Circuit Court for Anne Arundel County
Case No. C-02-FM-15-000375

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 313

September Term, 2018

LUIS FUQUEN

v.

TRINA EVERITT

Meredith,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: March 5, 2019

Luis Fuquen ("Father"), appellant, appeals the judgment entered after a custody trial in the Circuit Court for Anne Arundel County. The appellee is Trina Everitt ("Mother"). By order docketed March 22, 2018, the court awarded sole legal custody, as well as primary physical custody, of the parties' two minor children to Mother. The court's order also provided for Father to pay child support, made a marital property award, and ordered Father to pay a portion of Mother's attorney's fees. Father's brief states:

> There are now three primary questions before this court:
>
> 1) whether a parent's exercise of the constitutionally protected choice to dissolve the marital relationship provides sufficient state trigger to regulate and censor intimate and expressive close family parent-child speech, association, and worship;
>
> 2) whether TC's [the trial court's] viewpoint regarding the best interest of the children sufficiently justifies that regulation and censorship of intimate and expressive close family parent-child speech, association, and worship; and
>
> 3) whether the absence of a neutral and impartial decision-maker deprived the litigants of a fair hearing?

We perceive no reversible error, and affirm the judgments of the Circuit Court for Anne Arundel County.

FACTS AND PROCEDURAL HISTORY

Father and Mother were married on April 25, 2002. Two children were born to the parties: R., on March 29, 2002, and K., on July 7, 2004. The parties separated in June 2014 when Mother took the children and left the marital home. The court found that their

separation had been uninterrupted since September 2014. The court made the following findings:

> The parties' marriage was turbulent before it began. Their first wedding date was canceled, and they didn't talk for months after that, despite the fact that [Mother] was already pregnant with their first child. Eventually they did marry and went on to have their second [child]. Their children are the subject, in part, of the instant controversy. Their marriage was never good, and according to [Father] their ever-present tension came to a head when he realized the parties' life goals were not the same. This realization came about as the result of the parties' attempts to purchase a franchise for [Mother] to run. In the course of their discussions, [Mother] indicated that she would like to eventually retire and stay home. [Father] was appalled by her lack of ambition.
>
> Throughout 2013 the tension in their household had been rising. During this time, [Father] was commuting to Virginia to work. He arrived home late in the evenings and was exhausted on weekends. For weeks and sometimes months, [Father] would refuse to communicate with [Mother] or the children ("the silent treatment") as the result of some perceived infraction. [Father] raised the issue of divorce with [Mother] on several occasions throughout that year. To add to this stress, in the Fall of 2013, [Father] learned that his employment was being terminated.
>
> Finally, as the result of an incident on Thanksgiving of 2013, [Mother] came to the realization that she and the children could no longer live with [Father]. Pets were an integral part of the parties' household, and they recently had added a kitten to their menagerie. At dinner, [Father] became angry with their youngest child for being disrespectful to [Mother's] mother. As punishment to the child, [Father] announced that the kitten would have to go and threw the kitten out of the house into the cold night, causing everyone at the house, especially the children, great emotional distress. [Footnote 1 explains that the kitten was rescued by Mother's father.] After that, [Father] did not speak to [Mother] or the children for months, including over the Christmas holidays.
>
> At some point thereafter, [Mother] began to make active plans to move out of the home with the children, which she eventually did in June 2014. [Father] testified that he was shocked and emotionally devastated by this move. He threatened suicide and eventually ended up in Sheppard Pratt for one week. Following his release from Shep[p]ard Pratt in August

2014, he went to his sister's home in Chicago and underwent two weeks of intense out-patient therapy. When he returned to Maryland in September of 2014, [Mother] agreed that he could sleep on the couch in the family home, and he did so temporarily. Despite having an offer of employment in Washington, DC, [Father] accepted a position in New Jersey and relocated there, with [Mother's] help, in September, 2014. Although he had been terminated from this new job by Thanksgiving of 2014, [Father] continued living in New Jersey until July of 2016. [Father] had no contact with the children during the first three weeks after he moved. Thereafter until July, 2016, the vast majority of [Father's] contact with them was electronic. A Consent Order Regarding Final Custody and Visitation Determination was entered on June 22, 2015 providing the parties with joint legal custody and [Mother] with primary physical custody and final decision-making authority. Under that Order [Father] had alternating Sunday afternoon visits, two non-consecutive summer weeks and certain holiday visits. A subsequent Consent Order Regarding Custody further defining the parties' joint legal custody was entered on November 19, 2015.

On that same date, another Consent Order was entered which provided, inter alia, that the parties would continue to rent the marital home to a third party tenant and that [Mother] should be "entitled to retain as her sole property any and all rental income that exceeds the cost of [the] mortgage . . .[.]" As previously indicated, in July of 2016, [Father] began coming back to Maryland, and he eventually moved back into the marital home located at [redacted] Lane, Annapolis, Maryland 21409. Until that point, the net third party rental income had been $600.00 per month. Pursuant to the terms of the November 19, 2015 Consent Order, those funds were paid to [Mother]. [Mother] has not received any rental income since [Father] resumed residing in the marital home. On November 29, 2017, [Mother] filed a Petition for Contempt and Motion to Enforce Consent Order due to [Father's] alleged failure to follow the dictates of the November 19, 2015 Consent Order. During his occupancy, [Father] claims he made a number of repairs to the property, for which he now seeks contribution from [Mother].

Once [Father] returned to live in Maryland, he became hyper-vigilant of the [children] and hyper-critical of [Mother's] parenting. He decided that the [children] were malnourished and suffered from eating disorders. He insisted that they be evaluated for eating disorders, a demand to which [Mother] acceded. Eventually, [R.] was diagnosed with an eating disorder for which she has been treated. [Father] introduced the [children] to calorie counting and suggested at one point that [R.]'s "ins and outs" be

weighed. Much to [R.]'s chagrin, he contacted her recreational soccer coach and suggested she not exert herself due to her eating disorder. He has also, to the [children's] great embarrassment, advised school personnel of certain alleged physical and psychological conditions of the [children] and their mother, all without the input or approval of [Mother] or the [children's] health care providers. To the detriment of the children, [Father] verbally attacks and berates any professional who disagrees with his unconventional theories of treatment, on at least one occasion causing a scene in the pediatrician's office in front of both children.

Through text and telephone calls, [Father] has attempted to manipulate the [children] by threatening to again move away or texting them cryptic goodbyes, leaving them to conclude he is suicidal, if they do not live with him or behave the way he wishes. At one point, [Father] went to [Mother's] home and demanded they give him their puppy Simon in apparent retaliation for [Mother] hiring a lawyer to represent her in the divorce case. This came after he had already gotten rid of three of their dogs, their chickens and at least one cat.

[Father] repeatedly shared details of the parties' case and the court process with the [children] and is apparently unable to see the impropriety of doing so, at one point stating, "As a parent I have clearly stated the facts to the kids and they are in the know because they need to know how screwed up is the system." In contrast, [Mother] expressed regret and remorse for the few times she improperly involved the children in the parties' disputes. Aside from deriding the court system to the [children], [Father] repeatedly blames [Mother] for everything to them. He tells them that [Mother] is mentally and physically ill and is taking a "cocktail" of drugs. He also tells them that [Mother's] depression is genetic and that they too are likely to suffer from mental illness in the future. He has unjustifiably reported [Mother] to Child Protective Services, leaving the [children] to fear they would be put in foster care. The Child Protective Services investigation resulted in a recommendation to [Father] that he stop putting the children in the middle of the parties' divorce. Several mental health professionals testified at trial that [Father] was not receptive to their suggestions that he stop threatening and manipulating the children. The experts also made it clear that while [Father] has inflicted significant psychological damage on the children, he is not considered to be a physical threat to them.

Despite all of this, the [children] love [Father] and through counseling they are learning to establish the necessary boundaries between

> [Father] and themselves to preserve and protect their mental health. At trial one of the counselors recommended reunification therapy for [Father] and [K.] [Father] testified he did not think such therapy would be beneficial but would defer to the therapist's recommendation.

The court granted Mother an absolute divorce based on a one-year separation.

With respect to the parents' competing claims for custody, the trial court found that there had been a material change in circumstances since the time the court had entered a consent order in June 2015 providing for joint legal custody of the children. The court found that Father's move back to Maryland from New Jersey was a material change in circumstances, as was "the deterioration in the parties' ability to communicate" as alleged by Mother. And the court found, based "on the factors set forth in *Montgomery County v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986)," plus the reasons articulated in the court's opinion, that it was "in the best interests of the parties' children to be in the primary physical custody of" Mother.[1]

[1] In *Sanders*, 38 Md. App. at 419-21, we explained:

> Where modification of a custody award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child. Unfortunately, there is no litmus paper test that provides a quick and relatively easy answer to custody matters. Present methods for determining a child's best interest are time-consuming, involve a multitude of intangible factors that ofttimes are ambiguous. 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. At the bottom line, what is in the child's best interest equals the fact finder's best guess.

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> What critics of the "judicial prognostication" overlook is that the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. See *Chapsky v. Wood*, 26 Kan. [650] at 655, 40 Am.Rep. [321] at 325 [(1881)]. The court's prediction is founded upon far more complex methods than reading tea leaves. The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents, *Cornwell v. Cornwell*, 244 Md. 674, 224 A.2d 870 (1966); *Barnard v. Godfrey*, 157 Md. 264, 145 A. 614 (1929); 2) character and reputation of the parties, *Hoder v. Hoder*, 245 Md. 705, 227 A.2d 750 (1967); 3) desire of the natural parents and agreements between the parties, *Breault v. Breault*, 250 Md. 173, 242 A.2d 116 (1968); *McClary v. Follett*, 226 Md. 436, 174 A.2d 66 (1961); *Colburn v. Colburn*, 20 Md. App. 346, 316 A.2d 283 (1974); *Davis v. Jurney*, 145 A.2d 846 (D.C. Mun. App. 1958); 4) potentiality of maintaining natural family relations, *Lippy v. Breidenstein*, 249 Md. 415, 240 A.2d 251 (1968); *Melton v. Connolly*, [219 Md. 184, 188 (1959)]; *Piotrowski v. State*, 179 Md. 377, 18 A.2d 199 (1941); 5) preference of the child, *Ross v. Pick*, 199 Md. [341] at 353, 86 A.2d at 469 [(1952)]; *Young v. Weaver*, 185 Md. 328, 44 A.2d 748 (1945); *United States v. Green*, 26 Fed.Cas. No. 15256, pp. 30, 31-32 (C.C.R.I.1824); 6) material opportunities affecting the future life of the child, *Thumma v. Hartsook*, [239 Md. 38, 41-42 (1965)]; *Butler v. Perry*, [210 Md. 332, 339-40 (1956)]; *Cockerham v. The Children's Aid Soc'y of Cecil County*, 185 Md. 97, 43 A.2d 197 (1945); *Jones v. Stockett*, 2 Bland. 409 (Ch.1838); 7) age, health and sex of the child, *Alden v. Alden*, 226 Md. 622, 174 A.2d 793 (1961); *Cullotta v. Cullotta*, 193 Md. 374, 66 A.2d 919 (1949); *Piotrowski v. State, supra*; 8) residences of parents and opportunity for visitation, *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431, 440 (D.C. App. 1972); 9) length of separation from the natural parents, *Ross v. Hoffman*, [280 Md. 172, 175 (1977)]; *Melton v. Connolly, supra*; *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976); and 10) prior voluntary abandonment or surrender, *Dietrich v. Anderson*, [185 Md. 103, 116-17 (1945)]; *Davis v. Jurney, supra*.
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> While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, *Cockerham v. The*

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The court found each party to be physically fit to have custody of the children, but noted that it was "unpersuaded" by Father's attempts to convince the court that Mother was "psychologically unfit[.]" Not only was the court unpersuaded that Mother was psychologically unfit, the court also stated that it was, "[i]n contrast . . . greatly concerned about [Father's] psychological fitness." The court observed that Father was "combative and antagonistic by nature," had "alienated at least four of the five medical/mental health professionals who have attempted to treat his [children]," "projects his own medical conditions onto the [children], causing them extreme anxiety and depression," and "manipulates the children by overtly threatening to abandon them and more obliquely threatening suicide." In September 2017, a few months before the proceedings at issue here, Father had experienced what he described as "an emotional meltdown," but he was no longer in treatment because he claimed he had "found a better way to cope with his issues" and was "currently utilizing a 'life coach.'"

The court found that, while Mother was described by witnesses as "a loving, generous, stable parent" who was "'kind to a fault,'" and "well-liked, respected and helpful," Father, "[i]n contrast . . . was described as 'extremely controlling,' behaving explosively at times." The court further noted that "[a]t least one of the therapists

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Children's Aid Soc'y of Cecil County, supra, or the length of separation. *Powers v. Hadden, supra*.

directly attributed [R.'s] depression to exhaustion from the parties' custody battle and pressure placed upon her by [Father]."

The court found that "[b]oth parties appear sincere in their expressed desire to have primary physical custody of the children," but they could not agree on either physical or legal custody. Likewise, the court found that both parties "can adequately support the children and provide them with adequate material opportunities," and each lives in a "suitable residence for the children." The court noted that neither child testified, but the evidence indicated that, "at the time of trial, by their own choice, [R.] was seeing [Father] on alternating weekends and on an occasional weekday evening, and [K.] had seen [Father] only once in the preceding three months."

The court's finding as to which parent offered greater potential for maintaining natural family relations came down on the side of Mother. The court found:

> [Mother] has a close relationship with her own family. [Father] became estranged from his family in 2011 as the result of an unspecified incident. He has since reconciled with most of his family but remains estranged from his brother. [Mother] is in contact with that brother and has arranged for the parties' children to see his children, their cousins, since the parties' separation. [Father] views [Mother's] family as genetically damaged and psychologically unstable, none of which was borne out by the evidence. [Father] does not have a good relationship with the children's maternal relatives.

The court found that, overall, the children, who were fifteen and thirteen at the time of trial, were healthy,

> although at [Father's] instigation, [R.] has been diagnosed with an eating disorder. . . . Both [children] have been traumatized by the protracted custody battle and the undue pressure and manipulation placed on them by

> [Father]. As a result, both [children] suffer from anxiety and [R.] has been diagnosed with depression.

Regarding the "length of separation from the natural parents," *see Sanders*, *supra*, 38 Md. App. at 420, the court found:

> Following the parties[']' initial separation in June of 2014, [Father] suffered a mental breakdown requiring his hospitalization for one week. He then went to Chicago for several weeks. He subsequently relocated to New Jersey where he lived for approximately two years. Throughout this period, his communications and visitation with his [children] were sporadic and inconsistent. For the first three months after his relocation, [Father] had no contact with the children. On several occasions since his return to Maryland in July of 2016, [Father] has threatened to again leave the area if the [children] don't behave as he wishes or if he does not get the custodial arrangement to which he feels he is entitled. [Mother] has never been separated from the children for any significant period of time, and she has never abandoned or threatened to abandon them.

The court found that, in light of its consideration of the *Sanders* and *Taylor* factors, "the best interests of the children will be served if they are in the primary custody of [Mother]."

The court then turned to consideration of the advisability of continuing joint legal custody, applying the guidance provided in *Taylor*, 306 Md. at 302-11, in which the Court of Appeals revisited the option of joint custody for the first time since its predecessors had "denounced" the concept in *McCann v. McCann*, 167 Md. 167, 172 (1934), as "an evil" "to be avoided, wherever possible[.]" The *Taylor* Court recognized that "[s]ignificant societal changes" had occurred since 1934 that warranted a "re-examination" of the views that led to the *McCann* holding. The *Taylor* Court observed that, "in any child custody case, the paramount concern is the best interest of the child."

Taylor, 306 Md. at 303. Building on the factors discussed in *Sanders*, *supra*, the *Taylor* Court articulated "factors particularly relevant to a consideration of joint custody[.]"

The trial court in this case expressly referred to the *Taylor* factors in its discussion of its consideration of the award of legal custody, stating:

> The court must consider the factors set forth in *Taylor v. Taylor*, 306 Md. 290 (1986), in determining whether joint legal custody is appropriate, *i.e*., in the children's best interests. The most important of these factors is the capacity of the parents to communicate and to reach shared decisions affecting the children's welfare. *Taylor* states:
>
> > Rarely, if ever, should joint custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.
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> *Id*. at 304. The court is aware that in *Santo v. Santo*[, 448 Md. 620 (2016),] the Court of Appeals recently held:
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> > that a court of equity ruling on a custody dispute may, under appropriate circumstances and with careful consideration articulated on the record, grant joint legal custody to parents who cannot effectively communicate together regarding matters pertaining to their children. In doing so, the court has the legal authority to include tie-breaking provision[s] in the joint legal custody award.
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> 448 Md. 620, 646 (2016).
>
> In the case *sub judice*, the parties have not been able to communicate and reach shared decisions regarding the children. They were unable to agree on the children's counselors, pediatrician, church attendance, summer camps, extracurricular activities, diet and overall physical and psychological needs. [Father] is overbearing and manipulative. If a professional disagrees with him, he becomes antagonistic. He views [Mother], who has been open and receptive to the recommendations of

> various professionals, as child-like and unstable. He does not value her opinion.
>
> *Taylor* further dictates that the court is to also consider the geographic proximity of the parties' homes, each child's relationship with each parent, the potential for disruption in the children's school and social lives, the demands of parental employment and the benefits to the parties. The parties live approximately ten minutes from one another. Prior to trial [Father] "threatened" to move across the street from [Mother] when the marital home is sold. At trial, [Father] indicated he no longer intends to do so. The court does not believe such a living arrangement would be in the [children's] best interests. In addition, the court believes that joint legal custody would disrupt their school and social lives, as the parties' inability to effectively communicate would severely delay any decision-making. At trial, both parties indicated they have flexibility with their employment. [Mother] indicated she works very close to home, and her employer has been extremely accommodating by giving her necessary time off. [Father] testified that he works from home occasionally and that he also has flexibility with his work hours. However, the testimony at trial also indicated that for his visits with [R.], [Father] frequently does not pick her up until after 7:00 or 8:00 p.m. because he has been working. As previously discussed, [K.] and [Father] do not have a good relationship at this time. One mental health professional testified they have an "unhealthy dynamic." Except for one occasion, she refused to visit with him in the three months preceding the trial. [R.'s] relationship with [Father] is a bit better. Both children have a good, stable relationship with [Mother]. Finally, the court does not believe joint legal custody would benefit either party. To the contrary, it would provide more opportunities for conflict, disagreement and discord and the inevitable associated stress. Considering all of the above, the court believes it is in the children's best interests for [Mother] to have sole legal custody of the children.

With respect to the monetary issues that are challenged in Father's brief, the trial court ruled that Father had dissipated a portion of the couple's marital assets by withdrawing over $88,000 from two marital-property accounts in 2017, as to which Father produced evidence that he used $12,500 to pay attorneys' fees, but, the court found, Father "produced no credible evidence to establish [any other portions of the

withdrawals] were used for marital purposes." The court therefore found "that [Father] has dissipated marital assets totaling $75,531.34." The court ruled that Mother would be compensated for this dissipation of marital assets either by an increase in the purchase price of her interest in the marital home if Father sought to buy the home (in which he was residing), or, if Father did not purchase Mother's interest in the marital home, the court would reduce to judgment the $37,765.67 (*i.e.*, half of $75,531.34) that would have been Mother's share of the dissipated funds.

The court also ordered Father to pay to Mother "the sum of $15,000.00 as contribution to her reasonable and necessary attorneys' fees . . . within thirty days of th[e] court's Judgment of Absolute Divorce . . . ."

I. Custody

In *Gillespie v. Gillespie*, 206 Md. App. 146, 170-72 (2012), we summarized the standards of appellate review that are applied in an appeal from a custody ruling as follows:

> Courts must engage in a two-step process when presented with a request to change custody. We have described the two-step analysis as follows:
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> > First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner v. Wagner*, 109 Md. App. 1, 28 [674 A.2d 1] (1996). If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody. *See id.; Braun v. Headley*, 131 Md. App. 588, 610 [750 A.2d 624] (2000).
>
> *McMahon v. Piazze*, 162 Md. App. 588, 594, 875 A.2d 807 (2005). Therefore, we first consider whether the trial court erred in finding that a

material change in circumstances occurred. Second, we consider whether the court abused its discretion in modifying custody.

* * *

This court reviews child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586, 819 A.2d 1030 (2003). The Court of Appeals described the three interrelated standards as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8–131(c)] applies. [Second,] if it appears that the [court] 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 [trial court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [trial court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586, 819 A.2d 1030. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584, 819 A.2d 1030. We recognize that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [the trial judge] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id.* at 585–86, 819 A.2d 1030.

(Internal headers omitted.)

In this case, the court's findings that there had been a material change in circumstances and that a change in custody to Mother would be in the best interests of the children are neither based upon an error of law, nor any clearly erroneous finding of fact,

nor an abuse of discretion. Upon our review of the record in this case, we affirm the court's decision to award Mother primary physical custody and sole legal custody of the parties' children.

In Father's brief, he raises a number of arguments that had been asserted in his motion for a new trial. Although there is nothing frivolous about the United States Constitution and the Supreme Court cases cited in Father's brief, Father's arguments appear to be wholly without merit. Father makes references to due process, overbreadth, vagueness, fundamental rights, and equal protection, but provides no rational explanation as to how those concepts compel a different result in his case. He refers to "orders that are least restrictive" and "strict scrutiny" and "*ex post* facto" laws and "viewpoint discrimination," but, again, this use of legalese provides no rational explanation of a reversible error on the part of the trial court.

For example, Father asserts that the trial court erred by failing to "render an equal division of time between each parent," but there is no statutory or constitutional requirement that mandates that result. Father bemoans that the "best interest of the child" standard impinges upon his personal freedoms, but Maryland cases have repeatedly determined that the best interests of the child are paramount to conflicting interests of parents who are not in agreement about the care and custody of a minor child. In *Boswell v. Boswell*, 352 Md. 204, 236 (1997), the Court of Appeals asserted: "In all family law disputes involving children, the best interests of the child standard is always the starting—and ending—point." And in *Taylor, supra*, 306 Md. at 303, the Court of

Appeals reiterated that "[t]he best interest of the child" is the "paramount concern" in "any child custody case," *i.e.*, not merely one factor the court should consider, but rather "the objective to which virtually all other factors speak." The best interest of the child is "of transcendent importance." *Id.* Suffice it to say that the best interest of the child standard is not unconstitutional, and the trial court here analyzed the facts without committing clear error and applied the law to the facts without abusing the court's discretion.

Based upon the Maryland cases describing the best interest of the child as the overriding concern of a court considering a dispute between two parents, we see no merit in Father's assertion that the circuit court abused its authority when it ordered him to participate in reunification counseling with a therapist who was recommended by an expert witness at trial.

McDermott v. Dougherty, 385 Md. 320 (2005), cited by Father in his brief, was a custody challenge by maternal grandparents to a fit natural parent's exercise of custody. Father's case, in contrast, is a custody challenge between fit natural parents. The two factual backdrops are not the same, nor is the applicable law, as the Court of Appeals recognized in *McDermott*, 385 Md. at 353-55:

> In a situation in which both parents seek custody, each parent proceeds in possession, so to speak, of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide "care, custody, and control" of the children. *See* Md. Code (1984, 1999 Repl. Vol., 2004 Supp.), § 5–203(d)(2) of the Family Law Article. **Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the *sole standard* to apply to**

these types of custody decisions. Thus, in evaluating each parent's request for custody, the parents commence as presumptive equals and a trial court undertakes a balancing of each parent's relative merits to serve as the primary custodial parent; **the child's best interests tips the scale in favor of an award of custody to one parent or the other**.

Where the dispute is between a fit parent and a private third party, however, both parties do not begin on equal footing in respect to rights to "care, custody, and control" of the children. **The parent is asserting a fundamental constitutional right. The third party is not.** A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child.

The arguments and outcome of the instant case in no way alter the "best interests of the child" standard that governs courts' assessments of disputes *between fit parents* involving visitation or custody. We have frequently and repeatedly emphasized that in situations where it applies, it is the central consideration. *See Wilhelm v. Wilhelm*, 214 Md. 80, 84, 133 A.2d 423, 425 (1957) (stating succinctly and conclusively in regard to the best interests standard, that "[i]t seems unnecessary to cite additional authority in support of this firmly established rule"). **So critical is the best interests standard that it has garnered superlative language in the many cases in which the concept appears: This Court labeled it "of transcendent importance**" in *Dietrich v. Anderson*, 185 Md. 103, 116, 43 A.2d 186, 191 (1945), as the **"ultimate test**" in *Fanning v. Warfield*, 252 Md. 18, 24, 248 A.2d 890, 894 (1969), and as the "**controlling factor**" in *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 113, 642 A.2d 201, 208 (1994). *See also Hoffman*, 280 Md. at 175, n. 1, 372 A.2d at 585 n.1 (providing a more complete survey of the various descriptions of the best interest standard). Although the child's well-being remains the focus of a court's analysis in disputes between fit parents, "[t]he best interests standard does not ignore the interests of the parents and their importance to the child. We recognize that in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent." *Boswell v. Boswell*, 352 Md. 204, 220, 721 A.2d 662, 669 (1998) (alteration added).

When considering the application of the "best interests of the child" standard it is essential to frame the different situations in which it is attempted to be applied. First, and certainly the most important application

> of the standard, is **in disputes between fit natural parents, each of whom has equal constitutional rights to parent. In those cases the dispute can be resolved best if not solely, by an application of the "best interests of the child" standard. This situation most often arises in marriage dissolution issues between natural parents and it is necessary to resolve the matters of custody and visitation between two constitutionally equally qualified parents**. Although the Court is unaware of any compilation of numbers, it can reasonably be supposed that the vast majority of cases throughout the country in which the "best interest of the child standard" is applied, or sought to be applied, are of this nature. . . .

(Footnote omitted; internal headers omitted; bolding added.)

Father refers repeatedly to what he calls "the *Palmore* standard," which he describes as "hold[ing] that parental conflict does not neutralize constitutional rights or grant [the trial court] authority to balance 'merits.'" In his brief, Father cites (incompletely) to Justice Thomas's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003), contending that Justice Thomas wrote that, in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "the Court held that even the best interests of a child did not constitute a compelling state interest." 539 U.S. at 352. Father asserts that the trial court in some way violated this so-called "*Palmore* standard" in its decision on custody in this case. First of all, we observe that *Grutter* was *not* a child custody case, but was a case addressing a race-conscious admission policy of the University of Michigan Law School. Second, *Palmore* does not weaken the "best interest of the child" standard in any respect that affects the trial court's ruling in this case.

In *Palmore*, after a couple divorced and the mother (Palmore) was awarded custody of the parties' 3-year-old daughter, the father (Sidoti) filed a motion to modify custody, asserting not that Palmore was unfit, but that there were changed circumstances

justifying a modification of custody because Palmore and the child had begun living with an African-American man (whom Palmore later married). The trial court in that case made no express finding of unfitness by either parent, and even noted that it found "no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." 466 U.S. at 430. However, it nevertheless granted Sidoti's motion to modify based on the "changed circumstances," namely, Palmore's "cho[ice], for herself and her child, [of] a life-style unacceptable to the father and to society[,]" a thinly-veiled reference to her choice of a bi-racial relationship. *Id*. at 431. The District Court of Appeal for the Second District of Florida summarily affirmed, and the United States Supreme Court granted *certiorari*. Writing for a unanimous Court in *Palmore*, Chief Justice Burger observed that the trial court had "correctly stated that the child's welfare was the controlling factor." *Id*. at 432. And the Supreme Court stated, *id*. at 433:

> The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. Fla.Stat. § 61.13(2)(b)(1) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

The *Palmore* Court "had little difficulty in concluding" that "the reality of private biases and the possible injury they might inflict" are **not** "permissible considerations for removal of an infant child from the custody of its natural mother." *Id*. With respect to invidious racial discrimination prohibited by the Fourteenth Amendment, the *Palmore*

Court reiterated: "The Constitution cannot control such prejudices but neither can it tolerate them." *Id*. at 433. Accordingly, the Court reversed the Florida court's custody ruling that was based upon racial prejudice. We fail to discern any meaningful similarity between *Palmore* and the custody ruling in Father's case.

II. Dissipation

At trial, Mother argued that Father had dissipated marital assets by withdrawing funds in 2017 from savings accounts titled in his name. The court agreed, and explained its finding as follows:

> [Mother] claims that [Father] has dissipated marital assets. In order for the court to find that one spouse has dissipated marital assets, warranting a deviation from the standard that marital property which has been sold or transferred should not be considered by the court, the finder of fact must find by a preponderance of the evidence that the accused "spent or otherwise depleted marital funds or property with the principal purpose of reducing the amount of funds that would be available for equitable distribution at the time of the divorce." *Welsh v. Welsh*, 135 Md. App. 29, 50-51 (2000).
>
> The evidence shows that in 2017, [Father] removed $75,031.14 from his retirement accounts. On December 4, 2017 he also removed $13,000.00 from his USAA money market account. **Of the $88,031.14 withdrawn in 2017, $12,500.00 was used for [Father's] attorneys' fees. Payment of attorneys' fees is a proper use of marital assets and those sums will not be considered dissipated assets.** See *Allison v. Allison*, 160 Md. App. 331[, 339-40] (2004). However, the court finds [Father's] principal purpose in making the balance of the 2017 withdrawals was to reduce the amount of funds that would be available for distribution at the time of divorce, and these funds were dissipated. **[Father] produced no credible evidence to establish they were used for marital purposes.**

> **The court therefore finds that [Father] has dissipated marital assets totaling $75,531.34. This sum will be treated as extant property and accounted for in the disposition of the marital estate.**

(Emphasis added.)

"The doctrine of dissipation is aimed at the nefarious purpose of one spouse's spending for his or her own personal advantage so as to compromise the other spouse in terms of the ultimate distribution of marital assets." *Heger v. Heger*, 184 Md. App. 83, 96 (2009). The Court of Appeals discussed how a court evaluates a dissipation claim in *Omayaka v. Omayaka*, 417 Md. 643, 655–57 (2011) (boldface italics added):

> In their *Maryland Family Law* treatise, the authors suggest a "**cookbook method**" to resolve a dissipation allegation. As modified to clarify the burdens of production and persuasion, that method is as follows:
>
> - If property does not exist at the time of divorce, it cannot usually be included as marital property
> - Well, that is so unless one spouse proves [by a preponderance of the evidence] that the other spouse dissipated assets acquired during the marriage to avoid inclusion of those assets toward consideration of a monetary award.
> - [A prima facie case] of dissipation occurs when evidence is produced that marital assets were taken by one spouse without agreement by the other spouse.
> - ***Then, the burden of going forward with evidence shifts to the party who [allegedly] took the assets without permission to [produce evidence that generates a genuine question of fact on the issue of (1) whether the assets were taken without agreement, and/or (2)] where the funds are [and/or (3) whether the funds] were used for marital or family expenses.***
> - If that proof of use for marital or family purposes is not produced, then the property taken is "extant" marital property, titled in or owned by the individual who took the marital property without permission.

- From that "extant" property in the name of one spouse, the other spouse may be given a monetary award to make things equitable.

John F. Fader, II & Richard J. Gilbert, *Maryland Family Law*, § 15–10 (4th ed.2006).

It is clear that the ultimate burden of persuasion remains on the party who claims that the other party has dissipated marital assets.

> The burden of persuasion and the initial burden of production in showing dissipation is on the party making the allegation. *Choate v. Choate*, 97 Md. App. 347, 366, 629 A.2d 1304[, 1314] (1993). That party retains throughout the burden of persuading the court that funds have been dissipated, but after that party establishes a prima facie case that monies have been dissipated, i.e. expended for the principal purpose of reducing the funds available for equitable distribution, the burden shifts to the party who spent the money to produce evidence sufficient to show that the expenditures were appropriate.

Jeffcoat [*v. Jeffcoat*], 102 Md. App. [301] at 311, 649 A.2d at 1142. [(1994)].

Proof that a spouse made sizable withdrawals from bank accounts under his or her control is sufficient to support the finding that the spouse had dissipated the withdrawn funds. *Ross v. Ross*, 90 Md. App. 176, 191, 600 A.2d 891, 898–99, *vacated on other grounds*, 327 Md. 101, 607 A.2d 933 (1992).

"A trial court's judgment regarding dissipation is a factual one and, therefore, is reviewed under a clearly erroneous standard. 'If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (quoting *Fuge v. Fuge*, 146 Md. App. 142, 180, 806 A.2d 716, 738 (2002)). *Accord Beck v. Beck*, 112 Md. App. 197,

216 (1996) ("We will not set aside a trial court's determination regarding dissipation of marital assets unless the determination is clearly erroneous.").

Here, Father raises no genuine dispute as to the *prima facie* evidence of dissipation, *i.e.*, the fact that he withdrew $88,031.14 from accounts under his control that were marital assets. But he argues that the trial court's view of the evidence was clearly erroneous because the court failed to trace a greater portion of those funds to expenditures that were for proper marital purposes. In essence, he argues that the trial court was required to accept his conclusory arguments that he spent the withdrawn funds for legitimate family expenses.

At trial, Father submitted, as Exhibit J, his financial statement, which noted that he had five credit-card accounts on which he owed an aggregate balance, as of January 5, 2018, of $57,477.18, and that he had a monthly recurring expense of $924, which he attested was the monthly minimum payment on that debt. He also submitted, as his Exhibit K, his (non-itemized) credit-card bills, showing five accounts with a total debt of $56,619.12. The sole evidence he cites in support of his contention that the trial court erred in failing to consider his "high" credit card bills as an allowable expenditure of marital funds for family expenses was the following bit of his direct testimony:

> [BY FATHER'S ATTORNEY]: Now, sir, how did those credit cards get that high?
>
> [BY FATHER]: Through all the --- all --- it's been a journey. Since 2014, I've been having to pay to --- pay living expenses, to feed myself, to pay legal fees, the transportation to and from Long Island, New Jersey to see my kids, the money to be able to provide food for my kids, entertain my

> kids, legal fees, medical fees, paying the, you know, house repairs, car repairs.

Father's reliance upon this vague testimony and the exhibits he introduced to rebut the evidence of dissipation misses the point. Once Mother made out a *prima facie* case of dissipation by offering evidence that Father made the withdrawals of marital funds from those accounts in 2017, the burden shifted to Father to "produce evidence sufficient to show that the expenditures [he made with those withdrawals of $88,031.14] were appropriate." *Omayaka, supra,* 417 Md. at 657 (quoting *Jeffcoat, supra,* 102 Md. App. at 311 (1994)). In other words, it became his burden to offer evidence to answer for the court the question: Where did that money that you withdrew from these accounts go? Father's documents established no utilization of the withdrawn funds to make substantial *payments* on his credit card debts or any other particular marital obligations after the funds were withdrawn in 2017. Consequently, the trial court's finding of dissipation in the amount of $75,531.34 was not clearly erroneous.

III. Attorneys' Fees

Father's final complaint is that the trial court erred in ordering him to pay $15,000 toward Mother's legal fees. The court explained its ruling on this issue as follows:

> Both parties incurred significant legal fees in this case. In addition to the $25,000 in attorneys' fees she incurred in 2015, [Mother's] attorneys' fees from October 6, 2016 through January 12, 2018 totaled $32,889.10. Her expert witness fees were $2,150.00. [Father's] attorneys' fees and costs for the five attorneys he employed since 2014 totaled about $73,000.00. His fees for his trial counsel were over $21,375.00, incurred over a six-week period. In addition, the court-appointed Best Interest

> Attorney for the children had fees of $30,090.64. Of that sum, [Mother] has paid $4,500.00, and [Father] has paid $7,000.00.[2] [Mother] was justified in pursuing her claims for divorce, custody and property division. However, the court does not believe that [Father's] custody claim was well-founded. He, himself, predicted he would lose his custody claim, but he persisted nonetheless at great monetary and emotional expense for all. In addition, he undertook a series of retirement account withdrawals which the court has determined to constitute a dissipation of marital assets. Each party has already used marital assets to pay some of his/her attorneys' fees. [Father's] income is approximately $110,000.00 per year higher than [Mother's], and he will be able to financially rebound from this financial catastrophe more quickly than [Mother].
>
> Upon consideration of the statutory factors set forth in Family Law, §§ 8-214, 11-110 and 12-103, the court shall direct [Father] to pay [Mother] the sum of $15,000.00 as contribution to her reasonable and necessary attorneys' fees. This sum is in addition to the unpaid $5,000.00 awarded to [Mother] by Judge Silkworth on December 4, 2015, $2,700.00 of which shall immediately be reduced to judgment. [Father] shall pay the additional $15,000.00 attorneys' fees award to [Mother] within thirty days of this court's Judgment of Absolute Divorce or the same shall be reduced to a judgment against him without need for further hearing.
>
> With regard to the Best Interest Attorney's Fees, [Father] will be ordered to pay Mr. Bennett the sum of $18,590.64 within thirty days of the date of the Judgment of Absolute Divorce or the same shall be reduced to judgment against him without the need for further hearing.

With respect to the standard of appellate review for an award of counsel fees, this Court said in *Gillespie v. Gillespie*, 206 Md. App. 146, 176 (2012):

> We review the award of counsel fees under the abuse of discretion standard. *Meyr v. Meyr,* 195 Md. App. 524, 552, 7 A.3d 125 (2010). The circuit court's decision regarding the award of fees "will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini,* 336 Md. 453, 468, 648 A.2d 1016 (1994).

[2] The court noted in a footnote here that "Mr. Fuquen ignored the Best Interest Attorney's second escrow request."

On appeal, Father contends that the court erred in awarding counsel fees based upon its finding that his custody claim was not "well-founded." Father assails that finding because, he argues, "it is always in the best interest of society to prevent violations of constitutional rights, a practice rampant in family courts throughout the U.S."

The foregoing sections of this opinion have explained our conclusion that, as the circuit court observed, Father's claims that his constitutional rights were being violated were not well-founded. We perceive no abuse of discretion in the court's modest award of counsel fees to Mother.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.