Circuit Court for Allegany County
Case No. 01-C-16-044279

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1230

September Term, 2021

JAMES BECK

v.

JENNIFER BECK

Reed,
Friedman,
Albright,
JJ.

Opinion by Reed, J.

Filed: July 5, 2022

James Beck ("Father"), appellant, and Jennifer Farrell, f/k/a Jennifer Beck ("Mother"), appellee, are the divorced parents of three minor children. In the Circuit Court for Allegany County, Father moved to modify custody and visitation. Following a contested hearing, a family law magistrate recommended that Father's motion be denied because he failed to make a threshold showing of a material change of circumstances. Father's exceptions to the magistrate's report were overruled, and the circuit court denied his motion. He appeals, presenting seven questions,[1] which we have condensed and rephrased as two:

> I. Did the circuit court err or abuse its discretion by overruling Father's exceptions and denying his motion to modify custody and visitation?

[1] The issues raised by Father in his informal brief are:

> 1. The recommendations from the magistrate on June 8th 2021 were never signed by a circuit court judge.
>
> 2. Two agreements between the parties were never place[d] in the recommendations or in the Circuit Court Appeal order.
>
> 3. The childrens' [sic] co[u]nselor, a sworn expert, provided recommendations that were not followed and were misquoted on several occasions.
>
> 4. Parental Alienation was not recognized in either hearing.
>
> 5. Change in material circumstances.
>
> 6. The current custody agreement violates Maryland law.
>
> 7. The Only objection [Mother] had to the custody modification was that there would be more back and forth.

II. Did the circuit court err by not incorporating in its order two agreements placed on the record at the hearing before the magistrate?

We answer "no" to the first question and "yes" to the second. We thus shall affirm the order of the circuit court denying Father's motion for modification, but direct that, on remand, the circuit court enter an order incorporating the parties' consent agreement modifying two provisions of the existing custody order.

FACTS AND PROCEEDINGS

Mother and Father are the parents of three sons: P, age thirteen, R, age eleven, and E, age eight. They were divorced on December 20, 2017. The divorce judgment incorporated an agreement between the parties placed on the record at the divorce hearing as to custody and visitation. The parties agreed that they would share joint legal custody of the children and that Mother would have primary physical custody. Father's access schedule varied between the school year (forty-two weeks) and the summer (ten weeks). During the school year, the children were to be with Father on alternating weekends, from Friday through Monday, and for Wednesday overnights. During the summer, the children split their time between Mother's and Father's homes on a week-on, week-off basis. The agreement also set out a detailed holiday and school break access schedule.

In 2018, the parties modified the custody and visitation order by consent. First, they agreed that Father would have overnight visitation on Mondays in the weeks preceding his weekend access, in lieu of his Wednesday overnight access. Second, they agreed that Father's access periods during the school year would begin at 4:15 p.m. and that Mother

would drop the children off to him at his house. Third, they agreed that if the children did not have school on the last day of Father's access period, he would drop them off at Mother's house at 10 a.m. Fourth, they agreed that summer access periods would begin and end at 10 a.m. and that the party with the children in their custody would be responsible for dropping them at the other party's house. Fifth, they agreed to add Easter to the holiday schedule and alternate access. Last, they agreed that the children would be allowed to contact the non-custodial parent by telephone when they were with the other parent.

The modified order also directed Father to pay Mother $1,004 per month in child support, comprising $804 in child support calculated under the child support guidelines and an additional $200 per month that Father had agreed to pay.

On July 13, 2020, Father, then representing himself, moved to modify custody. He alleged that changes in his work schedule would allow him to spend more time with the children, which would result in less "[a]lienation" and promote the children's bond with him. He also asserted that the existing visitation schedule violated Maryland law and that Mother was engaging in parental alienation. He asked the court to modify the physical custody provisions to grant him equal time and to change the start time for access periods to 10 a.m.

Mother opposed Father's motion and counter-petitioned for a modification of legal custody to make her the sole legal custodian for the children.

On October 2, 2020, Father, now represented by counsel, filed an amended petition to modify custody. He alleged fourteen material changes of circumstance since the entry

of the divorce judgment, as modified, including that Mother refused to add Father to the children's medical insurance paperwork; ignored medical advice to the detriment of the children; that Mother and her fiancé transported the children without appropriate child safety seats; that Mother unreasonably limited and/or prevented the children from communicating with Father when they were in her care, resulting in parental alienation; and that Father's work schedule had changed to permit him to spend more time with the children.

Mother opposed Father's petition, as amended.

On June 8, 2021, the parties appeared before a magistrate for a hearing on Father's petition.[2] Both were represented by counsel and a best interest attorney ("BIA") appeared on behalf of the children. At the outset of the hearing, Father's attorney advised that the parties had reached agreement on two collateral issues. First, they agreed that the summer access schedule would commence on the Friday after the last day of school and end on the Friday before school resumed. Second, they agreed that each parent would be entitled to one week of vacation access during the school year if approved by the children's schools.

The court permitted the BIA to call the children's former therapist, Susan Nallin, LCSW, out of order. The parties stipulated to her being accepted as an expert in counseling. Ms. Nallin testified that she met with each of the children, individually, for counseling sessions beginning in February 2020 and ending in July 2020, just less than a year before

[2] Though Mother never explicitly withdrew her counter-petition for modification of legal custody, she did not pursue that relief at the hearing.

the modification hearing. She met with P over twelve sessions; R over nine sessions; and E over six sessions. She also met with Mother and Father together on at least one occasion. Ms. Nallin opined that the children had "anxieties specifically related to the tension that they . . . knew existed with their mom and their dad." The parents were each, individually, "terrific parents," in her view. During the course of therapy, the boys expressed a desire to see their Father "a little more" and for their parents to argue less. The children stated that they did not like it when one parent spoke about the other parent or asked them questions about the other parent.

Ms. Nallin met with Mother and Father together in April 2020 and explained that P had expressed an interest in spending "a little more time" with Father and that "there [also] was a time that [R] and [E] . . . expressed that." Ms. Nallin opined that it was normal for children to identify with their same sex parent and to want to spend time with that parent. Mother and Father agreed to try adding some access time. Mother later told Ms. Nallin that she was "not exactly comfortable with that happening." P reported that he and his brothers saw Father for "a few more hours" on just one occasion.

On cross-examination, Father's counsel inquired about whether Ms. Nallin would have recommended more time with Father if Mother had consented. She responded that had the parties agreed and the extra time went "smoothly," she would have assessed the impact on the children's anxiety with the goal of achieving "more . . . equal type of parenting time[.]" When Father's counsel asked if the children wanted "equal time" with Father, however, Ms. Nallin clarified that they wanted "more time with dad."

Mother's counsel asked Ms. Nallin to confirm that the children expressed an interest in spending more time with Father, "[b]ut not equal time?" She replied, "That's correct." She added that the children did not want to ask Mother directly because they did not want to upset her. Ms. Nallin also testified that the children wanted to speak to Father about "not talking about the other parent."

In his case, Father testified that he lives in a three-bedroom home with the children, when they are in his care, and the family dog. He has been in a committed relationship with his girlfriend for more than three years. She has children from a prior relationship. She and her children have their own home.

According to Father, the children are happy and thriving socially and academically. They are active and like to play soccer, football, kickball, and ride dirt bikes and four-wheelers.

Father testified that several changes had occurred since the entry of the amended custody order. First, he had moved from a small two-bedroom home back to the family home where he and Mother had lived during the marriage.[3] Consequently, P now had his own bedroom, though R and E still shared a room. Father was in the process of adding a bedroom in the basement as well. He testified that the children were excited to return to that home.

[3] He explained that the family home had been foreclosed upon and purchased at auction by the parties' mortgage lender. Father successfully negotiated with the lender to rent the house and, ultimately, to purchase it from the lender.

Second, Father's work schedule had changed. He works as a patrol officer for the Cumberland City Police Department. He previously worked the overnight shift, from 7 p.m. until 7 a.m., but, beginning in December 2020, had switched to the day shift, from 7 a.m. until 7 p.m. He works fifteen days per month and is off the remaining days. This change was beneficial because he no longer needed to sleep during the day and could spend more time with his children when they are in his care. Father also works as a trainer for the United States Airforce Air National Guard one weekend per month. Occasionally he is required to participate in raids with the Cumberland SWAT team on short notice. When that occurs during his access periods, he asks his girlfriend or his neighbor, Sue Williams, to stay with the children.

Though Father testified that Mother is a fit parent, he did have concerns about some of her parenting practices. He explained that P and R both are nearsighted, had been prescribed eyeglasses, and had been directed by their eye doctor to wear them "constantly." Nevertheless, Father testified that on many occasions when he video chatted with P and R while they were in Mother's custody, they were not wearing their glasses. There also had been instances when Mother dropped them at Father's home for his access period and they did not bring their glasses. Father also testified that Mother had not provided him with a copy of the boys' health insurance card.

Communication also was an issue. Father had purchased cell phones for the children so that they could communicate with him more easily. He testified that on occasion the boys would not communicate with him for four days while in Mother's care. He attributed

these lapses to Mother's not allowing them access to their phones or permitting them to answer his calls.

He testified that Mother and her fiancé did not always ensure that R, then age ten, and E, then age seven, were secured in child booster seats in their vehicles. He explained that though R was over eight years of age, he was not "tall enough" to ride without a booster according to their pediatrician.[4] He introduced into evidence a text message exchange with Mother in which Father stated that R told him that Mother did not make him ride in a booster seat. Father told Mother, over text message, that R was required to be in a booster seat and she responded, "I always make sure they are safe[.]" Father also testified that he had filed charges in the District Court of Maryland against Mother's fiancé for transporting the younger children without a booster seat. The charges later were dismissed.

Father also introduced text messages into evidence with Mother concerning sports activities for the boys. Father wanted Mother to consider a different soccer program for R. Mother elected to enroll R in the same soccer program he had played with in the past, which also was E's program.

In Father's view, the "biggest source of tension" between him and Mother was that he was "constantly ask[ing] her for more time with the kids" and she did not agree to his requests. He testified that if he and Mother evenly shared custody, this source of tension

[4] Under Maryland law, any child "under the age of eight years" must be secured in a child safety seat while in a vehicle unless they are taller than four feet, nine inches. Md. Code, Transp. § 22-412.2(d).

would be eliminated. He asked the court to modify the access schedule to a 2-2-3 schedule. Under that schedule, in week one, Parent A would have the children beginning from Sunday night until Tuesday night; Parent B would take custody from Tuesday night through Thursday night; and Parent A would resume custody from Thursday night through Sunday night. In week two, access for Parent A and Parent B would reverse. Father proposed moving the exchange times from 4:15 p.m. until 7:00 p.m., which was when he got off work. Father explained that by making the exchange time later, the children would have some time after school to prepare to transition to the other parent's home and would not be as rushed.

Father's neighbor, Ms. Williams, testified that Father was an involved and loving parent. Ms. Williams also knew Mother and believed her to be a wonderful parent. She testified that she provided childcare for the children if Father was called out for a SWAT raid.

At the close of Father's case, Mother moved for judgment, arguing that Father had not met his burden of showing a material change of circumstances since the entry of the prior custody order, as amended. The court denied her motion at that juncture.

Mother testified in her case that she lives with the children, her fiancé, her older son from a prior relationship, her fiancé's seventeen-year-old son, and her and her fiancé's four-month old daughter. The children each shared a bedroom with another child.

Mother testified that Father began taking the children to see Ms. Nallin about eighteen months after he "fired" the children's previous therapist. She explained that she

initially agreed to allow Father more access with the children during the meeting with Ms. Nallin because she felt pressured. She then changed her mind because she felt that they should abide by the custody schedule, especially because Father was constantly sending her text messages asking her to give him more time with the children.

Mother testified that she required P and R to wear their eyeglasses except when they were engaged in activities that could cause them to break, like wrestling or jumping on the trampoline. Nevertheless, because they are young children, there were times when they neglected to wear them, including on occasions when they were with Father.

Mother denied that she prevented the children from communicating with Father. She did restrict their cell phone use because they were children and did not allow them to keep their phones in the room at night when they went to bed. She added that Father often tried to Facetime with the children on her phone "multiple times a day" when they were in her care.

Mother denied that she transported the children without appropriate child safety seats.

In Mother's view, the current access scheduling was working well and provided each parent with enough time with the children. She testified that the children were "doing amazing" in school and that the current schedule provided them with "stability" during the school week. She expressed concern that if the court were to modify the access schedule as requested by Father, the children would not feel like they had a home.

On cross-examination, Mother agreed that the children would not be harmed if they spent more time with Father. She reiterated, however, that she believed the children would never feel "settled" if the court modified the schedule as requested by Father.

At the end of the evidentiary portion of the hearing, Father's attorney argued that there had been "significant changes" since the amended custody order was entered. He noted Father's return to the children's family home, his new work schedule, issues with Mother not enforcing the eye doctor's instructions, and not permitting regular communication between the boys and Father. Counsel argued that Ms. Nallin's expert opinion was that the children would benefit from "more time with their Father," but acknowledged that she did not say equal time.

Mother's attorney responded that Father's position was that there would be less tension between the parties if he got what he wanted because then he would stop "harassing" Mother for more time. Counsel argued that the only changes identified by Father were the parties having moved to new homes and changes in Father's work schedule. None of those changes were material, however, because the children were thriving, and their welfare was not impacted.

The BIA took no position on whether Father had met his burden of establishing a material change of circumstances. He emphasized that the children "love[d] each of their parents" and wished there was less conflict between them. His "takeaway" from Ms. Nallin's testimony was that the children were "healthy" and "well adjusted."

The magistrate took the matter under advisement and, nine days later, filed his report and recommendations. After setting out the testimony and other evidence received, the magistrate summarized the material changes of circumstance alleged by Father as follows: 1) the change in Father's work schedule; 2) Father's move to a larger home; 3) P & R's inconsistent eyeglass use; 4) "the boys not being signed up for a particular soccer league"; 5) the younger children "not sitting in a booster seat"; and 5) "that sometimes [Father]'s phone calls to the [c]hildren are not returned." The magistrate further explained that Ms. Nallin had testified that when she was counseling the children, she believed that some extra time with Father would be "helpful" to the children. The magistrate noted, however, that because Mother did not agree to provide Father with extra time (except for one occasion), Ms. Nallin did not have the opportunity to assess if extra time was or was not beneficial to them.

The magistrate found that there was no credible evidence that Mother did not require P and R to wear their glasses or that she did not require the younger children to ride in booster seats. There likewise was not convincing evidence that "any significant number of phone calls" between Father and the children were missed. The evidence showed that Mother enrolled the children in sports and other activities, even if these activities were not the ones that Father would have chosen. Father's move to a larger home permitted P to have his own room, but there was no evidence that this change otherwise affected the welfare of the children. The magistrate reasoned:

> While it is appreciated that [Father] wants to spend more time with his sons – the fact is, the Children are doing well. They have done well in school.

> According to Children's counsel, they are well-adjusted. There was little evidence to show [that] the Children are struggling in any appreciable way. In applying the case law, there is no reason to upset the status quo.

On this basis, the magistrate recommended denial of Father's motion to modify custody and visitation.

Within ten days, Father filed exceptions.[5] First, he argued that the magistrate clearly erred by not entering an amended custody order incorporating the parties' agreement on the two collateral matters. Second, he argued that the magistrate clearly erred by not addressing all the alleged material changes in circumstance. Specifically, he maintained that the magistrate failed to consider Ms. Nallin's testimony that the children displayed anxiety because they were not "able to see their father . . . more" and that all three children "expressed a desire to have more time with their father." Further, he argued that it was Ms. Nallin's opinion that the children would benefit from more time with Father because they strongly identified with him as their same-sex parent. In Father's view, this was evidence establishing a material change of circumstances.

Father further argued that the magistrate failed to consider that Father's move back to "family home" was a material change because it offered the children stability and provided a support system of neighbors and friends, including Ms. Williams, who testified in Father's case. Father's new work schedule, which did not necessitate him sleeping

[5] The tenth day fell on Sunday, June 27, 2021. Father filed his exceptions on Monday, June 28, 2021.

during the day, also was a material change because it permitted Father to spend more quality time with the children during his access periods.

Third, Father argued that the magistrate failed to consider that Father's proposed custody schedule would "eliminate the awkward travel and time-consuming circumstances" under the existing schedule. By shifting the drop-off time to 7:00 p.m., the children would begin access periods after Father got off work for the day. The switch to the 2-2-3 schedule also would provide them with additional time with Father each week, consistent with Ms. Nallin's recommendation.

Finally, Father argued that the magistrate clearly erred in his findings regarding the booster seats and the eyeglasses and erred by neglecting to address Mother's failure to provide Father with a copy of the children's health insurance card.

Mother responded and asked the court to overrule Father's exceptions.

On September 13, 2021, the circuit court heard argument on Father's exceptions.[6]

Two days later, the court issued an order denying the exceptions. After reviewing the transcript of the magistrate's hearing and the exhibits, the circuit court concluded that the magistrate's findings were supported by the record and not clearly erroneous. Exercising its independent judgment, the circuit court agreed with the magistrate's conclusion that Father failed to meet his threshold burden of showing a change in

[6] Father did not request a transcript of the exceptions hearing.

circumstances affecting the welfare of the children and that the magistrate's recommendation to deny the motion to modify was correct.

This timely appeal followed.[7] We shall supplement these facts as necessary to our discussion of the issues.

STANDARD OF REVIEW

We review child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals has described these standards as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second], if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586 (cleaned up). We give "due regard to the opportunity of the trial court to judge the credibility of the witnesses." MD. RULE 8-131(c).

In reviewing exceptions to a magistrate's findings and recommendation, the circuit court must exercise its own independent judgment, decide each question presented in an

[7] Father noted his appeal within thirty days after the court entered its order ruling that the magistrate's findings were not clearly erroneous, and his recommendation was correct. On October 20, 2021, the court entered another order explicitly denying Father's motion to modify custody and visitation. Father did not note another appeal after the issuance of that order. Because we conclude that the order denying Father's exceptions was itself a final judgment, Father's appeal was not premature.

exception, and state how it has resolved those challenges, but, with respect to fact-finding, should defer to the magistrate's findings if they are supported by substantial credible evidence. *Leineweber v. Leineweber*, 220 Md. App. 50, 60-61 (2014).

DISCUSSION

I.

Denial of Motion to Modify Custody

A trial court must engage in a two-step process when presented with a request to change custody or visitation:

> First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody. *See id*.; *Braun v. Headley*, 131 Md. App. 588, 610 (2000) (cleaned up).

McMahon v. Piazze, 162 Md. App. 588, 594 (2005). If the court does not find a material change of circumstances, its "inquiry must cease." *Braun*, 131 Md. App. at 610. A change is material if it affects the welfare of the child. *McMahon*, 162 Md. App. at 594; *see also Wagner*, 109 Md. App. at 28 ("In [the custody modification] context, the term 'material' relates to a change that may affect the welfare of a child."). Evidence bearing upon materiality necessarily relates to the best interests of the children. *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012).

In this case, Father, as the moving party, bore the burden "to show that there ha[d] been a material change in circumstances since the entry of [the 2017 divorce judgment, as modified by consent in 2018] and that it [was] now in the best interest of the child[ren] for

custody to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008), *aff'd* 408 Md. 167 (2009). He contends that the circuit court erred by ruling that he did not meet that burden, because the magistrate made clearly erroneous factual findings, failed to fully address the evidence adduced at the hearing, and the circuit court erred as a matter of law by determining, in its independent judgment, that the evidence did not establish a change in circumstances affecting the welfare of the children. We shall address his contentions in turn below.

A. The Timing of the Order Adopting the Magistrate's Recommendation Was Proper

As a threshold matter, Father argues that the circuit court erred because it did not sign an order adopting the magistrate's recommendations until October 20, 2021, after the exceptions hearing and the entry of the order denying Father's exceptions. Rule 9-208 provides that if a family law matter, such as a motion for modification of custody, is referred to a standing magistrate, "the court shall not direct the entry of an order or judgment based upon the magistrate's recommendations *until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions*[.]" MD. RULE 9-208(h)(1)(A) (emphasis added). Consequently, Father argues that upon Father's his timely filing of exceptions, the circuit court was without authority to adopt the magistrate's recommendations until after it ruled upon the exceptions. As noted above, however, the circuit court it adopted the recommendations in it's the same order

that overruled overruling Father's exceptions. Therefore, this was done in the proper order under Rule 9-208 and we reject Father's argument to the contrary.

B. The Magistrate's Findings Were Not Clearly Erroneous

Father challenges for clear error certain findings made by the magistrate. First, he argues that the magistrate failed to follow Ms. Nallin's recommendations and misquoted her. A factfinder is free to accept or reject, in whole or part, the testimony of any witness, including an expert like Ms. Nallin. *Walker v. Grow*, 170 Md. App. 255, 275 (2006). Here, the magistrate's summary of Ms. Nallin's testimony was supported by the record. Further, the magistrate did not reject Ms. Nallin's testimony outright, but found it equivocal. We perceive no clear error.

Father next argues that the magistrate failed to make findings on the issue of parental alienation.[8] Though Father alleged parental alienation in his motion for modification, as amended, the transcript from the magistrate's hearing reflects that this issue was not raised at the hearing. Father's counsel never mentioned it during his opening statement or closing argument and Father did not refer to alienation in his testimony. The only evidence adduced arguably bearing upon parental alienation was Father's testimony that the children do not always answer his phone calls when they are in Mother's custody. The magistrate found

[8] In this section of his brief, Father argues that Mother did not inform him when P fractured his arm. There was no evidence adduced before the magistrate about this incident and, accordingly, it is not properly before us on appeal. Father also raises the issues relative to the booster seats and children's eyeglasses in this section of his brief. Neither issue is relevant to parental alienation, however.

that testimony unpersuasive. The magistrate did not err by not making additional findings on this issue.

C. The Circuit Court Did Not Err in Denying the Motion for Modification

Father argues that the evidence that the children desired more time with Father, his move back to the family home, the changes to his work schedule, and that Mother occasionally neglected to enforce certain rules, in its totality, amounted to a material change in circumstances. However, this Court holds that the circuit court did not err by determining that the other changes identified by Father did not materially impact the children's welfare for the reasons stated below.

Father relies primarily upon Ms. Nallin's testimony, which he characterizes as establishing that the children's anxiety was tied to their desire to have more time with Father. As such, Father contends that an equal custody schedule would be more therapeutically appropriate. This is a mischaracterization of her testimony. According to Ms. Nallin, the children's anxiety arose from the "tension" between their parents. By Father's own admission, his requests to Mother for additional time with the children outside of the established schedule was a major source of that tension. In that context, Ms. Nallin testified that the children, then ages eleven, nine, and six, made occasional statements that they would like to spend some more time with Father. As the magistrate noted in his report, it had been nearly a year since Ms. Nallin had met with the children[9]

[9] We note that at the time that Ms. Nallin counseled the children, Father was working the overnight shift and, according to his testimony, needed to sleep during the day.

and she otherwise testified that the children were happy and well adjusted. It was not unreasonable for the court to conclude on this evidence that the children's statements to Ms. Nallin did not amount to evidence of a change affecting their welfare since the entry of the custody order. This is especially so given Ms. Nallin's testimony that the children did not seek equal time with Father, who already was entitled to five out of fourteen overnights in a two-week period during the school year and received equal access during the summer.

This Court further notes that the anxiety that the children are experiencing stem directly from Father's actions. The constant requests from Father to Mother for more time with the children outside of the court-ordered arrangement generates tension between the parents and causes stress and anxiety for the children. In holding that an action injurious to the mental health of the children generated a plausible assertion for a material change in circumstances would only be rewarding such harmful behavior. We decline.

Moreover, while changes in circumstance may occur, not all of them are materially related to the welfare of the child. *See McCready v. McCready*, 323 Md. 476, 481 (1991); ("The question of whether there has been a material change in circumstances *which relates to the welfare of the child is*, however, often of importance in a custody case." (emphasis added)); *Braun*, 131 Md. App. at 610. A move out of state might be found to be a material change in circumstance that may trigger analysis on what is in the best interest of the children. *Domingues v. Johnson*, 323 Md. 486, 491, 498-499 (1991) (where the mother's relocation to Texas might constitute change in circumstance sufficient to justify change in

custody); *Braun*, 131 Md. App. at 613 ("[T]he relocation of appellant *to another state*, can, under Maryland law, constitute the material change in circumstances necessary to trigger the best interests analysis." (citations omitted) (emphasis added)). Father's intrastate move from one address in Cumberland, MD to another[10] and the change in his work schedule does not warrant such an analysis. The magistrate concluded these changes do not materially affect the children's welfare, and we agree.

Moreover, the preservation of stability in custody cases cuts in favor of not modifying the child custody order, especially where the children are not experiencing any hardship and no material circumstances related to the welfare of the child are present. *See McCready*, 323 Md. at 482-483; *Domingues*, 323 Md. at 498; *McMahon*, 162 Md. App. at 596. "Basically, if a child is doing well in the custodial environment, the custody will not ordinarily be changed." *Levitt v. Levitt*, 79 Md. App. 394, 397 (1989). The magistrate concluded that the children are doing well in school, are well adjusted, enjoy playing sports and engaging in outdoor activities, and are involved in activities in the community. As a result, the magistrate concluded that a modification in the custodial arrangement was not warranted, citing *Levitt* and the unknown nature of the effect of the change on the children. While this Court acknowledges Father's efforts to spend more time with his children, we agree with the magistrate's conclusions.

[10] On April 22, 2019, Father filed a change of address with the circuit court moving from address in Cumberland, MD to another address in Cumberland, MD. On May 16, 2019, Mother filed a change of address with the court, also residing in Cumberland, MD.

Finally, the magistrate weighed Mother's alleged parenting lapses, including disputes about the children's soccer league, not wearing their glasses, the children not being in a booster seat when riding in the car, and Father's unreturned phone calls from the children while in their Mother's care. The magistrate found the evidence of parenting lapses by Mother "unconvincing", and the circuit court adopted those findings.[11] Based upon the magistrate's findings, which the circuit court found were "supported by the record and [were] not clearly erroneous," the court ruled that Father had not demonstrated a change in conditions affecting the children's welfare warranting modification of custody.

We only will "reverse a decision that is committed to the sound discretion of the trial judge" if we "are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion." *Maddox v. Stone*, 174 Md. App. 489, 502 (2007). Here, the magistrate fully set out relevant facts and explained his reasoning supporting the determination that there had been no material change. The circuit court conducted its own independent appraisal of the record before the

[11] In his report, the magistrate stated:

> As noted, the evidence is unconvincing that [Mother] does not make the boys wear their glasses. [Mother] has enrolled the Children in activities. Granted, the activity may not be one that [Father] preferred. [Father] has not shown that there was any significant number of phone calls missed by the Children. Clearly, the boys should sit in booster seats. There was no credible evidence that [Mother] does not have the boys sit in booster seats. [Mother's fiancé] may have transported the boys without a booster seat on one occasion. But, one occasion does not require an alteration to the parties' custody. While [Father] lives in a larger home, there was no evidence how this affects the welfare of the Children, other than [P] has his own room.

magistrate and reached the same conclusion. It is not the role of an appellate court to reweigh the evidence or to second guess the ultimate determination of the circuit court.[12]

D. The Existing Custody Order Does Not Violate Maryland Law

Father contends that the current custody order violates Maryland law. He asserts that when the parties reached agreement concerning custody and visitation in 2017, he agreed to pay $200 in child support above the guidelines amount in exchange for Mother's agreement to extend his alternating weekend access periods through Sunday night. He argues, citing *State v. Runkles*, 326 Md. 384 (1992),[13] that this amounted to the parties' "buying, selling or trading time with [his] children for money."

Father did not note an appeal from the divorce judgment incorporating the parties' custody agreement, raise this issue when the parties modified the custody order by consent in 2018, or raise this issue at any time during the instant modification proceedings aside from a vague reference to illegality in his original motion for modification. Consequently, this issue is not before us on appeal. *See* MD. RULE 8-131(a) ("[o]rdinarily, [an] appellate court will not decide any [non-jurisdictional issue] unless it plainly appears by the record to have been raised in or decided by the trial court"). However, arguendo, we would

[12] Because the magistrate determined that Father had not met his threshold burden of proving a material change of circumstances, a determination adopted by the circuit court, he did not make any findings about the appropriateness of Father's requested changes to the custody schedule or engage in fact finding on the best interest factors, beyond assessing the impact of changes on their welfare generally. Because we affirm the circuit court's determination, we do not address Father's contentions of error bearing upon the proposed schedule or the best interests of the children more generally.

conclude that this contention is without merit. Father's agreement to pay $200 in additional child support was not linked, explicitly or implicitly, to his access to the children and, in any event, the case he relies upon involves a criminal statute.

II.

Clarification of Existing Custody Order

Father contends the circuit court erred by not entering an order incorporating the clarifications to the existing custody order agreed to by the parties. We agree, it appears that there was no dispute before the magistrate that these clarifications were in the children's best interest. *See Ruppert v. Fish*, 84 Md. App. 665, 674-76 (1990).As set out above, the parties agreed: 1) that the summer access period would commence on the Friday after the last day of classes and would end on the Friday before school resumes and, 2) that each parent could exercise one week of vacation time with the children during the school year if the vacation time was approved by the children's schools. On remand, the circuit court shall enter an amended order incorporating these clarifications to existing custody order.[14]

ORDER OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED IN PART AND REMANDED IN PART WITHOUT EITHER AFFIRMING OR DENYING PURSUANT TO RULE 8-604 (D)(1) SOLELY TO PERMIT THE CIRCUIT COURT TO ENTER AN AMENDED ORDER INCORPORATING

[14] Mother moved in this Court for an award of her attorneys' fees incurred to defend the appeal under Rule 1-341. Because we conclude that Father's arguments were not made in bad faith or without substantial justification, we deny the motion for fees.

THE PARTIES' TWO AGREEMENTS. COSTS TO BE PAID EIGHTY PERCENT BY THE APPELLANT AND TWENTY PERCENT BY THE APPELLEE.