NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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December 18, 2023

LETTER OPINION

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RE: *William D. Livingston, Jr. v. Pooja S. Stark*
Case No. CL-2019-850

Dear Counsel:

The Court has before it the question of apparent first impression whether a child's expressed preference to change a custodial arrangement is alone sufficient for the Court to find there is a material change in circumstances, and thus to have jurisdiction to consider whether the best interests of the child warrant a modification. Here, the child's preference is undergirded by two considerations. First, the child believes the current

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arrangement is "unfair" because it results in Defendant having less custodial time on part of rotating Sundays, and it is clear the child loves both parents equally and dearly. Second, the child expressed some degree of inconvenience at having to transfer from Defendant's home to Plaintiff's home on Sunday evenings, which is in contrast the converse case on the alternating weekends when Plaintiff has the children. Two children are involved, both of an age where they can possess discretion, but only the eldest testified and expressed the preference on behalf of both siblings without objection.[1]

This Court finds a child's preference for a change in custodial arrangements, without more, is not a material change in circumstances if the facts upon which the preference is based have not changed since entry of the order sought to be modified. Here, the same degree of "unfairness" and attendant degree of inconvenience perceived by the child, existed at the time the parties agreed to this Court's first custodial order. Moreover, both parents appear to be near optimal stewards of their children, and there is no evidence the current arrangement rises to the level of causing psychological distress to the children, which could be an independent basis for the finding of a material change in circumstances.

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[1] "The wishes of the children, if they are of the age of discretion, should . . . be considered and given weight, although their wishes are not conclusive." *Hall v. Hall,* 210 Va. 668, 672 (1970). In determining if a child is "of discretion" to testify, a particular age alone is not determinative.

> The competency of a child as a witness to a great extent rests in the sound discretion of the trial judge whose decision will not be disturbed unless the error is manifest. It is the duty of the trial judge to determine such competency after a careful examination of the child. In deciding the question the judge must consider the child's age, . . . intelligence or lack of intelligence, and . . . sense of moral and legal responsibility.

Hepler v. Hepler, 195 Va. 611, 619 (1954).

Consequently, this Court shall deny Defendant's Motion to Reconsider the holding of the Court that Defendant had not proved a material change in circumstances for this Court to have the jurisdiction to consider imposing a change to the custodial schedule.

BACKGROUND

Only those facts necessary to analyze the question raised in this Letter Opinion are stated herein to maintain the privacy of the parties. The dispute involves Defendant's Motion to Modify the existing custodial schedule to equalize the time between the parties. The Court heard evidence and determined that all the reasons advanced by Defendant as constituting a material change in circumstances in order to enable jurisdiction of the Court to modify the governing custodial order were changes, but not ones of a material nature. The Court did express that one of the circumstances posited about which no Virginia authority was presented, the preference of the children, might be the closest supporting consideration. The Court ruled however that, given the dearth of caselaw and the fact that such preference is already a statutory factor to be considered after a finding of material change, it seemed inconsistent with the statutory scheme that it alone could be the basis for a finding of a material change in circumstances. The Court denied Defendant's Motion to Modify, but also stated that if Defendant found any authority touching the subject the Court would be open to reconsidering its ruling.

Subsequently, Defendant filed a motion to reconsider the Court's Order, attaching a case not heretofore cited. Upon receiving this motion, the Court suspended the Order entered on October 26, 2023, until January 15, 2024. The October 26, 2023 Order granted Plaintiff's motion to strike Defendant's petition to modify the visitation schedule. The Court

undertook review of this matter to determine whether its decision was in error. In order not to generate additional costs, the Court indicated Plaintiff's counsel would need only respond to the motion if the Court was persuaded to rehear the matter by Defendant's filing, whereupon Plaintiff would be given a full opportunity to file an opposition.

Under the original custodial schedule ordered by agreement of the parties, Plaintiff has the children from 4:00 p.m. Sunday until after school Wednesday. Defendant has the children from after school Wednesday until after school Friday. The parties alternate having the children from Friday after school until Sunday at 4:00 p.m. If there is no school on Wednesday or Friday, then the transition time is 4:00 p.m. By agreement of the parties included in this Court's Order of October 26, 2023, the 4:00 p.m. Sunday transition time has been changed to 6:00 p.m. When Defendant has the children on the weekends, she is thus to drop off the children at Plaintiff's house by 6:00 p.m. on Sunday; whereas, when Plaintiff has the children on the weekends, he always has them overnight on Sundays.

At trial, the eldest of the two children testified both siblings would prefer to equalize the Sunday schedule between their parents. The stated reasons for expressing this view were that the child thought the current arrangement "unfair" to Defendant, and believed it was also inconvenient to the children having to transfer households from Defendant's to Plaintiff's on Sunday evenings. The child did not manifest any psychological distress about the current arrangement, nor was there any expert testimony indicating such a circumstance.

ANALYSIS

This "court, in determining whether a change of custody should be made, must

apply a two-pronged test: (1) whether there has been a [material] change in circumstances since the most recent custody award; and (2) whether a change in custody would be in the best interests of the child." *Visikides v. Derr*, 3 Va. App. 69, 70 (1986); *see Bistel v. Bistel*, No. 1126-16-3, 2017 Va. App. LEXIS 96, *11 (Apr. 4, 2017). If the movant does not establish the threshold evidentiary burden of a material change in circumstances, "the court does not consider whether a change in custody would be in the best interests of the children," and custody is not modified. *Cooper v. Laurent*, No. 1078-20-3, 2021 Va. App. LEXIS 64, *10 (Apr. 20, 2021).

Virginia caselaw and statutes do not confine the definition of "material change in circumstances" to a specific situation; rather, caselaw and statutes provide general explanations and examples of what may constitute a material change in circumstances. The Court of Appeals of Virginia has accentuated that "[a] material change in circumstances can include changes involving the children themselves as well as changes relating to the parents and their circumstances." *Bistel*, No. 1126-16-3, 2017 Va. App. LEXIS 96, *11. "Material change in circumstances"

> is broad enough to include changes involving the children themselves such as their maturity, their special educational needs, and any of a myriad of changes that might exist as to them. It is also broad enough to include positive changes in the circumstances of the noncustodial parent such as remarriage and the creation of a stable home environment, increased ability to provide emotional and financial support for the children, and other such changes.

Keel v. Keel, 225 Va. 606, 612 (1983).

Virginia courts tend to find a material change in circumstances when multiple changes have occurred since the most recent custody award so as to undermine the custodial arrangement. *See Cooner v. Cooner*, No. 1570-03-4, 2004 Va. App. LEXIS 179,

*9 (Apr. 20, 2004) (upholding the trial court's finding of a material change in circumstances based on "wife's admission that she hit one of the children, the disclosures of physical abuse made in various proceedings since the custody issue was heard by any other court, and that the children had been living with the father for more than a year"); *Etter v. Etter*, No. 0506-97-4, 1998 Va. App. LEXIS 276, *7 (May 5, 1998) (upholding the trial court's finding of a material change in circumstances where "[t]he parties' inability to cooperate sufficiently to co-parent clearly was not contemplated by the agreement. The lack of effective communication and the inability to adequately consult and make joint decisions regarding the children undermined the earlier joint custody agreement"); *Caruthers v. Bean*, 2015 Va. Cir. LEXIS 84, *6-7 (Fairfax May 18, 2015) (finding a material change in circumstances where parents have since become engaged to others, the mother "no longer lives in close geographic proximity to" husband, the children attend private school in Herndon rather than the Falls Church Public Schools they previously attended when they lived in Falls Church, and as "there is a great deal of animosity between the two" parents). Additionally, Virginia Code § 20-108 states that "[t]he intentional withholding of visitation of a child from the other parent without just cause may constitute a material change of circumstances justifying a change of custody in the discretion of the court."

Given that Virginia cases finding a material change in circumstances tend to be based on changes which destabilize the previous custodial arrangement, and that § 20-108 exemplifies that a material change in circumstances is something more than minor inconvenience, this Court finds, without more, that a child's preference as to custody alone is not enough to constitute a material change in circumstances. That is not

to say that if a child expresses a preference which is coupled with sufficient demonstration that such child is in "absolute distress" in the current custodial arrangement, such circumstance would be insufficient to find a material change in circumstances. *See Khalid-Schieber v. Hussain,* 70 Va. App. 219, 236 (2019).

The finding by this Court in the instant case that there is no material change in circumstances when based only on the preference of the children is consistent with Virginia Code § 20-124.3, which lists the factors courts consider in determining the best interests of the child. One such factor is "[t]he reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference." Va. Code § 20-124.3(8). If the Virginia legislature intended to have a child's preference be a material change in circumstances, this factor's inclusion in the best interests of the child standard would be redundant.

Moreover, consideration of the best interests of the child is "clearly the most important part of the two-part test," as the courts must protect children's interests. *Keel*, 225 Va. at 612. Thus, if a child's preference were important enough on its own to be a change in circumstances, then that factor should be enough on its own for the best interests of the child analysis. However, Virginia caselaw has already determined, a court must "consider all of the [best interests of the children] factors," but need not "'quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors.'" *Piatt v. Piatt*, 27 Va. App. 426, 434 (1998) (quoting *Sargent v. Sargent*, 20 Va. App. 694, 702 (1995)). Therefore, to say a child's preference is enough for the first prong

of custody modification, but that its weight does not carry over as dispositive of the second prong, would be incongruous.

Finding a child's preference alone is not a material change in circumstances is also consistent with the law in other jurisdictions which have considered this question, such as Nebraska, Tennessee, and Arkansas. *See Jaeger v. Jaeger*, 307 Neb. 910, 919 (2020) (holding that "a child's stated preference, alone, will [not] suffice to establish a material change in circumstances," but a child's preference coupled with factors indicating "an evolving relationship between the parent and child" could be a material change in circumstances); *Canada v. Canada*, No. W2014-02005-COA-R3-CV, 2015 Tenn. App. LEXIS 720, *16 (Sept. 4, 2015) ("Daughter's testimony that she would prefer to live with Father is not sufficient alone to constitute a material change of circumstances"); *Hollinger v. Hollinger*, 65 Ark. App. 110, 114-15 (1999) (upholding the trial court's finding of material change in circumstances based on "the clear preference of the girls to live with their father" combined with the "strained relationship existing between the daughter . . . and the mother," "the remarriage of the father," and the mother's move).

Finally, the finding by this Court that there is no material change in circumstances based on the isolated preference of the children supports the role of courts in protecting children's interests. Allowing a child's preference alone to constitute a material change in circumstances would open the door for parents to pressure and manipulate their children into saying they wish to live with one parent over the other.[2] Additionally, if a child's preference were enough, children may often change their minds as to their preferences

[2] In the instant case there was no evidence that either parent sought before or during trial to influence the testimony of their child.

without thinking about what is truly best for them, or may change their minds based on interactions with their parents at any given time, thus unduly drawing courts into more family disputes.

CONCLUSION

The Court has considered the question of apparent first impression whether a child's expressed preference to change a custodial arrangement is alone sufficient for the Court to find there is a material change in circumstances, and thus to have jurisdiction to consider whether the best interests of the child warrant a modification. Here, the child's preference is undergirded by two considerations. First, the child believes the current arrangement is "unfair" because it results in Defendant having less custodial time on part of rotating Sundays, and it is clear the child loves both parents equally and dearly. Second, the child expressed some degree of inconvenience at having to transfer from Defendant's home to Plaintiff's home on Sunday evenings, which is in contrast the converse case on the alternating weekends when Plaintiff has the children. Two children are involved, both of an age where they can possess discretion, but only the eldest testified and expressed the preference on behalf of both siblings without objection.

This Court finds a child's preference for a change in custodial arrangements, without more, is not a material change in circumstances if the facts upon which the preference is based have not changed since entry of the order sought to be modified. Here, the same degree of "unfairness" and attendant degree of inconvenience perceived by the child, existed at the time the parties agreed to this Court's first custodial order. Moreover, both parents appear to be near optimal stewards of their children, and there is

no evidence the current arrangement rises to the level of causing psychological distress to the children, which could be an independent basis for the finding of a material change in circumstances.

Accordingly, this Court shall deny Defendant's Motion to Reconsider the holding of the Court that Defendant had not proved a material change in circumstances for this Court to have the jurisdiction to consider imposing a change to the custodial schedule.

The Court shall enter a separate order denying Defendant's Motion and allow the Suspending Order to expire on its stated date of January 15, 2024, leaving that the date upon which this cause becomes final.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

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