

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1478

September Term, 2020

KARI LYNN DIERSEN FISHER

v.

DEREK FISHER

Wells, C.J.,
Friedman,
Albright

JJ.

Opinion by Friedman, J.

Filed: June 28, 2022

*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, we are asked to determine whether the Circuit Court for Prince George’s County erred in denying a petition to modify a child custody order because there was insufficient evidence of a material change in circumstances. For the reasons that follow, we affirm the ruling of the circuit court.

FACTUAL BACKGROUND

Appellant, Kari Lynn Diersen Fisher (Mother), and appellee, Derek Fisher (Father), were divorced in 2016. The Judgment of Absolute Divorce granted the parties shared physical custody and joint legal custody of their two minor children, K. and Z., who were then ages 12 and 9 respectively. The custody order provided for the children to spend alternating weeks with each parent. A subsequent order entered in 2017 granted Mother the right to claim the child tax credits until 2018, after which time the parties would alternate years. The court did not award child support to either party.

After entry of the custody order, the parties roughly followed the schedule established by the court. In late 2017, however, Father became unemployed and the children began spending more overnights in Mother’s care. In December 2017, Father accepted a new job in Broward County, Florida. Father rented an apartment in Florida and signed an agreement partially leasing his home in Maryland to his brother and his brother’s family. Although Father made efforts to visit Maryland to see K. and Z., he was only able to take custody of the parties’ children a few days each month.

In December 2019, Mother filed a petition for modification of the custody order, seeking sole legal and primary physical custody of the children, an award of child support, and the exclusive right to claim the child tax credits. Mother argued that since Father had

moved to Florida, he had not been sharing in the physical custody or financial support of the children, and it was in the children’s best interest to modify the court orders to reflect those changes.

A hearing was set for March 2020 but was postponed due to the onset of the COVID-19 pandemic. Shortly thereafter, Father began teleworking and returned to Maryland. As a result of the lease agreement, however, Father’s brother, his wife, and their three children occupied much of the upstairs living space. K. and Z. maintained their same bedrooms upstairs, but Father moved into a room in the basement. After his return, both children went to stay with Father for several weeks until the end of the virtual school year.

On September 21, 2020, the circuit court held a virtual hearing on Mother’s motion. At the outset of the hearing, Father moved to bifurcate the proceedings and have the court first take evidence on and determine whether there had been a material change in circumstances. The circuit court granted the motion, over Mother’s objection.

At the hearing, Mother presented evidence about how infrequently Father had taken custody of the children after he moved to Florida. She estimated that throughout the 2018 calendar year, each child had spent only 32 to 40 nights with Father. Mother further testified about Father’s living situation since his return to Maryland, noting that although Father had returned to the same house, the circumstances within the house had changed. She described that there were now five additional people living in the house and although K. and Z. still slept in the same bedrooms that they had before, Father was now in the basement, significantly removed from them.

Mother further testified that since Father's return to Maryland, even when the children were physically with Father, he was not sufficiently involved in their care. Mother testified that while they were at Father's house, they failed to attend virtual school, they were not completing assignments, and their grades dropped to the point of almost failing. Mother also described that the children's personal hygiene deteriorated when they were with Father, specifically, they did not regularly wash their faces or comb their hair, and Z. failed to wear his retainer for such a long time that it no longer fit. Mother stated that she believed K. did not like being with Father because she did not feel supported there.

During his testimony, Father denied that he had ever fully moved to Florida and maintained that he had only been dividing his time between Maryland and Florida. He acknowledged that he had spent more than half his time in Florida, and all the information regarding his employment was from Florida. He further testified that he would be working remotely indefinitely and staying in Maryland to continue the week on/week off custody schedule.

At the conclusion of the hearing, the circuit court ruled that although there had been changes in the interim, the circumstances as they existed at the time of the hearing were substantially the same as they had been at the time the custody order was originally entered. The court concluded that because the parties were in the same position that they had been in at the time the order was entered, there was no material change in circumstances that would justify a modification of the custody order.

Mother now raises three issues on appeal. She first argues that the circuit court erred in finding that there was no evidence of a material change in circumstances. She next

asserts that the court erred in not awarding child support and changing the allocation of the child tax credits. Finally, she argues that the circuit court erred in denying a post-judgment motion that she filed asking the court to vacate its order and set a new hearing to consider evidence of the children’s best interests.

DISCUSSION

I. EVIDENCE OF A MATERIAL CHANGE IN CIRCUMSTANCES

In her first issue, Mother argues that the circuit court erred in finding that there was no evidence of a material change in circumstances. Specifically, Mother argues that the circuit court’s finding was too “simplistic” because it was based solely on the fact that both parents were living in the same houses that they had been at the time of the original custody order and did not give enough consideration to the events that had occurred throughout the time period from the date of the custody order to the hearing.

When considering a motion to modify custody, the circuit court engages in a two-step process to determine whether modification is warranted. *Jose v. Jose*, 237 Md. App. 588, 599 (2018); *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). First, the court determines whether there has been a material change in circumstances since the previous custody order was entered, and if so, the court then considers whether a change in custody would be in the best interest of the child. *Jose*, 237 Md. App. at 599; *McMahon v. Piazze*, 162 Md. App. 588, 593-94 (2005). The burden is on the moving party to establish both that there has been a material change, and that because of that change it is now in the best interest of the child for the custody arrangement to be changed. *Gillespie*, 206 Md. App. at 171-72.

This two-step process helps to ensure that custody orders, though subject to modification, are afforded a certain amount of finality. *McCready v. McCready*, 323 Md. 476, 481-82 (1991); *McMahon*, 162 Md. App. at 596 (citing *Domingues v. Johnson*, 323 Md. 486, 498 (1991)). Requiring the party seeking the modification to show that a material change has occurred prioritizes stability in the child’s life and attempts to minimize unnecessary upheaval due to discontented parents endlessly relitigating the same facts in the hope of achieving a different outcome. *McCready*, 323 Md. at 481-82; *McMahon*, 162 Md. App. at 596. There is not always a distinct line between the questions of whether there has been a material change and what is in the best interest of the child. For a change to be considered material, it must be something that affects the welfare of the child. *Gillespie*, 206 Md. App. at 171. As a result, it may not always be apparent whether a change is material without considering how it will affect the welfare of the child. *McCready*, 323 Md. at 482. But even though the best interest question is always present, the court’s analysis for modification must “emphasize changes in circumstances which have occurred subsequent to the last court hearing.” *Id.* at 481 (cleaned up).

In support of her motion for modification, Mother relied almost exclusively on the events that occurred between January 2018 and April 2020, when Father was attempting to divide his time between Maryland and Florida. By the time of the hearing in September 2020, however, those circumstances were no longer present, and Father had arranged to work remotely from Maryland indefinitely.

Mother presented little evidence showing that the current conditions were materially different than when the original custody order was issued. She testified that there were now

five extended family members also living in Father’s house, and that Father’s bedroom was no longer on the same floor as the K. and Z. In addition, she described to the court that although the children’s special and educational needs were mostly the same as they had been at the of the original custody order, they had increased in intensity to the extent that it should have been considered a material change in circumstances sufficient to trigger a best interest analysis.

In making its ruling, the circuit court acknowledged that during the period when Father was residing in Florida, the circumstances may have been so materially changed that a modification of custody would have been warranted. But the court further noted that by the time of the hearing, circumstances had again changed and very closely resembled the conditions at the time that the original custody order was issued. Although Mother argues that the circuit court should have given more weight to the circumstances during the intervening time period, it was well within the circuit court’s discretion to determine how much (or how little) weight to afford that evidence. In child custody matters, we will not disturb a circuit court’s factual findings unless they are clearly erroneous. *In re Yve S.*, 373 Md. 551, 586 (2003). Here, we are not persuaded that there was anything clearly erroneous in the circuit court’s finding that the differences described by Mother did not rise to the level of being a material change in circumstances. Thus, it was not an abuse of discretion for the court to deny the motion for modification.

II. CHILD SUPPORT AND ALLOCATION OF TAX CREDITS

In her second issue, Mother argues that the circuit court erred by failing to order Father to pay child support and by not reassigning to Mother the exclusive right to claim both child tax credits children annually.

Similar to custody, a court can modify child support upon a showing that there has been a material change in circumstances. MD. CODE, FAMILY LAW § 12-104(a) (“FL”). A change is considered material when it is both “relevant to the level of support a child is actually receiving or entitled to receive” and “of sufficient magnitude to justify judicial modification of the support order.” *Wheeler v. State*, 160 Md. App. 363, 372 (2004) (quoting *Wills v. Jones*, 340 Md. 480, 488-89 (1995)). Even when a material change is shown, the court “may not retroactively modify a child support award prior to the date of the filing of the motion for modification.” FL § 12-104(b). We review a circuit court’s decision whether to modify child support for an abuse of discretion. *Ley v. Forman*, 144 Md. App. 658, 664 (2002).

When the original custody order was issued in 2016, Mother and Father had comparable incomes and were understood to be sharing equal custodial time, thus neither party was awarded child support. In her motion for modification, Mother claimed that child support had become necessary because of the material change in circumstances regarding the division of custody. The circuit court concluded, however, that there was no material change in circumstances that would justify a modification of custody. Thus, the same facts—that Father had moved to Florida and then moved back to Maryland—made it that there is no factual foundation to support her motion for child support. As a result, it was

not an abuse of discretion for the circuit court to decline to award child support or make changes to the child tax credits.

III. DENIAL OF MOTION TO ALTER OR AMEND

Finally, Mother argues that the circuit court erred in denying her post-trial motion to vacate its order and set a new hearing to take additional evidence on the best interests of the children. Mother argues that by not taking evidence about the best interests of the children simultaneously with evidence regarding whether there was a material change, the court did not have enough information to “make an informed decision” about the most appropriate custody arrangement.

We review a court’s ruling on a motion to alter or amend its judgment for an abuse of discretion. *Barrett v. Barrett*, 240 Md. App. 581, 591 (2019); *Berringer v. Steele*, 133 Md. App. 442, 472 (2000). As discussed previously, consideration of a motion to modify custody is a two-step process, and the party seeking modification must first establish that there has been a material change in circumstances before the court considers the best interests of the children. By limiting evidence only to whether there had been a material change in circumstances, the circuit court was applying the correct legal standard. As a result, we conclude that the court did not abuse its discretion by denying Mother’s motion.

CONCLUSION

For the foregoing reasons, we conclude that the circuit court did not abuse its discretion in denying Mother’s motion for modification of child custody and her motion to alter or amend that ruling.

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