Circuit Court for Anne Arundel County
Case No.: C-02-FM-18000725

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1576

September Term, 2021

JUSTON HAWLEY

v.

TINA GREER

Shaw,
Albright,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by: Shaw, J.

Filed: December 15, 2022

Following a hearing held on November 16, 2021, the Circuit Court for Anne Arundel County denied a motion to modify child custody filed by Appellant, Juston Hawley. Mr. Hawley appeals that decision. For reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Mr. Hawley and Appellee, Tina Greer, are the parents of son, K, born in August 2015. In 2018, Mr. Hawley—who was never married to Ms. Greer—married another woman and moved to West Virginia. In March 2018, Ms. Greer filed a petition with the circuit court seeking sole legal and primary physical custody of K. Mr. Hawley filed an Answer opposing the request and a counter-complaint in which he requested primary physical and sole legal custody be awarded to him. Pursuant to an order entered on February 21, 2019, the court awarded sole legal custody and primary physical custody of the child to Ms. Greer. The court awarded Mr. Hawley access to the child on alternate weekends and three non-consecutive weeks during the summer. The order also set forth a detailed holiday and "special occasion" schedule. The court's order, among other things, also directed Ms. Greer to "keep the father regularly informed as to educational, religious, and healthcare matters pertaining to the minor child." And it ordered that "both parties shall be entitled to telephone and/or videochat access with the minor child, while i[n]

custody of the other parent, not to exceed one time during any weekend or holiday access, and not to exceed two times for any week-long period." Neither party appealed that order.[1]

In May 2019, Mr. Hawley, representing himself, filed a petition for contempt in which he alleged that Ms. Greer "has not inform[ed] me of any upcoming medical appointments" and "has blocked me from having video chat access with my son[.] On July 8, 2019, a hearing on the contempt petition was held before a magistrate and testimony taken. The hearing sheet reflects that the "[p]arties reached a goal as to video chat/pick-ups and placed it on the record."

The magistrate's report reflects that Ms. Greer had taken the child for a flu shot, but was "unable to recall when or where or by whom the shot was given." The magistrate further found that Mr. Hawley "has had difficulty connecting with the child for his video chats." The magistrate concluded that "taking the child for a flu shot only, without any showing that it also involved medical advice or treatment, amounts to contempt for failing to 'provide reasonable advance notice of a medical appointment.'"[2] The magistrate concluded that although Mr. Hawley's "difficulties in exercising his right to video-chats are unfortunate, they do not amount to contempt." The magistrate recommended that the

[1] The order was issued following a hearing held on February 15, 2019. The order states that the court's decision was based on testimony at the hearing and "for the reasons stated by the Court on the record[.]" It does not appear that the hearing has been transcribed, and the court's reasons for its award are not set forth in the written order.

[2] Although the magistrate's report states that Ms. Greer taking the child "for a flu shot only, without any showing that it also involved medical advice or treatment, amounts to contempt[,]" the hearing sheet as well as the magistrate's proposed order, which the court adopted, both state that the magistrate found Ms. Greer "not in contempt" of court.

court set specific times for father's video-chat access," citing *Dodson v. Dodson*, 380 Md. 438, 448 (2004) for the proposition that a court has the authority to issue "ancillary orders for the purpose of facilitating compliance or encouraging a greater degree of compliance with court orders." Neither party filed exceptions to the magistrate's report.

By order date August 5, 2019, the court adopted the magistrate's proposed order and denied Mr. Hawley's petition for contempt. The court ordered that "the right of defendant/father to telephone and/or video-chat access with the parties' child shall be between 7:00P.M. and 8:00P.M. on Thursday, Sunday and Wednesday on a bi-weekly basis following his alternating weekend access[.]" Neither party appealed that order.

In July 2019, prior to the ruling on his contempt petition, Mr. Hawley moved back to Maryland and filed a petition with the court to modify custody and visitation, stating: "I have relocated back to Maryland to be apart [sic] of my son[']s life a lot more. Tina Greer is giving problems with the court order we have now and breaking some of court order and its not in the best interest of my son to be in her custody." About six weeks later, after the court ruled on the contempt petition, Mr. Hawley filed an amended motion to modify custody and visitation seeking "more legal say so over [K's] medical and schooling decisions" and requesting "custody or 50/50." For various reasons—including unsuccessful attempts at mediation,[3] filing of contempt petitions, hearings before a

[3] The record reflects that the parties attended two 2-hour mediation sessions in May of 2020, with the result that "no agreement was reached or the sessions resulted in no written agreement."

magistrate, and postponements—the modification request did not come before the court for a hearing until November 16, 2021.

Following a settlement/pre-trial conference held on January 5, 2021, the court, "pending trial" and pursuant to an interim agreement of the parties, increased Mr. Hawley's access to the child by adding visitation every Wednesday from 3:00 PM to 7:00 PM and "one video chat" not to exceed one hour in length on alternating Fridays at 5:30P.M.

At the November 16th hearing, Mr. Hawley testified that he currently lives in Dundalk (less than ten miles from Ms. Greer's home) with his wife, their one-year-old son, his seventeen-year-old daughter, his wife's eleven-year-old daughter, and his grandfather. His wife's then eight-year-old son, who resides with his father in West Virginia, also visits regularly. Mr. Hawley related that when K and his stepson are both visiting, they share a bedroom dedicated to them in his house. The girls and the grandfather sleep in rooms in the basement of the three-bedroom home. On cross-examination, when asked whether it was true that his grandfather "is often naked around the children," Mr. Hawley responded that "[t]here is a separate room" and that he had "never seen it personally." When asked whether it is true that the grandfather "sometimes [ ] gets a little rough with the children," Mr. Hawley responded "[c]ould be."

Ms. Greer lives in a rowhouse in Brooklyn Park, where she has resided since 2014. Ms. Greer's older son, nineteen years old at the time of the hearing, lives there with her and K and he helps her with the rent. Her home is within walking distance of Park Elementary, which K attends. When asked how K was doing in school, Ms. Greer related that his teacher reports that "he's doing fantastic."

Mr. Hawley related that he picks up K from school on Wednesday and returns him about 7:00 PM and also exercises his visitation rights on alternating weekends. He picks up and drops off K at the home of Ms. Greer's sister.

K is typically picked up and dropped off at the home of Ms. Greer's sister because, in the sister's words, Mr. Hawley "has a tendency to be rude and disrespectful to [Ms. Greer] if nobody else is around." Ms. Greer's eldest son, also testified that exchanges of K can be "tense, to say the least" and, therefore, he and his uncle "are there sometimes to keep peace essentially so [Mr. Hawley] won't berate [Ms. Greer] about things[.]"

Mr. Hawley and his wife both testified that when K is in their home, they bathe him and ensure that he eats well and gets to bed at a reasonable hour. They claimed that K enjoys his visits, and they make it a point to engage in family activities, like trips to Six Flags, playing board games, and going to the beach. Mr. Hawley described his relationship with K as "awesome," and claimed that "sometimes" when it is time for K to leave after a weekend visit, K's reaction "is somewhat sad because he is not wanting to leave sometimes." He asserted that when getting out of the car at drop off, "he gets in tears sometimes."

When asked whether he had any "concerns" about K being in Ms. Greer's care, Mr. Hawley testified that he is concerned with his son's hygiene and related that on a few occasions when K arrived at his house it seemed like his hair "was crusty or something." He claimed that K needs a bath "every time" he comes for a visit. He was also worried about K's dental health and hygiene and the fact that he "has had five caps on his teeth."

Ms. Greer admitted that K had three cavities that prompted the need for the caps, and that he had had a tooth pulled because it "was growing in wrong."

Mr. Hawley testified that he and Ms. Greer communicate primarily via Facebook Messenger, admitting that they have difficulties communicating. Ms. Greer related that communicating with Mr. Hawley is "frustrating" because "[i]f he doesn't get his way, he's not happy." She also claimed that whenever there was a need or desire to change the visitation schedule, Mr. Hawley "would not budge at all." For example, one time she wanted to take K on a one-week family vacation with her sister and the sister's children who K frequently plays with, but Mr. Hawley refused because it would interfere with his Wednesday visit with K. Although Ms. Greer had offered to give him other time with K to make up for the lost visit, Mr. Hawley would not consent and, therefore, Ms. Greer and K missed the vacation.

Mr. Hawley was not working at the time of the hearing, but his wife was working. He testified: "I am trying to get my business license and everything and figure out where I'm going to be at." He explained that he has worked as a truck driver, but that he had not secured new employment because he needs to work around his wife's work schedule ("she starts at 3:00 PM promptly") so that he can be home with the children. He claimed that the household bills are paid by him, his wife, and his grandfather. Mr. Hawley also testified that he and his family were "possibly" moving to Florida and that they had already secured "a home approval." When pressed about how his request for shared custody of K would work if he moved to Florida, Mr. Hawley stated he would remain in Maryland if the custody arrangement was modified to "50/50."

Ms. Greer receives Social Security Disability Income, having been certified as permanently disabled about 18 years ago. She has cerebral palsy and diabetes and is unemployed, but her physical limitations do not hamper her ability to keep house or parent K. Ms. Greer requested that the present custody arrangement, including the Wednesday visits, remain unchanged.

The court ruled as follows:

> Let me just say at the outset that I've been a member of this bench for 17 years. And I was [a] family law judge, I've done hundreds and hundreds of custody cases. And as a private lawyer, that was the majority of my practice. So I take them very seriously. This case, unfortunately, was delayed. I guess because of COVID. Judge Klavans' [February 21, 2019] order [awarding custody] is, I think, less than three years. I've read his order several times and it's pretty thorough.
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> The issue that I have to decide here today is whether or not anything should change. And there's a standard. I have to determine that there's a material change in circumstances, material change of circumstances, that affects the well being of the child. Then I have to go through the process of the Montgomery County factors. [4] Which I've taken a look at.
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> The problem with this case is, **I think there's been a change in circumstances, but I don't think it's a material change in circumstances. The father now lives here**. And when I came out and didn't hear any evidence in this case, I thought; well, maybe there's some room for joint legal custody. But after hearing the testimony of both parties and assessing their credibility, they have no ability to communicate, quite frankly. And I attribute that to the fault of Mr. Hawley. I think it's either his way or the highway. It doesn't work that way.
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> But if there were a material change in circumstances and I had to apply the Montgomery County factors, sometimes history and prior actions of a party tell you quite a bit. And the tenth factor under Montgomery County is prior voluntary abandonment or surrender of custody of the child. This child

[4] In *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977), this Court set forth ten non-exclusive factors for a court to consider when making a custody determination.

was less than three-years-old when Mr. Hawley decided to leave the child behind and move on with his life in another direction. It's a factor.

But because I did not consider a change in circumstances, I don't have to consider that in analyzing whether there should be any change in the status quo. He has a right to do that. He has a right to carry on his life. And I think it's commendable that he's at least attempting to get as much time with his child as he possibly can. But unfortunately, there's just not enough time has gone by. And again, **there's no ability to communicate concerning this child. And I said, and I'll say it again, I attribute that to Mr. Hawley, he's not willing to discuss anything. It's his way, or like I said, the highway**.

Now, believe me, there's a presumption of joint legal custody.[5] And I really, in the beginning, wanted to go in that direction, to give the parties some kind of joint decision-making authority. But right now I think the situation is working fine for this child. He sees his father, I believe, a generous amount of time. 50/50 is done very seldom. So the bottom line for me is, we're going to keep this case as is. We're going to add, however, and I can do it on the hearing sheet as a court order the Wednesday, he should keep that. I think that makes sense now that he's living closer. And if, for any reason, either party has to change that Wednesday, because I heard some testimony that it affected a situation. And they're to notify the other party within seven days and that will be rescheduled. It's not going to be lost, it will be rescheduled.

So if Ms. Greer, if the same situation arises and she's prevented from doing it because of that Wednesday four hour visit from 3:00 to 7:00, she just simply notifies him at least seven days in advance. But she will owe him those four hours at some point, to be made up with, I think in 45 days. Now, again, I think they're both good parents. Unfortunately, Mr. Hawley's past

[5] We do not necessarily agree with the court's statement that there is "a presumption of joint legal custody." Section 5-203(d)(1) of Family Law Article of the Maryland Code provides that, "[i]f the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents." The statute further provides that "[n]either parent is presumed to have any right to custody that is superior to the right of the other parent." Fam. Law § 5-203(d)(2). In our view, the statute does not create a presumption of joint legal custody, but rather eliminates a preference to either mother or father. Indeed, when deciding legal or physical custody, the circuit court's foremost consideration is the best interests of the child. *Santo v. Santo*, 448 Md. 620, 626 (2016). The best interest of the child standard applies whether it be an original action or a motion to modify a prior order. *McCready v. McCready*, 323 Md. 476, 480-81 (1991).

> actions here have kind of dug himself into a hole that he's not going to be able to get out of immediately.
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> The fact that there's no communication between the parties here is concerning to me. This is a six-year-old child. This child loves both parents, he's going to need both parents. They just got to find a better way to get along with one another. Anyhow, that's my decision. It will be reflected on a hearing sheet, nobody needs to prepare any orders. We're simply denying the Motion to Modify keeping everything. And by the way, Judge Klavans' order, he put a lot of time and effort in this, and it makes sense. He heard this case closer to the time when Mr. Hawley left his child and the mother of the child. I think at that point in time, it was probably only three years, and Ms. Greer is the one that actually initiated the whole custody to get the issues resolved. It was not Mr. Hawley. So good luck in the future.

(Emphasis added.)

The hearing sheet, which the court "signed as order of court," reflects that the court denied Mr. Hawley's motion to modify custody. It further states "Dad will get every Wednesday 3PM-7PM. If either party needs to cancel they must give 7 days notice and it will be made up within 45 days."

Mr. Hawley noted a timely appeal.

DISCUSSION

"On a motion for modification of custody, a trial court employs a two-step process: (1) whether there has been a material change in circumstances, and (2) what custody arrangement is in the best interests of the children." *Santo v. Santo*, 448 Md. 620, 639 (2016). "A material change of circumstances is a change in circumstances that affects the welfare of the child." *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). "Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child." *McCready v. McCready*, 323 Md. 476, 482

(1991). "The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008). Requiring the moving party to show that a material change has occurred prioritizes stability in the child's life and attempts to minimize unnecessary upheaval where discontented parents seek to relitigate the same facts in an effort to achieve a different custody result. *McCready v. McCready*, 323 Md. 476, 481-82 (1991).

Generally, the scope of appellate review of a custody decision is narrow. *Id*. at 484. As such, we "will not set aside factual findings made by the [trial court] unless clearly erroneous," and we "will not interfere with a decision regarding custody that is founded upon sound legal principles unless there is a clear showing that the [trial court] abused [its] discretion." *Id*. And, because "appellate review is properly limited in scope, the burden of making an appropriate decision necessarily rests heavily upon the shoulders of the trial judge." *Taylor v. Taylor*, 306 Md. 290, 311 (1986) (citation omitted).

On appeal, Mr. Hawley continues to represent himself and raises five issues, which we shall discuss in turn.[6] First, he seems to assert that the court erred in ordering that either parent could alter his Wednesday visit with K upon seven days advance notice and with the stipulation that those hours would be rescheduled within 45 days. Mr. Hawley complains that "the judge gave Ms. Greer full say so for scheduling of the visits with leaving [him] in the air when she can make plans during [his] time with K[.]"

[6] Although both parents were represented by counsel at the November 16, 2021 hearing, both are representing themselves on appeal.

We note first that neither parent objected below, or challenges in this appeal, the court's decision to maintain the child's Wednesday visits with his father, which began pending trial by agreement of the parties and pursuant to an order of the court following the settlement/pre-trial conference.[7] Rather, as noted, Mr. Hawley challenges the court's allowance of either party to occasionally adjust that schedule when either parent "needs to cancel[]" a particular Wednesday.

Based on the record before us, we are not persuaded that the court abused its discretion in this instance. First, the court was very cognizant of the parties' inability to communicate, a problem it attributed to Mr. Hawley. Second, the court was aware of Mr. Hawley's flat refusal to allow Ms. Greer to take K on a one-week family vacation merely because he would miss a single Wednesday visit. And the court heard Ms. Greer testify, repeatedly, that she did not "want to take his Wednesday away." In fact, Ms. Greer testified that when Mr. Hawley refused to consent to missing a Wednesday visit, she stayed home and did not join her sister on vacation. In short, we are not convinced that the court acted contrary to K's best interest by allowing either parent to cancel an occasional Wednesday visit, which would have a minor effect on the visitation schedule.

[7] It is our observation, that where one parent has primary physical custody and the other visitation rights, an access schedule giving the non-custodial parent overnight visitation on alternate weekends and visits on Wednesday afternoons/evenings is fairly typical. At the November 16, 2021 hearing, Mr. Hawley's counsel related that, at the time custody was awarded, Mr. Hawley lived in West Virginia, "so practically speaking" the visitation schedule put in place "was probably really the only access schedule that would work with the distance[.]" Counsel further noted that "as a result of the settlement conference, he did get the Wednesday," informing the court that "[i]n lieu of the video chats, it was implemented that it be in person."

The next issue Mr. Hawley raises is "depriving the child from help or learning." He states that "nobody wants to seem like they want to help K with his anger when K possibly could see a counselor or enroll in martial arts to help K to control his anger or build his focusing up." This issue is not properly before us. First, the court's order did not address in any manner any anger issues K may be experiencing. Nor, as far as we can discern from the record before us, did Mr. Hawley testify to any anger issues K may have or request that K see a counselor or enroll in marital arts. He did testify that he would "like to be able to get [K] into like the martial arts program for children" to help him "build his confidence" and into T-ball or "something[.]" When asked whether he had discussed with Ms. Greer getting K involved in such activities, Mr. Hawley testified that he had "previously," and "[i]t never really went anywhere I guess because of K's age and everything." In short, this is a matter Mr. Hawley may address directly with Ms. Greer.

The next issue Mr. Hawley raises is "taxes." He asserts that he should be able to "claim K on taxes." Again, this issue is not properly before us as it was not raised in or decided by the court in its November 2021 order denying the motion to modify custody.

Mr. Hawley's next issue is "the ruling of the courts." He maintains that a "modification would probably be in better interest in regards to this matter because of interference of planning things to do with the child visitation time and it probably wouldn't be any complications." He also asserts that a modification of custody would assist his ability to find work and if granted he "would not be judged on employment and so [he would] not be set up for failure to pay [his] child support[.]" In essence, Mr. Hawley is arguing that modifying custody is his preference and that it would be in his best interest.

That, however, is not the appropriate standard. Rather, the focus of a court when ruling on a request to modify custody is whether there is a material change of circumstances affecting the welfare of the *child* and, if so, whether, due to that change in circumstances, a modification of the custody agreement would be in the *child's* best interest.

At the November 2021 hearing, Mr. Hawley's counsel maintained that the father's move back to Maryland constituted a material change in circumstances justifying a change in custody. The court agreed with Mr. Hawley that his move back to Maryland was a change of circumstances, but concluded that the move was not a *material* change in circumstances warranting a modification of the 2019 decision granting Ms. Greer primary physical and sole legal custody. Mr. Hawley has not persuaded us that the court erred in that conclusion.

The final issue Mr. Hawley raises relates to the attorney who represented him at the November 2021 hearing. He seems to assert that the attorney did not proceed as he anticipated. This issue, however, is not properly before us and it is not our role to evaluate any complaints Mr. Hawley may have about his lawyer.[8]

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[8] In a subsequent filing with this Court, which Mr. Hawley captioned as "Just Informing the Court of recent things," he elaborated on some on the issues in his brief and discussed facts not in the record before us. Assuming the pleading may be deemed a Reply brief, nothing therein changes the outcome of this appeal.