Circuit Court for Anne Arundel County
Case No. C-02-FM-16-001211

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2614

September Term, 2016

AYMEN SHARGAWU MOHAMED

v.

MIYADA OSMAN ABAS

Woodward, C.J.
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: October 19, 2017

In this case, a father appeals from an order of the Circuit Court for Anne Arundel County that granted joint legal custody to both parents, primary physical custody to the mother, and visitation rights to the father. He presents several questions, which we quote:

1. Was the trial court clearly erroneous in several factual findings relevant to custody determinations and its joint custody order?

2. Did the trial court abuse its discretion in not interviewing the child and not considering the child's preferences for custody?

3. Did the trial court abuse its discretion in issuing its joint custody order, especially when neither party sought joint custody?

4. Did the trial court abuse its discretion in issuing its joint custody order with primary physical custody to Appellee when the facts compelled a different custody order?

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

BACKGROUND

Aymen Shargawu Mohamed ("Father") and Miyada Osman Abas ("Mother") were married in the Republic of the Sudan in 2004. They are the parents of one child ("Daughter"), who was born in 2007.

Father moved to the United States around the time of Daughter's birth, and he eventually settled in Maryland. In 2008, when Daughter was a year old, Mother and Daughter came to the United States and joined Father.

A year later, Mother returned to the Sudan to care for her ailing mother. She took Daughter with her and continued to live in the Sudan for the next seven years. The

parties dispute whether Father agreed to allow Mother to take Daughter back to the Sudan.

In 2009, Mother filed for divorce in the Sudan. The Sudanese divorce decree did not address questions of custody or child support.

Mother remarried in the Sudan and has had two sons with her second husband. She now lives in Cedar Rapids, Iowa, with one of her sons, while the other son and second husband remain in the Sudan. Father remarried and lives with his second wife in Maryland.

Between 2009 and 2015, Father tried to visit Daughter several times in the Sudan. In addition, he sought custody of Daughter in the Sudanese courts, apparently with little success. During one of his visits, in 2013, Father took Daughter without Mother's consent and attempted to bring her back to the United States. The Sudanese authorities stopped Father at the Eritrean border, and the child was returned to Mother.

In 2013, Mother came to the United States for specialized medical care in connection with a pregnancy, while Daughter remained in the Sudan with Mother's family and her husband. During that time, Father complained to the United States Department of State and the Federal Bureau of Investigation that Mother had abducted Daughter and had abandoned her in the Sudan. Little seems to have come of Father's complaints, and Mother returned to the Sudan after the birth of the second of her two sons.

Mother and Father are cousins, and in 2015 the members of their extended families met, in the Sudan, to reach an agreement regarding who would have custody of Daughter. The agreement was never reduced to writing, and the parties disagreed as to its substance.

According to Father, the parties agreed that Mother would come to live in the United States and would reside in Maryland, that Father would have custody of Daughter, and that visitation would be shared equally.

According to Mother, on the other hand, the parties agreed that she would come to the United States, that Father would have custody for the first year while she got settled in the United States, but that she would regain custody after a year. Father would then have visitation rights.

Mother eventually moved to Iowa, where she is studying to become a phlebotomist and perhaps, eventually, a nurse. Apparently pursuant to the oral agreement, Father obtained custody of Daughter when Mother came to the United States in July 2015.

In 2016, Father filed a complaint seeking sole legal and physical custody of Daughter. Through counsel, he argued that Mother "is not a fit and proper person to have custody" of their daughter. Representing herself, Mother denied Father's allegations, but did not make any formal requests regarding physical or legal custody. Just before trial, however, Mother refused to agree to an arrangement under which Father would have legal custody and primary physical custody.

The circuit court conducted a trial on February 10, 2017. At the trial, Mother represented herself, and both Father and Mother spoke through interpreters.

Following the trial, the court went through the relevant factors,[1] made oral findings, and issued its ruling. In summary, the court decided that both parents were fit and proper persons to have custody of the child. The court, however, did not find it credible that Mother had agreed to relinquish custody by way of an oral or family-brokered agreement, as Father contended. The court allowed that the material opportunities affecting the child's future life would be slightly better if Father had custody, because he is and has been employed for a period of time, while Mother was only a student with a plan to obtain eventual employment. The court did not find the age, sex, and health of the child, the potential of maintaining natural family relations, or the preference of the child to be relevant in this case.

In the court's view, a "significant" factor was the length of Daughter's separation from her natural parents. It was undisputed that Daughter had spent the vast majority of her nine years of life in Mother's care or custody. While Daughter had lived with Father for the last year or 18 months, it was disputed whether Mother had consented to that arrangement or whether it had been imposed on her. In this regard, the court mentioned that Father admittedly took Daughter off the street in the Sudan, while she was in

[1] Although the court did not explicitly say so, its analysis follows the factors recited in *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977).

Mother's custody, and attempted to leave the country with her. The court found that conduct to be "disturbing."

The court recognized that because of the distance between Mother and Father, it had to decide which parent would have primary physical custody and which would have visitation rights. The court found nothing about either parent's residence that militated in favor of or against granting primary physical custody to one or the other.

In determining which parent should have primary physical custody, the court found it "most significant" that Father had "engaged in a pattern of unilateral control" over the child. In the court's view, Father had not made much of an attempt to resolve the dispute with Mother, but instead had attempted to impose a resolution on her.

Based on the relevant factors, the court found that it was in Daughter's best interest to grant joint legal custody to both Father and Mother and primary physical custody to Mother. Father was to have visitation during spring break, summer break, and winter break from school. Neither parent could relocate or leave the country with Daughter unless they had written approval from the other parent or the court.

Although the court awarded primary physical custody to Mother, it ordered that physical custody would not change until after July 1, 2017, so that Daughter could complete the school year in Maryland. The court allowed Mother to have visitation during spring break in 2017.

Finally, the court explained to the parties that because they had joint legal custody, they must confer with each other about fundamental decisions affecting the child, such as

educational, religious, and medical decisions (except those involving emergency care). In its written order, the court required the parties to use their best efforts to attempt, in good faith, to reach an agreement on any fundamental issues pertaining to legal custody. If the parties are unable to reach such an agreement "after a good faith effort," Mother has tie-breaking authority.

Father noted this timely appeal. He challenges the trial court's decision granting joint legal custody and primary physical custody of the child to Mother.

DISCUSSION

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)). "The trial judge has the authority to determine custody, regardless of whether 'joint custody has existed in the past, or award custody to one of the parents, or to a third person, depending upon what is the best interests of the child.'" *Leary v. Leary*, 97 Md. App. 26, 36 (1993) (quoting *Taylor v. Taylor*, 306 Md. 290, 301 (1986)), *abrogated on other grounds by Fox v. Wills*, 390 Md. 620 (2006).

"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) (first alteration in original) (quoting *In re*

Adoption/Guardianship No. 3598, 347 Md. 295, 312-13 (1997)) (further quotation marks omitted).

A. Factual Findings Supporting Award of Custody

Father argues that, in several respects, the court's decision was not supported by the evidence received at trial. 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.

1. Award of Joint Custody to Parents Who Have Difficulty Cooperating

According to Father, the record does not support the court's finding that he and Mother can cooperate and make shared decisions regarding Daughter. In support of his contention, Father refers to his allegation that Mother took the child back to the Sudan without his consent and that she allegedly refused to abide by an alleged agreement regarding custody.

The court, however, does not appear to have credited Father's contention that Mother took the child back to the Sudan without his consent, and it expressly rejected his contention that she failed to abide by the oral, family-brokered agreement on custody. Hence, the court did not accept the factual contentions that underlie Father's attack on joint custody. We have no basis to conclude that the court's rejection of those contentions was clearly erroneous.

In any event, the circuit court was not oblivious to the disputes between Mother and Father. The court took note of the disputes, but it also noted that they did not relate

to fundamental child-rearing decisions (which it empowered the parents to decide), but to physical custody and visitation (which it decided for them).

Finally, even if the parties did have difficulty cooperating with one another about fundamental child-rearing decisions, the Court of Appeals has explicitly declined to hold "as a matter of law that a court errs if it awards joint custody to parents who fail to communicate effectively with one another." *Santo*, 448 Md. at 630. Instead, the Court emphasized "that a trial court should carefully set out the facts and conclusions that support the solution it ultimately reaches." *Id.* The court complied with that obligation in this case.

2. Mother's Fitness

Father complains that the circuit court erred in finding Mother to be a fit parent. In support of his complaint, however, Father simply reiterates the arguments that he made at trial.

Specifically, Father complains that the court did not consider Mother's alleged "abandonment" of Daughter, when Mother left Daughter with Mother's family in the Sudan for six months while she sought specialized medical treatment in the United States. He cites his own testimony that, when he visited Daughter in the Sudan, she was dusty and dirty, and was playing in the street without adult supervision. He takes the court to task for allegedly giving no credence to his efforts to involve the United States government in support of his claims that Mother had abducted and abandoned Daughter. Finally, he faults the court for "concentrat[ing] on one action" by him – his aborted

attempt to spirit Daughter out the Sudan, without Mother's knowledge or consent.

The short answer to Father's complaint is that the circuit court implicitly rejected his contentions. In concluding that Mother was a fit parent, the court expressly stated that Mother "shows great concern for" Daughter – a finding that is completely inconsistent with the notion that Mother abandoned or neglected her child. On the related issue of character and reputation, the court stated that it had "heard no credible evidence that would undermine the character and reputation of" Mother.

We have no basis to conclude that the court's findings were clearly erroneous. The court was not required to accept Father's testimony about his alleged observations of Daughter's conditions while she was in the Sudan. Nor was the court required to accept Father's benign characterization of his motivation for attempting to enlist the aid of the United States government (apparently after the Sudanese authorities had prevented him from removing the child from the Sudan without Mother's knowledge or consent). Moreover, the court had a firm evidentiary basis for not accepting Father's allegation of maternal abandonment: Mother testified that under Sudanese law Daughter was under the custody of Mother's mother (i.e., of Daughter's maternal grandmother). Hence, when Mother left the Sudan for six months to obtain medical care in the United States, she did not "abandon" Daughter; rather, Daughter remained in the custody of her maternal grandmother during that time.

The court was not compelled to make the findings that it made, nor was it clearly erroneous in making them.

3. Separation of Residences

Father argues that the award of joint custody is "incomprehensible," given that the parents live in separate states, "about 1000 miles" (he says) away from each other.[2] He predicts that despite his best efforts the arrangement for joint custody "will fall apart" within a year. He does not, however, advance any legal argument in support of his contention. Consequently, we decline to address it. *See DiPino v. Davis*, 354 Md. 18, 56 (1999) ("if a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it"); *accord Moosavi v. State*, 355 Md. 651, 660-61 (1999); *Rutherford v. State*, 160 Md. App. 311, 328 (2004); *see also Klauenberg v. State*, 355 Md. 528, 552 (1999) ("arguments not presented in a brief or not presented with particularity will not be considered on appeal"); Md. Rule 8-504(a)(6) (requiring that a brief contain "[a]rgument in support of the party's position on each issue").

4. Disruption of Daughter's Life

Father argues that the circuit court "glossed over the definite disruption" that Daughter would face in her school and social life, apparently as a result of the award of primary physical custody to Mother. To the contrary, the court understood that some

[2] According to Google Maps, the distance (by automobile) from Laurel, Maryland, where Father resides, to Cedar Rapids, Iowa, is about 928 miles via Interstate 80 (which takes a northerly route through Pittsburgh, Cleveland, and Gary, Indiana) and 976 miles via Interstates 70 and 74 (which take a more southerly route through Columbus, Indianapolis, and Peoria, Illinois).

disruption would occur, but took steps to minimize it by staying the order until after the end of the school year. The court was not clearly erroneous in awarding primary physical custody to Mother, notwithstanding the inevitability of some disruption to Daughter's school and social life, because the court based its decision on the conclusion that the child should reside with the parent with whom she had resided for the vast majority of her life. If a court finds that it is in a child's best interests to reside with one parent, the court is not precluded from awarding primary physical custody to that parent merely because the court's order will require the child to move from one community to another.

5. Daughter's Dental Care

At trial, Father introduced evidence that when Daughter came into his custody he obtained dental care for her, because her teeth were in poor condition. He complains that the court "glossed over" the condition of Daughter's teeth, which he appears to suggest constituted evidence of neglect by Mother.

Father is incorrect. The court did not ignore his evidence about Daughter's dental problems. It did, however, elect to give that evidence little weight, as it was entitled to do. The court explained that neither party put on evidence about whether Daughter's dental problems resulted from neglect or from the difficulty of obtaining adequate dental care in the eastern Sudan, where Daughter had lived for most of her life.

In his brief, Father asserts, without citation to the record, that "[*t*]*here are dentists in Sudan*." (Emphasis in original.) Father's broad statement is undoubtedly true. Unfortunately, at trial, Father did not adequately establish that Mother had access to

affordable, quality dental care for Daughter, but neglected to obtain it. In this regard, therefore, the Court's finding was not clearly erroneous.

B. Not Interviewing Daughter about Her Preferences

Father argues that the court abused its discretion in not interviewing Daughter and not considering her preferences for custody. Father, however, failed to raise the issue at trial. Thus Father failed to preserve the issue for appellate review. *See* Md. Rule 8-131(b) ("[o]rdinarily, the appellate court will not decide any issue," other than subject matter and personal jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court"); *see Cohen v. Cohen*, 162 Md. App. 599, 607-08 (2005). We cannot fault the circuit court for failing to do something that no one asked it to do.[3]

C. Award of Joint Custody Without an Express Request

Father, without citing any authority, argues that the trial court abused its discretion in ordering joint legal custody even though neither party requested it. A court's discretion in ordering custody, however, is not governed by the parties' formal requests, but by the child's best interests. *See Kerns v. Kerns*, 59 Md. App. 87, 94 (1984) ("[t]he fact that the parties do not request joint custody is no limitation upon a court's authority to award it"). A child has "an indefeasible right to have any custody determination

[3] In any event, it is not even clear from the record that Daughter was present for the proceedings before the circuit court. The court certainly could not interview Daughter if she was not there.

concerning him made, after a full evidentiary hearing, in his best interest." *Flynn v. May*, 157 Md. App. 389, 410 (2004).

In *Flynn v. May*, a mother failed to file a proper answer to a complaint for custody. *Id.* at 392. The circuit court entered an order of default against her (*id.* at 393), prohibited her from contesting the father's case and from offering any proof at a hearing on the merits (*id.* at 395-98), and gave custody of her seven-year-old son to the father (*id.* at 398) even though the child been had been in her primary physical custody "[s]ince the day of his birth." *Id.* at 411. In holding that the circuit court's conduct amounted to an abuse of discretion, this Court held that the mother's procedural default could not divest the child of *his* right to have a court evaluate his best interests in deciding which parent should have custody of him. *Id.* at 410. Custody decisions, Judge Moylan explained, do not turn upon procedural gamesmanship in the litigation between the parties. *Id*. at 408.

In this case, Mother, a recent immigrant, who did not have an attorney and did not speak English well enough to address the court without an interpreter, actually filed an answer, but did not expressly request joint legal custody. But just as the failure to file a proper answer did not divest the child of his right to have the court consider his best interests in deciding custody in *Flynn v. May*, Mother's failure to include an express request for joint custody in her answer could not divest Daughter of *her* right to have the court order joint legal custody if it was in her best interest to do so. The court therefore did not abuse its discretion in awarding joint legal custody in the absence of a formal request for it.

D. Award of Tiebreaking Authority

In its written order, the court required the parties to use their best efforts to attempt, in good faith, to reach agreement on any fundamental issues pertaining to legal custody. If the parties are unable to reach such an agreement "after a good faith effort," Mother has tie-breaking authority.

Father complains that the grant of the tie-breaking authority vested Mother with absolute authority over all aspects of their daughter's care. His argument ignores both the terms of the order and the fundamental premises of an award of joint custody with tie-breaking authority in one parent.

In *Santo v. Santo*, 448 Md. at 632-33, the Court of Appeals undertook to explain how an award of joint custody with tie-breaking authority in one parent still comports with the core concepts of joint custody:

> In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking provision permit one parent to make the final call. Because this arrangement requires a genuine effort by both parties to communicate, it ensures each has a voice in the decision-making process.

Although the parents do not have an equal voice on issues on which one of them has tie-breaking authority, "such an award is still consonant with the core concept of joint custody because the parents must try to work together to decide issues affecting their children." *Id.* at 633. "[T]he tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children."

Id. Furthermore, a court has the means to address a breach of good faith should the parent with tie-breaking authority abuse that authority. *Id.* at 634 (citing *Downing v. Perry*, 123 A.3d 474, 483-85 (D.C. 2015)).

The circuit court's order is consistent with these principles. Under the order, Mother can exercise her tie-breaking authority only if the parties have used "their best efforts" to attempt "in good faith" to reach agreement, but are unable to reach an agreement on a "fundamental" issue. Far from vesting Mother with absolute authority over matters pertaining to legal custody, this order imposes strict conditions that she must meet before she can claim the right to exercise her tie-breaking authority. If Mother does not meet those conditions, Father can ask for judicial redress. *See id.*

CONCLUSION

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*, 366 Md. at 472. There is no basis to set aside that judgment.

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