

Circuit Court for Prince George's County
Case No.: CAD15-21453

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1194

September Term, 2017

BRIAN C. HOLMES

v.

NAKESHA WILLIAMS

Kehoe,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: September 18, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this appeal, Brian C. Holmes (“Father”), appellant, appeals from an order of the Circuit Court for Prince George’s County denying his motion for modification of custody and petition for contempt against Nakesha Williams (“Mother”), appellee. Mother and Father were represented by counsel in the circuit court, though both parties are proceeding *pro se* on appeal. Father contends that the circuit court abused its discretion in denying his petitions for contempt and modification of custody.¹

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

Father and Mother are the parents of one daughter, “B.,” who was born on September 24, 2007. On February 10, 2016, a Custody Order was filed by the circuit court awarding sole legal custody and primary physical custody of B. to Mother (“Custody Order”). The court awarded Father reasonable visitation with B. on alternate weekends from Friday at 5:00 p.m. to Monday morning, at which time Father must return B. to school, and in the intervening weeks on Wednesday from 5:00 p.m. until 8:00 p.m. In addition, the court ordered that Mother keep Father advised of all B.’s school activities and events within seven days of being advised of the same; that Mother provide Father with copies of school report cards or any other school communication within seven days of receipt; that both parents consult one another on any non-emergency medical procedures relating to B.;

¹ For clarity, we have rephrased Father’s question presented, which reads:

Did the Appellee make false statements under oath in court and even when brought to the Courts attention did they make the corrected adjustments in the case, including holding the Appellee liable 2010 Maryland Code Criminal Law 9-101 Perjury prohibits false statements under oath?

that each parent be permitted reasonable telephone contact with B., and that each is enjoined and restrained from listening in on, influencing or interfering with said telephone conversations.

On August 24, 2016, six months after the Custody Order was entered, Father filed a petition to modify the Custody Order, arguing that there had been a drastic change in circumstances resulting from Mother's refusal to co-parent with him and her failure to fulfill "her duties to [B.] as a custodial parent." Specifically, Father claimed that when he picked up B. for visits, she appeared "dirty" and unbathed with knotted hair, stained clothes, and ill-fitting shoes, and she was unable to tie her own shoes. Father also complained that B.'s teeth appeared as though they had not been brushed regularly, and that she is "about thirty pounds overweight" resulting from a diet of unhealthy foods provided by Mother. Father requested that he be awarded sole legal and physical custody of B., or in the alternative, that the current visitation schedule be modified to accommodate his work schedule. Father also filed a petition for contempt alleging that Mother had denied him visitation with B. on multiple occasions, interfered with his telephone communications with B., refused to provide him with copies of B.'s school records, failed to advise him of school events, and failed to provide him with requested medical information.

On January 30, 2017, prior to filing an answer to Father's petitions, Mother filed a motion to dismiss for improper service. On March 7, 2017, the circuit court granted in part, and denied in part, Mother's motion to dismiss, and ordered that a new Order to Show Cause be issued and served on Mother along with a copy of Father's petitions for contempt

and modification of custody. On April 20, 2017, Mother filed answers to Father’s petitions for contempt and modification of custody, requesting that both petitions be denied.

The modification and contempt hearing occurred on May 24, 2017, before a family magistrate. Both parties testified. Father testified that on April 27, 2016, he was unable to arrive at the designated meeting location by 5:00 p.m. to pick up B. and Mother refused to permit Father’s wife, who was available at that time, to pick up B. on behalf of Father. Father claimed that on May 6, 2016, he contacted Mother to inform her that he would be approximately thirteen minutes late to pick up B., but Mother refused to wait for him to arrive, and he missed his visit with B. Father also claimed that he missed his visit with B. on September 14, 2016, because Mother had traveled to California and had not contacted Father to cancel or reschedule B.’s visit with him. Father testified that he had been unable to contact B. on a cell phone that he had provided to her, but he subsequently acknowledged that the incident pre-dated the custody hearing in December of 2015.

With respect to B.’s hygiene, Father testified that B.’s shirts “looked like they had been worn three or four times” before being washed, her shoes had holes, and her teeth were yellow. Father explained that B. had learned to tie her shoes, but that she “struggles” doing so. Father believed that B. was overweight, but he acknowledged that this condition had “pretty much stayed the same” since the issuance of the Custody Order in February 2016, and, in fact, B. might just have a large body type based on his own “large family.” Father claimed that Mother had not provided him with information regarding B.’s school activities or honor roll assemblies. He acknowledged, however, that in the preceding thirty

days, Mother had shared B.'s school events with him on a Google calendar, though that he had been unable to access it. Father also indicated that he had moved at least twice in 2016.

On cross-examination, Father indicated that Mother generally allowed him an extra fifteen minutes beyond the designated meeting time for picking up B. Father acknowledged that the parties' designated meeting location is the police station due to the history of abuse between him and Mother. He recognized that B.'s report card from the previous school year had reflected that she received good grades in school, and there was no indication in her medical records that she was overweight or suffered from poor hygiene.

Mother testified that she has lived at her current residence for six years. Mother explained that since 2015, B. has been under the care of an ophthalmologist for a "lazy eye" or "cross eye" situation, but otherwise, she is in good health. Mother testified that in approximately January 2017, Father purchased a pair of glasses for B. from an optician without first discussing it with Mother and without using the prescription from the ophthalmologist. Mother disputed that her trip to California interfered with Father's scheduled visit with B. on September 14, 2016, insisting instead that she traveled there on the following weekend. Mother described Father as a "very abusive man," explaining that she had a protective order against him in 2016, which he violated several times.

At the conclusion of the hearing, the magistrate made oral findings and recommendations. The magistrate explained:

With regard to the contempt, [Father] has alleged that he's had problems, so to speak, trying to pick up the child [at] the pick-up times, the Friday pick-up time specified in the Order [] of February 10, 2016, it was 5:00 p.m. and the intervening Wednesday pick-up time was 5:00 p.m.;

however, he testified that his schedule changed after the Order was passed and he didn't get off work until 5:00 p.m.

I understand that, but he didn't file to modify the schedule and I find that his not being able to - - his not getting to the pick-up location timely was precipitated by his change in his work hours such that he couldn't comply with the pick-up time of 5:00 pm.

[Mother] testified that she was trying to accommodate him by giving him a 15-minute grace period, but she stated that most of the time, as a matter of fact he was on time only two times with regard to pick up.

With regard to the telephone issue, he says he tries to contact [B.] by telephone but implicitly he's had some problems. He said he gave her a telephone but when he calls it goes to voice mail. He later got the phone back, but he seems to be referring to a time which pre-dated the last Order for the last hearing because he said he got the phone back for good Friday before Thanksgiving. That was objected to.

[Mother] testified that [B.] has a phone but it's broken. Even [Mother] has a phone, but hers is broken, at least that's where we are now, but that her other children have phones which can be accessed [] for [Father] to speak with [B.]

[Father] alleges that he was not informed of honor roll nights, dances, field trips and so on. He said his daughter told him. [Mother] testified that she has mailed information of such events to him ...

[Father] testified he's been in three different residences. [Mother] testified that approximately a month ago she gave him a, what I understand is a calendar of events because of whatever issues he was having allegedly not getting her mail.

[Father] alleges that [B.] is overweight, but then he testified that her weight has pretty much stayed the same. She has a large body type and he indicated that, he mentioned other family members and implicitly I got the impression that a large body type may be something which runs in the family.

[T]he medical records for [B.] from the doctor which is [Mother's] Exhibit Number 4 does not indicate any overweight issue.

* * *

[F]ather testified that he believes he can now co-parent with [Mother]. He wants joint legal custody and he wants to change the access schedule so that he has [B.] on a 50/50 basis on a 2-2-5 schedule.

He was asked if the parties meet at a [p]olice station because of a past history of abuse, he stated that - - he stated yes to that question and [Mother] has testified to the past history of abuse by [Father] against her. ...

She stated that she is unable to co-parent; that is, communicate with [Father]. He undermines her requests. He is abusive. She has endured, endured abuse for years and he has been, he has made her, as I understand it, miserable.

* * *

She stated there was a Protective Order which was violated by him several times. She says the level of communication with him is terrible. He doesn't talk to her, he talks to [B.].

With regard to the issue regarding [B.]'s eye or eyes, [B.] apparently has a lazy eye or a cross eye. [Mother] has been taking [B.] to the ophthalmologist. [Father], on his own, as I understand it, took the child to an optician, got the child some eyeglasses, which apparently are not appropriate for the child and [Mother] had to get information from the ophthalmologist, as I understand it, to [Father] that he should not have the child wearing the eyeglasses which were not prescribed by the ophthalmologist.

The child has done phenomenally well in school, according to [Mother] and, as well as the school report card that I have. The child has been on the honor roll every quarter since she's been in school and on the report card that was introduced into evidence, the child has straight As, except that in reading she has an A/B. So incredibly good grades.

I find that [B.] has been in a continued stable environment with [Mother], same environment, same residence in which the child was living when this case was heard, as I stated, back on December 8th, 2015.

Based on these findings of fact, the magistrate determined that Father had not met his burden of proving by a preponderance of the evidence that Mother had willfully violated the February 10, 2016 Custody Order.

The magistrate also found, based on the following evidence, that Father had not met his burden of proving a material change in circumstances as a threshold first step to a custody modification. The court explained:

With regard to the matter of his request to modify custody, in custody modification cases, resolution is most often a chronological two-step process. First, unless a material change in circumstances is found to exist, the [c]ourt's inquiry ceases. In this context, the term material relates to a change that may affect the welfare of the child.

If a material change in circumstances is found to exist, then the [c]ourt in resolving the custody issue considers the best interests of the child as if it were an original custody proceeding.

I also want to just mention that [Father] said the child, when he picked her up from, for visitation one time that her teeth were yellow and her clothes looked like they had been worn three or four times and she had holes in her shoes. I don't find that those allegations constitute a material change.

I don't know what the situation was on the particular occasion with [B.] having yellow teeth. Nothing that I saw in any medical evidence today indicates [B.] has any dental problems.

The magistrate determined, however, that due to the change in Father's work schedule since the February 11, 2016 order, Father's pick-up time should be changed from 5:00 p.m. to 6:00 p.m. on Fridays and intervening Wednesdays. In addition, the magistrate recommended that, in the event that Father is unable to personally pick up B. or drop her off at the specified time, he may designate a responsible adult to do so, provided Mother is given reasonable advance notice thereof. The magistrate further recommended that Father have full access to B.'s medical and school records. The magistrate's findings and recommendations were included in a written proposed order issued the same day.

On June 2, 2017, Father filed exceptions to the magistrate’s ruling on contempt and custody. Father disagreed with the magistrate’s “entire ruling except the change in time” as well as much of Mother’s testimony, which he characterized as “unsubstantiated and blatant lies.” Father claimed that he was prejudiced by his attorney’s failures to present key evidence and call witnesses at trial, and his attorney’s filing of a motion to withdraw, over his protests, which the court denied. In support of his exceptions, Father attached documents not introduced at trial, including copies of text messages between him and Mother, provocative professional photographs of Mother, “screenshots” of Mother’s Facebook posts, as well as copies of his communications with his attorney regarding the circumstances of her motion to withdraw. On July 18, 2017, the circuit court issued a final order adopting the magistrate’s recommendations and denying Father’s motions for modification and contempt. Father noted this appeal.

DISCUSSION

Standard of Review

“Pursuant to Maryland Rule 8-131(c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence.” *Friedman v. Hannan*, 412 Md. 328, 334 (2010). It is not the function of this Court to “sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Instead, our task is to search the record for the presence of sufficient material evidence to support the [court’s] findings,” and to view that evidence in the light most favorable to the prevailing party. *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). If there is competent evidence produced to support the trial court’s findings, its conclusion,

based on those findings, is not erroneous. *Id.* The trial court’s legal conclusions, however, are reviewed *de novo*. *Jackson v. Sollie*, 449 Md. 165, 173-74 (2016).

Analysis

Father challenges the trial court’s conclusions of law and its acceptance of the magistrate’s findings of fact, essentially arguing that the court erroneously accepted Mother’s testimony and her version of events over his testimony, without regard to the documents that he attached to his exceptions. Mother asserts that the circuit court did not err in denying Father’s exceptions because Father failed to comply with Md. Rule 9-208(f) by failing to set forth the magistrate’s asserted error with particularity, and by attaching irrelevant and improper documents to the exceptions.

In deciding whether modification of an existing custody order is warranted, the “threshold question” is whether a material change in circumstances has occurred since the matter was last before the trial court. *Wheeler v. State*, 160 Md. App. 363, 372 (2004) (citation omitted). A material change in circumstances is a change “that affects the welfare of the child.” *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). If the court finds that there has been a material change, it next considers the best interests of the child. *Id.* at 170 (citations and quotation omitted). The burden of proof is on the party seeking modification. *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008). If there is no material change, the court’s inquiry ends.

Much of the disagreement between the parties turns on credibility. The determination of credibility is within the purview of the trial court. Despite Father’s allegations, the evidence before the court supported the magistrate’s findings that B. was

healthy and doing well in school, and that Mother had made efforts to share B.’s school information with Father and to accommodate his new work schedule. Indeed, Father has indicated that he agreed with the court’s changes to the terms of the parties’ pick-up arrangement. Moreover, the court addressed the information-sharing problem by ordering that Father was authorized to obtain B.’s medical and school records directly. We conclude that the court’s findings were not erroneous and that it did not abuse its discretion in denying Father’s petition for contempt.

With respect to the trial court’s conclusion that there had been no material change in circumstances, Father failed to demonstrate how their difficult relationship and poor communication had changed since the Custody Order. Nor was there any evidence supporting Father’s claims that there had been changes in B.’s weight, dental hygiene, and the condition of her clothing. Accordingly, we conclude that the court did not err or abuse its discretion in denying Father’s petition for modification of custody.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**