

Circuit Court for Montgomery County
Case No.: 166431FL

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 2117

September Term, 2023

ROBERT SIMMONS

v.

TATYANA SIMMONS

Berger,
Nazarian,
Reed,

JJ.

Opinion by Reed, J.

Filed: July 15, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Robert Simmons, appellant, appeals the decision of the Circuit Court for Montgomery County granting his ex-wife, Tatyana Simmons, Appellee, sole legal custody and sole primary physical custody of their daughter and denying him access to the child “at this time.” He does not challenge the custody award, but only the court’s decision prohibiting his access to the child. For the reasons to be discussed, we shall remand the case to the circuit court, without affirmance or reversal, for a determination of whether Mr. Simmons should be awarded access to or visitation with the child.

BACKGROUND¹

The Superior Court of the District of Columbia granted Mr. and Ms. Simmons a divorce and, pursuant to an order dated April 11, 2018, awarded the parties joint legal custody and joint physical custody of their two children. The custody order was subsequently registered in the Circuit Court for Montgomery County and was modified in 2021 to grant Ms. Simmons sole legal custody. In July 2022, Ms. Simmons filed a motion to modify custody seeking primary residential custody of the children with limited access to Mr. Simmons. She alleged that Mr. Simmons was not taking proper care of the children when they were in his care.

Several months later, Ms. Simmons petitioned the court (in a separate case) for a protective order to keep Mr. Simmons away from their then 11-year-old daughter (“Daughter”). The petition alleged that Mr. Simmons continually subjected Daughter to emotional and verbal abuse which culminated in an anxiety attack and visit to the

¹ We relate only the facts relevant to the issue before us on appeal.

emergency room in October 2022. Following a hearing on November 1, 2022, the court in that case issued a final protective order after finding that Mr. Simmons had committed statutory physical and mental abuse of Daughter. The protective order, among other things, prohibited Mr. Simmons from entering Ms. Simmons’s home where Daughter resided, directed him to stay away from Daughter’s school, and ordered that he “have no uninvited contact with Daughter.” The protective order was in place through November 1, 2023.

On October 24, 2023, the court convened a merits hearing on Ms. Simmons’s motion for modification of custody. Although it is appellant’s responsibility to obtain a transcript of all relevant proceedings necessary for this Court’s review of the issues on appeal, *see* Md. Rule 8-411(a), the record before us does not include the transcript from the October 24th hearing where testimony and evidence was taken.²

On November 21, 2023, the court convened a hearing to announce its findings and decision. The court found that the parties had resolved, by prior agreement, their dispute regarding custody of their son, the older of the parties’ two children. Daughter, born in July 2011, was then 12 years old.

The court noted that the evidence before it included the protective order that had been issued the previous year. The court further found that the “finding of abuse” leading to the issuance of the protective order had not been challenged and that that finding

² The only relevant transcript in the record before us is from the court’s November 21, 2023 oral pronouncement of its findings and decision on Ms. Simmons’s motion for modification of custody.

constituted a material change in circumstances warranting a review of the custody arrangement.

The court then turned to § 9-101 of the Family Law Article of the Maryland Code, which provides:

- (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
- (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

Finding that the unchallenged protective order was evidence of Mr. Simmons's past abuse of Daughter, the court turned to subsection (b) of the statute and stated:

That provision requires the court to deny custody or visitation rights to the party found to have committed the abuse, unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party. The statute specifically uses the word no likelihood. It doesn't say if it's less likely, if it's unlikely. It says no likelihood. That's sort of odd language for the Legislature to have used. But it is, nonetheless, the language of it.

I can't find on the evidence presented that there is no likelihood of further child abuse or neglect by Mr. Simmons. I don't know how I could find that, frankly, but on this record I cannot specifically find that there's no likelihood of further child abuse by Mr. Simmons.

That takes us to the next step in the analysis. The statute does allow the court to order supervised visitation. However, in this case, Mr. Simmons, the father, has not requested supervised access. Instead, he seeks a psychological evaluation of [Daughter][.]

Regardless, I think I'm required by the statute to modify custody. Again, the current status is joint physical or residential custody. I can't allow that under the statute given the findings that I've made here today. As I read that statute, it does not allow a best-interest analysis, even though this is a modification case, and even though the law in Maryland says if there's a material change in circumstance, the court then determines what is best for the minor child. In other words, what's in the minor child's best interest?

I will say, however, in the event I'm determined to be in error in that regard and I'm reading what is clearly stated in the statute somehow incorrectly, assuming *arguendo* that I can go to best interest, the [c]ourt would find that it's not currently in [Daughter's] best interest to have access with her father.

The court then announced that it had considered the factors set forth in *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406 (1978) and *Taylor v. Taylor*, 306 Md. 290 (1986), which a court considers when determining the best interests of the child in custody disputes. In reviewing those factors, the court noted that, with regard to “the fitness of the parents,” it had “some concerns about Mr. Simmons’ way of disciplining” Daughter and “some concerns about his psychological fitness with regard to caretaking of the minor child.” The court did not “find anything particularly negative about either parent when it relates to their character and reputation.” As for “the desires of the natural parents,” the court found it did not “really know what Mr. Simmons’ desire is with respect to custody, other than he wants some sort of reunification with [Daughter] at a point in time[.]” The court stated, however, that it had “some questions about the sincerity of the father’s request in this case.”

When discussing the “preference of the child” factor, the court found that Daughter “doesn’t feel comfortable around her father and would prefer to be with her mother[.]” and that “she does have a preference at this time to continue residing with her mother.” As for

the parties’ residences, the court found that “the mother’s residence is perfectly suitable” for Daughter, but Mr. Simmons lives in a studio apartment with no “designated separated bedroom” for Daughter and very little privacy. The court acknowledged that the protective order had expired, but found that as of the October 2023 merits hearing, Mr. Simmons and Daughter did not have “a good relationship[.]”

The court concluded that “it’s in the minor child’s best interest that Mother has sole custody” and found that Mr. Simmons had not made any request for supervised access or visitation and “[t]here was no testimony about it.” The court, therefore, declined to award supervised access, but announced that Mr. Simmons could later file a motion for modification “if he is interested in that.” The court asserted that a request for visitation “would have to be done on a [motion for] modification” and be “based upon a material change in circumstance.” The court also reiterated its position that it did not believe that Family Law § 9-101(b) is “a permanent ban on custody or access[.]” but stated that it could not “order access or custody unless [the court] find[s] that there is no, N-O, likelihood of future abuse or neglect.” The court then stated that it “can’t make that finding in this case.”

The court continued:

Again, I’ll say this. I don’t know how anybody could make that finding, predicting human behavior is impossible. Ask any psychologist or psychiatrist. They’re the first to tell you that they can’t do it. But I didn’t write the statute. I carry it out, and I use the literal language of it. But I have to believe that if there’s a change in circumstance, then I’m not precluded from coming back later. You’re not precluded. Defendant is not precluded from coming back later and saying, okay, that was the order, and you were required to do that. But here’s what’s new. But he’s going to have to take it upon himself to figure out what to do to put him in a better position to try to get that order modified.

And there can always be an agreement between the parents as well. Because as I recall the evidence in this case, I don't think Ms. Simmons believes that he should never have contact with his daughter and that she should not have any relationship with her father.

The court denied Mr. Simmons's request that the court order psychological counseling for the children after questioning the "sincerity" of the request and finding that "[i]t seems like a tactic more than a sincere request." In a subsequently filed written order, the court awarded Ms. Simmons sole legal and sole primary physical custody of Daughter and directed that Mr. Simmons "have no access with [Daughter] at this time[.]"

Mr. Simmons filed a motion for reconsideration in which he expressed his desire for a relationship with Daughter and noted that the protective order had expired prior to the court's modification of custody.³ He asserted that, by banning him from any contact with Daughter and failing to order reunification therapy or counseling, the court had effectively terminated his parental rights. He also claimed that during the merits hearing he had requested "parenting time with his daughter." Admitting that he had not requested "supervised visitation," he asserted that, given that the protective order had expired, "there was no foreseen reason why the Father would find it reasonable or necessary to specifically request supervised visitation." He requested that the court modify the custody order and grant "him regular visitation to include a minimum of two (2) supervised visits, and four (4) supervised virtual visits per month." Ms. Simmons filed an opposition to the motion, in which she argued that, given that the court was unable to determine that abuse would

³ Although represented by counsel at the time, Mr. Simmons filed his motion for reconsideration *pro se*. He is also representing himself in this appeal.

not occur in the future, “no access was the only option.” The court summarily denied Mr. Simmons’s motion.

STANDARD OF REVIEW

In an action tried by the court, we “review the case on both the law and the evidence” and “will not set aside the judgment of the trial court on the evidence unless clearly erroneous, [as we give] due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c). “When a trial court decides legal questions or makes legal conclusions based on its factual findings we review these determinations without deference to the trial court.” *E.N. v. T.R.*, 474 Md. 346, 370 (2021) (cleaned up). We review a trial court’s custody decision for abuse of discretion. *Basciano v. Foster*, 256 Md. App. 107, 128 (2022).

DISCUSSION

Mr. Simmons does not challenge the court’s award of sole legal and sole physical custody of Daughter to Ms. Simmons. Rather, he asserts that the circuit court erred or abused its discretion when it denied him “any access” to Daughter. He claims that the record does not show a likelihood that he would abuse or neglect Daughter. He maintains that, in interpreting Family Law § 9-101(b), the court equated “no likelihood” of further child abuse or neglect with “no chance.” Mr. Simmons asserts that the court “was caught up by the semantics and definitions of the language” of the statute and by making “no likelihood” a synonym of “no chance” has “permanently banned custody and access of Father.”

According to Mr. Simmons, the court also ignored its “broad discretion to order supervised visitation, regardless of a specified request” for it. He states that, “without any access between Father and Minor Child, there would not exist the opportunity for a material change to take place which would warrant more access or encourage Father and daughter to heal and bond their once strong and loving relationship.” He requests that this Court “enter an order either ordering the Father’s visitation (supervised with an agreed upon adult) of the parties[’] minor daughter” or remand the case to the circuit court “for a more appropriate judgment[.]”

Ms. Simmons responds that the court did not abuse its discretion in denying Mr. Simmons’s access to Daughter because, in her view, “there was no discretion under the statute.” She also points out that the court stated that it “cannot find on the evidence presented that there would be no likelihood of further abuse by the father.” She maintains that Mr. Simmons “presented no evidence to support a specific finding that abuse was not likely to occur[.]” and, therefore, the court “had no discretion to award any access” to him.

Our review of the issue on appeal is hampered by Mr. Simmons’s failure to produce the transcript of the October 24, 2023 merits hearing, as well as the court’s failure to make specific findings to support its conclusion regarding the likelihood of further abuse of Daughter by Mr. Simmons. Nonetheless, we agree with Mr. Simmons that the court was not constrained from awarding him supervised visitation simply because he failed to request it or include it in his pleadings. Based on our review of the record, Mr. Simmons opposed Ms. Simmons’s motion for a modification of the then current custody order which gave them joint physical or residential custody of Daughter. Thus, we see no reason why

he would have been required to include in his pleadings a request for supervised visitation. Because we believe the court erred in holding to the contrary, we shall remand this case, without affirmance or reversal, for a determination of the access or visitation issue.

We disagree with Ms. Simmons that the court had no discretion to permit Mr. Simmons access to Daughter. Family Law § 9-101(b) clearly provides that, “[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, *except that the court may approve a supervised visitation arrangement* that assures the safety and the physiological, psychological, and emotional well-being of the child.” (Emphasis added.) Clearly, in adopting this statute, the Legislature recognized that visitation between a parent and child is an “important, natural and legal right” and “it is only in exceptional cases that this right should be denied.” *Roberts v. Roberts*, 35 Md. App. 497, 507 (1977).

We agree with Mr. Simmons that the court appeared troubled by the task of determining whether there is “no likelihood of further child abuse or neglect” of Daughter by Mr. Simmons. The court did seem to infer that it is generally an impossible task given the inability to predict human behavior, but on the other hand, as Ms. Simmons points out, the court did state that “on this record [it] cannot specifically find that there’s no likelihood of further child abuse by Mr. Simmons.” The court, however, did not support its conclusion with any findings from the record, other than the protective order (that had recently expired) and “some [unspecified] concerns” regarding Mr. Simmons’s method of discipline. Thus, we are unable to review whether the court erred in failing to find that there is no likelihood of further abuse.

Upon remand, the parties and the court should be mindful of what this Court stated in *Gizzo v. Gerstman*, 245 Md. App. 168 (2020). The parent who was found to have previously abused or neglected the child has “the burden to produce evidence to persuade the court that there [is] no likelihood that she [or he] would commit further child abuse or neglect.” *Id.* at 201-02 (citation omitted). In this case, of course, the burden is Mr. Simmons’s. The court’s finding on the issue of whether there is no likelihood of further abuse or neglect should be based on the preponderance of the evidence. *Id.* at 204.

Family Law “§ 9-101 ‘does not absolutely preclude a parent who has previously abused or neglected his or her child from ever having custody or visitation.’” *Id.* at 202 (quoting *In re: Adoption No. 12612 in Circuit Court for Montgomery Cty.*, 353 Md. 209, 238 (1999)). Rather, the statute “‘merely requires the court, when faced with a history of child abuse or neglect by a party seeking custody or visitation, to give specific attention to the safety and well-being of the child in determining where the child’s best interest lies and not place the child in harm’s way.’” *Id.* at 202 (quoting *In re: Adoption No. 12612*, 353 Md. at 238).

While proving that (or determining whether) there is “no likelihood of further child abuse or neglect” is certainly a daunting task, Family Law § 9-101 “‘does not set an insurmountable burden[.]’” *Id.* (quoting *In re: Adoption No. 12612*, 353 Md. at 238). “[E]ven upon substantial evidence of past abuse or neglect, it does not require a finding that further abuse or neglect is impossible or will, in fact, never occur, but only that there is no likelihood—no probability—of its recurrence.” *Id.* (quoting *In re: Adoption No. 12612*, 353 Md. at 238). “In other words, the statute ‘does not require that the hearing

judge be a prophet or soothsayer and somehow ‘know’ that there will never be a future incident of abuse or neglect.” *Id.* (quoting *In re: Yve S.*, 373 Md. 551, 587-88 (2003)). “Such a finding would require unobtainable proof on the part of the parent, and omniscience on the part of the judge.” *Id.* (quoting *In re: Yve S.* at 588).

To be clear, given that Mr. Simmons has not challenged the court’s award of sole legal and sole residential custody of Daughter to Ms. Simmons, we have not considered those rulings in this appeal. The remand is strictly for the court’s determination of whether Mr. Simmons should be awarded access to or visitation with Daughter.

**CASE REMANDED TO THE CIRCUIT
COURT FOR MONTGOMERY COUNTY
WITHOUT AFFIRMANCE OR REVERSAL
FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.**