Circuit Court for Montgomery County
Case No. 163943FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 210

September Term, 2021

OSEI SONO ASARE

v.

TERRASSA ASARE

Friedman,
Beachley,
Zic

JJ.

Opinion by Friedman, J.

Filed: November 15, 2021

This case arises out of a custody dispute over three minor children. On appeal, the father asks us to review whether the circuit court erred by (1) excluding his proffered character witness and (2) awarding sole physical custody to the mother.

FACTS AND PROCEDURAL BACKGROUND

Osei Sono Asare ("Father") and Terrassa Asare ("Mother") met in 2012 and married in 2014. Together they have three daughters—ages 7, 5, and 3. The family lived in Virginia, where both Mother and Father have family, until 2017 when they moved to Maryland to be closer to Father's work. Because Father's work allowed him the flexibility to work nights and weekends, Father had primary caretaking responsibility for the children during the day, and Mother had primary responsibility in the evenings and on weekends.

Mother moved out of the marital home with the children in August of 2019. Father quickly filed for limited divorce, seeking sole physical and legal custody of the children. Shortly thereafter, Father picked the children up—for what Mother thought was just a visit—and failed to return them. From that point forward, the children primarily lived with Father.

In November of 2019, Mother filed an answer to Father's complaint as well as a counter complaint for limited divorce, seeking sole physical custody and legal custody, or in the alternative, joint legal custody with tie-breaking decision-making authority. In December, Mother and Father agreed to a *Pendente Lite* custody order, which provided that the children would reside primarily with Father while the divorce was pending. The order granted Mother visitation with the children three weekends out of every month and every Wednesday afternoon. At trial, Mother stated that she only agreed to such limited

access because "it was an improvement" over the confusing and contentious situation that had existed since Father took the children and because "it was difficult even trying to get that agreement, and [she] just didn't see it getting any better."

In February of 2020, a court-appointed custody evaluator interviewed both parties and the eldest child, observed the children with each party, reviewed submitted documents, ran a criminal record search, and spoke with references for both parties. As a result of pandemic-related court closures, however, the case was postponed several times, and the custody evaluator's report was not presented to the circuit court until seven months later. In her report, the custody evaluator stated that both parents "have an obvious connection" with the children, both are "employed and have suitable living arrangements for the children[, and t]hey both have support to help them in caring for the children when needed." Given the "breakdown in communication" between the parties and the "distance between the parties['] homes," however, the custody evaluator concluded that a shared access schedule would be difficult. The custody evaluator found that Mother "made continued efforts to coparent" while Father "continue[d] to have a difficult time focusing on what is in the best interest of the children." The custody evaluator noted that "[w]hile the children [were] currently residing with [Father], it appears that this was due to [Father's] unilateral decision [not to] return the children to [Mother's] care as the parties previously arranged." She also voiced "a major concern regarding [Father's] ability to keep these young children safe," as Father indicated to her that there had been "two to three occasions that he has left the children in the apartment with no one physically present in the home." Ultimately, the

custody evaluator recommended that it would be in the children's best interests for Mother to have primary physical custody, for the parties to have joint legal custody, and for Mother to have tie-breaking decision-making authority.

In early 2021, the circuit court held a four-day, remote trial on the parents' competing claims for custody. It heard testimony from both parties, the custody evaluator, and two character witnesses for Mother. As relevant to this appeal, the circuit court did not hear from Father's proffered character witness, Katelyn Shelly. At the start of trial, Mother moved to exclude Shelly's testimony on the basis that Father had not identified Shelly in any of his answers to interrogatories, discovery, deposition, or his first pre-trial statement. The first time Mother was made aware of Shelly's potential testimony was, in fact, just days before trial began. Father, who was self-represented at trial, explained that Shelly had initially not wanted to testify, which is why he had not identified her as a potential witness earlier.

In determining whether to admit Shelly's testimony, the circuit court engaged in the following exchange with Father:

> COURT: [W]hat is Ms. Shelly expected to testify about? ...
>
> FATHER: … About my character and I've known her for quite some time, and she knows the defendant as well too and has interacted with both defendant and I with the kids.
>
> * * *

> COURT: Well what specifically is she going to testify about? You said character … but what specifically, sir?
>
> FATHER: As far as who is more hands on with the care of the children, Your Honor.
>
> COURT: She's going to testify as to who is more hands on?
>
> FATHER: Correct.
>
> COURT: Okay. All right. So when is the last time that she saw the children with [Mother]?
>
> FATHER: 2017, Your Honor.
>
> COURT: All right. In light of the proffer as to what she'll testify about given … this is … between three and four years ago and [Father] would have had that information and it's important that in discovery when you're asked questions about who has personal knowledge that you reveal that in enough time for the other side to be able to issue discovery or whatever, to prepare themselves.
>
> … [T]he week before trial is not enough time and given the proffer as to what she would testify about I am going to grant the motion to exclude her as a witness and will not allow Ms. Shelly to testify given these circumstances.

After trial, the circuit court issued an oral ruling, in which it considered a range of custody factors that are required by our case law and that are discussed in more detail below. The circuit court determined that it was in the children's best interests for Mother and Father to have joint legal custody, for Mother to have primary physical custody, and

for Mother to have tie-breaking decision-making authority. The circuit court entered a written order accordingly, and Father noted a timely appeal to this Court.

DISCUSSION

Father presents two issues on appeal, which we have simplified as follows:

1. Did the circuit court err in excluding the testimony of Father's character witness?

2. Did the circuit court err in awarding sole physical custody to Mother?

We hold that the circuit court acted within its broad discretion in both regards, and we, therefore, affirm.

I. EXCLUSION OF WITNESS TESTIMONY

Father's first argument on appeal is that the circuit court erroneously excluded the testimony of his character witness, Shelly, without considering the best interest of the children. Under Maryland Rule 2-433(a), the circuit court has the authority to impose sanctions against a party who commits discovery violations. Available sanctions include prohibiting the violating "party from introducing designated matters in evidence." MD. R. 2-433(a)(2). In a child custody case, however, a court's "paramount concern is the best interest of the child," *Taylor v. Taylor*, 306 Md. 290, 303 (1986), and "the court has an absolute and overriding obligation to conduct a thorough examination of all possible factors that impact the best interests of the child[ren] …. This supreme obligation may[, therefore,] restrain the court's broad authority to exclude evidence as a discovery

sanction." *A.A. v. Ab.D.*, 246 Md. App. 418, 444 (2020). More specifically, this Court has held that:

> [T]he court's independent obligation to the child[ren] requires that, before ordering the exclusion of evidence as a sanction, the court should take a proffer or otherwise ascertain what the evidence is that will be excluded, and then assess whether that evidence could assist the court … in its determination of the best interests of the child[ren]. When the court completes this assessment, we review any discovery sanction it imposes thereafter for an abuse of discretion.

Id. at 448–49. Here, Father acknowledges that the circuit court sought and received a proffer from him but argues that the court's inquiry was "superficial" and that the "court could not have fully understood what [Shelly] would testify [about] … to adequately assess how that testimony would impact the court's determination of the children's best interest."

The record shows, however, that the circuit court did precisely what was required. When considering whether to exclude the testimony, the circuit court asked Father what Shelly would testify about. Father stated, as quoted in full above, that she would testify as to his "character." The circuit court then asked Father to be more specific. Father responded that Shelly would testify about "who is more hands on with the care of the children." The circuit court next asked when Shelly had last seen the children with Mother, which Father stated was in 2017. "In light of the proffer as to what [she would] testify about," and the prejudice late disclosure caused Mother, the circuit court concluded that it did not need to hear Shelly's testimony. That satisfies the obligation under *A.A.*

Father makes three additional arguments in an attempt to escape this conclusion: (1) that the circuit court was required—and failed—to make an express, on-the-record

finding that exclusion of the witness would not impair its ability to determine the best interest of the children; (2) that the circuit court erred in not considering or imposing lesser discovery sanctions than exclusion of the witness; and (3) that the circuit court erred in excluding his witness because his late disclosure caused "no articulable prejudice to Mother." We reject each of these additional arguments.

First, Father argues that beyond accepting a party's proffer, the circuit court must make an on-the-record, express finding that excluding a witness will not adversely impact the circuit court's ability to determine the best interests of the children. While we agree that a trial court must consider this impact, as discussed above, we reject the argument that such consideration must be made expressly, on the record. Father has not pointed us to, nor have we found, such a requirement in the Rules or in our case law. Moreover, the record here demonstrates that the circuit court knew—because it discussed it at other times during trial—that it must consider how a decision to exclude evidence would impact its ability to determine what is in the children's best interests.

Second, Father argues that the circuit court erred by not considering a lesser sanction than exclusion of the witness. This argument relies upon our statement in *Rolley v. Sanford* that "a trial court must exhaust every available remedial step to enforce discovery before the extreme sanction of dismissal may be ordered." 126 Md. App. 124, 131 (1999). Although "the same principle applies to discovery sanctions," *A.A.*, 246 Md. App. at 447, the circuit court's decision here to exclude Shelly's testimony is not similarly "well removed from any center mark we can imagine and beyond the fringe of what we deem

minimally acceptable." *Rolley*, 126 Md. App. at 131. For one thing, we have no reason to believe that the circuit court *didn't* consider the full range of options available, including lesser sanctions. Just because the court didn't say this aloud does not necessarily mean, as Father suggests, that the circuit court failed to consider sanctions short of exclusion. Moreover, discovery sanctions exist on a continuum, and exclusion of the testimony of one character witness[1] is not as extreme a sanction as Father would have us believe. It is a lesser sanction than dismissal, *see Rolley*, 126 Md. App. at 131; than entry of default judgment, *see Flynn v. May*, 157 Md. App. 389, 411 (2004); or even than exclusion of parental testimony, *see A.A. v. Ab.D.*, 246 Md. App. at 447-48. Finally, a greater sanction may very well have been justified, given that Father had previously violated discovery and the circuit court had previously imposed lesser sanctions (ordering compliance, awarding Mother reasonable attorneys' fees, and dismissing Father's request for *Pendente Lite* child support). For these reasons, we do not think that the circuit court abused its discretion by not imposing a lesser sanction.

Third, Father argues that the court erred in excluding Shelly's testimony because Mother was not prejudiced by his late disclosure of the witness. We disagree. "The

[1] The circuit court did not, as Father asserts, preclude him "from presenting evidence about his pertinent character traits and Mother's lack of engagement with their daughters." Instead, Father was precluded only from presenting such character evidence through Shelly's testimony. Father himself testified extensively on both topics. Moreover, at the time the circuit court excluded Shelly's testimony, Father's sister was also listed as a potential witness. Father did not ultimately call her to testify, but it is misleading to imply that Shelly's testimony was the only opportunity Father had to present such evidence.

Maryland Rules do not require that a showing of prejudice is necessary … In fact, Md. Rule 2-433(a) clearly provides that once the trial court finds a failure of discovery, it may impose various sanctions" regardless of prejudice. *Klupt v. Krongard*, 126 Md. App. 179, 201 (1999) (cleaned up). Nonetheless, the circuit court found that Father's delay in identifying Shelly as a witness did, in fact, prejudice Mother's ability to prepare for trial. Unlike the mere typographical error involved in *A.A. v. Ab.D.*, Mother was given only two business days' notice that Shelly would testify, effectively preventing her from deposing Shelly or otherwise preparing to cross-examine her. Under these circumstances, we cannot say that the circuit court's finding of prejudice was an abuse of the court's discretion.

For all of these reasons, we conclude that the circuit court upheld its "independent obligation to the child[ren]" to assess how excluding Shelly's testimony would impact its ability to make a best interest determination and that it subsequently did not abuse its discretion in deciding to exclude the testimony. *A.A.*, 246 Md. App. at 448-49.

II. ULTIMATE CUSTODY DETERMINATION

Father's second argument on appeal is that the circuit court erred in awarding sole physical custody to Mother. We review a circuit court's ultimate custody determination for abuse of discretion, a deferential standard that "accounts for the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses." *Santo v. Santo*, 448 Md. 620, 625 (2016) (cleaned up).

> Abuse of discretion may arise when no reasonable person would take the view adopted by the trial court or when the court acts without reference to any guiding rules or principles. … Put simply, we will not reverse the trial

> court unless its decision is well removed from any center mark imagined by the reviewing court.

Id. at 625-26 (cleaned up).

"[T]he power of the [trial] court is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interest of the child." *Taylor*, 306 Md. at 301-02. To assist trial courts in determining what is in a child's best interest, this Court and the Court of Appeals "have set forth a non-exhaustive delineation of factors" for trial courts to consider. *Azizova v. Suleymanov*, 243 Md. App. 340, 345-46 (2019) (citing *Montgomery Cnty. Dep't of Social Serv. v. Sanders*, 38 Md. App. 406 (1977); *Taylor*, 306 Md. 290).[2] As Maryland courts have repeatedly cautioned, no one factor is

[2] The number of factors cited in our case law varies, but *Fader's Maryland Family Law* has compiled a list of twenty-one. *Id.* (citing Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 5-3(a), at 5-9 to 5-11 (6th ed. 2016)). The numbers associated with the factors here refer to the way they are numbered in *Fader's* and our recent decision in *Azizova*, 243 Md. App. at 345-46:

1. The fitness of the parents;
2. The character and reputation of the parties;
3. The requests of each parent and the sincerity of the requests;
4. Any agreements between the parties;
5. Willingness of the parents to share custody;
6. Each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest;
7. The age and number of children each parent has in the household;
8. The preference of the child, when the child is of sufficient age and capacity to form a rational judgment;
9. The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;
10. The geographic proximity of the parents' residences and opportunities for time with each parent;

always determinative, *Santo*, 448 Md. at 629, and each custody determination is "to be made by a careful examination of the specific facts of each individual case." *Azizova*, 243 Md. App. at 344.

Here, the circuit court was faced with what it described as "a very tough custody case." It had before it two parents who both appeared to be "loving, caring, and engaged" (reflective of Factor No. 15) and who both sought sole physical and legal custody (Factor No. 5). Because of the distance between the parties' homes (Factor No. 10) and the difficulties in communication (Factor No. 9), the circuit court found that shared custody would not be "appropriate" or "tenable."

To determine what custody arrangement would be in the children's best interests, the circuit court considered "the testimony, evidence[,] and arguments of the parties, the

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11. The ability of each parent to maintain a stable and appropriate home for the child;
12. Financial status of the parents;
13. The demands of parental employment and opportunities for time with the child;
14. The age, health, and sex of the child;
15. The relationship established between the child and each parent;
16. The length of the separation of the parents;
17. Whether there was a prior voluntary abandonment or surrender of custody of the child;
18. The potential disruption of the child's social and school life;
19. Any impact on state or federal assistance;
20. The benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child;
21. Any other consideration the court determines is relevant to the best interest of the child.

report and testimony of the [custody evaluator,] and the testimony of all [other] witnesses." The circuit court then engaged in an analysis of the custody factors, mentioning no fewer than seventeen factors by name. Here we focus on those factors that the circuit court relied upon most heavily in reaching its best interest determination.

The circuit court found that a few factors weighed in Father's favor, but it did not find these factors determinative. For example, the court expressed "concern[] about [Mother's] lack of stability" but still believed that she, like Father, had the ability to maintain a stable and appropriate home for the children (Factor No. 11). The circuit court saw Mother's lack of stability as "a condition of circumstances of separation and job loss which was not her doing," and did not "believe that [she would] have that problem moving forward," especially given that she had recently secured a new job. The circuit court also gave substantial weight to the "potential disruption [a move to Virginia would cause to] the child[ren]'s social and school life" (Factor No. 18), given that the children had been living in Maryland since 2017 and with Father since the time of separation. Considering, however, that the children "are fairly young … [have] been in virtual school," lived in Virginia until 2017, and have "spent substantial time at their maternal grandmother's home," the circuit court concluded that it would be a manageable adjustment.

Ultimately the circuit court found that the factors in Father's favor were outweighed by those that favored Mother. In particular, the court pointed to Father's "major mistakes in judgment" (reflective of Factor No. 1); his character as reflected in his poor treatment of Mother (Factor No. 2); his initial willingness to give Mother custody and his focus on

"painting [Mother] in a bad light" rather than "on the girls" (reflective of Factor No. 3); his demonstrated inability "to maintain [the children's] relationships with [Mother and her family]" (Factor No. 6); and his lack of "capacity or desire to communicate [with Mother] or make shared decisions" (Factor No. 9). These findings were based, at least in part, on the circuit court's "opportunity to observe the demeanor and the credibility of the parties and the witnesses," and we will not now substitute our judgment for that of the circuit court. *Santo*, 448 Md. at 625 (internal quotation omitted). Because the circuit court "embarked upon a thorough, thoughtful and well-reasoned analysis congruent with the various custody factors," *Azizova*, 243 Md. App. at 347, we hold that the award of sole physical custody and tie-breaking authority to Mother was not an abuse of the court's discretion.[3]

CONCLUSION

For the reasons stated above, we hold that the circuit court did not err in excluding the testimony of Father's character witness or in awarding sole physical custody and tie-breaking authority to Mother. We, therefore, affirm.

[3] Father makes three additional arguments in an attempt to escape this conclusion: that the circuit court erred by (1) "relying upon an assessment of [Father's] character that was made without hearing the testimony of his only character witness;" (2) relying upon a custody evaluation that was seven months old by the time of trial; and (3) "disproportionately weigh[ing]" Father's past conduct over the circumstances of the parents at the time of the trial. As to the first, we have already ruled that there was no error in excluding the witness. Moreover, the circuit court was aware of the evidentiary limitations when it made its determination and was well within its broad discretion to weigh the various factors as it saw fit. A reasonable person could take the view adopted by the circuit court, and it is not our place to decide these questions anew. *Santo*, 448 Md. at 625-26.

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