UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2686

September Term, 2015

KENNETH HOWARD KAYE

v.

LEAH MICHELLE DAVIS KAYE

Krauser, C. J.,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 9, 2016

At issue in this appeal is the efficacy of rulings made by the Circuit Court for Harford County following a post-divorce hearing relating to appellant's petition for modification of existing child custody and visitation orders, appellee's petitions for contempt, and appellant's petition for contempt.

Appellant, Kenneth Kaye, having failed to prevail below, asks us to consider the following three questions, which we rephrase:[1]

> I. Did the circuit court err in awarding appellee the sum of $19,500, representing one-half of her attorney's fees accrued to the time of trial?
>
> II. Did the circuit court err in conducting an independent factual verification of evidence adduced at trial?
>
> III. Did the circuit court err when it modified the visitation schedule after finding that there was no material change in circumstances relevant to a modification of custody?

For the reasons set forth below, we agree that the court did not make the appropriate factual findings to support the award of counsel fees. We shall affirm the judgments of the circuit court in all other respects.

[1] Mr. Kaye phrased his questions presented as follows:

> I. Did the court err in granting appellee's request for attorney's fees under Maryland Rule 1-341 when the appellee failed to specifically request attorney's fees under Maryland Rule 1-341, and when the court did not make the required findings of fact under Maryland Rule 1-341?
> II. Did the court err in not withdrawing from the case after becoming personally familiar with facts at issue during the trial?
> III. Did the court err in modifying the custody and visitation order after finding that no material change in circumstances had occurred?

BACKGROUND

The parties were divorced on January 29, 2013. The Judgment of Absolute Divorce granted sole legal and physical custody of their two children, born in 2001 and 2003, to appellee, Leah Kaye. The Judgment incorporated the parties' custody agreement, which provided specific visitation rights to Mr. Kaye during the school year, summer school vacation, and vacation periods during the school year. In addition, each parent was granted two weeks of vacation with the children during the summer, and one week of vacation during school vacation periods.

The Judgment of Divorce also ordered that Mr. Kaye pay Mrs. Kaye $1,250 each month for the ensuing ten years in exchange for work she performed in their family business, a dog kennel, which was conducted out of the family home.

On April 23, 2013, Mrs. Kaye filed a complaint for contempt, seeking a money judgment for the unpaid amount relating to her work in the business, as well as monies Mr. Kaye agreed to pay into the children's college fund. She also sought a more specific visitation order prohibiting such contact as entry onto her property and places of work. Mrs. Kaye also requested attorney's fees, but cited no specific rule or statute. As we shall discuss, *infra*, awards of counsel fees may be made pursuant to either Md. Rule 1-341 – Bad Faith – Unjustified Proceedings – or Md. Code Ann., Family Law (FL) § 12-103.[2]

[2] Md. Rule 1-341 provides, in relevant part:

(a) Remedial Authority of Court. In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceedings was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them (continued…)

Mr. Kaye denied the allegations in Mrs. Kaye's complaint, and filed a counter-complaint, alleging that Mrs. Kaye had violated the visitation provisions of the Judgment of Divorce in numerous aspects. We shall discuss specifics of his assertions if, and as, they become relevant to our analysis.

Prior to the complaint and counter-complaint coming to trial, Mrs. Kaye filed two additional petitions for contempt. The first alleged that Mr. Kaye violated an interim protective order by attending their son's soccer practice on a day that he did not have visitation, and having personal contact with her. The second alleged that Mr. Kaye took the children to Florida during a week they were supposed to spend with her, without notice to her and without advising her of where and when they were traveling. In each of her filings, Mrs. Kaye requested attorneys' fees.

Soon thereafter, Mr. Kaye filed a counter-complaint for contempt, alleging that Mrs. Kaye repeatedly violated the divorce decree by filing a false report against him with Child Protective Services, sending threatening and harassing emails, speaking directly to him at

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to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

FL § 12-103 provides, in relevant part:

(a) In general – The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:

(1) Applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties;

* * *

(c) Absent of substantial justification – Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

the children's activities in a threatening or derogatory manner, by denying or interfering with his visitation, by denying him his right of first refusal to supervise the children when she was unable to care for them, and by again attempting to claim one of the children on her 2014 income tax return.

By way of a brief illustration of the animosity that pervades this litigation, we present a limited review of the trial testimony.

The children's therapist, Erric Hetzer, testified that he saw the children approximately three to four times each month to deal with the anxiety and depression problems they experienced relating to the custody dispute and their relationship with their father. Hetzer testified that the children expressed anxiety and fear about the unpredictability of Mr. Kaye's behavior, that "he might get physical with them, certainly verbal with them; that he doesn't listen to them, and that he keeps pressing them and pushing them for information regarding whatever the issue might be at that point, their mother, or what have you." Likewise, the court-appointed custody evaluator, Kathryn Rogers, testified that the children described an apprehension of their father, and worried that he might keep them longer than his visitation rights allowed, and fight with their mother when dropping them off. She also testified that she would support an order prohibiting the parent without visitation from attending the children's activities:

> Unfortunately, I mean, I have done that. I have recommended that a handful of times, but, I mean, that indicates the level of hostility and dysfunction between the parents. I really hesitate to make that type of recommendation, but yes, I think at the time I saw these parents, I did make that recommendation that they not – well, not have any contact in any way at the extra-curricular activities or that the exchanges

> take place at the Visitation Center. We were trying to maintain a sense of peace for the children when the parents were around.

Mrs. Kaye testified that Mr. Kaye often flouted the established protocol for exchanging the children. For instance, when Mrs. Kaye was supposed to meet the children inside the Wawa store (the designated exchange location), Mr. Kaye waited for the three of them to come out of the store, where he approached them to have a conversation. Mrs. Kaye further testified that Mr. Kaye parked so closely to her car that she was unable to exit her vehicle through the driver's side door. Mrs. Kaye testified that on one occasion, when they were to park on either side of the Wawa store parking lot, he pulled his car next to hers and instructed the children to move their bags over to her car, and then drove the children to his side of the parking lot and had them walk over to her car.

At the end of four days of trial, the court issued its opinion from the bench. The court granted Mrs. Kaye's contempt petition regarding Mr. Kaye's non-payment into the college fund and the money owed to her related to the business. The court denied Mr. Kaye's contempt petitions, finding that he failed to show Mrs. Kaye had denied him visitation on any occasion, and that she had not effectively claimed the children on her tax returns. After applying the evidence presented to the relevant factors and finding no material change in circumstances relating to custody, the court denied Mr. Kaye's request for a change in legal custody. The court then modified the visitation order, reducing Mr. Kaye's visitation to every other weekend, and prohibited the parent without visitation from attending the children's activities. Finally, the court ordered Mr. Kaye pay the attorney's

fees of the best interests attorney for the children and one-half of Mrs. Kaye's attorney's fees accrued to the date of the trial.

DISCUSSION

I. Attorneys' Fees

Mr. Kaye first argues that the court erred in awarding Mrs. Kaye attorneys' fees, because (1) she never requested such sanctions by motion and (2) the court failed to make appropriate factual findings. He further argues that his counter-complaints and his requests for custody were maintained in good faith, as Mrs. Kaye denied him visitation and at times failed to communicate with him about the children, and thus a change in custody was necessary.

Initially, we note that in each of her petitions for contempt, and in response to Mr. Kaye's petition for contempt, Mrs. Kaye included a *pro forma* prayer for the award of costs and "reasonable attorneys' fees," citing neither FL § 12-103 nor Md. Rule 1-341 as a predicate for such award.

Mr. Kaye's argument is premised on the court awarding the attorney's fees under Maryland Rule 1-341. He argues that the court's use of the term "bad faith" indicates that it must have applied Rule 1-341 and, moreover, that the court made no specific findings to support the finding of bad faith and the amount awarded.

We agree with Mr. Kaye's assertion that it appears that the court determined the award of counsel fees pursuant to Md. Rule 1-341 – the bad faith rule. The record reveals no discussion of an award under FL § 12-301 and counsel's requests were, as we have noted, generic. The only mention of the award of fees under either authority was the court's

reference, in its oral opinion, to "bad faith." Thus, our review the award of counsel fees is under the bad faith standard.[3]

In *Garcia v. Foulger Pratt Development, Inc.*, 155 Md. App. 634 (2003), citing *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 105 (1999), and drawing from established Maryland jurisprudence, we observed that:

> Maryland courts employ a two-step process to determine if sanctions under [Rule 1-341] are warranted. First, the court must decide if the party or attorney maintained or defended the action in bad faith or without substantial justification. Bad faith, in the context of Rule 1-341, 'exists when a party litigates with the purpose of intentional harassment or unreasonable delay.' 'For there to be substantial justification, the litigant's position must be fairly debatable and with the realm of legitimate advocacy.' The action(s) must be viewed at the time it was taken, not from judicial hindsight. A trial judge must be satisfied by a preponderance of the evidence that a party has acted in bad faith or without substantial justification. We review the court's first determination under a clearly erroneous standard.

Id. at 676-77 (internal citations omitted).

Next, "if a court finds a claim was pursued in bad faith or without substantial justification, it then has to determine whether to award sanctions." *Id.* at 677. We review the court's second determination under an abuse of discretion standard. *Id.*

In *Talley v. Talley*, 317 Md. 428 (1989), the Court observed that, "The Court of Special Appeals has said, and we agree, that 'before a court metes Rule 1-341 sanctions, it

[3] Although the award of counsel fees might have been appropriate under FL § 12-103, the court below entertained no discussion of that authority, nor was it briefed in this appeal. Hence, we need not discuss that aspect of counsel fee awards. This is not to say that, upon remand, Mrs. Kaye is precluded from seeking, or the trial court from awarding, fees based on FL § 12-103.

must make an evidentiary finding of 'bad faith' or 'lack of substantial justification.'"" *Id.* at 436 (quoting *Legal Aid v. Bishop's Garth,* 75 Md. App. 214, 220 (1988)).

The Court continued:

> The justification for this requirement lies not only in the clear language of the rule, but also in the logic that before such an extraordinary sanction is imposed there should be evidence that there has been a clear focus upon the criteria justifying it and a specific finding that these criteria have been met. Moreover, some brief exposition of the facts upon which the finding is based and an articulation of the particular finding involved are necessary for subsequent review.

Id. The Court concluded that a sanction pursuant to Md. Rule 1-341 is an extraordinary remedy, "intended to reach only intentional conduct." *Id.* at 438.

We are reminded of Chief Judge Gilbert's admonition in *Bishop's Garth* that:

> Maryland Rule 1-341 is not, and never was intended, to be used as a weapon to force persons who have a questionable or innovative cause to abandon it because of a fear of the imposition of sanctions. Rule 1-341 sanctions are judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so. No one who avails himself or herself of the right to seek redress in a Maryland court of law should be punished merely for exercising that right.

75 Md. App. at 224 (internal citation omitted).

"[An] action is frivolous . . . if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." *Bishop's Garth*, 75 Md. App. at 222 (quoting Comment to Rule 3.1, Md. Lawyers' Rules of Professional Conduct).

With those authorities as our guidepost, we examine the record for support for the trial court's imposition of "bad faith" sanctions.

After a thorough discussion of the parties' conduct *vis a vis* custody, visitation, and their financial agreements, the court reached the question of attorneys' fees:

> The attorney's fees in this case. The Court needs to make a finding whether there is bad faith in either maintaining – bringing or maintaining or defending a suit. I think this case could have been resolved by not filing frivolous contempt petitions, first of all, and also by not asking for joint legal custody when there clearly was no material change in circumstances, that being Mr. Kaye's behavior changing in order to look out for the best interest of the children. So I am going to award Ms. Kaye half of her outstanding attorney's fees in this case . . . .

The post-divorce proceedings were initiated by Mrs. Kaye's two petitions for contempt. It is not unreasonable to expect that the alleged contemnor would respond and defend. We do not see how response to allegations of contempt can be considered to have been made in bad faith, or were frivolous. Moreover, we cannot find Mr. Kaye's filing of a contempt petition to have been frivolous or made in bad faith or "vexatiously, wantonly, or for oppressive reasons." *Needle v. White*, 81 Md. App. 463, 474 (1990). We glean from the record his substantial belief in the worthiness of his allegations, however misplaced they were ultimately determined to be. We also note that the trial of the various filings consumed four days, leading to a conclusion of the existence of substantial justification, at least in some measure. While the record may support a finding that certain of Mr. Kaye's post-divorce filings might have been maintained in bad faith, there is nothing in the record to suggest that his defense of the initial proceedings was maintained in bad faith.

Other than a conclusory reference to "bad faith", the court offered no ". . . exposition of the facts upon which the finding [was] based [nor] an articulation of the particular finding involved . . ." in the determination of the sanction. *See Talley*, 317 Md. at 436.

Reasonableness of the Fees

Evidence to support the award of counsel fees, admitted through the testimony of Mrs. Kaye, consists of a reproduction of the billing records maintained by her counsel. Mrs. Kaye testified that she had been billed $39,533 by her attorney, which the court accepted as the basis for the fee award, by halving the total, without further comment.

The Judgment of Divorce was entered in January 2013. The post-divorce litigation began shortly thereafter, in April 2013. We do not know, from the record, whether the fees incurred relate, in some part, to the earlier divorce litigation, the post-divorce litigation, or all legal services.

The court must give proper consideration to factors such as financial status of each party; needs of each party; and whether there was substantial justification for bringing, maintaining, or defending the proceeding. An award of attorneys' fees will stand unless the court's discretion was exercised arbitrarily or the judgment was clearly wrong. *Henriquez v. Henriquez*, 185 Md. App. 465, 476 (2009). The court need not make specific findings as to the factors when awarding fees if it has considered those factors in other aspects of the same case. *Meyr v. Meyr*, 195 Md. App. 524, 553-54 (2010) ("Although the court did not specifically recite the statutory factors in its award of attorney's fees, the court's earlier statements [in prior orders in the same case] show that it had considered these factors with respect to its other rulings.") In sum, we conclude that the determination

of reasonableness is to be made by the court, not the client, particularly when a substantial burden of the fee is to be passed to the opposing party.

The exhibit – counsel's record-keeping – was before the court, but the court made no mention of it in ruling on the attorney's fees award. Moreover, the record does not reveal that the court made any findings of reasonableness of the charges before merely assessing one-half of the outstanding amount to Mr. Kaye. Indeed, the only reference to reasonableness was made as Mrs. Kaye's counsel offered the exhibit; the court asked, "Fair and reasonable bills?" to which Mrs. Kaye responded in the affirmative.

While we are loath to perpetuate this unpleasant and expensive litigation, we are at the same time constrained to remand to the circuit court to further consider the imposition of sanctions, and the reasonableness of the fees ordered, under the requirements of Md. Rule 1-341 or, should either party seek, under FL § 12-103.

II. The Trial Court's Extrajudicial Investigation

Mr. Kaye next argues that the court improperly performed an independent investigation into facts at issue in the trial. He asserts that this independent research created a conflict under Rule 2.11 of the Maryland Code of Judicial Conduct, which requires a judge to disqualify himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned," including when the judge has "personal knowledge of facts that are in dispute in the proceeding." Md. Rule 16-813. The thrust of Mr. Kaye's complaint is that the extrajudicial information gained by the court influenced the court's credibility assessments to his detriment.

The genesis of this argument is that, in response to Mrs. Kaye's claim that Mr. Kaye had failed to pay her $8,750 relating to her work in the family business, Mr. Kaye claimed that she had incurred expenses to the business by changing the payroll system and, because she failed to return her set of keys, by necessitating a changing of the locks and security.

In that regard, Mr. Kaye submitted into evidence one invoice from Rising Sun Lock & Key for $1,575 and one invoice from Lombard Street Computer Services for $3,630, testifying that he paid those amounts, although he did not offer the cancelled checks into evidence.

In its oral opinion, the court reviewed the evidence related to Mr. Kaye's claim:

> In terms of [Mrs. Kaye's] wages, whether she falsified records, I don't believe that. I don't believe either that the invoices are true in this case, and I don't believe they are true because they look exactly alike. And it was testified to they are exactly like the type of invoice the kennel would use. *And, coincidentally, I tried to Google them, these places. I tried to dial 411. I tried MapQuest. Nothing came up regarding either Lombard Computer Services or Rising Sun Lock and Key. Absolutely nothing.* But I simply don't believe Mr. Kaye because he only provided checks that he had written. Provided nothing to demonstrate he incurred any cost. Copies of the cancellation would have helped, but I don't think any exist. I think it was just to provide an opportunity to cheat Ms. Kaye out of the $8,750. So you are ordered to pay her that, and that's how you can purge your contempt for that.

(Emphasis supplied).

"[T]here is a strong presumption in Maryland, and elsewhere, that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Jefferson-El v. State*, 330 Md. 99, 107 (1993) (internal citations omitted). "The party requesting recusal has a heavy

burden to overcome the presumption of impartiality and must prove that the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceedings." *Attorney Grievance Comm'n. of Md. v. Shaw*, 363 Md. 1, 11 (2001). "Only bias, prejudice, or knowledge derived from an extrajudicial source is 'personal.'" *Jefferson-El*, 330 Md. at 107.

Failure to object to a trial court's perceived prejudice at the time of trial waives the right to raise it on appeal. *McCall v. Warden*, 3 Md. App. 188, 191 (1968). In the instant case, Mr. Kaye and his counsel were unaware of the court's independent investigation until the trial had concluded and the court's oral opinion was given. At that point, objection would have been futile. Assuming an objection, and further assuming the court's recognition of its own impropriety, the remedy would have been a retrial, at that point a practical impossibility.

Faced with a similar question in *Smith v. State*, 64 Md. App. 625 (1985), we said:

> In the final analysis, the question of whether to review an issue not raised and decided below is discretionary with the appellate court. *Booth v. State*, 62 Md. App. 26, 38 (1985). The Court of Appeals has observed that this discretion should be exercised in favor of review when the "unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980).

Id. at 632 (modification in original).

On the record before us, we exercise our discretion to review the unobjected to issue.

In *Wiseman v. State*, 72 Md. App. 605, 608 (1987), involving a violation of probation hearing, there arose a dispute as to whether the probationer had been terminated

for drinking on the job, as reported by the probation officer, or had been encouraged to leave in order to avoid the risk that she might in the future drink on the job, as reported by the probationer. Prior to the hearing, the court had participated in the probation officer's telephone call to the probationer's employer, and learned that she had been terminated for drinking on the job; at the hearing, the court used that information in its findings that the defendant was in violation of her probation. *Id.* at 609. The court's participation in the call was considered an extrajudicial investigation because, "the judge is not part of the prosecution team, . . . and has no business conducting or participating in any kind of independent investigation into the facts that he or she will ultimately have to determine." *Id.* In reversing, we noted that the court had "hardly comport[ed] with impartiality." *Id.* at 610.

Likewise, in *Smith v. State*, *supra*, Smith, facing a violation of probation, told the judge's law clerk that her failure to report to her probation agent was due to health problems connected with her pregnancy. 64 Md. App. at 629. At the hearing, in the absence of any rebuttal by the prosecutor, the court called the law clerk as a witness, who testified that she had called the treating hospital and learned that the health problems were related to heroin abuse. *Id.* After noting, "I don't believe you now and I didn't believe you then [at sentencing on the underlying handgun charge] and I can't believe anything you said and that is why I carefully had it checked by my law clerk to determine whether or not there was anything valid to your explanations . . . ," the court revoked Smith's probation. *Id.* at 630. We reversed and remanded for a new hearing, ruling that the law clerk's ex parte communication with Smith and the law clerk's subsequent investigation of that

communication "turned the judge from an impartial arbiter, bound to decide the case on the facts presented in open court, into an investigator for the prosecution." *Id.* at 634.

Before us, Mrs. Kaye responds that the court's online and telephone search for the existence of the contractors, of which she was already suspicious, using publicly available resources online was "hardly" an independent investigation.[4]

In both *Wiseman* and *Smith*, the extrajudicial activity of the trial judges was for the purpose of determining whether the probationers were being untruthful about violating certain conditions of their probation, which was the only issue in dispute at those hearings. Here, the court clearly harbored a doubt about Mr. Kaye's truthfulness in his testimony about the expense incurred for the locksmith and computer services, which led to the out-of-court investigation. If the use of the extrajudicial search was the sole basis for an adverse credibility assessment, such prejudice would support a reversal. We are satisfied, however, that the record – independent of the court's inappropriate extrajudicial investigation – and, taking into account Mr. Kaye's outrageous conduct throughout, supports the court's decision on that particular issue.[5]

[4] Mrs. Kaye further argued that the harmless error doctrine applies, and that Mr. Kaye did not demonstrate prejudice as a result.

[5] That said, we feel an obligation to comment on the substantial impropriety of the court's conduct. Our adversarial system of justice contemplates an equal playing field between the parties, not to be abandoned in favor of an inquisitorial one, or tilted by information gathered by a presiding judge from sources not validated by rules of evidence or tested by cross-examination. Parties to litigation are entitled to present their cases unhampered by the court's ideas of how they should be conducted. *See Smith*, 64 Md. App. at 633. In a closer case, the trial court's extrajudicial investigation might have dictated the outcome; but, as we have noted, the evidence was abundant to support the court's ultimate rulings (save our discussion in Part I) and undue prejudice was avoided. The error was harmless.

III. Reduction of Visitation Rights

Lastly, Mr. Kaye argues that the court erred in amending the visitation schedule after finding that there had been no material change in circumstances in the court's custody evaluation. He argues that the court was required to review all the custody modification factors in its visitation modification as well. Neither in his brief, nor at oral argument, was he able to offer authority for this proposition, and our research has revealed none.

We review a trial court's decision regarding visitation for an abuse of discretion. *Boswell v. Boswell*, 352 Md. 204, 223 (1998) ("Custody and visitation determinations are within the sound discretion of the trial court, as it can best evaluate the facts of the case and assess the credibility of witnesses").

The principles governing custody determinations "are equally applicable to visitation proceedings," and the "best interest factors also apply to visitation." *Id.* at 222, 236. "We also keep in mind that 'overarching all of the contentions in disputes concerning custody or visitation is the best interest of the children." *Wagner v. Wagner*, 109 Md. App. 1, 11 (1996) (quoting *Hixon v. Buchberger*, 306 Md. 72, 83 (1986)) (internal modifications omitted).

In considering a request for modification of an established visitation format, a trial court first determines whether there has been a material change of circumstances, and then considers how the material change affects the children's best interest. *Id.* at 28. "[T]his two-step process is sometimes considered concurrently, in one step, *i.e.*, the change in circumstances evidence also satisfies — or does not — the determination of what is in the best interest of the child. . . . Thus, both steps may be, and often are, resolved

simultaneously." *Id.* at 28-29. "[I]f a court concludes, on sufficient evidence, that an existing provision concerning custody or visitation is no longer in the best interest of the child and that the requested change is in the child's best interest, the materiality requirement will be satisfied." *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005).

To make a proper record, a trial court is required to make a "brief statement of the reasons for the decision." Md. Rule 2-522(a). "At minimum, this rule mandates that the court state an objective to be served by the restriction and then detail the facts furthering the objective." *Boswell*, 352 Md. at 223 (considering Md. Rule 2-522(a) in the context of custody and visitation determinations).

The court's opinion regarding physical custody fulfills all of those requirements:

> The primary physical custody will remain with Ms. Kaye. I am going to at this point take away the weekday visitation. I am doing that because of the evidence that I have heard here, how transitions heighten the anxiety of these children, and how they just provide another opportunity for interaction between these parents that should not be occurring, and that's due mainly to Mr. Kaye's inability to not go into the Wawa, for example; to not park right next to Ms. Kaye's car; to park at the far end of the Wawa after having unloaded the boys' belongings right next to her car and then requiring the children to walk back to their mother's car.
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> * * *
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> What I will do is I will also require that the parent that does not have custody will not attend the sporting events. So I don't believe that Mr. Kaye needs to be there when it's not his weekend. You are not involved, and you have never used it as an opportunity to look out for how well your kids are doing, you have used it as an opportunity to further irritate and harass Ms. Kaye.

The court stated the restriction and its objective – eliminating Mr. Kaye's weekday visitation in order to reduce the children's anxiety – and detailed the facts that the exchanges tend to heighten the anxiety of the children. Those same facts demonstrate that the modification of the visitation schedule is in the children's best interests, thus meeting the materiality requirement.

Furthermore, it was noted at argument, and in Mrs. Kaye's brief, that Mr. Kaye's visitation has been twice reduced by the trial court during the pendency of this appeal. Indeed, at oral argument, we were advised that, in subsequent trial court proceedings, Mr. Kaye's visitation has been terminated. A case must present a controversy between the parties for which the Court can provide an effective remedy. *Tempel v. Murphy*, 202 Md. App. 1, 16 (2011). Although those subsequent proceedings and orders may have rendered the visitation issue moot, we have addressed the question in this appeal to affirm the trial court's rulings and orders regarding both custody and visitation for, we suspect, this dispute will survive the minority of the Kaye children.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND REVERSED IN PART;
CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS ASSESSED TO APPELLANT.