No. 04-FM-1230

DISTRICT OF COLUMBIA COURT OF APPEALS

INDIA FIELDS,

Appellant,

v.

GREGORY CONWAY,

Appellee.

Appeal from the Superior Court of the District of Columbia,
Family Division (No. DR-403-02)

BRIEF OF APPELLANT

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STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties to this case are India Fields, the defendant-appellant, and Gregory Conway, the plaintiff-appellee. Ms. Fields was represented in the trial court by The Legal Aid Society of the District of Columbia, including attorneys Rachel Halperin, Rahman Harrison, Sterling Ashby, Haimera Workie, Jonice Gray Tucker, and Juliette Williams Pryor. She is represented in this Court by Barbara McDowell of the Legal Aid Society. Mr. Conway was represented in the trial court initially by G. Arden Hill and subsequently by Robert L. Chaves. No intervenors or amici have appeared in this case.

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QUESTION PRESENTED

Under District of Columbia law, a trial court may modify a custody order entered with consent of the parties only if the movant proves, by a preponderance of the evidence, that "there has been a substantial and material change in circumstances and that the modification * * * is in the best interest of the child." D.C. Code 16-914(f)(1) and (2). In this case, the court modified a custody order, under which the mother had the right to unsupervised visits with her son, to impose a requirement that the visits occur at the Supervised Visitation Center. The court based the modification on its finding that the mother "is physically abusive toward the minor child and has allowed the minor child to be physically injured by a sibling." The question presented on this appeal is:

Whether the trial court abused its discretion in modifying the custody order when the only evidence supporting its requirement that visitation be supervised consisted of the three-year-old child's out-of-court statements that his mother struck him on one occasion and his brother struck him on another.

STATEMENT OF THE CASE

This is an appeal of a Memorandum and Order entered by the Superior Court (Vincent, J.) on September 1, 2004, that restricts appellant India Fields's visitation with her young son, Tyshe Fields, to the Supervised Visitation Center at the Courthouse. The order was entered on the motion of appellee Gregory Conway, the child's biological father, to modify a consent order that gave Ms. Fields unsupervised visitation with Tyshe for weekends and holidays.

STATEMENT OF FACTS

India Fields is the mother of Tyshe Fields, who was three years old at the time of the events at issue in this case, and Tyquan Fields, who was then six years old. The children have

different fathers. As the trial court recognized in an earlier ruling, Ms. Fields has "serious cognitive limitations." Order (R. 32), at 1; see Joint Pretrial Statement (R. 40), Addendum C, at 3, 4 (both parties acknowledge Ms. Fields's cognitive limitations).

For the first years of Tyshe's life, Ms. Fields was his primary caregiver. Tyshe lived with Ms. Fields and Tyquan. Mr. Conway, who was never married to Ms. Fields, did not share their home. See Joint Pretrial Statement 2 (agreed facts).

The Complaint: In February 2002, Mr. Conway initiated this case to obtain sole legal and physical custody of Tyshe. In his verified complaint, Mr. Conway alleged that he would be the preferable custodial parent because, inter alia, he "holds an associate degree," has a well-paying job with the District of Columbia government, and "provides a stable environment" for Tyshe. Complaint for Custody (R. 1), at 2. In contrast, he alleged, Ms. Fields "has no high school diploma," "fails to maintain employment, relying on public assistance to support her needs," "has a criminal record," and is HIV positive. Ibid.

Ms. Fields, initially proceeding pro se, filed a form answer and counterclaim. In the answer, Ms. Fields asserted that she "is a fit and proper person to have custody of the minor child." Contested Answer to Complaint for Custody and Counterclaim for Custody (R. 3), at 2.[1]

In February 2003, the court entered an order granting Mr. Conway pendente lite custody of Tyshe and granting Ms. Fields unsupervised weekend visitation. Order (R. 24), at 1. In July 2003, citing "mental health evaluations and home studies" that raised questions as to whether Ms. Fields's "cognitive limitations" might affect "her ability to competently parent the minor

[1] In the answer, Ms. Fields attempted to explain that the criminal charge against her was for conduct that she had not understood to be unlawful. Answer 4.

child," the court modified the pendente lite order to require that Ms. Fields's visitation with Tyshe be conducted under supervision. Order (R. 32), at 1, 2.

After that time, Ms. Fields entered the Strong Parents, Strong Children Parenting Program of the Catholic Charities of the Archdiocese of Washington. She received a certificate of successful completion of the program in November 2003. Def.'s Exh. 1 (R. 61).

The case meanwhile proceeded toward trial.

The Consent Custody Order: On December 22, 2003, the court entered a consent order that resolved issues of custody, visitation, and support. Under the terms of the order, Ms. Fields and Mr. Conway were to share legal custody of Tyshe, and were to "discuss and consult on all major issues involving the child's health, education, religion, discipline and other matters of major significance." Consent Custody Order (R. 49), at 1.[2] Mr. Conway was to be Tyshe's primary physical custodian. Ibid. Ms. Fields was to have unsupervised visitation with Tyshe every other weekend from Friday evening through Sunday evening; in addition, Ms. Fields was to have visitation for ten days in the summer, as well as on Christmas and other specified holidays in alternating years. Id. at 2. The court attached an addendum specifying that Ms. Fields would have visitation from December 25, 2003, until December 27, 2003. Id., Addendum 1.

On the evening of December 25, 2003, Mr. Conway delivered Tyshe to Ms. Fields's home for the Christmas visit, as directed by the court. Mr. Conway retrieved Tyshe on the evening of December 27, 2003. See 3/22/04 Tr. 9-10

The Motion to Modify: Six days later, Mr. Conway filed a Motion to Modify Consent Order (R. 50) based on events that allegedly occurred during Tyshe's Christmas visit with Ms. Fields. In a supporting affidavit, Mr. Conway stated that Tyshe "appeared to be ill" after his re-

[2] The order was entered by the court on December 22, 2003, but was not docketed until January 8, 2004, after the events at issue in this case.

turn from Ms. Fields's home, that he developed "a significant fever" within the next "several hours," and that Mr. Conway took him to the emergency room the following day. Aff. in Supp. of Pl.'s Mot. to Modify Consent Order, at 2. According to the affidavit, the physician who examined Tyshe in the emergency room "noticed a redness or bruise on [his] forehead" and three loose teeth. Ibid. The affidavit stated that Tyshe told the doctor that Ms. Fields "punched him with her fist in the head causing him to fall to the floor" and that Tyquan "punched him with his fist in the mouth." Ibid. The motion requested that Mr. Conway be granted sole legal custody of Tyshe and that Ms. Fields be permitted only supervised visitation. Mot. to Modify Consent Order 4.

In opposition to Mr. Conway's motion, Ms. Fields submitted an affidavit stating, inter alia, that "I did not punch Tyshe at any time during Tyshe's visit," "I did not observe Tyquan punch Tyshe at any time during Tyshe's visit," and "Tyshe also did not tell me at any time that Tyquan had punched him." Aff. in Supp. of Def.'s Opp'n to Pl.'s Mot. to Modify Consent Custody Order (R. 52), at 2. Ms. Fields also stated in the affidavit that she had not observed Tyshe to be ill during the visit. Ibid.

As an interim measure, the court "suspended" the consent custody order and directed that any visitation between Ms. Fields and Tyshe occur at the Supervised Visitation Center. Order (R. 53), at 1, 2.

The Evidentiary Hearing: On March 22, 2004, the court conducted the evidentiary hearing on Mr. Conway's motion.

At the outset of the hearing, the court admitted into evidence a report prepared by the District of Columbia's Child and Family Services Agency (CFSA) after its investigation of the alleged incident. Def.'s Exh. 2 (R. 62); see 3/22/04 Tr. 7. CFSA determined that "the incident

involving Tyshe Fields while visiting with his mother is inconclusive for hitting and inconclusive for lack of supervision." Def.'s Exh. 2, at 3. On the one hand, CFSA reported that Tyshe "stated that his mother hit him in the head with her fist, and that his older brother hit him in the mouth." Id. at 1. On the other hand, CFSA reported that Ms. Fields "stated that she did not hit her son" on that occasion and that, as a general matter, she "does not discipline her children with any objects or her hand"; Tyquan, in turn, "stated that he does not remember his brother getting a beating from his mother" and "denie[d] that he and his brother had a fight during the visit." Ibid. CFSA reported that Dr. Charles Lloyd, Tyshe's primary physician, stated that the child's medical chart did not contain any indication of child abuse; that Dr. James Mitchell, the emergency room physician, had not returned CFSA's telephone calls; and that Mr. Conway had not presented any "emergency room documentation" of child abuse. Id. at 2.

Mr. Conway testified consistently with his affidavit about Tyshe's illness after his return from Ms. Fields's home and about the trip to the emergency room. See 3/22/04 Tr. 8-29. He did not, however, testify that Tyshe had made any statements about having been hit by Ms. Fields or Tyquan during the Christmas visit. He acknowledged that he was not present during that visit to observe whether Ms. Fields or Tyquan hit Tyshe. Id. at 24-25. He stated that he had not noticed Tyshe's bruise or loose teeth until they were pointed out by Dr. Mitchell. Id. at 22-24. He also stated that he had not recognized that Tyshe was ill until some time after their return from Ms. Fields's home. Id. at 20.

Ms. Fields testified that she loves Tyshe and would never do anything to harm him. 3/22/04 Tr. 62. She stated that she does not hit her children. Id. at 55. She explained that she had voluntarily taken parenting classes that dealt with how to discipline children; for example, she stated that she learned to punish misbehavior by taking away toys or denying television

privileges. Id. at 54-55. More specifically, she testified that she did not hit Tyshe during his Christmas visit and that she did not see Tyquan hit Tyshe. Id. at 60-61. She stated that she did not leave Tyshe and Tyquan unattended during that visit. Id. at 57. She further stated that she did not observe Tyshe to have any bruises, red marks, or loose teeth during the visit. Id. at 61.

Joanne Reid, a former teacher with whom Ms. Fields lives, testified that she saw Tyshe at the beginning and the end of his Christmas visit with Ms. Fields. According to Ms. Reid, Tyshe spent the first night of the visit at her house, after which Ms. Fields took the children to stay with her mother, returning shortly before Mr. Conway picked up Tyshe. 3/22/04 Tr. 33. Ms. Reid testified that Ms. Fields disciplines her children by requiring them to sit down or to go to their room. Id. at 32. Ms. Reid stated that Tyshe and Tyquan "got along great" during the Christmas visit, and that she did not see Tyquan hit Tyshe. Id. at 33-34. Ms. Reid stated that Tyshe did not appear to be ill or to have any bruises or other injuries at the time that Mr. Conway picked him up from her house. Id. at 35-36, 39.

Marilyn Fields, Ms. Fields's mother, testified that Ms. Fields and the children stayed overnight at her house during Tyshe's Christmas visit. 3/22/04 Tr. 42. She stated that her daughter had not become angry with Tyshe during that stay. Id. at 43. She stated that she had never seen her daughter hit the children or otherwise cause them physical injury. Id. at. 41. She stated that Tyshe and Tyquan "got along fine" during the visit, and that she did not see Tyquan hit Tyshe. Id. at 42-43. She testified that Tyshe did not appear to be ill while he was at her house; nor did he appear to have any bruises or other injuries. Id. at 44.

Wabley Brinkley, Marilyn Fields's fiancé, testified that he spent time with Ms. Fields and her children during the Christmas visit. He stated that he did not see Ms. Fields become angry with Tyshe during the visit. 3/22/04 Tr. 50. He also stated that he did not see Tyquan hit Tyshe.

Ibid. He testified that Tyshe did not appear to be ill during the visit or to have any bruises or other injuries. Id. at 51.

Neither Tyshe nor Tyquan testified at the hearing.

The Court's Ruling. Five months after the hearing, the court issued its Memorandum and Order, which directed that "all visitation between [Tyshe] and [Ms. Fields] shall be supervised." Mem. & Order 6 (R. 64). Any such visitation was to occur at the Supervised Visitation Center, absent any different agreement of the parties or future order of the court. Ibid.

The court acknowledged that, under controlling law, the provisions of the consent order regarding Ms. Fields's right to unsupervised visitation with Tyshe could be modified only "upon a showing that there has been a substantial and material change in circumstances, and that the modification * * * is in the best interest of the child." Mem. & Order 4 (citing D.C. Code 16-914(f)). The court concluded, however, that Mr. Conway had made such a showing. Id. at 5.

Although the court noted "CFSA's finding of 'inconclusive' regarding the allegations that [Ms. Fields] and Tyquan Fields caused Tyshe's injuries," the court did not accord any weight to that finding. Mem. & Order 5. Instead, the court found that Ms. Fields "is physically abusive toward the minor child, and has allowed the minor child to be physically injured by a sibling." Ibid. The court disregarded the contrary testimony of Ms. Fields and her witnesses. The court suggested that Ms. Fields's "manner of testifying" cast doubt on her credibility, as did certain "inconsistencies" within her testimony and between her testimony and that of other witnesses. See id. at 2 n.1; id. at 3 nn. 2 and 3; id. at 4 n.5.

SUMMARY OF THE ARGUMENT

This is an appeal from the trial court's grant of a contested motion to modify a consent order addressing child custody, support, and visitation. This Court has recognized that a parent

bears "a heavy burden of persuasion" when seeking to modify such an order over the opposition of the other parent. Rice v. Rice, 415 A.2d 1378, 1383 (D.C. 1980). The trial court abused its discretion in holding that Mr. Conway, the moving parent, met that burden on the record here, and consequently restricting Ms. Fields's visits with the parties' young son to the Supervised Visitation Center.

The trial court rested its ruling on three-year-old Tyshe's out-of-court statements that, during a Christmas visit, Ms. Fields struck him in the head and his six-year-old brother, Tyquan, struck him in the mouth. Because Tyshe did not testify at the evidentiary hearing (or otherwise address the court), the court had no basis to assess the reliability of his hearsay statements. No witness at the hearing corroborated Tyshe's statements. To the contrary, Ms. Fields and others who were present during the Christmas visit testified that Ms. Fields did not strike Tyshe, that Tyquan did not strike Tyshe, and that Tyshe did not exhibit any injuries during the visit. On that record, the court was not justified in preferring Tyshe's account of the events at issue over the account of Ms. Fields and her witnesses. Indeed, the Child and Family Services Agency's report -- which contained the statements of Tyshe on which the court relied -- declined to draw any conclusions about whether Ms. Fields did, in fact, hit Tyshe or allow him to be hit by Tyquan.

It is no small matter for a court indefinitely to confine all contacts between a parent and a child to the Supervised Visitation Center. Such an order imposes a substantial burden on the parent's ability to maintain a relationship with the child. The Center is open for only limited hours; arranging for the parent and the child to meet at the Center during those hours can present logistical difficulties; and the Center's institutional atmosphere, in which all visitors are closely monitored, often strains the interactions between the parent and the child. While a court should order supervised visitation at the Center (or elsewhere) when a parent poses a threat to a child, a

court should not depart from ordinary standards and burdens of proof in assessing whether a threat exists. Too much is at stake for the parent-child relationship to give conclusive weight, as the court seemingly did here, to a three-year-old's hearsay statement to the effect that "Mommy hit me."

ARGUMENT

As this Court has recognized, a parent's "right of visitation is an important, natural and legal right" that, while "not an absolute right," is not to be denied unless "necessary to avoid harm to the child." Sampson v. Johnson, 846 A.2d 278, 279, 286 (D.C. 2004). Here, the trial court imposed a severe burden on Ms. Fields's right of visitation with her young son, Tyshe, without an adequate factual basis that she harmed the child in the past or would do so in the future. The court could only have reached its conclusion that Ms. Fields was "physically abusive" toward Tyshe by treating as dispositive the three-year-old child's out-of-court statements -- statements that were not corroborated by any witness before the court and that were contradicted by Ms. Fields and her witnesses. A court is obligated to engage in a far more rigorous inquiry before branding a parent as a child abuser and confining the parent's contact with the child to the Supervised Visitation Center.

I. THE MOVING PARTY MUST MEET A HEAVY BURDEN TO OBTAIN THE MODIFICATION OF A CUSTODY ORDER

"Under the governing statute, an order relating to custody may be modified only if the moving party shows 'that there has been a substantial and material change in circumstances and that such modification * * * is in the best interest of the child.'" Galbis v. Nadal, 734 A.2d 1094, 1102 (D.C. 1999); see D.C. Code 16-914(f)(1) and (2); see also, e.g., Rice, 415 A.2d at 1383 ("Any change justifying amendment of the decree must be both substantial and material to the child's welfare and best interests."); Dawn v. Dawn, 194 F.2d 895, 896 (D.C. Cir. 1952)

("Unless a showing is made that circumstances and conditions have so changed that the best interests of the child would be served by amending the custodial order, it cannot be amended.").

The party seeking the modification bears the burden of proving that the change in circumstances is "substantial," "material," and "in the best interest of the child." D.C. Code 16-914(f)(1) and (2); see, e.g., Galbis, 734 A.2d at 1102; Rice, 415 A.2d at 1383. This Court has recognized that imposing that "heavy burden of persuasion" on the movant serves salutary purposes, such as curbing "the evil of prolonged custody battles" and "the danger that children will be disturbed by changes in custody." Rice, 415 A.2d at 1383 (internal quotation marks and brackets omitted).

A trial court's ruling on a motion to modify a custody order is reviewed for abuse of discretion. See, e.g., Galbis, 734 A.2d at 1102. An abuse of discretion may occur when a trial court has "failed to consider a relevant factor" or "relied upon an improper factor," or when its "reasons given [do not] reasonably support the conclusion." Coulibaly v. Malaquias, 728 A.2d 595, 603 (D.C. 1999) (quoting Johnson v. United States, 398 A.2d 354, 365 (D.C. 1979)); see, e.g., In re T.L., 859 A.2d 1087, 1090 (D.C. 2004) ("Judicial discretion must be founded upon correct legal principles and must rest on a firm factual foundation."); In re A.S.C., 671 A.2d 942, 947 (D.C. 1996) (explaining that review under the abuse of discretion standard "requires this court to assure that the trial court has exercised its discretion within the range of permissible alternatives, having considered all relevant factors and no improper ones, and then to determine whether its decision is supported by substantial reasoning based upon a factual foundation in the record") (internal quotation marks omitted).

This Court has not hesitated to find an abuse of discretion when a trial court has modified a custody or support order without an adequate legal or factual basis. See, e.g., Foster-Gross v.

Puente, 656 A.2d 733, 737-738 (D.C. 1995) (holding that an order modifying custody was an abuse of discretion when the trial court applied an incorrect legal standard); Hamel v. Hamel, 539 A.2d 195, 200-203 (D.C. 1988) (holding that an order modifying spousal support was an abuse of discretion when the trial court relied upon improper considerations); Rice, 415 A.2d at 1380-1381, 1383 (holding that an order modifying custody was an abuse of discretion when the record did not contain sufficient facts to establish a material change in circumstances).

II. THE TRIAL COURT DID NOT HAVE AN ADEQUATE FACTUAL BASIS TO FIND A 'SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES' THAT JUSTIFIED SEVERELY RESTRICTING MS. FIELDS'S VISITATION WITH HER CHILD

The trial court concluded that Mr. Conway had met his burden of proving "a substantial and material change in circumstances, i.e., that the defendant is physically abusive toward the minor child, and has allowed the minor child to be physically injured by a sibling." Mem. & Order 5. The court did not specify what evidence it relied upon to reach that conclusion. Nor does the record contain sufficient evidence to sustain such a conclusion.

A. The trial court could only have relied for that conclusion on two purported out-of-court statements by Tyshe -- one described in the report of the Child and Family Services Agency (CFSA) and one described in Mr. Conway's affidavit in support of his motion to modify. Only the first of those two documents was admitted into evidence for any purpose.

The CFSA report summarily states that Tyshe told the investigator "that his mother hit him in the head with her fist, and that his older brother hit him in the mouth." Def.'s Exh. 2, at 1. The report further states, however, that Ms. Fields and Tyquan denied hitting Tyshe (or seeing the other hit Tyshe). See ibid. The report does not reach any conclusions as to whether Tyshe was more believable on this critical issue than were Ms. Fields and Tyquan. It states simply that the incident "is inconclusive for hitting and inconclusive for lack of supervision." Id. at 3. The

CFSA report thus gave the court no warrant to credit Tyshe's account of the Christmas visit over Ms. Fields's and Tyquan's.[3]

What is more, Ms. Fields testified at the evidentiary hearing that she did not hit Tyshe and did not see Tyquan hit Tyshe. See 3/22/04 Tr. 60-61. Three additional witnesses, who had the opportunity to observe Ms. Fields and her children during the Christmas visit, gave similar testimony. They testified that they did not see Ms. Fields hit Tyshe or become angry with him, that they did not see Tyquan hit Tyshe, and that they did not observe Tyshe to have any bruise or other injuries. See id. at 32, 33-34, 35, 39 (testimony of Joanne Reid); id. at 41-44 (testimony of Marilyn Fields); id. at 50-51 (testimony of Wabley Brinkley).

In the face of that evidence supporting Ms. Fields's account of the Christmas visit, Mr. Conway presented essentially nothing. Mr. Conway did not call Tyshe as a witness (or propose an alternative mechanism by which the trial court could hear from Tyshe). See In re Ko.W., 774 A.2d 296, 306 n.12 (D.C. 2001) ("Although we do not suggest that in-court testimony by [a child who alleged that his father had abused him] is the only possible way of ascertaining the facts, it is significant that none of these accusations has been tested by cross examination, which is the greatest legal engine ever invented for the discovery of truth.") (internal quotation marks and ci-

[3] The trial court did not indicate at the evidentiary hearing (or at any other time before its issuance of the ruling at issue) that it intended to rely on Tyshe's out-of-court statements in the CFSA report for their truth. It is thus unsurprising that Ms. Fields's counsel did not object on hearsay grounds to the trial court's use of the CFSA report for that purpose. The court did not identify any exception to the hearsay rule that would have permitted such use. See, e.g., Leiken v. Wilson, 445 A.2d 993, 996 n.1 (D.C. 1982) ("Factual observations in a police report may be admissible under the business records exception to the hearsay rule if made and reported in the regular course of business. Statements of third parties recorded in police reports may be admissible if they fall within another exception to the hearsay rule, such as the exception for admissions.") (internal citations omitted); Sellman v. United States, 386 A.2d 303, 306 (D.C. 1978) ("The business records exception to the hearsay rule permits the introduction of the [police] report to prove that the victim described her assailant in certain terms. * * * But in order for the report to be admissible for the truth of the victim's statement rather than for the fact that she made it, the victim's statement must fall within an independent exception to the hearsay rule.").

tations omitted). Mr. Conway did not call as a witness the emergency room physician who allegedly noticed Tyshe's injuries and spoke with him about their cause. Mr. Conway did not even testify himself about any statement that he allegedly heard Tyshe make about having been hit by Ms. Fields or Tyquan. Nor did Mr. Conway present any admissible evidence beyond his own testimony about the existence, nature, or extent of any injuries to Tyshe.[4]

Arguably, even if Ms. Fields had the burden of proving that she was not "physically abusive toward the minor child" and did not "allow[] the minor child to be physically injured by a sibling" (Mem. & Order 5), the trial court should have held that she met that burden on the record here. But the law placed the burden on Mr. Conway to prove that Tyshe was injured as a result of Ms. Fields's act or neglect. Mr. Conway did not come close to doing so. The court's contrary conclusion constitutes an abuse of discretion because it does not "rest on a firm factual foundation." In re T.L., 859 A.2d at 1090.

B. The trial court "question[ed] the overall credibility of [Ms. Fields's] testimony," both because of Ms. Fields's "manner of testifying" and because of "inconsistencies" in Ms. Fields's and her witnesses' testimony. Mem. & Order 3 n.2; see id. at 2 n.1, 3 n.3. On the record here, however, such credibility findings (much less mere credibility "question[s]") cannot insulate the court's ruling from reversal. See, e.g., Eilers v. District of Columbia Bureau of Motor Vehicles Servs., 583 A.2d 677, 685 (D.C. 1990) (observing that, "[t]he limitations of 'cold' transcripts

[4] As noted in the text, although Mr. Conway did not testify at the hearing that Tyshe claimed to have been hit by Ms. Fields and Tyquan, Mr. Conway did state in his earlier affidavit that Tyshe told the emergency room physician that Ms. Fields "punched him with her fist in the head" and Tyquan "punched him with his fist in the mouth." Aff. in Supp. of Pl.'s Mot. to Modify Consent Order 2. The affidavit was not offered into evidence at the hearing. Because Mr. Conway did not testify about Tyshe's statements, the court had no opportunity to evaluate Mr. Conway's credibility as to whether Tyshe actually made them. As explained in the text, moreover, because Tyshe did not testify at the hearing, the court had no opportunity to evaluate his credibility on any matter.

notwithstanding," a reviewing court may disregard credibility findings that are "unreasonable, self-contradictory or based on inadequate reasoning") (quoting Midwest Stock Exch., Inc. v. NLRB, 635 F.2d 1255, 1265 (7th Cir. 1980)).

First, the trial court did not identify what about Ms. Fields's "manner of testifying" raised "question[s]" about her credibility. Mem. & Order 3 n.2. If there had been anything out of the ordinary in Ms. Fields's demeanor on the witness stand, it might well have been attributable not to any untruthfulness on her part, but to what the court previously recognized to be her "serious cognitive limitations." Order (R. 32), at 1. Nothing in the ruling under review suggests that the court adequately considered that alternative explanation for whatever it found peculiar about Ms. Fields's "manner of testifying." A court's obligation to afford reasonable accommodation to individuals with physical or mental disabilities -- see, e.g., 42 U.S.C. 12131-12134 (relevant provisions of the Americans With Disabilities Act); Tennessee v. Lane, 541 U.S. 509 (2004) -- surely requires sensitivity to whether a disability may adversely affect how litigants and witnesses present themselves to the court.[5]

Second, to the extent that the trial court identified a few specific "inconsistencies" in Ms. Fields's and other witnesses' testimony, they related to tangential issues, such as whether Tyshe arrived at Ms. Fields's home on Christmas Eve or Christmas Day (Mem. & Order 2 n. 1), whether Ms. Reid was visibly ill during the visit (ibid.), or whether Ms. Fields gave Tyshe one bath or two at her mother's home (id. at 3 n.3). This Court has recognized that, when witnesses

[5] Studies have found that jurors encounter difficulty in accurately assessing the credibility of witnesses with mental illness or mental retardation. See Steven I. Friedland, On Common Sense and the Evaluation of Witness Credibility, 40 Case W. Res. L. Rev. 165, 179, 186 (1990). Courts sometimes permit expert testimony on such matters in order to prevent jurors' credibility assessments from being influenced by erroneous assumptions and stereotypes. See, e.g., New York v. Parks, 359 N.E.2d 358, 366-367 (N.Y. 1976).

are "almost always in full agreement" in their testimony about "the main events" in the case, the witnesses' credibility is not undermined by "inconsistencies and contradictions" in their testimony about "collateral details." In re A.H.B., 491 A.2d 490, 496 (D.C. 1985). As the Court explained, "[a] witness may be inaccurate, contradictory and even untruthful in some respects and yet be entirely credible in the essentials of his testimony." Ibid. (quoting United States v. Tropiano, 418 F.3d 1069, 1074 (2d Cir. 1969)). Here, as noted, Ms. Fields and her three witnesses agreed about "the main events" in this case: whether or not Tyshe was hit by Ms. Fields or Tyquan during the Christmas visit and whether or not Tyshe displayed bruises or other indicia of abuse during the visit. Any divergence in the witnesses' testimony was confined to "collateral details."

Third, some of the grounds that the trial court offered for questioning Ms. Fields's credibility are not "supported by substantial reasoning based upon a factual foundation in the record." In re A.S.C., 671 A.2d at 947 For example, the court apparently found improbably and thus "d[id] not credit [Ms. Fields's] testimony that Tyshe and his brother were at all times under her observation." Mem. & Order 3 n.2. What Ms. Fields actually testified is that she did not leave the children "unattended" at her mother's house (3/22/04 Tr. 57): that she was "with the kids the entire time they were taking a bath" at her mother's house (id. at 58); that the boys were never "upstairs alone in [her] room" at Ms. Reid's house (id. at 64); and that "the boys were [never] alone" (ibid.). There is nothing improbable about this testimony. It does not, as the court may have perceived, necessarily indicate that Ms. Fields never let the children out of her sight for the entire two-day visit. It does indicate, however, that Ms. Fields was constantly in the home with the children (as were other adults), and was in their immediate presence while they were bathing

and upstairs at Ms. Reid's. That is the sort of supervision that one might reasonably expect of children of the ages of Tyshe and Tyquan.[6]

Finally, the trial court did not, and could not, measure the credibility of Ms. Fields and her witnesses against the credibility of any witness who gave a contrary account of Tyshe's Christmas visit. No such witness appeared before the court. The court was not entitled simply to assume that Tyshe would have been a more credible witness than his mother had he testified (consistent with his statement to the CFSA investigator) that his mother and his brother hit him during the visit. See In re Ko.W., 774 A.2d at 306 & n.12 (noting the importance of "testing by cross examination" of a child's accusations of abuse against a parent). If anything, the CFSA investigator's conclusion that the incident was "inconclusive for hitting and inconclusive for lack of supervision" suggests that the investigator, who (unlike the court) personally spoke with the individuals involved, did not find Tyshe to be more credible than Ms. Fields and Tyquan.

Indeed, the law recognizes that the testimony of very young children, such as Tyshe here, may present particular concerns as to reliability. In cases in which a party seeks to call a child as a witness, this Court has directed trial judges to make a threshold determination of competency, which requires that "(1) the child must be able to recall the events which are the subject of the testimony; and (2) the child must understand the difference between truth and falsehood and ap-

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[6] Nor did the trial court have any reasoned basis for questioning Ms. Fields's credibility on the ground that, while she reportedly told the CFSA investigator "that any injury suffered by [Tyshe] happened while [he] was playing with his brother and cousin," she did not offer any testimony at the hearing about a cousin's having been present during the Christmas visit. Mem. & Order 4 n.5. Presumably, when Ms. Fields's referred to Tyshe's "cousin" in her conversation with the CFSA investigator, Ms. Fields was referring to the cousin who shares Mr. Conway's home. See Order (R. 24), at 1 (trial court's February 2003 finding that Mr. Conway "lives with his sister and her eleven-year-old daughter"). It would have been reasonable for Ms. Fields to suggest that Tyshe might have sustained the injuries while playing with that cousin before or after the Christmas visit at issue. Nothing in the CFSA report indicates that Ms. Fields was implying that the cousin was present during the Christmas visit.

preciate the duty to tell the truth." Barnes v. United States, 600 A.2d 821, 823 (D.C. 1991); accord, e.g., Wheeler v. United States, 159 U.S. 523, 524 (1895). Even after a child has been found competent to testify, the jury is often specifically instructed to "consider the capacity of a child witness to distinguish truth from falsehood and to appreciate the seriousness of his/her testimony," and is sometimes also told that "children may be more suggestible than adults." Brown v. United States, 840 A.2d 82, 95 n.22 (D.C. 2004) (quoting standard criminal jury instruction; affirming conviction when the jury was instructed more generally to consider "the age of the witness and the capacity of the witness to distinguish truth from falsehood"); see Barnes, 600 A.2d at 824-825 n.6 (affirming conviction when the jury was instructed, inter alia, that "children may be more suggestible than adults"); Barrera v. United States, 599 A.2d 1119, 1127 n.6 (D.C. 1991) (affirming conviction when the jury was instructed, inter alia, that "[c]hildren may not have a full understanding of the serious consequences of the charges they make or the testimony they give").

Here, of course, the trial court was not in any position to make an assessment of three-year-old Tyshe's ability to distinguish truth from falsehood, of his suggestibility, or of his ability to recall the events at issue. In such circumstances, the court erred in holding that Mr. Conway had proved that Ms. Fields was physically abusive and neglectful toward Tyshe based on nothing more than Mr. Conway's testimony that Tyshe had suffered injuries and Tyshe's out-of-court statements that his mother and brother had hit him.

C. Even if the record would have permitted the trial court to find that Ms. Fields or Tyquan struck Tyshe on the single occasion at issue, that would not be sufficient to establish, as the court assumed, the sort of "substantial and material change in circumstances" that justifies modification of the consent custody order. While many might wish for a world in which a parent

never laid a hand on a child, and a sibling never laid a hand on a sibling, the law does not impose that unrealistic standard of conduct on parents or siblings. It is not uncommon in the real world for a parent to slap or spank a misbehaving child -- sometimes with more impact than the parent intended, causing the child to suffer a bruise, a scratch, or a similar, relatively minor injury. It is likewise not uncommon in the real world for young siblings to engage in roughhousing, which may result in physical injuries (ranging from cuts and bruises to loose teeth and broken bones) before a parent intervenes. When such incidents occur, as they do countless times each day in the District, the law ordinarily does not intervene to restrict parents' rights with respect to their children. See, e.g., In re G.H., 797 A.2d 679, 684 (D.C. 2002) ("Our neglect statute does not proscribe all physical chastisement of a child by a parent or by one acting in loco parentis. On the contrary, the legislature's prohibition of 'excessive corporal punishment' in § 16-2301(23) (emphasis added) necessarily means that non-excessive corporal punishment does not constitute child abuse."). No more onerous standard should apply to Ms. Fields merely because she was a party to a private custody case.

To be sure, a single application of physical force by a parent could, in egregious circumstances, warrant legal intervention to restrict custody or visitation. Here, however, even if one were to assume the truth of Tyshe's out-of-court statements, the record would not permit the conclusion that Ms. Fields's conduct was of that character. For example, one could not ascertain from those statements whether Tyshe's injuries were caused by Ms. Fields's (allegedly) hitting him in the head, or by Tyquan's (allegedly) hitting him in the mouth, or by some unrelated event. A child's being struck by a sibling during horseplay with enough force to loosen teeth would not, of course, raise the same concerns as a child's being struck by a parent in anger to similar effect. Cf. A.J. v. L.O., 697 A.2d 1189, 1193 (D.C. 1997) (observing that, if a parent's custody of a

child could be challenged by a non-parent based on such "commonplace" events as "a child cutting his head playing in the yard," "it would be the rare parent indeed who could not be vulnerable"). And, in any event, it would be inappropriate to assume the truth of Tyshe's out-of-court statements, for the reasons explained above.

III. IN VIEW OF THE SEVERE BURDEN IMPOSED ON THE PARENT-CHILD RELATIONSHIP BY SUPERVISED VISITATION, A SEARCHING INQUIRY IS REQUIRED INTO CLAIMS THAT A PARENT POSES A THREAT TO A CHILD

Although the trial court's order permitting Ms. Fields to see Tyshe only at the Supervised Visitation Center does not effect a total denial of her "important, natural and legal right" of visitation with her son, Sampson, 846 A.2d at 279, the order does substantially burden her exercise of that right for an indefinite period of time. Such an order should not be entered lightly.

The Supervised Visitation Center is open only for limited hours.[7] Arrangements must be made for the parent and the child to travel to the Center, which may be some distance from their homes, and which may be costly for low-income individuals such as Ms. Fields to travel to and from on a regular basis.[8] Both the non-custodial parent and the custodial parent may have to make adjustments in their work or family responsibilities in order for visitation to occur at the Center.

Necessarily, perhaps, the atmosphere in the Supervised Visitation Center is institutional, and thus is a somewhat artificial one for parents and children to interact with one another. All

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[7] The Center is closed on Monday and Tuesday. It is open for two hours (6 p.m. to 8 p.m.) on Wednesday, Thursday, and Friday; for six hours (9 a.m. to 4 p.m.) on Saturday; and for five hours (noon to 5 p.m.) on Sunday. See Superior Court of DC: Supervised Visitation Center, http://www.dccourts.gov/dccourts/superior/dv/visitation.jsp (visited April 28, 2005).

[8] See, e.g., Welcome to the District of Columbia Courts: Getting Here, http://www.dccourts.gov/dccourts/about/gethere.jsp (visited April 28, 2005) ("On-street parking in the Judiciary Square area is extremely limited. Therefore, we encourage public transportation. Parking is available in commercial garages for 412 to $15 per day.").

visitation occurs within the confines of a single room, in the presence of Center personnel, other parents, and their children. All contacts between parent and child are closely monitored. The parent cannot take the child outside even for a few minutes. Such conditions pose challenges to establishing or preserving the sort of relations that ordinarily exist between a parent and a child.[9]

None of this is to deny that the Center may often be an appropriate option -- perhaps the most appropriate option -- when a court has an adequate evidentiary basis to find that a parent poses a threat to a child's safety. (Or when the allegations against a parent are sufficiently serious to order visitation at the Center as an interim measure until the court is in a position to conduct a full evidentiary hearing on the matter.) But a court should not force parents and children into the Center without having engaging in a searching inquiry into whether a bona fide threat exists to the child exists. No such inquiry occurred here. As explained above, the court failed to adhere to ordinary standards and burdens of proof, instead simply assuming the truth of a three-year-old child's uncorroborated out-of-court statements. To do so was an abuse of discretion on the record of this case.

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[9] See, e.g., Jessica Pearson and Nancy Thoennes, Supervised Visitation: The Families and Their Experiences, 38 Fam. & Council. Cts. Rev. 123, 136 (Jan. 2000) (reporting survey results that "[a]t least a quarter of the visiting parents" stated "that the children were not comfortable during visits" and that "almost a third" of those parents stated that they had not "been able to relax and enjoy the time with their children"); Karen Oehme, Supervised Visitation Programs in Florida: A Cause for Optimism, a Call for Caution, 71 Fla. Bar J. 50, 54 (Feb. 1997) (noting "the obvious restrictions that institutional supervised visitation places in developing a parent-child bond").

CONCLUSION

The trial court's Memorandum and Order granting appellee's motion to modify the consent custody order should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

Section 16-914(f) of the District of Columbia Code provides:

(1) An award of custody may be modified or terminated upon the motion of one or both parents, or on the Court's own motion, upon a determination that there has been a substantial and material change in circumstances and that the modification or termination is in the best interest of the child.

(2) When a motion to modify custody is filed, the burden of proof is on the party seeking a change, and the standard of proof shall be by a preponderance of the evidence.

(3) The provisions of this chapter shall apply to motions to modify or terminate any award of custody filed after April 18, 1996.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2005, I caused a true and correct copy of the foregoing Brief of Appellant to be deposited in the first-class mail, postage prepaid, addressed to:

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