Third District Court of Appeal

State of Florida

Opinion filed April 22, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-0560
Lower Tribunal No. 09-7093

Sonia Talarico,
Appellant,

vs.

Leonard Talarico,
Appellee.

An appeal from nonfinal orders from the Circuit Court for Miami-Dade County, Stacy D. Glick, Judge.

Sandy T. Fox, P.A., and Sandy T. Fox, and Alisha B. Savani, for appellant.

Bette Ellen Quiat, for appellee.

Before SALTER, MILLER, and LOBREE, JJ.

MILLER, J.

Appellant, Sonia Talarico, the mother, appeals a series of nonfinal orders substantially curtailing her established timesharing with her twin minor daughters, at the behest of appellee, Leonard Talarico, the father. We have jurisdiction.[1] See Fla. R. App. P. 9.130(a)(3)(C)(iii)(b). Because the lower tribunal based its findings upon non-record evidence and the evidentiary record below is devoid of a "substantial, material, and unanticipated change in circumstances" warranting a modification of the stipulated custody arrangement under the parenting plan, we reverse and remand for further proceedings. § 61.13(2)(c), Fla. Stat. (2019).

The mother and father wed in 1997 and their union produced twin daughters, now aged sixteen. By early 2009, marital discord developed, hence the mother filed for dissolution. The lower court terminated the marriage and ratified a negotiated parenting plan. Years later, the parties refashioned the existing arrangement, effectively endowing each parent with equal timesharing and shared parental

[1] The mother sought to invoke our original jurisdiction by filing a petition for certiorari. As the challenged orders determine "the rights or obligations of a party regarding child custody or time sharing," we treat the instant petition as a notice of appeal. Fla. R. App. P. 9.130(a)(3)(C)(iii)(b); see Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy."); Hickey v. Burlinson, 33 So. 3d 827, 828 (Fla. 5th DCA 2010); Lawrence v. Peyton, 9 So. 3d 670, 670 (Fla. 3d DCA 2009) ("[W]e are comfortable that non-final orders determining visitation in family law cases are reviewable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iii).") (citations omitted).

responsibility. The court validated the modified plan, and for several years, the action remained dormant.

In January of this year, the mother, a practicing physician, unilaterally cancelled the planned dental surgery of one of the children, citing a lack of compliance with essential preoperative instructions. The father then filed an urgent motion to suspend the mother's timesharing. The motion contained scandalous allegations of parental alienation and sought to suspend all child support payments.

The lower tribunal duly convened an expedited hearing. Both parties were represented, and their attorneys made preliminary evidentiary proffers. The court then, at the request of the father, recessed the proceedings to conduct a closed, in-chambers interview of the children. No further evidence was received.

At the conclusion of the hearing, the court announced its intent to limit the mother's physical contact with the children to a shared meal at a restaurant twice per week and relieve the father of any obligation to furnish further child support payments.[2] The mother inquired as to the basis for the ruling. The court declined to provide the parties with a synopsis of the in-chambers testimony, but generally

[2] Following the entry of the challenged orders, Miami-Dade County imposed dine-in restrictions in response to the current COVID-19 pandemic, resulting in a de facto denial of any visitation. See Miami-Dade County Exec. Order No. 03-20 (Mar. 17, 2020).

articulated a finding that the mother exhibited inconsistent moods. The challenged orders were rendered and the instant appeal ensued.

Child custody determinations are "some of the most difficult and sensitive problems [that] face the judiciary." Waites v. Waites, 567 S.W.2d 326, 330 (Mo. 1978). Thus, "the trial court is vested with broad discretion." Peterseil v. Peterseil, 307 So. 2d 498, 499 (Fla. 3d DCA 1975) (citation omitted). However, "a trial court has far less discretion in modifying a custody order than in making the original determination." Bartolotta v. Bartolotta, 687 So. 2d 1385, 1386 (Fla. 4th DCA 1997) (citation omitted); see Bon v. Rivera, 10 So. 3d 193, 195 (Fla. 4th DCA 2009).

In order "[t]o justify modification, the [petitioning] parent carries an 'extraordinary burden' to prove the occurrence of a substantial and material change in circumstances since the original custody order's entry." Bartolotta, 687 So. 2d at 1386 (citation omitted). The demonstrated change in circumstances must have "adversely affect[ed] the welfare of the children." Young v. Hector, 740 So. 2d 1153, 1173 (Fla. 3d DCA 1998) (en banc) (Schwartz, C.J., dissenting) (citations omitted).

Section 61.13(2)(c), Florida Statutes, governs shared parental responsibility, and mandates consideration of numerous factors, among them "[t]he reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference." §61.13(3)(i), Fla. Stat.

(2019). Nonetheless, it is axiomatic that "[n]o person who is a party to a divorce proceeding—litigant, counsel, or chancellor—relishes the spectacle of a child testifying in open court as to his or her preference for one parent over another." Haase v. Haase, 460 S.E.2d 585, 589 (Va. Ct. App. 1995) (citing Buck v. Buck, 31 N.W.2d 829, 831 (Mich. 1948); Price v. Price, 192 S.W. 893, 894 (Ark. 1917)). "[A] child's choice between parents is often emotionally wrenching, and announcing that choice in open court could add significantly to the child's emotional toll." N.D. McN. v. R.J.H., 979 A.2d 1195, 1200 (D.C. 2009). Hence, "the preferred method of receiving such evidence in the majority of jurisdictions is to obtain the child's views in an in camera interview." Haase, 460 S.E.2d at 589 (citing Stickler v. Stickler, 206 N.E.2d 720, 723 (Ill. App. Ct. 1965). See generally Cathy J. Jones, Judicial Questioning of Children in Custody and Visitation Proceedings 18 Fam. L.Q. 43 (1984)).

In conducting these closed proceedings, tribunals are charged with striking a proper balance between two competing interests: the "due process rights of the parents to know and respond to evidence . . . and the privacy and best interests of the children." Helen S.K. v. Samuel M.K., 288 P. 3d 463, 473 (Alaska 2012). Typically, this is achieved by simultaneously recording or later disclosing an appraisal of the proceedings. See Monteiro v. Monteiro, 55 So. 3d 686, 689 (Fla. 3d DCA 2011) ("[T]he trial court has inherent authority and discretion to protect a child witness . . .

[Where a parent is] the subject of the minor children's testimony . . . the only way to obtain the truth from the minor children is to conduct the interview outside [his or her] presence.") (citation omitted); Fla. R. Juv. P. 8.625(c) ("The child may be examined by the court outside the presence of other parties under circumstances as provided by law. The court shall assure that the proceedings are recorded unless otherwise stipulated by the parties."); Fla. Fam. L. R. 12.407(a) ("Unless otherwise provided by law or another rule of procedure, children who are witnesses, potential witnesses, or related to a family law case, are prohibited from being deposed or brought to a deposition, from being subpoenaed to appear at any family law proceeding, or from attending any family law proceedings without prior order of the court based on good cause shown.").

In the instant case, "[t]he record suggests that the judge relied primarily upon [the] in camera interview with the child[ren]" in modifying custody.[3] Nowak v. Nowak, 546 So. 2d 123, 124 (Fla. 1st DCA 1989). Under these circumstances, "[t]he divulging of information ascertained from the in camera interview . . . is required by due process principles." Uherek v. Sathe, 917 A.2d 306, 308 (N.J. Super. Ct. App. Div. 2007) (citation omitted); see Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 288 n.4, 95 S. Ct. 438, 443 n.4, 42 L. Ed. 2d 447 (1974) ("A

[3] The "fact that the parents cannot communicate and get along does not constitute a material change in circumstances to warrant modification of custody." Ring v. Ring, 834 So. 2d 216, 217 (Fla. 2d DCA 2002) (citation omitted).

party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the [decision-maker] relies for decision so that he [or she] may rebut it. Indeed, the Due Process Clause forbids [a decision-maker] to use evidence in a way that forecloses an opportunity to offer a contrary presentation.") (citations omitted); Hickey v. Burlinson, 33 So. 3d 827, 829 (Fla. 5th DCA 2010) ("Reaching the merits, [appellant] was entitled to have the children's testimony transcribed. This is because due process requires the party seeking to modify visitation demonstrate that there has been a material change in circumstances and that modification is required to protect the child's best interest.") (citation omitted); Nowak, 546 So. 2d at 124 ("Due process considerations require the party seeking modification of visitation demonstrate by record evidence that there has been a material change in circumstances and modification is required to protect the child's best interests.") (citations omitted). However, here, the interview went unrecorded[4] and the court declined to provide an appraisal or summary of the

[4] "[W]here appropriate, the trial judge may interview the child in camera in order to determine with which parent the child would prefer to live, but a record of the interview should be made." In re T.M., 835 S.E.2d 132, 146 (W. Va. 2019) (citation omitted). Such documentation is vital to enable "meaningful appellate review of the evidence relied on by the trial court in determining the child's best interests." People in Interest of H.K.W., 417 P.3d 875, 880 (Colo. App. 2017) (citations omitted); see Ex Parte Wilson, 450 So. 2d 104, 106-07 (Ala. 1984) ("[T]he absence of a record would preclude 'meaningful review with respect to what extent, if any, the trial court relied upon the child's testimony in determining . . . the best interests of the child.'") (second alteration in original) (citation omitted); N.D. McN., 979 A.2d at 1201 ("And meaningful appellate review can only be had if there is a record that allows

children's testimony.[5] See N.D. McN., 979 A.2d at 1204 ("We also conclude that appellant was not unduly prejudiced by the manner in which the trial judge used the in camera interview. The content of the children's interview, which was largely undisputed, was disclosed to the parties in open court."); Strain v. Strain, 523 P.2d 36, 38 (Idaho 1974) ("It is within the trial court's discreti[o]n to personally examine children in custody disputes out of the presence of their parents, but if the interview is necessary to support the trial court's decision, it must be recorded."). Consequently, because no other evidence was admitted, "[m]odifying custody under these circumstances [was] an abuse of discretion, especially considering that the modification order drastically altered and severely limited the [m]other's contact

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the parties to challenge, and the appellate court to evaluate, the evidence and reasoning that underlies an adverse decision."); Hutchinson v. Cobb, 90 A. 3d 438, 442 (Me. 2014) ("[T]he lack of a record of the in-chambers testimony deprives [appellant] of any ability to respond to the court's findings or to seek meaningful appellate review."); In re. H.R.C., 781 N.W.2d 105, 114 (Mich. Ct. App. 2009) ("Unrecorded, off the record, in chambers interviews of children . . . provide no opportunity for . . . meaningful appellate review.") (citations omitted); Robinson v. Lanford, 841 So. 2d 1119, 1124 (Miss. 2003) ("The absence of a record of the conversation 'makes impossible our ability to thoroughly and properly review the record of the trial between the parties.'") (citation omitted); Williams v. Cole, 590 S.W.2d 908, 911 (Mo. 1979) ("[T]he failure to preserve the child's testimony precludes meaningful review with respect to what extent, if any, the trial court relied upon the child's testimony in determining whether a change of circumstances has occurred and if modification of a prior custody decree is necessary in order to serve the best interests of the child.").

[5] "Due process and fundamental fairness require that a parent have access to the content of the interview." People in Interest of H.K.W., 417 P.3d at 881 (citation omitted).

with the children." Bartolotta, 687 So. 2d at 1387 (citation omitted); see also Kilgore v. Kilgore, 729 So. 2d 402, 407 (Fla. 1st DCA 1998) ("[W]e conclude the order is deficient, because the trial court failed to make an express finding of a substantial change of circumstances."); Finney v. Giddens, 707 So. 2d 856, 858 (Fla. 2d DCA 1998) ("The trial court did not make an affirmative finding of a substantial and material change of circumstances and therefore erred in changing custody based on evidence presented.").

Accordingly, we reverse the orders under review and remand for further proceedings consistent with this opinion.

Reversed and remanded.