

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1093

September Term, 2014

CORINTHIA L. OLDHAM

v.

BELINDA KING

Graeff,
Kehoe,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: May 6, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal involves a continuation of custody and a reduction in child visitation ordered by the Circuit Court for Washington County following a hearing on June 26, 2014. That ruling is the latest in a years long dispute between the mother of the children, the appellant, and the maternal grandmother, the appellee, who has sole legal and primary physical custody. Unfortunately (although properly), the only record before us is of the proceeding resulting in the order under appeal, where the court and parties referred to, and assumed knowledge of, three prior proceedings, namely, a CINA (Child in Need of Assistance) case, a criminal prosecution, and a custody and visitation case.

The *dramatis personae* are:

B., age eight at trial, son of Corinthia Oldham by a prior marriage;¹

Z., age six at trial, daughter of Corinthia Oldham by a prior marriage;²

Corinthia Oldham, the appellant and mother of the children. She resides in a rent-subsidized, three bedroom apartment and is employed part time at the Dollar Store;

Russell Smith, the boyfriend of Ms. Oldham, whom she had been dating for five years as of the trial in June 2014;

Belinda King, age fifty at trial, the appellee and maternal grandmother of the children; and

Howard "Poppy" King, the husband of Belinda King.

¹The father did not participate in the proceeding resulting in this appeal.

²See footnote 1.

As explained below, we shall affirm.

Facts and Procedural History

Some years prior to the subject hearing, Mr. Smith battered B., causing two black eyes. This resulted in the CINA case in which the children were found to be in need of assistance. They were placed in the custody of Ms. King who has raised the children continuously, but for one and one-half months, since February 2009. The battery also resulted in a criminal prosecution of Mr. Smith who pled guilty either to physical child abuse or assault.

Apparently the juvenile court, after considering the mother's constitutional right to raise her children, *see, e.g., Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2006), determined that reunification was not in the best interest of the children. On November 7, 2012, the circuit court awarded primary physical custody and sole legal custody of both children to Ms. King. The order entitled Ms. Oldham to a minimum of three unsupervised visitations per week, to take place at Ms. King's residence or other locations agreed upon by the parties, but Ms. Oldham was not to take the children to her home.³

³That order, in relevant part, reads:

"ORDERED, that Belinda King is awarded sole legal and primary physical custody of the two minor children ... and it is further

(continued...)

In the five months following the issuance of the November 7, 2012 order, the parties more or less abided by the visitation provisions, though not without some issues. The testimony of both parties at the June 26, 2014 hearing makes clear that the issues arose from a common source, namely, Russell Smith. Ms. King explained how the pattern of discord developed from her perspective.

"[MS. KING]: Some [visitations] – some are ok. And then – and then they go two or three times okay and then, 'Boom,' right away they change. And – and it's Russell again. It's always Russell. And – and the thing about it is that she knows Russell is not supposed to be around the children."

Ms. King testified that she would not allow Russell Smith into her house "because I do not want to see my grandchildren beat up again." However, she claimed that Ms. Oldham would frequently spend the visitation period talking to Russell Smith on the phone or encouraging her children to talk to Russell Smith. Ms. King did not feel that either activity was in the best interest of the children.

The testimony below encapsulates appellant's perspective:

³(...continued)

"ORDERED, that Corinthia Oldham shall have reasonable, unsupervised rights of visitation with the minor children at least three times per week at Belinda King's residence ... and at other locations agreed upon by the parties such as South Side Bowling Alley and the Valley Mall; and it is further

"ORDERED, that Corinthia Oldham shall not bring the children to her home[.]"

"[MS. OLDHAM]: There's been several incidents where she's told me as long as I'm with an, excuse me, I'm gonna use an exact quote from her, as long as I – 'As long as you're with that nigger, you're never gonna see your children again.'"

When Ms. King was asked on cross-examination whether she had ever "uttered any type of racial animosity throughout [her] adult lifetime," she conceded that she had.⁴

In mid-March 2013, each party moved to modify visitation, the first of many motions that were resolved by the circuit court following the June 26, 2014 hearing.

Tensions between the parties came to a head in April 2013, after which visitation came to a full stop. A flare-up erupted on April 19, 2013, at a bowling alley where B. participated in a bowling league, and where the parties had successfully conducted visitation on the three prior weekends. On that visitation, Ms. King discovered that Russell Smith was present. Upon learning of his presence, Ms. King got back into her car with the children and endeavored to leave. She testified that Ms. Oldham then attempted to open the car door, banged on the passenger window with her fist, and yelled obscenities.

On April 22, 2013, Ms. Oldham filed a *pro se* petition in the circuit court to modify custody, asking that she be awarded full and "soul" [sic] custody. She alleged that the grandparents had yelled at the children and ordered Z. to take sleeping pills, threatening to

⁴The circuit court opened its oral opinion with ruminations about the history of race relations in Washington County. We interpret these remarks as an indirect admonishment of appellee.

beat her if she did not. Ms. Oldham raised concern that Z. was sexually abused by Howard King.

That same day, during a visitation at Ms. King's home, Officer Tim Culp of the Hagerstown Police Department arrived in response to a call, made by Russell Smith on behalf of Ms. Oldham, regarding possible sexual abuse of a child. Mr. Smith had alleged that Mr. King had inappropriately touched Z. in the bathroom, based on statements made by her that her genital area was sore. The case was closed after an investigation, that included a medical examination of Z. and interviews with both children conducted at a Child Advocacy Center. It was determined that there was no evidence of any such abuse.

On April 29, 2013, Ms. Oldham filed the first of her petitions that Ms. King be found in contempt of the November 7, 2012 visitation order. After a dismissal of the petition on procedural grounds, and a refile, the circuit court ruled on the merits following the June 26, 2014 hearing. It held that Ms. King was not in contempt. Ms. Oldham does not appeal that determination.

There was no visitation by Ms. Oldham after April 2013. The parties apparently awaited a hearing and ruling on their pending motions. In its oral opinion, the court gave its explanation of the absence of any visitation.

"And apparently there was just an impasse. And – maybe stubbornness runs in that family because they – because neither one was talking to each other and they're still at odds and here they're mother and daughter But

there's something – there's something terribly wrong with the chemistry between Ms. King and Ms. Oldham. And the – the history shows it's probably Ms. Oldham's stubbornness, but I think also Ms. King has been stubborn too. ... But I don't find by even a preponderance of the evidence that Ms. King was doing anything deliberately to – to harm the visitation arrangement. I think it was just an impasse[.]"

Some aspects of Ms. Oldham's testimony at the June 2014 hearing merit notice. She did not see what caused B. to have two black eyes. She testified that B. told her that he was trying to be Spiderman and was jumping from his dresser to his bed, unsuccessfully. Ms. Oldham testified that she thought Mr. Smith had pled guilty to assaulting Howard King. The circuit court found:

"In the meantime, I don't – I don't know what – what is going on that today that Mr. Smith is – is dangerous to the children, but I think he probably did this to [B.] earlier. And that's – that's concerning to me."

Ms. Oldham testified that when she was fourteen Howard King offered her money to have sex with him. Howard is twelve years younger than Ms. King and only five years older than Ms. Oldham. The latter explained that recall of that incident caused her concern, when, in April 2013, Z. said that "Poppy" touches her when he wipes her. That concern led her to obtain a protective order from the District Court against Mr. and Ms. King. She testified, "I didn't really wish for [the children] to be back in my custody, but I didn't want them in the home still if that's what was going to happen."

The court did not accept Ms. Oldham's testimony. It said:

"You know, but I wasn't there and I don't know, and I don't know what happened to [Ms. Oldham] as a teenager. It – it's troubling but I – but I can't find it probable. And certainly I – I can't say it's impossible, but I don't find it probable that Mr. King did these things to [Z]."

And further:

"And but I don't find it probable that Ms. King would tolerate Mr. King doing this stuff."

The court found credible Ms. King's testimony that the children are apprehensive around Mr. Smith. In making this finding, the court recalled testimony from the CINA case that the children were apprehensive of Mr. Smith. The court also referred to testimony that the children were in counseling.

The essence of the problem, as found by the trial court, was that Ms. Oldham had not prioritized her children over Mr. Smith. It said:

"And[,] I don't know[,] Ms. Oldham in the CINA case and in this case hasn't prioritized her children over him. Because it ultimately ended up turning from reunification to Ms. King getting custody and – and here we still are years later fighting about this."

In ruling on Ms. King's motion to modify visitation, the lower court observed that "[t]his isn't a case today of extraordinary circumstances or unfitness as a parent. That was decided when Ms. King got custody in the CINA court and then later on in this court in the civil case." Instead, "it's a matter of if there's been a change of circumstances since the last

Order." The court found that there had been such a change as it had become clear that "visitation really wasn't working in Ms. King's home."

It said that Ms. Oldham

"loves her children. She apparently loves Mr. Smith. And I don't know how to get around that impasse but the last Order says visitation I think – everybody's fairly copacetic about this, that there be three visits. Let's see, what does it say? Reasonable unsupervised rights of visitation is three times per week at Belinda King's residence. That's not going to work. There's – there's too much bad chemistry. So the visitation needs to be some place public, bowling alley, Valley Mall. ... But the visitation if it can be three times a week that would be wonderful, but at least ought to be once a week at a minimum."

The court stated that it would further modify the existing visitation order by directing that the visits be supervised by Ms. King, or by someone of her choosing, and take place in circumstances that Ms. King "deems to be safe." When entered on June 27, 2014, the order, in relevant part,

- continued sole legal and primary physical custody of the children in Ms. King;
- ordered that Ms. Oldham "have reasonable rights of visitation, supervised by Belinda King or someone of her choosing, at a minimum of once per week for four hours at some public place," and
- ordered "that neither party shall permit Russell Smith to have any contact[,] direct or indirect, with the minor children[.]"

This appeal followed. Ms. Oldham poses two questions for our review, which we have rephrased as follows:

1. Did the trial court err as a matter of law in granting third-party custody and visitation against the wishes of the mother?
2. Did the trial court err in granting Ms. King's Motion to Modify Visitation where Ms. King failed to prove a material change in circumstances affecting the best interests of the children?

Standard of Review

"Orders related to visitation or custody are generally within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion. *See Walter v. Gunter*, 367 Md. 386, 391-92, 788 A.2d 609 (2002); *Beckman v. Boggs*, 337 Md. 688, 703, 655 A.2d 901 (1995). However, where the order involves an interpretation and application of statutory and case law, the appellate court must determine whether the circuit court's conclusions are 'legally correct' under a *de novo* standard of review. *Walter*, 367 Md. at 391-92, 788 A.2d 609."

Brandenburg v. La Barre, 193 Md. App. 178, 186, 996 A.2d 939, 943-44 (2010) (quoting *Barrett v. Ayres*, 186 Md. App. 1, 10, 972 A.2d 905, 910 (2009)).

Discussion

I

Appellant contends that the order denying her request for custody and/or the modified visitation order should be set aside, as a matter of law under *Barrett v. Ayres*, 186 Md. App. 1, 972 A.2d 905 (2009). *Barrett* involved an order for visitation under the Grandparent Visitation Statute (GVS), Maryland Code (1984, 2006 Repl. Vol.), § 9-102 of the Family Law Article, that had been entered in 2006 before the decision of *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007). Alleging that acrimony between the parties had increased,

the mother, who had custody of the children, sought to modify visitation with the grandparent. Overruling a master's report, the circuit court dismissed the mother's application, finding that there was no material change in circumstances. This Court vacated and remanded.

After analyzing *Koshko*, we noted that its holding applied a gloss to the GVS by "requiring a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children[.]" *Barrett*, 186 Md. App. at 16-17, 972 A.2d at 914 (quoting *Koshko*, 398 Md. at 441-42, 921 A.2d at 192-93 (citations and footnotes omitted)). We then held that "the threshold showing required by *Koshko* necessarily applies to both first instance adjudications under the GVS and to subsequent judicial modification of existing GVS orders as well. *Barrett*, 186 Md. App. at 17, 972 A.2d at 914. We concluded that under the constitutionally required presumption, whereby a parent's decision concerning visitation is in the best interest of the child, "the parent's decision to modify or terminate visitation [is] a change in circumstances that satisfies the materiality requirement." *Id.* at 19-20, 972 A.2d at 916.

Ms. Oldham submits that, because she now seeks custody and/or opposes the modification of her visitation, Ms. King must show that Ms. Oldham is an unfit parent or that exceptional circumstances exist before the court can consider the best interest of the children. This, Ms. Oldham asserts, Ms. King has not done.

The constitutional overlay on visitation that was recognized and applied in *Koshko* and *Barrett* cannot be invoked by Ms. Oldham because she is not a custodial parent. The entire context of the two opinions pits a custodial parent against persons who do not have custody. The presumption that the decision of the parent is in the best interest of the child derives not only from the biological relationship but from custody as well. Thus, the *Koshko* Court spoke of "a presumption that the parent's decision to decline visitation is in the best interest of the child over whom the parent has custody[.]" *Koshko*, 398 Md. at 418, 921 A.2d at 179 (quoting *In re Tamara R.*, 136 Md. App. 236, 252, 764 A.2d 844, 853 (2000), *overruled in part on other grounds by In re Victoria C.*, 437 Md. 567, 88 A.3d 749 (2014)).

II

Appellant next contends that Ms. King failed to allege and prove a material change in circumstances which would justify a change in the visitation order of November 7, 2012. Ms. Oldham points out that Ms. King alleged that the children were out of control, that their grades had slipped, and that their counselor recommended visitation be reviewed, but, appellant asserts, appellee did not prove those allegations. This court proceeding, however, was in equity and, as appellant recognizes, Ms. King also alleged that there were other circumstances of material change that would be brought out at the time of trial. To the extent that appellant's point has any merit under some surviving vestige of the concept of

variance, there was no objection on variance grounds to Ms. King's evidence, and Ms. Oldham has not demonstrated any unfair prejudice from the error, if any.

"A material change of circumstance is a change in circumstances that affects the welfare of the child." *Gillespie v. Gillespie*, 206 Md. App. 146, 171, 47 A.3d 1018, 1033 (2012). We explained in *McMahon v. Piazze*, 162 Md. App. 588, 596, 875 A.2d 807, 812 (2005) (citing *Dominques v. Johnson*, 323 Md. 486, 498, 593 A.2d 1133, 1139 (1991)):

"The 'material change' standard ensures that the principles of *res judicata* are not violated by requiring that such a showing must be made *any time* a party to a custody or visitation order wishes to make a contested change, even if it is to an arguably minor term. The requirement is intended to preserve stability for the child and to prevent relitigation of the same issues."

Here, the material change requirement is fully satisfied. There had been no visitation for over a full year following the events of April 2013 when Mr. Smith's appearance at a visitation produced the blow up between the parties, followed by unsubstantiated accusations of sexual child abuse against Mr. King.

For these reasons, we are unpersuaded by the arguments of Ms. Oldham and affirm the judgment of the circuit court.

**JUDGMENT OF THE CIRCUIT
COURT FOR WASHINGTON
COUNTY AFFIRMED.**

**COSTS TO BE PAID BY THE
APPELLANT.**