UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01592

September Term, 2016

SARBJIT SINGH

v.

SUKBHIR KAUR

Meredith,
Reed,
Wallace, Sean D.
(Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: May 19, 2017

In this appeal, Sarbjit Singh ("Father"), appellant, contends that the Circuit Court for Montgomery County committed legal error and abused its discretion in awarding primary residential and sole physical custody of his minor daughter ("Daughter") to Sukbhir Kaur ("Mother"), appellee, his former wife. In his Brief, Father presented five "issues," which we have distilled as follows[1]:

[1] Father set forth the following as his statement of "Issues Presented":

> I. Whether the trial court was clearly erroneous in permitting Sandeep Singh Gill to testify at the 11th hour, by telephone when the trial court erroneously believed that a rule on witnesses had not been invoked and the trial court concluded that despite the fact that Appellee Kaur had contacted and communicated with Gill after the beginning of the Trial, it permitted him to testify because the trial court erroneously believed that a rule on witnesses *had not been invoked.*
>
> II. Whether the trial court was clearly erroneous in its Opinion and Order by denying the joint legal and physical custody by basing its decision on two 'key moments' which are not related to Singh's character or capacity to participate in joint legal and physical custody of the minor child.
>
> III. Whether the trial court was clearly erroneous and without credible testimony when it abrogated the prior consent arrangements for the joint legal and physical custody of the minor child by asserting that [Mother-in-Law] had previously 'proven to be non-credible and hostile towards [Mother]' and without any evidence that [Father's] decision making was guided or would be guided by pleasing his own mother rather than what is in the best interest of the child
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> IV. Whether the trial court was clearly erroneous by failing to consider the essential principle of continuity and stable custody of the child where all of the evidence supported the conclusion[ ] that the arrangement for joint legal and physical custody contained in the Voluntary Consent Protective Order had worked well for 11 months and was in the best interest and welfare of the minor child.

1. Did the trial court commit reversible error by allowing Sandeep Gill to testify?

2. Was the trial court's custody order the product of clear error or an abuse of discretion?

For the reasons that follow, we find neither error nor abuse of discretion, and accordingly, affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

At the suggestion of a mutual family friend, the parties to this case first made contact with each other and began communicating via e-mail and telephone in late October 2012. At that time, Father, who had immigrated to the United States from India in July 1991, at

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> V. Whether the trial court was clearly erroneous in denying joint legal and physical custody to [Father] where the court concluded he was a fit and proper person and a person of high character, there was no evidence that the present arrangement for joint legal and physical custody had not been serving the best interest and welfare of the child, a considerable amount of time had elapsed between the separation of the parties and [Mother] acknowledged that she was comfortatgblae and able to communicate with [Father] concerning the best interest and welfare of the child, there was evidence[] that [Mother-in-Law] played a nurturing role in the care and welfare of the child, and [Mother-in-Law] and [Mother] no longer lived together and had no communications between each other that were detrimental to the best interest and welfare of the child and [Father] asserted credibly that he wanted to be a full partner with [Mother] in the exercising [sic] joint legal and physical custody of the child."

(Emphasis in original.)

the age of twenty, was serving in the United States Air Force. Mother, who was approximately age 32 when the parties first began communicating with each other, lived in India and was working as a registered nurse.[2] After a few years of long-distance communication, the parties first met in person in India in late July 2014, and were married ten days later.

After the wedding, the parties spent another ten days or so in India. Father had to return to the United States, without Mother, in early August to report to duty at Andrews Air Force Base; he was accompanied by his elderly parents, who moved into his house in Silver Spring. Mother remained in India while Father filed a petition for her immigration to the United States. Around the 22nd of December, 2014, Mother came to the United States and took up residence in Father's home in Silver Spring, where his parents were also residing. This trip was the first time Mother had ventured beyond her hometown in India. On December 28, 2014, Father deployed to Qatar for six months. On the same day, Mother and Father's parents flew to Salem, Oregon, to live with Father's sister until Father returned from overseas.

Relations between Mother and the rest of Father's family were not smooth in Oregon. Mother, who had returned from India pregnant and was due to deliver in late April, testified that her life in Oregon could be described as "hell for me." She was expected to cook and clean for the whole family. Mother's relationship with Father's

[2] The opinion on appeal here reflects that Mother "was approximately thirty-six (36) years old at the start of the trial," which began in May 2016.

mother ("Mother-in-Law") was rocky. After Mother would spend an entire day on her feet, Mother-in-Law would demand that Mother spend another hour to ninety minutes performing physical therapy on her injured arm. Mother was not allowed to use her cell phone to call her family she left in India. Not long after Mother gave birth to Daughter via caesarian section on April 26, 2015, and returned home from the hospital, Mother-in-Law became angry with Mother and kicked Mother in her sutures, causing an infection that resulted in Mother's hospitalization for three or four days. Mother described the altercation as follows:

> [BY MOTHER]: After my C-section, like I think maybe 10 days after that or maybe about a week, my brother's wife called and [Mother-in-Law] started yelling . . . at her and she said ['] she's not going to die so why are you guys calling every day.['] So I told [Mother-in-Law] why did you talk to my sister-in-law like that, we have never spoken to her like that.
>
> And so after that, [Mother-in-Law] disconnected the phone and she pulled me by my hair and she threw me down on the floor. And then she started kicking me on my stitches. I felt so weak and I was so weak at that time that I fell down and I could not even bring myself up. And then I managed somehow slowly to go upstairs, and then [Mother-in-Law] and [my] father-in-law, they followed me, and I was wearing a robe that my sister-in-law, [Father's] sister, had bought for me and she, in front of my father-in-law, she disrobed me. She said this is my daughter [sic] who bought it for you, and she just disrobed me in front of my father-in-law.
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> [BY MOTHER'S COUNSEL]: Did you ever push your mother-in-law during that time?
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> A. No.
>
> Q. Push your father-in-law?
>
> A. No.
>
> Q. Did you have anywhere to go if they kicked you out of that house?

A. No, I did not. No, that's why I did not leave the house.

Mother testified that she was hospitalized twice after Daughter's birth, and, although she wanted to breastfeed Daughter, Mother-in-Law and Father's sister would not allow it.

Mother testified that she spoke with Father "on a daily basis" while he was deployed, and told him about her rough treatment at the hands of his family. Father would "always say that [Mother-in-Law] needs treatment and can you please tolerate her until I come, and after I come back, I'll take care of her treatment." Father told Mother that she would just have to do the household chores because Mother-in-Law "is old." Father's "answer would always be that it is between you and her, and I can't intervene. I can't do anything about it."

Father returned from deployment in late July 2015, and moved Mother, Daughter, and his parents from Oregon to Silver Spring in early August. But living conditions for Mother did not improve. Mother testified that she could not characterize her relationship with Father during this time, stating: "I don't know how a husband and wife are supposed to be when they are together because whenever I sat down with him, [Mother-in-Law] would always constantly come and start yelling at me." Mother-in-Law expected Mother to take care of all household chores, plus care for Daughter, and Mother-in-Law would not allow her son (*i.e.*, Father), to assist. In Mother's view, Father acquiesced in his mother's wishes with regard to how the household should be run.

In late August 2015, Mother briefly fled the house after Mother-in-Law threw a plate at her. Police responded to Mother's 911 call, but made no arrests.

The incident that precipitated the divorce, which, in turn, precipitated the instant custody case, occurred a few weeks after the plate-throwing incident. Mother testified that, on the morning of September 8, 2015, she woke up and did her "daily chores," including preparing breakfast and lunch for the family. Mother-in-Law had a doctor's appointment, and, despite the fact that Mother wanted to stay home, "they insisted that you have to come along." Mother testified regarding the events of September 8:

> [BY MOTHER'S COUNSEL]: So you went to the doctor, you ran some errands with the family, and then you came back to the house sometime later that day, correct?
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> [BY MOTHER]: Yes. After that, there were other errands. [Mother-in-Law] needed to go to some stores or something, and I was carrying [Daughter] all along, so I was really tired. So we returned around 6:00 p.m., so I prepared coffee for everyone. Everybody had coffee, and then I wanted to sit back and rest for a bit, but [Mother-in-Law] said get to preparing dinner.
>
> Q. And then what happened?
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> A. I told [Mother-in-Law] that I'm very, very tired, and I want to sit and I cannot do any more work, and she said that ["]I am the master of this house, and you have to obey me and you have to listen and do whatever I ask you to, how can you talk back to me.["]
>
> So after that, [Father] was in the basement, so I went and I told him about it. I told him that I'm really very tired. My legs are really aching, and your mother wants me to cook, and I cannot do that. So he said this is between the two of you. I cannot do anything about it.
>
> After that, so I did start cooking, preparing dinner, and his mother was constantly yelling at me. She kept on cursing, using bad words. So after the dinner was done, then I cleaned up. I started washing all the dishes. I did all the cleaning, and after that what she did was put the dishes back in the sink, and she said they're not cleaned properly, so do them again.
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> And so after finishing all that, like around 10:30, I got done and then I sat down to watch TV for a bit. So she said that if your work is all finished

and if you are hurting, then just take Tylenol and then get back to work, so I told her that I had already taken the medicine, and she said no, take it in front of me.

So after saying no to her, refusing that, then [Daughter] was on the sofa, so I just picked up [Daughter] from the sofa, and then I tried to go upstairs. [Father] had me on my throat, and then he said that you cannot go away. You have to listen to what my mother is saying.

I told [Father] that I cannot listen to her because she is talking a lot of wrong things. And then he took his shoe off and then he started hitting me on my head. I wanted to get away from [Father], so I actually opened the door, and I was just about to leave and one of my --- I had put one foot out the door.

He, in the meantime, grabbed me and pulled me back in, and in the process, my legs got a lot of scratches. While he was trying to drag me upstairs, and he had just gone up one or two stairs, and in the meantime, [Mother-in-Law] came and she grabbed me by my hair, and she put her hand in my mouth and then scratched me all over my face and then also kicked me around here and there.

And then after that, [Father] took me upstairs and then he pushed me onto the bed. He said no you can't leave, and my face was --- there was blood on my face and my clothes, so he asked me to wash up, wash my face and change my clothes. I told [Father] that I wanted to call the police and I also wanted to call my family. So after hearing that, he took his shoe off again and then he started hitting me on my head again.

So after that, I got scared, and I went and washed my face, and I changed my clothes, and during all this, [Daughter] was downstairs all alone, and she started crying. And then so after that [Father] opened the door for me and then he came down with me and picked up [Daughter] and then went back upstairs with me. After that, I gave milk to [Daughter] and then after a while, she fell asleep and [Father] fell asleep too.

So it must be like around 12:00, 12:30 at night, that's when I got out of the house. I knocked on the neighbors' doors with the hope that even if they don't open the door for me, they will at least call the police.

Q. Did you have your phone at this time?

> A. No, I did not actually. Ever since we came back from Oregon, [Father] had actually taken away my phone, and I was not allowed to use the home phone.

After hiding in the bushes from Father, who had pursued her outside, Mother was able to flag down a passing car, and that driver helped Mother call the police. Mother spent that night in the hospital, and was discharged to a shelter in the morning. No one was arrested, but Mother never returned to the home.

On September 16, 2015, Father, through counsel, filed a complaint for absolute/limited divorce and other relief, in which he fixed the date of the parties' "mutual and voluntary separation" as September 9, 2015. He requested that the court award him sole physical and sole legal custody of Daughter, and order Mother to pay child support. On October 15, 2015, Mother filed an answer and counter complaint requesting primary physical and sole legal custody of Daughter.

Between these two filings, on October 2, 2015, the parties entered into a consent final protective order ("the Consent Order"). The Consent Order provided, as relevant to the issues before us, that the parties would share, pendente lite, legal and physical custody of Daughter. Daughter would live with Mother Sunday through Thursday, but Father would have "visitation" from 6 p.m. every Thursday through 6 p.m. Sunday. Father also agreed to pay Mother $1,500 per month in emergency family maintenance. The court ordered the parties to participate in a custody and visitation evaluation. The merits of the custody case were set to be heard in May 2016.

On March 24, 2016, the court-appointed custody evaluator orally delivered her report at a circuit court proceeding attended by the parties, their counsel, and a family magistrate.

On May 18, 2016, the custody evaluator was called as the court's witness, and was the first witness to testify on the first day of the custody merits trial. The parties stipulated that she is an expert in custody evaluations. She was examined by the court and the parties' respective counsel.

The custody evaluator discussed the various sources for her report and recommendations, including interviews with the parties, Father's family members, Daughter's pediatricians, Daughter's day care provider, and Mother's landlord. The custody evaluator also reviewed documents, including medical records, a report at Child Protective Services, and police dispatch reports.

When the evaluator was asked by the court if she had concerns about Father's ability to make decisions for the child and share joint custody with Mother, the evaluator testified that she did have concerns about Father:

> THE COURT: Okay. So, based upon your interview of the plaintiff [Father], did you have any reservations or concerns about his ability to make decisions for the child [Daughter]?
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> MS. MANZANARES: Well I did have concerns, just there were questionable aspects within his narrative so that caused me to question the veracity of his statements, some of his statements and also some of his concerns that he voiced about the defendant's [*i.e.*, Mother's] ability to care for the child. I had questions about the veracity and sincerity of some of those concerns. . . . I had concerns that he seemed a bit angry with the defendant and that could possibly impact his decision making for the child. However, as far as his ability to care for her and meet her needs, her basic

needs over the courts of the interview and may interactions with him I did not have concerns in that respect.

THE COURT: Go ahead.

MS. MANZANARES: So I, I guess I didn't have concerns that he would cause physical harm to the child or possibly neglect her. However, I did have concerns about his feelings towards the defendant and how that might impact his decision making for the child.

THE COURT: Based upon your interaction with him, did you have any concerns about his ability to co-parent joint legal custody with the mother.

MS. MANZANARES: Yes. This seemed to be very contentious situation relationship between the parties. He acknowledged that he had obtained medical care for the child. In one instance and I asked if he had informed the defendant of that and he said no because it was no use that she wouldn't respond. Also, some of the e-mail exchanges that he provided me there was just a contentious tone of many of the text message --- excuse me --- text message exchanges. That in one instance I believe the defendant asked the plaintiff how [Daughter] was doing and he responded by saying stop pretending that you even care and didn't provide a response about how the child was doing. So that concerned me. It didn't seem as though this was a productive --- there was productive communication between the parties.

Also, the plaintiff presented himself as the victim and in terms of the power dynamic that seemed inaccurate and even his interaction or e-mail, text message exchanges he did not seem fearful of provoking or raising conflict with the defendant as he told me in his interview. Which he told me he didn't address certain things with the defendant when they were living together because he was afraid that she would have an outburst. However, in their text message exchanges that doesn't appear to be the case.

The evaluator made further comments regarding her concern about the parents' inability to communicate effectively about the welfare of Daughter:

In reference to the parties' capacity to communicate and reach shared decisions, based on the differing accounts of many aspects of the parties' relationship beginning from when they, from when they began dating or even

> were initially introduced, there's discrepancy in their accounts of that, so that indicates that their stories, there is conflicts in their versions of events that transpired starting from when they met. In addition to the conflicting versions of the events that transpired during the days immediately preceding their separation, their dysfunctional communication is further demonstrated by the fact that neither party is willing to share custody.[3] In fact, in addition, their contentious text messages and the final protective order that is valid until 2016 are additional indications that the parties are not able to effectively work together on [Daughter's] behalf. Therefore, it is not [Daughter's] best interest that legal custody be shared.

Although Father denied that Mother-in-Law had mental-health issues, evidence to the contrary included a September 2013 police dispatch report reflecting that Father had called Montgomery County police for help because Mother-in-Law "was having a psychiatric panic attack."

During an interview, Father told the evaluator that he had been married a total of four times, including his marriage to Mother. Father said that he was paying child support for a child in California even though he was not sure the child was his and he did not know the child's name. He denied any mental-health history for himself or anyone in his family, and claimed that his only involvement with the criminal justice system was based on false allegations.

The evaluator's interview with Mother-in-Law was of concern to the evaluator because Mother-in-Law "seems to harbor very negative feelings towards [Mother]." And

[3] Although Father now asserts that the court erred in failing to award him joint legal custody, in his complaint, he asked: "That he be awarded sole physical and sole legal custody of the minor child of the parties, both *pendent lite* and permanently[.]" Mother also asked for sole legal custody.

it was not disputed that Father left Daughter in the care of Mother-in-Law on many occasions.

Questions about Father's credibility, the degree of hostility he felt toward Mother, and concerns about Mother-in-Law's overbearing influence, among other things, led the evaluator to opine that it was not in Daughter's best interest to remain in a shared-custody arrangement. The custody evaluator recommended that Mother be awarded primary residential and sole legal custody of Daughter.

The custody merits hearing took place on three days in May (May 18, 19, and 31) and one in August (August 1). On August 29, 2016, the court issued an opinion and order granting Mother primary physical and sole legal custody of Daughter, with visitation to Father every other weekend. The court's opinion reviewed each of the factors set forth in *Montgomery County v. Sanders*, 38 Md. App. 406, 419-21 (1977), where we observed:

> Where modification of a custody award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child. Unfortunately, there is no litmus paper test that provides a quick and relatively easy answer to custody matters. Present methods for determining a child's best interest are time-consuming, involve a multitude of intangible factors that ofttimes are ambiguous. The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication. The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess.
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> What critics of the "judicial prognostication" overlook is that the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. *See Chapsky v. Wood*, 26 Kan. at 655, 40 Am.Rep. at 325. The court's prediction is founded upon far more complex

> methods than reading tea leaves. The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents, *Cornwell v. Cornwell*, 244 Md. 674, 224 A.2d 870 (1966); *Barnard v. Godfrey*, 157 Md. 264, 145 A. 614 (1929); 2) character and reputation of the parties, *Hoder v. Hoder*, 245 Md. 705, 227 A.2d 750 (1967); 3) desire of the natural parents and agreements between the parties, *Breault v. Breault*, 250 Md. 173, 242 A.2d 116 (1968); *McClary v. Follett*, 226 Md. 436, 174 A.2d 66 (1961); *Colburn v. Colburn*, 20 Md. App. 346, 316 A.2d 283 (1974); *Davis v. Jurney*, 145 A.2d 846 (D.C. Mun. App.1958); 4) potentiality of maintaining natural family relations, *Lippy v. Breidenstein*, 249 Md. 415, 240 A.2d 251 (1968); *Melton v. Connolly*, *supra*; *Piotrowski v. State*, 179 Md. 377, 18 A.2d 199 (1941); 5) preference of the child, *Ross v. Pick*, 199 Md. at 353, 86 A.2d at 469; *Young v. Weaver*, 185 Md. 328, 44 A.2d 748 (1945); *United States v. Green*, 26 Fed. Cas. 30, 31-32 (No. 15256) (C.C.R.I. 1824); 6) material opportunities affecting the future life of the child, *Thumma v. Hartsook*, *supra*; *Butler v. Perry*, *supra*; *Cockerham v. The Children's Aid Soc'y of Cecil County*, 185 Md. 97, 43 A.2d 197 (1945); *Jones v. Stockett*, 2 Bland. 409 (Ch.1838); 7) age, health and sex of the child, *Alden v. Alden*, 226 Md. 622, 174 A.2d 793 (1961); *Cullotta v. Cullotta*, 193 Md. 374, 66 A.2d 919 (1949); *Piotrowski v. State*, *supra*; 8) residences of parents and opportunity for visitation, *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431, 440 (D.C. App. 1972); 9) length of separation from the natural parents, *Ross v. Hoffman*, *supra*; *Melton v. Connolly*, *supra*; *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976); and 10) prior voluntary abandonment or surrender, *Dietrich v. Anderson*, *supra*; *Davis v. Jurney*, *supra*.
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> While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, *Cockerham v. The Children's Aid Soc'y of Cecil County*, *supra*, or the length of separation. *Powers v. Hadden*, *supra*.

The circuit court found that, although both parents are fit and proper, Mother-in-Law "has a history of mental health issues and also . . . of mistreating" Mother, and Father's "consistent decision to leave [Daughter] in the care of [Mother-in-Law] is of big concern to the court as [Mother-in-Law] has proven to be non-credible and hostile towards" Mother. The court also expressed its concern that Father's "decision making will be guided by

pleasing his own mother rather than by what is in the best interest of the child," and that "one major problem in the parties' relationship is the role [Mother-in-Law] plays in these parties' lives."

Father has appealed, arguing (a) that the court should have precluded the testimony of Sandeep Gill --- Father's brother-in-law --- due to Maryland Rule 5-615; and (b) that the court's decision was either unsupported by substantial evidence or was contrary to the weight of the evidence presented. He argues that the trial court should have simply kept in place the custody arrangement outlined in the October 2, 2015, Consent Order. For the reasons outlined below, we disagree.

STANDARD OF REVIEW

In *Gillespie v. Gillespie***,** 206 Md. App. 146, 170-71, 173 (2012), we summarized the standards of appellate review that apply to a child custody ruling:

> This court reviews child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586, 819 A.2d 1030 (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, 819 A.2d 1030. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584, 819 A.2d 1030. 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 he 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, 819 A.2d 1030.
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> *** * ***
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> When making a custody determination, a trial court is required to evaluate each case on an individual basis in order to determine what is in the best interests of the child. *Wagner* [*v. Wagner*], 109 Md. App. [1] at 39, 674 A.2d 1 [(1996)] (citing *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503, 605 A.2d 172 (1992)). Factors the trial court may use in this determination include:
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> > [A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.
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> *Id.* (internal citations omitted). These factors make it clear that the best interest of the child is not a factor of its own. Instead, it is the goal that all other factors seek to reach. *Id.* In determining whether joint custody is appropriate, the capacity of the parties to communicate and reach shared decisions regarding the children's welfare is of paramount importance. *Taylor v. Taylor*, 306 Md. 290, 303, 508 A.2d 964 (1986).

Pertinent to appellant's contention that the trial court should have simply continued the custody arrangement the parties had agreed to in the Consent Order, the Court of Appeals noted in *Frase v. Barnhart*, 379 Md. 100, 111 (2003):

> Child access (custody and visitation) orders are ordinarily of two types. The normal progression of a contested child access case is for there first to be a *pendent lite* determination, designed to provide some immediate stability pending a full evidentiary hearing and an ultimate resolution of the dispute. The child is often traumatized enough by the separation that engenders the dispute, and, to the extent possible, the courts look to avoid any further unnecessary immediate disruptions in the child's life. A *pendent lite* order is not intended to have long-term effect and therefore focuses on the immediate, rather than on any long-range, interests of the child. As a result, although it should not be changed lightly, lest the stability intended by it be diminished, it is subject to modification during the pendency of the action, as current circumstances warrant, and it does not bind the court when it comes to fashioning the ultimate judgment.

DISCUSSION

I. Maryland Rule 5-615

At the beginning of the first day of trial, Father's counsel invoked Maryland Rule 5-615, Maryland's codification of the "rule on witnesses." The rule provides:

> (a) Except as provided in sections (b) and (c) of this Rule, upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. When necessary for proper protection of the defendant in a criminal action, an identification witness may be excluded before the defendant appears in open court. The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.
>
> (b) A court shall not exclude pursuant to this Rule
>
> (1) a party who is a natural person,
>
> (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney,
>
> (3) an expert who is to render an opinion based on testimony given at the trial,

> (4) a person whose presence is shown by a party to be essential to the presentation of the party's cause, such as an expert necessary to advise and assist counsel, or
>
> (5) a victim of a crime or a delinquent act, including any representative of such a deceased or disabled victim, to the extent required by statute.
>
> (c) The court may permit a child witness's parents or another person having a supportive relationship with the child to remain in court during the child's testimony.
>
> **(**d) (1) A party or an attorney may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.
>
> (2) The court may, and upon request of a party shall, order the witness and any other persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.
>
> (e) The court **may** exclude all or part of the testimony of the witness who receives information in violation of this Rule.

(Emphasis added.)

In this case, the rule was invoked by Father before any testimony was taken on May 18, 2016, the first day of trial. Father was the plaintiff in the trial court. Following the testimony of the custody evaluator, who testified as a court's witness, Father's case was presented through the testimony of his witnesses, which included his sister Minander Gill and Mother-in-Law. Both Minander Gill and Mother-in-Law denied that Mother had suffered any abuse at their hands while living in Oregon.

After Father rested his case on August 1, Mother informed the court that she wanted to call Sandeep Gill ("Sandeep") (who was married to Minander Gill, and therefore, was

Father's brother-in-law) in rebuttal. Mother said that Sandeep and Mother had been in contact in July, and counsel proffered that Sandeep would testify about Mother's life in Oregon and "fill in some gaps" for the court. Counsel asserted that Sandeep's testimony would rebut testimony given by Minander and Mother-in-Law.

Father objected because Sandeep had not been disclosed during discovery to be a witness with knowledge of pertinent information. Before ruling on Father's objection based on discovery, the court, *sua sponte*, noted that Sandeep's testimony could possibly implicate the rule on witnesses, but the court could not recall whether the rule had been invoked at the outset of the trial nearly three months prior. The court asked its law clerk to listen to the recordings of the earlier stages of trial and ascertain whether sequestration of witnesses had been ordered; and, in the meantime, the court reserved ruling on Father's objection, and went on to another witness.

After a recess, the court informed counsel and the parties that its clerk had listened to the recording of the first day of trial and had not heard any request for the rule on witnesses. As the parties agree on appeal, this was incorrect. The court then said it found no discovery violation and would permit Sandeep to testify.

Sandeep's testimony on direct examination by Mother was brief. He testified that Mother was a "very good" mother who "took care of her baby" and "she also respected her mother-in-law." Mother-in-Law, however, "was always speaking out loud, yelling at [Mother] and towards her wardrobe, she was always making comments that you're not supposed to wear this and not supposed to wear that."

Sandeep was not asked any questions about a cell phone on direct examination. But Father's counsel's very first question on cross-examination was: "During [the time Mother lived in Oregon], do you know whether she had her own cell phone or was she able to use the telephone?" Sandeep responded that Mother "did have a cell phone, but whenever they had a fight, [Mother-in-Law] would grab it from her. She would take it away." Sandeep also testified that Mother was not allowed to use her cell phone to call her family in India. This was contrary to the testimony of Minander and Mother-in-Law, who both claimed that Mother had a cell phone and had no restrictions on access to it.

On appeal, Father argues that the court committed reversible error by permitting Sandeep to testify in violation of Rule 5-615. Even though the transcript demonstrates that Father had asked for the rule on witnesses, and the trial court simply erred in failing to recall that it had ordered sequestration, we are not persuaded that an objection to the court's error in this regard was preserved or that the court's exercise of discretion to permit the witness to testify was an error that prejudiced Father.

When Mother first alerted the court of her intent to call Father's brother-in-law as a rebuttal witness on the fourth day of trial, Father did not raise an objection based upon Rule 5-615. Instead, the transcript shows Father's objection at trial was that Sandeep Gill had not been disclosed as a potential witness during discovery. Even when the trial judge *sua sponte* asked whether there was a rule on witnesses in place, Father did not object on that basis. When the judge's clerk reported that, after listening to portions of the recording from the beginning of trial, there seemed to be no mention of the rule on witnesses, Father

neither disputed that conclusion nor asserted any objection relative to the rule on witnesses. Consequently, the argument Father makes on appeal was not made at trial, and was not preserved.

But, even if Father had objected to Sandeep's testimony based upon a possible violation of the sequestration order, Rule 5-615(e) does not mandate the exclusion of all testimony of any witness who has communications with a party during the trial. Father asked no questions of either Mother or Sandeep regarding what, if any, information Sandeep received in contravention of the rule. Consequently, the record does not support a finding that Sandeep "receive[d] information in violation of [Rule 5-615]" such that Sandeep's testimony was subject to exclusion under Rule 5-615(e).

Furthermore, although Rule 5-615(e) provides that the "court *may* exclude all or part of the testimony of the witness who receives information in violation of this Rule," it does not mandate the exclusion of such testimony. "When there has been a violation of a sequestration order, whether there is to be a sanction and, if so, what sanction to impose, are decisions left to the sound discretion of the trial judge." *Redditt v. State*, 337 Md. 621, 629 (1995). In a case in which the best interest of a child is of paramount importance, we are reluctant to find that a trial judge committed an abuse of discretion in opting to hear from available witnesses who may be able to provide relevant information.

When an appellant complains of error by a trial judge in a civil case, the burden is on the appellant to persuade the appellate court that the error was prejudicial. *Crane v. Duncan*, 382 Md. 83, 91 (2004). Here, because exclusion of Sandeep's testimony was not

mandated by Rule 5-615(e), we are not persuaded that the trial court would have excluded the testimony even if the court had concluded there was a violation of the sequestration order. Because the court's paramount concern was the best interest of the minor child, we conclude that it was unlikely the trial court would have excluded the testimony of this witness even if the court had found that there was a violation of a sequestration order, and the admission of Sandeep Gill's testimony was, at most, harmless error.

II. Substantial evidence

The bulk of Father's Brief argues that the court either could have, or should have, drawn different inferences from the evidence than it did. Much of the evidence has been set forth above and need not be repeated here. We are satisfied there was sufficient evidence to support the court's decision to award sole legal custody to Mother.

Father urges us to find that the court gave excessive weight to the fact that, during a brief hiatus in the case between May 19 and May 31, Father posted derogatory statements on Mother's counsel's website about Mother's counsel. The court stated in its written opinion:

> Due to court [un]availability, the Court was required to take a pause in the proceedings between May 19 and May 31, 2016. When the trial resumed on May 31st, Defense counsel [*i.e.*, Mother's counsel] was able to elicit testimony that Plaintiff [*i.e.*, Father] visited Defense Counsel's webpage during the break in the trial proceedings. Plaintiff posted various statements, including that Defense Counsel is a crooked lawyer who should be disbarred and a lawyer who only represents crooks and cheats. While Plaintiff is entitled to his own opinions, the behavior sides with a viewpoint that Plaintiff is erratic and hyper-emotional.

Father asserts in his Brief that there is no evidence that *Mother* "took umbrage" at Father's postings or felt disrespected thereby, and that therefore, the court's consideration of these postings was "punitive" and "designed to punish" Father. But the court's conclusion that Father's ill-advised postings provided an example of "erratic and hyper-emotional" behavior on the part of Father was not clearly erroneous The weight to give that evidence was up to the trial judge. As we have noted: "Resolving disputed credibility and weighing disputed evidence are matters, of course, in the unfettered control of the fact finder." *Starke v. Starke*, 134 Md. App. 663, 683 (2000).

At trial, Father and Mother-in-Law downplayed the events and behavior of which Mother complained in her testimony. Although the custody evaluator testified that Mother-in-Law "denied any mental health issues for herself," the evaluator reviewed a police dispatch report from September 28, 2013, which reflected that Father called Montgomery County Police for help with Mother-in-Law. On that occasion, Father reported that Mother-in-Law "was having a psychiatric panic attack," during which "she kicked a door," and Father further told the police "that she takes psychiatric medication daily and had not taken her medication that day." This was of concern to the court from a credibility standpoint, and the concern was not unwarranted.

Furthermore, Mother-in-Law's testimony supported the court's conclusion that she was dictatorial toward Mother. Mother-in-Law testified that she wanted Mother to take certain vitamins even though Mother --- who is a trained nurse --- informed Mother-in-

Law that her doctor had told her not to take them. This explanation did not satisfy Mother-in-Law.

Mother-in-Law testified, with regard to Father's four failed marriages: "My son, he's so unfortunate. He's so unlucky." She said that it was "not at all" Father's fault that these marriages broke down; rather, it was a matter of such great family embarrassment "that the Indian girls are behaving in this manner" that "we are trying to hide our faces." She testified that Mother had "[t]remendously" shamed the family. This evidence supports the court's conclusion that the behavior of Father and his family toward Mother was of sufficient concern to weigh against joint legal custody.

One of the witnesses called by Father was Dr. Ramachandran, the pediatrician to whom Father and Mother-in-Law began taking Daughter after the parties separated, even though Daughter already had a pediatrician. On cross-examination, Dr. Ramachandran acknowledged that Father had instructed her not to give any of Daughter's medical records to Mother. The testimony was as follows:

> [BY MOTHER"S COUNSEL]: Did you ever get any instructions from Mr. Singh about whether or not you should give these records to another doctor or to the mother?
>
> [BY DR. RAMACHANDRAN]: No, he just said not to, who not to give it to.
>
> Q. Who did he say not to give it to?
>
> A. Sukhbir, mother, they were separated.
>
> Q. Okay, so he told you not to give her the records.
>
> A. Uh-huh.

Father admitted telling the pediatrician not to give Daughter's medical records to Mother. Such behavior supports the court's conclusion that joint legal custody was not the best choice in this case because "the parties are unable and are not willing to fully cooperate with one another in making important decisions related to the minor child."

We conclude that the trial court did not commit legal error or abuse its discretion in awarding Mother sole legal and primary physical custody of Daughter. There was ample evidence to support the court's decision.

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