

Circuit Court for Baltimore City
Case No. 24-D-16-000605

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2243

September Term, 2016

DAVID COLBERT

v.

PAMELA MERRICK

Friedman,
Beachley,
Fader,

JJ.

Opinion by Beachley, J.

Filed: February 26, 2018

*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.

By order dated December 2, 2016, the Circuit Court for Baltimore City awarded joint legal custody of M.C. (born March 2011) to her natural parents, appellant David Colbert (“Father”) and appellee Pamela Merrick (“Mother”), and primary physical custody of M.C. to Mother. Father timely appealed, apparently asking us to consider whether the circuit court erred or abused its discretion in granting primary physical custody of M.C. to Mother.¹ For the following reasons, we affirm.

¹ On June 16, 2017, this Court dismissed Father’s first appeal after he failed to file a corrected record extract that conformed to Maryland Rules 8-112(c), 8-501(i), and 8-504(a)(6). Upon Father’s motion for reconsideration, however, we ordered that the appeal proceed in the December 2017 session of this Court, but noted that the appeal could yet be dismissed *sua sponte* unless Father filed a corrected brief and record extract in full compliance with the Maryland Rules by August 28, 2017.

Although it appears that Father made an attempt to abide by our order and the Rules, he does not, in his brief, present any legal issues to be considered, nor does he cite any case law in support of his assertions. Instead, he sets forth nineteen factual reasons why he would be the better primary custodial parent for M.C. “On this basis alone, we could reject his contention.” *Ubom v. SunTrust Bank*, 198 Md. App. 278, 285 (2011). *See also Marquis v. Marquis*, 175 Md. App. 734, 758 (2007) (quoting *Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 138 Md. App. 686, 707 (2001)) (“It is not our function to seek out the law in support of a party’s appellate contentions.”).

In addition, Father does not reference the pages of the record extract to which his assertions refer. “This, too, is a basis to dismiss an appeal.” *Ubom*, 198 Md. App. at 285 n. 4. Nevertheless, although “dismissal may be an appropriate sanction, whether to employ it is a matter left to the exercise of this Court’s discretion.” *Esteps Elec. & Petroleum Co. v. Sager*, 67 Md. App. 649, 657 (1986). Because this matter involves custody of a minor child whose best interests must be considered, we will exercise our discretion to consider Father’s claim.

Mother did not file a brief.

FACTS AND LEGAL PROCEEDINGS

On February 25, 2016, Father, *pro se*, filed a complaint for custody of M.C., requesting sole physical and legal custody.² Prior to the filing of his complaint, Father said that he and Mother, who ended their romantic relationship in 2012, had a “verbal agreement,” whereby they would alternate custody of M.C. approximately every three weeks.³ According to Father, the agreement worked well until he informed Mother he planned to move to a farm in Virginia. Unhappy about the move, Mother refused to turn M.C. over to Father’s care, as promised, on January 3, 2016, and Father did not see the child again until April of that year. In his complaint, Father alleged that his rural home would provide M.C. a safer and more stable living environment than would the “chaotic” Baltimore City home in which Mother lived with her parents and disabled sister.

In her answer, Mother disputed Father’s allegations. She claimed that Father’s animosity toward her may have stemmed from her denial of his request to move with him and his girlfriend, Nura Fardan, to Virginia to participate in a polyamorous relationship. According to Mother, once Father moved, he refused to give her his new address and would not permit her to take M.C. to his home for visitation, instead coming to Mother’s home to pick the child up. Fearing that Father would keep M.C. from her, Mother “held on to [her]

² As the circuit court pointed out during the custody hearing, Father’s complaint and Mother’s answer, both filed without the assistance of counsel, are “more in the nature of testimony” and “not our traditional answer and complaint.” The court reminded the parties that “whatever information you have in the complaint or the answer is not evidence.”

³ Mother and Father never married and had never formalized custody arrangements with the court.

daughter a little while longer” in January 2016 to determine her options for co-parenting M.C. with Father. She denied any intention of keeping M.C. from Father longer than necessary to serve him with a formal complaint for custody, but Father filed his complaint first.

On June 20, 2016, the circuit court referred the matter to its adoption and custody unit for a home study of Mother’s home, which was completed on September 13, 2016. The study disclosed “very little food in the refrigerator” but noted the recent purchase of a new refrigerator to replace a broken one. The inspector found no signs of insect or rodent infestation, peeling or flaking paint, or unsecured hazardous items, but she did note that the home’s smoke detectors were inoperable.

On June 29, 2016, the court ordered mediation on the custody and visitation issues. The parties were unable to reach an agreement, and on November 16, 2016, Mother, through counsel, filed a counter-complaint seeking child support and sole legal and physical custody of M.C.

Mother and Father, both represented by counsel, appeared for trial on November 21, 2016.⁴ Father testified that he and Mother had begun a relationship in 2009, at some point moving in together.⁵ M.C. was born in March 2011.

In early 2012, Mother moved out of her and Father’s residence and returned to her parents’ house, while Father moved in with his now-fiancée, Ms. Fardan. Mother and Father briefly resumed their relationship in 2012 while Father was still in a relationship with Ms. Fardan, but they separated again shortly thereafter. After that definitive breakup, Mother and Father began an alternating custody schedule, with each parent having continuous custody of M.C. for two to four weeks at a time. Father testified that he provided financial support to M.C. in the form of food, clothing, books, and educational materials. The arrangement worked well until the end of 2015, when Father decided to move to Virginia.

Father explained that he began to think about moving in 2013 because he did not want M.C. growing up in or going to school in Baltimore City. He said he discussed the move with Mother and “it was never an issue.” He looked at homes in rural Pennsylvania

⁴ Because neither Mother nor Father had made any previous claim for child support, and neither had filed the requisite financial statement in support of the claim, the court decided to adjudicate the custody matter and defer ruling on the support issue raised in Mother’s counter-complaint until the parties had the opportunity to attempt to reach an agreement on their own. At the December 2, 2016 disposition hearing, the court stated it would not address support because there had not been enough testimony about the parties’ economic situations. The court encouraged the parties to resolve that issue in a proposed consent order.

⁵ Mother later testified that she and Father began their relationship in 2010.

and Virginia, ultimately choosing to lease a farm in Greenbush, Virginia for financial reasons; the home is approximately three to four hours' travel from Baltimore City.

At one point, Father proposed that Mother move to Virginia with him, either in an outbuilding on his property or as part of a romantic relationship with him and Ms. Fardan. Apparently unhappy with that suggestion, Mother thereafter would only communicate with Father by text message.

When he brought M.C. to Mother for the holiday season in 2015, Father told Mother he would pick the child up in early January 2016. But, on January 3, 2016, Mother “shot [him] down completely” and would not communicate with Father about returning M.C. Mother ultimately retained custody of M.C. until April 2016.

Mother later sent Father a Facebook message explaining that she kept M.C. because she planned to seek custody of the child in court and did not trust Father due to his move to Virginia. Father testified that he was unable to contact Mother and felt “in the dark,” and consequently filed a complaint for sole legal and physical custody of M.C.

When M.C. returned to Father's care in April 2016—where she remained until the November 2016 custody hearing—Father stated that M.C. had to readjust to life in Virginia with regard to her academics, partly because she wanted to watch television all day, as she had become accustomed to doing in Mother's home. Father described his daughter as “extremely” happy on his farm, where she eats very healthy foods and participates in Girl Scouts and cultural activities.

It was Father's desire to continue to homeschool M.C. in Virginia, with the assistance of the Virginia Virtual Academy, as he and Mother had agreed to do until Mother

changed her mind and sought to enroll M.C. in Baltimore City public schools. Father averred that the two closest schools to Mother’s home were underperforming schools that would not provide M.C. with an adequate education.

With regard to Mother’s home life, Father testified that he feared for M.C.’s safety in Baltimore City after hearing from Mother about gunshots in the area. He found Mother’s home to be very noisy and cluttered, with roaches and mice present and mold in the bedroom Mother shared with M.C. He also expressed his concern about a lack of healthy food in Mother’s house.

Father further referenced conversations he allegedly had with Mother about arguments with her own mother regarding the grandmother’s abuse of Mother’s disabled sister, who also lived in the house. Those arguments occasionally resulted in Mother staying with Father for “a few weeks” at a time. Father testified that Mother’s parents also argued frequently and spent much of their time and money gambling.

To the court, Father expressed his desire for primary legal and physical custody of M.C., with Mother to have visitation every other weekend, extended periods over the summer, and designated holidays. His witnesses, Nura Fardan, Ms. Fardan’s father, Ms. Fardan’s cousin, and a friend, all testified that Father is an excellent and attentive parent. None had any reservations about Father having primary physical custody of M.C.

Mother testified that her relationship with Father had always been “tumultuous.” She agreed that when she was not upsetting him, “it was wonderful.” On the other hand, when he was angry, Father could be cruel and had even choked her on one occasion. She

said he did not show that side of himself to others, instead putting on a happy face in public, but that she was afraid he would harm her.

According to Mother, after she and Father broke up, Father tried to convince her to live with him as a friend so that M.C. could have both parents in her home full-time. Mother declined because she and Father got along much better when apart.

Once Father leased the home in Virginia, however, Mother was unsure how they would handle custody, having always shared custody of M.C. equally. When she asked Father for his new address, he demurred and then provided her the wrong street name, which she could not find with a Google internet search.⁶ She worried that Father would flee with M.C., and so she refused to return M.C. to Father in January 2016.

Mother did not learn of Father's actual address until she received his complaint for custody in March 2016. Satisfied that she could find him, Mother immediately asked Father if he wanted to pick M.C. up on April 11, 2016, and keep her until August 2016, thereby giving him custody equal to Mother's recent care of M.C.

Mother expressed an interest in enrolling M.C. in public school at the end of August, but Father, during the summer 2016 mediation, indicated his intention not to return M.C. to Mother. In October 2016, Mother applied for free legal services with the Maryland Volunteer Lawyers' Service to institute a custody action against Father.

⁶ Father introduced into evidence a text message he had sent Mother in November or December 2015 setting forth the address, but with his street name misspelled "Nailey" instead of "Bailey," which, he said, was the reason she was unable to locate it. Stating he was unaware of the inadvertent misspelling, he admitted he ignored Mother's texts asking for the correct address because they were not "having the best of back and forth conversations" at the time.

In support of her claim for primary physical custody of M.C., Mother stated that she has many family members who live on her block, including a cousin the same age as M.C. She denied any unfitness of her home or any verbal or other abuse among family members. Mother explained that the finding in the court's home study of a lack of food resulted from a broken refrigerator that was in the process of being replaced when the inspector arrived. She produced receipts for the new refrigerator and newly purchased food. As for the mold Father mentioned, she testified that it was a small spot recently caused by a leaking air conditioner unit. She believed her parents' home to be clean and suitable for M.C. Although she only received \$357 per month in food stamps, Mother advised that her parents were willing and able to assist her financially. The maternal grandmother identified Mother as an excellent parent.

Mother requested primary physical custody of M.C. She proposed visitation with Father every other weekend, so long as the visit did not interfere with M.C.'s schooling. She suggested that Father be granted primary custody during the summer, with her having visitation on some summer weekends. She also sought M.C.'s entry into a local public school so as to socialize her and help her develop more independence and confidence. She expressed concern that Father drinks excessively and is overly harsh with M.C.

On December 2, 2016, the court issued its final decision regarding custody of M.C. After setting forth the relevant factors courts should consider in determining physical and legal custody of a child, the court found it in M.C.'s best interest to have Mother and Father share joint legal custody. The court ordered Mother and Father to make their best effort to communicate with each other about M.C.'s welfare, including information concerning her

education, medical care, social adjustment, and extracurricular activities. The court gave Mother tie-breaking authority to decide any dispute concerning M.C. that the parties could not resolve by agreement.

Acknowledging that the “most challenging . . . issue in this case is physical custody,” the court noted the “logistical hurdles” in continuing alternating months of physical custody given Father’s residence in Virginia. The court proceeded to consider the factors relevant to custody determinations in Maryland:

THE COURT: First is fitness of the parents. I do find that both parents are fit and proper to have—to care for [M.C.]. And again, when we talk about physical custody we are talking about the right and obligation to provide a home for [M.C.] and to make the day-to-day decisions required during the time that [M.C.] is actually with the parent exercising that physical custody.

So I’ve considered the fitness and there’s nothing that has been suggested to me that either party is unfit to care for [M.C.]. In fact, I think both parties were very complimentary of each other in terms of their care of [M.C.]. I’ve considered the character and reputation of the parties. I really have not heard much evidence that would dissuade me that either party was of—had an unfit character or reputation. I know that Ms. Merrick spoke of some issues she had with Mr. Colbert and Mr. Colbert spoke of some issues he had with Ms. Merrick but none of those were of such a level that I feel that [M.C.]’s well-being would be in jeopardy if [M.C.] was with mom or dad.

Certainly, each parent is—the third factor is the desire of the parents and the agreement of the parties. Well, each parent is desirous of primary physical custody, so there’s no agreement between the parties as of now. There was an agreement prior, you know, that kind of ended last December through changes of circumstance. So there is no agreement and that’s okay. I mean, it’s very hard to come to an agreement when the logistics are such as they are.

I am not considering [M.C.]’s preference per se. I’ve just heard anecdotally that she’s very happy with dad and she’s very happy with mom. But I do have to consider some factors that I think weigh in favor of custody with one parent or the other and one of them is the potential for maintaining

family relations. Mr. Colbert has moved to another part of the region. He's not light years away, but he's a good four hours away and to vest primary physical custody of [M.C.] with him is going to deprive [M.C.] of that opportunity to have those family relations with her extended family whether it be her mom's extended family or her dad's. Sir, I know you have reservations about [M.C.]'s time with her dad, your parents, your family and I think that—it seemed to me that that's been respected. I think that the contact with your family has been supervised or at least from what I can tell has been supervised. But I think the children need to be able to have that relationship with their extended family. And to have primary physical custody with Mr. Colbert would deprive [M.C.] of that.

She lives in a community or her mom is in a community where her mother—well, she lives with her mom and her father and her sister. Her grandmother lives across the street. Her cousins live up the street. There's a relative that lives next door. The family has occupied, if you will, this block in W. Baltimore for quite some time and it seems to me that no one seems to be going anywhere quickly. So that's a factor that's important to me in this decision.

On the other hand, I have to consider the material opportunities affecting [M.C.]'s welfare and I certainly understand Mr. Colbert's desire to expose [M.C.] to a different way of life, perhaps a better way of life in some respects and I applaud him for that. So I have to weigh all of these factors including, [M.C.]'s age, her sex, her health, which thank goodness is good, where the parents live, the fact that they are physically separated and that they have been separated from each other for some period of time.

So considering all those factors I do find that it is in [M.C.]'s best interest that Ms. Merrick have primary physical custody of [M.C.]. Now, that is again, primary custody is the right and obligation to make day-to-day decisions during a time when [M.C.] is actually in each others [sic] care.

Now, given that, what I would like to do and I think it's in [M.C.]'s best interest that we maintain the status quo that we have had this arrangement where we have one month with mom, one month with dad that we continue that through this summer, okay. That will—I think that's in her best interest. And ma'am, during the time that [M.C.] is with you until the end of July you're obligated to continue with the home schooling arrangement that Mr. Colbert has started with [M.C.]. Okay.

Now, beginning in August, primary physical custody will vest with Ms. Merrick. With that said, Mr. Colbert will have time with [M.C.] on the

first, third and fifth weekends of the month, okay. So Ms. Merrick doesn't drive. I hoping [sic] that perhaps you can reach some agreement where you have a middle ground where you can drop [M.C.] off if your parents drive, but right now I'm placing the responsibility on Mr. Colbert because he does have a vehicle and occupy [sic]. So the first—instead of every other weekend, the first, third and fifth weekends actually affords you—I've done this many times—it actually affords you four additional weekends per month (sic). So instead of it being 26, it will 22 with mom and 30 with dad and that would be Friday after school until Sunday evenings. Okay. Of course that does not mean that you can't arrange for other weekend time with dad. Additionally, I know that Mr. Colbert's work does bring him to Baltimore, I wouldn't say frequently, but with some regularity and if Mr. Colbert desires to visit with [M.C.] he should be able to do so during the week and it doesn't necessarily have to be when you're here, but I know you do come up here with some regularity for shows, openings and the like. So those should be at least one time per week for an extended period of time. Of course, that can't interfere with her schooling or her bedtime, but if Mr. Colbert is in town and he calls you and he wants to spend time with [M.C.] that should not be unreasonably denied. I've also set out a schedule for holidays whereby the parties will rotate major holidays with [M.C.] and I think that's fairly self-explanatory.

Now, with respect to summertime, effectively primary—[M.C.] is going to spend or be able to spend the bulk of her summers with her father on the eastern shore. So what I've ordered is that I kind of guesstimated that summers are going to be, you know, approximately eight weeks, eight or nine weeks, but that Mr. Colbert is going to have [M.C.] in his care and custody for all that time except for two weeks where, you know, ma'am, I think we spoke about you and your family taking vacations, that within that period of time there will be two vacation periods where you would have [M.C.] in your care.

Now, during [M.C.]'s winter school breaks and spring school breaks Mr. Colbert should have that parenting time. So if she's off from school for ten days during the spring break well then she'll spend that time with dad and the same thing for winter break. Okay.

I'm leaving additional parenting time and access to the discretion of the parties and I'm also requiring that Mr. Colbert have reasonable communication and access with [M.C.] when he is not in her—or she is not in his care and vice versa.

* * *

I have to say this is a very hard case because I know that both parents love [M.C.] and are good parents and want what's in her best interest. So I ask you to look at this as a template for going forward. I'm hoping that you two can build off of this. You can by agreement informally amend this.

If you want to increase this or decrease that, there's nothing that prevents you from doing this, but this is what I'm ordering in my considered judgment. I know it's hard, sir, and I know you are a wonderful father and we should all be so blessed to have dads like you and unfortunately, I don't—not every case I have have two engaged parents like you two. So I've had to weigh these factors and this is what I've come up with.

The court memorialized its final decision in a written order filed the same day.

Father, again *pro se*, noted his appeal on December 23, 2016. On December 29, 2016, Mother moved to revise the custody order on the grounds that Father assumed that his unfettered access to M.C. for visitation included the right to take the child at any time and to show up at her home unannounced. No court order addressing that motion appears in the record.

DISCUSSION

Father apparently contends that the circuit court erred or abused its discretion in granting Mother primary physical custody because he was not represented “in a way where the Judge could see him as the Primay [sic] Parent and take his evidence into consideration.”⁷ He argues that the court did not properly consider certain facts in

⁷ Father does not appear to dispute the court's decision to grant joint legal custody to the parties.

rendering its custody decision and maintains that he “does not feel heard by the court because he’s a father who wants Physical custody.”⁸

“While a trial court must look at each custody case on an individual basis to determine what will serve the welfare of the child,” *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996), the court may consider a non-exhaustive list of factors relevant to the best interest inquiry:

- 1) fitness of the parents;
- 2) character and reputation of the parties;
- 3) desire of the natural parents and agreements between the parties;
- 4) potentiality of maintaining natural family relations;
- 5) preference of the child;
- 6) material opportunities affecting the future life of the child;
- 7) age, health and sex of the child;
- 8) residences of parents and opportunity for visitation;
- 9) length of separation from the natural parents; and
- 10) prior voluntary abandonment or surrender.

Montgomery Cnty. Dep’t of Social Svcs. v. Sanders, 38 Md. App. 406, 420 (1977) (internal citations omitted). “The best interest of the child is . . . not considered as one of many factors, but as the objective to which virtually all other factors speak.” *Taylor v. Taylor*, 306 Md. 290, 303 (1986).

This Court conducts only a “limited review” of a circuit 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 lower 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). We review the

⁸ In his brief, Father also addresses perceived contempt of the court’s custody order on Mother’s part that occurred after the court’s ruling. Because there is nothing in the record to suggest that a petition for contempt has even been filed in the circuit court, we decline to consider this issue.

evidence in the light most favorable to the prevailing party, here Mother, and if there is any competent, material evidence to support the circuit court’s factual findings, we cannot conclude that those findings are clearly erroneous. *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002). With regard to the court’s ultimate decision on a custody matter, an abuse of discretion exists only if “no reasonable person would take the view adopted by the [trial] court[,]” or the ruling is “clearly against the logic and effect of facts and inferences before the court.” *Santo v. Santo*, 448 Md. 620, 625–26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

Here, the circuit court presided over a lengthy hearing on the parties’ custody issues, permitting both sides ample time to present witness testimony and documentary evidence. At the hearing, the attorneys limited their cross-examination of witnesses in an apparent nod to the fact that neither Father nor Mother materially disputed the evidence as presented. There was no dispute that both parents are fit to care for M.C. The court acknowledged the fact that its decision was difficult, given the two loving and supportive parents who genuinely appeared to want what was in their daughter’s best interest, but who lived a great distance apart. The court recognized the factors relevant to custody determinations as developed by our case law, and it thoroughly and properly explained the factors it considered most significant in determining that it was in M.C.’s best interest to be in Mother’s primary care.

Based on the record in this matter, we cannot say that the circuit court’s factual findings were clearly erroneous. And, given the highly deferential standard of appellate

review of the trial court’s findings of fact, we discern no abuse of discretion in the court’s ultimate decision to grant primary physical custody of M.C. to Mother.

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE CITY AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**