

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 654

September Term, 2016

MILLION AYTENFSU

v.

YORDANOS B. TEFERA

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: November 29, 2016

*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.

In this case, two parents raised competing claims for custody of their two minor children. The father appeals from an order of the Circuit Court for Montgomery County granting sole legal custody and primary physical custody to the mother and granting the father visitation rights on alternating weekends. He presents two questions:

1. Did the court abuse its discretion in awarding sole legal and physical custody of the parties' minor children to the mother?
2. Did the court give the father enough time to spend with his children when visitation was determined?

For the reasons explained in this opinion, we conclude that the circuit court did not abuse its discretion in its custody and visitation awards. The judgment is affirmed.

BACKGROUND

Million Aytenfsu (“Father”) and Yordanos Tefera (“Mother”) are the parents of two children. The older child was born in 2005. The younger child was born in 2008.

Father and Mother were once married, and they lived together in Ethiopia. Father moved to the United States in search of better employment in 2007, when the older child was two years old and Mother was pregnant with the younger child. The children have resided only with Mother since that time.

Father found a full-time job at a hotel in Maryland. He contributed financially to his family in Ethiopia. At one point, he returned to Ethiopia to visit his family for about one month. Otherwise, his only contact with the children was by telephone.

Communication between the parents broke down around May 2015, while Mother and the two children were in the process of relocating to the United States. Around the same time, Mother had sold some real property in Ethiopia. Father believed that Mother

had no right to sell the property. He eventually pursued a divorce in Ethiopia.

Mother did not move into Father's residence after she relocated to the United States. Instead, Mother rented a separate apartment in Maryland for herself and the two children. She found a part-time job, enrolled the children in school, and secured medical and dental care for the children. The parents continued to have a strained relationship with each other, and Father had minimal contact with the children.

A few months after Mother relocated, the Montgomery County Office of Child Support Enforcement filed a complaint for child support against Father on behalf of Mother. Father opposed the complaint.

On October 15, 2014, the same day that Father answered the child support complaint, he commenced this case by filing a complaint for custody in the Circuit Court for Montgomery County. Father claimed that the children wanted to live with him and that his home was more conducive to raising children than Mother's. He asked the court to grant him sole legal and physical custody of both children and to allow Mother to have visitation.

Mother answered and counterclaimed. She asserted that the children had no established relationship with Father and that he had started visiting the children only after being sued for child support. Mother requested sole legal and physical custody of both children, with visitation for Father.

With the agreement of the parties, the court ordered that the children would continue to reside with Mother while the case was pending and that Father would have access every weekend from Fridays after school until Monday morning before school.

During a weekend visit with Father, the younger child sustained a burn on his arm. A family magistrate reviewed the matter and found that the injury was accidental. The court made no changes to the interim custody arrangement.

The court tried the custody claims on May 18, 2016. Both parents represented themselves and testified with the aid of interpreters. The only other witness was a court-appointed custody evaluator.¹ The evaluator made a recommendation based on her interviews with the parents and children, her observations of the parents and children during home visits, and her review of school records and the Child Protective Services report from the burn incident.

The evaluator testified that, when she attempted to interview Father about the issues in the family, “he seemed to just be focused on an allegation he made that [Mother] had stolen land from him in Ethiopia,” and so “throughout the whole interview” she needed to “redirect him” from that issue. According to the evaluator, Father “said several times that he does not have any intention of communicating” with Mother.

The evaluator testified that she had inquired into the incident in which the younger child had injured himself while in Father’s custody. The two children had been staying with Father from Friday evenings until Monday mornings under the interim custody order. The evaluator said that Father would often sleep during the day because he worked nights on weekends. The younger child (then seven years old) woke up hungry

¹ A custody evaluator is an individual appointed by the court to study or analyze the needs and development of a child who is the subject of a custody or visitation proceeding and the abilities of the parties to care for the child and meet the child’s needs. Md. Rule 9-205.3(b)(3)-(4).

while Father was still asleep and then he burned himself while trying to cook an egg. Father treated the burn with ointment and a bandage. Mother took the child to a hospital a few days later because the injury was not healing well. The evaluator expressed no concerns about future abuse or neglect.

The evaluator characterized her home visits with Father as “challenging.” She recalled that, after she had explained to Father that the purpose of the visit was to observe his interactions with the children, “they just sat there looking at each other quietly.” She managed to encourage him to interact with the children for a few minutes, but then he began “talking about how he’s not going to talk to [Mother] again, that he doesn’t want to have anything to do with her[.]” The evaluator told him that it was not appropriate to discuss those issues in front of the children.

The evaluator testified that Mother’s interactions with the children were “very good” during the visit at Mother’s home. Mother lived in a one-bedroom apartment in the basement of a larger house. The apartment had its own bathroom and kitchen and Mother had access to some areas in the main house. The evaluator said that Mother served the children food when they arrived, that Mother talked with the children about their day, and that the children played with friends that lived in another part of the house.

When the evaluator interviewed the older child, the older child said that he wanted to spend more time with Mother because, under the interim arrangement, he did not get to spend time with her on weekends and he spent most of his time at school on weekdays. The older child told the evaluator that he “liked the time at [Mother’s] house because it feels like family” but that “he feels sad when he’s at his house because his dad spends

most of the time on his phone and doesn't really pay attention to him[.]” The younger child “didn't have any complaints about either house” and said that he liked visiting Father because he “let him do whatever he wanted.”

The evaluator recommended that Mother should have legal custody because Mother had been responsible for childcare decisions since the children were born. The evaluator did not recommend joint legal custody “because of [Father's] refusal to speak to [Mother.]” The evaluator commented that it was obvious that Father cared about his children, but that he was “really angry with [Mother] and [his anger] gets in the way of things right now[.]” The evaluator recommended that Father should have visitation every other weekend, but she expressed some “concerns about [Father] working nights” and about the children “taking care of themselves while he's asleep.”

In his testimony, Father testified that his “dream” was to bring the children to the United States “to make them productive citizens and have a better future[.]” Father stated that he “did everything to process [Mother's] travel to bring her over here with the children[.]” He said that, while he was “processing to bring them over here,” he and one of his brothers rented a two-bedroom apartment for the family.

Father testified that that he was currently working as a security guard at a hotel where he had worked for seven years. He said that he currently worked the night shift (from 11:00 p.m. to 7:30 a.m.) five days a week. His scheduled nights off were Wednesday and Thursday, and so he typically worked on weekends.

During Mother's testimony, the court asked her to describe what had happened since she arrived in the United States. Mother responded by saying that Father was

“hiding at his sister’s place” because “he didn’t want [Mother and the children] to find him.” Mother testified that, when she called Father on the phone to tell him that his children wanted to see him, he responded by threatening her.² Mother said that Father first saw the children about two or three months after her arrival in May 2015.

Mother testified that she worked three days a week during the daytime when the children were at school. Mother reported that the children were both doing well in school and that they both played soccer. She said that she was responsible for scheduling all medical and dental appointments for the children. Mother said that she was willing to communicate with Father about the children but that he had told her that he did not want to talk to her or make decisions with her.³

Testifying in rebuttal, Father challenged Mother’s assertion that he had not welcomed her when she arrived in the United States. According to Father, he had returned to Ethiopia to resolve “the land issue” on May 18, 2015, one day before Mother left for the United States. Father claimed that, when he went to see Mother in Ethiopia, she “insulted [him] in front of [his] children and made threats and threw [him] out.” He

² According to Mother, Father told her over the phone: “if you get any closer to me, I will shoot you.” She said that he also told her: “if you are trying to get close to me through the . . . excuse of the children, then you can cook the children . . . and eat them.”

³ In addition, Mother complained that the children “never bath[ed]” and “usually sleep late” whenever they spent weekends with Father. She also testified that Father arrived late when he took the children to a few medical appointments. As a rebuttal witness, Father said that it was “completely false” that the children did not bathe during their weekend visits. On appeal, he argues that the Mother’s testimony “trying to paint [him] as a careless father” was not credible because it was “not supported by any other testimony.” In making its custody decision, the trial court did not rely on the challenged portions of the Mother’s testimony or make any factual findings on those disputed issues.

said that she took the children to the United States and that he stayed in Ethiopia until June 5, 2015. Father produced his passport to confirm his travel date. Father stated that he was not in the United States at all when Mother arrived, and so he would not have been able to meet her. Father then claimed that “she did all this so that she can sell my property and get the money.” He accused Mother of saying negative things about him because she wanted to “starve [him] of [his] children’s affection or love.”

The court made oral findings and issued its ruling at the end of the trial. In summary, the court stated that, even though Father had moved to the United States with the goal of making a better life for the family, that decision “had the effect of separating [Father] from the children throughout the course of almost their entire lives.” The court said that Mother had been “the primary caregiver” for the children during that time and that she “continued in that role insofar as arranging for the schooling, medical and educational needs of the children” once they moved to the United States.

The court concluded that, because of the dispute over property in Ethiopia, the parties “were not on the best of terms when [Mother] arrived or in the months following.” The court credited Father’s testimony (verified by his passport stamp), that he was actually in Ethiopia during the first few weeks after Mother arrived. The court concluded, however, that “in the months that followed” Father “avoided contact” with Mother and the children because he believed she had taken property that belonged to him.

Relying on the testimony of the custody evaluator, the court concluded that the children were “very comfortable” and “very happy” living with Mother. The court commented that the relationship between the children and Father was “much more

strained,” which, the court said, was not necessarily “their father’s fault, but probably a condition caused by his absence from their lives because of his decision to come to this country.” The court noted that, because of Father’s overnight work schedule, “even on occasions when the children are able to visit their father, he’s gone during the night and, understandably, is very tired during some of the day while they are there with him.”

The court determined that Mother was fit to have legal custody and primary physical custody. The court determined that joint legal custody was not appropriate because “the parties are not able to communicate with respect to significant issues relating to the children.”

The court also determined that Father was fit to have visitation. The court granted him visitation every other weekend, from Saturday morning at 10:00 a.m. until Sunday evening at 7:00 p.m. The court reasoned that Mother “should be entitled to have some weekends with her children” and that “the children would be better off staying” with Mother on Friday and Sunday nights, when Father would be working.

One week after the trial, the court entered an order denying Father’s custody claim, granting Mother’s counterclaim, awarding sole legal custody and primary physical custody of both children to Mother, and awarding visitation to Father on alternating weekends, from Saturday morning until Sunday evening. Father noted this timely appeal.

DISCUSSION

Father challenges the trial court’s decision to grant sole legal custody and primary physical custody of the two children to Mother. Father also contends that the court

granted him inadequate visitation.

“In all custody and visitation determinations, the best interest of the child is the ‘overarching consideration.’” *Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 680 (2014) (quoting *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013)). The trial court has the responsibility to “evaluate each case on an individual basis in order to determine what is in the best interests of the child.” *Gillespie v. Gillespie*, 206 Md. App. 146, 173 (2012) (citing *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996)). “Particularly important in custody cases is the trial court’s opportunity to observe the demeanor and the credibility of the parties and witnesses.” *Petrini v. Petrini*, 336 Md. 453, 470 (1994). Because only the trial court has the opportunity to personally observe the witnesses, the trial court is in the best position “to weigh the evidence and determine what disposition will best promote the welfare of the minor’ child.” *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

As an appellate court, we conduct only a “limited review” of a trial court’s custody decision. *Wagner*, 109 Md. App. at 39. “[A]n appellate court does not make its own determination as to a child’s best interest; the trial court’s decision governs, unless the factual findings made by the [trial] court are clearly erroneous or there is a clear showing of an abuse of discretion.” *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007) (citations omitted). Under the clearly erroneous standard, the appellate court must view the evidence in the light most favorable to the prevailing party, and it will not disturb the trial court’s findings if the record contains any competent, material evidence to support those findings. *Hosain v. Malik*, 108 Md. App. 284, 303-04 (1996) (citing Md.

Rule 8-131(c); other citations omitted). An abuse of discretion exists where “no reasonable person would take the view adopted by the [trial] court[,]” where the trial court “acts ‘without reference to any guiding rules or principles[,]’” where the ruling is “clearly against the logic and effect of facts and inferences before the court[,]” or where the decision is “well removed from any center mark imagined by the reviewing court.” *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997)) (further quotation marks omitted).

In this case, Father disagrees with various aspects of the trial court’s assessment of the evidence and its ultimate decision based on that assessment. In view of the highly deferential standard of appellate review of the findings by the court that saw and heard the witnesses, we see no clear error or abuse of discretion.

Most notably here, Father accuses Mother of lying about events that occurred after she and the children moved from Ethiopia. The court had asked Mother to describe “what ha[d] happened with [her] and the children since [they] arrived here in the United States.” In response, she said that Father “was hiding at his sister’s place” and that, when she called him on the phone, he told her to stay away from him.⁴

During his rebuttal, Father produced a passport stamp showing that he remained in Ethiopia until June 5, 2015, a few weeks after Mother took the children to the United States. On appeal, Father asserts that the trial court failed to consider “the perjury” committed by Mother. He argues that Mother must have been lying when she claimed

⁴ Mother did not say exactly when this phone conversation occurred. Nor did either party testify about where the sister lived.

that she had contacted him after arriving in the United States, because he was in Ethiopia at the time.

As the trial court recognized, however, Mother’s testimony, that she spoke with Father and his sister by telephone at some unspecified time after she arrived in May 2015, was not inconsistent with Father’s evidence that he did not return to the United States until June 2015. The trial court found that Father was still in Ethiopia when Mother first arrived in the United States, but it chose to credit Mother’s testimony that “in the months that followed” Father “avoided contact” with her and with the children. This conclusion was consistent with the other testimony that Father repeatedly expressed that he had no intention of communicating with Mother. The court’s decision to credit Mother’s testimony that Father avoided contact with Mother was not clearly erroneous. *See Petrini*, 336 Md. at 472 n.14 (“it was well within the court’s discretion to decide which witnesses it found to be credible”); *Michael Gerald D. v. Roseann B.*, 220 Md. App. at 687 (“[i]t is not our role, as an appellate court, to second-guess” credibility determinations made by the trial court); *see also McCready v. McCready*, 323 Md. 476, 485 (1991) (deferring to trial court’s assessments of the credibility of parents seeking custody).⁵

In addition to attacking the Mother’s honesty, Father contends that the custody

⁵ In any event, the trial court properly recognized that the exact sequence of events from May and June of 2015 was not the main issue. The court’s objective in a custody dispute is not to determine what party had done past wrongs so that it may punish that party, but to establish a custody arrangement that will promote the best interests of the children under the circumstances. *See Hughes v. Hughes*, 80 Md. App. 216, 231 (1989).

evaluator “provided a flawed and bias[ed] report and exercised undue prejudice against” him. He asserts that “the evaluator did not ask [Father] if he would communicate with [Mother] regarding the parties’ children” and that he would have said yes if the evaluator had asked him that specific question. These assertions have no basis in the trial record.

The evaluator testified that Father “said several times that he does not have any intention of communicating with [Mother] and that he does not, in fact, talk to her at all.” The evaluator specifically mentioned that, during a home visit in the presence of the children, Father said “that he doesn’t want to have anything to do with [Mother.]” When Father cross-examined the evaluator, he asked about the evaluator’s interview of him, but when Father testified, he did not say anything about the interview or say that he was willing to communicate with Mother. In her testimony, Mother stated that Father told her that he “doesn’t want to talk to [her]” and that he “doesn’t want [her] to raise the children with him.” The court gave Father the opportunity to testify in rebuttal, but his rebuttal addressed only the other parts of Mother’s testimony. Father made accusations that Mother had threatened and insulted him, which seemed to confirm, rather than undermine, the conclusion that communication between the parents was poor.⁶

In sum, Father did not dispute the testimony that he repeatedly told Mother and the custody evaluator that he was unwilling to communicate with Mother. The evidence

⁶ In a written response to Mother’s counterclaim, Father had alleged that Mother had “shown enormous contempt” for his relationship with the children and that she had “made efforts to deny the minor children their rights to have a healthy relationship with their father.” Essentially, he admitted that the parents had an acrimonious relationship, but he blamed Mother for those problems.

amply supported the court’s conclusion that “the parties are not able to communicate with respect to significant issues relating to the children.” The court’s finding was not clearly erroneous. *See Baldwin v. Baynard*, 215 Md. App. at 111.

Both parties sought sole legal custody. Father did not ask the trial court to grant joint legal custody, and he did not argue that joint legal custody was appropriate. Nevertheless, he now contends on appeal that the court should have awarded joint legal custody.

Under joint legal custody, both parents have an equal voice in making the long range decisions that significantly affect a child’s life. *Taylor v. Taylor*, 306 Md. 290, 296 (1986). “[T]he most important factor’ in deciding whether to award joint legal custody” is “the ‘capacity of the parents to communicate and to reach shared decisions affecting the child’s welfare.’” *Santo*, 448 Md. at 628 (quoting *Taylor*, 306 Md. at 304). In evaluating the parents’ capacity to communicate, “‘the best evidence’ a court should look for is ‘past conduct or [a] “track record” of the parties.’” *Id.* (quoting *Taylor*, 306 Md. at 307). “‘Rarely, if ever,’ is a joint legal custody award permissible, . . . absent such conduct, ‘and then only when it is possible to make a finding of a strong potential for such conduct in the future.’” *Id.* (quoting *Taylor*, 306 Md. at 304).

As discussed previously, the evidence showed that the parents had been unable to communicate with each other for a significant period of time. Father asserts that Maryland law permits courts, in rare cases, to award joint custody notwithstanding evidence of the parties’ inability to communicate effectively with each other. But Father does not suggest any facts of this case that would justify a departure from the prevailing

rule that courts should rarely grant joint custody to parents who cannot communicate effectively. He does not point to any evidence that the parents had a “strong potential” (*Taylor*, 306 Md. at 304) for cooperation in the future. Evidence of the inability of parents to communicate is, by itself, a sufficient reason to refuse to grant joint legal custody. See *Cousin v. Cousin*, 97 Md. App. 506, 517 (1993); *Hughes v. Hughes*, 80 Md. App. 216, 233 (1989).

As Mother explains in her brief, the trial court did not base its custody decision solely on Father’s unwillingness to communicate with Mother. The court emphasized that Mother had been the “primary caregiver” to both children since birth, that she had continued to “arrang[e] for the school, medical and educational needs of the children,” and that the children were “very comfortable around their mother” and “very happy in the . . . living situation at the mother’s house.” By contrast, the court noted that Father “to some extent, understandably . . . ha[d] been a stranger to the[] children for most of their years” as a result of the living arrangement.

Father argues that the court engaged in “flawed reasoning” when it characterized Mother as the primary caregiver. He complains that the court should have given greater weight to his testimony that his goal in moving to the United States was to support his family and to make a better life for them. Indeed, the trial court did take that testimony into consideration. The court commented that Father’s goals were “laudable” and that the court did not “fault” Father for pursuing them. The court properly recognized, however, that its overriding consideration was to advance the best interests of the children under all of the circumstances, not simply to reward past sacrifices, as considerable as they are and

have been.⁷

The trial court did not abuse its discretion in determining that the relevant factors, on balance, weighed in favor of granting Mother’s custody claim. *See Baldwin v. Baynard*, 215 Md. App. at 109-12 (holding that trial court did not abuse its discretion in granting sole legal custody to mother where the parents struggled to communicate, neither parent had expressed desire for joint custody, and mother had been primarily responsible for child’s education and medical needs); *Maness v. Sawyer*, 180 Md. App. 295, 318 (2008) (holding that court did not abuse its discretion in awarding sole legal and physical custody to mother where the parents had a history of disagreements, including major dispute over sale of property they owned); *Cousin*, 97 Md. App. at 516-17 (holding that court did not abuse its discretion in granting sole legal custody to mother where parties could not agree on major issues in raising children and mother had always been decision maker in the children’s lives); *Leary v. Leary*, 97 Md. App. 26, 38 (1993) (holding that court did not abuse its discretion in awarding sole custody of children to mother where the record was “replete with examples of the parties’ lack of ability to communicate” and mother had been “the principal caretaker of the children”), *abrogated in part on other grounds by Fox v. Wills*, 390 Md. 620 (2006).

As a final issue in this appeal, Father contends that the court did not give him enough time to spend with his children. The court granted him visitation on alternating

⁷ Father asserts that “the testimony clearly shows” that he had “a much better living arrangement for his children[.]” The record does not support that assertion. It shows only that both parents provided suitable housing for the children.

weekends, from Saturday at 10:00 a.m. until Sunday at 7:00 p.m. Even though the court did not find a likelihood that the children would be neglected under Father's supervision, the court determined the children would be better off staying with Mother on Friday and Sunday nights. The court's decision to limit the visitation hours was reasonable in light of Father's testimony that he would be working on weekend nights and the older child's statements that he wished to spend some weekends with Mother. *See Odunukwe v. Odunukwe*, 98 Md. App. 273, 288 (1993). The access schedule was not so restrictive as to be an abuse of discretion. *See Jones v. Salter*, 253 Md. 667, 668-69 (1969) (per curiam); *Gordon*, 174 Md. App. at 638.

Because none of the court's findings were clearly erroneous and because the court made a reasonable choice based on the evidence and all appropriate factors, the court's custody award "constituted a lawful exercise of the sound discretion vested in it." *Petrini*, 336 Md. at 472. There is no basis to set aside that judgment.

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