Circuit Court for Montgomery County
Case No. FL89838

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 984

September Term, 2020

CHRISTOPHER W. BROWN

v.

SYLVIA M. SIMPSON

Graeff,
Shaw-Geter,
Gould,
JJ.

Opinion by Graeff, J.

Filed: June 28, 2021

Christopher Brown ("Father"), appellant, and Sylvia Simpson ("Mother"), appellee, are the parents of one daughter, H., born in September 2009. The parties separated in 2010 and were awarded joint legal and shared physical custody of H. After several modifications to the physical custody arrangement, Father filed for another modification in October 2019, requesting primary physical custody of H. Mother opposed this request and filed a counter motion for modification of visitation and custody, requesting a change to the visitation schedule. Following a hearing on their motions, the Circuit Court for Montgomery County entered an order denying Father's motion, granting Mother's counter motion to alter visitation, and awarding Mother sole legal custody.

On appeal, we discern from appellant's informal brief the following questions for this Court's review:[1]

1. Did the circuit court err in failing to provide sufficient instructions for submitting evidence?

2. Did the circuit court abuse its discretion in granting Mother sole legal custody?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

[1] Appellant filed an "Informal Brief" pursuant to this Court's March 9, 2021 Administrative Order permitting informal briefing in family law cases in which the appellant is a self-represented litigant. *See* Md. Rule 8-502(a)(9) (permitting this Court to authorize informal briefing for self-represented litigants). Mother did not file a brief in this Court.

FACTUAL AND PROCEDURAL BACKGROUND

A.

Prior History

Father, Mother, and H. lived together in Montgomery County from H.'s birth in September 2009 until October 10, 2010, when Mother moved out with H. The parties were never married.

On October 15, 2010, Father filed a Complaint for Custody requesting joint legal and shared physical custody of H. The complaint alleged that Mother had moved out with H. the previous week, and she had begun restricting Father's access to H. On November 23, 2011, Father amended his complaint to request sole legal custody, with supervised visitation for Mother, and child support in accordance with the guidelines.

On June 30, 2011, the court entered a Consent Order awarding the parties joint legal and shared physical custody of H. Father was provided access Saturday at 7:00 p.m. through Wednesday at 7:00 p.m. (plus certain holidays and weeks during the summer), and Mother was provided access Wednesday at 7:00 p.m. through Saturday at 7:00 p.m. (plus the remaining holidays and certain weeks during the summer), with the Saturday night alternated each week to make the access time equal under the joint arrangement.

On January 31, 2014, Mother filed a petition to modify custody and visitation, requesting child support and sole legal and sole physical custody with visitation for Father every other weekend and Wednesday evenings. She asserted that this schedule had been the norm since January 2013. On July 11, 2014, the court entered an order stating that the

parties had agreed to joint legal custody, with Mother having primary physical custody, and Father having access every other weekend (Friday 5:00 p.m. to Sunday 7:00 p.m.) and every Wednesday evening (5:00 p.m. to 7:00 p.m.).

On May 12, 2016, Father filed a Petition for Change of Custody. He requested primary physical custody based on a change in circumstances because H. was spending "most of her time" at his house. On February 2, 2017, following a hearing before a magistrate, the court entered an order partially granting Father's modification motion. The order provided that Mother would retain primary physical custody of H., the parties would continue to have joint legal custody, but the visitation schedule was altered to provide Father with regular access Thursday through Monday every other week and every Wednesday afternoon, and the parties would split the summer in half (5 weeks each).

In the summer of 2017, Father moved to northern Virginia and subsequently married another woman, who had five children of her own. Father also had two additional children after his relationship ended with Mother, bringing the household total when they were all present to eight children. In her home, Mother also had joint physical custody of a second child she had a few years after her relationship with Father ended. On October 18, 2019, Father filed another Motion to Modify Custody, requesting primary physical custody, with visitation for Mother. Father alleged that H. was with him or his mother (H.'s grandmother) "95% of the time," and that H., now age 10, had expressed a desire to live with Father.

On March 6, 2020, Mother filed a counter motion to modify custody and visitation. She proffered that, since Father had moved to Virginia, he had not taken advantage of his

weekday visitation time, and instead, Father's mother had been driving H. to northern Virginia on Friday nights. As a result, she requested that the visitation schedule be altered to every other weekend (Friday after school through Sunday evening) and that Father provide transportation.

B.

Custody Modification Hearing

The circuit court held a hearing on Father's and Mother's motions on October 19, 2020. Both parties appeared, self-represented, via video conference due to the COVID-19 pandemic.

At the outset, Father proffered that he was not seeking any relief other than primary physical custody, with visitation every other weekend for Mother. Father stated that such a modification was in H.'s best interest due to the "high level of instability in [Mother's] life" and Mother's "dependence on others to care for her and watch [H.]" Mother argued that she should retain primary physical custody because Father's mother had essentially become a *de facto* parent of H. during Father's access time, and he had not been taking full advantage of his visitation opportunities.

Father testified that he moved to northern Virginia in 2017 and resided there with his wife and the seven children and stepchildren (not including H.).[2] He owned his own

[2] Father testified that he had sole physical and legal custody of two biological children (ages 8 and 7) from another relationship. His wife had joint custody with her ex-husband of five boys, ages 13, 12, 10, and twins age 7.

carpentry business and worked part-time as a wedding videographer. Father's home in Virginia was approximately an hour and a half drive from Mother's home in Maryland.

Father testified that H., who was in fifth grade at the time, had been enrolled in four different elementary schools due to Mother's repeated moves, and this inconsistency had contributed to H.'s below-average grades in math and reading and lack of social connections. Mother had not informed him of her latest move until after H. was already enrolled at the new school. He characterized Mother's lifestyle as "wild" and alleged that her employment and housing situations were unstable.

Father further asserted that he had taken full advantage of his visitation under the current order, and that his mother sometimes would help with the pick-up and drop offs. There was tension between Mother and his mother, and on occasion, Mother had refused to exchange H. with his mother. He described Mother as being "unwilling to cooperate and co-parent." Father further proffered that, although the February 2017 Custody Order provided that he was supposed to have H. only on Wednesday evenings and Thursday through Monday every other week, he actually had her 55% of the year in 2018 and 58% of the year in 2019, by his calculations.

Father's mother, Marlene Brown, testified that she lived in Silver Spring, and Mother frequently asked her to watch H. during Mother's scheduled time, for a variety of reasons. Mother sometimes asked Ms. Brown to watch Mother's other son as well. Ms. Brown stated that there were times when Mother would sporadically drop H. off and not

return at the promised pick-up time, or she would see on social media that Mother was traveling and not where she said she would be when she had dropped off H.

Ms. Brown further testified that Mother and H. had moved numerous times since H. started school, and she had observed H. struggling academically. She and Father had hired a tutor for H. the prior year, but Mother would not let her "pick [H.] up or pay for her tutor" because she did not feel the tutor was necessary.[3] Ms. Brown testified that she often assisted in H.'s care by taking her to the doctor and other appointments.

Father's wife, Jennifer Brown, testified that she had a good relationship with H. and thought of herself as H.'s "bonus mom." H. often confided in her about personal matters and things going on in her life, and H. had a sibling-like relationship with the other seven children in their home. There were multiple occasions when they would watch H. on Mother's custodial time, noting that Mother did not take full advantage of her five weeks over the summer.

Mother testified that she was a stay-at-home mom living in Edgewater, Maryland with H., her seven-year old son, and her fiancé. Prior to moving into her fiancé's home in July 2020, she and the children had moved five times between 2013 and 2016, for various reasons. Prior to becoming a stay-at-home mom due to the pandemic, she had held various jobs over the years, and more recently, she had been studying for her real estate license.

[3] Mother subsequently testified, however, that, at some point, she "got [H.] a math tutor."

Mother testified that, although she and her fiancé generally watched H. while she was with them, Mother sometimes would ask her own mother and Father's mother to help. She denied, however, Father's allegations that she had not taken advantage of her five weeks over the summer each year, with the exception of one year when Father asked for an extra week to take H. to see her grandfather in Florida. She testified that she always tried to accommodate Father's requests for additional time. Mother stated that she was afraid that, if Father had primary physical custody, he would attempt to "close [her] out."

Mother requested that the visitation schedule be altered to every other weekend and Wednesday nights with Father because, once H. returned to in-person learning at school, it was not in her best interest to be traveling over an hour between the parties' houses on school days under the current arrangement. When asked by the court if she and Father had been able to make joint decisions since the February 2017 Custody Order, Mother replied in the negative, stating that it was "very hard to make any decisions with [Father]" because he was "very one-sided" and did not "seem to take into consideration how [she felt] about things."

C.

Custody Modification Order

The court made an oral ruling at the conclusion of the October 19, 2020 hearing. The court found that, since the July 2014 Order, H. had lived primarily with Mother. It noted that H. had developed significant relationships with Father's wife and mother, and it found that H. had not been "excessively pawned off" on her grandmother as Mother had

alleged. The court stated, however, that Father and his wife's responsibility for the other seven young children in the home, in addition to H., was a "huge factor for the [c]ourt."

The court found that the parties had not presented sufficient evidence to show that a change of custody would improve H.'s grades, but it stated that "transfers on school night[s] are not a good thing," especially because the parties lived approximately an hour and a half apart. It found there had been a material change in circumstances due to the distance between their residences, and that it was not in H.'s best interest to be traveling back and forth on school days.

The court then reviewed the necessary factors to access the best interest of the child in a custody and visitation dispute, discussed in further detail *infra*. *See Azizova v. Suleymanov*, 243 Md. App. 340, 344–45 (2019), *cert. denied*, 467 Md. 693 (2020). It found that both parties were fit parents for custody and visitation, that there were no significant issues with the parties' character and reputations, and that both parents could provide material opportunities and a stable home environment for H. The court noted, however, that the distance between the parties' homes was "substantial." With regard to the potential to maintain natural family relations, the court stated that, if Father were awarded primary physical and sole legal custody as requested, "the family relations that [H.] has with her mother would not be anywhere near as good as they would be if the mother had her." With respect to the parties' ability to communicate, the court stated as follows: "As far as joint legal custody continues, I don't believe [Father] and [Mother] can make joint legal

decisions together; in fact, I find they can't. . . . I don't think they communicate well with each other."

The court ultimately found that it was not in H.'s best interest to continue joint legal custody due to the parents' inability to communicate. In that respect, the court explained as follows:

> So, I don't think it's in the child's best interest to continue with the joint legal situation. The joint legal custody has its pros when parents have had a history of able [sic] to make joint decisions, can communicate well, and have shown to the [c]ourt a propensity and ability to do so. I don't find that in this case.
>
> I find that [Mother] is a fit and proper person to have legal custody of [H.]. The testimony has convinced me that there's a friction between the two, and it has to be resolved by one parent or the other; and I think [Mother], as I for reasons stated [sic], the longevity, the stability, the love she has for her daughter, the understanding of her needs, that will continue and it will be better served if she has sole legal custody. I don't think at this point [Father] is a fit and proper person to have sole legal custody. The joint legal custody doesn't work with you two.
>
> Now I only say that negative for [Father] because I don't know that he appreciates how potential[ly] damaging it is to all of a sudden uproot his daughter, bring her into a house with all these other wonderful people, but there's all these other people. And I don't know what the relationships are, and I just don't have enough evidence on that.

As a result, the court awarded Mother sole legal custody.

With regard to physical custody, the circuit court granted Mother's modification motion and denied Father's modification motion, finding that it was in H.'s best interest for Mother to continue to have primary physical custody. The court ordered that the current visitation schedule would remain in place until H. returned to in-person learning at school. When she did return to school, Father would be entitled to visitation every Friday after

school until Sunday night at 7:00 p.m. All other previous conditions and schedules regarding visitation, including holidays and the summer weeks, would remain in place.

On November 23, 2020, the court entered a written order denying Father's Motion to Modify Custody, granting Mother's Motion to Modify Custody, and awarding Mother sole legal custody of H. The order also established a new visitation schedule in accordance with its oral ruling.

This appeal followed.

DISCUSSION

I.

Submission of Evidence

At the outset of the remote hearing on October 19, 2020, Father inquired how he should present physical and documentary evidence to the court. The court responded as follows:

> THE COURT: Well, it should have been presented to the Court in advance, and I think your instructions tell you that. [Mother] is nodding her head affirmatively.
>
> (Discussion off record).
>
> [FATHER]: Well, is there a way that we can do it today since we had missed that?
>
> THE COURT: I don't know. We'll see.

Later, when Father was presenting his case, he proffered that he had "calendars" showing the dates that Father had watched H. when she was supposed to be with Mother. The following colloquy occurred in response:

> [FATHER]: Now, Your Honor, I do have calendars, but I guess will I not be able to present those in any way?
>
> [THE COURT]: No, well, you knew you were supposed to do that in advance, correct?
>
> [FATHER]: I'm aware and that was my mistake, Your Honor, and I'd ask for some --
>
> [THE COURT]: So --
>
> [FATHER]: -- leniency.
>
> [THE COURT]: Well, you can't present evidence that you should have presented before, that way [Mother] would have had an opportunity to take a look at it and study it, and check it out. She can't do that now, so I'm going to deny that request.
>
> [FATHER]: Okay.

Father argues that the circuit court "erred in failing to provide sufficient instructions for submitting evidence." He contends that he was "misdirected by an officer of the court on how to submit his evidence," and as a result of this misinformation, his evidence was deemed inadmissible at the hearing.[4]

This claim does not warrant reversal of the court's ruling for two reasons. First, although Father requested that the court allow him to submit evidence despite his failure to do so before the hearing, he did not raise below the objection he raises on appeal. Indeed, he admitted in the circuit court that he knew he was supposed to submit evidence in advance, and it was his mistake in not doing so.

[4] As indicated, Mother did not file a brief in this case.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The rule limiting appellate review to arguments raised in the court below "is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice." *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)). If a party fails to object "while it is still within the power of the trial court to correct the error," that is "regarded as a waiver estopping him from obtaining a review of the point or question on appeal[.]" *Lohss v. State*, 272 Md. 113, 119 (1974), *superseded on other grounds by State v. Rush*, 174 Md. App. 259 (2008). *Accord Halloran v. Montgomery Cty. Dep't of Pub. Works*, 185 Md. App. 171, 202 ("[U]nless a [party] makes timely objections in the lower court or makes his feelings known to that court, he will be considered to have waived them and he can not now raise such objections on appeal.") (quoting *Caviness v. State*, 244 Md. 575, 578 (1966)), *cert. denied*, 409 Md. 48 (2009). Because Father did not argue below, as he does on appeal, that he was given misinformation on the submission of evidence, the claim is not preserved for this Court's review.

Even if we were to exercise our discretion to review the issue, Father has not provided this Court with any factual background or materials in his brief or extract to show how he was "misdirected" or misinformed on the circuit court's procedure to submit

evidence for remote hearings.[5] Accordingly, Father has not presented a basis for this Court to conclude that the circuit court erred in precluding him from admitting evidence. *See Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011) (Appellant has burden to show error by the court.).

II.

Custody Modification

Father next argues that the circuit court erred in granting Mother sole legal custody of H.[6] In support, he asserts that Maryland law allows for parents to maintain joint legal custody despite an inability to effectively communicate.

This Court applies three interrelated standards of review when reviewing child custody determinations, including modifications of child custody:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the

[5] Although the guidelines for informal briefing relaxed the normal briefing requirements under Md Rule 8-501-04 where permitted, subsection (b) of the guidelines provides that an informal brief must "identify issues that explain why the trial court erred" and should provide a concise description of the fact surrounding the issue. *See* Md. Court of Special Appeals, *Guidelines for Informal Briefing*, https://mdcourts.gov/sites/default/files/import/cosappeals/pdfs/guidelinesinformalbriefs.pdf (effective August 1, 2020); *see also* Md. Rule 8-502(a)(9) (permitting this Court to authorize informal briefing for self-represented litigants).

[6] Although Father's request for relief asks this Court to "set aside" the November 2020 Order and "reinstate" the February 2017 Order, we interpret the substance of his argument to challenge only the legal custody determination, as he does not present any arguments in his brief regarding physical custody or visitation. *See Catler v. Arent Fox, LLP*, 212 Md. App. 685, 712 (2013) (Party waived claim of error on appeal when they failed to raise the issue in their briefs.).

> appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

Moreover,

> [i]n our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584, 819 A.2d 1030. We recognize that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only he [or she] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he [or she] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id.* at 585–86, 819 A.2d 1030.

Id. at 171.

When presented with a request to modify custody, the trial court must engage in a two-step analysis: "First, the circuit court must assess whether there has been a 'material' change in circumstance. If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody." *McMahon v. Piazze*, 162 Md. App. 588, 593–94 (2005) (internal citations omitted). These two steps are "often interrelated" because "[d]eciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child." *Gillespie*, 206 Md. App. at 171 (quoting *McCready v. McCready*, 323 Md. 476, 482 (1991)). "The burden is then on the moving

party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Id.* at 171–72 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)).

"A material change of circumstances is a change in circumstances that affects the welfare of the child." *Id.* at 171. Once that threshold has been cleared, the trial court then proceeds to consider the best interest of the child using the following non-exhaustive list of factors established in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1977):

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

E.N. v. T.R., 257 Md. App. 234, 250–51 (2020). *Accord Jose v. Jose*, 237 Md. App. 588, 599–600 (2018).

In *Taylor v. Taylor*, 306 Md. 290, 304–11(1986), the Court of Appeals provided additional factors, many of which overlap the *Sanders* factors:

> (1) capacity of the parents to communicate and to reach shared decisions aff ecting the child's welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11) financial status of the parents; (12) impact on state or federal assistance; (13) benefit to parents; and (14) other factors.

A.A. v. Ab.D., 246 Md. App. 418, 444 n.17, *cert. denied*, 471 Md. 75 (2020). *Accord Jose*, 237 Md. App. at 600.

Here, the circuit court found that there was a material change in circumstances because of Father's move, which resulted in the parties living approximately an hour and half away from one another and made weekday exchanges impractical in light of H.'s school schedule. The court awarded sole legal custody to Mother, thereby terminating the pre-existing joint legal custody arrangement, on the basis that the parents were unable to effectively communicate to "make joint legal decisions together." Moreover, it found that Father was not a "fit and proper person to have sole legal custody," noting that he did not "appreciate how potential[ly] damaging" his request to alter physical custody might be due to Father's large family size.

We hold that the circuit court did not abuse its discretion in awarding sole legal custody to Mother on the basis that the parties were unable to effectively communicate.[7] As the Court of Appeals explained in *Taylor*, 306 Md. at 304:

> *Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare.* This 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. Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability

[7] Although we are troubled by the court's implication that Father was unfit to have legal custody because of his request for primary physical custody in a large family setting, the court did find that the parties were unable to effectively communicate, a factor which weighs heavily in an award of sole legal custody to one parent. *See Taylor v. Taylor*, 306 Md. 290, 304–11 (1986) (Capacity to communicate and reach shared decisions is "the most important factor in the determination of whether an award of joint legal custody is appropriate.").

> to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.
>
> The Court further stated in *Santo v. Santo*, 448 Md. 620, 628 (2016):
>
> *Taylor* stands for the proposition that effective parental communication is weighty in a joint legal custody situation because, under such circumstances, parents are charged with making important decisions together that affect a child's future. If parents cannot make those decisions together because, for example, they are unable to put aside their bitterness for one another, then the child's future could be compromised.

Here, the circuit court carefully reviewed all the pertinent *Sanders-Taylor* factors and determined that it was not in H.'s best interest to continue the joint legal custody arrangement because her parents were unable to communicate effectively with one another in order to make joint decisions. This conclusion was factually supported by Mother's testimony that the parties had been unable to make any joint decisions since the February 2017 Order, as well as Father's testimony that Mother was "unwilling to cooperate and co-parent" and was often "very difficult to work with."

We conclude that the circuit court did not abuse its discretion in determining that joint legal custody was inappropriate in this case, and that Mother should be granted sole legal custody in the situation where H. had primarily resided with Mother since the July 2014 Custody Order and the parties could not effectively communicate. *See Baldwin v. Baynard*, 215 Md. App. 82, 109–12 (2013) (Court did not abuse its discretion granting Mother sole legal custody where parties were unable to effectively communicate, and

Mother had primary physical custody.).

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