

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2440

September Term, 2014

KEENAN G. SHAFFER

v.

KIMBERLY A. HESELBACK

Krauser, C.J.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: July 20, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from the filing of cross-complaints seeking joint legal custody of the parties' son. On the second day of hearings, the Circuit Court for Garrett County denied appellant permission to amend his complaint to request sole legal custody. Later in the hearing, the parties agreed to amend both complaints seeking sole legal custody. Following the hearings, the circuit court issued an order granting joint legal custody and appellee physical custody. Appellant appeals, presenting one question for our review:

Where the trial court failed to make findings of fact whether the action must be remanded so that the trial court can make the required findings and conduct an analysis of the facts in resolve the ultimate issue?

For the reasons that follow, we shall remand to the circuit court.

FACTUAL BACKGROUND

Appellant, Keenan Shaffer, and appellee, Kimberly Heselback, are parents to a son, Bayne, who was born on November 4, 2011. The parties were involved in a relationship prior to Bayne's birth and for several months thereafter, but were never married. The relationship deteriorated when appellee discovered that appellant was in a long term relationship with another woman, with whom he had two other children. On March 18, 2013, appellee filed a complaint for custody, seeking joint legal custody and sole physical custody. Appellant filed a cross complaint, requesting a paternity test and joint legal and physical custody. Due to health issues, appellant's counsel withdrew from representation and appellant attained new counsel in July 2013.

A hearing on the cross custody complaints was held on January 15, 2014. Although the parties came to an agreement, it apparently "fell through" when new disagreements arose between them. Therefore, the court held another hearing on July 15, 2014. Appellee

and her witnesses testified. At the hearing, appellant's counsel moved to amend appellant's complaint to seek sole legal and physical custody, arguing that it was his previous counsel who had requested joint custody, but appellant now wished to seek sole custody. Appellee opposed the motion and the court denied it, reasoning that appellant's current counsel entered her appearance more than a year prior to the hearing and accordingly, had ample time to amend the complaint. Later in the hearing, this issue arose again during cross examination of appellee. The court inquired regarding appellant's line of questioning involving appellee's alleged difficulty in arranging visitation. Appellant explained that he was attempting to challenge appellee's claim that she was able to cooperatively co-parent. The court remarked that both parties were seeking joint custody and accordingly, that line of questioning was unnecessary. After some discussion between the parties and the court, the parties agreed to both seek sole custody. The court then scheduled another hearing date to continue the proceedings. On October 22, 2014, the hearing resumed and appellant testified along with two witnesses he provided. At the conclusion of the hearing, the circuit court did not announce its ruling. Thereafter, on December 8, 2014, the court issued a custody order granting joint legal custody and appellee primary physical custody, but no findings of fact. Appellant was awarded visitation every other weekend and one full week of visitation in June, July and August. The parties were also ordered to alternate visitation on major holidays and received a full day of visitation on Mother's Day and Father's Day respectively. Appellant noted a timely appeal. Appellee did not file a response brief.

STANDARD OF REVIEW

This Court explained appellate review of a trial court's custody determination in *McCarty v. McCarty*, 147 Md. App. 268, 272-73 (2002):

Appellate review of a trial court's custody determination is limited. The standard of review in custody cases is whether the trial court abused its discretion in making its custody determination. *See Robinson v. Robinson*, 328 Md. 507, 513, 615 A.2d 1190 (1992). In *Davis v. Davis*, 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939, 98 S.Ct. 430, 54 L.Ed.2d 299 (1977), the Court explained that "when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion." *Id.* at 126, 372 A.2d 231. Again, "[p]articularly 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, 648 A.2d 1016 (1994).

(emphasis omitted).

DISCUSSION

The crux of appellant's argument is that the circuit court erred when it did not render findings of fact or provide an explanation of its analysis. This Court has reviewed Maryland's history of joint custody in *Shenk v. Shenk*, 159 Md. App. 548, 556 (2004). We explained that originally, fathers held an absolute legal right under the doctrine of *pater familias* to be awarded custody in all disputes. *Id.* at 556. Later, courts shifted towards granting a preference to mothers. *Id.* at 557. In 1929, the General Assembly mandated that neither parent had a superior right in child custody matters, however, notwithstanding this decree, courts continued to give mothers a preference. *Id.* Later, in the 1960's, Maryland courts adopted "the tender years doctrine" which presumed that young children

should be in the care of their mothers. *Id.* at 558. Consequently, in custody disputes where the parents were equal in most respects, and even when the father was not at fault, the presumption that the mother was better equipped to care for the children prevailed. *Id.* Additionally, under the tender years doctrine, a father bore the burden of proving that the mother was unfit in order to be granted custody. *Id.* Then, in the late 1970’s, the courts and the General Assembly embraced a gender neutral test to determine custody. *Id.* From that point on, courts have applied a standard which focused on the child’s best interest.

In *Taylor v. Taylor*, 306 Md. 290 (1986), a wife appealed a divorce decree, challenging the circuit court’s authority to order joint custody. The Court of Appeals granted *certiorari*, and after ruling for the first time that a circuit court may order joint custody if it deems it appropriate, discussed what considerations a court should make before granting joint custody. The Court explained that “[p]roper practice in any case involving joint custody dictates that the parties and the trial judge separately consider the issues involved in both joint legal custody and joint physical custody, and that the trial judge state specifically the decision made as to each.” *Id.* at 297. It continued:

Formula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made. At best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but in doing so we recognize that none has talismanic qualities, and that no single list of criteria will satisfy the demands of every case. We emphasize that in any child custody case, the paramount concern is the best interest of the child. As Judge Orth pointed out for the Court in *Ross v. Hoffman*, 280 Md. 172, 175 n. 1, 372 A.2d 582 (1977), we have variously characterized this standard as being “of transcendent importance” and the “sole question.” The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all

other factors speak. The question of whether to award joint custody is not considered in a vacuum, but as a part of the overall consideration of a custody dispute. The availability of joint custody, in any of its multiple forms, is but another option available to the trial judge. Thus, the factors that trial judges ordinarily consider in child custody cases remain relevant.

Id. at 303. The Court of Appeals then listed fourteen factors that a trial court may consider:

- 1) Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare;
- 2) Willingness of Parents to Share Custody;
- 3) Fitness of Parents;
- 4) Relationship Established Between the Child and Each Parent;
- 5) Preference of the Child;
- 6) Potential Disruption of Child's Social and School Life;
- 7) Geographic Proximity of Parental Homes;
- 8) Demands of Parental Employment;
- 9) Age and Number of Children;
- 10) Sincerity of Parents Request;
- 11) Financial Status of Parents;
- 12) Impact on State on Federal Assistance;
- 13) Benefit to Parents; and
- 14) Other Factors

Id. at 304-11.

The Court of Appeals stated that the trial court must be specific regarding its intentions for joint legal custody. *Id.* at 312. The Court then explained that in the case before it, it was difficult to ascertain exactly what the circuit court's intent was in its order, therefore, it remanded the case for the court to explain its reasoning and resolve the ambiguity of its order. *Id.*

Returning to the instant case, the parties had originally sought joint legal custody. On the second day of hearings however, they decided to both seek sole legal custody. There were at least three days of testimony from several individuals, including the parties.

Appellant and appellee testified regarding the breakdown of their relationship, employment schedules, relationship with Bayne, ability or inability to co-parent, and their financial situations. The court also heard from parties involved with Bayne's care including appellee's mother and appellant's current wife. At the conclusion of the evidence, the circuit court did not announce any findings of fact or a decision. When the court issued its order however, it only concluded to award joint custody and primary physical custody to appellee, and detailed the visitation schedule. It did not include any factual findings or analysis relative to its conclusion. Accordingly, we must remand this matter back to the circuit court for it to render its factual findings and rationale for its decision. Akin to *Taylor*, 306 Md. at 293, we are neither affirming nor reversing the order for joint custody, but rather, remanding the case to the circuit court to state its factual findings and explain its reasoning. *C.f.*, *Ellis v. Ellis*, 19 Md. App. 361, 365 (1973) (reversing where a chancellor adopted the Master's recommendations without making or stating any factual findings); *but see Davis v. Davis*, 280 Md. 119, 131-32 (1977) (declining to reverse a circuit court's findings when the court explained its factual analysis).

**JUDGMENT OF THE CIRCUIT COURT
FOR GARRETT COUNTY IS VACATED
AND CASE IS REMANDED FOR
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
APPELLEE.**