Circuit Court for Prince George's County
Case No. CAD20-10116

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0284

September Term, 2021

ARIS COMPRES

v.

LUZ MARIA CAMPUSANO CHARLES

Nazarian,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: December 14, 2021

This appeal arises out of a divorce between Aris Compres ("Father") and Luz Maria Campusano Charles ("Mother"). After a five-day bench trial, the Circuit Court for Prince George's County awarded joint legal and physical custody of the parties' three minor children, awarded tie-breaking authority to Mother, and ordered Father to pay child support and arrearages. The court reserved ruling on the issues of alimony, division of property, and attorney's fees. On appeal, Father challenges the trial court's decision to grant joint physical and legal custody, with tie-breaking authority to Mother, and the court's income calculation for both parents, and he argues that the court abused its discretion in relying on those calculations to make other decisions. We disagree and affirm.

I. BACKGROUND

Mother and Father were married on February 18, 2014 and have three daughters, all under age six. Before the marriage, Mother immigrated to the United States to be with Father. She speaks little to no English. Mother worked as an event planner and currently works as a line cook at The Cheesecake Factory. During the marriage, Father supported the family by working at his restaurant, Los Hermanos Dominican Restaurant ("Los Hermanos") and Mother was the primary caretaker of the children. She cooked, cleaned, arranged extracurricular activities for the children, attended school conferences, and took the children to doctor's appointments. Unfortunately, the marriage was troubled from the start. Father alleged that Mother abused alcohol and hookah and that a relationship she had with another person prior to the marriage were factors in its dissolution.

The parties separated in January 2020 and began a back-and-forth battle over the

care and control of the children. Mother had custody of the children until June 2020, at which point Father removed them from her without permission.

Father filed a Complaint for Absolute Divorce, Child Custody, and Other Relief on June 24, 2020. Father also filed a Motion for Emergency Custody on the same day, claiming that the children were being mistreated and neglected in Mother's care. That motion was denied by the court on June 25, 2020.

Mother answered and filed a counter-complaint on July 24, 2020 and requested an absolute divorce, custody, child support, alimony, and other relief. Mother also filed a Request for Pendente Lite Hearing on July 24, 2020, in which she claimed that Father withheld custody of the children for over a month and refused to allow them to communicate with her.

The court held a five-day trial on the merits in March 2021 and, in a Memorandum Opinion and Order filed on April 16, 2021,[1] granted the parties an absolute divorce based on twelve months of continuous separation, awarded joint physical custody and legal custody, and gave Mother tie-breaking authority. The court granted Mother custody of the children on school days during the school year and gave Father parenting time every other weekend. During the summer months, Father had custody on weekdays, and the children

[1] The court reserved ruling on the issues of alimony, property, and attorney's fees, as well as possible modification of child support, pending the resolution of all issues. An Order modifying and increasing the monthly child support amount and arrearages was entered on August 27, 2021. Father has noted a separate appeal of that Order; the only Order before us is the April 16, 2021 Order.

were with Mother every other weekend and for two weeks of summer vacation.

The court also ordered Father to pay child support. The court calculated Mother and Father's combined monthly income as $12,094.00. To determine Father's income, the court used his financial statement and W-2 and found that his monthly income was $7,833.00 and his annual income was $93,996.00. In addition, the court included a check payable to Father from Los Hermanos, Inc. for $15,000.00 in Father's income, which increased his monthly income to $9,083.00 and his annual income to $108,996.00. The court estimated Mother's income as $3,011.00 monthly and $36,132.00 annually using her year-to-date income from Cheesecake Factory. The court also included childcare expenses paid by Mother, estimated at $1,733.00 per month, and imputed $786.60 in medical insurance coverage costs to Father. The childcare expenses were based on Mother's testimony that her previous childcare expenses were $350.00 per week but she anticipated that they would increase to $400.00 per week as she needed more coverage. The court ordered Father to pay $2,866.00 per month in child support and arrearages in the amount of $25,794.00, to be paid as a lump sum or an additional $1,000.00 per month.

Father filed a timely notice of appeal. We discuss additional facts as appropriate below.

II. DISCUSSION

On appeal, Father challenges the circuit court's decision to grant joint physical and legal custody, with tie-breaking authority to Mother, and the amount of child support and

arrearages.[2] For both issues, our inquiry is limited to whether the trial court abused its discretion or whether its findings of fact are clearly erroneous. *Tracey v. Tracey*, 328 Md. 380, 385 (1992); *Kartman v. Kartman*, 163 Md. 19, 23 (1932).

A. The Circuit Court Did Not Abuse Its Discretion In Awarding Joint Physical And Legal Custody To The Parties With Tie-Breaking Authority To Mother.

At trial, Father sought joint legal and physical custody of all three children and for tie-breaking authority in the event he and Mother couldn't agree. Wife sought sole legal and shared physical custody. The trial court awarded joint physical and legal custody and gave tie-breaking authority to Mother. Father challenges that decision, as well as the number of overnights he was awarded as part of the joint physical custody arrangement.

Custody disputes between divorcing parents are decided according to the best interests of the children. *Taylor v. Taylor*, 306 Md. 290, 303 (1986); *Ross v. Hoffmann*, 280 Md. 172, 174–75 (1977); *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 407 (1977). There is no standard formula for determining the children's best interests—they depend on the facts of each case. *Bienenfeld v. Bennett-White*, 91 Md. App.

[2] Father phrased the Questions Presented in his brief as follows:

> I. Did the trial court err or abuse its discretion in ordering that Mother has the children the vast majority of overnight's during the school year, limiting Father's access to every other weekend during the school year, and awarding tie-breaking authority to Mother?
>
> II. Did the trial court err or abuse its discretion in calculating current child support and arrears?

Mother did not file a brief.

488, 503 (1992) ("Courts are not limited or bound to consideration of any exhaustive list of factors in applying the best interests standard . . . ."); *Sanders*, 38 Md. App. at 419 ("The best interest standard is an amorphous notion, varying with each individual case . . . ."). The trial judge, "who has had the parties before [them], has the best opportunity to observe their temper, temperament and demeanor, and so decide what would be for the child's best interest . . . ." *Kartman*, 163 Md. at 23.

The circuit court analyzed Father's and Mother's fitness and ability to care and provide for the children in detail,[3] and granted joint physical and legal custody to the parents. Father, however, characterizes the record as "devoid of a shred of evidence or testimony to support the trial court's finding that it was in the children's interest for Mother to have the vast majority of overnights during the school year." We disagree. The record readily supports the trial judge's finding that both parents are fit, that Mother has played a more active role in the children's lives due to Father's business responsibilities, and that Father's testimony regarding Mother's fitness was incredible and unpersuasive. The court

[3] The circuit court's Memorandum Opinion detailed the court's consideration of: the parents' fitness, the character and reputation of the parties; the adaptability of the custodian at task; the physical, spiritual and moral well-being of the children; the environment and surroundings in which the children will be raised; the influences likely to be exerted on the children; the desire of the natural parents and agreements between the parties; potentiality of maintaining natural family relations; material opportunities affecting the future life of the child; age and health of the children; length of separation from the natural parents; prior voluntary abandonment or surrender; capacity of the parents to communicate and to reach shared decisions affecting the children's welfare; the willingness to share custody; relationship established between the children and each parent; geographic proximity of parental homes; demands of employment; sincerity of parents' request; impact on state or federal assistance; and benefit to parents. *See Taylor*, 306 Md. at 971–75.

also found that Father contradicted himself in his testimony about his residence.[4] He represented to the court that he lives in Temple Hills, but produced a District of Columbia driver's license listing his address as the business next door to his restaurant. Father also represented that the children received medical insurance through Medicaid, but Father himself makes more than the annual eligibility threshold for low-income health insurance in Maryland.[5] In the court's view, these issues cast serious doubts on Father's credibility. And as such, the court found that Father's accusations about Mother's substance abuse unfounded and that his witnesses (all family members or close friends of his) were biased. Further, the court found that a few instances of drinking alcohol or smoking hookah did not constitute a problem that would impair Mother's ability to care for and have custody of her children. Whether Father, or any of us sitting as trial judges, would have reached the same decision doesn't matter—the record before the trial court supports this trial court's

[4] The court questioned whether Father was being truthful about his D.C. residence:

> THE COURT: Hold on. Let's back up, because I have a question for your client even before you -- so the driver's license was issued August 20 of 2020, but when did you physically move into the District of Columbia?
>
> [FATHER]: I haven't physically moved in. I've been living with my parents during the whole pandemic. The entirety of 2020.
>
> THE COURT: Okay, but you got a D.C. driver's license in August of 2020 even though you actually resided with your parents?
>
> [FATHER]: Yes, yes.

[5] The Maryland Medical Assistance Program shall provide medical and other health care services for all children aged 1 to 19 whose family income falls below 133 percent of the poverty level, as permitted by federal law. Health Gen. § 15-103(a)(v)-(vi).

decision that joint physical and legal custody served the best interests of the children.

The record also supports the trial court's conclusion that as between the two parents, the children's best interests will be served by awarding tie-breaking authority to Mother rather than Father. The record readily supports the trial court's finding that these parents do not communicate well and that Father's unilateral control over Mother's visitation with the children has strained their relationship. The court found, for example, that until June 2020, when Father removed the children from her, Mother was the primary caretaker for the children; after he took them, Father limited her contact with the children significantly. The record also revealed bitter disputes between the parents after January 2020, when they separated and attempted to share custody of the children.

While recognizing both parents' flaws, the court found Mother to be a fit parent and primary caretaker for the children (save the period after June 2020, when the children lived primarily with Father), and found Father fit as well. The court found Mother's requests for custody sincere and Father's suspicious, given that he restricted visitation and access when the children lived with him. At the same time, the court found Mother to be an engaged parent, that she recently had obtained a job at The Cheesecake Factory, and that she was working towards obtaining her driver's license and purchasing a vehicle. The court also credited her willingness to co-parent and to share custody with Father. On the other hand, the court found Father to be controlling and less willing to co-parent. Both parents had a story to tell, which left the court to assess their relative demeanor and credibility as well as the demeanor and credibility of their witnesses. On this record, it is not appropriate for us

to second-guess the court's resolution of this fact-intensive question. *See Petrini v. Petrini*, 336 Md. 453, 469 (1994).

Father also identifies a single evidentiary dispute—he contends that the deposition testimony of Cynthia Avery should have been admitted at trial. Father argues that "[t]he trial court incorrectly ruled that the testimony was not admissible in evidence under any circumstance because the witness had not been subpoenaed to appear for trial." This is an incorrect characterization of the trial court's decision not to admit the deposition testimony.

In order to introduce the deposition testimony of a witness, the party attempting to introduce the testimony must show that the witness who is not present at trial is unavailable:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had due notice thereof, if the court finds:
>
> (A) that the witness is dead, or
>
> (B) that the witness is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> (C) that the witness is unable to attend or testify because of age, mental incapacity, sickness, infirmity, or imprisonment; or
>
> (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
>
> (E) upon motion and reasonable notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Md. Rule 2-419(a)(3)(A)–(E).

The court declined to allow Father to offer the deposition testimony of Ms. Avery because Father failed to show that the witness was out of State or otherwise unavailable:

> THE COURT: Under what rule does it come in?
>
> You can only -- go ahead. I will let you, and then I --
>
> [FATHER'S COUNSEL]: Well, the witness is not available to testify, Your Honor.
>
> THE COURT: Why not?
>
> [FATHER'S COUNSEL]: Because the witness is in another -- is in Puerto Rico and is not available to testify in this case.
>
> ***
>
> THE COURT: Did you subpoena her for the trial today?
>
> [FATHER'S COUNSEL]: No. We did not, Your Honor.
>
> THE COURT: You have no basis to get in this deposition.
>
> So no. I don't see how you are going to get this in. The witness is not unavailable. Those are your only two options. You either have an unavailable witness, or you use it for impeachment purposes. But again, it is not [Mother's] testimony. It is somebody else's testimony. So I can't let it in.

Father failed to present any evidence to the court that the witness in fact was unavailable. Counsel proffered that the witness was in Puerto Rico, but provided no evidence about how she became unavailable or that she had moved to Puerto Rico (she had testified at the deposition that her address was Bowie, Maryland). At oral argument, Father's counsel stated that the witness lived in Puerto Rico at the time of the remote hearing, but provided no documentation of that fact to the trial court. Father made no attempt to show what steps had been taken to get the witness to attend the remote hearing or why she was unavailable. This scenario is unlike *Kishter v. Seven Courts Community Ass'n, Inc.*, in which we held that the deposition transcript of an out-of-state witness should have been admitted at trial.

96 Md. App. 636, 643 (1993). The deposition in that case had been taken outside of Maryland, where the witness lived and practiced, and therefore the court determined the witness to be "outside of the State and therefore unavailable as a witness." *Id.* Maryland Rule 2-419 doesn't require a subpoena specifically, but to demonstrate unavailability, Father needed to do more than his counsel stating mid-trial that the witness was in Puerto Rico. Father first needed to take reasonable steps to procure the witness's attendance at the remote hearing—which is, of course, more convenient for an out-of-state witness than an in-person hearing would have been. The trial court didn't abuse its discretion in finding that Father had not surmounted this threshold.

But even if we were to find that the deposition testimony shouldn't have been excluded, any error is harmless. Evidentiary rulings are "'left to the sound discretion of the trial court'" and will not be reversed on appeal "'absent a showing of abuse of that discretion.'" *Matthews v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 91 (2008) (*quoting Farley v. Allstate Ins. Co.*, 355 Md. 34, 42 (1999)). Father sought to introduce Ms. Avery's testimony to impeach Mother's testimony about her stability and substance abuse issues. But Ms. Avery's deposition testimony simply tracked the testimony of Father's other trial witnesses and doesn't offer any new facts or insights. At most, her testimony was cumulative and could not have had any significant impact on the court's ultimate custody analysis.

B. The Trial Court Did Not Abuse Its Discretion In Calculating The Parties' Income And Expenses For Child Support Purposes.

Father argues *next* that the circuit court miscalculated both parties' income, wrongly

imputed estimated childcare expenses to Mother, and failed to impute medical insurance coverage to Father in the course of determining his monthly child support obligation.

The Maryland Code provides that "[i]ncome statements of the parents shall be verified with documentation of both current and past actual income." Maryland Code (1984, 2019 Repl. Vol.), § 12-203(b)(1) of the Family Law Article ("FL"). Examples of "suitable documentation of actual income include[] pay stubs, employer statements otherwise admissible under the rules of evidence, or receipts and expenses if self-employed, and copies of each parent's 3 most recent federal tax returns." FL § 12-203(b)(2)(i). But that is not an exhaustive list. *See Tanis v. Crocker*, 110 Md. App. 559, 572 (1996) (FL § 12-203(b) "does not require that a parent's income tax returns be considered in order to resolve a dispute concerning that parent's income."). And the decisions a court makes about the evidence to credit or disregard in calculating actual income represent an important way that the court exercises its discretion. *See Petrini*, 336 Md. at 463 (holding that the trial court did not abuse its discretion when it increased father's actual income by approximately $10,000 based on evidence of "gifts" that the father regularly received from his family, like rent-free lodging, health insurance, and a spending allowance); *see also Walker v. Grow*, 170 Md. App. 255, 276–77 (2006) (affirming the trial court's reliance on expert testimony to verify and accurately determine the Father's actual income). For that reason, appellate courts don't "second-guess" the weight that the trial court gives "[expert] testimony, or any other evidence." *Walker*, 170 Md. App. at 277.

In this case, the court needed to figure out both parties' actual incomes, a task that

proved particularly challenging as to Father. Father lives what might euphemistically be called a complex financial life, and the court ultimately found his income to be higher than he presented.[6] But the court showed its work—it calculated Father's income using his W-2 from Los Hermanos, which indicated a monthly income of $7,833.00 and annual income of $93,996.00, plus a $15,000.00 check made out to Father from Los Hermanos. The court heard and considered testimony about the provenance and purpose of this check, weighed the parties' relative credibility, and decided that it was included properly in Father's income. Adding the Los Hermanos check yielded a final monthly income of $9,083.00, and we see no abuse of discretion in this determination.

From there, Father argues that the court miscalculated Mother's income using Cheesecake Factory paystubs. He contends "the pay statement only covered the time period of January 27, 2021 through February 9, 2021. So the cut-off period for the year-to-date earnings should have been calculated as of February 9, 2021, not February 16, 2021." But there is no error here either. Mother's pay statements cover two-week periods and represent the amount she has been paid through the pay date. There is, as Father says, a gap between the last date worked and the date the check is paid. But over the course of a year, that'll even out—when the last pay period of the year straddles New Year's Day 2022, a week's worth of her 2021 earnings will be paid in the new year and the annualized income

[6] The court was not entirely convinced by Father's claim that he had no interest in a restaurant owned by his brother called Mecho's Dominican Kitchen. The court also was concerned that Father was receiving multiple checks in various amounts related to his restaurant, Los Hermanos, in addition to a direct deposit paycheck every two weeks.

calculation will reflect that. For that reason, we see no error in the court's extrapolation from Mother's February 16 pay statement to an annual income number.

Next, Father argues that Mother's estimate of $1,733.00 per month ($400.00 per week for 52 weeks divided by 12 months) for childcare expenses was inaccurate based on Father providing primary care for the children during the summer months. Father also argues that Mother presented no evidence to support the childcare estimate. Father notes, correctly, that the court is to consider the "actual family experience" unless the experience is not in the best interest of the child. *See* FL §12-204(g)(2)(i). But Mother testified that her childcare provider charged $350–$400 per month based on the amount of time she worked, and that is the actual family experience that Father claims is missing from the court's analysis. The court found Mother credible, and we see no error in setting childcare expenses at $1,733.00 per month.

Father also argues the court erred by not crediting Father for health insurance paid by him in the amount of $786.60. This is incorrect. The Child Support Guidelines calculations correctly includes a credit for Father's medical insurance payment.

Father's last argument is that the trial court erred in awarding child support arrearages to Mother for the period when Father had physical custody of the children from June 2020 through the April 2021 Order. Section 12-101(a)(1) of the Family Law Article provides that "[u]nless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that requests child support pendente lite, the court shall award child support for a period from the filing of the pleading that

requests child support." Mother filed her counter-complaint on July 24, 2020, so the court was correct in awarding child support arrearages from August 1, 2020 through April 30, 2021.

The decision to award retroactive child support lies in the trial court's discretion. A court abuses that discretion only when its decision stands "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Sumpter v. Sumpter*, 436 Md. 74, 85 (2013) (*quoting North v. North*, 102 Md. App. 1, 13–14 (1994)). When determining the arrearages in this case, the circuit court determined that Father owed child support of $2,866.00 per month for nine months—the amount he would have to pay based on the court's custody finding. Father's argument that the court mistakenly found that Mother had sole custody during the arrears period misses the fact that the court calculated child support arrearages based on a *joint* custody schedule. Father limited visitation with Mother significantly from June 2020 through April 2021, but there was ample testimony that Mother was solely caring for the children from January 2020 (when the parties separated) to June 2020. The court struck a reasonable balance between Mother's and Father's interests in light of their respective time with the children, and we cannot characterize that balancing as falling "beyond the fringe of what [we] deem minimally acceptable."

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.