Circuit Court for Prince George's County
Case No. CAD14-15331

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1749

September Term, 2016

ANDREA MCLACHLAN

v.

DAVID MCLACHLAN

Berger,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: May 10, 2017

This case is before us on appeal from an order of the Circuit Court for Prince George's County denying a motion to modify custody filed by Andrea McLachlan, appellant. Ms. McLachlan raises a single issue in this appeal, namely, that the circuit court erred by denying her motion to modify custody without an evidentiary hearing. As we shall explain, given the particular circumstances of this case, we shall hold that the circuit court did not err by denying the motion without a hearing.

FACTS AND PROCEEDINGS

Andrea ("Mother") and David ("Father") McLachlan were married on May 20, 2006, and resided in Prince George's County, Maryland throughout their marriage. They are the parents of two children, L., age eight, and A., age five. Mother is an orthodontist and Father is a federal employee who works in the technology field.

Following the deterioration of the parties' relationship, Mother and Father separated on approximately March 13, 2014. Mother remained in the marital home with the children. Mother initiated divorce proceedings in the Circuit Court for Prince George's County on June 14, 2014. The court entered a *pendente lite* custody order on January 22, 2015, which awarded joint legal and shared physical custody.[1] Pursuant to the *pendente lite* order,

[1] Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor v. Taylo*r, 306 Md. 290, 296 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.*

Joint legal custody means that both parents have an equal voice in making those decisions and neither parent's rights are superior to the other." *Id.* "Joint physical custody

Mother had primary physical custody and Father was awarded visitation. Mother was also granted tie-breaking authority.

The parties appeared before the circuit court for a merits hearing on June 1, 2, and 11, 2015. The parties were unable to complete their case and two additional dates were scheduled for September 10 and 24, 2015. While the divorce case was pending, Mother advised Father that she intended to relocate with the children to Washington, D.C. Father filed an emergency motion for *ex parte* relief on July 10, 2015. The court determined that the motion was not an emergency and ordered that it proceed in due course. In violation of the *pendente lite* order, Mother moved with the children from Prince George's County, Maryland, to Washington, D.C. Father filed a motion to modify the *pendente lite* order on July 24, 2015, arguing, *inter alia*, that Mother's move constituted a material change of circumstances.

The court held a hearing on the motion to modify on September 10, 2015, which was the first scheduled date for the continuation of the parties' merits hearing. The court issued a memorandum opinion and order, in which the court concluded that "[d]espite the material change in circumstances, purposely caused by [Mother's] removal of the children from this jurisdiction and their previous schools, it is in the best interest of the children to

is in reality 'shared' or 'divided' custody. Shared physical custody may, but need not, be on a 50/50 basis." *Id.* at 296–97. "The parent not granted legal custody will, under ordinary circumstances, retain authority to make necessary day-to-day decisions concerning the child's welfare during the time the child is in that parent's physical custody. Thus, a parent exercising physical custody over a child . . . necessarily possesses the authority to control and discipline the child during the period of physical custody." *Id.* at 296 n. 4.

maintain their status quo." The court emphasized that it did "not condone [Mother's] behavior."

The merits trial continued on September 24, 2015, but again did not conclude. An additional date was scheduled for December 14, 2015. The parties were ultimately able to reach an agreement before the December 14, 2015 hearing. The parties signed a voluntary separation and property settlement agreement ("the Original Agreement") resolving all pending issues on December 14, 2015. The Original Agreement was incorporated but not merged into the judgment of absolute divorce issued on December 18, 2015.

Pursuant to the Original Agreement, the parties had joint legal and shared physical custody of the two minor children. The Original Agreement provided that the children would complete the 2015-16 school year in their Washington, D.C. school, but that Mother and the children would thereafter return to the marital home in Prince George's County. The Original Agreement further provided that the children would "attend school at a school located in Prince George's County no later than the commencement of the 2016-2017 school year." With respect to relocation, the Original Agreement provided:

> Should either party choose to relocate his/her present residence, the relocating party agrees to immediately notify the other party of the relocation, and the parties agree to immediately engage in mediation to address the physical custody and access issues to determine what is in the best interest of the minor children. Should the parties be unable to resolve these issues through mediation, they agree to expedite the appropriate court hearing to address the issues prior to any relocation of the children.

The Original Agreement further provided that Mother would have up to four years of use and possession of the marital home.

On April 26, 2016, Mother filed the motion to modify physical and legal custody that is the basis for the instant appeal. Prior to being served with Mother's motion to modify, Father filed his own motion to modify custody, as well as a petition to have Mother held in contempt, on May 20, 2016. Father was not served with Mother's motion to modify until June 27, 2016, when both parties appeared for a hearing on Mother's "Emergency Motion to Enroll Child in Summer School, to Avoid Academic Harm, and for Order Requiring Father to Administer Child's Asthma Medication, and for Immediate Hearing." At the June 27, 2016 hearing, the court ordered the parties to attend mediation. A hearing was scheduled for August 22, 2016 for consideration of the parties' respective motions for modification of custody, as well as Father's petition for contempt.

Before the modification hearing, the parties participated in mediation and ultimately reached an agreement ("the Modification Agreement"). The Modification Agreement was drafted as an amendment to the Original Agreement. It was signed by both parties at the Prince George's County Courthouse on August 22, 2016, the same day as the hearing had been scheduled on the parties' motions for modification of custody and father's petition for contempt.

Critically, the Modification Agreement reaffirmed that "[t]he parties shall continue to have the joint legal and shared physical custody of their two (2) minor children." The Modification Agreement set forth a different summer access schedule for the summer of 2016 as well as for summers thereafter. The Modification Agreement further provided that "[t]his Amendment modifies only the referenced subsections and paragraphs as indicated,

and all other terms of the parties' Voluntary Separation and Property Agreement dated December 14, 2015, shall remain in full force and effect."

Later on the same day after signing the Modification Agreement, the parties appeared for the hearing before the circuit court on their respective motions to modify and for contempt. Mother continued to argue that material change of circumstances had occurred that warranted a modification of custody. The court engaged in a lengthy colloquy with counsel for Mother with respect to whether a material change had occurred. Mother's counsel explained that Mother sought "to modify the order . . . to reflect that the kids would be going to school in D.C." The court found that Mother's proffer that the children were thriving in their D.C. school would not constitute a material change in circumstances justifying a modification of custody. The court explained that this issue "was resolved when the settlement agreement was reached . . . [T]he children were in the Monroe School and these parties entered an agreement and [Mother] agreed to enroll the children come fall of 2016 in a school in Prince George's County." The court further found that the parties had reaffirmed their previous agreement as recently as that same morning, when the parties signed the Modification Agreement, and that no material change of circumstances could have occurred since that morning.

The court denied Mother's motion to modify custody, explaining its reasoning as follows:

> [Y]et we're here and it's again we're having a hearing on where the children are to attend school after the settlement agreement that was reached on December 14, 2015.

> I have already indicated that based on the recent agreement by the parties that was presented to the Court today, August 22, 2016, that amendment to the voluntary separation and property settlement agreement I know as counsel said it dealt with some summer issues regarding summer camps. But the parties did reiterate on the first page that the agreed to modify the provisions of paragraph fifth of the voluntary separation and property settlement agreement as follows and a first line is the parties shall continue to have joint legal and shared physical custody of the two minor children.
>
> So with that in mind, I listened to the proffers by counsel as to what would be a material change in circumstances that would warrant a modification. I was not satisfied or persuaded just by their proffer that [Mother] would carry the burden of showing the [c]ourt that it was a material change in circumstances that would warrant a modification, in light of the recent amendment and in light of the fact that the whole basis for the modification was to present to the [c]ourt that the Bruce Monroe School was a better choice, that the children had thrived last year. And really, that's not a material change. They went to that school last year, that was a point of contention that was ultimately resolved by the settlement agreement of December 14, 2015.

The court also denied Father's motion to modify, but granted Father's petition to hold Mother in contempt. Mother noted a timely appeal of the denial of her motion to modify custody.

STANDARD OF REVIEW

The determination of whether a material change of circumstances had occurred which would justify a modification of custody is a legal issue. "Pursuant to Maryland Rule 8-131 (c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." *Friedman v. Hannan*, 412 Md. 328, 334 (2010). Pursuant to Md. Rule 8-131(c), an appellate court "will not set aside the

judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Campitelli v. Jonhston*, 134 Md. App. 689, 698 (2000). With respect to fact-finding, however, we defer to the finding of the trial court "unless it is clearly wrong or an abuse of discretion." *Id.*

DISCUSSION

A court must engage in a two-step process when presented with a request to modify an existing custody or visitation order. *See McMahon v. Piazze*, 162 Md. App. 588, 593-96 (2005). We have described the two-step analysis as follows:

> 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 [750 A.2d 624] (2000).

McMahon, *supra*, 162 Md. App. at 594. "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). The burden is on the moving party to (1) prove a material change in circumstances has occurred, and (2) to prove that a modification of custody is warranted. *Id.* at 171-72.

Multiple purposes are served by the material change requirement. The Court of Appeals has explained that "[t]he desirability of maintaining stability in the life of a child is well recognized, and a change in custody may disturb that stability." *McCready v. McCready*, 323 Md. 476, 481 (1991). Furthermore, "[a] litigious or disappointed parent

must not be permitted to relitigate questions of custody endlessly upon the same facts, hoping to find a chancellor sympathetic to his or her claim." *Id.* Indeed, "[a]n order determining custody must be afforded some finality, even though it may subsequently be modified when changes so warrant to protect the best interest of the child." *Id.*

It is with these principles in mind that we address the circumstances of the instant appeal. Mother asserts that the circuit court erred by denying her motion to modify custody without a hearing. In her motion to modify filed April 26, 2016, Mother sought sole physical and sole legal custody of the minor children. After participating in mediation, the parties reached an agreement to modify the Original Agreement, as discussed *supra*. Specifically, the parties agreed that the 2-2-5 schedule would remain in place during the academic year, but, during the summers, the parties would share physical custody of the children according to an alternate weekly basis. The Modification Agreement further provided, however, that **"all other terms of the parties' Voluntary Separation and Property Agreement dated December 14, 2015 shall remain in full force and effect."** Because the parties signed an agreement reaffirming their commitment to joint legal and shared physical custody that same morning, the trial court found that Mother could not prove that a material change of circumstances warranting a modification of custody had occurred.

Mother maintains that "[i]t is clear from the record that the trial judge simply could not understand that it was the intent of the parties that they would continue to have shared physical custody and joint legal custody of their minor children pending further order of court." Mother emphasizes that her counsel "specifically told the court that the

supplemental agreement was merely meant to modify the children's access with their parents during the summer." In our view, the record does not support Mother's characterization of the Modification Agreement.

Under Maryland law, "parties to a domestic case may resolve their disputes by way of separation agreements that are enforceable as independent contracts." *Petitto v. Petitto*, 147 Md. App. 280, 298 (2002). "As a contract between the parties, such [a separation] agreement is subject to the general rules of construction applicable to other contracts." *Id.* at 299. Maryland follows the objective law of contract interpretation. *Id.* at 300 (citing *Taylor v. NationsBank, N.A.*, 365 Md. 166, 178 (2001); *B & P Enterprises v. Overland Equip. Co.*, 133 Md. App. 583, 604 (2000)). "Under this doctrine, when a contract is clear and unambiguous, 'its construction is for the court to determine.'" *Id.* (quoting *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251 (2001) (citation omitted)). "[T]he court is required to 'give effect to [the contract's] plain meaning,' without regard to what the parties to the contract thought it meant or intended it to mean." *Id.* (quoting *Wells, supra*, 363 Md. at 251).

Mother's characterization of the Modification Agreement as temporary is not supported by the language of the Modification Agreement. The Modification Agreement contains no language indicating in any way that its provisions are intended to be temporary. In our view, reasonable parties would have included such language if they intended to limit the scope of an agreement. Indeed, the Modification Agreement expressly provided that it modified only sections relating to the summer access schedule and that the remainder of the Original Agreement remained "in full force and effect." In addition to providing that

the overwhelming majority of the Original Agreement remained "in full force and effect," the Modification Agreement further expressly provided that Mother and Father **"shall continue to have the joint legal and shared physical custody of their two (2) minor children."**

In our view, this language clearly and unambiguously indicates that the parties intended to continue to have joint legal and shared physical custody beyond the day the agreement was signed. Furthermore, Mother has not alleged fraud, duress, or mistake relating to the execution of the Modification Agreement. Accordingly, we will not look beyond the clear and unambiguous language of the Modification Agreement. *Equitable Trust Co. v. Imbesi*, 287 Md. 249, 271 (1980) ("Cases are legion in Maryland to the effect that where a contract is plain in its meaning, there is no room for construction and it must be presumed that the parties meant what they expressed. Hence, in the absence of fraud, duress or mistake (none of which are claimed to exist in the present case), parol evidence is not admissible to vary or contradict the terms of a written instrument.").

Although it is conceivable that circumstances could change at some point in the future which would make a change of custody serve the children's best interests, Mother proffered no facts that would suggest that such a change occurred between the signing of the Modification Agreement in the morning of August 22, 2016 and the hearing on Mother's motion to modify custody in the afternoon of August 22, 2016. We hold,

therefore, that the circuit court correctly determined that Mother had not satisfied her burden by demonstrating a material change of circumstances.[2]

Mother raises an additional procedural due process argument in this appeal relating to her fundamental liberty interest in the care and custody of her children. Mother asserts that because the circuit court "made a rash and inaccurate decision that a material change in circumstances did not exist," the court "violated the very principles of due process which ensure that litigants are given their day in court subject to legitimate challenges and objections presented by the opposing party." Mother claims that the circuit court "stripped" Mother of "her due process rights to litigate issues regarding her children."

To be sure, Mother is entitled to due process protections. Due process does not, however, require any evidentiary hearing when a court is convinced, based upon a party's proffer, that the party cannot meet his or her evidentiary burden. In this case, the circuit court explained that because the parties had signed the Modification Agreement that very morning, Mother would not be able to prove a material change of circumstances as of that afternoon. Under the facts of this case, if Mother had been permitted to present testimony

[2] Even if we were to assume *arguendo* that the Modification Agreement had not been signed by the parties and that the parties had not reaffirmed their commitment to joint legal and shared physical custody, and we looked to the date of the filing of Mother's motion to modify and evaluated whether a material change of circumstances had occurred between the signing of the Original Agreement and the filing of the motion to modify, the circuit court's denial of Mother's motion to modify would still be correct. The facts proffered by Mother in support of her motion to modify custody were contemplated by the parties at the time the Original Agreement was signed. The circumstances, therefore, could not constitute a material change, and Mother should not have been permitted "to relitigate questions of custody endlessly upon the same facts." *See McCready*, *supra*, 323 Md. at 481 (1991).

at an evidentiary hearing, Mother would have been unable to prove a material change of circumstances warranting a modification of custody. Consequently, Mother was not deprived of procedural due process when the circuit court denied her motion to modify custody without a hearing. Perceiving no error, we affirm.

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