UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1474

September Term, 2014

PIERRE RICHARD TORCHENOT

v.

SANDHRINIE IMBERT
f/k/a SANDHRINIE TORCHENOT

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: June 12, 2015

This is an appeal from the Circuit Court for Howard County of a Judgment of Divorce granting sole physical and legal custody of the parties' minor child to the Appellee, Sandhrinie Imbert ("Imbert") with visitation to the Appellant, Pierre Richard Torchenot ("Torchenot"). Torchenot raises six questions on appeal, which we have rephrased:

1) Did the trial court err in awarding sole legal custody to Imbert despite testimony by both parties that they can communicate through email?

2) Did the trial court err in awarding sole physical custody to Imbert where Torchenot requested equal access, the parties had the capacity to communicate, and each had a sincere desire to care for their child?

3) Did the trial court err in applying the best interests of the child analysis when it limited Torchenot's visitation to one week at the Thanksgiving holiday and two weeks in the summer?

4) Did the trial court err in granting permission to Imbert to relocate outside of Maryland or outside of the United States with the child?

5) Did the trial court err by imputing $40,000 in potential income to Torchenot as part of the child support calculation without making a finding of voluntary impoverishment?

6) Did the trial court err in ordering Torchenot to pay Imbert's attorneys' fees?

For the reasons that follow, we shall affirm the judgment of the Circuit Court.

FACTUAL BACKGROUND

Torchenot and Imbert were married in Howard County, Maryland, on June 22, 2007. They are the parents of a child born on March 23, 2011. Imbert works full-time as an

administrative assistant and is also a student at Howard Community College. Torchenot received a Bachelor's Degree from University of Baltimore in 2014 and, at the time of trial, was pursuing a Master's in Business Administration. Torchenot owns and is employed by Torch Light Tradings, a business through which he purchases computers, refurbishes them, and resells them on eBay. Torchenot's federal income tax return in 2013 indicated that the gross profits from his business were $56,578.00. Prior to becoming separated, Torchenot, Imbert, and their child lived together at Torchenot's computer shop in Baltimore, which is located in a warehouse with a small living area. At the time of trial, Torchenot still lived and worked there.

The parties separated at some time around January 1, 2013. Shortly after they separated, Torchenot asked for visitation with the child from Saturday to Sunday each week. Imbert denied his request because she wanted to take the child to church on Sunday and, instead, offered him visitation from Friday after daycare until Saturday. Torchenot rejected that counteroffer, and, as a result, did not see his child until the start of the divorce trial on August 11, 2014. Imbert testified that Torchenot had not provided any financial support whatsoever for their child since the date of separation, and that Imbert solely provided for all of the child's needs, including clothing, food, shelter, entertainment, medical care, and daycare.

On November 20, 2013, Imbert filed a complaint for limited divorce. She later filed an amended complaint seeking absolute divorce. Torchenot filed an answer to the amended complaint and a counterclaim for absolute divorce.

Trial was held in August 2014. At the conclusion, the trial court issued a Judgment for Absolute Divorce and issued the following orders relevant to this appeal: (1) Imbert will have sole legal and physical custody of the minor child; (2) Imbert will be permitted to relocate outside of Maryland or the United States with the minor child; (3) Torchenot will have the right to visitation with the minor child each year for one week at the Thanksgiving holiday and two consecutive weeks during the summer; (4) Torchenot shall be solely responsible for making the minor child's travel arrangements and paying all transportation costs; (5) Torchenot will pay child support in the amount of $923.00 per month; and (6) Torchenot will be responsible for Imbert's attorneys' fees in the amount of $2,072.00. Torchenot timely appealed.

DISCUSSION

Torchenot challenges several aspects of the trial court's decision, which we address in turn. We review the trial court's factual findings under the clearly erroneous standard. *Maness v. Sawyer*, 180 Md. App. 295, 312 (2008). If the trial court's ultimate conclusion is founded upon sound legal principles and based upon factual findings that are not clearly erroneous, we will only disturb its decision if there has been an abuse of discretion. *Id.*

I. Legal Custody

Torchenot's first claim of error is that the trial court abused its discretion by granting Imbert sole legal custody of their child, despite testimony by both parties that they were able to communicate with one another through email. Imbert, on the other hand, contends

that there was no evidence presented that showed that the parties could communicate effectively to reach shared decisions in the best interest of their child.

When a court makes a determination as to whether to grant one parent sole legal custody, it must consider the factors set forth in *Taylor v. Taylor*, 306 Md. 290 (1986). In that case, the Court of Appeals emphasized that among the factors, the capacity of the parents to communicate and reach shared decisions affecting the child's welfare is "clearly the most important factor" when determining whether joint legal custody is appropriate. *Id*. at 304.

In making its ruling, the trial court noted "when there's no real communication, normally speaking, joint custody is not deemed appropriate. The number one factor there, is the capacity of the parties to communicate effectively concerning the child's best interest, and there hasn't been any communication between the parties concerning the child's best interest, for all practical purposes." Torchenot claims that the trial court erred because there was testimony that he and Imbert had communication regarding the child through email. Imbert, on the other hand, points to the Torchenot's concession during closing argument that he and Imbert did not communicate well.

Torchenot points to no evidence on the record that renders clearly erroneous the trial court's factual determination that the parties are unable to effectively communicate to reach shared decisions affecting the child. The fact that he and Imbert would occasionally communicate through email does not prevent the trial court from finding that, under all the circumstances, the parties are not able to *effectively* communicate on matters concerning

the child's interest. Therefore, we affirm the trial court's decision to grant sole legal custody to Imbert.

II. Physical Custody

Next, Torchenot contends that the trial court erred in granting sole physical custody of the child to Imbert because, in his view, that decision was not in the best interest of child. A court considers a number of factors relating to the best interest of the child when determining whether to grant joint or sole physical custody.[1] Torchenot specifies four factors upon which he claims the trial court's decision was erroneous. We address these in turn and affirm the decision of the trial court.

A. Capacity of Parents to Communicate and Reach Shared Decisions.

Torchenot incorporates his argument regarding the capacity of the parents to communicate from his claim of error on the trial court's grant of sole legal custody. Having determined that the trial court's determination was not clearly erroneous, we also affirm that decision in the context of sole physical custody.

[1] These factors include: (1) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (2) the willingness of parents to share custody; (3) the fitness of the parents; (4) the relationship established between the child and each parent; (5) the preference of the child; (6) the potential disruption of the child's social and school life; (7) the geographic proximity of the parental homes; (8) the demands of each parents' employment; (9) the age and number of children; (10) the sincerity of the parents' request for joint custody; (11) the financial status of the parents; (12) the impact on state or federal assistance; (13) the benefit to the parents; and (14) any other relevant factors to be considered. *See Taylor v. Taylor*, 306 Md. 290, 304-11 (1986); *Reichert v. Hornbeck*, 210 Md. App. 282, 304-307 (2013).

B. Fitness of the Parents.

Torchenot appears to make a legal argument that the trial court confused two of the factors in best interest analysis, fitness for joint custody and financial status of the parents. In Torchenot's view, the trial court improperly relied on the fact that he had not contributed to his daughter financially for a year and a half to determine that he was not fit for joint physical custody. He contends that the fitness for joint custody factor concerns only physical and psychological capabilities of the parents to maintain joint physical custody. Imbert agrees with Torchenot that financial fitness is not an appropriate means for reaching a conclusion on this factor. Imbert, however, contends that the trial court did not base its decision on this factor on financial fitness, but rather considered the totality of the circumstances in reaching its conclusion, and that there was no evidence put forth that Torchenot was actually fit to have joint custody.

We agree with Imbert that there is nothing in the trial court's reasoning that indicates it misunderstood the legal standard and erroneously conflated the fitness for joint custody factor with the factor relating to the financial status of the parents. Financial status of the parents is distinct from fitness for joint custody, but the trial court has discretion to give as much weight to each factor as it sees fit under the circumstances. *See Taylor*, 306 Md. at 304-11. The trial court's decision to emphasize Torchenot's lack of financial support for his child does not mean the trial court somehow misunderstood the meaning of the fitness for joint custody factor. Moreover, Torchenot points to no facts on the record that would render a determination that Torchenot was not a fit candidate for joint custody clearly

erroneous. Therefore, we will affirm the trial court's factual determination on this factor, as there was no clearly erroneous factual conclusion made.

C. Potential of Maintaining Natural Family Relations.

Torchenot argues that the trial court failed to give due regard to the factor relating to the general preference for maintaining natural family relations, considering that Imbert was considering moving to France with the child. He claims that if Imbert moved with the child, he would never see his child again. The trial court considered this factor and did not give either party a "particularly high scores" with regard to their potential to maintain natural family relations.

It must be remembered that "[a]t best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but in doing so we recognize that none has talismanic qualities and that no single list of criteria will satisfy the demands of every case." *Taylor v. Taylor*, 306 Md. at 303. While the factors provide guidelines for determining what is in the best interest of the child, we defer to a trial court's opportunity to hear all testimony and consider which factors should carry the most weight in a given case. *See Reichert v. Hornbeck*, 210 Md. App. 282, 305 (2013).

The trial court did not place significant weight on this factor because neither parent demonstrated greater potential for maintaining familial connections and, therefore, the factor did not push the best interest analysis in either direction. We defer to the trial court's decision regarding the weight of these factual findings. Therefore, we affirm.

D. Sincerity of Request for Joint Custody and Voluntary Abandonment.

Torchenot claims the trial court erred when it found that his failure to see or financially support his child for a year and a half constituted a voluntary abandonment, and that this erroneous finding was incorporated into the analysis of the best interest of the child on the factor relating to the sincerity of Torchenot's request for joint custody.

Torchenot argues that the trial court failed to take into consideration: (1) testimony that Torchenot had tried to arrange visitation on Saturdays and Sundays, which Imbert denied; (2) testimony that Imbert took possession of the couple's only car upon separation, leaving Torchenot without transportation to visit the child at daycare; (3) testimony that Torchenot had offered money to support the child before a dispute arose as to the amount.

Torchenot provides no support for his assertion that these pieces of testimony were not taken into consideration by the trial court when forming its conclusion. Torchenot's dissatisfaction with the result does not mean that the trial court completely failed to consider this testimony. The testimony Torchenot cites is not sufficient to render clearly erroneous the trial court's decision that he voluntarily abandoned his child after separation, or that this voluntary abandonment weighed against finding that his request for custody was sincere.

We, therefore, affirm the trial court's decision with respect to the physical custody of the parties' minor child.

III. Visitation

Torchenot next argues that the trial court erred by granting him only three weeks of visitation during the year: two weeks during the summer and one week during the Thanksgiving holiday. Imbert, on the other hand, contends that amount of visitation is completely reasonable given both Torchenot's lack of effort to visit his child prior to the trial and the possibility that Imbert and the child will relocate outside of Maryland.

Under Maryland law, a non-custodial parent has a right to visitation, but it is not an absolute right. *Myers v. Butler*, 10 Md. App. 315, 317 (1970). "Decisions concerning visitation generally are within the sound discretion of the trial court, and are not to be disturbed unless there has been a clear abuse of discretion." *In re Billy W.*, 387 Md. 405 (2005).

Torchenot testified that he had not seen his child during the time he and Imbert were separated. Imbert testified that Torchenot only requested visitation once, at the beginning of their separation, but did not request to see her again until trial. Torchenot also testified that he knew that he could visit the child at her daycare provider but he did not take advantage of this opportunity. The trial court also noted that the fact that Imbert might possibly relocate outside of Maryland or the country could create difficulties in visitation. Based on this, as well as other testimony, the trial court concluded that Torchenot's visitation rights should be limited to three weeks per year: two weeks during the summer and one week during Thanksgiving holiday.

Torchenot claims that the trial court did not state any reasons for limiting his visitation to three weeks per year because "in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent." While the opportunity to develop a close relationship with each parent is ideal, the trial court in this case anticipated that the child would be in either Florida or France, either of which would create significant practical difficulties if visitation were more frequent.

These practical difficulties, along with all the other surrounding circumstances that the trial court had the opportunity to consider, provided reasonable grounds for limiting visitation to three weeks per year. There was sufficient evidence upon which the trial court based its decision. Accordingly, we hold that there was no abuse of discretion in granting Torchenot only three weeks of visitation.

Torchenot also challenges the trial court's decision to require him to pay for transportation costs relating to visitation despite his strained financial situation and the possibility of Imbert and the child relocating out of the country. Section 12-103(a)(1) of the Family Law ("FL") Article of the Maryland Code gives trial courts the discretion to award either party costs, including transportation costs for visitation, "that are just and proper under all the circumstances." In making the determination to award costs, the court considers "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b)(1)-(3).

The trial court made a determination regarding the parties' financial status, which we will further discuss *infra* Section V. The trial court was well aware of the needs of each party based on all the testimony given at trial. Importantly, the trial court considered the fact that Torchenot had not visited his child throughout his separation with his wife, despite having reasonable opportunity to do so, which reflected on his substantial justification for pursuing significant visitation periods. The trial court noted that ordering Torchenot to pay transportation costs "will sort of be a reflection of how much he really wants to see his daughter." The trial court did not abuse its discretion in ordering Torchenot to pay visitation expenses.

IV. Relocation

Torchenot contends that the trial court erred in granting Imbert permission to relocate out of Maryland or the United States with the child. Imbert responds that the trial court properly awarded her sole physical and legal custody and that, therefore, she has the right to choose hers and the child's residence.

Imbert testified that she had employment and family-related reasons for relocating. She testified that she had a potential employment opportunity at the Haitian Embassy in France and that, if that employment opportunity did not come to fruition, she planned to relocate to Florida because she has family and a better support system there. Improving a parent's employment prospects or relocating to enjoy a stronger familial support system could both be determined to benefit the interest of a child. *Cf. Domingues v. Johnson*, 323 Md. 486, 501 (1991) (noting that whether relocation serves the best interest of the child

depends on the unique circumstances of a case). It was completely reasonable for the trial court to permit this, especially considering that Imbert was given sole legal custody and would be responsible for decisions regarding the child. We hold that there was no abuse of discretion in granting Imbert permission to relocate based on employment or family support.

V. Child Support

Torchenot claims that the trial court erred by imputing income of $40,000 a year to him without making a finding of voluntarily impoverishment. Imbert claims that potential income can be imputed without a specific finding of voluntary impoverishment.

Section 12-204 of the Family Law Article provides the guidelines for determining the amount of child support a parent must pay. It provides in relevant part:

> **Basic child support obligation; division**
>
> (a)(1) The basic child support obligation shall be determined in accordance with the schedule of basic child support obligations in subsection (e) of this section. The basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes.
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> ***
>
> **Potential income**
>
> (b)(1) Except as provided in paragraph (2) of this subsection, if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income.
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> ***

FL § 12-204. The basic child support obligation is calculated between parents based on their adjusted actual incomes. Torchenot is self-employed so his actual income is defined by FL § 12-201(b)(2) as "gross receipts minus ordinary and necessary expenses required to produce income." A child support award may be based on potential income[2] if the parent is voluntarily impoverished. FL § 12-204(b)(1). Torchenot claims that the trial court improperly imputed $40,000 of potential income without first making a finding that he was voluntarily impoverished.

The trial court did not discuss voluntary impoverishment because it did not impute potential income to Torchenot. Instead, it merely made a factual conclusion as to Torchenot's actual income. The trial court stated that "I'm going to find that [Torchenot] has the potential to easily make $40,000 a year, *in fact, he probably makes more*." (emphasis added). While the trial court noted its belief that Torchenot certainly *could* make $40,000 per year, the crux of its conclusion was that he actually *did* make at least $40,000 per year. Therefore, it determined that, based on the record evidence, Torchenot's actual income for the purpose of the child support guidelines was $40,000 or more. This

[2] FL § 12-201(l) defines potential income:

> "Potential income" means income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.

determination was supported by the 2013 tax return of Torchenot's business, which claimed gross receipts of $123,601 and gross income of $56,578. The trial court also considered statements of the PayPal accounts for Torchenot's business, which had an average annual receipt of about $54,000.[3]

Thus, there was evidence that Torchenot's actual income, in fact, exceeded $40,000. The trial court did not err in concluding that Torchenot's actual income was at least $40,000. No finding of voluntary impoverishment was necessary because the court was making a factual determination as to actual income, rather than imputing potential income.

VI. Attorneys' Fees

When considering whether to award attorneys' fees in a child support matter, the trial court must consider "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b)(1)-(3).

Here, as to the first factor, the trial court had heard testimony regarding the financial status of each party and made conclusions that we affirmed in the previous section. As to the second factor, the trial court had heard testimony regarding the needs of each party, including the fact that Imbert had been the sole provider for the child since the separation.

[3] We also reject Torchenot's argument that the trial court abused its discretion by considering Torchenot's PayPal account statements in making its determination of actual income. He fails to provide any reason why considering PayPal statements is improper when making a factual determination as to actual income.

The trial court specifically noted its finding on the third factor that Torchenot's legal position was not well-founded and Imbert had probably incurred more legal fees than she needed to.

Torchenot points to nothing on the record that indicates any error in the trial court's determination. Torchenot flatly claims he had substantial justification for bringing the action for equal access to his child because "attempts to do so outside of court had failed." However, the trial court, which had the opportunity to hear all the testimony and consider all surrounding circumstances, found that his action lacked a strong legal grounding. Moreover, the decision to award attorneys' fees is within the trial court's discretion and we will defer to that discretion.

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