Circuit Court for Montgomery County
Case No. 142737 FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2498

September Term, 2018

E. T.

v.

A. T.

Fader, C. J.,
Kehoe,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: April 10, 2019

This is an appeal from a judgment of the Circuit Court for Montgomery County, the Honorable Joan E. Ryon, presiding, that clarified an existing child custody, visitation, and support order regarding the parties' minor daughter, who we will refer to as "E." for confidentiality purposes. Mr. T. ("Father") has appealed and presents two issues, which we have reworded:[1]

> 1. Did the trial court err in finding that there were no material changes in circumstances sufficient to justify a modification of custody from Mother's primary physical custody to joint physical custody?
>
> 2. Did the trial court err when, after finding that there was no material change in circumstances to warrant modification of custody, it nonetheless changed the visitation schedule to reduce E.'s overnight visitations?

We will affirm the court's judgment.

[1] Father articulates the issues in his brief as follows:

> 1. Did the trial court err in not finding a material change in circumstances sufficient to justify a modification of the custody from Mother's primary physical custody to joint physical custody where the original consent order was premised on the parents' ability to communicate and implement a schedule for Father having significant and liberal access to the child, Mother unilaterally imposed a substantial reduction in Father's access, Mother limited the child's maternal grandmother's caregiving, Father moved to a new home providing improved living arrangements for the child, the parties' homes were in close proximity to each other, and Father's workplace was next to the child's school?
>
> 2. Did the trial court err or abuse its discretion when, after it failed to find a material change in circumstances to warrant a custody modification, it nonetheless modified the residential schedule to reduce Father's access by approximately 35% of his overnights with the minor child?

Background

Father and A. T. ("Mother") were divorced in 2017. The judgment of divorce incorporated by reference a consent order entered into by the parties on the same day. The consent order, in addition to establishing Father's obligation to pay child support and temporary alimony, provided:

> that the parties shall have joint legal custody of [E.] and that [Mother] shall have primary physical custody with reasonable rights of visitation reserved to [Father].

Of importance, the consent order did not provide a structured visitation schedule, thus leaving it to the parties to decide on a visitation schedule themselves. The parties were not entirely successful in this endeavor.

Mother and Father began to have disagreements about overnight visitation during the school week. Particularly, Mother was concerned with Father's busy schedule as a part-time soccer coach, and what she saw as problems that arose when Father dropped off E. at Mother's home in the mornings before pre-school.

These events prompted Mother, in January 2018, to file a motion to enforce the custody order in the circuit court. Mother requested that the court mandate a visitation schedule for Father and E., taking into consideration that Mother has primary physical custody and that E. would be entering elementary school in the coming months.

Shortly thereafter, Father filed a motion to modify custody, child support, alimony, and for other relief. In his motion, Father requested that the question of physical custody

be revisited because of a "material change in circumstances," citing his move into a three-bedroom home which provides E. with her own bedroom, a separate playroom, and a backyard.[2] Pertinent to the issues raised on appeal, Father asked the court to award him joint physical custody of E. and to establish a time-sharing schedule that included holidays and vacations.

The parties settled their alimony dispute prior to trial and do not now assert that the circuit court erred in its resolution of the child support issues. This leaves their disagreement over custody and visitation. After a two-day trial, the court issued an opinion from the bench in which the court set out its findings of fact and conclusions of law. We will discuss these in more detail later in the opinion. In summary, the court did not find a material change in circumstances sufficient to warrant a modification of the existing custody arrangements. However, the court did conclude that it was in E.'s best interest to set out a specific visitation schedule for E. to replace the existing, and disputed, arrangement between the parties. The court's schedule eliminated mid-week overnight visitations at Father's house during the school year. The court's schedule did not change any term of the consent order but rather clarified the parties' previous agreement as to the meaning of "reasonable visitation." (We will explain the significance of this distinction later in the opinion.) The court entered an order consistent with its opinion. Mother filed a

[2] Immediately after the divorce, Father slept on a couch in E.'s maternal grandmother's one-bedroom apartment. Later, Father had rented a one-bedroom apartment for himself.

post-trial motion, which resulted in two additional orders relating to the pick up/drop off arrangements for the mid-week visitations.

The Standard of Review

The "best interests of the child standard [is] of transcendent importance and [is] the sole question" for judicial resolution in intrafamily disputes over child custody and visitation. *Boswell v. Boswell*, 352 Md. 204, 219 (1998) (citations and quotation marks omitted). The same legal principles apply in custody and visitation disputes. *Id.* at 236.

When resolving a parent's request for a change in the terms of child custody or visitation, "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). An appellate court reviews a trial court's resolution of custody and visitation disputes for abuse of discretion. *Santo*, 448 Md. at 625.

A court abuses its discretion when it makes a decision based on an incorrect legal premise or upon factual conclusions that are clearly erroneous. We review the trial court's legal reasoning *de novo*, and its findings of fact for clear error. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). Finally, in relatively rare circumstances, a court can abuse its discretion by reaching an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous. In this context, a discretionary

ruling by a trial court will not be reversed by an appellate court simply because appellate judges believe that they would not have made the same ruling. Instead, an appellate court will overturn a discretionary ruling by a trial court only when the decision in question is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In Re: O.P.*, ___ Md. App. ____, No. 2877, 2019 WL 1417368 (filed March 29, 2019) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1977); and *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017)).

Analysis

At this juncture, neither party suggests that the court erred in its resolution of their child support dispute; rather, the focus of this appeal is on visitation and custody. Father presents two arguments to this Court: first, that the trial court committed clear error when it found that there had not been a substantial change in the parties' circumstances sufficient to warrant a modification of physical custody; and second, that the trial court abused its discretion in reducing the number of E.'s overnight visitations with Father.

1.

The initial question is whether Father established that there had been a material change in circumstances affecting E.'s welfare, thereby allowing the court to reconsider primary residential custody with Mother. The burden of proof as to this issue is unquestionably on Father.

In its bench opinion, the trial court carefully analyzed the evidence presented on this issue. The court recognized that there had been changes to Father's living situation since the entry of the April 2017 custody and visitation order. Specifically, the court found that Father was living in a house with a separate bedroom for E., and that E. would have a private yard to play in when she was visiting Father. The court also found that Mother became engaged and that Mother, her fiancé, and E. moved in together into their own home. However, the court observed that neither Father's move to a single-family home nor Mother's living arrangement necessitated custody modification because neither constituted a material change in circumstances affecting E.'s welfare.[3]

A parent's right to raise his or her child is "essential" and "encompassed within a parent's 'basic civil rights.'" *McMahon v. Piazze*, 162 Md. App. 588, 593 (2005) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923) and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). In custody and visitation disputes, the court acts "as both a protector of the child and as the resolver of a dispute between the parents." *McMahon*, 162 Md. App. at 593. The court is often subjected to that role when presented with a request to modify custody. When such a request is made, the court employs a two-step analysis:

> First, the circuit court must assess whether there has been a "material" change in circumstance. 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.

[3] In its order, the court also discussed, at length, an ongoing conflict between E.'s maternal grandmother, Ms. V., and Mother, which we discuss later in our opinion.

Id. at 594 (internal citations omitted). The burden to show that a material change in circumstances has occurred is on the party who seeks the modification of the custody order. *Wagner v. Wagner*, 109 Md. App. 1, 31 (1996). As Judge Lawrence F. Rodowsky explained for this Court in *McMahon*, "the requirement of a showing of 'material change' has its roots in principles of claim and issue preclusion" and constitutes an exception to the general rule that "'[t]he provisions of the chancellor's decree with respect to the custody and maintenance of [an] infant are . . . res judicata with respect to these matters and conclusive upon both husband and wife so far as concerned their rights and obligations at the time of the passage of the decree.'" 162 Md. App. at 594–95 (quoting *Slacum v. Slacum*, 158 Md. 107, 110-11 (1939)).

The Court of Appeals has noted that these two steps are often interrelated, and so

> there will be some evidence of changes which have occurred since the earlier determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

McCready v. McCready, 323 Md. 476, 482 (1991).

For this reason, courts should be prepared to review the evidence under standards for both analytical steps. "A change in circumstances is 'material' only when it affects the welfare of the child." *Id*. (citing *McCready*, 323 Md. at 482 (1991)). The best interest factors include

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Montgomery County Dept. of Social Services v. Sanders, 38 Md. App. 406, 420 (1977) (internal citations omitted). The Court of Appeals later expounded on these factors and discussed the need to review additional criteria, including the capacity of the parents to reach a shared decision affecting the child's welfare, the willingness of the parents to share custody, the potential disruption of the child's social and school life, the demands of parental employment, and the sincerity of the parent's request. *Taylor v. Taylor*, 308 Md. 290, 304-11 (1986). When considering these factors, the court should "generally not weigh any one to the exclusion of all others[,]" but instead "should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation." *Sanders*, 38 Md. App. at 420-21.

If the court concludes that there has been material change or that the change does not relate to the child's welfare, "there can be no further consideration of the best interest of the child because, unless there is a material change, there can be no consideration given to a modification of custody." *Wagner*, 109 Md. App. at 29 (1996). With these principles in mind, we turn to the parties' contentions.

At trial, Father presented three reasons for the court to conclude that there had been a material change in circumstances: (1) he had changed his living situation by buying a single family home that provided E. with her own bedroom and play area; (2) Mother's engagement to her fiancé; and (3) a deterioration in the relationship between Mother and her own mother, Ms. V., who previously had played an important role in caring for E.

The trial court was not persuaded. It concluded that, although Father's new home did indeed benefit E., it did not rise to the level of a material change of circumstances. The court further found that new romantic relationships were a "foreseeable consequence of divorce and that there was nothing in the record to suggest that [Mother's] current living arrangement and engagement necessitated reconsideration of primary custody." Finally, the court found that, although Mother and Ms. V. were estranged, Father "continues to facilitate the relationship between [Ms. V.] and E." and that Ms. V. "is present about 50 percent of the time" when E. is present with Father. The trial court concluded that the current arrangement was in E.'s best interest because it permitted her to maintain a relationship with her grandmother while insulating her from the conflict between her mother and her grandmother.

We cannot discern an error in the court's change of material circumstances analysis. We agree with the court that it is entirely foreseeable that divorced spouses will develop new relationships. Father's willingness to allow Ms. V. to be present when E. visits is to his credit but Ms. V.'s presence has always been a constant in E.'s life. Father's new living

arrangement lends itself to only one of the *Sanders* factor ("residences of parents and opportunity for visitation"). Father also presented evidence of his good character and fitness as a parent, but he has always been of good character and a fit parent. This evidence does not support a finding of a material change in circumstances. We hold that the trial court did not err in deciding that there had not been a change of circumstances sufficient to warrant a change in physical custody.

2.

After concluding there had been no material change in circumstances, the trial court was left with the parties' joint request that the court impose an access schedule. The evidence as to visitation was vigorously disputed at trial. The evidence indicated that Father had overnight visitation with E. on Tuesdays, Fridays, and Sundays beginning in the fall of 2017 and extending through March or April of 2018. At that point, and over Father's objections, Mother began to disallow the Tuesday overnight visitations because she was concerned with the impact that schedule had on E.'s ability to perform at school the following day. Instead, Mother suggested that E. stay with Father Tuesday nights until only 7:00 p.m. It is clear from the evidence that disputes over what constituted reasonable visitation, including, but not limited to, the mid-week overnight visitation issue, became a significant source of conflict between the parties.

The court concluded that an access schedule "is very necessary and vital to [E.'s] well-being" given the ongoing conflict "over when and where and for how long [Father] will

spend time with [E.].” The court observed that, although “the evidence reflects that [E.] is a happy, creative, and sensitive child, who is excelling academically,” the effects of the parties’ strained relationship are being felt by E., and so a “fixed, consistent, and regular schedule of time with each of her parents will diminish a significant cause of stress in [E.’s] environment.”

Taking these concerns into account, the trial court clarified what was “reasonable” visitation under these circumstances. During the school year, Father would have visitation with E. Tuesdays and Thursdays until 7:00 p.m., as well as on alternative weekends from Friday after school until E. returned to school on Monday. During the summer, Mother and Father would alternate having E. on a weekly basis, and holidays would be shared on a rotating and shared basis. This schedule, the court concluded, was not only in E.’s best interest but would allow each parent to maintain his or her relationship with E., and to have a presence at E.’s school.

Father contends that because the court concluded that there was not a material change of circumstances warranting a change of custody, it could not change that part of the consent order pertaining to visitation and decrease Father’s overnight visitations with E. Father’s argument is not persuasive.

We return briefly to Judge Rodowsky’s analysis in *McMahon.* The material change in circumstances rule is designed to protect the claim and issue preclusive effects of prior judgments. Because Father failed to prove that there had been a material change in

circumstances, *McMahon* and similar decisions teach that the trial court could not modify the custody portion of the consent order because the order specifically awarded primary physical custody to Mother. But the *McMahon* rule does not apply to Father's visitation rights because of the way that the consent order was worded. In contrast to the visitation order at issue in *McMahon*—which "detailed the allocation of [the child's] time between the parties," 162 Md. App. 591—the consent order in the case before us reserved "reasonable rights of visitation" to Father. The parties could not agree as to what "reasonable" meant, nor could they agree on the number of overnight visitations that Father should have with E. Both parties asked the court to set out a reasonable visitation schedule. In doing so, the trial court did not modify the terms of the consent order, because the consent order did not set out a specific visitation schedule. Father does not argue that the court's visitation schedule is unreasonable or arbitrary—and, in any event, it is not. There is no basis for us to disturb the court's resolution of this aspect of the parties' dispute.

We realize that this explanation of the arid technicalities of claim and issue preclusion may be of scant comfort to Father. There is, however, another way of looking at this case and the court system's resolution of it.

The record reflects that Mother and Father are loving, caring, and responsible parents who want the very best for E. But the record also shows that the parties were unable to resolve their differences and that the resulting tension and conflict, increasingly acrimonious as time wore on, was having a negative effect on E. It was only then that the

trial court issued an order setting out a schedule that not only balanced the interests of both parents, but also, first and foremost, protected E.'s best interests. To hold that the court was powerless to do *anything* under the circumstances would be to relegate the parties to constant squabbling and endless battles over visitation, a process with corrosive effects on their relationship with one another as well as affecting E.'s well-being. Such a scenario is not in the best interest of E., nor, for that matter, of anyone else connected with this litigation.

Because we discern no abuse of the trial court's discretion in its resolution of the custody and the visitation disputes, we affirm the judgment.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.