**IN THE**
**COURT OF SPECIAL APPEALS OF MARYLAND**

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Case No. CSA-REG-0576-2019

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**MARK CABRERA**

*Appellant*

*v.*

**ISABELLE LORANT CABRERA**

*Appellee*

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Appeal from the Circuit Court for Montgomery County
(Hon. David A. Boynton)

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# BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

This case arises from post-judgment motions filed in the parties' divorce case in the Circuit Court for Montgomery County. The parties are the parents of three children: a daughter, Solenn; and two sons, Aubry and Elouan. The daughter is an adult, and Aubry was recently emancipated by age, leaving only the youngest child, Elouan, still subject to the jurisdiction of the circuit court. The parties had been married for approximately 17 years at the time of their divorce in 2015. Their dispute created an ongoing saga of protective orders, peace orders, criminal cases, civil cases, multiple emergency motions, and calls for investigations by Child Protective Services, all of which could have been avoided. The father's unwillingness to stop the endless stream of litigation has led to predictable results: harm not to his ex-wife, but to his children, all of whom have suffered. That is the subject of this appeal, as well as the subsequent cases filed by the father and now pending before the circuit court below.

At the time of the divorce, the parties entered into a marital settlement agreement pursuant to which, *inter alia*, they shared legal custody, and established a schedule for the father's visitation. (E. 5). That agreement called for the father to have alternating weekends with the minor children, but to be deemed to have taken 128 overnights with the children even if he didn't (and

he never did), so that he could gain the benefit of lower child support associated with having more than 127 nights, even though he did not actually pay child support.

The father's relationship with the children was toxic, and slowly but surely each of the children grew apart from him. First, the daughter, Solenn, stopped visiting him. Then, the oldest son (Aubry) refused to visit his father. (Tr. 01/14/2019 at 105). Eventually, the youngest child, Elouan, who is the primary subject of this appeal, began experiencing psychological problems when visiting with his father. On two occasions during the time period herein, he expressed suicidal ideations and was hospitalized. Once was for ten days, and once for approximately seven days. On another occasion he either ran away from the father's residence or was kicked out of his car, depending on whose version is believed, and had to be picked up by his sister in the middle of the night in the rain. On yet another occasion he left the father's home to attend a Christmas party with relatives without permission. The relationship was troubled and both parents agreed upon the need for counseling to attempt to restore the father's relationship with his two minor children. The children experienced no such problems when they were with their mother.

The father blamed the mother for the deterioration of his relationship with the children and filed a motion to modify custody and limit the mother, who has been the primary caregiver for the children all of their lives, to

supervised visitation. (E. 5). The mother, in turn, filed a motion to enforce certain other terms of the marital settlement agreement. (E. 6). The agreement had called for the father to live in the family house, formerly held as tenants by the entireties, but to refinance or sell the house within three years to take her name off the note. He had not only not done so, but was more than $75,000 in arrears and ruined her credit by not paying the mortgage, even though he took numerous international trips (Cancun, Philippines, Ukraine) and traveled to Las Vegas. He is a licensed real estate broker, but failed to sell the house even after three years. Evidence submitted by the father at trial showed the house was only on the market for two months during the three-year period. He had also refused to deliver certain furniture/property items pursuant to the agreement.

The parties exchanged discovery and engaged in numerous discussions between counsel. The father filed several emergency motions and protective orders. Eventually, the scheduled trial date arrived and as a result of discussions between counsel, a new agreement was placed on the record and an order entered on September 7, 2017, which established a revised schedule of visitation (somewhat less time for the father than before), revised legal custody (gave tie-breaking authority to the mother), provided that the mother would enroll the two sons in individual therapy and after four sessions the father would enroll them in reunification therapy. It established child support

and a schedule for the father to catch up his arrearages, and provided that either party could request mediation, or could file to modify the terms agreed to no sooner than January 2018 and no later than the end of February 2018. (E. 12). This gave the plan a chance to work before either party ran back to court, and established a preference for mediation over litigation.

Neither side sought mediation in January, but in February the father filed a motion to modify custody. (E. 33). The motion alleged that the mother had "thwarted" the benefit of counseling when "she has the children," and had "created an atmosphere of gloom for the children." *Id*. Father claimed that he had done everything in his power to try to reunite with the children including, "giving up visitations so that *the children can have their way*." *Id*. (emphasis added). He did not ask for any specific relief other than a hearing. *Id*.

A hearing was held before the circuit court on January 14-15, 2019. At the beginning of the hearing, several preliminary issues were raised. First, the mother made a motion to exclude from evidence two cell phone videos recorded by the father of her without her consent that he wanted to play for the court. The mother argued that the videos were recorded in violation of the Maryland Wiretap Act, Maryland Code Ann., Courts and Judicial Proceedings § 10-401, *et seq*., and pursuant to that Act could not be introduced into evidence. Further, the videos predated the last custody order from August 2017 and had no probative value. Neither of the two minor children were in either of the videos

or discussed in either of the videos. After hearing legal arguments and factual proffers, the circuit court excluded the cell phone videos. The court held that they were not relevant due to their age. The court also ruled that the father would need to show a material change of circumstances since the last order in order to gain a modification of custody. His attorney did not object to that ruling, and in fact agreed with it. (Apx. 22)("I know. I understand…"). That is the ruling now on appeal.

The trial continued and the father produced three witnesses. He testified first, then his wife, and finally an expert witness was proffered who failed to qualify as an expert. The father testified that he had difficulty achieving all of his scheduled visitation days, was not kept fully informed about medical visits of the children, and that at one point the mother went out of town without notifying him. On cross examination, he conceded that the attempt to reunite with his oldest son (Aubry) had failed and been discontinued (Tr. 01-14-2019 at 105; Apx. 39), although therapy with Elouan had continued for almost three months, well past the minimum required in the order. (Apx. 41). He further testified that he had voluntarily relinquished certain of his visitation days so that he could travel to Ukraine and Las Vegas (Tr. 01-14-2019 at 121), that the mother had regularly offered him access with Elouan on Mondays that wasn't required under the order (Tr. 01-14-2019 at 114), that when Elouan was in the

hospital for ten days after a suicide scare he only managed to visit him three times (Tr. 01-14-2019 at 129).

The next witness was the current wife of the father. She testified that it takes Elouan a day or so to adjust to visits at his father's house. She testified that the father would discipline Elouan when he was rude, and that the father and Elouan played cards during one hospital visit.

Finally, on the second day of trial, the father offered the testimony of Lorrie Hood as an expert in the field of parental alienation. Ms. Hood was not a licensed psychologist or social worker. (Apx. 34). She had listed a non-accredited school on her resume. (Apx. 36). She had no indication on her resume that she had experience working in the area of parental alienation, but rather she worked as a "life coach." (Apx. 37). She had never interviewed the child or the mother in connection with her testimony. *Id*. She had never performed a custody evaluation. (Tr. 01-15-2019 at 46). The court denied her qualification as an expert and the plaintiff rested. (Apx. 38).

The mother moved for judgment on the father's motion after the close of his case in chief, which was granted. The court then moved on to consider the mother's motion to enforce.

The mother testified about the father's non-compliance with the marital settlement agreement's requirement that he sell or refinance the house, and return of personal property items. The mother asked the court to appoint a

trustee to sell the house, and for attorney's fees of slightly more than $2000 for having to litigate this portion of the case. These requests were granted. (E. 17).

The court issued a written order reflecting the oral rulings at the hearing approximately a month later. (E. 35). The father filed a motion for new trial and to alter or amend, which was denied. (E. 37). He noted this appeal on May 14, 2019. (E. 19). Two weeks after noting the appeal, the father filed *another* motion to modify visitation in the circuit court. (E. 19). He later filed a motion to reduce child support (E. 21), and a petition for contempt (E. 22). He refused to pay the trustee's fees as ordered by the court, refused to turn over the keys to the house to the trustee, and refused to pay the attorney's fees ordered by the court. A money judgment was entered against him. (E. 19). Those fees, as well as the trustee's fees, were recovered from the proceeds when the trustee sold the house by way of a deed-in-lieu of foreclosure. (E. 19).

## ARGUMENT

### I. Father's counsel did not make a timely objection to the judge's ruling.

When the judge assumed the bench on the first day of trial, counsel for both parties alerted him to several preliminary matters that they felt ought to be resolved:

[Defense counsel]: One involves the Maryland Wire Tap Act.

THE COURT: Okay.

[Defense counsel]: The other involves let's say the relevant time period of the case.

THE COURT: Okay.

[Defense counsel]: How far back you want the evidence to go, how far back is too far.

(Apx. 6). Counsel then began to outline why he believed that two non-consensual oral recordings provided in discovery were inadmissible as evidence under the Maryland Wiretap Act, Maryland Code Ann., Courts and Judicial Proceedings § 10-401, *et seq*. The date of the videos was discussed:

[Defense counsel} -- when it occurred that that it was 2015 and 2016.

THE COURT: What was 2015 and '16?

[Defense counsel] This audio in question.

THE COURT: Oh. Well –

(Discussion off the record.)

[Defense counsel]: A long time ago.

[Plaintiff's counsel]: Okay. This one is 2-15.

THE COURT: Okay. So, I thought that there was a consent order in this case from August of 2017, and that's –

[Plaintiff's counsel]: There is.

THE COURT: -- what we're here to modify.

(Apx. 20). The court then proceeded to review the factual and legal posture of the case in light of the previous order.

THE COURT: Either party shall have the right to petition the court to modify their pendente lite agreements that are contained herein. However, should neither party do so by February 28th, then the terms of the order shall become permanent.

[Plaintiff's counsel]: **Correct**.

. . .

THE COURT: Right. Okay. But in order to modify that, there has to be - -

[Plaintiff's counsel]: We have to go back. We –

THE COURT: -- a change of circumstances since –

[Plaintiff's counsel]: **That's right**. And we're going to –

THE COURT: -- the time of the order. So anything that happened before the order is not really relevant to a change of circumstances. So, we're here for a modification. So, the modification would be a change of circumstance from the date of the order. Anything that post date's the order might be relevant, it may not be relevant, I'm not sure, but anything prior to that order would, in my view, clearly not be relevant –

[Plaintiff's counsel]: **Okay**.

THE COURT: -- because the parties have entered into –

[Plaintiff's counsel]: For the change in circumstance.

THE COURT: Anything prior to the date of the order, which was August of 2017, could not be considered a change of circumstance to an order that was issued.

[Plaintiff's counsel]: **I know. I understand**, but, however, if you find that there is a change in circumstance since that order, then we can

go back a reasonable period of time to establish the terms of what would be required to do for a change of custody, such as character, what each party brings to the table, et cetera, et cetera, et cetera, **because if you find that there's no change of circumstance, fine, I understand**, but if you find that there's change in circumstance, then –

(Apx. 21-22). (Note: the circuit court in this case found that there was no change of circumstance.)

THE COURT: Okay. So, this is what I'm going to do. Because this is a modification, any facts that I'm going to be considering to determine the change of circumstance have to post-date the order. All of the conduct that that existed at the time of this order was known by the parties, so that was taken into consideration at the time that this was reached. So, what I'm

> going to consider is anything that happened after that.

*Id*. The court then proceeded to consider the other preliminary matters and the trial began.

Counsel for the father did not object to the circuit court's ruling. Custody modification cases have a two-step procedure. First, the moving party must show that there has been a material change of circumstance since the prior order that affects the welfare of the children. If this threshold is not met, there is no need for further analysis. *Gillespie v. Gillespie*, 206 Md. App. 146 (2012). If, and only if, this threshold is met, then the court conducts an analysis of the best interests of the children in terms of custody and visitation as if it were an original custody proceeding. *Wagner v. Wagner*, 109 Md. App. 1 (1996).

In this case, the circuit court held that there was no material change of circumstance since the prior order. The judge's preliminary ruling went no further than to hold that the relevant time period was the period since the last court order in August 2017. Counsel for the father did not object, and in fact stated, "That's right" and "I know" and "I understand." These are not words of objection. Counsel for the father only requested the right to bring in earlier evidence *in the event that* the court found there to be a change of circumstance, which the court never found. As he stated, "because if you find there's no change in circumstance, fine, I understand." At no point in the transcript did

counsel for the father attempt to introduce the two cell phone videos, or any other item of evidence that predated the August 2017 order.

## II. The judge's order was correct on the merits.

Judge Boynton's preliminary ruling required that the father show a material change of circumstance since the order of August 2017 was entered.

The father did not contend that the earlier agreement of August 2017 represented anything other than the exercise of the parties' best judgment at the time concerning the best interests of their children. He did not suggest that the order reflecting their agreement was inappropriate at the time it was entered. Nor did he proffer what the change of circumstance was that he was basing his motion upon.

Custody modification standards have been explained many times over the years:

> The appropriate standard for determining a contested custody case is the best interest of the child. As we said in *Taylor v. Taylor, supra,* 306 Md. at 303, 508 A.2d 964:
>
> > We emphasize that in any child custody case, the paramount concern is the best interest of the child. As Judge Orth pointed out for the Court in *Ross v. Hoffman,* 280 Md. 172, 175 n. 1, 372 A.2d 582 (1977), we have variously characterized this standard as being `of transcendent importance' and the `sole question.' The best interest of the

> child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.
>
> The question of whether there has been a material change in circumstances which relates to the welfare of the child is, however, often of importance in a custody case. The desirability of maintaining stability in the life of a child is well recognized, and a change in custody may disturb that stability.
>
> Stability is not, however, the sole reason for ordinarily requiring proof of a change in circumstances to justify a modification of an existing custody order. A litigious or disappointed parent must not be permitted to relitigate questions of custody endlessly upon the same facts, hoping to find a chancellor sympathetic to his or her claim. An order determining custody must be afforded some finality, even though it may subsequently be modified when changes so warrant to protect the best interest of the child. As we said in *Hardisty v. Salerno,* 255 Md. 436, 439, 258 A.2d 209 (1969), "[w]hile custody decrees are never final in Maryland, any reconsideration of a decree should emphasize changes in circumstances which have occurred subsequent to the last court hearing

*McReady v. McReady*, 323 Md. 476 (1991). While there can be an interplay between the best interests of the child standard and the standard for a material change, the law is nevertheless clear that the moving party in a custody modification hearing must show a material change of circumstance "subsequent to the last court hearing." In this case, the circuit court correctly ruled that the father needed to show a material change since the last court order in August 2017, some seventeen months earlier. The court did not rule out considering evidence that pre-dates the order for the purposes mentioned

by father's counsel – to show character, fitness, and other custody factors in the event that the court found a change of circumstance. (Apx. 21-22).

Appellant's brief is silent about what evidence, other than two illegal cell phone videos, the father would have wanted to adduce. Likewise, the transcript of the hearing contains no proffer. The court is left to guess what "material change" the father is alleging occurred. It will be recalled that the father's motion to modify listed only the following:

a. The father believed the mother "is thwarting the benefit of the counseling" when she has the children.
b. The father believed the mother prevented several counseling sessions from occurring.
c. The father believed the mother created an "atmosphere of gloom."

(E. 33). The father testified at the hearing. He presented no evidence that the mother thwarted anything when she had the children. He didn't discuss it. It was not the case that the judge prevented him from testifying about thwarting the benefits of counseling (all of which occurred subsequent to the August 2017 order). The father simply didn't bring it up in his disjointed testimony. Secondly, the father did testify that the children's counseling was delayed several weeks in getting started. However, he testified the delay occurred in the counseling that *he* was directed by the August 2017 order to arrange. The

August order provided that there would be two kinds of therapy for the children, and at the time the parties were aware that they might disagree on what counselor to choose. So, the order provided that the mother would choose an individual counselor for Elouan, and after four individual counseling sessions Elouan would have reunification therapy (with his father) with a counselor chosen and arranged by the father. The mother arranged the individual therapist in a timely way. The father did not arrange a reunification counselor timely, and there was a brief delay. In any event, the reunification counseling went on for several months until the father stopped it because he felt it was no longer necessary. Elouan continues to see his individual therapist. Finally, during his testimony there was no discussion of an "atmosphere of gloom."

The trial judge correctly concluded that the father had utterly failed to present evidence warranting a continuation of the hearing. All of the father's testimony, such as it was, concerned post-order conduct. All of it failed to even begin to suggest that custody should be modified, or that doing so would be in the best interests of Elouan. In truth, the father simply wanted to continue his financial and psychological pressure on his ex-wife in bad faith.

## III. Any error was harmless.

On review of an order regarding custody or visitation:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. 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.

*Davis v. Davis*, 280 Md. 119, 125 (1977). In this case, any error was harmless. The meandering evidence adduced by the father did not in any way suggest that a substantial change of circumstance had occurred. His relationship with his sons was toxic, if anything, and had been for some time. The children needed the counseling provided by the August order, which he dragged his feet on implementing because he was more interested in fighting with his ex-wife. No evidence was offered of any prior change of circumstance, or proffered and rejected. Under *any* standard of law, the motion of the father would have been rejected. The children were caught in the middle of an ongoing legal war that damaged each one of them. The two oldest children would have nothing to do with their father. The father was showering attention on the youngest son, Elouan, in an unhealthy way vis-à-vis his siblings. Counseling was needed and provided under the August order. Counseling can only work, however, if the patient is willing to listen to the counselor. The father's description of counseling at the hearing doesn't even mention changing his behavior, or an

improvement in his relationship with his son. Why would a court switch custody and place a vulnerable young child with his father when their relationship is so troubled that they need two sets of counselors, including reunification therapy?

The circuit court listened to the father for the better part of two days with patience and civility. There would not have been a different result if the court had listened for ten more days. There simply was no merit to the father's position. The judge considered everything the father said and offered. He was an experienced judge who applied his experience and wisdom to the facts at hand. There was no error.

## CONCLUSION

For the foregoing reasons, appellee respectfully requests that the order of the circuit court be affirmed.

Respectfully submitted,

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## Statement Pursuant to Rule 8-504(a)(9)

The foregoing brief has 3975 words and was prepared with proportionally spaced type in Century Schoolbook font in 13-point size.

## Certificate of Service

I hereby certify that on November 14, 2019, two copies of the foregoing brief were mailed, postage prepaid, to:

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