UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0051

September Term, 2016

KAYLA B. REX

v.

MATTHEW L. REX

Wright,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 3, 2017

The parties to this case, Kayla B. Rex, appellant ("Mother"), and Matthew L. Rex, appellee ("Father"), are the parents of a minor child, Jackson T. Rex ("Jackson"), who is the subject of these proceedings. On January 19, 2016, after hearing testimony and argument over a period of two days in December of 2015, the Circuit Court for Caroline County issued a memorandum opinion and order divorcing the parties, granting joint legal custody of Jackson, and awarding primary residential custody to Father during the school year, with access to Mother every other Tuesday and Thursday, and the first and third weekend of every month, with shared physical custody during the summer school holiday by alternating weeks.

On January 21, 2016, Mother filed a motion to alter or amend, which was answered on February 5, 2016, and denied on February 17, 2016. Mother noted her appeal on March 11, 2016.

For the following reasons, we affirm the decision of the circuit court.

QUESTIONS PRESENTED

I. Did the trial court err and/or abuse its discretion when it changed the physical custody schedule of the minor child without making factual findings as required by *Montgomery County v. Sanders*, 38 Md. App. 406 (1978)?

II. Did the trial court err when it failed to strike the remarks and recommendations of Child's Best Interest Attorney?

FACTS

The parties were married on January 1, 2012, and separated in January of 2014. Jackson, their son, was born prior to their marriage, on August 2, 2011. When the parties separated in January of 2014, Jackson was attending the Brenda Pepper day care home in

Denton, and the parties evenly shared physical custody. Father is employed by his family's construction business, while Mother is employed by a veterinary office.

Shortly after the separation, there was an altercation between the parties. Mother testified that Father pushed her into the bathroom counter, causing injury, which he denied. Father concedes that an argument occurred, the genesis of which was his belief that Mother was engaged in a party lifestyle at the expense of Jackson. Mother filed a petition for protection from the domestic violence in the District Court for Caroline County and obtained a temporary order directing that Father have no contact with Mother except to arrange for visitation. At the hearing conducted on February 4, 2014, Father consented to the entry of a final order without the taking of any testimony or finding by the court that any abuse occurred. The district court directed that custody of the child was to remain joint and it prohibited contact between the parties except to arrange for access to the child. The court lifted the no contact restriction on May 9, 2014, at Mother's request.

From February 2014 through March of 2015, the parties seemingly peacefully shared physical custody of Jackson, who was shuttled back and forth between Father's home in Burrsvile, Mother's home in Federalsburg and later, Preston, and Ms. Pepper's day care home.

In October of 2014, Mother moved into the home of her boyfriend, Mason Platzke ("Platzke"), in Preston, Maryland.

In March of 2015, the parties were unable to reach an agreement regarding where Jackson would attend school. Mother, without Father's knowledge, submitted a Caroline

County Public School enrollment form for Jackson on March 27, 2015, listing his address as her residence and identifying only her parents and her boyfriend as authorized emergency contacts.

On April 6, 2015, after Ms. Pepper informed Mother that Father had stated an intent to remove Jackson from Maryland, Mother filed a petition for protection from abuse and received a temporary order granting her physical custody of Jackson.

A final protective order hearing was conducted in the district court on April 14, 2015. At that time, Father had gone for over ten days without seeing Jackson. After considering the testimony from both parties, the court denied Mother's petition. According to Father, immediately following the hearing and while still in the courthouse, he asked Mother to see Jackson, which she refused, telling him that she wanted a written agreement regarding Jackson's custody before he could see Jackson.

That same day, Mother filed an application for statement of charges against Father for the incident in their home in January of 2014. Also on that day, Father filed an amended complaint seeking sole legal and physical custody of Jackson.

Mother did not permit Father to have access to Jackson until April 23, 2015, when "under protest" the parties signed a temporary *pendent lite* order. The order was not signed by the court.

The parties continued to experience co-parenting challenges throughout the Summer. Mother refused to permit Father to see Jackson on Father's Day, and on July 28, 2015, Platzke filed criminal charges against Father for malicious destruction of property for an event that allegedly occurred in February 2013. The charges were *nolle*

prossed by the State. Platzke also filed civil charges against Father for the same alleged February 2013 incident, which resulted in a trial and a verdict in favor of Father.

By August of 2015, the parties agreed that Jackson would attend afternoon kindergarten at Denton Elementary in the Fall of 2015, and he would attend Denton Child Development Center before and after school. In November of 2015, Mother chose to hire a babysitter to care for Jackson when he was sick, rather than let Father take care of him. Mother also cancelled a well-child doctor appointment when she could not attend, without providing timely notice to Father.

The circuit court described at length its fact-finding regarding the parties' employment, homes, and child care arrangement, including the finding that "[t]here is no evidence that either home is inappropriate or deficient in any physical way." The court also noted, "Father and his mother report that Jackson is often tired and hungry when the exchange occurs between the homes. Father believes Mother keeps Jackson out too late and does not keep him on a schedule."

The circuit court set forth its decision as follows:

> Several facts are abundantly clear to this Court after hearing two days of testimony and considering the numerous exhibits presented. In the first year of their separation, the parties were able to maintain a shared custodial arrangement without the intervention of the court until the late winter, early spring of last year when choices made by each of them caused their fragile relationship to deteriorate dramatically. Inflamed by various court proceedings, one of which was recently initiated by Mr. Platzke, Father does not trust the Mother and has concerns that contact with her may result in his being embroiled in ancillary court proceedings. Mother at one time believed that Father was going to abscond with Jackson to another State, leading her to file the temporary protective order referenced above. Additionally, it is clear that Mother does not care for the paternal

> grandparents upon whom the Father relied heavily, especially his mother. This lack of mutual trust has lead (sic) to communication solely by text . . .
>
> Using past behavior as a harbinger of things to come, maintaining the "3 – 3 – 2" schedule would not be in Jackson's best interest, especially considering that all day kindergarten starts in the Fall of 2016. The challenge for this Court is to determine what arrangement is in the best interest of Jackson. Considering the factors outlined in *Taylor v. Taylor*, 306 Md. 290 (1986), and the numerous appellate cases that have followed, the paramount concern of this Court is the demonstrated difficulty in communication between the parties and Mother's manipulation of the schedule at times with no sound reason. This Court concludes that Father is in the better position to exercise residential custody of Jackson during the school year, providing Mother with maximum access to Jackson, but that the parties share physical custody during the summer school break.

Additional facts will be provided as they become relevant to our discussion.

DISCUSSION

"For cases involving the custody of children generally, our precedents establish a three part review of the decisions of the lower courts, addressing the findings of fact, conclusions at law, and the determination of the court as a whole." *In re Yve S.*, 373 Md. 551, 584 (2003). In sum:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8-131(c)] applies. If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

Sider v. Sider, 334 Md. 512, 534 (1994) (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1977)); *accord In re Yve S.*, 373 Md. at 584-86. An abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court" or when the court

acts "without reference to any guiding rules or principles." *In re Adoption/Guardianship No.* 3598, 347 Md. 295, 312 (1997) (citations omitted). "Additionally, the trial court's opportunity to observe the demeanor and credibility of the parties and witnesses is of particular importance." *Wagner v. Wagner*, 109 Md. App. 1, 40 (1996) (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). Thus, "the chancellor's decision is unlikely to be overturned on appeal." *Id.* (citations omitted).

I. Physical Custody Schedule

Mother avers that the circuit court erred or abused its discretion when it changed the physical custody schedule of Jackson, because the court did not make factual findings as required by *Sanders, supra*, or because it did not state its reasons and thus, "failed to provide a proper platform for its exercise of discretion[.]" Mother asks that we vacate and remand for further proceedings.

Father responds that the circuit court did not abuse its discretion, but rather that after hearing significant evidence, finding facts, and considering the best interest of the child, the court communicated that it reasonably concluded that the lack of communication and Mother's behavior had an adverse effect on the child. We agree.

Before turning to our analysis, it is important to distinguish joint legal custody from primary physical custody. Here, the parties share joint legal custody, which is not being challenged. Rather, Mother challenges the circuit court's decision to grant primary physical custody to Father, without enumerating the court's consideration of the *Sanders* factors.

"Consistently, the courts of Maryland have endeavored, in custody cases, to look to the 'best interest' of the child." *Sanders*, 38 Md. App. at 407 (citations omitted). The enumerated criteria listed in *Sanders* have been the guiding principles in custody decision making and aid the courts in determining what parenting arrangement achieves the "best interest" standard for each child before the court. The criteria for judicial determination of custody include, but is not limited to:

> (1) fitness of the parents;
> (2) character and reputation of the parties;
> (3) desire of the natural parents and agreements between the parties;
> (4) potentiality of maintaining natural family relationships;
> (5) preference of the child;
> (6) material opportunities affecting the future life of the child;
> (7) age, health and sex of the child;
> (8) residences of parents and opportunity for visitation;
> (9) length of separation from the natural parents;
> (10) prior voluntary abandonment or surrender.

Id. at 420 (internal citations omitted).

Since *Sanders*, Maryland's appellate courts have repeatedly discussed and reaffirmed the "best interest" standard. In *Taylor v. Taylor*, 306 Md. 290, 303 (1985), the Court of Appeals stated:

> Formula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made. At best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but in doing so we recognize that none has talismanic qualities, and that no single list of criteria will satisfy the demands of every case.
>
> We emphasize that in any child custody case, the paramount concern is the best interest of the child. As Judge Orth [wrote], we have variously characterized this standard as being "of transcendent importance" and the "sole question." The best interest of the child is therefore not considered as

> one of many factors, but as the objective to which virtually all other factors speak.

Mother avers that the circuit court's reliance on *Taylor* was inappropriate because in *Taylor*, the Court was primarily addressing joint legal custody. We disagree and reiterate that joint legal custody factors are considered "as a part of the overall consideration of a custody dispute[,]" and that the "availability of joint custody, in any of its multiple forms, is but another option available to the trial judge." *Id.* Therefore, "the factors that trial judges ordinarily consider in child custody cases remain relevant" and a number of the factors enumerated in *Taylor* regarding joint legal custody were specifically noted to also be relevant in the decision regarding the "consideration of shared physical custody." *Id.* at 304-11.

This Court recently again restated the wide latitude that courts have in custody decision making, and that they must "examine 'numerous factors' and weigh the advantages and disadvantages of the alternative environments." *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013) (citation omitted).

Mother attempts to persuade us that the circuit court failed to adequately examine the *Sanders* factors, although she concedes that the court did indeed make some factual findings related to them. She further avers that the court's order failed to comply with Md. Rule 2-522(a), which requires that in a "contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision . . . ." However, in looking at the order itself, it

is clear that the court offered a clear reason for its conclusion and the case law on which it relied.

We believe, that the circuit court appropriately focused its attention on Jackson's best interest. To the contrary, Mother avers that the court failed to root its assessment of best interest in the appropriate factors, and that the order lacks logically directed reason. However, the court's order included an evaluation of the parties' incomes, residences, and declared that both parents are fit. The court then stated:

> The challenge for this Court is to determine what arrangement is in the best interests of Jackson. Considering the factors outlined in *Taylor v. Taylor*, 306 Md. 290 (1986), and the numerous appellate cases that have followed, the paramount concern of this Court is the *demonstrated difficulty in communication between the parties* and Mother's manipulation of the schedule at times with no sound reason. This Court concludes that Father is in the better position to exercise residential custody of Jackson during the school year, providing Mother with *maximum access* to Jackson . . . .

(Emphasis added). The circuit court relied on *Taylor*, where the Court of Appeals stated that the capacity of the parents to communicate, "is relevant . . . to a consideration of shared physical custody." *Taylor*, 306 Md. at 304. The court further alluded to reliance on *Boswell v. Boswell*, 352 Md. 204, 220 (1998) (stating that "reasonable maximum" time with the child is ideal). From these references alone, we cannot say that the court acted "without references to any guiding rules or principles." *In re Adoption/Guardianship No.* 3598, 347 Md. at 312.

Rather, we reiterate the Court of Appeals's position "that no single list of criteria will satisfy the demands of every case." *Taylor*, 306 Md. at 303. Here, the circuit court clearly evaluated a number of the relevant factors named in *Sanders*, and then reasonably

prioritized a key factor later named in *Taylor*. The decision to do so is within the court's discretion, and one that we affirm.

II. Remarks and Recommendations of the Child's Best Interest Attorney

Next, Mother avers that the circuit court erred when it failed to strike remarks made by, Mr. Joyce, the child's best interest attorney. Father responds that this issue was not preserved during the proceedings, and that even if it was, any error was harmless.

Maryland Code (1984, 2012 Repl. Vol.), Family Law Article § 1-202 authorizes appointment of counsel for a minor choice as a best interest attorney. Section 2.2 of the Maryland Guidelines for Court Appointed Lawyers defines the role and activities of a best interest attorney and notes that a best interest attorney "advances a position that the attorney believes is in the child's best interest," but that the attorney "shall not testify at trial or file a report with the court."

Mother avers that the circuit court erred by permitting Mr. Joyce to make custody recommendations and behavioral observations in his opening statement, by failing to strike the remarks upon her objection, by allowing him to make recommendations in his closing, and by overstepping his role during witness examination.

Mr. Casey, counsel for Mother, objected to Mr. Joyce's statements or questions throughout the hearing. The objections were at sometimes ambiguous. We will discuss below the most relevant of these objections.

During opening statements, Mr. Joyce told the circuit court about Jackson's personal interests and made the recommendation not to continue "fifty, fifty custody" and "not to continue any sort of joint legal custody" due to changes observed in Jackson's

behavior. He then recounted the legal history between the parties, the conditions of the exchange of Jackson between the parties at his office, and behavioral observations. At the conclusion of his statement, Mr. Casey made an objection for the record, stating:

> Concerning Child Counsel's remarks to the Court in opening. Um, I believe counsel was appointed in the role pursuant to the Maryland Rules to be Child's Counsel and therefore to have the role identical to that of Ms. Jennings and I, being in the best interest attorney in this, not a witness. So, I don't know, but I do want to object to the extent that he, is stating his personal observation as a witness. I can't cross examine him. I think the rules are clear that he's not to be a witness, nor is he to give a report to the Court. But is to participate as an attorney in the matter. And so I would object to what he . . . to everything he said, cause it all seems to be based on what his observations were in his office, factually. Which I am prohibited from cross examining him. Him being a fellow attorney. So, to the extent those remarks aren't tied to evidence that's offered in the case we think they should be respectfully stricken.

Next, while examining Ms. Pepper, the operator of the daycare center, Mother avers that Mr. Joyce again stepped out of his role.

> Mr. Joyce: Do you remember when we spoke on the phone back on July 31st telling me that you did not have a very positive impression of Mr. Matthew Rex?
>
> Ms. Pepper: Only because he got mad.
>
> Mr. Casey: I object to this. I object to this, I think a couple of things Your Honor that have occurred, that put sort of Counsel in the position of being a witness in this with regard to the subpoena I think to a certain extent with regard to Counsel's opening and with regard to that question. I think there's ways to ask questions that leave your own credibility as counsel, or your own version of events out of it.

The circuit court stated that the question was appropriate and moved on.

> Mr. Joyce's role is also discussed again while he examines Mother.
>
> Mr. Joyce: Ok. And we more recently met with yourself and Mr. Platske and Jackson in my office, do you recall that?

> Mother: I do.
>
> Mr. Joyce: Ok. Do you recall leading up to that meeting there being some discussion about whether or not Jackson should meet with me again after having already met with your husband the same day?
>
> Mother: You gave your opinion, yes.
>
> Mr. Joyce: Okay. My opinion was please don't do this, wasn't it?

Mr. Casey began to interject, stating "Judge I'm . . . really . . ." and the court interrupted the questioning, advising Mr. Joyce that he cannot put himself "in the position of being a witness." Mr. Joyce stated that he understands and the hearing continued.

Although Father avers that the issue was unpreserved, assuming *arguendo* that the best interest attorney provided testimony in violation of Section 2.2 of the Maryland Guidelines for Court Appointed Lawyers, and also that the issue was preserved for review, we hold that no error occurred because the inclusion was harmless as the circuit court's order lacks evidence that Mother was prejudiced by the testimony.

Maryland Rule 5-103(a) provides that, "[e]rror may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling . . . ." This rule is applicable to all civil cases, including custody determinations. *In re Ashley E.*, 158 Md. App, 144, 164 (2004) (stating that it "is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error *and* prejudice to the appealing party" in this Court's review of a trial court's ruling changing a permanency plan for four children) (citing *Muthukumarana v. Montgomery County,* 370 Md. 447, 477 n.20 (2002)) (emphasis in original). In this context, prejudice means "that

it is likely that the outcome of the case was negatively affected by the court's error." *Id.* (citing *State Rds. Comm. v. Kuenne*, 240 Md. 232, 235 (1965)).

Mother offers only five lines of text as to prejudice, despite providing seven pages of text in her attempt to persuade us that the best interest attorney overstepped his role. To demonstrate prejudice, she points *only* to the final order visitation schedule, which is similar to one stated by the best interest attorney during the hearing.[1] While attempting to persuade us that she was negatively affected by the circuit court's alleged reliance on Mr. Joyce's statements, Mother fails to note that Mr. Joyce also stated that he did not

[1] Mr. Joyce in closing stated:

> During the school year, I would suggest that the visitation, the overnight visitation for Mrs. Rex be at least two weekends a month to run Friday evening to Monday morning. Okay, now I . . . I'll leave it to the Court's discretion if three weekends a month may be appropriate my concern there is how much time, um, weekend time will then Mr. Rex have. But at the same time I want to see mom have more time. So, I'm not opposed to the motion of three weekends a month and running them to Monday morning. I would also suggest that um, in the off weeks there be a Thursday and a Tuesday non-overnight visit.

The final order, in most relevant part, states:

> 3. That Father shall have primary residential custody of Jackson during the school year subject to Mother's access/visitation as follows:
>
> (a) Mother shall have access to Jackson every Tuesday and Thursday, from after school until 7:00 p.m. when Jackson shall return to the Father. If there is no school the following day, Jackson shall spend the overnight with Mother.
>
> (b) Mother shall have weekend visitation with Jackson every first and third weekend, from Friday after school until Sunday at 7:00 p.m. when he shall return to his Father.

believe joint legal custody was appropriate here – a position the court did not adopt. To evaluate for prejudice, we again look to the record.

After hearing all testimony and receiving all evidence, Mr. Casey made a final request to the judge, stating:

> Mr. Casey: Judge, I want to note, if, with your leave, just one additional objection, which I meant to mention in my closing argument, which was the reference of Child Counsel to his observations outside the classroom . . . .
>
> The Court: I … I ….
>
> Mr. Casey: …meeting.
>
> The Court: … I understand I'm not able to take those into consideration whatsoever. So, and I think that Mr. Joyce understands that. And again, some of, it's very difficult for child counsel not to get into being a fact witness. I think that Mr. Joyce stopped short of doing that, and if he crossed the line the Court's completely disregarding anything in that regard Mr. Casey, you can be assured of that.

The circuit court's lengthy memorandum and order affirms that the court relied on the witness testimony rather than any remarks by Mr. Joyce. As discussed extensively above, the order stated clearly and repeatedly that the basis for the determination was the communication issues between the parties and Mother's behavior towards Father, not the substantive areas to which Mother's counsel objected during Mr. Joyce's comments or questions. Further, we disagree that any similarity between the final order and the possible custody arrangement Mr. Joyce suggested is adequate to show prejudice. This is

especially true given that the court adopted a legal custody arrangement quite different than the options Mr. Joyce discussed in his closing.[2]

Answering no to both of Mother's questions on appeal, we affirm the circuit court's final order.

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] Mr. Joyce recommended a "split" legal custody arrangement, and implied a recommendation against joint legal custody, stating, "I think the quote in Taylor about absent a track record, of them being able to work together it's seldom appropriate to award joint legal custody, it's appropriate in this case." Mr. Joyce continued with his recommendation, stating:

> Having said all that, in terms of legal custody, the biggest issue that they've had has been education. So, I would suggest to the Court that sole legal custody to Mr. Rex on the issue of education is appropriate. On the issue of, medical issues I believe joint legal custody is appropriate. I have the concern based upon the well child visit having been cancelled. And the concern based upon the communication as it has been historically that putting a tie breaker authority may be appropriate. If the Court were to do that, I would suggest that issue go to Mr. Rex. For extracurricular issues I would suggest that it be joint. And if there is a tie breaker for medical, I suggest there be a tie breaker for extracurricular that goes to Mrs. Rex.

The final order, in most relevant part, stated, "[T]he Court will continue joint legal custody, providing Father with tie-breaking authority only for educational decisions."