

Circuit Court for Cecil County
Case No. C-07-FM-19-936

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 779

September Term, 2021

R.M.

v.

L.M.

Berger,
Reed,
Beachley,

JJ.

Opinion by Berger, J.

Filed: April 4, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case involves a custody and marital property dispute originating in the Circuit Court for Cecil County. After a three-day trial, the circuit court issued a Judgment of Absolute Divorce and determined legal and physical custody of the parties' minor child.¹ The court awarded L.M. ("Mother") and R.M. ("Father") joint legal and physical custody of the minor child and granted neither party tiebreaking authority.² Additionally, the circuit court denied Father use and possession of the marital home.

On appeal, Father presents four questions for our review,³ which we have rephrased and consolidated for clarity:

¹ "Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.* "Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other." *Id.* "Joint physical custody is in reality 'shared' or 'divided' custody. Shared physical custody may, but need not, be on a 50/50 basis." *Id.* at 296–97. "The parent not granted legal custody will, under ordinary circumstances, retain authority to make necessary day-to-day decisions concerning the child's welfare during the time the child is in that parent's physical custody. Thus, a parent exercising physical custody over a child . . . necessarily possesses the authority to control and discipline the child during the period of physical custody." *Id.* at 296 n. 4.

² We use initials for the parents and refrain from using any of the parties' children's names in order to protect their privacy.

³ Father's original questions presented are as follows:

1. Did the judge make an error not considering that the Plaintiff committed unmitigated, excessive fraud, and that no reasonable person would think she is credible and that her behavior is vicious towards her spouse?

- I. Whether the circuit court erred in awarding the parties joint legal and physical custody of the minor child with neither party having tiebreaking authority.
- II. Whether the circuit court erred in not granting Father use and possession of the marital home.

For the reasons explained herein, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on December 18, 2016 and separated on or about October 2019. The parties have four children between them. Father has two children from a previous marriage and Mother has one child from previous marriage. The remaining child (hereinafter “the minor child”) was the subject of the circuit court’s custody determination. The parties shared a marital home which was purchased jointly but mortgaged solely in Mother’s name.

The first proceeding in the Circuit Court for Cecil County was held on October 17, 2019 when Mother filed an emergency *ex parte* request for full physical and legal custody of the minor child. Mother testified at the *ex parte* hearing that she should have sole

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2. Did the trial judge make an error regarding the school for the minor child?
 3. Did Judge Baynes make an error in not awarding use and possession of the home to the Appellant and ordering the Plaintiff to modify the mortgage to mitigate foreclosure by utilizing COVID relief that was available to her and still remains available to the Plaintiff?
 4. Was it an error not allowing the other children to be heard? Was it an error to not allow witnesses at all?

physical custody of the minor child because of Father's history of being "hotheaded." Mother testified that Father had physically and sexually abused her on one occasion in December of 2017. Father denied that any abuse occurred, and testified that Mother's personal life was unstable.

The *ex parte* hearing judge determined that although the parties' relationship had ended, they should continue to share joint legal custody of the minor child until the divorce was fully resolved. The court found that the minor child had a good relationship with the parties, and further, that the parties were fit and proper to raise the minor child. The court awarded Mother primary physical custody and awarded Father alternating visitation rights on weekends.

The parties appeared for a second hearing in the Circuit Court for Cecil County on February 6, 2020. This hearing related to Father's request for a temporary restraining order to prevent Mother from selling the marital home. The circuit court found that the home was marital property, but also found that neither party had made a mortgage payment in three years and that the property was under threat of foreclosure. Nevertheless, the court granted the temporary restraining order and prohibited Mother from selling the property for a period of forty-five days in order to give Father the opportunity to bring the mortgage current.

Mother's Counter-Complaint for Absolute Divorce was heard in the Circuit Court for Cecil County over three days.⁴ In addition to both parties, the court heard testimony from the child protective services worker, Jerome Garrett, who had previously interviewed both parties and the minor child. The court called Mr. Garrett to testify about any changes that may have occurred since his original evaluation.⁵

Mother and Father presented extensive testimony over the course of the three-day divorce proceeding. A majority of testimony from each of the parties attributed fault and character defects to the other party. Mother testified that Father had physically and sexually abused her on one occasion in December 2017. Father vehemently denied this allegation and testified that Mother tended to falsify facts to achieve her desired outcomes. Mother testified that Father had a temper and would make derogatory comments to her in front of the minor child. Father testified and put forth evidence of Mother's multiple alleged extra-marital affairs and general instability in her personal life.

⁴ The hearing was eventually held on February 23 and 24, 2021, and concluded on May 27, 2021 after delays due to COVID-19 concerns.

⁵ The circuit court also called Noland Kirby to testify. Ms. Kirby interviewed Father's child from another marriage in a previous and separate divorce proceeding. There was some dispute between counsel and the court over the relevancy of this witness. Nevertheless, the court allowed the witness to testify under Family Law Article § 9-101.1(b)(3) requiring the court to consider any evidence of prior abuse in a custody determination. Md. Code (1984, 2019 Repl. Vol., 2021 Suppl.), § 9-101.1(b)(3) of the Family Law Article. Ms. Kirby testified that Father's child from the previous marriage indicated during an interview that Father would favor his male child over his female children, that Father would sometimes yell, and that there were often arguments between Father and Mother. Ms. Kirby testified that there was no evidence of physical abuse elicited in her interview with Father's child from the previous marriage.

Regarding the minor child, there was testimony from both parties that the minor child should stay, or be transferred from, her current elementary school. Mother testified that she was required to transfer the minor child to Charlestown Elementary School because of a change in her employment and relocation into a different school district. Father testified that the minor child should return to Cecilton Elementary School -- the minor child's first elementary school -- because of the established community there. Father also testified that the transfer to Charlestown Elementary School would adversely affect his work schedule and income. Each party testified that the other was not always available for the minor child's extracurricular activities and medical appointments due to scheduling conflicts.

Father testified extensively on the issue of the marital home. Father testified that storage structures located on the marital property were essential for conducting his landscaping business, and therefore, that he should be awarded use and possession of the marital home. Mother testified that even though the mortgage was solely in her name, it was Father's responsibility to pay the mortgage, which he had consistently failed to do. Father testified that he paid other shared expenses and made improvements and repairs to the marital home.

Despite the parties' disagreements on many issues, both parties agreed that the marriage had severely deteriorated due to ongoing conflicts regarding finances and decisions affecting the minor child. The parties further agreed that the minor child had a

good relationship with the other parent, and that each parent should continue to have a relationship with the minor child.

The child protective services worker, Mr. Garrett, testified that during his interview with the minor child that there was no evidence that the minor child was uncomfortable or distressed when with Father. Mr. Garrett testified that he didn't see a reason for there not to be shared physical and legal custody, and also that he "felt that the child would prosper by being involved with both parents[.]" Mr. Garrett testified that the acrimony between Father and Mother was not affecting the minor child directly, and further, that there was no evidence that the child was exposed to the parties' ongoing strife. Mr. Garrett also testified that he did not see any evidence that Father abused Mother, nor did he recall Mother informing him of any abuse. Mr. Garrett's testimony and resulting determination is best displayed in the following exchange with the court:

[THE COURT]: Let me ask you. You interviewed both parties.

THE WITNESS: Yes.

[THE COURT]: And without getting into details it is my impression that when you met with [Father] he told you certain things about his wife that he didn't think was appropriate.

THE WITNESS: Right.

[THE COURT]: [Mother] told you certain things about him that she didn't think were appropriate.

THE WITNESS: Yes.

[THE COURT]: And I think you indicated that you felt that that information, while it may pertain to the divorce, had no bearing on your recommendation for custody.

THE WITNESS: That's correct.

[THE COURT]: And when you interviewed [the minor child], did she mention anything about the allegations that [Father] was making against his wife, or the allegations the wife was making against [Father]?

THE WITNESS: No. It was an age-appropriate interview. I wouldn't quiz her on that, and it's not something she brought up without prompting.

[THE COURT]: So she never brought up any mention of abuse or verbal abuse with either her or siblings or anything like that, or inappropriate conduct on the part of mom or anything like that?

THE WITNESS: No.

[THE COURT]: All right.

Mr. Garrett further testified regarding his previous recommendation concerning the minor child's elementary school enrollment. Mr. Garrett clarified that at the time of his evaluation that the minor child was attending Cecilton Elementary School, and that he was under the impression that Father would be staying in the marital home. Mr. Garrett testified that although his recommendation at that time was for the minor child to stay enrolled at Cecilton Elementary School, that he would have reconsidered any new information regarding changes since his initial evaluation if he had been given the opportunity to update his recommendation.

Mr. Garrett testified that "it's best that with all these changes going on in a child's life that they remain as steady and consistent as possible[.]" Notably, Mr. Garrett did not re-affirm his recommendation that the minor child should stay at Cecilton Elementary

School. This was because of the uncertainty regarding the foreclosure of the marital home, and further, that the minor child had been transferred to two different elementary schools since his initial evaluation and was currently enrolled at Charlestown Elementary School.

The circuit court judge issued a ruling from the bench on the last day of the divorce proceedings. The court granted a Judgment of Absolute Divorce on the basis of 12 months of separation. The court made no finding regarding alimony or monetary award as there was no request by either party. The court ordered that the parties would share joint legal and physical custody of the minor child, with neither party having tiebreaking authority.

The circuit court ordered that neither party should remove the minor child from the current residence in Cecil County and that the minor child should remain at Charlestown Elementary School. The court ordered the parties to arrive at a week on/week off physical custody schedule, and further ordered the parties to communicate and co-parent regarding any important issues affecting the minor child. The court reserved on the issue of child support until the parties exchanged relevant child support information.

Regarding the marital home, the circuit court denied Father use and possession of the marital home but afforded him sixty-days to refinance the home solely in his name. The court held that if Father was unable to successfully refinance the mortgage, the home should then be listed for sale and that any proceeds were to be held in Mother's trust account until the court ordered division of the proceeds. On July 9, 2021 the circuit court issued a written order memorializing its oral ruling.

DISCUSSION

In this appeal, Father contends that the evidence and testimony presented do not support the circuit court’s custody or marital property determination. He asserts that the court erred by not considering that Mother “committed unmitigated, excessive fraud, and that no reasonable person would think she is credible and that her behavior is vicious towards her spouse[.]” Father also argues that the circuit court erred by not allowing testimony of additional witnesses. Lastly, Father argues that the circuit court erred by not granting him use and possession of the marital home.

Taking into consideration the highly deferential standard of appellate review of the findings by the court that saw and heard the witnesses, we perceive no clear error or abuse of discretion by the circuit court.

I. Standard of Review

The best interest of the child “is always determinative” in child custody disputes. *Santo v. Santo*, 448 Md. 620, 626 (2016) (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977)). The trial court has the responsibility to “evaluate each case on an individual basis in order to determine what is in the best interests of the child.” *Gillespie v. Gillespie*, 206 Md. App. 146, 173 (2012) (citing *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996)).

“Particularly important in custody cases is the trial court’s opportunity to observe the demeanor and the credibility of the parties and witnesses.” *Petrini v. Petrini*, 336 Md. 453, 470 (1994). Indeed, the trial court is in the best position “to weigh the evidence and

determine what disposition will best promote the welfare of the minor’ child.” *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

Appellate courts conduct only a “limited review” of a trial court’s custody decision. *Wagner, supra*, 109 Md. App. at 39. We do “not make [our] own determination as to a child’s best interest; the trial court’s decision governs, unless the factual findings made by the [trial] court are clearly erroneous or there is a clear showing of an abuse of discretion.” *Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007) (citations omitted).

When evaluating factual findings under the clearly erroneous standard, we must view the evidence in the light most favorable to the prevailing party, and we will not disturb the trial court’s findings if the record contains any competent, material evidence to support those findings. *Omayaka v. Omayaka*, 417 Md. 643, 652-53 (2011) (quoting *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002)). We also review a trial court’s decision regarding use and possession of marital property under an abuse of discretion standard. *St. Cyr v. St Cyr*, 228 Md. App. 163, 199 (2016); *see Flanagan v. Flanagan*, 181 Md. App. 492, 521–22 (2008).

An abuse of discretion is found where “no reasonable person would take the view adopted by the [trial] court[,]” where the trial court “acts without reference to any guiding rules or principles[,]” where the ruling is “clearly against the logic and effect of facts and inferences before the court[,]” or where the decision is “well removed from any center mark imagined by the reviewing court.” *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (first alteration in original) (internal quotations omitted). In our review, we give “due regard . . .

to the opportunity of the lower court to judge the credibility of the witnesses.” *In re Yve S.*, 373 Md. 551, 584 (2003).

II. The circuit court’s custody determination.

With this deferential standard in mind, we turn to the allegations of error that Father presents on appeal. Father does not contend that the court failed to consider the applicable *Taylor* and *Sanders* factors.⁶ Indeed, the record is clear that the circuit court judge applied the *Taylor* and *Sanders* factors in making the custody determination.⁷ Father, instead,

⁶ The *Taylor* and *Sanders* factors are outlined in *Taylor v. Taylor*, 306 Md. 290 (1986), and *Montgomery Cty. Dep’t of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1978), and address the factors the trial court must consider when making custody determinations. The non-exhaustive factors set forth in *Taylor* are: (1) capacity of the parents to communicate and reach shared decisions affecting the child’s welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of child’s social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents’ request; (11) financial status of the parents; (12) impact on state and federal assistance; and (13) benefit to parents.

The non-exhaustive factors set forth in *Sanders* are: (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentially maintaining natural family relations; (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 opportunities for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender.

⁷ Specifically, the court announced: “Based on testimony the court has considered that testimony in light of the various factors that have been recited by both counsel, the fitness of the parents, desire of the parents, any current agreement, obviously none. Preference of the child, the court believes it is not in [the minor child’s] best interest to drag her into the middle of this. Kids do not need to be in the middle of the parties’ legal problems because they can’t get along with each other. The stability of the parties, age, sex, and health of [the minor child], which I don’t think is a factor. And, you know, the prior abandonment, I don’t find any evidence with regard to [the minor child.]”

makes generalized allegations that the circuit court incorrectly resolved the custody determination because of Mother’s allegedly false testimony.

Despite Father’s many and varied allegations that Mother “committed fraud in literally every hearing involving [him],” we hold that the circuit court acted well within its discretion to credit and discredit testimony from each party. The court specifically explained that it would not grant either party tiebreaking authority because, “I don’t know if I trust either one [of the parties].” The circuit court’s determination regarding the parties’ credibility was clearly reflected in its admonition: “[R]ather than looking at the other parent, they [should] look in a mirror, because as counsel indicated each party have -- definitely have their flaws.”

The circuit court properly evaluated the parties’ testimonies, as well as the custody evaluator’s testimony under the *Taylor* and *Sanders* factors. The court examined the evidence concerning the fitness and desire of the parents, which indicated that both parents were fit, proper, and wanted a relationship with the minor child. The court found that there were no existing agreements. The court further evaluated evidence regarding the preference of the minor child and determined that it was not in the best interest of the minor child “to drag [them] in the middle of this.” The court evaluated the stability of the parents and the age, sex, and health of the minor child. The court also determined that there was no evidence of prior abandonment. Critically, the court assessed Mr. Garrett’s evaluation and testimony regarding custody and his recommendation for the minor child’s enrollment in elementary school.

We do not attempt to summarize all the evidence presented over the course of the three-day trial and related hearings. Nevertheless, our thorough review of the record reveals that there was ample evidence presented to support the circuit court's conclusion that neither party was more credible than the other. We note that although Father vehemently argues that Mother committed fraud and gave false testimony, the circuit court's determination clearly reflected that *it found neither parties' testimony to be entirely credible*. The court clearly believed and doubted parts of both Father's and Mother's testimony, and accordingly granted joint physical and legal custody with neither party having tiebreaking authority. Under such circumstances, we see no abuse of discretion in the court's even-handed resolution of the issue regarding custody of the minor child.

II. The circuit court's determination of the use and possession of the marital home.

Father premises his challenge to the circuit court's determination regarding the use and possession of the marital home on his assertion that the circuit court erroneously relied on Mother's allegedly false testimony. We construe Father's allegations regarding the lack of credibility regarding Mother's testimony as an argument that the circuit court abused its discretion in denying him use and possession of the marital home.

The circuit court determined that it would not grant use and possession of the marital home to Father based on the uncertainty of the looming foreclosure. In this respect, the court found: (1) that neither party had made a payment on the mortgage in three years; (2) that it did not know the status of taxes or insurance on the home; and (3) that the home would likely have already been foreclosed if not for the COVID-19 pandemic stay on

foreclosure actions. Crucially, the court found that Father had continuously failed to bring the mortgage current -- after already having the opportunity to do so following the grant of the temporary restraining order preventing Mother from selling the marital home. The court also found that Father had already leased another residence given the uncertainty of foreclosure on the marital home.

Although the circuit court did not grant Father use and possession of the home, it did allow Father another opportunity to bring the mortgage current by granting him sixty days to refinance the home solely in his name.⁸ The court's resolution of the use and possession of the marital home was more than reasonable under these circumstances. Accordingly, we hold that the circuit court did not abuse its discretion in denying Father use and possession of the marital home.

As we have explained *supra*, our review of the record leads us to conclude that the circuit court's factual findings were supported by ample evidence. The court's application of the *Taylor* and *Sanders* factors was consistent with its ultimate custody determination and was eminently reasonable under the circumstances. The court drew reasonable inferences from the evidence presented by the parties and explained how the factual findings impacted the custody and marital property determination.

⁸ Notably, there is another case pending in this court in which Father has appealed a Circuit Court for Cecil County order denying his request to stay foreclosure on the marital home (case number CSA-REG-0475-2021). Our review in this case is limited to the divorce proceedings and the custody and marital property determinations and does not have any effect on Father's appeal of the circuit court's denial of his request to stay foreclosure.

In sum, we conclude that the circuit court’s factual findings were not clearly erroneous, and the circuit court’s ruling was founded upon sound legal principles. The circuit court’s decision to grant the parties joint legal and physical custody with no tiebreaking authority -- and to deny Father use and possession of the marital home -- was not “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *In re Yve S.*, *supra*, 373 Md. at 583-84. Accordingly, we affirm the circuit court’s custody and marital property determination.⁹

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

⁹ Father separately argues that the circuit court erred by not allowing the testimony of additional witnesses including the parties’ children from previous marriages. The record reflects that both parties’ counsel made attempts to introduce witnesses on the day of trial without prior identification. Under Maryland Rule 2-504.2(b)(9), each party is required to identify all witnesses at pre-trial conference except those introduced for impeachment. Md. Rule 2-504.2(b)(9). The court determined that neither party had supplemented their pre-trial statements or witness lists and, therefore, no additional unidentified witnesses would be permitted to testify. Accordingly, we hold that the trial court’s decision to decline to hear from unannounced and last-minute witnesses was proper under Md. Rule 2-504.2(b)(9).