Circuit Court for Howard County
Case No.: 13-C-11-89170

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2720

September Term, 2016

TREVOR HARRISON

v.

VALARIE HARRISON

Kehoe,
Reed,
Salmon, James P.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Reed, J.

Filed: February 6, 2018

Trevor Harrison (Appellant) and Valarie Harrison (Appellee) were divorced on February 19, 2015. The two had three daughters, Amanda, Kimberly, and Isabella. Isabella is a minor and the daughter at issue in this suit. Per agreement between the parties and their Judgment of Absolute Divorce, the parties agreed that Appellee would receive a psychological evaluation by a qualified psychologist or psychiatrist. All psychological information regarding Appellee would be distributed to both parties. The completion of a psychological report would constitute a material change of circumstance. Each party could request a hearing upon the completion of the report to challenge the evaluation, methods, or findings. Appellee filed to modify custody and visitation of Isabella. Appellant filed a Petition of Contempt against Appellee for previous violations of the custody agreement. At trial, the psychological report was not introduced and the doctor who completed the report did not testify. The trial court's order relied on parts of the psychological report to provide Appellee with more visitation time with Isabella.

On appeal, Appellant presents two questions for our review:

1. Did the trial court abuse its discretion in considering a psychological evaluation of Appellee that was never presented to court, marked for identification, or admitted into evidence during the trial?
2. Did the trial court abuse its discretion in modifying the prior custody determination?

Appellee filed no response to Appellant's Brief.

For the following reasons, we answer Appellant's questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 19, 2015, Trevor Harrison and Valarie Harrison were officially divorced by way of Judgment of Absolute Divorce in the Circuit Court for Howard County. Appellant and Appellee agreed[1] on the terms of their custody plan for their daughters, Isabella and Kimberly, ages 8 and 15, respectively, at the time. The parties agreed that Appellant would be granted sole legal and physical custody of their children. The agreement granted Appellee visitation rights for Isabella as follows: "[Appellee] shall have supervised visitation one (1) time per week with Isabella Harrison." If their designated supervisor was unavailable, the parties agreed to split the cost of hiring a supervisor during Appellee's one two-hour weekly visit with Isabella. Appellee was also to have daily communication with Isabella via telephone or Skype at 7:30p.m. It was Appellee's duty to initiate this communication. As it related to their daughter Kimberly[2], per the Judgment of Absolute Divorce, contact between Appellee and Kimberly would be at Kimberly's discretion and through Kimberly's attorney. Additionally, Appellee was to "submit to a psychological evaluation by a licensed psychologist, who has met certain requirements and

[1] The agreed upon terms were also memorialized in the Judgment of Absolute Divorce. MD Code, Family Law, § 8-101(a) states: "A husband and wife may make a valid and enforceable deed or agreement that relates to alimony, support, property rights, or personal rights." As it relates to children, MD Code, Family Law, § 8-103(a) states that: "The court may modify any provision of a deed, agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child." "The court may enforce by power of contempt the provisions of a deed, agreement, or settlement that are merged into a divorce decree" under MD Code, Family Law, § 8-105(a).

[2] Kimberly is the adopted daughter of Appellant and Appellee. The parties have another daughter, Amanda. But she is emancipated and therefore, not part of this case.

chosen by the [children's] Best Interest Attorney." The parties agreed that all information provided to the psychologist would be completely disclosed to both parties, including any and all results from any evaluations as well as any comprehensive reports. The comprehensive report would be deemed a material change of circumstance pursuant to the Maryland Family Article of the Annotated Code of Maryland.

On May 5, 2016, Appellee filed a Complaint to Modify Custody and Visitation in the Circuit Court for Howard County. On December 30, 2016, Appellant filed a Petition for Contempt against Appellee for alleged violations of the parties' visitation agreement as it pertained to Isabella. Namely, Appellant claimed Appellee often had unauthorized and unsupervised visits with Isabella by intercepting her walks to and from her school bus, as well as at church. Appellant stated that Appellee would watch Isabella walk to and from her school bus in an attempt to intercept her, resulting in Appellant having to leave work early to escort her himself. This, Appellant stated, has resulted in Isabella's reluctance to go outside to play. Appellant also argued that Appellee's mental health issues, erratic behavior, and previous threat of suicide, made her a risk to Isabella's safety and raised issues as to Appellee's judgment. For example, Appellant states that Appellee gifted Isabella with an iPod without notifying him first; and upon looking at the iPod, Appellant found obscene photos and "explicit conversations between Appellee and men" on the device. A hearing on the matters was held on January 27, 2017.

Consequently, the circuit court granted in part, and denied in part, Appellee's Complaint to Modify Custody and Visitation, relying in part on Dr. Scott A. Holzman,

PhD's March 16, 2016 comprehensive psychological report on Appellee. In his report, he stated that:

> Based on the totality of information obtained from a review of the records, the clinical interview, the behavioral observations, the objective test finding, and the input of her treatment providers, it is my opinion with a reasonable degree of psychological certainty that Ms. Harrison's psychiatric symptoms are relatively stable at this time…There is no clinical evidence of a delusional disorder on current assessment. There is no evidence of Ms. Harrison being a danger or risk to self or others.

The court ruled that "the Court does not believe it is necessary to continue with a supervised visitation regimen. The report of Dr. Holzman does not indicate to the Court that this is needed." Effective February 13, 2017, the court ordered that the parties Judgment of Absolute Divorce be modified to reflect the court's removal of the requirements that Appellee's visits be supervised. Additionally, the court created a graduated schedule by which Appellee's time with Isabella would increase. Appellee was granted one three-hour weekly visit with Isabella for 60 days, then six hours per week for the next 60 days, then one overnight visit each weekend after that 60 day period. Appellee was not allowed to follow or intercept Isabella to or from school, nor discuss custody matters concerning Appellant with Isabella. It is from this order that Appellant now appeals.

STANDARD OF REVIEW

> In sum, we point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of Rules 886 and 1086 [current Maryland Rule 8-131(c)] applies. If it appears that the

> chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.
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> This Court further explained the *Davis* rule in *Ross v. Hoffman,* 280 Md. 172, 372 A.2d 582 (1977):
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> "The teaching of *Davis v. Davis, supra,* is plain. The ultimate conclusion as to the custody of a child is within the sound discretion of the chancellor. That conclusion is neither bound by the strictures of the clearly erroneous rule, that rule applying only to factual findings of the chancellor in reaching the conclusion, nor is it a matter of the best judgment of the reviewing court. It is not enough that the appellate court find that the chancellor was merely mistaken in order to set aside the custody award. Rather, the appellate court must determine that the judicial discretion the chancellor exercised was clearly abused. This is the principle which controls the review of any matter within the sound discretion of a trial court as distinguished from a judgment falling squarely within the ambit of the clearly erroneous rule.

Robinson v. Robinson, 328 Md. 507, 513-14 (1992) (internal citations omitted).

"An appellate court does not make its own determination as to a child's best interest; the trial court's decision governs, unless the factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gordon v. Gordon*, 174 Md. App. 583, 637-68 (2007). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996).

DISCUSSION

A. Parties' contentions

Appellant argues that the trial court erred when it relied on the psychological report completed by Dr. Holzman in deciding to remove the supervision requirement for Appellee's access to their daughter, Isabella. Appellant's chief contention is not that he did not have a copy of the report, but that although he had a copy, Dr. Holzman was not called as a witness to testify, the report was not marked for identification, and the report was not admitted into evidence. Because of these things, Appellant asserts that he was not given the opportunity to confront Dr. Holzman, "apprise him of any actions and statements that had occurred after the report; and ascertain whether such an evaluation remained valid based upon new circumstances and the passage of time," thus, resulting in prejudice to Appellant. Lastly, Appellant argues that without Dr. Holzman's testimony, the report constituted inadmissible hearsay.

B. Analysis

Under MD FAMILY, §12-104, "the court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." *Wagner v. Wagner,* 109 Md.App. 1, 28 (1996) Material is defined as "a change that may affect the welfare of a child." *Id*. A change of custody resolution requires a two-step process. *Id*. First, a material change of circumstance must exist. *Id*. Without one, the court's inquiry stops. *Id*. If a material change of circumstance exists, the

second step is for the court to consider the child's best interest[3], "as if it were an original custody proceeding." *Id.* Oftentimes, these two steps are resolved simultaneously. *Id.* However, once a material change of circumstance is found, the best interest of the child standard predominates over the relevant evidence. *Id*.

Appellant does not argue that he does not know Dr. Holzman or that he does not have Dr. Holzman's report. He concedes that he has always had the report. At trial, counsel for Appellant stated "we had worked with Dr. Holzman, providing him all the information for him to reach a, a strong basis of where it is. And he should have been the one here to testify whether or not any, what's in the best interest of the, the girls." Appellant's chief argument is that Dr. Holzman's report was not admitted into evidence and that Dr. Holzman could not be challenged on his report because he did not testify at trial.

[3] [S]everal factors must be considered by the trial court in deciding what is in the best interest of the child. In *Montgomery County v. Sanders*, 38 Md.App. 406, 420, 381 A.2d 1154 (1977), the Court set forth a list of factors that a trial court should consider in making a custody determination, but cautioned against weighing any one factor "to the exclusion of all others." The *Sanders* Court said:

> The criteria for judicial determination [of child custody] includes, but is not limited to, 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.

Gordon v. Gordon, 174 Md.App. 583, 637 (2007) (internal citations omitted).

Appellant compares this case to *Sumpter v. Sumpter*, 436 Md. 74 (2013), where the trial court incorrectly applied a policy, limiting the parties' access to a court ordered custody investigation report conducted on both parties in a custody suit. The trial court allowed the parties access to the report during breaks and to examine witnesses, but the parties were only permitted to share one copy between them. *Id*. at 80-81. On appeal, the mother in that case argued that the court's application of the policy provided her with insufficient time to review the contents of the report, inhibited her ability to prepare for trial, frustrated her ability to retain an expert, and prevented her from challenging the report. *Id*. None of these issues are present in the case *sub judice*. Appellant does not provide any support for this court to believe that he was prohibited from using, reviewing, or questioning Dr. Holzman or his report. Nor does Appellant argue that he was constrained to time limits with the report. Appellant also does not contend that he was not prevented from calling Dr. Holzman as a witness or another expert witness to question the report. Appellant chose to forego doing all of these things.

We acknowledge that Dr. Holzman did not testify at trial, nor was his report formally admitted by either party. Ordinarily, this would lead the court to find that the trial court erred in relying on evidence not on the record to rule on this matter. However, the circumstances in this case are different. At trial, Appellant's counsel moved for judgment at the conclusion of Appellee's case, stating that there was nothing on the record from February 2015 to the present. The trial court agreed, stating, "Ordinarily, you'd be right on target here. But there's an agreement that – the agreement says that she gets her

evaluation—at least one way of reading the agreement – if she gets her evaluation, that she, that that, that the change in circumstances block would be a bar to consideration of the custody situation. That's how, at least how I read it. I've never seen something like that before. But that's what seems to have been."

We decline to find that the trial court erred in relying, in part, on Dr. Holzman's report because the parties previously agreed that the psychological report would constitute a material change of circumstance, and thus satisfy step one of the custody analysis. To ignore the report, or the contents therein, which is what the Appellant essentially hopes this court does, would be to deny the parties' prior agreement per their Judgment of Absolute Divorce. But it is that agreement that sets the basis for this entire suit. The specific provision in the parties' Judgment of Absolute Divorce reads:

> [T]hat the completion of the report regarding [Appellee's] psychological evaluation by said licensed psychologist or psychiatrist chosen by the Best Interest Attorney, Victor Berger, Esquire, shall be deemed a material change of circumstance pursuant to the Maryland Family Article of the Annotated Code of Maryland;
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> and it is further ORDERED that either party may request an immediate hearing after the completion of the comprehensive report regarding Defendant's psychological evaluation, methods, and findings by said licensed psychologist or psychiatrist chosen by the Best Interest Attorney after service upon all parties.

Here, Dr. Holzman's report, as agreed to by the parties, constituted a material change of circumstance, the existence of which gave way to the suit presently before us. The Appellant's contention that the trial court should not have been allowed to rely on the

report, unfortunately, is meritless. Per the parties' agreement and Judgment of Absolute Divorce, either party could challenge Dr. Holzman's findings. Appellant chose to avoid doing so, thereby permitting the court to continue with the second part of the analysis—the best interest of the child analysis, without substantial challenge. We find no error or abuse of discretion.

II. Best Interest of the Child

A. Parties' Contentions

Appellant contends that the trial court abused its discretion in modifying custody. Appellant argues that the record was devoid of evidence to support a removal of the supervision regime and provide Appellee more time with Isabella. Accordingly, Appellant argues that granting Appellee more time with Isabella is not in Isabella's best interest, as Appellee "suffers from an array of mental and physical ailments that are highly challenging for her to manage," as found by the trial court judge. Appellee asserts that the evidence before the trial court demonstrated Appellee's unstable housing and mental issues, suicidal thoughts, and inability to comply with the original supervised visitation requirement by finding ways to sneak away from supervisors to be with Isabella.

B. Analysis

Maryland has long abided by the principle that "the right of a parent to raise his child, 'recognized by constitutional principles, common law and statute, is so fundamental that it may not be taken away unless clearly justified.'" *In re Adoption/Guardian of C.A.*

and D.A., 234 Md.App. 30, 47 (2017) (citing *In re Adoption Guardianship No. 10941 in the Circuit Court for Montgomery County*, 335 Md. 99, 112 (1994). However, a parent's fundamental right to raise their child is not absolute and is not excluded from other important considerations. *In re Adoption/Guardian of C.A. and D.A.*, 234 Md.App. 30, 47 (2017). Additionally, "our appellate courts have long held that the best interests of the child may take precedence over the parent's liberty interest in the course of a custody, visitation, or adoption dispute." *Id*. (internal citation and quotations omitted).

"[I]n any child custody case, the paramount concern is the best interest of the child." *McReady v. McCready*, 323 Md. 476, 481 (1991) (internal citations omitted). In the present case, the trial court did not restrict Appellant's right to parent Isabella. Taking Isabella's best interest into consideration, the trial court, in fact, did not modify custody; rather the court modified the visitation arrangement. Specifically, in its order, the trial court wrote:

> The Court is convinced that it would not be wise or in the best interest of Isabella at this time to change the **legal or physical custody of Isabella** and those parts of the Judgment of the Absolute Divorce **shall not be altered**. However, based on the evidence currently of the record, the Court does not believe it is necessary to continue with a supervised visitation regimen. The report of Dr. Holzman does not indicate to the Court that this is needed. The mechanics and payment of supervision have been fertile areas for the parties to engage in protracted disputes that have resulted in [Appellee] not being engaged with meaningful visitation with Isabella. The court believes that it is time for the visitation to become unsupervised and that visitation should develop into a more traditional model.

(Emphasis added.)

The trial court clearly found that providing Appellee with custody of Isabella was not in Isabella's best interest. The court did however, find that the supervised visitation scheme was unnecessary. The Appellant states that the trial court relied on the Dr. Holzman's report. This is correct, but the court also considered the other evidence presented before it to make a determination that Appellee should be granted visitation in line with a more traditional model. In this case, neither legal nor physical custody of Isabella was given to Appellee. Accordingly, this Court finds that the trial court did not abuse its discretion.

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