UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1849

September Term, 2015

EDWARD GILLESPIE

v.

HELEN GILLESPIE

Berger,
Arthur,
Friedman,

JJ.

Opinion by Berger, J.
Concurring Opinion by Friedman, J.

Filed: April 25, 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.

This case involves a custody dispute originating in the Circuit Court for Montgomery County. Helen Gillespie ("Mother") filed a complaint for absolute divorce against Edward Gillespie ("Father") on April 21, 2014. The parties agreed to a *pendente lite* custody arrangement in which each parent had roughly equal time with their two children. The parties' *pendente lite* agreement was incorporated into a *pendente lite* consent custody order on July 29, 2014.

The parties initially believed that the divorce matter would be resolved in an uncontested proceeding, and informed the court accordingly, requesting that the matter be scheduled for an uncontested divorce hearing. Before the hearing occurred, the parties began to experience difficulties with the *pendente lite* custody schedule. Father filed a motion for custody on September 5, 2014 and Mother filed an opposition on September 22, 2014. The circuit court subsequently entered a new scheduling order for a contested domestic matter, appointed a best interest attorney for the parties' minor children, and appointed a court custody evaluator to perform a custody evaluation and issue a recommendation to the court. A contested custody trial was held over a three-day period on July 6, 7, and 10, 2015. The court issued a final custody order which awarded Mother more time with the children than the parties had previously agreed to in the *pendente lite* custody agreement. Father noted an appeal.

Father presents four questions for our review,[1] which we have consolidated and rephrased as a single question:

> Whether the circuit court's custody order, which awarded Mother primary physical custody of the parties' minor children, constituted an abuse of discretion.

Perceiving no error, we shall affirm the judgments of the Circuit Court for Montgomery County.

FACTS AND PROCEEDINGS

Mother and Father married on May 24, 1997. They adopted two children as a result of their marriage, L., born on November 22, 2000, and M., born on September 11, 2004.

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[1] The issues, as presented by Father, are:

> I. Did the circuit court err, as a matter of law, in failing to consider whether there had been a material change of circumstances when it modified the custody order?
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> II. Did the circuit court err, as a matter of law, in failing to consider the best interests of the children when it modified the custody order?
>
> III. Did the circuit court abuse its discretion when it modified the shared physical custody order despite finding that the parties were able to communicate amicably, where no other factors were found to weigh more in favor of either party?
>
> IV. Did the circuit court abuse its discretion when it modified the custody order from a shared physical custody arrangement to an arrangement affording the mother primary custody, where the mother was found to have alienated the children from the father and interfered with the father's custodial rights?

L. has a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") and also suffers from a degenerative eye disease. M. has asthma. The parties ultimately separated on November 30, 2013. Mother filed a complaint for divorce on April 21, 2014, seeking sole legal and physical custody of the children.[2] Father filed a counterclaim, seeking joint legal and shared physical custody of the children.[3]

The parties resolved the issues of *pendente lite* custody and access by agreement. The *pendente lite* consent order, entered on July 29, 2014, provided that Father would have the children overnight on Wednesday and Thursday evenings and on alternate weekends from Friday through Sunday. Father would not pick up the children from school on the days of his overnight visits. Rather, the children would return to Mother's home after school and Father would pick the children up from Mother's home no later than 6:30 p.m. On his custodial weekends, Father would return the children to Mother's home by 6:30 p.m. on

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[2] "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.*

[3] 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.* at 296. "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.

Sunday evening. Mother would have the children from Sunday evening through Wednesday at 6:30 p.m. as well as on alternate weekends. The consent order included a provision that the children "not be forced to stay overnight with either parent" (hereinafter referred to as "the force provision").

The parties entered into a Separation and Property Settlement Agreement ("the Agreement") on August 15, 2014. The parties agreed to have joint legal and shared physical custody of the children. Consistent with the *pendente lite* consent order, the Agreement provided that "[t]he minor children will not be forced to stay overnight with either parent for either regular, holiday or summer access."

Shortly thereafter, the parties began to experience difficulties with the custody and access arrangement. At this point, the Agreement had not been incorporated into a court order. Father asserts that, during this period, Mother was interfering with his time with the children, causing the children to see Father as the enemy, and "painting a picture of [Father] as a monster." Mother asserts that she encouraged the children to stay with Father on his scheduled overnight visits but that the children would telephone her crying and asking to go home. Mother picked up the children from Father's home during his scheduled custodial time on two occasions. Mother asserts that she picked up the children because the *pendente lite* custody order and the Agreement provided that the children should not be forced to stay at the home of either parent. On two occasions, Father telephoned the police and reported that Mother had kidnapped the children, and another time, Father called the police to have Mother removed from his apartment building. Father asserts that Mother would show the

children emails, text messages, and court documents relating to the custody dispute, which he believes further alienated him from the children.

As a result of the issues between Mother and Father relating to access to the children, the circuit court rescheduled the custody trial and merits trial. The custody trial was scheduled for July 6-7, 2015 and the merits divorce trial was scheduled for December 11, 2015. The court appointed Nina Helwig, Esq., as the children's best interest attorney and ordered that a court custody evaluator complete an evaluation. The custody trial began on July 6, 2015. The trial involved issues relating to custody, access, child support, and attorney's fees. The court considered testimony from eight witnesses, including Mother, Father, and custody evaluator Rosalyn Hsnako.

Ms. Hsnako testified that she met with both parents, both children, the children's pediatrician, and several former neighbors of the family. Ms. Hsnako gathered information from the children's schools, requested that Father complete a urine screening, and reviewed the custody file. Ms. Hsnako explained that the children were uncomfortable with Father's living situation. The children had only lived in a single family home before and disliked Father's fourteenth-story apartment. One child was afraid of heights and both were bothered by fire alarms which went off in the building. The fire alarms caused the children to be "uncomfortable and stressed out."

Both children reported that they had difficulty concentrating on their homework at Father's apartment and that there was no bedtime. L. in particular was bothered by having no bedtime at Father's home. L. reported that Father did not require her to take her ADHD

medication but instead would give her the option of whether to take the medication or not. Ms. Hsnako testified that, on Father's custodial weekends, the children did not complete their homework at Father's home. Instead, the children would return to Mother's home on Sunday night and "would be rushing to do it Sunday night, get to bed late and then be tired in school the next day." L. reported that the children did not spend very much time as a family at Father's home but that instead she would stay in her room playing on electronic devices. M. reported that she enjoyed going to a frozen yogurt shop with Father and L. Father reported various other activities that he and the children did together, including watching movies. The children told Ms. Hsnako that they had watched a horror movie with Father and, thereafter, M. was scared and had difficulty sleeping. M. told Ms. Hsnako that she woke Father up to tell him that she was scared but that Father was angry with her for waking him.

Ms. Hsnako testified that Mother had reported that, on several occasions, the children were upset when they returned from visits with Father and would cry. Mother attempted to help the children become more comfortable at Father's home by doing things such as helping decorate M.'s bedroom, providing Father with a shopping list of the children's favorite foods, and creating a game to help them feel more comfortable with the fire alarm at Father's home.

Ms. Hsnako expressed various concerns about both parents. She testified that she believed that the children, and particularly M., should have a "stable, consistent bedtime," which they did not have at Father's home. Ms. Hsnako further testified that she believed it

was inappropriate for L. to make the decision whether to take her medication or not. Ms. Hsnako explained that she believed it was a mistake on Father's part to show the children a horror movie, but that Father had acknowledged that it was a mistake and had admitted that he "shouldn't have done that."

With respect to Mother, Ms. Hsnako testified that some of her behaviors had damaged the children's relationship with Father. Ms. Hsnako testified that she believed that Mother picking up the children during Father's custodial time was inappropriate unless the children were in significant danger. Ms. Hsnako further testified that, in her view, it was not appropriate for Mother to give the children a choice whether to go with Father. Ms. Hsnako expressed concern that Mother had told L. about the custody dispute and the existence of the custody order, which Ms. Hsnako believed was inappropriate. Ms. Hsnako testified, however, that despite her concerns, she believed that Mother's actions were based upon an attempt to protect the children and that it was not Mother's intention to alienate the children from Father. Ms. Hsnako emphasized that she believed that both parents are "good parents at their core."

Ms. Hsnako testified as to her recommendations for the family. Ms. Hsnako recommended that Father participate in counseling with the children in order to help Father connect better with the children and improve their relationships with each other. With respect to custody and access. Ms. Hsnako recommended that Mother be granted primary physical custody of the children and that Father have access to the children on alternate weekends from Friday after school until Sunday evening. Ms. Hsnako further recommended

a mid-week dinner visit with Father on Wednesdays. Ms. Hsnako explained that she recommended that Mother have primary physical custody because Mother's home provided structure and consistency, the children were comfortable in Mother's home, and the children were accustomed to the routines and lifestyle in Mother's home. Ms. Hsnako testified that, in her view, Mother "being the primary parent would really just allow [the children] to be happy, healthy and have a good life." Ms. Hsnako recommended omitting the force provision. Ms. Hsnako explained that the force provision had "caused a lot of issues for the family" by allowing "the children to be placed in the position where they have the power to decide if they're seeing [Father] or not, which is not . . . good for them at their ages to have that much power in the situation not only because it's inappropriate, but it also places them in a very stressful position that they shouldn't be in."

Mother testified that she has a flexible work schedule which allows her to work from home. Mother explained that she and Father had originally agreed to the schedule set forth in the *pendente lite* consent order but that the arrangement did not go well for various reasons. Mother reiterated many of the reasons testified to by Ms. Hsnako, including that the children had difficulty completing homework assignments at Father's apartment, that the children were fearful at Father's apartment, and that the children were bothered by various noises as well as the fire alarms at Father's apartment. Mother further testified that the children were worried about being late for school when staying with their Father. Mother testified that L. was not always given her ADHD medication regularly with Father.

Mother described one incident when M. returned from Father's home with welts all over her body, which were later determined to be from bed bugs. The welts would diminish when M. was at Mother's home but would return after another visit with Father. Father initially told Mother that he did not believe there were bed bugs in his home but eventually had the home treated for bed bugs. After two treatments from an exterminator, the issue was resolved.

Mother testified that she attempted in various ways to help the children adjust to the parents' separation. Mother invited Father to have dinner together as a family, and Mother accompanied the children to a Thanksgiving holiday vacation in the Poconos with Father and Father's family. Mother described her relationship with Father's parents as very positive and testified that she would have Father's parents over to her home after the separation. Mother expressed concerns about Father's use of marijuana and alcohol in the past. Mother acknowledged that Father had been making more of an effort to be involved with the children over the previous year.

Mother testified that, in her view, Father should have access to the children on alternate weekends from Friday through Sunday. Mother further testified that she believed a midweek dinner visit was appropriate. Mother did not believe that the children should stay overnight with Father during the school week. Mother acknowledged that the force provision was problematic and should be omitted from a future order.

Tracy Spencer Newburgh testified on behalf of Mother. Dr. Spencer,[4] a psychologist, testified that she and Mother have been friends for approximately ten years and that she initially got to know Mother because, like the Gillespies, Dr. Spencer also has an adopted daughter from Guatemala. Dr. Spencer's daughter is close friends with L. Dr. Spencer testified that she had not interacted very much with Father, but she described Mother as "very hands on," "creative," and "very active and energetic" with the children.

Various former neighbors also testified. David Nettleton, a former neighbor of the family, testified that both parents were appropriate with the children. Annetta Dexter Sawyer testified that Father is loving, patient, and kind with the children. Russell Sawyer testified that he had not seen Father with the children often in the past year, but that he previously saw Father with the children two to three times per month. Mr. Sawyer described Father as a great parent and a loving father who is very attentive.

Licensed clinical psychologist Dr. Christopher H. Lane testified on behalf of Father over Mother's objection.[5] Dr. Lane testified that, in his view, implementing Ms. Hsnako's recommendation would risk "further attenuation of the father daughter relationship." He testified generally about the importance for children of maintaining a relationship with both

[4] Tracy Spencer Newburgh explained that she usually goes by Dr. Spencer.

[5] Mother had objected on the basis of Md. Rule 5-702, arguing that there was not a sufficient factual basis to support Dr. Lane's testimony. Dr. Lane had not talked to or met with Mother, Father, the children, or any other witnesses. Rather, Dr. Lane's testimony was based upon Ms. Hsnako's custody evaluation report. The circuit court found that Dr. Lane's opinion and testimony would be of assistance of the trier of fact and permitted his testimony over Mother's objection.

parents following a divorce. Dr. Lane commented specifically on the father-daughter relationship, explaining that "different gender parents have different things to offer their children on a long term basis." Dr. Lane testified that current research suggests that a minimum of thirty to thirty-five percent of a child's time should be spent with the non-primary parent in order to optimize the child's relationship with the non-primary parent. He explained that the amount of time recommended by Ms. Hsnako for Father to have access to the children "might be particularly risky because of the gender of the children."

Lastly, the court heard testimony from Father. Father testified that he has a very strong relationship with the children but that Mother attempted to undermine his authority with the children. He testified that he does not have a particularly flexible schedule and is generally unable to leave work before 5:15 p.m. Father testified that, since the separation, Mother has interfered with his relationship with the children by telling the children what to say and telling the children inaccuracies. According to Father, Mother pushed the children to ask for more time with Mother and encouraged the children to say they did not want to go with Father. Father testified that the children would send text messages to Mother, claiming to be upset, and that Mother would come to Father's home, unannounced, and ask the children if they wanted to leave with her. Father further testified that Mother would send him text messages informing him that the children would not be coming with Father during his scheduled access time because the children were "scared." Father testified that he repeatedly asked Mother to stop telling the children that they were not required to stay

overnight at his home. Father asserts that Mother's interference with his custodial rights caused "extreme calamity and chaos" and caused the children "to see [Father] as the enemy."

Father testified that he had attempted to include Mother in family activities and celebrations. He provided an example of when he invited Mother to join him and the children at a restaurant to celebrate M.'s birthday. Father explained that Mother "would always be included in a family celebration for the children." Father provided further examples of his attempts to include Mother in activities, including a text message informing Mother that he had saved her a seat at one of L.'s performances. Father further testified that he is "hugely involved" in the children's various extracurricular activities, including karate, dance, violin, and chorus.

With respect to L.'s ADHD medication, Father testified that he has allowed her to decide whether to take her medication on weekends when "there's nothing else going on." Father explained that he talked with L.'s doctor before giving L. this option.

Father testified that during his weekends with the children, the family generally eats dinner together and watches a movie on Friday evenings. On Saturdays, Father takes the children for some type of activity, such as visiting a museum or attending a play. Father also explained that he sometimes takes the children with him while he is running errands, such as buying birthday presents for the children's friends or purchasing new clothing for the children. With respect to bedtimes, Father testified that M. goes to bed on school nights by 9:45 p.m. and L. goes to bed by 10:15 or 10:30 p.m. Father described himself as a very involved and active parent.

Father explained that he believed there were many inaccuracies in Ms. Hsnako's custody evaluation report. Father testified that Ms. Hsnako failed to verify information in the report with him, including information about the children's bedtimes and information regarding whether Father said goodnight to the children. Father testified that he was "very disappointed" because "[t]here was so much detail that [Ms. Hsnako] didn't cover or didn't follow up on or didn't have accurately."

Father summarized his views on what he believed would be an appropriate custody and access arrangement. Father testified that he believed that the existing arrangement was appropriate except that force provision should be removed. Father testified that he wanted to "start effectively co-parenting" with Mother and that, in his view, this arrangement would be in the children's best interest.

The children's best interests attorney, Ms. Helwig, argued to the circuit court that both parents clearly love the children, but that Father struggled with setting routines and being consistent. Ms. Helwig argued that Father's judgment and parenting skills are not always in the children's best interest, such as with respect to bedtimes and ensuring that L. receives her ADHD medication. Ms. Helwig did not believe that Mother was intentionally alienating Father, but explained that Mother was put in a difficult situation when the children would cry and say that they did not want to go to Father's home. Ms. Helwig commented that "if there was any alienation," she did not "think it was purposeful" and that it was not Mother's intention to alienate Father. Ms. Helwig agreed with the evaluator's recommendation and argued that an appropriate custody arrangement would include primary

physical custody to Mother with Father having the children on alternate weekends and for a weekday dinner visit.

The circuit court issued its ruling from the bench on August 4, 2015, which was memorialized in a written order on August 11, 2015. The circuit court commented on the children's discomfort with Father's living situation but observed that there was a "fine line between making sure that the [children] are happy and comfortable and making sure that they have a meaningful relationship with" Father. The court found that "it's clear, based on all the testimony, that both parents love these two girls tremendously, want them to do well, succeed, and become good citizens."

The court noted that Father had expressed concerns about Mother alienating him from the children. The court found that "there seems to be some alienation" but that it was not intentional on Mother's part. Rather, the court found that "because [Mother] is so involved and so in love with the girls that she almost can't have that separation for them."

The court considered various factors when reaching its determination with respect to custody, which shall be discussed further as necessitated by our discussion of the issues. The circuit court ultimately awarded Mother primary physical custody. The court awarded Father an access schedule which included more time with the children than had been advocated by the custody evaluator or by the children's best interests attorney. The court ordered that Father would have the children on alternate weekends on Thursday through Sunday. On weeks following a visitation weekend, the court ordered that Father would have

dinner visits on Tuesdays and Thursdays. The circuit court explained its reasoning as to the schedule as follows:

> I know that . . . at least a couple of you were hoping that I wouldn't do the Thursday at 6:30, but I think [Father] has every intention and desire to really be there for the girls, so he'll do the homework with them if it's not already done, and he will be responsible for making sure that they have bedtimes and structure. It's new to [Father] and it's new to the girls, but I think it can be done.

The court ordered that when Father's custodial weekend was followed by a school holiday on Monday, Father's visitation would conclude on Monday at either 9:00 a.m. or 6:30 p.m., depending upon Father's work schedule. The circuit court also issued rulings with respect to a holiday schedule and child support.[6]

The circuit court issued a judgment of absolute divorce on December 31, 2015, which provided that the custody order and child support orders of August 11, 2015 and September 23, 2015[7] remained in full force and effect. This appeal followed.

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[6] Following the court's order, Mother filed a motion to alter or amend based upon a miscalculation of child support, which was granted. Father has not appealed the circuit court's child support order.

[7] The September 23, 2015 order referred to in the judgment of absolute divorce was the order granting Mother's motion to alter or amend child support on the basis of a miscalculation.

STANDARD OF REVIEW

We review child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the three interrelated standards as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131 (c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584. 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; he 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.

DISCUSSION

Father asserts that the circuit court erred and/or abused its discretion by failing to find a material change of circumstances warranting a custody modification, by granting Mother more access than under the prior arrangement after finding that Mother had alienated the children from Father, by modifying custody despite the parties' ability to communicate amicably, and by failing to make a finding with respect to the best interests of the children. As we shall explain, the issue of whether a material change of circumstances warranting a change in custody had occurred is not properly before us. Furthermore, our review of the record indicates that the circuit court properly considered the relevant factors and set forth its detailed findings with respect to each factor when exercising its discretion and fashioning a child custody and access schedule to best serve the children's interests.

I. Material Change of Circumstances

On appeal, Father asserts that the circuit court erred in modifying custody without first finding a material change of circumstances. Father is correct that a court must engage in a two-step process when presented with a request to modify an existing custody or visitation order. *See McMahon v. Piazze*, 162 Md. App. 588, 593-96 (2005). We have described the two-step analysis as follows:

> First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (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, *supra*, 162 Md. App. at 594.

In this case, however, the issue of whether a material change of circumstances occurred was never raised or argued before the circuit court. Our review of the record indicates that neither party addressed this issue before the circuit court whatsoever. Rather, the parties both argued for their preferred custody arrangements applying the typical best interests analysis applicable to initial custody determinations. This is logical, given that the only prior order in this case was identified as a *pendente lite* custody order. Although the parties had reached a resolution with respect to custody in the Agreement, it had never been incorporated into a court order. Maryland Rule 8-131(a) provides that an appellate court normally will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." *Univ. Sys. of Maryland v. Mooney*, 407 Md. 390, 400 (2009). Accordingly, we will not address on appeal the issue of whether a material change of circumstances warranting a modification of custody occurred.[8]

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[8] We observe, however, that the evidence appears to present multiple material changes of circumstances between the time the *pendente lite* custody order was entered and the merits custody trial, including but not limited to the children's discomfort with Father's living arrangement, the parties mutual recognition that the force provision was causing difficulties, and the significant tension between Mother and Father due to the previous arrangement. By mentioning these examples, we do not suggest that the material change of circumstances analysis is applicable to this case or that a trial court is required to find a material change of circumstances when entering an initial custody order following a *pendente lite* order. Rather, we simply point out that the circumstances had changed, and likely materially so, before the entry of the final order in this case.

II. The Circuit Court's Substantive Custody Determination

Father contends that the circuit court's custody determination constituted an abuse of discretion for multiple reasons. Father asserts that the court erred in several ways, including that it: inappropriately granted the Mother additional access despite its finding that Mother had alienated the children from Father; failed to properly consider the parties' ability to communicate amicably; and failed to make a finding with respect to the best interests of the children. As we shall explain, the circuit court properly considered the relevant factors and set forth its detailed findings with respect to each factor when determining an appropriate custody and visitation arrangement for the children.

It is well established that the following factors ("the *Taylor* factors") are considered by a court when determining an appropriate custody arrangement: (1) capacity of parents to communicate and to reach shared decisions affecting child's welfare, (2) willingness of parents to share custody, (3) fitness of parents, (4) relationship established between child and each parent, (5) preference of 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 parents, (12) impact on state or federal assistance, and (13) benefit to parents. *Taylor*, *supra*, 306 Md. at 304-11. Not all of the factors are necessarily weighed equally; rather, it is a subjective determination. *See id.* at 302 ("Formula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the

evaluations and decisions that must be made."). The capacity of the parents to communicate and reach shared decisions is "the most important factor in the determination of whether an award of joint legal custody is appropriate." *Id.* at 304.

In this case, the circuit court considered each of the factors and set forth its reasoning and conclusions in detail. With respect to the fitness of the parents, the circuit court found that both parents were fit. The court noted some concern, however, with both parties' willingness to call the police in the presence of the children "over things that, as adults, they should be able to resolve and step back and be more calm about." The court further commented that Father had admitted to smoking marijuana in the past, but that he had not done so in the previous year and that there had been no allegation that he had smoked marijuana in front of the children.

The court considered the character and reputation of the parties, commenting that although there had been an allegation that Father abused alcohol, there was no corroboration of it. The court further commented that the marijuana smoking "doesn't seem to be affecting [Father's] character or how he is interacting with the" children. With respect to the request of each parent and the sincerity of the request, the court found that "both parents are sincere in seeking custody in this matter." The court found that it was "clear [that both parties] love the girls and they have the girls' best interests in mind."

The circuit court commented on the prior agreement between the parties, which was the consent *pendente lite* order. The court did not comment further on the *pendente lite* order, presumably because it did not affect the court's analysis. With respect to the parents'

willingness to share custody, the circuit court commented that "ultimately both parent[s] agree that the girls need the other [parent] in their lives." The court observed that Mother had "made efforts in certain respect to make sure that [Father] is a part of the girls' lives and has gone out of her way to maintain ties with [Father's] family and make sure that the girls participate." The court commented that Mother had "been the caregiver" and that Father needed "to learn how to be a little more of the appropriate caregiver."

The circuit court considered each parent's ability to maintain the child's relationships with the other parent and with other relatives. Again, the court emphasized that both parents believed it was important for the children to maintain relationships with the other parent. The court commented that Mother "tries to make [Father's] house more accommodating so that the girls can feel comfortable." The court expressed concern that "at points [Mother] has not required the girls to go to [Father's] house" and explained that "the force clause made it easy to allow the girls to say, yeah, we don't feel like going." The court emphasized that children "many times . . . just don't know what's best for them" and "for their lives later, certainly having a healthy relationship, a close relationship with their father is paramount." The court found that Mother "at points has been a little too quick to give the girls a way out of that closeness with dad." The court further found that "[o]n the flip side, [Father] calling the police on [Mother] is extremely problematic." The circuit court summarized its views on this factor, emphasizing that "both parents recognize the importance of the other one in the kids' lives, but they've done things to make it more difficult for the other parent."

The circuit court considered the age and number of the children in each household, finding that L. and M. are the only children of each parent. The circuit court considered the preference of the children and noted that both children said they wanted to stay with Mother during the week because it made things easier for homework and school, but both children wanted to spend time with Father on the weekends, on holidays, and during the summer. With respect to the parents' capacity to communicate and reach shared decisions, the court found that "generally speaking the parties have been able to communicate about the girls."

The court found that geographic proximity was not an issue because both parents reside close to one another and close to the children's schools. The court found that both parents had the ability to maintain a safe and appropriate home for the children. The circuit court commented that the children either needed time "to adjust to . . . apartment living or perhaps [Father] will end up changing where he is living."

The circuit court considered the financial status of the parents, noting that both parents had stable employment, although Father had been unemployed in the past for a period of time. With respect to the demands of parental employment, the circuit court found that Mother's hours were more flexible and that, although Father's hours were less flexible, he had "been able to manage to be there for the girls when he's needed to be."

Commenting on the age and health of the children, the circuit court observed that L. is fourteen years old, partially blind, with a diagnosis of ADHD, taking medication regularly, and underweight. The circuit court commented that M. is eleven years old and has asthma, for which she takes medication.

The circuit court considered the relationship established between each child and each parent, noting that Mother "has a good relationship with both the girls." The court observed that, as a teenager, L. had "figured out kind of how to be manipulative when it suits her," which the court found was not unusual given her age. The circuit court emphasized that it "really did consider that in coming up with a decision in this case." The court found that Father "definitely needs to be in therapy with the girls, particularly with [L.]."

Regarding the length of separation, the court observed that the parties were married in 1997 and separated in 2013. With respect to disruption of the children's social and school life, the court observed that there was "no issue with respect to the kids having to change schools" but observed that "with the girls experiencing anxiety around school work, time spent moving from one house to the other is important."

The circuit court noted that there was no testimony regarding any impact on state or federal assistance. With respect to the benefit either parent may receive from an award of joint physical custody and how that will enable the parent to bestow more benefit upon the child, the court emphasized that both "parents love these girls and clearly enjoy spending time with the girls."

After setting forth its findings with respect to each factor, the circuit court issued its ruling with respect to custody. As discussed *supra*, the circuit court awarded Mother primary physical custody, with Father having access to the children on alternate weekends on Thursday through Sunday. On weeks following a visitation weekend, the court ordered that Father would have a dinner visit on Tuesdays and Thursdays.

Having reviewed the record and having summarized the circuit court's factual findings as well as the circuit court's reasoning and conclusions, we hold that the circuit court did not err in its custody determination. Contrary to Father's assertion, the circuit court did not find that Mother had alienated the children from Father. Rather, as recounted above, the circuit court expressed concerns that Mother may have inadvertently acted in ways that proved harmful to Father's relationship with the children. Although the circuit court expressed concern about Mother's actions, the court expressed concern about Father's actions as well, such as, for example, Father's tendency to call the police and ask that Mother be removed from his home.

Furthermore, the court considered the parties' ability to communicate amicably within the context of the larger best interests analysis. Father's assertion that the circuit court failed to make a finding with respect to the best interests of the children is plainly without merit. As discussed in detail *supra*, the circuit court considered each of the *Taylor* factors and set forth its findings and reasoning articulately. The circuit court did not simply adopt the recommendation of any party or of the custody evaluator. Rather, the circuit court explained the reasoning behind its decision to have Father's alternate weekend visits begin on Thursdays instead of Fridays, explaining that such a schedule would allow the children to adjust to completing homework at Father's home and adjust to the weekday evening and morning routine with Father.

In this case, the circuit court engaged in precisely the type of analysis we have explained is appropriate when evaluating the best interests of a child in the context of a

custody determination. Accordingly, we reject Father's assertion that the circuit court erred and/or abused its discretion with respect to its custody determination.

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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1849

September Term, 2015

EDWARD GILLESPIE

v.

HELEN GILLESPIE

Berger,
Arthur,
Friedman,

JJ.

Concurring Opinion by Friedman, J.

Filed: April 27, 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.

I concur in every respect with the majority Opinion for the Court. Particularly, I agree with the majority's conclusion that although the circuit court used the verb "alienate" in its discussion, it made no finding that "this Mother had *alienated* the children from Father." Slip Op. at 24 (emphasis added). I write separately to state my view that I consider the diagnoses of "parental alienation" or "parental alienation syndrome" (which, quite evidently, are the basis for Father's appeal) to be based on novel scientific theories. Prior to admissibility, testimony on these subjects must be subjected to a *Reed/Frye* hearing to prove that such diagnoses are generally accepted in the relevant scientific community, a conclusion about which I have significant doubt. *See* Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64 (2016) (collecting cases denying admissibility of diagnoses of parental alienation syndrome); Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 539 (2001-2002) (quoting Dr. Paul J. Fink, past president of the American Psychiatric Association: "[Parental Alienation Syndrome] as a scientific theory has been excoriated by legitimate researchers across the nation. Judged solely on [its] merits, [Parental Alienation Syndrome] should be a rather pathetic footnote or an example of poor scientific standards.").[1] Unless and until that happens, however, I would caution

[1] In my view, this Court's decision in *Barton v. Hirshberg*, 137 Md. App. 1 (2001) is not to the contrary. There, the report of a court appointed custody evaluator included a diagnosis of Parental Alienation Syndrome. It does not appear that the admissibility of the report was challenged on that basis. This Court rejected an argument that it should have awarded custody based on that diagnosis, and instead found that the trial court did not abuse its discretion by making a custody award relying upon the custody evaluator's underlying findings. *Id*. at 31.

courts, lawyers, expert witnesses, and litigants not to use the terms "parental alienation" or "parental alienation syndrome" casually, informally, or as if they have a medically or psychologically diagnostic meaning that has not been established.