Circuit Court for Baltimore County
Case No. 03-C-14-003349

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1587

September Term, 2021

A.H.

v.

W.H.

Kehoe,
Reed,
Albright,

JJ.

Opinion by Albright, J.

Filed: August 15, 2022

The parties, A.H. ("Father") and W.H. ("Mother"), were previously married and are the parents of two minor children. In May 2020, Father petitioned to modify the 2018 consent custody order that awarded the parties joint legal custody (with tie-breaking authority to Mother) and primary physical custody to Mother. Father claimed, among other bases, that Mother left the children home without proper supervision when they were seven and eight years old. After a hearing, the Circuit Court for Baltimore County denied Father's petition. Father timely appealed, presenting one question for our review, which we have rephrased:[1]

> Did the court err, or otherwise abuse its discretion, in denying Father's Petition to Modify Custody?

For the reasons below, we affirm.

BACKGROUND

The parties were divorced in June 2013 by order of an out-of-state court. According to the divorce decree, child support and custody were "not contemplated" because Father was served by publication and was not within the court's jurisdiction.

In March 2014, Mother filed a petition for custody in the Circuit Court for Baltimore County, seeking sole physical and legal custody of the parties' minor children:

[1] The issue as presented in A.H.'s brief was as follows:

> Was the error that the children were 7 and 12 when left home alone a harmless error in a custody modification centering on parental supervision?

"N.", who was born on May 29, 2011; and "X.", who was born on May 15, 2012.[2] Father filed a counter-petition, seeking the same relief.

On February 4, 2015, a consent custody order was entered, granting primary physical custody of the children to Mother, and setting forth a visitation schedule for Father. The order further provided that the parties would share joint legal custody, and that Mother would have tie-breaking authority in case of an impasse.

On February 5, 2018, a second consent custody order was entered. That order did not alter physical or legal custody but provided only for changes to Father's visitation schedule.

On May 4, 2020, Father filed a petition to modify custody, alleging that there had been a material change in circumstances. Father alleged, among other things, that Mother repeatedly left the children unattended overnight.[3] Father requested that he be granted sole legal custody and primary physical custody.

On October 5 and 6, 2021, the court held an evidentiary hearing on Father's motion for modification. Both parties were represented by counsel. At the time of the hearing, N. was ten years old, and X. was nine.

[2] To protect privacy, we refer to the children using randomly selected letters.

[3] In support of his claim that there had been a material change in circumstances, Father also alleged that Mother (1) "unjustifiably removed the minor children from school for more than one month in order to accompany a casket to the Republic of Afghanistan[,]" (2) "refused to facilitate the enrollment of the children in age-appropriate extracurricular activities[,]" and (3) "refused to engage in any joint custodial decision making." Because Father's sole argument on appeal is that the court erred in finding that leaving the children at home alone was not a material change in circumstances, we recite only those facts necessary to address that issue.

Mother testified that, from June 2018 to March 2020, she worked an overnight shift, from 6:30 p.m. to 7:00 a.m., three days a week. Mother's father, who had lived with her since at least 2018, cared for the children while Mother was at work.

Mother's father died on January 10, 2020. His burial took place in Afghanistan. Mother traveled to Afghanistan on January 16, 2020 to attend her father's funeral and returned to Maryland on February 3, 2020. During Mother's trip, Father cared for the children at his home in Georgia.

The children returned to Mother's home in Maryland in early February and they went back to school at that time. Mother took leave from work and stayed home with the children. A few weeks later, schools closed due to the COVID-19 emergency.

Mother talked to her manager and asked for a different shift. She explained that she did not have anyone to take care of the children, but was told that there was nothing that could be done at that time. Mother asked her two sisters to watch the children until she was able to change her schedule to a day shift and find after-school day care, but neither was able to help. According to Mother, her sisters' husbands were "against" her and told her sisters that they should not help Mother. Mother asked a neighbor if she could watch the children at night, but the neighbor declined due to fears about the spread of COVID-19. Mother looked for other nighttime childcare options but found nothing available.

When Mother's leave expired around mid-March 2020, she returned to work. Mother explained that she was "forced" to return to work and leave her children at home alone "[t]o make sure [the children had] a safe place to live and [ ] food on the table." In

response to being asked about when she "stop[ped] leaving the children home alone[,]" Mother responded with the following: "This was [the] only time that the children were left at home alone and I did that because I was compelled to. I didn't do it because I had a choice."

Mother testified that she did not know about the law governing the age at which children may be left alone, but she believed that the children were mature and smart enough to stay on their own.[4] Mother instructed the children not to use the stove while she was at work. She left them food that did not need to be heated, and a list of emergency phone numbers, including her sisters' and Father's numbers. Mother checked on the children by Facetime every three hours, when she had a 15-minute work break, until the children were asleep.

Father testified that, at some point in March 2020, he received an anonymous letter advising him that Mother left the children alone in the house. Father hired a private detective to investigate. Father subsequently received a call from Y. K., the husband of Mother's older sister, and learned that Y.K. had sent the letter.

[4] In Maryland, children under the age of eight cannot be left at home without being supervised by an individual who is at least 13 years old. Specifically, Section 5-801(a) of the Family Law Article of the Maryland Code provides:

> A person who is charged with the care of a child under the age of 8 years may not allow the child to be locked or confined in a dwelling, building, enclosure, or motor vehicle while the person charged is absent and the dwelling, building, enclosure, or motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to remain with the child to protect the child.

On March 23, 2020, the police went to Mother's place of employment and asked to speak with her. Police advised Mother that they received a report that she left her children at home, alone. Mother admitted that the children, who were then seven and eight years old, were at home alone. She left work and followed the police officer to her apartment.

Mother testified that she was not aware that children under the age of eight could not legally be left alone. She immediately stopped working and applied for "emergency vacation." In May or June of 2020, Mother was offered and accepted a daytime shift with the same employer, but at a different location. In August 2020, Mother moved to a different neighborhood because it was the "only location" that she could find "good" day care close to a school. At the time of the hearing in October 2021, the children were still attending the same daycare center.

Mother's younger sister, K.A., testified in Mother's case. K.A. stated that she provided childcare to the children when her father, who had been watching the children while Mother worked, became very sick. Mother asked K.A. for her help with childcare after their father died, but K.A.'s husband, who is the brother of Y.K., would not allow K.A to help.

Y.K. was called as a witness in Father's case. He testified that, in December 2019, Mother's father, who was then in the hospital, gave him a key to Mother's apartment "to go and look to the children." Y.K. went to the apartment and found the children there, alone. He explained that he "tried to counsel" Mother about leaving the children home at night without supervision.

After Mother's father died in January 2020, Y. K. told Mother that he and his wife did not have room in their home for the children to stay while Mother was at work. He told Mother to "change [her] job to daytime and stay with the kids at nighttime, but [Mother] never listened." He then wrote a letter to Father to let him know that the children were at home at night without supervision. He did not put his name on the letter because he was afraid that the letter would "create a hazard at [his] home."

In closing argument, counsel for Father argued that Mother did not appreciate that it was wrong to leave the children at home alone, and that her actions evidenced a lack of judgment. In response, counsel for Mother conceded that Mother should not be "absolved" of her actions, but argued that the situation was not due to a lack of judgment or effort on Mother's part. Counsel emphasized the evidence that Mother reached out to family members and others in her community for help, to no avail, and that she immediately stopped working when she learned that the law prohibited her from leaving the younger child at home alone. Counsel pointed out that, at the time of the hearing, the children were still enrolled in daycare, even though they were then ten and nine years old and were legally old enough to be left alone. Counsel argued that there had been no material change in circumstances as the children had proper supervision.

After closing argument, the court took a recess to consider the evidence and the arguments presented. The hearing then resumed, and the court issued its ruling from the bench. The court began by summarizing the four issues raised by Father in support of his petition for modification. According to the transcript, the court stated that one of the

issues Father raised was "that the children were left alone when they were the ages of 7 and 12 in March of 2020."

After discussing and finding that the other issues raised by Father did not constitute a material change in circumstances, the court considered whether Mother's actions in leaving the children at home without supervision while she went to work constituted a material change in circumstances.[5] The court stated that, although it did not condone Mother's actions, it found that Mother "was put in a position that at least explains why she had to leave the children alone." The court credited Mother's testimony that her sister was forbidden by her sister's husband, Y.K., to help Mother, and that Mother was unable to find other means of childcare due to the COVID-19 pandemic.[6] The court accepted that Mother had tried without success to change her work hours, and that she believed that the children were mature enough to be left alone. The court found it "curious" that, if the children's welfare was truly endangered, no immediate action, such as notifying Child Protective Services, was taken by Y.K.

The court concluded that leaving the children without nighttime supervision was not a material change in circumstances:

> The [c]ourt finds that [Mother] at that time was in a crisis, crisis mode, and that she did everything that she believed reasonable to deal with this situation with no help and later acted to cure the problem.

[5] In ruling that there was no material change in circumstances that justified modifying the 2018 consent custody order, the circuit court considered all four of the issues raised by Father in his petition.

[6] Mother testified that both of her sisters were prevented by their husbands from helping Mother with childcare.

> I find that this is not a material change, this situation that she was put into. I say put into because I do believe that there is or was something going on between [Y. K.] and perhaps [Father] as to having [Mother] put into this position.

On October 15, 2021, the court entered an order denying Father's motion to modify custody.

Father filed a motion for a new trial, or, in the alternative, to alter or amend the judgment. The basis for the motion was that the court stated that the children were seven and 12 years old in March 2020, rather than seven and eight years old, as the undisputed evidence had shown. Father asserted that the court had made an erroneous finding that "nullified the existence of a change in circumstances[.]" The court denied the motion. This appeal followed.

STANDARD OF REVIEW

The scope of appellate review for a trial court's decision on a motion for modification of custody is narrow. *McCready v. McCready*, 323 Md. 476, 484 (1991). The appellate court "will not set aside factual findings made by the [trial court] unless clearly erroneous, and [ ] 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.* (citing *Davis v. Davis*, 280 Md. 119, 124-26 (1977)).

DISCUSSION

A final custody order, including an order "entered by the consent and upon the agreement of the parties," may be modified only if the court concludes that circumstances have materially changed since the prior custody determination. *Id.* at 481, 483. The party

moving for modification bears the burden of showing "'that there has been a material change in circumstances since the entry of the [prior] custody order and that it is now in the best interest of the child for custody to be changed.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 171-72 (2012) (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)). "[U]nless there is a material change, there can be no consideration given to a modification of custody." *Wagner v. Wagner*, 109 Md. App. 1, 29 (1996).

The rule that a custody award may not be modified absent a material change in circumstances is "intended to preserve stability for the child and to prevent relitigation of the same issues." *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005). "'In [the custody modification] context, the term "material" relates to a change that may affect the welfare of the child.'" *Gillespie*, 206 Md. App. at 171 (quoting *Wagner*, 109 Md. App. at 28). A court will not find a material change in circumstances if the "evidence of change is *not strong enough*," that is, there is "either no change or the change itself does not relate to the child's welfare[.]" *Wagner*, 109 Md. App. at 28–29 (emphasis in original).

Father's sole argument on appeal centers on the court's statement at the outset of its oral ruling, when, in summarizing the issues raised by Father, the court stated that the issue "that ha[d] been given the most attention is that the children were left alone when they were the ages of 7 *and 12* in March of 2020" (emphasis added). Father argues that the statement reflects clear error in the court's analysis of whether there had been a material change in circumstances. Mother maintains that the court's "misstatement" regarding the age of the older child is immaterial because age was not a "determinative

factor in deciding whether there was a material change in circumstance." We agree with Mother.

The evidence before the court regarding the age of the children was ample and undisputed. At the outset of the hearing, which took place in October 2021, Mother informed the court that the children were then ten and nine years old. Mother testified that, in March 2020, when the children were left alone, they were seven and eight years old, and in the second and third grade. The court accepted into evidence the children's report cards for the 2020-21 school year, which showed that N. was in fourth grade and X. was in third grade at that time. During the hearing, the court reviewed the February 5, 2018 consent custody order, which includes the children's dates of birth. In announcing its ruling, the court expressly acknowledged that, at the time of the hearing, the children were still in elementary school.

Based on our review of the record as a whole, it does not appear that the court made an affirmative finding that N. was 12 years old in March 2020. Given the amount of undisputed evidence in the record regarding the age of the children, it appears more likely the court simply misspoke. *See Paige v. State*, 222 Md. App. 190, 199 (2015) (observing that "[a]lmost anyone can make a slip of the tongue, and judges are not immune from such errors.") (quoting *Reed v. State*, 225 Md. 556, 570 (1961)).

In any event, even if we were to agree with Father that the court's statement reflects an erroneous finding of fact, such a finding was immaterial to the court's ultimate determination and, therefore, the error would not warrant a remand. Father argues that remand for further proceedings is necessary because Mother's actions would be

"impossible to justify based on the real ages of the children." The record reflects, however, that, even assuming the court believed that the older child was 12, the court still did not find Mother's actions to be justified. Indeed, the court expressly stated that it did not "condone" Mother's decision to leave the children at home alone.

The court determined, however, that Mother's actions did not amount to a material change in circumstances, that is, that her actions did not affect the welfare of the children. The court found that Mother was in "crisis mode" and "did the best that she could under very challenging circumstances[,]" and that she subsequently took action to remedy the situation. In sum, based on our review of the record as a whole, we conclude that the court's determination that there was no material change in circumstances was not error.

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