Circuit Court for Anne Arundel County
Case No. C-02-FM-15-000253

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1041

September Term, 2020

KARI SHERBERT

v.

JAY S. SEYMOUR

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Berger, J.

Filed: June 28, 2021

This case is before us on appeal from a child custody order of the Circuit Court for Anne Arundel County. Kari Sherbert ("Mother") moved to modify child support in the circuit court, and, in response, Jay S. Seymour ("Father") moved to modify child custody, visitation, and child support. The circuit court found that a material change of circumstances had occurred and that it was in the best interests of the parties' three minor children to modify custody. The court, therefore, issued a memorandum opinion and order addressing physical and legal custody of the parties' three minor children. The circuit court additionally modified child support in light of the new custody order. Mother appealed.

Mother presents three issues for our review on appeal, which we have rephrased as follows:

1. Whether the circuit court erred and/or abused its discretion by declining to include private school tuition in its determination of child support.

2. Whether the circuit court erred and/or abused its discretion when it maintained joint legal custody but modified tie-breaking authority by granting each party tie-breaking authority for certain categories of decisions.

3. Whether the circuit court erred and/or abused its discretion by modifying the physical custody schedule for the minor children.

Perceiving no error, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father married in 2002 and are the parents of three sons, Jackson, born April 21, 2005, Jett, born December 18, 2006, and Joseph, born August 8, 2008. The parties separated and subsequently divorced in 2012 in the Circuit Court for Calvert

County. The parties were able to reach agreement on financial and child custody matters and entered into a Marital Settlement Agreement in November 2012, which was incorporated but not merged into the parties' Judgment of Absolute Divorce. In 2015, the case was transferred to Anne Arundel County, where both parties had relocated. Pursuant to the 2012 agreement, Mother was granted primary physical custody of the children and the parties were granted joint legal custody with Mother having tie-breaking authority in the event of an impasse.[1]

The parties agreed to a complicated physical custody schedule that was designed to accommodate the parties' work schedules. Father worked unconventional hours as a firefighter and Mother worked unconventional hours at Anne Arundel Medical Center.[2] Pursuant to the agreement, the children were with Father on the following days each week:

[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] As a firefighter, Father was scheduled to work 24-hour shifts, but the days on which Father worked differed each week over the course of a 4-week cycle.

> Week 1: Tuesday after school through Wednesday morning; Thursday evening until 7:30 p.m.; and Saturday 10:00 a.m. through Monday at 7:30 p.m.
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> Week 2: Monday after school until 7:30 p.m.; Thursday after school through Friday morning.
>
> Week 3: Monday after school until 7:30 p.m.; Tuesday after school until 7:30 p.m.; Thursday after school through Saturday at 8:00 p.m.
>
> Week 4: Monday after school until 7:30 p.m., Tuesday after school through Wednesday morning.

On days that school was closed, instead of the transitions occurring after school hours, the children would be returned to the other parent at 9:00 a.m.

Regarding child support, the agreement provided that Father would pay Mother $600.00 per month. In the agreement, "[t]he parties acknowledge[d] that the amount of child support [was] a downward deviation of $202.00 per month," but the parties agreed that "said deviation is in the best interest of the minor children, based upon the other agreed upon obligations that benefit the minor children." The agreement provided that the parties would equally divide all medical expenses, work-related childcare expenses, and the costs of extracurricular activities. Alimony was waived and Mother was awarded a monetary award of $20,000.00 from the net proceeds of the sale of the parties' marital home.

In 2014, Mother moved to modify child support. In response, Father moved to modify the children's physical custody schedule. The trial court increased Father's child support obligation to $1,451.00 per month and did not modify the children's physical custody schedule.

As the parties' youngest child, Joseph, moved through elementary school in the Anne Arundel County Public Schools, Mother became increasingly concerned about his academic struggles, particularly with reading. Joseph had struggled with sight words as early as kindergarten and the school recommended that he be evaluated in first grade. As a result of the testing performed by the public schools, Joseph began receiving additional services for reading through a 504 Plan.[3] Mother sought to have an Individualized Education Plan ("IEP")[4] implemented for him because he continued to read well below grade level. Joseph was tested and diagnosed with severe dyslexia. Joseph's IEP was implemented in April 2018.

Mother had become increasingly concerned about Joseph's lack of progress with reading and, in addition to pursuing the IEP process in the public school system, Mother researched and identified a private school that she thought might benefit Joseph. Mother believed that the Summit School, a private school specifically focused on serving children with learning disabilities, would offer more to Joseph than the public school system.

[3] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funding. A "504 Plan" is implemented to set forth reasonable accommodations a student with disabilities is entitled to receive at school. http://mdod.maryland.gov/education/Pages/Section-504-Plans.aspx (last visited May 10, 2021).

[4] IEPs are designed to provide students with disabilities a public education that appropriately meets their needs. IEPs are mandated for students with special needs under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400. An IEP is unique to an individual student and it is tailored to address that student's specific educational needs.

Mother attempted to discuss the Summit School with Father, but Father was opposed to sending Joseph to private school. After learning more about the school, Mother applied for Joseph to attend the Summit School, and he was accepted. Mother used her tie-breaking authority to enroll Joseph at the Summit School for the 2018-19 school year.

On November 1, 2018, Mother filed a motion to modify child support in an attempt to gain assistance from Father with Joseph's tuition. In response, Father moved to modify the children's physical custody schedule, arguing that he should have more overnights with the children. Father also moved to modify child support.

A hearing was held over three days in January and August of 2020.[5] Mother testified, *inter alia*, that Joseph's reading and confidence levels had improved significantly since he began attending the Summit School. Father expressed concerns regarding Joseph's social interactions since enrolling at the Summit School and expressed his opinion that the public schools were capable of addressing Joseph's educational needs appropriately. The trial court considered the factors set forth in *Witt v. Ristaino*, 118 Md. App. 155, 169-71 (1997), in determining whether private school tuition should be ordered and apportioned to the parents. The trial court ultimately determined that the factors "weigh against private school costs being included in the child support determination."

The trial court further addressed legal and physical custody. The court determined that a change in material circumstances had occurred and that "the best interests of the

[5] The trial court heard testimony over two days in January 2020. The third and final day of testimony did not occur until August 2020 due to the Covid-19 emergency and court shutdown.

minor children require a change in the legal custody order to more specifically define the responsibilities of the parties." The court ordered that the parents would remain joint legal custodians but modified the tie-breaking provision, granting Mother tie-breaking authority for educational and religious decisions while granting Father tie-breaking authority for extracurricular activities and medical decisions.

The trial court further found that a material change of circumstances had occurred such that the physical custody schedule in place was no longer in the children's best interest. The court modified the custody and visitation schedule set forth in the parties' Marital Settlement Agreement. The court ordered that the schedule would be modified "to allow for a shared residential schedule as requested by Father for the three minor children, the remaining days that the children are with the Father to be overnight visits." Instead of transferring from Father's home to Mother's home at 7:30 p.m. in the evenings, the children would instead stay at Father's overnight on the days when they previously had been with Father after school until 7:30 p.m.

With respect to child support, the trial court found that the best interests of the children warranted a modification of the previous child support order that required Father to pay Mother $1,064.00 per month. The court determined that the "guidelines as computed moving forward" with the new physical custody schedule "show a recommended child support to be paid by [Mother] to [Father] in the amount of $151.00." The trial court, however, found that "it [wa]s in the best interests of the children that the parties be charged generally with their support." The court further ordered that "[i]n the event that the parties

agree upon the need for private school for their youngest son, Joe, they shall be responsible for any tuition in the proportion of their incomes . . . ."

Mother noted a timely appeal. Additional facts shall be discussed as necessitated by our consideration of the issues on appeal.

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). We review "a trial court's custody determination for abuse of discretion." *Id.* at 625. "This standard of review accounts for the trial court's unique 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Id.* (quoting *Petrini v. Petrini*, 336 Md. 453, 470 (1994)).

"A court can abuse its discretion when it makes a decision based on an incorrect legal premise or upon factual conclusions that are clearly erroneous." *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). 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). 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.

We have explained that a "court can abuse its discretion by reaching an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous." *Guidash v. Tome*, 211 Md. App. 725, 736 (2013). For an appellate court to reverse a trial court's ruling under this scenario,

> [t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

North v. North, 102 Md. App. 1, 15 (1994).

DISCUSSION

I.

The first issue raised by Mother on appeal pertains to the trial court's determination that private school tuition should not be included in the child support analysis in this case. Mother takes no issue with the overwhelming majority of the trial court's consideration of the factors set forth in *Witt v. Ristaino*, 118 Md. App. 155 (1997) (setting forth several non-exhaustive factors a trial court may consider when determining whether to include private school tuition in the child support calculation) (the "*Witt* factors"). Mother, however, asserts that the trial court erred when it found that Father had no ability to contribute to the

cost of Joseph's tuition. Specifically, Mother asserts that the trial court's conclusions regarding Father's actual income were incorrect and that the trial court failed to properly consider Father's spending on luxury items when concluding that Father was unable to contribute financially to private school tuition.

In *Witt*, *supra*, 118 Md. App. at 169-71, we explained that trial courts should consider the following "non-exhaustive" list of factors when determining whether a child has a "'particular educational need' to attend a special or private elementary or secondary school." *Id.* at 169-70. Specifically, trial courts should consider:

> (1) the child's educational history, such as the number of years the child has attended the particular school;
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> (2) the child's performance in the private school;
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> (3) whether the family has a history of attending a particular school;
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> (4) whether the parents had made the decision to send the child to a particular school prior to their divorce;
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> (5) any particular factor that may exist in a specific case that might impact the child's best interest; and
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> (6) the parents' ability to pay for the schooling.

Id. at 170-72. The trial court need not refer to the *Witt* factors explicitly so long as the record reflects that the trial court considered them. *Ruiz v. Kinoshita*, 239 Md. App. 395, 430-31 (2018) (holding that the trial court did not err in connection with its "decision to include [private school] costs in the child support calculus" when the "record reveal[ed] that the court heard evidence and considered several relevant factors relating to the children's enrollment in private school -- most notably the parents' consent agreement to

continue with private school and their ability to pay" even though the court "did not refer to [the *Witt* factors] explicitly").

As Mother concedes on appeal, the record reflects that the trial court considered each of the above factors. The court explained its reasoning in detail, and although we shall not restate the trial court's reasoning with respect to each factor in light of the fact that Mother focuses specifically on the trial court's finding as to affordability, we shall briefly summarize the trial court's findings in order to provide the appropriate context for Mother's appellate issue.

With respect to Joseph's educational history, the trial court observed that Joseph had attended the Summit School since the beginning of fifth grade in 2019. The court found that Joseph had made "significant improvement" since enrolling at the Summit School. Joseph was reading at a second-grade reading level at the beginning of fifth grade and was reading at a fifth-grade reading level by the time of trial. The circuit court further credited testimony from Mother and the maternal grandmother that Joseph was "doing extremely well." The court observed that Joseph's self-esteem and self-confidence had improved and homework had become "an easier task." Joseph had performed poorly on a recent standardized test, but Dr. Joan Mele-McCarthy, the Executive Director of the Summit School, had opined that Joseph's performance on this measure was not indicative of his overall progress. The trial court observed that Father saw no demonstrable improvement in Joseph's performance while attending the Summit School. The trial court found that the "recent testing by the Summit School clearly shows that Jo[seph] continues

to struggle, which is consistent with Father's testimony regarding Jo[seph's] reading performance."

The court found that there was no family tradition of attending the Summit School or any other private school, nor had the parties chosen to send Joseph to a particular school prior to their divorce. When considering whether there was any particular factor that might impact Joseph's best interest, the court observed that Joseph had been diagnosed with "severe dyslexia" and had been "making little to no progress in the public school system despite [Mother's] concerted efforts to assist him in any way that she could do so."

The court considered the parties' ability to pay tuition for the Summit School, observing that "[t]he parties have a combined income of nearly $200,000.00," and, "[i]n addition, they each receive indirect financial assistance from third parties." Mother resides with her own mother and does not pay rent or make mortgage payments, while Father resides with his girlfriend "who assists him with household bills." The trial court found that Mother earned $103,669.18 when working overtime on-call hours and would earn $83,669.18 per year if she did not work additional overtime hours.

Additional factors the trial court considered included Father's opinion that Mother never gave Joseph's IEP a chance to succeed before removing him from his public elementary school and that Joseph's social life had been adversely affected by his attendance at the Summit School because he did not have classmates living nearby and was no longer involved in sports.

The trial court found that both parents lacked the ability to afford private school tuition for Joseph. The court found that Father was "presently essentially 'breaking even' with his income and expenses" and that Father's "expenses are appropriate for a father of three teenage boys earning in the mid-eighty thousand dollar range per year." The court found that Mother similarly lacked the financial ability to pay for private school tuition. Although Mother's income was greater than Father's and she did not have any rent or mortgage expenses, the evidence demonstrated that Mother had "a substantial monthly deficit" that had largely depleted her savings. The court further considered potential future increases in the cost of Joseph's tuition. Although Mother received $15,000.00 in financial aid for the 2018-19 school year and $10,000.00 in financial aid for the 2019-20 school year, the amount was determined based on Mother's application and finances alone. The court considered that if Father's income were also considered, the financial aid award may be reduced, and "a substantial increase in such cost would be catastrophic and would inevitably lead to reduced assets to support all of the Minor Children as well as to likely further litigation." Based upon its consideration of all of the factors, the trial court concluded that the factors "weigh against private school costs being included in the child support determination."

Mother takes particular issue with the trial court's determination that Father earns $88,108.91 per year, hindering his ability to pay for private school tuition. Mother asserts that Father's actual income is $16,096.00 more than computed by the trial court, which would easily allow Father to pay for half of the tuition for the Summit School regardless

of whether Joseph was awarded scholarships or grants. Mother contends that although Father claimed that his income was $72,708.00 per year from his full-time position and $4,999.92 from his "side job," his actual income from his full-time position as a firefighter was $95,055.17.[6] Mother further asserts that Father should have included $4,150.00 of retirement plan contributions in income. Father responds that there is evidentiary support for the trial court's conclusion that his annual income of $88,108.91.

In our view, the record supports the trial court's conclusion that Father's income was $88,108.91 per year. The circuit court considered the W-2 forms submitted by Father for his full-time firefighter position as well as his "side job" as a bartender, paystubs, and Father's testimony regarding his income. Furthermore, Mother never asserted before the trial court that Father's actual income was at least $95,055.17. Indeed, in the Proposed Finding of Facts, Conclusion of Law, and Proposed Order filed by Mother before the circuit court, Mother asked the trial court to find, *inter alia*, that Father "earns $84,201.00 per year in his employment as a firefighter as well as an additional $3,907.91 from his employment

[6] Mother obtained the $95,055.17 figure by adding together the amount $66,318.29, which appeared in Box 5 on Father's W-2 statement, labeled "Medicare wages and tips," and $28,736.88, which appeared in Box 12b on Father's W-2 statement, labeled with the code "DD." According to the Internal Revenue Service, the amount reported in Box 12b with the "DD" code is the cost of employer-sponsored health insurance. IRS, Form W-2 Reporting of Employer-Sponsored Health Coverage, https://www.irs.gov/affordable-care-act/form-w-2-reporting-of-employer-sponsored-health-coverage (last visited May 13, 2021). Mother cites no authority that supports her position that the amount Father's employer paid for Father's employer-sponsored health insurance should be imputed to Father as income, nor do we know of any such authority. The amount that Father's employer paid for health insurance does not in any way affect Father's actual take-home pay or his ability to afford private school tuition.

as a bartender. [Father's] total yearly income is $88,108.91." Mother cannot argue on appeal that the circuit court erred by determining that Father earned the same amount of money that she argued Father earned before the trial court.

Mother further asserts that Father enjoys a luxurious lifestyle including having a home with an in-ground pool, owning multiple vehicles including at least one boat, and frequent dining out at bars and restaurants. In Mother's view, these luxuries show an ability on Father's part to contribute to private school expenses for Joseph. The circuit court considered the expenses testified to by each of the parents and determined that the parties' expenses were not unreasonable. The trial court further concluded that Father was "breaking even" and that neither parent could afford private school tuition. This conclusion was supported by the evidence and was not clearly erroneous, and we shall not second-guess the trial court's determination on appeal.

The trial court carefully considered the *Witt* factors and evaluated the evidence presented by the parties when determining whether or not private school tuition for Joseph should be included in the child support determination. It is not our task on appeal to consider each of the factors anew and make an independent determination as to each. The trial court considered Joseph's progress at the Summit School and observed that he had made strides in his reading performance since transferring schools. The trial court also considered, among other factors, that parties lacked the ability to pay for private school tuition. Our review of the record reveals that the court heard evidence and considered several relevant factors relating to Joseph's enrollment in private school. Although other

fact-finders may have reached a different conclusion when weighing the *Witt* factors, the court's conclusion that the factors weighed against the inclusion of private school tuition was premised upon factual findings drawn from the record. We will not disturb this determination on appeal.

II.

Next, we turn our attention to Mother's assertion that the circuit court erred by modifying custody. Mother asserts that the circuit court erred both by (1) modifying legal custody by splitting the tie-breaking authority between the parties; and (2) modifying physical custody by granting additional overnights to Father. Mother asserts that there was no material change of circumstances warranting a modification of legal or physical custody. As we shall explain, we are not persuaded by Mother's contention that the trial court erred in connection with its modification of legal and physical custody.

A. Material Change of Circumstances

When addressing a potential change in custody, a trial court must engage in the following two-step process:

> 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).

A material change of circumstances is a change in circumstances that affects the welfare of the child. *McMahon*, *supra*, 162 Md. App. at 594. The Court of Appeals has explained that although courts must engage in a two-step process in evaluating a petition to modify custody, the two-steps are often interrelated:

> [I]n the more frequent case . . . there will be some evidence of changes which have occurred since the earlier [custody] determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

McCready v. McCready, 323 Md. 476, 482 (1991). "In [the custody modification] context, the term 'material' relates to a change that may affect the welfare of a child." *Wagner*, *supra*, 109 Md. App. at 28, 674 A.2d 1 (1996).

The trial court explained in detail the basis for its determination that a material change of circumstances had occurred. The court found that the minor children were "significantly older, resulting in changes in maturity, interests, abilities to care for themselves (i.e., to be less reliant on constant supervision and care from their parents), and in their schedules. The court further observed that the children had later bedtimes and extracurricular activities that ended in the evening "as late at 8:30 or 9:30 p.m.," rendering the evening exchange time in the prior custody order unworkable. The court further observed that there were frequent disruptions on evenings where the children had to be returned to Mother late in the evening.

Mother's work schedule had changed as well. The trial court observed that prior to 2018, Mother worked on Mondays, Tuesdays, and Thursdays from 10:00 a.m. to 10:30 p.m., but since May 2018, Mother worked four days per week from 7:00 a.m. to 5:30 p.m., with the day off varying each week. The trial court explained that Mother's previous schedule allowed her to be home when the children left for school in the morning, but her current schedule does not.

The trial court emphasized that what was "[m]ost concerning" was the parties' "fail[ure] to comply with the prior order that they share the joint legal custody of the children, requiring collaboration and civil communication." The court found that "the increased level of conflict and resulting stress that has impacted and continues to impact all of the children" was "in and of itself, a material change that directly and significantly impacts the children." The trial court observed that "[b]oth [parties] acknowledge a continued deterioration of the parenting relationship" which was "particularly concerning in light of the added stress that the children must feel based upon the changes necessitated by the [C]ovid[-]19 lockdown."

Mother argues that there was no material change of circumstances because Father sought the same schedule modification in his 2016 modification request, which was denied by the circuit court. Mother asserts that the children's extracurricular activities do not constitute a material change of circumstances since the children were involved in many of the same sports and activities at the time of the divorce and at the time of Father's 2016 modification request. Mother further asserts that she has worked for the same employer

since the parties' divorce and that the change in her work hours is not a change in circumstances warranting a modification of custody. Mother additionally asserts that the parties have always had difficulty with communication and that these challenges are "nothing new." Finally, Mother contends that the fact that the children have gotten older is not sufficient to constitute a material change of circumstances.

Viewing the record as a whole, we conclude that there was sufficient evidence to support the trial court's conclusion that a material change of circumstances had occurred. The basis for the trial court's finding of a material change of circumstances was not only the fact that the children had grown older.[7] Rather, the children's activity schedules had changed, rendering 7:30 p.m. changes challenging if not impossible. Mother's work schedule had changed as well, and she was no longer available in the mornings to assist the children with getting ready for school. There was also evidence presented that supported the trial court's conclusion that there was an "increased level of conflict and resulting stress that has impacted and continues to impact all of the children," which the court found "in and of itself [was] a material change that directly and significantly impacts the children." The parties both testified as to their inability to communicate effectively regarding whether Joseph should change schools. That particular conflict resulted in Mother exercising her tie-breaking authority to enroll Joseph at the Summit School despite

[7] Mother asserts that a material change cannot be found on the sole basis the children have grown older. *McMahon, supra*, 162 Md. App. at 596 (quoting *Campbell v. Campbell*, 477 S.W.2d 376 (Tex. App. 1972) (explaining that the older age of a child is "particularly unpersuasive" as a material change of circumstance "because aging is an inexorable progression prevalent in all custodial contests.").

Father's objection. The circuit court's conclusion that this level of conflict and stress affected the children was reasonable.

Based upon our review of the record as a whole, we hold that the circuit court's determination that a material change of circumstances had occurred was supported by the evidence presented at trial. Indeed, a change is considered to be "material" only if it affects the welfare of the child. *McCready v. McCready*, 323 Md. 476, 481-82 (1991). There were several changes identified by the trial court that had evidentiary support and also affected the welfare of the minor child. Accordingly, we shall turn our attention to the trial court's specific determinations as to legal and physical custody.

B. Modification of Legal Custody

As we discussed *supra*, the trial court ordered that the parties would continue to have joint legal custody but modified the tie-breaking provision after finding that "the best interests of the minor children require a change in the legal custody order to more specifically define the responsibilities of the parties." The trial court ordered that Mother would have tie-breaking authority for educational and religious decisions, while Father would have tie-breaking authority for extracurricular activities and medical decisions.

"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." *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.* In some

circumstances, it is appropriate for the parties to have joint legal custody but for one party to possess tie-breaking authority. The Court of Appeals has described joint legal custody with tie-breaking provisions as follows:

> In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking provision permit one parent to make the final call. Because this arrangement requires a genuine effort by both parties to communicate, it ensures each has a voice in the decision-making process.
>
> To be sure, the *Taylor* Court's definition of joint legal custody places parents' decision-making rights on an equal footing; indeed, it characterizes their voices as being equal. A delegation of final authority over a sphere of decisions to one parent has the real consequence of tilting power to the one granted such authority.
>
> But such an award is still consonant with the core concept of joint custody because the parents must try to work together to decide issues affecting their children . . . We require that the tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children.

Santo v. Santo, 448 Md. 620, 632–33 (2016) (internal citation omitted) (emphasis in original).

Mother asserts that there was no evidence presented that it was in the best interest of the minor children to split tie-breaking authority between the parents. Mother emphasizes that neither party specifically requested that tie-breaking authority be divided between the parties based upon the subject matter of the decision at issue. Rather, Mother requested that she retain tie-breaking authority and Father requested that tie-breaking

authority be removed. Mother contends that because the parties were not on notice that such a result was a possibility, they did not put forth evidence as to which party should have final decision-making authority on which issue.

Mother is correct that neither party specifically requested that tie-breaking authority be divided between the parents in the specific manner imposed by the trial court, but the issue of whether tie-breaking authority should be modified was clearly raised before the trial court. The trial court heard testimony regarding Mother's previous exercise of her tie-breaking authority when deciding to enroll Joseph at the Summit School and the circuit court concluded that Mother "unilaterally decided" to enroll Joseph having had "minimal communications" with Father regarding the issue. The court found that Mother had "ignored" Father's input and that "Mother made up her mind long before any 'discussions' occurred between the parties and nothing Father said was going to have any impact on Mother's decision whatsoever." Mother's decision to exercise her tie-breaking authority previously without having engaged in good faith discussions with Father about such a significant decision was a reasonable factor for the trial court to consider when determining that a modification of legal custody was appropriate.

After setting forth its findings as to the *Taylor* and *Sanders*[8] factors, the trial court explained why it had decided to split tie-breaking authority between the parents for

[8] The *Taylor* and *Sanders* factors are the best interest of the child factors outlined in *Taylor v. Taylor*, 306 Md. 290 (1986), and *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1997), that trial court must consider when making custody determinations. The non-exhaustive list of factors set forth in *Taylor* are: (1) capacity of

different issues. The court specifically explained that "the best interests of the minor children require a change in the legal custody order to more specifically define the responsibility of the parties" and further determined that "[i]t is in the best interest of the children that the parties remain joint legal custodians but that tie[-]breaking authority be modified." The court "reminded [the parents] that they each have an equal role and responsibility to make appropriate decisions for their children but only after they have fully vetted any issue." The trial court further explained:

> Both parties appeared to acknowledge the stress that is impacting the children and appear to be committed to eliminating that stress. It is their responsibility to do just that for these children. Instead of feeling in the middle of two parents who cannot agree, the children should feel loved by both parents and not be constrained to act differently for fear that they will upset one or the other parent. Therefore, this

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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 list of 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.

Mother does not assert that the trial court erred in connection with its assessment of the *Taylor-Sanders* factors when arguing that the court inappropriately split tie-breaking authority between the parties but instead argues that there was no evidence to support the split tie-breaking authority and asserts that there was no material change of circumstances. Accordingly, we shall not address the circuit court's findings as to each factor.

> [c]ourt will order the parents to comply with a common sense set of "kid's rules" designed to help eliminate stress to the children. In addition, this [c]ourt will add an additional set of parental conduct directives that if followed will also minimize stress and conflict. Both parties are expected to follow the rules set forth in this [c]ourt's order, to take no action that will place any of the children in a stressful circumstance. Both parties are to be civil, courteous, and respectful to each other at all times.

It was within this context that the court divided tie-breaking authority between the parties, granting Mother tie-breaking authority for "educational and religious decisions" and granting Father tie-breaking authority for "extra-curricular activities and medical decisions." The court further directed that "[t]he tie-breaking authority shall not be exercised but in rare circumstances and only after the parties have consulted with one another and sought additional outside guidance on any issue." The court "recommended that the parties utilize the services of a Parent Coordinator to assist them in improving their parenting relationship." The court further required that the parents ensure the children receive appropriate counseling "to deal with any issues results from past experiences" and ordered that the parents "shall both participate and themselves engage in appropriate [counseling] to assist them in dealing with any anger issues or other problems that have contributed to the stressful environment. As parents, they must work together to ensure a stress-free environment for the children."

We disagree with Mother's contention that there was no material change of circumstance warranting a change in tie-breaking authority and that there was no evidence supporting a split in tie-breaking authority. Although no specific evidence was presented

as to which precise subject matters should be subject to each party's tie-breaking authority, there was ample evidence presented regarding the parties' challenges with communication and difficulty reaching shared decisions. Furthermore, the trial court was entitled to credit Father's testimony that Mother failed to engage with him and consider his opinion prior to exercising her tie-breaking authority to enroll Joseph at the Summit School. The trial court's determination that splitting tie-breaking authority between the parties based upon the subject matter of the decision was reasonable in light of its determination that "the best interests of the minor children require a change in the legal custody order to more specifically define the responsibility of the parties." The trial court reasonably concluded that giving each parent specific categories of decisions for which each had tie-breaking authority would reduce conflict and stress.[9] We perceive no abuse of discretion by the trial court in reaching this determination.

C. Modification of Physical Custody

In challenging the trial court's modification of physical custody, Mother focuses upon the trial court's finding of a material change of circumstances, arguing that no material change of circumstances had occurred. Mother asserts that the trial court failed to consider the prior litigation between the parties and did not consider Father's previous modification motions in which he made the same or similar arguments. We have already

[9] As Father observes, splitting tie-breaking authority between the parties may promote more productive communication between the parties because one party may be less likely to abuse tie-breaking authority if that party knows the other parent has the authority to act unilaterally as to other matters.

addressed the trial court's material change of circumstances finding *supra*. As we explained, the trial court's finding of a material change of circumstances affecting the best interests of the children was supported by the evidence, and we reject Mother's argument to the contrary.

After determining that a material change of circumstances had occurred, the trial court examined the *Taylor* and *Sanders* factors and set forth its reasoning as to each factor. Mother does not expressly challenge any of the trial court's findings as to the *Taylor* and *Sanders* factors and we need not reassess each of the factors on appeal. Our review of the record demonstrates that the trial court considered the applicable factors when assessing whether the existing physical custody schedule should be changed. For example, the trial court considered Father's testimony that the children desired additional overnights with him and that the modification of the physical custody schedule would be "easier for [the children] and require less transition time." The court further considered the stressful situation the family had experienced and reasoned that additional overnights with Father would be "for the benefit of the children to avoid unnecessary and potentially stressful exchanges," observing that "[e]veryone benefits from less stress."

Having reviewed and considered the record in this case, it is our conclusion that the trial court's factual findings were supported by the evidence and not clearly erroneous. Furthermore, the circuit court considered the applicable factors before modifying the children's physical custody schedule. We hold, therefore, that the trial court's determination that a material change of circumstances had occurred that warranted a

modification of the children's physical custody schedule so as to include more overnight time with Father was not an abuse of discretion. Accordingly, we affirm.

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