UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1789

SEPTEMBER TERM, 2004

KARL ULF WILHELM HEDBERG

v.

ANNICA MADELAINE DETTHOW

Kenney,
Adkins,
Rodowsky, Lawrence F.,
(Retired specially assigned)

JJ.

Opinion by Kenney, J.

Filed: June 13, 2005

36963FL

Karl Hedberg ("Father") is seeking modification of a custody order (the "Custody Order") issued by the Juvenile and Domestic Relations Court of the City of Alexandria, Virginia ("Virginia Juvenile Court"). By that order, Father was granted physical custody of his son, Alex, on the condition that Blaise Delahoussaye no longer reside in his home. The Circuit Court for Montgomery County ruled in favor of Annica Detthow ("Mother") on the parties' cross motions for summary judgment based on its finding that there had been no material change of circumstances since the entry of the Custody Order. Father poses two questions for our review,[1] which we have consolidated and reworded as follows:

> Did the circuit court err in granting Mother's motion for summary judgment?

For the following reasons, we answer that question in the affirmative and reverse the grant of Mother's motion for summary judgment[2].

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[1] Father presented the following two questions:

> 1. Whether the [c]ircuit [c]ourt erred in its summary judgment rulings and in refusing to modify the Custody Order to remove the residency restriction in light of changed factual and legal circumstances and the best interests of Alex.
> 2. Whether the residency restriction must be set aside because it impermissibly infringes [] [Father's] constitutional rights of personal liberty and parental autonomy to direct Alex's upbringing, as made clear by the intervening decision of the United States Supreme Court in *Lawrence v. Texas*.

[2] Father contends that the circuit court erred "in its summary judgment rulings" and requests that this Court "reverse the [c]ircuit [c]ourt's orders granting [Mother's] motion for summary judgment and denying [Father's] cross-motion for summary judgment." However, "it is well settled in Maryland that the denial of a motion for summary judgment is ordinarily not a final judgment from which an appeal may be taken." *Porter Hayden Co. v. Commercial Union*

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FACTUAL AND PROCEDURAL HISTORY

Alex, who was born on September 17, 1992, is the only child born of the marriage between Father and Mother. The parties resided in Virginia until they separated in 1996. Shortly after the parties' separation, Father and Alex began living with Alex's godfather, Blaise Delahoussaye. At some point in time, Father and Delahoussaye began an intimate relationship.

In 2000, after Mother had moved to Florida, Mother and Father each sought custody of Alex in the Virginia Juvenile Court. A hearing was held on the parties' respective custody petitions on April 1, 2002. Proceedings in the Virginia Juvenile Court are not transcribed unless requested by one of the parties. *Va. Sup. Ct. R.* 8:11. Because neither Mother nor Father requested that the proceedings be transcribed, no transcript was made.

On May 14, 2002, the Virginia Juvenile Court issued the Custody Order awarding Father and Mother joint legal custody of Alex. Father was awarded primary physical custody "conditioned on [] Delahoussaye no longer residing in the [Father's] home after the end of the child's current school year." The Custody Order did not include any express findings of fact. It merely states that, in making its custody determination, the Virginia Juvenile Court had considered "the best interests of the minor child and all of the

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[2](...continued)
Ins. Co., 339 Md. 150, 164, 661 A.2d 691 (1995).

factors set forth in Virginia Code 20-124.2 and 20-124.3,[3] all

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[3] Virginia Code Ann. § 20-124.2 (2002) governs court ordered custody awards and provides, in relevant part:

> B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or interference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint or sole custody.

Virginia Code Ann. § 20-124.3 provides:

> In determining the best interest of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following:
>
> 1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
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> 2. The age and physical and mental condition of each parent;
>
> 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
>
> 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
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> 5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
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> 6. The propensity of each parent to actively support the child's contact and relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
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> 7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve

(continued...)

testimony and evidence presented and the argument of counsel for all parties." Neither Father nor Mother appealed the Virginia Juvenile Court's order, which would have resulted in a hearing *de novo* in a Virginia circuit court. *Peple v. Peple*, 364 S.E.2d 232, 236 (Va. App. 1988).

Father and Alex moved from Alexandria, Virginia to Rockville, Maryland in June 2003. On February 6, 2004, Father moved to enroll the Custody Order in the Circuit Court for Montgomery County and to modify it by removing the condition prohibiting Delahoussaye from residing in his home. Specifically, Father asserted that the Custody Order

> was not based on factual findings that [] Delahoussaye's residing in [Father's] home was detrimental to the well-being of the minor child, but as a question of law in that the Commonwealth of Virginia has treated the criminalization of homosexual sodomy as determinative in custody proceedings, *i.e.*, that if a homosexual couple is residing with a minor child, the child is in a felonious environment.

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[3](...continued)
disputes regarding matters affecting the child;

8. The reasonable preferences of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse as that term is defined in § 16.1-228. If the court finds such a history, the court may disregard the factors in subdivision 6; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis for the decision either orally or in writing.

Mother consented to the enrollment of the Custody Order, but opposed the requested modification. Both parties filed cross-motions for summary judgment.

In support of his summary judgment motion, Father filed an affidavit asserting that the following circumstances had changed since the Virginia Juvenile Court's order:

> 3. Alex cried often and repeatedly and asked me why Blaise moved out and when he would move back in. Alex especially misses Blaise at bedtimes, because Blaise used to have a short chat with him before wishing him goodnight with a kiss and a hug. Alex also misses having Blaise around for such activities as family games, vacations, and dinner time together.
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> 4. I have missed Blaise's support and help with Alexander. For example, when Blaise lived with us, he could help with dinner while I could work with Alex on his homework. Also, he would watch Alex when I attended workshops or meetings related to my work.
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> 5. Blaise has consistently shown great interest and involvement in Alexander's school work, health, meals and sports.
>
> 6. During these years that Blaise has not been permitted to live with us, Blaise and Alex have maintained their bond and loving relationship. Blaise comes over every other weekend. He cooks dinner every weekend night and keeps up with Alex's activities, sports, and school news. Blaise and Alex go biking, roller skating, swimming, and ball-playing often.
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> 7. Based on conversations with my son and his behavior, it is my understanding that Alex would like to have Blaise move in to resume our normal routines as a family.

> 8. As Alex's father, I do not see it in his best interest to artificially restrict Blaise from sharing our home.
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> 9. I have been renting our home in Rockville but could afford to buy a house, if Blaise were permitted to live with me. A permanent home would provide more long-term security and stability for raising Alex. (Blaise and I had owned a house together in Virginia from 1999, but could no longer share it due to the Virginia Court Order.)
>
> 10. The fact that Blaise cannot live with us has worried Alex. He was especially upset during Hurricane Isabel last fall.
>
> 11. The Virginia judge specifically state [sic] that Virginia's law does not permit same-sex couples to live together with a child. I know the only reason for the Virginia court's restriction on Blaise living with Alex and me, is our admitted gay relationship. Blaise and I have been partners for eight years, and we provide a stable, loving family life within the constraints of the Court Order, which would be enhanced if we could resume living together.

Father also asserted that the condition imposed by the Custody Order was "based upon a line of cases prohibiting custodial homosexual parents from living with their partners because certain sexual acts believed to be inherent to homosexuality constitute felonies under Virginia law and therefore burdens the child with the risk of stigmatization." Relying on the opinion of the Supreme Court of the United States in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in which the Court found that a Texas statute criminalizing homosexual sodomy violated the Due Process Clause of the United States Constitution, Father

averred that the circuit court could not "enforce the [custody condition] based on the unconstitutional Virginia criminal law."

In support of her motion, Mother argued that the change in circumstances alleged by Father was not material, and, therefore, insufficient to warrant modification of the Custody Order. More specifically, she claimed that "[t]he only change in circumstance reflected in the record is that [] Father has relocated from Alexandria, Virginia to Rockville, Maryland, both within the same metropolitan area a distance of only [twenty-six] miles" and that "living in Rockville instead of Alexandria does not create additional difficulty in complying with the Custody Order."

A hearing was held before the circuit court on the parties' cross-motions for summary judgment on September 15, 2004. Ruling from the bench, the circuit court granted Mother's motion for summary judgment and denied father's motion, finding that there had not been a material change of circumstances. The circuit court issued a written order to that effect on January 12, 2005, and this timely appeal followed.

STANDARD OF REVIEW

Under Maryland Rule 2-501(e), a court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." We review a trial court's "grant of

a motion for summary judgment *de novo*." *Remsburg v. Montgomery*, 376 Md. 568, 579, 831 A. 2d 18 (2003); *see also Todd v. MTA*, 373 Md. 149, 154, 816 A. 2d 930 (2003); *Beyer v. Morgan State Univ.* 369 Md. 335, 359, 800 A. 2d 707 (2002); *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443, 795 A. 2d 715 (2002). "The trial court will not determine any disputed facts, but rather makes a ruling as a matter of law. The standard of appellate review, therefore, is whether the trial court was legally correct." *Williams v. Baltimore*, 359 Md. 101, 114, 753 A. 2d 41 (2000) (internal citations omitted).

When reviewing a grant of summary judgment, we first determine whether a genuine dispute of material fact exists "and only where such dispute is absent will we proceed to review determinations of law." *Remsburg*, 376 Md. at 579. In so doing, "we construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *Id.* at 579.

The Court of Appeals has held that general denials and proffered facts, lacking detail and precision, are insufficient to defeat a properly plead motion for summary judgment. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737-38, 625 A. 2d 1005 (1993) (citing *Lynx, Inc. v. Ordnance Prods.*, 273 Md. 1, 7-8, 327 A. 2d 502 (1974)). Instead, opposing a motion for summary judgment requires that the facts presented must be detailed and admissible

in evidence. *Beatty*, 330 Md. at 737-38 (citing *Hoffman Chev. v. Wash. Co. Nat'l Sav.*, 297 Md. 691, 711-15, 467 A. 2d 758 (1983); *Shaffer v. Lohr*, 264 Md. 397, 404, 287 A. 2d 42 (1972); *Broadfording Ch. v. Western Md. Ry.*, 262 Md. 84, 89, 277 A. 2d 276 (1971)). "[T]he mere presence of a factual dispute in general will not render summary judgment improper." *Remsburg*, 376 Md. at 579. As the Court explained in *Lippert v. Jung*, 366 Md. 221, 783 A.2d 206 (2001), "A dispute as to facts relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment." *Id.* at 227 (quoting *Salisbury Beauty Schs. v. State Bd. of Cosmetologists*, 268 Md. 32, 40, 300 A.2d 367 (1973)) (emphasis in *Lipppert*). "Where the record shows that there was no such genuine dispute as to any material fact necessary to resolve the controversy as a matter of law, and it is shown that the movant is entitled to judgment, the entry of summary judgment is proper." *Lynx*, 273 Md. at 8 (citing *Selected Risks Ins. Co. v. Willis*, 266 Md. 674, 296 A. 2d 424 (1972)).

"Finally, [i]n reviewing [the circuit court's] decision to grant a motion for summary judgment, we evaluate 'the same material from the record and decide [] the same legal issues as the circuit court.'" *Campbell v. Lake Hallowell Homewoner's Ass'n*, 157 Md. App. 504, 518-19, 852 A.2d 1029 (2004) (citations omitted). We "uphold the grant of a summary judgment only on the grounds relied

on by the trial court." *Id.* at 519 (quoting *Ashton v. Brown*, 339 Md. 70, 80, 660 A.2d 447 (1995)).

DISCUSSION

Father contends that the circuit court erred in granting Mother's summary judgment motion because the "evidence of the [] changed circumstances and their negative impacts on Alex was unrebutted." He also claims that the court failed to consider Alex's best interests when he had shown that the Custody Order was not working. In addition, he states that the Virginia Juvenile Court based its award on a presumption in Virginia that it is contrary to a child's best interests to reside in a home with a homosexual parent and his or her non-marital partner because the child would be subjected to an environment of "felonious conduct" under Virginia laws criminalizing sodomy.

According to Father, Virginia's law is also contrary to the Court of Appeals of Maryland's holding in *Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998). Therefore, "when presented with a petition to modify [a custody order conditioning custody or visitation on the child not residing with a parent's non-marital partner,] a Maryland court's first inquiry should be the extent to which that restriction was demonstrably based on evidence of harm and not on mere presumptions about what is best for children." He also claims that the Supreme Court's recent decision in *Lawrence v. Texas*, declaring a Texas statute criminalizing homosexual sodomy

unconstitutional, renders the Virginia Juvenile Court's order unconstitutional and therefore, unenforceable. Alternatively, he asserts that *Lawrence* constitutes a change in law since the Custody Order, warranting modification.

In opposition, Mother argues that the circuit court correctly found that there was no material change in circumstances and, therefore, summary judgment was appropriate because, in the absence of a material change in circumstances, "the court [was] precluded from performing a best interest analysis." She also contends that *Lawrence* does not preclude a state court from conditioning a grant of custody to a parent on the parent's non-marital partner no longer residing in the home and, therefore, it does not constitute a change in circumstances. Finally, citing *Malik v. Malik*, 99 Md. App. 521, 638 A.2d 1184 (1994), Mother argues that the Custody Order is entitled to full faith and credit notwithstanding that Maryland may apply different best interest considerations than Virginia.

I.

Although the parties agree that Maryland has jurisdiction and, if there is a material change of circumstances, may modify the Custody Order under Maryland law, given the various arguments presented, we find it useful to review the two relevant acts, one state and one federal, governing interstate custody and visitation disputes, namely the Uniform Child Custody Jurisdiction and

Enforcement Act ("UCCJEA") and the Parental Kidnapping Prevention Act of 1980 ("PKPA").

Drafted by the National Conference of Commissioners on Uniform State Laws, the UCCJEA is a revision of the Uniform Child Custody Jurisdiction Act ("UCCJA"). *Uniform Child-Custody Jurisdiction and Enforcement Act* (1991) (prefatory note). The UCCJEA "prioritizes home state jurisdiction" and sought to resolve jurisdictional discrepancies between the UCCJA and the PKPA. *Id.* Maryland and Virginia have both adopted the UCCJEA. *See* Maryland Code (1999, 2004 Repl. Vol.), §§ 9.5-101-318 of the Family Law Article ("F.L."); Va. Code Ann. § 20-146.1 *et seq.*

Family Law § 9.5-313 provides:

> A court of this State *shall* accord full faith and credit to an order issued by another state and consistent with this title that enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under Subtitle 2 of this title.

(Emphasis added). Maryland has jurisdiction to modify a child custody determination of a sister state,[4] where Maryland is "the

[4] Maryland has jurisdiction to make an initial child custody determination if this State is the child's home state and :

> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
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> (2) a court of another state does not have jurisdiction under

(continued...)

home state of the child on the date of the commencement of the proceeding," and:

> (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9.5-202 of this subtitle or that a court of this State would be a more convenient forum under § 9.5-207 of this subtitle; or
>
> (2) a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

F.L. §§ 9.5-201-203. "Home state" is defined, in pertinent part, as "the state in which a child has lived with a parent or a person acting as a parent for at least 6 consecutive months, including any

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[4](...continued)

> item (1) of this subsection, or a court of the home state of the child had declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and;
>
> (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other then mere physical presence; and
>
> (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
>
> (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2) or (3) of this subsection.

F.L. § 9.5-201(a).

temporary absence, immediately before the commencement of a child custody proceeding." F.L. § 9.5-101(h)(1).

Under Va. Code Ann. § 20-146.13, a Virginia court has exclusive, continuing jurisdiction over a custody order so long as "the child, the child's parents, or any person acting as a parent continue to live in [Virginia]." In the absence of exclusive, continuing jurisdiction, a Virginia court has jurisdiction to modify a child custody order issued by a Virginia court "only if it has jurisdiction to make an initial determination under [Va. Code Ann.] § 20-146.12." *Id.* § 20-146.13(B). A Virginia court does not have jurisdiction to make an initial determination under § 20-146.12 if Virginia is not the child's home state, has not been the child's home state for six months, and a court of another state has jurisdiction as a result of being the child's home state and does not decline to exercise jurisdiction on the grounds that it would be an inconvenient forum. *Id.* § 20-146.12.

Father and Alex moved to Montgomery County, Maryland in June of 2003. At the time of the commencement of the Maryland proceeding, February 6, 2004, Maryland was Alex's home state. Because Father, Mother, and Alex no longer reside there, Virginia is without exclusive, continuing jurisdiction. *See* Va. Code Ann. § 20-146.13 (providing that Virginia no longer has exclusive continuing jurisdiction over a child custody determination where

the child and the child's parents no longer reside in the state). *Accord* F.L. § 9.5-202(a)(2).

For those same reasons, in addition to the fact that Alex was enrolled in a Maryland school, evidence concerning his best interest was available in Maryland. Maryland was, and is not, an inconvenient forum and Virginia was, and is not, a more appropriate forum. F.L. § 9.5-207. *See also Olson v. Olson*, 64 Md. App. 154, 164, 494 A.2d 737, (1985) (concluding that Maryland had jurisdiction to modify a Rhode Island custody decree under the UCCJA and that Rhode Island was not a more appropriate forum where Maryland was the children's home state, one parent continued to reside in Rhode Island, and the children visited Rhode Island regularly "for long periods of time"). Therefore, as Maryland was Alex's home state and was not an inconvenient forum such that courts of this State should decline to exercise home state jurisdiction, under Va. Code Ann. § 20-146.12-.13, Virginia courts would not have jurisdiction to modify the Custody Order.

The PKPA, 28 U.S.C. § 1738A (2000), is a federal act, and where it conflicts with the UCCJEA, the PKPA prevails by virtue of the Supremacy Clause of Article VI of the Constitution of the United States. *See Britton v. Meier*, 148 Md. App. 419, 426, 812 A.2d 1082 (2002). We see no conflict in this case.

The PKPA mandates that each state shall enforce a child custody determination of another state, provided the foreign

custody determination has been reached in accordance with that act's jurisdictional provisions, which are substantially similar to the UCCJEA. *Id.* § 1738A(a)-(d). As Virginia was Alex's residence since birth, his home state and the residence of one parent at the time the Virginia Juvenile Court custody proceedings were initiated, the jurisdictional provisions of the PKPA were satisfied at the time the Custody Order was entered. *See id.* § 1738A (b)-(c).

28 U.S.C. §§ 1738A (f)-(g) governs modification of foreign custody determinations under the PKPA and provides, in pertinent part:

> (f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if-
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> (1) it has jurisdiction to make such a child custody determination; and
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> (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.
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> (g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

At the time of the commencement of the modification proceedings, Maryland was Alex's home state, no proceeding was pending in Virginia, and Virginia no longer had continuing jurisdiction. Therefore, modification of the Custody Order by a Maryland court is

not prohibited by either the UCCJEA or the PKPA. We next examine what it means to afford a foreign custody order full faith and credit in the context of a request for modification.

II.

The Full Faith and Credit Clause, found in Article IV § 1 of the United States Constitution provides, in pertinent part, that "[f]ull faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *U.S. Const.* IV § 1. Enacted during the first session of Congress, 28 U.S.C. § 1738, provides that properly authenticated acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." As the Court of Appeals recently opined:

> The statute is clear and has been interpreted as meaning precisely what it says: . . ., a Federal court or the court of another State must give the same preclusive effect to the judgment of a State court as would the courts of the State that rendered the judgment, no more and no less.
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> * * *
>
> [T]he United States Supreme Court has made clear that, in determining the preclusive effect to be given to the judgment of a State court, the claim and issue preclusion rules of the State that rendered the judgment must govern.

Rourke v. Amchem Products, Inc., 384 Md. 329, 344, 863 A.2d 926 (2004) (citing *Board of Public Works v. Columbia College*, 84 U.S. 521, 21 L. Ed. 687, 17 Wall. 521 (1873)). In other words, under the Full Faith and Credit Clause, "the *res judicata* effect to be given to the judgment of a court of a foreign state is the *res judicata* effect that the judgment has in the state where the judgment was rendered." *Jessica G. v. Hector M.*, 337 Md. 388, 404, 653 A.2d 922 (1995).

In *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947), the Supreme Court considered whether a New York court could modify a Florida order granting sole custody of a minor child to the mother. *Id.* at 611-12. Both parents had previously resided in New York, but the mother moved to Florida with the minor child, established residence, and soon after instituted a suit for divorce. *Id.* When the father, who did not appear in the Florida proceeding, absconded with the child to New York, the Florida court awarded the mother a divorce and permanent care, custody, and control of the child. *Id.* at 612. She then filed a habeas corpus proceeding in New York, seeking return of the child. *Id.* Following a hearing, the New York court ordered that the child be returned to the mother, but modified the Florida order by awarding the father visitation. *Id.* Unhappy with that modification, the mother argued in the Supreme Court of the United States that, by modifying the Florida decree, the New York court

had failed to afford the Florida court's custody order full faith and credit. *Id.* at 614-15.

The Supreme Court explained that "custody decrees of Florida courts are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of judgment." *Id.* at 613 Rather, a Florida custody order could be modified where a change of conditions affected the welfare of the child. *Id.* As to the Full Faith and Credit Clause, "[t]he general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum," but "it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." *Id.* at 615. The Supreme Court concluded that "[i]t is not shown that the New York court[,] in modifying the Florida decree[,] exceeded the limits permitted under Florida law." *Id.* Accordingly, the New York court did not violate the Full Faith and Credit Clause by modifying the Florida custody order. *Id.*

Subsequent to *Halvey*, the Supreme Court, in *Ford v. Ford*, 371 U.S. 187, 83 S. Ct. 273, 9 L. Ed. 2d 240 (1962), considered whether South Carolina was required to give full faith and credit to an order of dismissal issued by a Virginia court in a child custody dispute. *Id.* at 192. When both the mother and father were residing in Virginia, the father filed a habeas corpus petition

seeking custody of their three children, in which he alleged that the mother was unfit. *Id.* at 188. The mother and father reached a custody agreement, whereby the father would have custody of the children and the mother visitation. *Id.* Based on that agreement, the Virginia trial court dismissed the father's petition. *Id.* Several months later, while the children were visiting their mother in South Carolina, the mother filed suit for custody in that state. *Id.* The trial court conducted a full evidentiary hearing and concluded that the children's best interests were served by granting the mother custody and control of the children. *Id.* at 189. The father appealed to the Supreme Court of South Carolina, which reversed, stating:

> "If the respondent (the [mother]) here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of res judicata as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is res judicata in that State, it is res judicata and entitled to full faith and credit in this State. We are required under Art. IV Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or usage' the Courts of Virginia would give such order or judgment."

Id. at 190 (quoting *Ford v. Ford*, 123 S.E. 2d 33, 39 (1961)).

The case then proceeded to the Supreme Court of the United States, which concluded that the Supreme Court of South Carolina's interpretation of the Full Faith and Credit Clause was premised

upon that court's erroneous interpretation of Virginia law. *Id.* at 191. It iterated that the "Full Faith and Credit Clause, if applicable to a custody decree, would require South Carolina to recognize the Virginia order as binding only if a Virginia court would be bound by it." *Id.* at 192. Because the Virginia court's dismissal of the father's initial habeas corpus petition was based on a contract between the parties and did not involve a consideration of "Virginia's strong public policy of safeguarding the welfare of the child," a Virginia court would "not treat as res judicata the dismissal in this case." *Id.* at 193-94. Accordingly, the Supreme Court held that the courts of South Carolina were not precluded by the Full Faith and Credit Clause from considering the best interests of the children. *Id.* at 194.

In *Taylor v. Taylor*, 246 Md. 616, 229 A.2d 131 (1967), the Court of Appeals considered whether the Circuit Court for Prince George's County was precluded by the Full Faith and Credit Clause from modifying a custody order issued by a California court.[5] *Id.* at 621-22. That court granted the mother custody of the two children with extensive visitation to the father. *Id.* at 617. The mother and children subsequently moved to Maryland, where the mother sought to enjoin the father from visiting the children. *Id.* at 617-18. Persuaded that the Full Faith and Credit Clause

[5] We note that *Taylor* was decided prior to the PKPA and prior to this State's enactment of the UCCJA.

precluded modification of the California court's order, the circuit court declined to consider the relief requested by the mother. *Id.* at 618-19.

The Court of Appeals, citing *Ford,* explained "that the courts of the children's domicile have jurisdiction to modify or change an award of custody and the constitutional mandate of full faith and credit, or, for that matter the principle of comity, need not apply" when "a change of circumstances affecting the parties or the children has occurred since the filing of the original decree." *Id.* at 620-21. When considering whether modification of a foreign custody order is ultimately appropriate, a Maryland court applies Maryland law because

> [t]he infant child by virtue of his domicile has a right to the protection which may be afforded by the sovereignty under which he resides. Although the state is not a party to custody or support proceedings yet it does stand as *parens patriae* when the authority of the courts are invoked to determine questions concerning the welfare and status of a child within its jurisdiction.

Id. at 621.

We are satisfied that full faith and credit jurisprudence does not preclude a Maryland court with jurisdiction from modifying a foreign custody order to serve a child's best interests based on a change of circumstances occurring since the filing of the order when modification of that order could be pursued in the foreign

court. The child's right to protection imposes a duty on the court to act.

Father claims not to be pursuing the "additional argument made in the [c]ircuit [c]ourt that in the alternative Maryland need not afford constitutional Full Faith and Credit to the Virginia Custody Order." But, citing *Bottoms v. Bottoms*, 457 S.E. 2d 102 (Va. 1995), and *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985), he asserts that the Custody Order was based upon controlling Virginia law that maintained a presumption against awarding custody to a homosexual parent who resided with another homosexual on the grounds that the child would be living with individuals engaging in criminal sodomy. According to Father, *Lawrence* renders the Custody Order unconstitutional.

In *Roe*, the Supreme Court of Virginia considered whether "a child's best interests are promoted by an award of custody to a parent who carries on an active homosexual relationship in the same residence as the child." 324 S.E.2d at 691. The mother was initially awarded primary physical custody of the child, but when she became ill and could no longer continue to care for the child full time, she and the father consented to a custody decree awarding custody to the father. *Id.* at 691-92. When the mother later learned that "the father was living with a man who was his homosexual lover, that the two men occupied the same bed in a bedroom in the house in which the father lived with the child, that

the child had reported seeing the two men 'hugging and kissing and sleeping in the bed together,'" and that other homosexuals visiting the home engaged in similar conduct in the child's presence, the mother filed a petition in the Circuit Court of Fairfax County for a temporary restraining order seeking, among other things, to have the child placed permanently in her care. *Id.* at 692. After a hearing, the trial court awarded the father and mother joint custody, with the father to have custody of the child during the school year. *Id.* The trial court conditioned custody to the father "upon his 'not sharing the same bed or bedroom with any male lover or friend while the child is present in the home.'" *Id.* The mother appealed. *Id.*

The *Roe* Court found *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977), controlling and reversed the award of custody to the father, stating that the father's conduct "flies in the face of . . . society's mores." *Id.* at 693. Discussing its holding in *Brown*, in which the court had considered the propriety of denying a mother custody based on a heterosexual adulterous relationship, the *Roe* court stated:

> An illicit relationship to which minor children are exposed cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding . . . Our decision, [that the mother was unfit], . . ., was not based upon the mother's adulterous relationship in the abstract, but rather on the fact that it was conducted in the children's presence. It was Mrs. Brown's exposure of the children to an

> immoral and illicit relationship which rendered her an unfit and improper person to have their custody.

Id. at 693-94. Although the *Roe* Court did not say that a homosexual parent was unfit *per se*, it explained:

> The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law. Indeed, the mother contends that the influences to which the child is exposed here are far more deleterious than those in *Brown*. She points out that, as an illustration of the relative degree of abhorrence by which our society regards such conduct, adultery is a class four misdemeanor in Virginia (Code § 18.2-365) which is seldom prosecuted, while the conduct inherent in the father's relationship is punishable as a class six felony (Code § 18.2-361) which is prosecuted with considerable frequency and vigor, as evidenced by the decided cases annotated under those respective sections in the Code. However, that may be, we have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with peers and with the community at large. The father's unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification.
>
> The trial court was, as stated above, seriously concerned as to the impact of the father's conduct upon the child, but took the position that its worst features could be allayed by ordering him out of his lover's bedroom. We are not so persuaded. The child's awareness of the nature of the father's illicit relationship is fixed and cannot be dispelled. The open behavior of the father and his friends in the home can only be expected to continue. The impact of such behavior upon the child, and upon any of his

> peers who may visit the home, is inevitable. We conclude that the best interest of the child will only be served by protecting her from the burdens imposed by such behavior, insofar as practicable. In the circumstances of this case, this necessitates not only a change of custody to the mother, but also a cessation of any visitations in the father's home, or in the presence of his homosexual lover, while his present living arrangements continue.

Id. at 694 (citations omitted).

Ten years later, in *Bottoms,* the Supreme Court of Virginia considered a custody dispute between a mother and the child's maternal grandmother. 457 S.E.2d at 103. Upon learning that her daughter was engaged in a lesbian relationship, the grandmother filed a petition in the Juvenile and Domestic Relations Court of Henrico County seeking custody of her grandson. *Id.* at 106. That court awarded custody to the grandmother. *Id.* at 107. After a *de novo* hearing in the circuit court with the same result, the mother appealed to the Supreme Court of Virginia. *Id.*

The *Bottoms* Court pointed out that the mother had left the child with the grandmother and not returned for weeks and that the mother's companion had struck the child on one occasion. *Id.* at 108. It then explained the factors to be considered in determining parental fitness, which included

> the parent's misconduct that affects the child, neglect of the child, and demonstrated unwillingness and inability to promote the emotional and physical well-being of the child. Other important considerations include

> the nature of the home environment and moral climate in which the child is to be raised.

Id. at 107. In addition to the evidence of the Mother's abuse and neglect, the court commented on the impact the mother's homosexual lifestyle may impose on the child as a factor for consideration in the custody determination, stating:

> And, we shall not overlook the mother's relationship with [the mother's companion], and the environment in which the child would be raised if custody is awarded the mother. We have previously said that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the "social condemnation" attached to such an arrangement, which will inevitably afflict the child's relationships with its "peers and with the community at large." We do not retreat from that statement; such a result is likely under these facts. Also, [the mother's companion] has struck the child, and when there was a dispute over visitation, she threatened violence when her views were not accepted.

Id. at 108 (internal citations omitted).

Although the cases cited by Father certainly demonstrate that the Supreme Court of Virginia has considered homosexual sodomy and concepts of "social condemnation" in denying custody and restricting visitation, there is no transcript or express findings to establish that the Virginia Juvenile Court relied upon those cases when it imposed the condition in the instant case.

We have only the Custody Order, which reflects that the Virginia Juvenile Court considered all of the applicable statutory

factors in its best interests determination.[6] In addition, it appears that had the Virginia Juvenile Court adhered strictly to *Roe* and *Bottoms*, the court would likely not have awarded custody to Father because the condition imposed was not materially different from the condition rejected by the *Roe* Court as being insufficient to protect the child from "social condemnation." *Roe*, 324 S.E.2d at 694. Furthermore, *Roe* and *Bottoms* do not rest exclusively on the Virginia statute criminalizing sodomy occurring in private between two consenting adults.[7] Rather, as explained in *Roe*, the Supreme Court of Virginia applied a similar "social condemnation" consideration to heterosexual parents engaging in adulterous relationships. *See Roe*, 324 S.E.2d at 693-94. In fact, prior to the Custody Order, the Virginia Court of Appeals had recently stated that, "[i]n general, a court examines the sexual conduct of a parent to determine whether it has had any adverse impact on the

[6] As noted, under Va. Code Ann. § 20-124.3, a court making a custody determination is required to communicate to the parties the basis for its decision either orally or in writing. Interpreting that section, Virginia court's have held that a trial court's statement that "'I've considered all the factors and I rule thus and such' or 'the best-interest test generally favors this or that party,'" does not satisfy the requirement that the trial court communicate to the parties the basis for its decision. *Kane v. Szymczak*, 585 S.E.2d 349, 353-54 (2003). But, the trial court is not required "to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors," "as one would expect from comprehensive findings of fact and conclusions of law." *Id.* at 353. Assuming the Virginia Juvenile Court communicated the basis for its decision orally, as Father seems to indicate, he declined to request that the proceedings be transcribed. By not appealing the sufficiency of the Virginia Juvenile Court's communication of its reasoning, Father lost the right to a more definite explanation for the initial decision.

[7] *See Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005) (holding that *Lawrence* renders Virginia's criminal fornication statute unconstitutional).

child," and "[t]his standard applies to both heterosexual and homosexual conduct." *Piatt v. Piatt,* 499 S.E.2d 567, 570 & n.2 (Va. App. 1998). *See also Brinkley v. Brinkley,* 336 S.E.2d at 901 (Va. App. 1985). *Compare Piatt,* 499 S.E.2d at 570 & n.2, *with* Boswell, 352 Md. at 236, 237 (requiring "an evidence-based finding of adverse impact on the child caused by a parent's non-marital relationship to justify restrictions or limitations on custody or visitation" and that the "actual harm and nexus approach . . . applies to both heterosexual and homosexual relationships").

To adopt Father's argument would require a Maryland court to determine whether the Custody Order was in the child's best interest when it was entered. To do so, would clearly deny the Custody Order full faith and credit.

Father cites *Lawrence* for the proposition that the Supreme Court

> made clear that gay people have equal constitutional liberties and cannot be denied them based on differences in moral attitudes toward homosexuality or gay relationships. The Court made clear that in overruling *Bowers* it was doing more than decriminalizing an act-- it was affirming the right of gay people to form and sustain loving personal relationships and to lead their private lives free of government restriction and legal condemnation.

Father is correct in his assertion that fit custodial parents have a fundamental liberty interest "in the care, custody, and control of their children," but that interest is not absolute. *Troxel v. Granville,* 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed. 2d 49 (2000).

The State has the responsibility to interfere with the parent's liberty interest where the parent's desires are contrary to the child's best interests. *Id.* at 68. As stated in *Piatt*, Virginia courts consider the sexual conduct of a parent to determine whether it has an adverse impact on the child. *Piatt*, 499 S.E.2d at 570 & n.2. We are not persuaded that *Lawrence* prohibits such a consideration.[8]

Father also claims that *Lawrence* constitutes a change of legal circumstances necessitating a modification of the Custody Order. We recognize that, in some instances, a change of law might equate to a material change in circumstances requiring a reconsideration of the child's best interest. In *In re T.J.K.*, 62 S.W.3d 830 (Tex. Ct. App. 2001), the Court of Appeals of Texas considered whether the Supreme Court of the United States' opinion in *Troxel* constituted a change of law sufficient to modify a custody order awarding a child's maternal grandparents visitation. *Id.* at 831. The *T.J.K.* Court held that a father had "no less a right to seek modification of the [custody] order because a statute [upon which the award was premised] is found unconstitutional than because of a change of fact." *Id.* at 833. But, as discussed above, we cannot

[8] We note that in the majority opinion in *Lawrence*, Justice Kennedy indicated that the Court's holding was limited only to those statutes criminalizing sexual activity occurring in private between consenting adults. *Lawrence*, 539 U.S. at 578. Moreover, the Court remarked that the *Lawrence* holding "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*

determine, and we should not presume, that the Virginia sodomy statute was the sole basis for the imposition of the condition.

Father also contends that Virginia law conflicts with Maryland law, which requires a showing of actual or potential harm to the child before a homosexual partner's residing with a homosexual custodial parent can be ordered to move out. *See Boswell*, 352 Md. 204. According to Father, "when presented with a petition to modify [a custody order conditioning custody or visitation on the child not residing with a parent's non-marital partner,] a Maryland court's first inquiry should be the extent to which that restriction was demonstrably based on evidence of harm and not on mere presumptions about what is best for children." The statement of the *Piatt* Court, that a Virginia court examines sexual conduct of parents, both heterosexual and homosexual, "to determine whether it has had any adverse impact on the child," suggests that there might not be a conflict. But, suffice it to say that Father's contention that Maryland courts cannot enforce the Custody Order simply because it conflicts with Maryland law ignores the mandate of the UCCJEA and the PKPA, which require Maryland to give full faith and credit to a foreign court's custody order.

Even if this State's best interests considerations might differ from those of Virginia, we cannot disregard the Custody Order solely because a Maryland court may have found what was in Alex's best interests to be different had it entertained the initial custody dispute. For example, in *Malik*, this Court

provided full faith and credit to a Pakistani custody order under the UCCJA, even though the courts of Pakistan maintained a presumption that the child's best interests were served by awarding custody to the father. 99 Md. App. at 531-35. In *Malik*, we said that, "although Maryland has abolished a maternal preference, . . . [a] Maryland court would not refuse to enforce an award of custody made by a court of competent jurisdiction in any of [the four states in the United States that still maintain such a preference]."[9] *Id.* at 535.

What a Maryland court might have determined had it initially decided the custody dispute is not the focus of a full faith and credit analysis. In *G.P. v. A.A.K.*, 841 So.2d 1252 (Ala. Civ. App. 2002), in the context of modification of a custody order issued by a Kentucky court, the Alabama Court of Civil Appeals held that *ab initio* consideration of the constitutionality of grandparent visitation by the Alabama trial court, an issue not raised in the Kentucky court, "would contravene the [F]ull [F]aith and [C]redit [C]lause," and was res judicata in the custody modification proceeding initiated in Alabama.[10] *Id.* at 1255-57.

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[9] We note that *Malik* was decided subsequent to the ratification of Maryland's Equal Rights Amendment, which occurred in 1972, and the abrogation of a maternal preference by the Court of Appeals in *Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984).

[10] We do not know whether, and to what extent, the constitutionality of the restriction at issue was raised or considered in the Virginia Juvenile Court.

Therefore, we now consider Virginia law as it relates to the res judicata effect of a Virginia custody order.

III.

Va. Code Ann. § 16.1-241-244 (2003) governs jurisdiction and venue of the Virginia Juvenile and Domestic Relations Courts, and provides those courts with original venue and concurrent jurisdiction over proceedings involving disputes over child custody and visitation. Typically, an *ore tenus* hearing is conducted.[11] In making a custody determination, the Virginia Juvenile Court must consider the best interests of the child, including ten enumerated factors. Va. Code Ann. § 20-124.2-124.3. *See also supra* note 3. The decision of the Virginia Juvenile Court may be appealed to the circuit court, which conducts a hearing *de novo*. Va. Code Ann. § 16.1-296; *Peple*, 364 S.E.2d at 236. If an appeal from the Virginia Juvenile Court's order is not noted within ten days that order becomes final as to the circumstances known to the court at the time of the order and may only be modified upon a showing that a change in circumstances has occurred subsequent to the initial decree that affects the best interests of the child. *Peple*, 364 S.E.2d at 236-37. *See also Harper v. Harper*, 229 S.E.2d 875, 876

[11] *Black's Law Dictionary* (7th ed. 1999) defines "ore tenus" as "orally" or "made or presented orally." *Id.* at 1126. The "ore tenus rule" is defined as "[t]he presumption that a trial court's findings of fact are correct and should not be disturbed unless clearly wrong or unjust." *Id. See also Peple*, 364 S.E.2d at 237 ("The judgment of a trial court sitting in equity, when based on evidence heard *ore tenus*, will not be disturbed on appeal unless plainly wrong or without evidence to support it.").

(Va. 1976) ("[T]he unchallenged order of a juvenile court remains in effect . . . [and] the burden is on a parent who seeks to change the custody to show that circumstances have so changed that the best interests of the child require the transfer.").

As a general rule, Virginia custody orders are never final. *Roberts v. Roberts*, 586 S.E.2d 290, 295 (Va. App. 2003). Because "the welfare of the [child] is the primary, paramount, and controlling consideration of the court in controversies between parents over the custody of their minor children," a Virginia custody award is subject to modification where "there has been a change of circumstances since the most recent custody award; [and] [] a change in custody [would be] in the best interest of the chil[d]." *Keel v. Keel*, 303 S.E.2d 917, 920-21 (Va. 1983). But, "[i]n the absence of a material change of circumstance, reconsideration [of a child custody or support decree,] would be barred by principles of res judicata." *Bostick v. Bostick-Bennett*, 478 S.E.2d 319, 323 (Va. App. 1996). *Accord Sullivan v. Jones*, 595 S.E.2d 36, 42 (Va. App. 2004). The requirement that a material change in circumstances be demonstrated ensures stability in a child's life and also promotes judicial economy.

Virginia courts apply substantially the same standard for modifying custody orders as do Maryland courts, as will be discussed in Part IV *infra*. The party seeking modification has the burden of demonstrating, first, that there has been a material

change in circumstances since the prior custody order and, second, that modification of the order would be in the child's best interests. *Jones*, 595 S.E.2d at 42. *See also Wagner v. Wagner*, 109 Md. App. 1, 28-29, 674 A. 2d 1 (1996) (setting forth Maryland law on custody modification). Interpreting the first part of the two part test for modification, Virginia courts have said that "'"[c]hanged circumstances" is a broad concept and incorporates a broad range of positive and negative developments in the lives of children.'" *Jones*, 595 S.E.2d at 42 (quoting *Parish v. Spaulding*, 496 S.E.2d 91, 94 (Va. App. 1998)). The Supreme Court of Virginia has opined that a proper application of its material change of circumstances test "requires an analysis of the circumstances of both parents and the chil[d]. In addition, it is concerned with positive as well as negative changes." *Keel*, 303 S.E.2d at 920.

In *Wheeler v. Wheeler*, 591 S.E.2d 698 (Va. App. 2004), the Court of Appeals of Virginia upheld a modification of a custody order where the trial court found that the custodial parent's "deteriorating economic situation" constituted a material change in circumstances. *Id.* at 701. The order at issue in *Wheeler* was modified to allow the custodial parent to move from Northern Virginia to Florida, in part, because following her divorce, the mother could no longer afford the same quality of housing in Northern Virginia. *Id.* at 702-03.

In *Roberts*, the Court of Appeals of Virginia upheld the modification of a custody order to terminate the children's visitation with their father where the trial court found that visitation was "causing serious psychological and emotional injury to the children," who "feigned illness" and were "visibly uncomfortable in his presence." 586 S.E.2d at 297.

Because, under the second prong of the modification standard, Virginia courts may only modify a custody order if modification would be in the child's best interests, there must be some nexus between the alleged change in circumstances and the relief sought by the modification. When considering the best interests of the child, Virginia courts are expressly required to consider, among other factors,

> 1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
>
> * * *
>
> 3. The relationship existing between each parent and the [] child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
>
> 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
>
> * * *
>
> 8. The reasonable preferences of the child, if the court deems the child to be of

> reasonable intelligence, understanding, age and experience to express such a preference;
>
> * * *
>
> 10. Such other factors as the court deems necessary and proper to the determination.

Va. Code Ann. § 20-124.3.

In the present case, more than two years has passed since the Virginia Juvenile Court issued the Custody Order. According to Father, Alex, who is now nearly thirteen years of age, had, at the time of the Custody Order, lived with Delahoussaye for more than half his life and has maintained a close relationship with him. As a result of Delahoussaye's leaving the home, Father alleges that Alex has suffered emotional distress and wants him to move back in. In addition, Father also claims that, because Delahoussaye was required to move out, his ability to provide for Alex's general well being has been diminished.

We are persuaded that Father would not be barred by res judicata in a Virginia court from seeking modification of the Custody Order based on a change in circumstances since the filing of the Custody Order that materially affects the economic, psychological, and emotional well being of the child. Therefore, modification of the Custody Order by a Maryland court is not barred by full faith and credit principles.

IV.

As the Court of Appeals explained in *Taylor*, Maryland is now Alex's home state, and under the State's *parens patriae* authority, courts of this State now have an obligation to protect his health, safety, and welfare. *Taylor*, 246 Md. at 21. In determining whether Alex's best interests require modification of the Custody Order, we look to Maryland law. *Id.*

In this State, as in Virginia, "[t]he guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child." *Shunk v. Walker*, 87 Md. App. 389, 396, 589 A. 2d 1303 (1991). As discussed above, before a court can modify a final order regarding the care, custody, and support of a minor child, the court must first be satisfied that there has been "a material change of circumstances." *Knott v. Knott*, 146 Md. App. 232, 239, 806 A.2d 768 (2002) (*citing* F.L. § 12-104). "In this context, the term 'material' relates to a change that may affect the welfare of the child." *Wagner*, 109 Md. App. at 28. In other words, the alleged change of circumstances must speak to "the welfare of the child and not of the parents." *Sartoph v. Sartoph*, 31 Md. App. 58, 67, 354 A.2d 467 (1976).

To determine whether there has been a material change in circumstances affecting a child's best interests, the court compares the circumstances known to the court at the time of the original custody award with the current circumstances. *Wagner*, 109

Md. App. at 28. "If the actual circumstances extant at the time were not known to the court because evidence relating thereto was not available to the court, then the additional evidence of actual (but previously unknown) circumstances might also be applicable in respect to a court's determination of change." *Id.*

What is in a child's best interest and what is a material change of circumstances are necessarily interrelated questions that only infrequently can be answered as a matter of law. *See Flynn v. May*, 157 Md. App. 389, 410-12, 852 A.2d 963 (2004) (holding that a child had "an indefeasible right to have any custody determination concerning him made, after a full evidentiary hearing, in his best interest," and noting that "it is impossible for [the Court] to conjure up a hypothetical in which a judgment by default might ever be properly entered in a case of disputed child custody"). As this Court said in *Wagner*:

> Certainly, the very factors that indicate a material change in circumstances has occurred may also be extremely relevant at the second phase of the inquiry--that is, in reference to the best interest of the child. If not relevant to the best interest of the child, the changes would not be material in the first instance. Because of the frequency with which it occurs, this two-step process is sometimes considered concurrently, in one step, *i.e.*, the change in circumstances evidence also satisfies--or does not--the determination of what is in the best interest of the child. Even if it alone does not satisfy the best interest standard, it almost certainly will afford evidentiary support in the resolution of the second step. Thus, both steps may be, and often are, resolved simultaneously.

> If, however, in respect to the previously known circumstances the evidence of change is *not strong enough*, i.e., either no change or the change itself does not relate to the child's welfare, there can be no further consideration of the best interest of the child because, unless there is a material change, there can be no consideration given to a modification of custody.

Id. at 28-29 (emphasis in original). Similarly, the Court of Appeals has reasoned that

> [a] litigous 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 interests of the child. . . 'While 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.' . . . In the limited situation where it is clear that the party seeking modification of a custody order is offering nothing new, and is simply attempting to relitigate the earlier determination, the effort will fail on that ground alone. In that instance, . . . the absence of a showing of a change in circumstances ordinarily is dispositive, and . . . the c[ourt] does not weigh the various factors to determine the best interest of the child.
>
> In the more frequent case, however, there will be some evidence of changes which have occurred since the earlier determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child.

McCready v. McCready, 323 Md. 476, 481-82, 593 A.2d 1128 (1991) (internal citations omitted).

In *Domingues v. Johnson*, 323 Md. 486, 593 A.2d 1133 (1991), the Court explained the predictive nature of the best interests of the child standard:

> "[C]ustody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past." In *Montgomery County v. Sanders*, 38 Md. App. 406, 419, 381 A.2d 1154 (1978), Chief Judge Gilbert wrote for the Court of Special Appeals that:
>
> > "The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication. The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future."

Id. at 499-500. It is precisely because a best interests determination is necessarily one of prognostication that a change in circumstances may require modification of the earlier determination when it is proven that some provision of a custody order is, in fact, not in a child's best interest. Such a change would be material and would permit modification of the custody order.

Mother asserts that the court is without authority to modify the Custody Order because the alleged change in circumstances is the direct result of the Custody Order. To adopt Mother's position

in this regard would require courts to disregard a child's best interest absent a change in circumstances unrelated to and unaffected by the prior order.

In *McCready*, the Court of Appeals considered whether the circuit court abused its discretion by modifying a child custody agreement that provided the parents with joint legal and physical custody. 323 Md. at 478-79. In that case, the mother and father of a three and one-half year old child agreed that the mother would retain physical custody of the child on weekdays, while the child would be with the father on weekends. *Id.* at 479. The allocation of physical custody was premised upon the mother's employment schedule, and, in the event that the mother was able to secure weekday employment, the parties agreed, "in good faith[,] [to] renegotiate th[e] agreement." *Id.*

Five weeks passed before the mother was able to obtain weekday employment. *Id.* When the mother was unable to successfully renegotiate the custody arrangement with the father, she filed a complaint for divorce and for sole physical custody. *Id.* In doing so, she alleged, among other things, "that joint physical custody was causing the child to experience stress and confusion, and had not 'proved to be good for [the child.]'" *Id.* The father agreed that joint physical custody had not proved beneficial to the child, and he sought primary physical custody. *Id.* In addition to allegations that the joint physical custody arrangement "was

causing confusion and insecurity for the child, and was otherwise adversely affecting her," the mother and father lodged numerous allegations attacking the character and parental fitness of one another. *Id.* at 484-85. Following a three day hearing, the circuit court agreed that joint custody was no longer in the best interests of the child, and because it determined that the father was more mature and credible, the court awarded primary physical custody to him. *Id.* at 485.

On appeal, the Court of Appeals held that the circuit court had applied the correct standard, which was whether there had been a material change in circumstances subsequent to the custody agreement that affected the best interests of the child. *Id.* at 484. The Court then determined that the alleged change in circumstances was sufficient "to demonstrate that the parties were not simply seeking to relitigate issues previously decided." *Id.*

Similarly, in *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 605 A.2d 172 (1992), this Court considered whether religious views or practices were permissible considerations for a court making a custody determination. *Id.* at 493. In that case, three children were born of a marriage between an Episcopalian couple. *Id.* at 493. Prior to the dissolution of the marriage, the mother and children had converted to Orthodox Judaism, while the father remained Episcopalian. *Id.* The father believed that he could continue to expose the children to the Episcopal faith, while the

mother believed that the children's religious education should adhere strictly to Orthodox Judaism. *Id.*

When they separated, the parents agreed that the children would reside primarily with the mother, and that the father would be afforded liberal visitation. *Id.* The agreement also provided that the children would attend a Jewish day school at the mother's expense, but that the parties would not interfere with the other parent's "religious activities with the children." *Id.* at 494.

After their divorce, the mother objected to the children's exposure to the Episcopal faith, and the father objected to the children's enrollment in the Community Day School of Beth Tfiloh ("Beth Tfiloh"). *Id.* at 495-96. The mother filed a complaint for divorce and for temporary custody of the children in the Circuit Court for Baltimore County. *Id.* at 494. The father counterclaimed seeking temporary and permanent custody of the children. *Id.* After a trial on the merits, on June 29, 1990, the circuit court awarded the father physical and legal custody of the children and awarded the mother visitation. *Id.* It ordered that the children be allowed to continue to attend Beth Tfiloh, provided that the mother pay for the school's cost. *Id.* at 495-96. In so doing, the court determined that the mother "had attempted to restrict the children's access to the father because of her view that the children's religious upbringing should be exclusively Orthodox

Jewish," in violation of the custody agreement. *Id.* at 495. The mother appealed. *Id.*

While the appeal was pending, the father filed a motion for modification of the custody order in order to enroll the oldest child in a public middle school. *Id.* at 496. The mother opposed the motion for modification. *Id.* Following a hearing, on August 15, 1991, the circuit court found that the elder child's "preference for public school had not changed [since the June 29 Order], [but] the circumstances surrounding his preference had changed." *Id.* at 496. Specifically, the court determined that the public school could better provide for the thirteen-year-old child's learning needs and that, contrary to most of the other children at Beth Tfiloh, the child did not desire to be bar mitzvahed. *Id.* at 496-97. According to the court, the child "was acutely aware of this difference between himself and his peers at Beth Tfiloh, and that the emotional stress and tension caused by this perception would not be present if [he] attended public school." *Id.* at 497. The circuit court concluded that it was in the child's best interests to attend public school. *Id.* The mother filed another appeal, which was consolidated with her appeal of the June 29 Order. *Id.* at 498.

This Court concluded that there had been a material change in circumstances warranting modification of both the original custody agreement and the June 29 custody order. *Id.* at 500, 511. In

holding that the circuit court did not abuse its discretion by modifying the original custody agreement, we explained:

> Several criteria must be considered in arriving at [the best interest of the child], including, *inter alia*, the fitness of the parents, character and reputation of the parties, desire of the natural parents and agreement between the parties, potentiality of maintaining natural family relations, preference of the child, material opportunities affecting the future life of the child, age, health and sex of the child, residences of the parents and opportunity for visitation, length of separation from the natural parents, and prior voluntary abandonment or surrender.

Id. at 500 (citing *Shunk*, 87 Md. App. at 397). Regarding the circuit court's modification of the June 29 order, the Court determined that the circuit court did not err in allowing the elder child to attend public school because "the evidence showed that, after the trial on the merits, [the child's] teachers at Beth Tfiloh had noticed him exhibiting increased symptoms of anxiety, which included facial tics and writing and verbalizing themes of sadness and worry about family problems." *Id.* at 511.

We learn from *McCready* and *Bienenfeld* that an increase in a child's stress, anxiety, insecurity, or sadness resulting from a prior custody order may constitute a material change sufficient to warrant a reconsideration of the child's best interests. In addition, it is well settled that "the desire of an intelligent child who has reached the age of discretion should be given some consideration in determining custody," and the child's wish may

contribute to the consideration of whether there has been a change of circumstances necessitating modification of a prior custody order. *Sullivan v. Auslaender*, 12 Md. App. 1, 5-6, 276 A.2d 698 (1971) (citing *Radford v. Matczuk*, 223 Md. 483, 491, 164 A.2d 904 (1960)). "The weight to be given the wish of the child in a custody case depends on the contribution the reasons for that wish make to the solution of the ultimate test, the best interests and welfare of the child." *Auslaender*, 12 Md. App. at 5-6 (internal quotations omitted).

In its finding that the change in circumstances alleged by Father amounted simply to an attempt to relitigate an issue presented to the Virginia Juvenile Court, the circuit court focused on the twenty-six mile move from Alexandria, Virginia to Rockville, Maryland.[12] In itself, the twenty-six mile move would appear to have no direct or material relationship to the condition that Father seeks to modify. It does not affect adversely in any material way the visitation by Mother, who has been a resident of Florida for some time. Therefore, we agree with the circuit court that, in these circumstances, the twenty-six mile move, standing alone, would not constitute a material change in circumstance. We

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[12] In Virginia, as in Maryland, in some instances, a move by one parent can constitute a material change in circumstances requiring modification of a previous custody or visitation order. *See e.g.*, *Sullivan v. Knick*, 568 S.E.2d 430 (Va. App. 2002) (denying a custodial parent's request for out-of-state relocation where the move affected visitation of the non-custodial parent).

are persuaded, however, that the alleged change in circumstances cannot be reduced simply to a relocation to Maryland.

The circuit court concluded that the remainder of the allegations raised by Father in the pleadings were insufficient to "trigger an inquiry as to whether there has been a significant change of circumstances, which would justify modification of custody." In his affidavit offered in support of his motion for summary judgment, Father alleged, in relevant part:

> 3. Alex cried often and repeatedly and asked me why Blaise moved out and when he would move back in. Alex especially misses Blaise at bedtimes, because Blaise used to have a short chat with him before wishing him goodnight with a kiss and a hug. Alex also misses having Blaise around for such activities as family games, vacations, and dinner time together.
>
> 4. I have missed Blaise's support and help with Alexander. For example, when Blaise lived with us, he could help with dinner while I could work with Alex on his homework. Also, he would watch Alex when I attended workshops or meetings related to my work.
>
> 7. Based on conversations with my son and his behavior, it is my understanding that Alex would like to have Blaise move in to resume our normal routines as a family.
>
> 8. As Alex's father, I do not see it in his best interest to artificially restrict Blaise from sharing our home.
>
> 9. I have been renting our home in Rockville but could afford to buy a house, if Blaise were permitted to live with me. A permanent home would provide more long-term security and stability for raising Alex. (Blaise and I had owned a house together in Virginia from 1999,

but could no longer share it due to the Virginia Court Order.)

10. The fact that Blaise cannot live with us has worried Alex. He was especially upset during Hurricane Isabel last fall.

In her deposition, Mother stated that she opposed Delahoussaye's residing in the home with Alex because it would be a change of environment. She acknowledged, however, that she did not know whether Delahoussaye was a bad person, whether Alex demonstrated negative behaviors related to his contact with Delahoussaye, whether Alex's behavior had changed as the result of Delahoussaye's no longer living in the home, or whether permitting Delahoussaye to move back in with Alex and Father would represent an adverse change in environment.

In the context of a motion for summary judgment in a child custody dispute, we are persuaded that Father's affidavit and Mother's deposition testimony, viewed in the light most favorable to Father, are sufficient to create a dispute of material fact regarding whether the condition imposed by the Virginia Juvenile Court continues to be in Alex's best interests. By concluding that the motion for modification was simply an attempt to relitigate the issues presented to the Virginia Juvenile Court, the circuit court was, in effect, resolving a dispute of material fact that should have been resolved only after a full evidentiary hearing.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY GRANTING SUMMARY JUDGMENT REVERSED.

COSTS TO BE PAID BY APPELLEE.

JUN 1 6 REC'D