NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STEVEN R. MEYERS,

Appellant,

v.

LAURA M. MEYERS,

Appellee.

Case No. 2D18-4931

Opinion filed March 6, 2020.

Appeal from the Circuit Court for Collier County; Scott H. Cupp, Judge.

Reuben A. Doupé of Coleman, Hazzard, Taylor, Klaus, Doupé & Diaz, P.A., Naples, for Appellant.

Shayna K. Cavanaugh of The Law Offices of Cavanaugh & Cavanaugh, P.A., Naples, and Nicole L. Goetz of Nicole L. Goetz, P.L., Naples, for Appellee.

SMITH, Judge.

Steven R. Meyers (the Former Husband) appeals the final judgment entered by the trial court following a final hearing on the amended supplemental petition for modification of timesharing and shared parental responsibility filed by Laura M. Meyers (the Former Wife). The Former Wife filed her petition based upon allegations of

domestic violence between the Former Husband and his current spouse. The Former Husband challenges the final judgment arguing that the trial court erred by: improperly admitting prior bad act evidence of domestic violence concerning the Former Husband's current spouse; finding a substantial change in circumstance where it is unsupported by competent substantial evidence; modifying and reducing the Former Husband's timesharing; and awarding the Former Wife sole parental responsibility over the minor child's education. Because there was competent substantial evidence of domestic violence in the presence of the minor child, which constitutes a substantial change in circumstances, we affirm, in part, the final judgment. We reverse the award of sole parental responsibility over the minor child's education, finding an abuse of discretion by the trial court. With regard to any remaining issues, we affirm without discussion.

Background

The parties dissolved their marriage on September 8, 2014. Pursuant to the final judgment of dissolution, and until the time the Former Wife filed her petition, the parties exercised equal timesharing with their thirteen-year-old son, A.M. A.M. has been home-schooled by the Former Wife for most of his education but will be transitioning to public high school, as testified to by both parties at the trial.

On July 31, 2017, the Former Wife filed her petition, alleging there were "several unforeseen changes in circumstances" involving domestic violence since the entry of the final judgment of dissolution that justified modifying the Former Husband's timesharing with A.M. The Former Wife also requested in her petition sole parental responsibility for A.M.'s education in the event public school does not work out for A.M.

Before the final hearing, a temporary order was entered restricting the Former Husband's current wife, G.F., from being present during the Former Husband's timesharing with A.M. The Former Husband stipulated to the arrangement but believed the restriction would be short-term.

At the final hearing, the Former Wife recounted two incidents of domestic violence between the Former Husband and G.F., which were relayed to her by A.M.[1] One incident occurred on February 14, 2017 (the Valentine's Day Incident), in the presence of A.M. While the Former Wife had no personal knowledge of this incident, the Former Husband and G.F. corroborated A.M.'s account of the evening.[2] Specifically, the Former Husband and G.F. both testified that an argument ensued between them after they returned home from a Valentine's Day dinner. The Former Husband went into A.M.'s bedroom and was standing next to A.M.'s bed when G.F. entered the room and launched a metal garbage can at the Former Husband, hitting him in the face. A.M. was in his bed and witnessed the domestic violence. The Former Husband left the home with A.M. after the incident and sought emergency medical treatment at the hospital for his injuries. While at the hospital, and in the presence of A.M., the Former Husband lied to hospital staff about the cause of his injuries, claiming

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[1]The trial court did not speak to A.M., nor did A.M. testify at the hearing.

[2]The Former Wife also listened to the Former Husband's testimony describing the Valentine's Day Incident during the Department of Children and Families (DCF) proceedings involving G.F. and G.F.'s child, which are discussed below. To the extent that the trial court allowed the Former Wife to testify to these events over the hearsay objections of the Former Husband, such error was harmless in light of the competent substantial evidence received by the testimony of the Former Husband and G.F. See Special v. W. Boca Med. Ctr., 160 So. 3d 1251, 1253 (discussing harmless error test in civil appeals wherein "the beneficiary of the error must prove that there is no reasonable possibility that the error complained of contributed to the verdict").

that he was struck by a garage door. The Former Husband also verified the Former Wife's allegation that he told A.M. to keep the matter "in house," meaning, presumably, to avoid telling anyone what had really transpired. G.F. admitted she was enraged at the time she threw the garbage can at the Former Husband and further testified that the police and representatives from the Department of Children and Families (DCF) arrived at the home after the incident. As a result of DCF's involvement, G.F.'s daughter was removed from the home for a period of time. G.F. blamed her outburst on, among other things, having had too much to drink and not enough to eat that day.

The Former Wife testified that A.M. began experiencing nightmares after the Valentine's Day Incident and returned to an early childhood habit of sleeping in her bed, which she attributed to the stress of the domestic violence. The trial court also heard testimony from A.M.'s therapist, who opined that the Valentine's Day Incident was psychologically detrimental to A.M.

The other domestic violence incident alleged by the Former Wife as grounds for modification of timesharing involved G.F.'s arrest for domestic violence against the Former Husband in August 2015. The Former Wife, again, did not witness the August 2015 incident. Unlike the Valentine's Day Incident, A.M. did not witness this incident. The Former Husband testified he and G.F. were driving in his car when they began arguing. G.F.'s dog, who was sitting on the Former Husband's lap, allegedly scratched him. The Former Husband pulled over and G.F. called 911. The police arrived and arrested G.F. for domestic violence. The Former Husband claims G.F. was arrested because the officers saw scratches on his neck.

Following the hearing, the trial court entered a final judgment granting the Former Wife's petition for modification, reducing the Former Husband's timesharing—on paper, at least—from 50/50 to approximately 90/10, favoring the Former Wife. The trial court also awarded "sole parental responsibility" for A.M.'s education to the Former Wife. In the final judgment, the trial court expressed concern that the Former Husband seemed to lack awareness of his abusive relationship with G.F. and his "willingness" to expose A.M. to domestic violence was "potentially extremely damaging" to his son.

Analysis

We first address whether the record contained competent substantial evidence of domestic violence.

"On appellate review, an order changing custody has a presumption of correctness and will not be disturbed absent a showing of abuse of discretion." Wade v. Hirschman, 903 So. 2d 928, 935 (Fla. 2005) (citing In re Gregory, 313 So. 2d 735, 738 (Fla. 1975)). In applying an abuse of discretion standard, we review the trial court's order to determine "whether there is logic and justification for the result." A.L.G. v. J.F.D., 85 So. 3d 527, 529 (Fla. 2d DCA 2012) (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)).

Modification of timesharing by a trial court should be affirmed if the trial court's order is supported by competent substantial evidence. Sordo v. Camblin, 130 So. 3d 743, 744 (Fla. 3d DCA 2014). "Substantial evidence" has been described as evidence that establishes a substantial basis of fact from which another fact at issue may reasonably be inferred. De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). The Florida Supreme Court has also described "substantial evidence" as being "relevant

evidence as a reasonable mind would accept as adequate to support a conclusion." Id. (citing Becker v. Merrill, 20 So. 2d 912, 914 (Fla. 1944); Laney v. Bd. of Pub. Instruction for Orange Cnty., 15 So. 2d 748, 753 (Fla. 1943)); see also Haines v. Dep't of Children & Families, 983 So. 2d 602, 603 (Fla. 5th DCA 2008) ("The competent substantial evidence standard requires the Department to establish that its determination to revoke petitioner's foster care license was a reasonable decision supported by some direct evidence in the record.").

Further, "[a] party seeking to modify a parenting plan 'must show that (1) circumstances have substantially and materially changed since the original custody determination, (2) the change was not reasonably contemplated by the parties, and (3) the child's best interests justify changing custody.' " Garcia v. Guiles, 254 So. 3d 637, 640 (Fla. 1st DCA 2018) (quoting Reed v. Reed, 182 So. 3d 837, 840 (Fla. 4th DCA 2016)); see also § 61.13(3), Fla. Stat. (2017). The substantial, material, and unanticipated change in circumstances must not have been contemplated at the time the parties entered into their timesharing agreement. See Cooper v. Gress, 854 So. 2d 262, 265 (Fla. 1st DCA 2003). This court recognizes that parents engaging in domestic violence in front of their children constitutes an unanticipated, material, and substantial change in circumstances supporting modification of a timesharing arrangement. See e.g. Slaton v. Slaton, 195 So. 3d 1192, 1194 (Fla. 2d DCA 2016).

In determining whether the best interests of the child justify changing custody, the trial court should evaluate the factors enumerated in section 61.13(3). See Hollis v. Hollis, 276 So. 3d 77, 79 (Fla. 2d DCA 2019). Domestic violence is one of the factors for the trial court's evaluation of the child's best interests. § 61.13(3)(m).

"Domestic violence and other forms of violent behavior are probative matters in a child custody case." Waybright v. Johnson-Smith, 115 So. 3d 445, 447 (Fla. 1st DCA 2013).

Courts have recognized that "harm" occurs as a result of domestic violence when it occurs in the presence of the child. In re E.B., 834 So. 2d 415, 416 (Fla. 2d DCA 2003); T.R. v. Dep't of Children & Families, 864 So. 2d 1278, 1280 (Fla. 5th DCA 2004) ("It does not matter that the violence is not directed at [the children] so long as they are aware of its taking place, and the violent behavior demonstrates a wanton disregard for the presence of a child."); D.H. v. Dep't of Children & Families, 769 So. 2d 424, 427 (Fla. 4th DCA 2000).

The final judgment in this case contains the finding that there was a substantial change in circumstances based upon "unforeseen and disturbing incidents of domestic violence" between the Former Husband and G.F. In support of this conclusion, the trial court cited Lewandowski v. Langston, 969 So. 2d 1165 (Fla. 5th DCA 2007). Lewandowski involved a former husband who appealed the denial of his petition to modify the timesharing agreement after the former wife remarried. 969 So. 2d at 1166. As grounds for modification of timesharing, the former husband argued that the former wife had married a convicted sex offender who had victimized his own daughter and whose parental rights had been terminated. Id. at 1166-67. In reversing the trial court's judgment, the Fifth District concluded, "the evidence leads to the inescapable conclusion that the former wife's actions, which exposed the child to a registered sex offender on a regular basis, constituted a material change of circumstances affecting the physical and emotional health, safety, and well-being of the child." Id. at 1169.

Here, the trial court expressed concern that the Former Husband seemed to lack awareness that he is involved in an abusive relationship with G.F., and that the Former Husband's "willingness" to expose A.M. to domestic violence is "potentially extremely damaging" to his son. The Former Husband denies being in an abusive relationship and that he is a victim of domestic violence. He complains the record lacks competent substantial evidence supporting the trial court's factual findings of domestic violence. The Former Husband also argues there is no evidence supporting the factual finding that the incidents were "alcohol fueled" or that A.M. hid in a closet during the Valentine's Day Incident.

The Former Husband correctly argues the trial court included certain factual findings that are not supported by evidence in the record. For example, the trial court found in the final judgment that during the Valentine's Day Incident, A.M. hid in a closet and called 911. No witness testified to this information and the record is silent as to any evidence supporting these facts other than the Former Wife's allegations in the petition that A.M. "huddled with [G.F.'s] daughter for safety and called 911." Most likely, the Former Wife learned of this information from A.M. A.M.'s statements to the Former Wife about the Valentine's Day Incident constitute hearsay, unless they meet one of the exceptions enumerated in sections 90.803 or 90.804, Florida Statutes (2018), which they do not.

The trial court also erred in concluding in the final judgment that "[t]he testimony established that the [Former Husband] and [G.F.] engaged in multiple incidents of domestic violence between them fueled by alcohol." The trial court further found that G.F. and the Former Husband "both admitted to consuming alcohol" at dinner

prior to the Valentine's Day Incident. Although G.F. admitted she drank too much, contributing to her becoming "enraged," the Former Husband denied drinking alcohol that evening; thus, the record does not support the finding that "both admitted to consuming alcohol" prior to the Valentine's Day Incident.

Despite these unsupported findings, competent substantial evidence was established through the Former Husband and G.F.'s testimony supporting the trial court's determination that the Former Husband was the victim of at least two incidents of domestic violence. Foremost, the Former Husband and G.F. admitted the factual allegations of the Valentine's Day Incident were accurate. Second, with regard to the August 2015 incident involving G.F.'s dog, which the Former Husband attempts to portray as a simple argument leading to a 911 call to law enforcement, the trial court, as the trier of fact, determined the Former Husband's account of the events lacked credibility. The credibility of witnesses is within the trial court's exclusive purview. Jeffries v. Jeffries, 133 So. 3d 1243, 1244 (Fla. 1st DCA 2014); Disston v. Hanson, 116 So. 3d 612, 612 (Fla. 5th DCA 2013). It is inappropriate for an appellate court to reweigh the evidence and credibility of witnesses. Cole v. Cole, 723 So. 2d 925, 927 (Fla. 3d DCA 1999) (citing Froman v. Froman, 458 So. 2d 833, 833 (Fla. 3d DCA 1984)). And so we defer to the trial court as to issues of credibility.

While we agree the record does not support the trial court's findings that either of the incidents were fueled by alcohol or that A.M. hid in the closet and called 911 after the Valentine's Day Incident, the Former Husband and G.F.'s testimony together provide ample support for the trial court's determination that the Former Husband exposed A.M. to domestic violence on the night of the Valentine's Day Incident

and then tried to conceal the incident from the Former Wife by telling A.M. to keep the matter secret. Therefore, we find that there was a substantial change in circumstances justifying modification of the parties' timesharing. See Slaton, 195 So. 3d at 1194.

The final issue we address in this appeal pertains to the trial court's award of sole parental responsibility to the Former Wife for A.M.'s education. The Former Husband posits error by the trial court on two grounds. First, the Former Husband argues chapter 61, Florida Statutes, does not permit the award of sole parental responsibility for a child's education alone. Second, the Former Husband argues that the record contains no factual findings supporting an award of sole parental responsibility for A.M.'s education to the Former Wife. The Former Wife concedes error on this point. Because we find merit in the Former Husband's first argument, which is dispositive, we need not reach the second argument.

Section 61.13 refers to two types of parental responsibility, sole and shared parental responsibility. Shared parental responsibility is the preferred arrangement, rather than sole parental responsibility. § 61.13(2)(c)(2); see also Fazzaro v. Fazzaro, 110 So. 3d 49, 51 (Fla. 2d DCA 2013) (the intent of the child custody statute is to strive for shared parental responsibility). It is well-established that a trial court may not grant one parent sole parental responsibility without making a specific finding that "shared parental responsibility would be detrimental to the child." § 61.13(2)(c)(2); see also Musgrave v. Musgrave, No. 2D18-2792, 44 Fla. L. Weekly D2861 (Fla. 2d DCA Nov. 27, 2019) (determining that once a trial court concludes shared parental responsibility would be detrimental to a child, the trial court must then make a specific finding of such, either on the record or in the final judgment); Evans v.

Woodard, 898 So. 2d 230, 231 (Fla. 2d DCA 2005) ("Without such a finding [that shared parental responsibility would be detrimental to the child], the court's award of sole parental responsibility must be reversed."); Hicks v. Hicks, 511 So. 2d 628, 628-29 (Fla. 2d DCA 1987). The statute allows a trial court to award one parent responsibility for a specific aspect of a child's welfare, as the trial court did in this case with A.M.'s education, but only in the context of shared parental responsibility. This designation is referred to as "ultimate responsibility":

> In ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those responsibilities between the parties based on the best interests of the child. Areas of responsibility may include education, health care, and any other responsibilities that the court finds unique to a particular family.

§ 61.13(2)(c)(2)(a).

The instant final judgment contains no factual findings whatsoever as to any conflict between the parties regarding A.M.'s education. We are unable to find any logic or justification from review of the final hearing transcript or the record to support the result reached here by the trial court in awarding sole parental responsibility, much less ultimate responsibility. See Grigsby v. Grigsby, 39 So. 3d 453, 456 (Fla. 2d DCA 2010) (concluding there was sufficient evidence that shared parental responsibility would be detrimental to minor children and award of sole parental responsibility to father was not abuse of discretion due to mother's parental-alienation tactics). Therefore, we reverse the award to the Former Wife of sole parental responsibility for A.M.'s education.

Conclusion

Affirmed in part and reversed in part.

KHOUZAM, C.J., and SALARIO, J., concur.