Circuit Court for Montgomery County
Case No. 147816FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 663

September Term, 2018

DEMETRIUS HARRISON

v.

CORAL BOSWELL

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: February 6, 2019

*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.

Shortly before their child turned three years old, the parties to this case agreed to the entry of a consent order establishing joint legal custody and equal physical custody. Within the next two years, both parents moved to modify those terms. After a two-day hearing, the Circuit Court for Montgomery County concluded that, because of changes occurring after the entry of the consent order, it was in the child's best interests to grant sole legal custody and primary physical custody to the child's mother. On appeal, the father raises two questions:

> 1. Did the Circuit Court err or abuse its judicial discretion by modifying the March 28, 2016 Consent Child Custody Order without a finding of a material change in circumstance regarding the custody of the Minor Child?
>
> 2. Did the Circuit Court err or abuse its judicial discretion by modifying the March 28, 2016 Consent Child Custody Order?

In light of this Court's limited and deferential role in reviewing custody decisions, we discern no basis to set aside the circuit court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Circumstances at the Time of the Consent Order

Coral Boswell ("Mother") and Demetrius Harrison ("Father") are the parents of a son who was born in March 2013. Mother and Father never married each other, but they lived together for the first few years after the birth of their child. In the spring of 2015, the family moved to Severn, Maryland. By the fall of 2015, however, the romantic relationship between the parents ended, and they began living in separate residences.

In March 2016, Mother initiated custody proceedings against Father in the Circuit

Court for Anne Arundel County. Both parents agreed to the entry of a consent order establishing joint legal custody and shared physical custody of their child. The circuit court approved the order and entered it onto the docket on March 31, 2016.

Under the consent order, the two parents shared equal access to their child according to a “2-2-3” alternating schedule. On any given week, the child would spend two days with the first parent, two days with the second parent, and three days with the first parent. On the following week, the schedule would be reversed. The consent order required exchanges to occur at the child’s daycare center, with one parent dropping the child off in the morning and the other parent picking him up in the evening.

At the time of the consent order, the parents lived at separate residences in Severn, while the child attended daycare in nearby Odenton. The time needed to drive from the daycare center to either parent’s residence was about 10 to 15 minutes. The consent order provided that “the child is permitted to attend one daycare/school per school year[,]” and prohibited each parent from making “[a]ny change or variation” in the child’s attendance at daycare or school “without consent from the other parent.” It further prohibited each parent from moving more than 35 miles away from Severn without consent from the other parent.

B. Developments After the Entry of the Consent Order

Although both parents abided by the terms of the consent order, the degree of open communication between them diminished soon after its entry. In April 2016, Father became engaged to marry a woman who had been a close, long-time friend to Mother, as

well as godmother to the parties' child. Mother became extremely upset when she learned of the engagement through social media. She informed Father that she would no longer speak to him over the phone and that she would communicate with him only through emails and text messages. Father nevertheless continued to make phone calls to Mother, which she would not answer.

Around the time of his engagement, Father and his fiancée moved to a new home in Bowie. He declined to disclose his new address to Mother until after he relocated. At that time, he spoke to Mother about finding a new daycare location, but he abandoned those efforts after some preliminary discussions.

Meanwhile, Mother had begun a new relationship of her own. In the fall of 2016, she relocated temporarily to Beltsville where she resided with her boyfriend. They became engaged and purchased a home in Silver Spring in the spring of 2017. Mother declined to disclose her new address to Father until after the purchase was finalized. Father learned of the engagement through social media.[1]

Around the time that Mother was relocating to Silver Spring, the daycare center attended by the parties' child was undergoing a change of management. Mother suggested that the two parents should try to select a new daycare center at a mutually convenient location. She proposed a list of three daycare options, while Father proposed his own list of three other options. Without Father's approval, Mother applied to enroll

[1] Mother married her husband in April 2018. Although she changed her last name, almost all documents relevant to this appeal use her previous name.

the child at a daycare center that she preferred. She withdrew from the enrollment after Father protested her decision.

Because the parties could not agree on a new daycare center, the child continued to attend daycare in Odenton. The average drive time between the daycare center and the parents' respective residences is about 40 to 45 minutes. Mother typically needs about one hour and 15 minutes to drive between that daycare center and her workplace in Washington, D.C., while Father's job requires him to drive to various locations in Maryland and other surrounding areas.

C. The Parents' Cross-Motions for Modification of Custody

On September 8, 2017, Mother filed a motion in the Circuit Court for Anne Arundel County, seeking a modification of child custody. She asked the court to grant her sole legal custody and primary physical custody of the child.

In her motion, Mother contended that "substantial and material changes" had occurred since the date of the consent order. She asserted that the child's continued attendance at the Odenton daycare center was "extremely inconvenient," but that Father "refuse[d] to work with [her] in a productive or meaningful way" to select a new daycare location. She asserted that the "2-2-3 schedule cannot continue once the minor child starts kindergarten" in the fall of 2018 "since the parties live approximately forty (40) minutes away from each other, without traffic." In addition, she alleged that communication between the parties had "completely deteriorated." As examples, she alleged that Father had failed to inform her about changes in his employment, health

insurance for the child, and the scheduling of medical appointments for the child.

Along with her motion to modify custody, Mother moved to transfer the case to Montgomery County, the county in which she resides. Father did not oppose that motion, and the custody case was transferred to Montgomery County. Mother also commenced a separate case in the Circuit Court for Montgomery County by filing a complaint against Father for child support. On a joint motion from both parties, the Montgomery County court consolidated the custody case with the child support case.

Father contested Mother's claims by filing a response in opposition to Mother's motion to modify custody, his own motion to modify custody, an answer to Mother's complaint for child support, and a counter-complaint for child support. He asked the court to grant him sole legal custody of the child (or joint legal custody with tie-breaking authority), to grant him primary physical custody of the child, and to order Mother to pay child support.

In his filings, Father expressly agreed with Mother's allegation that "substantial and material changes" in circumstances had occurred since the date of the consent order. He asserted that these changes included: the increased distance between the parties' residences, Mother's refusal to answer his phone calls, and the child's impending transition to elementary school in September of 2018.

On May 1 and 2, 2018, the Circuit Court for Montgomery County held an evidentiary hearing on the issues of custody modification and child support. Both parties contended that the child's best interests would be served by modifying the custody

arrangement before the child would begin kindergarten in the fall of 2018. Mother believed that the child should live with her and her husband in Silver Spring, while Father believed that the child should live with him and his wife in Bowie. Each parent planned for the child to attend a public elementary school near the parent's respective home.[2]

Among other things, the parties testified in detail about their struggles to make shared decisions under the joint custody arrangement. They introduced many exhibits documenting their email exchanges and text-message conversations. At the conclusion of the hearing, the court told the parties that "there is definitely a change in circumstances" and that the "2-2-3 schedule cannot continue with [the child] starting kindergarten." The court informed the parties that it would need time to review the exhibits before deciding on the appropriate custody arrangement.

D. Custody Determination by the Circuit Court

One week after the hearing, the circuit court announced its decision to grant sole legal custody and primary physical custody to Mother. The court explained the reasons for its decision in a comprehensive oral opinion.

The court found that, although both parents were entirely suitable caregivers, they "refuse[d] to co-parent and communicate with each other in a respectful and collaborative manner about the wellbeing of [their] wonderful child." The court stated that, although

[2] Although the parties, by necessity, continued to communicate with each other about certain matters, they did not discuss the child's elementary school placement with one another. The parties learned of each other's elementary school preferences through answers to interrogatories.

the child was "now 5 years old" and would "begin kindergarten in the upcoming school year in the fall of 2018[,]" both parents wanted the child "to attend public school in the county in which they reside." "As a result," the court said, "the 2-2-3 shared physical custody agreement is no longer viable." The court stated: "The evidence is clear that a modification of custody from the consent order is necessary due to a change in circumstances." The court added: "The relocation of the parents to different counties and their desire to have [the child] attend a public school near their home is a change in circumstances."

In its careful review of relevant factors,[3] the court identified circumstances that weighed toward modifying the custody arrangement. "Based on the testimony of the parties," the court concluded that "neither parent is willing to share legal custody or share[] physical primary custody." The court emphasized that the "capacity of the parents to communicate and to reach shared decisions affecting [the child's] welfare is an issue of great concern[.]" The court noted that "[g]eographic proximity of the parents is an issue" as well. The court reasoned that a modification of the custody arrangement would not cause additional "disruption to the child's social and school life[,]" because a "change in [the child's] current routine [was] mandatory due to the change in circumstances."

The court found that almost none of the relevant factors favored the grant of

[3] The court analyzed the non-exhaustive lists of factors set forth in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977), and *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986).

custody to one parent over the other. The court stated that: "both parents are fit"; the child "is well cared for when he is in the care of both parents"; both parents "are psychologically and physically capable of caring for" the child; "the reputation or character" of the parents was not in doubt; both parents are "genuine and sincere" in their requests for custody; both parents "love and care for [the child], want what is best for him, and believe that they can best provide for his needs on a daily basis"; both parents "are capable of maintaining positive and nurturing relationships with the other parent and extended family, and have taken affirmative steps to do so"; the "preference of the child is not applicable, as [the child] is only 5 years old"; both parents have "a proper home, which is stable and appropriate" for the child; both parents "are employed and able to provide financially" for the child and "have flexible work and employment schedules to be available for [the child] as needed"; and both parents "have a warm and loving, caring relationship" with the child.

The most important factor in the court's best-interest analysis was its extensive assessment of "communication issues[,]" which the court believed were "a symptom of an underlying problem between the parents." The court observed that "all was fine" in the parents' communication until Mother learned that Father was engaged to her best friend and the godmother of their child. The court concluded that Mother "requested that all communication between them be by way of text message and e-mail" because she felt "upset" and "betrayed" by the engagement. In the court's assessment, the "e-mails and text messages submitted by [Mother] of her communications with [Father] showed

instances of pettiness by both parties[,]" but in particular revealed "a distressing pattern of behavior" by Father.

Citing specific exhibits, the court commented that the "tone" of Father's statements was often "dismissive[,] . . . rude, condescending, and disrespectful." The court said that Father "at times" engaged in "controlling behavior" by demanding information or phone contact with the child while the child was in Mother's care, even though he himself was "inflexible in making any accommodations regarding [the child] outside of his own needs." The court said that Father "seems to demand that [Mother] communicate everything to him, and that he believes he can pick and choose, from his perspective, what he feels needs to be communicated." The court found it "troubling" that Father's "dismissive and rude attitude" toward Mother might "be transmitted to [the child] by the tone and his comments[.]"

The court said that these "communication issues have made the simplest of decisions challenging, such as scheduling and attending medical appointments, who . . . should schedule dental appointments, when to go to Urgent Care or follow up with a specialist, what extracurricular programs to enroll [the child] in, when to register, and who paid for pizza." The court attributed its decision to grant sole legal custody to Mother "in large part . . . to the communication issues between the parties." The court found that it was in the child's best interests for Mother to have primary physical custody.

On May 22, 2018, the circuit court entered a written order granting Mother sole legal custody and primary physical custody of the child. The court granted Father access

with the child every Wednesday evening after school, and every other weekend from Friday afternoon until Sunday evening. The court ordered that the parties would alternate physical custody each week during the summer months and made some minor modifications to the holiday schedule from the consent order. The court directed the parties to "continue to communicate via text and email," but also required Mother to "facilitate phone and/or face time access between [the child] and his father during the week, three times per week on a routine schedule[.]" The court further required Mother to "include and notify [Father] of school conferences, meetings, events, and activities, including medical appointments[.]"

One day after the entry of the order modifying custody, Father filed a notice of appeal. He now asks this Court to reverse the custody modification order and to remand the case for further proceedings.[4]

DISCUSSION

Under Maryland law, the parents of a minor child bear equal responsibility "for the child's support, care, nurture, welfare, and education" and have "the same powers and duties in relation to the child." Md. Code (1984, 2012 Repl. Vol.), § 5-203(b) of the

[4] After Father noted his appeal, Mother made a timely motion to amend the child support order. In its oral ruling, the court had said that Father should pay $830 in monthly child support, but the written order obligated him to pay just $290 per month. The court granted Mother's motion, and set the child support obligation at $830 per month. Under Md. Rule 8-202(c), Father's notice of appeal is effective even though he filed it before the court disposed of the motion to amend its judgment and even though he did not file another notice of appeal after the court disposed of that motion. *See, e.g.*, *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 198 n.7 (2013) (citing *Edsall v. Anne Arundel County*, 332 Md. 502, 508 (1993)).

Family Law Article ("FL"). "If the parents live apart," however, "a court may award custody of a minor child to either parent or joint custody to both parents." FL § 5-203(d)(1).

The term "custody" includes two distinct concepts: legal custody and physical custody. *Taylor v. Taylor*, 306 Md. 290, 296-97 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.* at 296. "Physical custody, on the other hand, means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Id.*

The Court of Appeals has consistently held that the best interest of the child is the determinative issue in any child custody dispute. *See Santo v. Santo*, 448 Md. 620, 626 (2016) (citing *Ross v. Hoffman*, 280 Md. 172, 178 (1977)). The court's assessment of the child's best interest controls any child custody decision, whether it be an original action or a motion to modify a prior order. *See McCready v. McCready*, 323 Md. 476, 480-81 (1991). The "'fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future.'" *Domingues v. Johnson*, 323 Md. 486, 499 (1991) (quoting *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419 (1977)). Given the "unique character of each case" and "the subjective nature of the evaluations and decisions that must be made," Maryland courts have attempted to identify "major factors

that should be considered" in custody determinations, while recognizing that "no single list of criteria will satisfy the demands of every case." *Taylor v. Taylor*, 306 Md. at 303. Accordingly, "trial courts are endowed with great discretion in making decisions concerning the best interest of the child." *Petrini v. Petrini*, 336 Md. 453, 469 (1994).

As Father acknowledges in his brief, appellate courts use multiple, interrelated standards of review to different aspects of a custody decision. On pure questions of law, such as the interpretation and application of statutes and case law, the appellate court determines whether the circuit court's conclusions are legally correct (*Barrett v. Ayers*, 186 Md. App. 1, 10 (2009)), and if not whether the error was harmless. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). Otherwise, the scope of appellate review is quite narrow. *See, e.g.*, *Barton v. Hirshberg*, 137 Md. App. 1, 24 (2001). The appellate court "will not set aside factual findings made by the [trial court] unless clearly erroneous," and "will not interfere with a decision regarding custody that is founded upon sound legal principles unless there is a clear showing that the [trial court] abused [its] discretion." *McCready v. McCready*, 323 Md. at 484.

The clearly erroneous standard is "a deferential one, giving great weight" to the trial court's findings. *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000). When scrutinizing factual findings for clear error, this Court must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). Similarly, the abuse-of-discretion standard "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. at 625 (quoting *Petrini v. Petrini*, 336 Md. at 470). The trial judge who "'sees the witnesses and the parties, [and] hears the testimony . . . is in a far better position than the appellate court, which has only a [transcript] before it, to weigh the evidence and determine what disposition will best promote the welfare of the [child].'" *Viamonte v. Viamonte*, 131 Md. App. at 157 (quoting *Davis v. Davis*, 280 Md. 119, 125 (1977)). Because "appellate review is properly limited in scope, the burden of making an appropriate decision necessarily rests heavily upon the shoulders of the trial judge." *Taylor v. Taylor*, 306 Md. at 311 (citation omitted). Indeed, custody decisions are "unlikely to be overturned on appeal." *Domingues v. Johnson*, 323 Md. at 492.

A custody order established by the consent of the parents may be modified upon a sufficient showing of changes occurring since the prior order. *See McCready v. McCready*, 323 Md. at 483. When a parent moves for modification of custody, the trial court must analyze two main questions: "(1) whether there has been a material change in circumstances, and (2) what custody arrangement is in the best interests of the child[]." *Santo v. Santo*, 448 Md. at 639. In this context, "the term 'material' relates to a change that may affect the welfare of a child." *Gillespie v. Gillespie*, 206 Md. App. at 171 (quoting *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996)) (further quotation marks omitted). A "change in circumstances which, when weighed together with all other relevant facts, requires a court to revise its view of what is in the future best interest of a child" may justify a modification of custody. *Domingues v. Johnson*, 323 Md. at 500.

Where the parties present "some evidence of changes which have occurred since

the earlier determination was made[,]" the court must decide "whether those changes are sufficient to require a change in custody[,]" a decision that "necessarily requires a consideration of the best interest of the child." *McCready v. McCready*, 323 Md. at 482. Accordingly, the court's assessment of the materiality of changes often overlaps with its ultimate decision about which custody arrangement will serve the child's best interest. *See Wagner v. Wagner*, 109 Md. App. at 28-29.

As his first challenge to the custody modification order, Father faults the circuit court's finding of a material change in circumstances. At certain points in his brief, he appears to question whether the court made the requisite finding at all. He asserts that the court either modified custody "without a finding of a material change in circumstance" or at least "failed to clearly indicate that a material change in circumstances occurred[.]" Yet the court spoke with unmistakable clarity when it said that "a modification of custody from the consent order is necessary due to a change in circumstances." A trial judge is not required to recite any particular words, but is "simply require[d] . . . to explain, at or before the time the judgment is entered, [his or] her reasons for making [his or] her decision." *Viamonte v. Viamonte*, 131 Md. App. at 162 (applying Md. Rule 2-522(a)). Our review of the 17-page transcript of the oral opinion leaves no doubt that the trial judge clearly articulated the rationale behind the decision.

Most of Father's argument focuses on the substance of the court's determination that the changes in circumstances warranted a custody modification. He argues that the developments since the entry of the consent order were "not sufficient to warrant the

upheaval of a 5-year-old child's stable life," and therefore that the court "should have terminated" its inquiry before evaluating whether to modify the custody arrangement in favor of either parent.

Father's position on appeal directly contradicts the position that he advanced in the trial court. In his response to Mother's motion to modify custody, Father admitted the allegation that "[s]ince the entry of the Consent Order, there have been substantial and material changes such that it is in the best interests of the minor child for the Consent Order to be modified." In his cross-motion to modify custody, he himself alleged that "[s]ince the date of the Consent Order, there have been substantial and material changes that warrant a modification of the Consent Order[.]" At no point in the proceedings did he abandon that position. Rather, in closing argument, his counsel told the trial court, "unfortunately, there has been a material change in circumstances since March 2016." Father can hardly be heard to complain that the court agreed with him on that initial matter.

In any event, the circuit court did not merely rely on the parents' stipulations that a material change in circumstances had occurred. The court understood its dual role "as both a protector of the child and as the resolver of a dispute between the parents." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). The "principle that an existing custody order ordinarily should not be modified in the absence of a showing of changes affecting the welfare" of the child serves not only to prevent parents from relitigating issues but also to preserve stability for the child. *Domingues v. Johnson*, 323 Md. at 498.

Here, the court provided a thorough discussion of changes in circumstances that it deemed important enough to modify the terms of custody. The court's finding that the parents had established sufficient justification to modify custody "must be accorded great deference on appeal, and will only be disturbed if [it is] plainly arbitrary or clearly erroneous." *Braun v. Headley*, 131 Md. App. 588, 597 (2000).

Father's challenge focuses on one particular comment from the oral opinion. The court said: "The relocation of the parents to different counties and their desire to have [the child] attend a public school near their home is a change in circumstances." Father argues that neither of these two developments amounts to a material change bearing on the best interest of the child. He points out that a parent's relocation, even one of significant distance, does not necessarily require a custody modification. *See Domingues v. Johnson*, 323 Md. at 500 ("changes brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody[;] [t]he result depends upon the circumstances of each case"). He theorizes that the trial court mistakenly treated it as "a foregone conclusion" that the parents' relocation from 15 minutes away from each other to 45 minutes away from each other would "automatically" warrant a custody modification. He faults the court for failing to discuss "the specifics of the relocation" and "whether the relocation ha[d] negatively impacted [the child's] life." Similarly, he argues that each parent's preference for the child to attend elementary school near the parent's home "is merely a preference" of the parent, which "does not significantly impact [the child's] welfare."

We agree with Mother's observation that Father's argument "ignores the totality" of trial court's reasoning. The proper method for assessing a trial court's custody decision is to take each statement "in context" and to consider the decision "in its entirety[.]" *Petrini v. Petrini*, 336 Md. at 471-72 (rejecting argument that trial court had awarded custody based on what the trial court had "called a 'gut feeling'" where the court had "carefully explained" that it had considered all evidence and weighed all appropriate factors). Properly viewed, the court's analysis of changes in circumstances was not confined to the single sentence on which Father bases his argument.

Communication between the parents was the predominant focus of the court's analysis. The court emphasized that issue at the beginning ("these two intelligent adults refuse to co-parent and communicate with each other in a respectful and collaborative manner"), middle ("[t]he capacity of the parents to communicate and to reach shared decisions affecting [the child's] welfare is an issue of great concern"), and end ("the Court will award [Mother] sole legal custody . . . due in large part to the communication issues between the parents") of its remarks. The court believed that these "communication issues" were the "symptom of an underlying problem with the parents[,]" which did not emerge "until [Mother] learned of [Father's] engagement" to her close friend and "requested that all communications between them be by way of text message and e-mail." The court observed that these "communication issues have made the simplest of decisions challenging[.]"

Amid the breakdown of effective communication, the court confronted a situation

in which: the parents had formerly established joint legal custody and a 2-2-3 shared physical custody schedule just before the child turned three years old; both parents had since remarried and relocated to different counties; the child was now five years old and ready to begin kindergarten in a few months; and both parents planned for the child to attend kindergarten at schools in their respective counties. It should go without saying that the parents believed that attending kindergarten was in their child's best interest. The selection of an appropriate elementary school is one of the long-range decisions that must be made by the party or parties with legal custody. By establishing joint legal custody, the consent order gave Father and Mother each "an equal voice in making [that] decision, and neither parent's rights [were] superior to the other." *Taylor v. Taylor*, 306 Md. at 296. Furthermore, the consent order expressly prohibited the child from attending multiple schools in one year and prohibited either parent from selecting a school without consent from the other parent.

The court's focus on communication between the parents is no accident. While many factors are relevant, the "capacity of the parents to communicate and to reach shared decisions affecting the child's welfare . . . is clearly the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant as well to a consideration of shared physical custody." *Taylor v. Taylor*, 306 Md. at 304 (capitalization removed). Assessing this factor requires the trial court to examine the parents' past conduct (*id.* at 307), and to predict whether any problems are likely to persist. *Id.* at 304. "Although it is not required for joint legal custody that

parents 'agree on every aspect of parenting . . . their views should not be so widely divergent or so inflexibly maintained as to forecast the probability of continuing disagreement on important matters.'" *Baldwin v. Bayndard*, 215 Md. App. 82, 111 (2013) (quoting *Reichert v. Hornbeck*, 210 Md. App. 282, 306 (2013)). In particular, joint legal custody requires cooperation on fundamental matters, such as the child's education. *Compare Bienenfeld v. Bennett-White*, 91 Md. App. 488, 500 (1992) (upholding modification of custody where "the parties had failed to cooperate with respect to the religion and education of the children"), *with Walsh v. Walsh*, 95 Md. App. 710, 720 (1993) (upholding award of joint legal custody where the parents had "no disagreements about fundamental matters such as the children's health or education").

Here, in addition to the parents' inability to work together on their child's transition from preschool to kindergarten, they failed to communicate effectively about health care issues, both large and small. Their communication about health insurance coverage is a notable example. Although the consent order did not expressly require him to do so, the parties had orally agreed that Father would maintain health insurance for the child, through his employer. On two occasions, however, he changed employers and allowed the child's health insurance coverage to lapse for at least one month, without consulting with Mother. After learning of the coverage lapses, Mother purchased separate health insurance for the child, without consulting with Father. Meanwhile, they showed a pattern of distrust in their frequent conflicts over more mundane matters, such as Mother's disclosures to a pediatrician, the treatment of an injury that the child

sustained at Mother's home, and the treatment of a fungal infection that the child contracted on vacation a few weeks before the custody hearing.

We disagree with Father's suggestion that the court faced a simple choice between maintaining "stability" for the child and accommodating the parents. "The issue of stability may cut different ways in a given case[.]" *Bienenfeld v. Bennett-White*, 91 Md. App. at 502 (citing *Domingues v. Johnson*, 323 Md. at 502). With the two parents firmly entrenched in their respective school districts, all options carried destabilizing consequences. The court could have left the consent order in place, in the hope that the parents would arrive at the kind of compromise that had eluded them for years. Given their history, it was more likely that, absent court intervention, they would not come to an agreement. In the event their standoff would escalate in the fall of 2018: either the child would not attend school at all, or one or both parents would enroll the child in a school without the other parent's consent and in violation of the consent order. Granting sole legal custody to one parent ensured a resolution before those risks would be realized, even though the child would lose the equal involvement of both parents. We cannot say that the court was clearly wrong to permit one form of instability so as to prevent another.

"Blind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon the warring parents will bring peace, is not acceptable." *Taylor v. Taylor*, 306 Md. at 307. The circumstances here justified the conclusion that "existing provision[s]" in the consent order, establishing joint legal custody and requiring both parents to agree on school placement, were "no longer in the

best interest of the child" and thus needed modification. *See McMahon v. Piazze*, 162 Md. App. at 596. The court did not need to find that any of the changes had "already caused identifiable harm" to the child. *Domingues v. Johnson*, 323 Md. at 499. It is "neither necessary nor desirable" for the court "to wait until the child is actually harmed to make a change" in the child's custody. *Id.* at 500.

The combination of circumstances that made the joint legal custody untenable also weighed in favor of replacing the 2-2-3 physical custody schedule. As the court noted, "[g]eographic proximity of the parents is an issue," now that the parents live about 40 to 45 minutes away from one another. In his brief, Father criticizes what he calls the court's lack of "analysis" as to why the existing physical custody schedule was no longer in the child's best interest. Yet, there was an obvious connection between the significant distance separating the parents' homes and the best interest of a five-year-old child about to begin kindergarten. In view of that obvious connection, the court did not need to "articulate every step in [its] thought processes." *Bangs v. Bangs*, 59 Md. App. 350, 370 (1984).

For the child to maintain the old schedule while attending school near the home of one parent, he would need to endure about 90 minutes in a car on weekdays. Although both parents had some flexibility in their schedules, they both worked full time and intended to use aftercare programs near their neighborhood schools. In his testimony, Father explained that the child would benefit from "minimal time in the car from the aftercare back to home" so that the child "would get a sufficient amount of downtime"

each evening. He opined that the child would benefit from "a consistent routine and pattern so that he can be comfortable and . . . feel relaxed and able to focus on his studies as opposed to sitting in a car for 45 minutes back and forth" to a parent's home. The court evidently shared these well-founded concerns. The court did not need to spend any time explaining to these parents what they already knew.

Overall, the finding of a material change in circumstances was sufficiently explained and amply supported by the evidence. Thus, it was appropriate for the court to make the ultimate, and more difficult, determination of which custody arrangement would best accommodate the interests of the child.

A trial judge "'agonizes more about reaching the right result in a contested custody issue than about any other type of decision[,]'" especially where both parents are fit caregivers. *Bienenfeld v. Bennett-White*, 91 Md. App. at 502-03 (quoting *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. at 414). Despite attempts to channel the court's subjective judgments into objective criteria (*see Taylor v. Taylor*, 306 Md. at 303), the "'multitude of intangible factors '" used to evaluate a child's best interest "'ofttimes are ambiguous.'" *Shunk v. Walker*, 87 Md. App. 389, 397 (1991) (quoting *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. at 419). "'At the bottom line, what is in the child's best interest equals the fact finder's best guess.'" *Bienenfeld v. Bennett-White*, 91 Md. App. at 503 (quoting *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. at 419). Relative to a panel of appellate judges, the trial judge who actually observes the testimony firsthand is in the better position to make

that difficult prediction. *See Viamonte v. Viamonte*, 131 Md. App. at 157.

In a second challenge to the judgment, Father contends that the circuit court abused its discretion when it decided that granting sole legal custody and primary physical custody to Mother was in the child's best interest. "On the ultimate issue of which party gets custody—the application of law to the facts—we will set aside a judgment only on a clear showing that the [trial court] abused [its] discretion." *Viamonte v. Viamonte*, 131 Md. App. at 157 (citing *Davis v. Davis*, 280 Md. at 125). Appellate courts "rarely, if ever, actually find a reversible abuse of discretion on this issue." *McCarty v. McCarty*, 147 Md. App. 268, 273 (2002).

Father again draws our attention to certain comments from the court's oral opinion. In its discussion of relevant custody factors, the court said:

> As to any other considerations that the Court determines to be relevant to the best interest of [the child], the communication issues appear to be a symptom of an underlying problem between the parents.
>
> According to [Father], all was fine until [Mother] learned of his engagement, which does appear to be true.
>
> The evidence revealed that [Mother] and [Father] were together as a couple for four years. The relationship ended in October of 2015, and six months later, [Father] was engaged to [Mother's] best friend and the godmother of their child, which [Ms. Bowell] learned of on social media. This can, understandably, place a strain on a relationship.
>
> [Father] did not seem to be able to give any credence as to why [Mother] may be upset and feel betrayed. Not once did he acknowledge what must be an incredibly uncomfortable and awkward situation for [Mother] in this case.

> [The child] now calls [Father's] wife Mommy Bina (phonetic sp.). The Court feels confident that [Father] would strenuously object to [Mother] allowing [the child] to refer to her husband as Daddy anything.
>
> [Mother] acknowledged being hurt and upset by this unpleasant situation. At one point, she had designated [Father] in her phone using an unflattering and profane moniker. She admitted that it was childish and changed it. There is no evidence that [the child] saw it or was able to read it.
>
> As a result, [Mother] requested that all communication between them be by way of text message and e-mail. The emails and text messages submitted by [Mother] of her communications with [Father] showed instances of pettiness by both parties; however, over all [sic], they showed the Court a distressing pattern of behavior.
>
> The tone of [Father's] communications were often dismissive and rude, condescending and disrespectful. At times, it appeared that he was more concerned about being right than thinking about [the child]. Based on comments, he seemed to be more concerned with being named the better parent.

The court went on to detail, in remarks that occupy the subsequent five pages of the transcript, specific emails and text messages that the court believed to show a "dismissive and condescending tone" as well as an "inflexible and demanding attitude" from Father. The court expressed particular concern that the "father's dismissive and rude attitude towards [the child's] mother may be transmitted" to the child. The court emphasized that its decision to award custody to Mother resulted "in large part" from the same "communication issues" which the court had largely attributed to Father's conduct.

Father questions the propriety of the court's remarks about his engagement in 2016 to the woman who is now his wife and was formerly a close friend to Mother. He asserts that his "relationship with his wife has no bearing on [his] fitness to raise and

appropriately care for [the child]" and "does not appear to be related to any factors" relevant to the custody determination. He theorizes that the court granted Mother sole legal and primary custody "as punishment for [his] relationship with [Mother's] best friend[,]" rather than to advance the child's best interest.

"When taken in context, and the court's decision is considered in its entirety" (*Petrini v. Petrini*, 336 Md. at 471), it is clear that the decision was based on appropriate considerations. The court's mention of Father's engagement and Mother's reaction is "better understood, in context" (*Santo v. Santo*, 448 Md. at 645), as part of the assessment of communication between the parents. As explained previously, "'the most important factor' in deciding whether to award joint legal custody [is] the 'capacity of the parents to communicate and to reach shared decisions affecting the child's welfare.'" *Santo v. Santo*, 448 Md. at 628 (quoting *Taylor v. Taylor*, 306 Md. at 304). "'[T]here is nothing to be gained and much to be lost by conditioning the making of decisions affecting the child's welfare upon the mutual agreement of' parents who are 'severely embittered' and whose 'relationship [is] marked by dispute, acrimony, and a failure of rational communication.'" *Santo v. Santo*, 448 Md. at 628 (quoting *Taylor v. Taylor*, 306 Md. at 305).

In this case, it was entirely appropriate for the court to consider how and why the communication problems arose so that the court could understand the nature and severity of those problems. The most significant consequence of Father's engagement was Mother's response: her request that they communicate exclusively through emails and

text messages. Not surprisingly, both parents recounted the facts of Father's engagement and Mother's reaction in their direct testimony, and both parties mentioned those facts in opening and closing arguments. Counsel for Father argued that Mother's unilateral refusal to speak over the phone "put a strain on the whole process" and made every decision "more labored" than it could have been over the phone. Counsel for Mother argued that she had managed to keep her "emotions separate from her desire to communicate" with Father, but that he proved to be "combative," "rude," and insulting" in his emails and text messages. Based on its own review of the evidence, the court found Mother's view of the situation to be the more convincing one. The court fully explained why it deemed the content of Father's emails and text messages to be the most noteworthy aspect of their communication issues. We see no indication that the custody decision was motivated by any desire to "punish" Father rather than to advance the child's best interest.

Father takes issue with the court's failure to mention other facts and failure to draw certain inferences. He asserts that the court "fail[ed] to consider" Mother's "substantial contribution to the breakdown of communication" between the parties. He argues that the evidence showed that Mother "consistently makes unilateral decisions" and has a "pattern of controlling important information" regarding the child. In his view, Mother "persistently acts in a manner that minimizes her negative behavior and her impact on [the child], while emphasizing [Father's] behavior and over[-]exaggerating the impact on the [p]arties' son." He insists that the court's "failure to acknowledge any of

these issues in [its] [o]pinion indicates that all relevant evidence was not considered" by the court.

Of course, a trial court need not mention every piece of evidence or address every conceivable argument in order to demonstrate that it has conducted the appropriate analysis. *See Viamonte v. Viamonte*, 131 Md. App. at 161-62. Any fair reading of the court's opinion reveals that the court had, as it expressly said, given due consideration to all testimony and exhibits. The court even discussed many of the issues that Father accuses the court of overlooking, just not in support of the inferences urged by Father. For instance, the court noted: that Mother was the one who "requested that all communication between them be by way of text message and e-mail"; that Mother "designated [Father] in her phone using an unflattering and profane moniker"; and that a recent disagreement over medical treatment resulted in an "unnecessary" exchange about paperwork and scheduling of appointments. The court expressly acknowledged "instances of pettiness" by Mother. Yet overall, the court concluded that Father's tone and attitude were the predominant features of their poor communication. This assessment of the situation may "seem harsh to a loving [father], but it does not abuse discretion." *Viamonte v. Viamonte*, 131 Md. App. at 162.

Often, in contested custody cases between two parents who are both fit, the evidence "may be sufficient to support an award of custody to either parent." *Domingues v. Johnson*, 323 Md. at 492. Put differently, there are cases in which the evidence and factors "would support the ultimate decision made by the trial judge" and "would also

support a contrary decision" to award custody to the other parent. *Goldmeier v. Lepselter*, 89 Md. App. 301, 313 (1991). This case is one such case. The evidence and the relevant factors called for shifting the decision-making power to one parent and allowing the child to live primarily in that parent's home, while ensuring extensive contact with the other parent. The selection of the primary caregiver who would serve the child's best interests "was neither easy nor clearcut[,]" but it was one "for [the trial judge] to make in the exercise of [her] discretion." *Bienenfeld v. Bennett-White*, 91 Md. App. at 503.

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