Circuit Court for Montgomery County
Case No. 138101FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 781

September Term, 2017

SHEELAGH SVIATYI

v.

SERGUEI SVIATYI

Graeff,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 30, 2018

*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 is an appeal from an order of the Circuit Court for Montgomery County in which the court awarded sole legal custody of the minor child, SS, to appellee, Serguei Sviatyi. Appellant, Sheelagh Sviatyi, timely appealed and raises the following issues for our review:

I. "Did the Judge not articulate the basis for his ruling consistent with the required case law?"

II. "Did the Judge [prejudge] the matter without considering all of the evidence and testimony presented as in § 9-101 of the Family Law Article?"

III. "Did the [appellant have] ineffective assistance of counsel at the trial?"

IV. "Was there an abuse of discretion when the Court cut short the duration of the trial scheduled from 3 day trial to 2 day trial not allowing further evidence to be presented by the Appellant?"

V. "Did the trial court [err] in scheduling a review hearing disregarding the self executing authentication of the custody order?"

For the reasons to follow, we affirm the judgments of the circuit court.

BACKGROUND

Appellant and appellee were married in May 2000. They have one son, SS, who was born in 2005. There were intermittent separations in the marriage following SS' birth, and the final separation occurred on July 16, 2016, after an altercation led to a protective order being issued against appellant. Appellee filed a complaint for absolute divorce on August 2, 2016, seeking sole legal and primary physical custody. Appellant filed a counterclaim on September 23, 2016, also seeking sole legal and primary physical custody.

The custody merits portion of the parties' complaint and counter complaint for absolute divorce began on April 18, 2017. Audrey Elkinson, the custody evaluator for the

circuit court, was the first witness to testify. Elkinson conducted in-depth interviews of both parties, went to their homes to observe parent-child interactions, and interviewed SS. Elkinson also interviewed family members of each party, reviewed child welfare and police reports, and spoke to the child privilege attorney, who waived privilege.

Elkinson testified there were two incidents that stood out during her investigation. First, there was an incident "two hours after a Saturday visit began in which Ms. Sviatyi became angry at [SS] . . . and the grandmother was home, and the aunt ended up coming to pick them up because they were so scared or concerned that Ms. Sviatyi was out of control that the child left, left the home." Elkinson stated that the incident occurred in the middle of winter, January 21, 2017, and that SS left with one shoe on and without a winter coat. SS was then "hesitant to return visits because his mother's behavior has been very unpredictable and that she would just go out of control for reasons that he doesn't understand." Elkinson noted that appellant lives with her mother and the mother "did not return to her own home for several days because she thought her daughter needed some time to cool down and she couldn't deal with her daughter in that state." Elkinson explained that "if an adult couldn't deal with another adult in that state, then it's unrealistic to think that an 11- -- well, he just turned 12 -- year-old child could deal with his mother in that type of emotional state."

The second incident, Elkinson testified, occurred at a restaurant on January 31, 2017. On that occasion, "the aunt had to leave to pick up the grandmother from the bus or the Metro, and in that period of time, Ms. Sviatyi got into an argument with a waitstaff person, which embarrassed or got [SS] very upset, and so it, it just happened again."

Elkinson spoke with SS' aunt and grandmother, and "they reported that [appellant] has had behaviors like this for quite some time; that they said that she gets like this when she's under stress or she gets like this -- that she was very stressed by the legal situation; that they think, thought that she needed help, they tried to get her to seek help but she was resistant to getting help, and they didn't know what to do." Elkinson attempted but was unable to determine whether appellant had completed a mental health evaluation by a medical professional.

In appellant's individual interview, Elkinson testified that she "was hostile with me at times. She left me numerous voice mail messages. One morning she filled out 50 percent of my voice mail in less than an hour. She [also] left me numerous, or sent me numerous e-mail messages." As a result of her investigation, Elkinson recommended that SS "have visitation with Ms. Sviatyi through the court-supervised visitation program until the Court can be assured that Ms. Sviatyi is, is in the most appropriate mental health treatment that she needs."

The next witness was appellee. He testified that there had been domestic violence in the relationship, and that police were called to the marital home at least twice. Appellee said that appellant was charged with second-degree assault in 2009, although the case was later dismissed when he asserted marital privilege. A second incident, which precipitated the final separation, occurred on July 16, 2016. Appellee wanted to take SS to the doctor to receive immunizations but appellant refused to allow him to do so. Appellee explained that there was "a physical altercation initiated by my wife . . . during which she scratched me heavily on the arm. I end[ed] up calling the police, and she was arrested for second-

degree assault." Appellant subsequently pled guilty to one count of disorderly conduct and received probation before judgment. A protective order was also put in place that prohibited appellant from contacting appellee except to facilitate child visitation.

Appellee testified there were occurrences that caused him concern when SS was in appellant's care. Appellee discussed the two instances referenced by the court evaluator, and stated that when he arrived to pick up SS after the January 31 incident, SS was "scared," "crying," and "embarrassed." Appellee also testified about a third occasion on February 18, 2017, when appellant and SS ran into appellee's counsel at the grocery store. Appellee was called to pick SS up and observed that SS was "scared," "frazzled," and "in shock."

Appellee testified that Child Protective Services (CPS) was called on more than one occasion to investigate appellant. In 2014, he and appellant were attending counseling. During one of the sessions, appellant "disclosed that there was an incident between her and [their] son during which [their] son had bruises and scratches on him." Appellant elected to self-report the incident. Appellee testified that he had contacted CPS "multiple times in 2015" when SS "would come back from visitation or stays with his mom, he would either come back distressed, crying," or "had bruises." Additionally, after the July 16, 2016 incident, the police department called CPS, who recommended that appellee "take [SS] for Safe Start counseling program, that [appellee] follow protective order guidelines as they are stated at that time, and that if [he] need[ed] to contact support programs that were offered by Montgomery County, [he] had that option."

Appellee called two witnesses in his case-in-chief. He called his sister, Svetlana Bivens, who testified that SS "was and still is everything in [appellee's] life," and that appellee is a responsible father. As for her interactions with appellant, Svetlana observed that she has acted "compulsively" and "unpredictably" at times. Appellee also called Nancy Bivens, Svetlana's mother-in-law. Nancy testified that appellee "is a very good dad" who is patient and attentive with SS. Nancy further testified that, based on her observations, SS is developing emotionally and physically well for his age.

In appellant's case-in-chief, she testified that she has been very involved in SS' life. For example, when SS said that he wanted to be an inventor, appellant enrolled him in a robotics contest at the KID Museum. SS won third place and received a $500 cash prize. To provide SS further exposure to the field of robotics, appellant enrolled him at Parkland Middle School, which has a magnet program for aerospace technology. In the months preceding the trial, appellant also testified that she had taken SS to a number of events, including a Pokémon Concert and a Medieval Times show, and that they had visited the Spy Museum and the National Cathedral in Washington, D.C.

When asked about appellee's relationship with SS, appellant called into question a number of his parental decisions. Appellant testified that on one occasion, appellee allowed SS to start his car. When the vehicle accidently rolled into reverse, appellee jumped out of the way and fractured his ankle. On another, appellee took SS to the gym and left him unattended. SS got onto a treadmill, "turned it on and he couldn't turn it off and he fell down backwards and his whole back, his skin got ripped off and burned." Appellant added that she was concerned with SS' use of BB guns at appellee's house.

Appellant testified that she became the primary caretaker for SS during her and appellee's prior separations. For example, appellee "was away for two years and a half from 2013 to 2016 and he was out of the house in 2010 for eight months." During that time, appellee "left [appellant] and [her] son [alone] in the house." Appellant also noted that appellee's job is based in Philadelphia, Pennsylvania, and that she was frequently called to look after SS when he could not return home on time.

Appellant responded to a number of comments made by appellee. Appellant testified that in 2009, when she was charged with second-degree assault, it was appellee who was the aggressor. Appellant said that he "came and he sat on my stomach and I couldn't get up from the couch. . . . He also grabbed me and slapped me and pulled my hair, all happening and I had bruises on my face. And then he, then he, he striked me here in my arm and I went down on the floor and the police found me on the floor with my broken arm[.]" Regarding the incident when SS was taken from the house with one shoe on and without a winter jacket, appellant stated that she was suffering from a crisis: her car broke down when she was scheduled to start a new job and she was stressed by the pending divorce proceedings. As a result, appellant said that she "screamed out of nervousness," but it had nothing to do with SS. As for the restaurant incident, appellant testified that she and SS were in a hurry because SS had to leave to meet appellee. Appellant explained that the only thing she did was complain to a manager that the waiter was not taking their order promptly. Finally, as to the encounter with appellee's counsel at the grocery store, appellant testified the only thing she said was "bye" and then she and SS left the store.

Like appellee, appellant also testified that there had been domestic violence in the relationship. Appellant indicated that in 2003, appellee "punched me in the stomach when I was pregnant and I lost it, miscarriage." She testified to her version of the 2009 incident, discussed above. And she stated that in 2016, appellant "grabbed me when I turn around and I didn't want to listen to any of his accusations as to why I had lost my job. He grabbed me and told me you have to look at me when I talk to you. And he held me down and he put his big leg in between mine and I was in there held against my will for a period of time."

Appellant called two witnesses to testify on her behalf. The first was her sister, Maritza Ortega, who testified that appellant is a fit parent and "cares about her son very much[.]" Maritza stated that appellant "takes [SS] out, we take him out as a family with her, does recreational things with him, takes him to several places all the time, takes him out to eat, just the normal things that parents do." Maritza acknowledged that appellant could be "moody sometimes" when she is stressed out. Further, on cross-examination, Maritza admitted that she recommended to put appellant's visitation on hold after the January 21 incident, and that SS has sometimes been hesitant or tentative to visit with appellant. However, Maritza testified that in the months preceding trial, appellant had "been more [in] control of herself, more reserved and [it] is very pleasant to be around her." Appellant also called Mary Boudoir, the director of religious education at St. Raphael Church. Boudoir testified that appellant was involved in the religious education program, and that the two had met when appellant enrolled SS in First Communion classes. When

asked if appellant was someone who could cause SS harm, Boudoir responded "[n]o, not at all, that is not, I did not see that at all."

On April 25, 2017, the circuit court read its opinion into the record. The court agreed with the evaluator that appellant "suffers from some unidentified and unspecified mental health issue whether it is anxiety or depression related to the divorce or whether it is something more severe is not clear." The court noted that there was "significant evidence" to support this finding, which included the incident where SS was removed from appellant's care without a winter jacket and with one shoe on, the incident at the restaurant, and the police department's call to Child Protective Services. The court also noted that appellant's sister has suggested that visitation with SS should be suspended, that appellee's sister described appellant's behavior as strange, and that appellant had overreacted during her interview with the court evaluator.

Based on this evidence, the court concluded that it "shared the evaluator's concern that [SS'] emotional health more than his physical wellbeing is threatened by his mother's failure to get a proper diagnosis and treatment for her condition. And for that reason, I share in the evaluator's belief that at this time the defendant is not a fit and proper person to have unsupervised visitation of [SS]." For the same reasons, "the defendant's failure to address what is an apparent mental health issue, the Court believes that at this time [appellee] should have sole legal custody of [SS]." The court added, however, that it would allow appellant to have unsupervised visitation once she gets a mental health evaluation and complies with any treatment recommendations. Next, the court gave appellant credit for work related to child care and ordered that, based upon her income, she pay $605 per

month in child support; it also ordered appellant to contribute to SS' ongoing counseling in proportion to her income. Finally, the court found there was "a very volatile relationship involving abusive conduct on the part of both parties," and it ordered appellant and appellee to participate in a co-parenting program.

The parties were unable to agree upon the language of a written order following the hearing. As a result, the court ordered that its oral opinion on April 25, 2017, be filed as the order of the court. That order was entered on May 3, 2017. Appellant filed a notice of appeal on June 2, 2017. She did not specify which order she was appealing, as is required by Maryland Rule 8-202. However, because the court's June 2 order is the only order that was filed within thirty days of appellant's notice of appeal, we shall use that order to review her claims.

STANDARD OF REVIEW

"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). To that end:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Maryland 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.

Davis v. Davis, 280 Md. 119, 126–27 (1977) (footnote omitted).

DISCUSSION

I. *Sanders* Factors

When a circuit court is tasked with awarding custody to one parent over the other, the best interest standard is "*the* dispositive factor on which to base custody awards." *Wagner v. Wagner*, 109 Md. App. 1, 38 (1996). In making this determination, the court is required to evaluate the guiding factors laid out in *Montgomery County Dep't of Social Serv. v. Sanders*, 38 Md. App. 406 (1977). These factors include: 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; and 10) prior voluntary abandonment or surrender. *Id.* at 420.

In this case, appellant argues that the circuit court erred by failing to consider three *Sanders* factors. Before turning to the merits of those arguments, we note that the court recognized and applied the applicable standard set forth in *Sanders* when it stated "the Court's responsibility and obligation is to do that which it believes is in the best interests of the minor child, not necessarily that which it believes is in the best interests of the parents, so the child is the Court's responsibility, not the parents, only to the extent that the conduct of the parents has an impact upon the child."

Appellant's first argument is that the court failed to consider the potentiality of "maintaining natural family relationships of the child who live[s] in Rockville from mom's

side of the family." This argument is not supported by the record. In fact, the court found the opposite to be true: "[appellant] appears for some reasons not entirely known to the Court to have no interest in maintaining a relationship with [appellee's family] which of course would make it difficult for [SS] in her custody to maintain relationships with that side of the family." SS, moreover, will have ample opportunity to maintain relationships with appellant's family. During the trial, appellant, who lives with her mother, testified that she is within "walking distance" and "five minutes apart" from appellee.

Next, appellant argues that "the Court did not take in consideration that the party's equally shared custody and visitations during the years of separations" and "the fact that the Appellant had been the main caretaker of the child since his birth was not taken in consideration." There is no *Sanders* factor directly on point with these arguments, but we will consider them in the context of the sixth factor, material opportunities affecting the future life of the child. We agree that appellant has been actively involved in SS' life, and we believe that she has done an admirable job in fostering SS' interest in robotics. But our analysis does not stop there.

Appellee, for his part, testified that the parties "shared [their] responsibilities" when asked who was the primary caretaker. Further appellee testified that he had "done everything [he] could, including sacrificing promotions and, and [his] career, to better support [SS]." It should also be noted that the impetus behind the court's custody award was appellant's "failure to address what is an apparent mental health issue." As that applies to this factor, at a minimum, there was sufficient evidence before the court for it to find that the material opportunities affecting the future of SS weighed in favor of appellee. *See*

In re Adoption/Guardianship No. 3598, 347 Md. 295, 331 (1997) (explaining that the role of a reviewing court "is to assess the sufficiency of the evidence, not embark on an independent fact-finding mission and substitute its judgment for that of the trial judge. It is the trial judge's role to assess the evidence and the credibility of witnesses, and to resolve the conflicting evidence").

The third argument raised by appellant is that the court did not consider the age of SS and that "for 11 years the child has depended on his mother's care." We are not persuaded. The court evaluator testified in this case that SS was "hesitant to return visits because his mother's behavior has been very unpredictable." Additionally, appellant's sister testified that SS has sometimes been hesitant or tentative to visit with appellant, and appellee testified that SS "is very scared of going to his mom because he does not know what to expect during, during a visit." The evidence, therefore, supported the court's finding that SS' emotional health "is threatened by his mother's failure to get a proper diagnosis and treatment for her condition."

II. Statutory Findings

Section 9-101 of the Family Law Article provides that "[i]n any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party." Md. Code Ann., Fam. Law § 9-101 (West 2006). As pertinent here, neglect "means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or other person who has permanent or temporary care or custody or responsibility for

supervision of the child under circumstances that indicate: (1) that the child's health or welfare is harmed or placed at substantial risk of harm; or (2) mental injury to the child or a substantial risk of mental injury." *Id.* § 5-701(s).

Appellant argues that the circuit court "did not consider all of the evidence of child neglect per § 9-101 of the Family Law Article." Specifically, she maintains that appellee "had a history of instructing the child [to] operate his Jeep and other vehicles since the child was 7 years old" and "purchased a pair of BB guns without the intention to let the Appellant know about it." To be sure, appellee exercised poor judgment in allowing SS to start his car. None of these instances, however, rise to the level of neglect. *See, e.g.*, *In re Priscilla B.*, 214 Md. App. 600, 613 (2013) (upholding finding of neglect based on: "one, the allegation of ongoing domestic violence; two, allegations of unsafe and unhygienic conditions of the house; [and] three, allegations that [the child's] medical needs may not have been properly met"); *Doe v. Allegany County Dep't of Soc. Servs.*, 205 Md. App. 47, 58–59 (2012) (affirming neglect finding "based on the undisputed fact that [the child] was under eighteen when [the parents] refused to let him return to their home"). As a result, the evidence in this case does not provide reasonable grounds to believe that SS has been neglected by appellee.

III. Remaining Arguments

We will address the remaining issues raised by appellant together, as she does not cite any authority in support of these arguments, nor do we find that they provide a basis to overturn the circuit court's custody award.

First, appellant argues that she had ineffective assistance of counsel at trial. The right to effective assistance of counsel is a constitutional right that applies to criminal cases. *See Bridges v. State*, 116 Md. App. 113, 129 (1997) ("The Sixth Amendment, also by its very terms, is a package of rights only for the benefit of 'the accused.'"). This is a civil, not a criminal case; as such, appellant's ineffective assistance of counsel claim does not provide a basis for relief. We note parenthetically, however, that appellant's counsel argued zealously on her behalf at each stage of the trial.

Second, appellant asserts that there was an abuse of discretion "when the Court cut short the duration of the trial scheduled from 3 day to 2 day trial not allowing further evidence to be presented[.]" Appellant does not name any other witness she would have called or evidence she would have introduced. Further, the court specifically asked appellant's counsel whether he had any other witnesses; appellant responded "No, so I'll rest." This issue, therefore, has not been preserved for review.

Finally, appellant maintains that the court erred "in scheduling a review hearing disregarding the self executing authentication of the custody order" that required her to obtain a mental health evaluation. Appellant's argument misses the mark because the circuit court's order was not entered until May 3, 2017. Until that time there was no "self executing order" in place. Further, as we have explained, there was "significant evidence" to support the court's finding that appellant suffered from a mental health issue. As such, the court was within its discretion to schedule a review hearing to ensure that appellant followed through with the evaluation and any treatment recommendations.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.