UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1333

September Term, 2014

JAMILA MEYERS

v.

ANDRE PERRY

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*Zarnoch,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: October 6, 2015

*Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of the Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

A child was born on July 5, 2012, to Jamila Meyers ("Appellant" "Mother") and Andre Perry ("Appellee" "Father"). The parents were never married and agree on little other than that they were friends in high school and attended the same church. Following a merits hearing on the underlying complaint for custody filed by Mother, the Circuit Court for Frederick County, Honorable Danny O'Connor presiding, awarded sole legal and primary physical custody of the minor child to Father with reasonable access and visitation afforded to Mother on alternating weekends and holidays. Mother presents a single broad question to this Court on appeal:[1]

> "Did the Court[] erroneously strip Appellant's shared physical and legal custody of her minor child where its findings of fact and conclusions of law are not supported by the trial evidence?"

Because in reviewing a child custody case we cannot set aside the factual findings of the circuit court unless they are clearly erroneous, *Davis v. Davis*, 280 Md. 119, 124 (1977), and, in the present case, there is competent and material evidence in the record to support the circuit court's findings, we affirm the court's decision. We conclude that, the circuit court correctly found that the inability of the parties to communicate precluded a joint legal custody arrangement, and that the court carefully considered the necessary factors in determining the appropriate custody arrangement.

BACKGROUND

On April 23, 2014, the circuit court held a merits hearing and heard testimony from both parties on the matter of custody. Testifying on her own behalf and proceeding *pro se*,

[1] Mother does not challenge and makes no arguments concerning the circuit court's award of child support in her appeal.

Mother explained that she moved into the Frederick Community Action Agency shelter in January of 2012 and remained there until she gave birth to her child by Caesarean section on July 5, 2012. She related that, prior to moving into the shelter, she lived with her six-year old son from a previous relationship in a house owned by her parents, but she had to move out when financial hardship left her unable to pay the rent.[2] At that time, Mother was four or five months pregnant and unemployed. Following some medical complications, Mother and the baby resided in Prince George's County with Mother's godmother, Ms. Powell, for about a month. Mother testified that, after a month, she chose to return to the shelter with her children "[b]ecause I knew I was getting housing and I wanted to do something independently on my own." In November of 2012, Mother and her children moved into a Section-8 apartment at Windsor Gardens in Frederick, Maryland. At that time, Mother was still unemployed.

Regarding her relationship with Father, Mother testified that, from the time she discovered that she was pregnant until just after their child was born, she and Father were not on speaking terms. A DNA test report, dated August 28, 2012, established Father's paternity. After the paternity determination, Father first met the minor child in September of 2012.

Father, who appeared at the April 23, 2014, hearing with counsel, testified that he and Mother had been friends since high school but that he only learned that she was pregnant through a mutual friend and from his mother, Ms. Clarke, who had maintained

[2]Mother's parents had relocated to another state.

contact with Mother. Father maintains that he did not see Mother at all during the pregnancy, but that, after he received the results of the DNA paternity test, he visited the child regularly, "every weekend or every other weekend." Despite visiting the child in Frederick on some occasions, Father claimed that he was unaware that Mother and minor child were homeless and living in a shelter.

According to Mother, in May of 2013, she was stressed, battling hypertension, and needed a break. She asked Father whether he would care for their child during the coming summer months, but he said he could not because he worked as a truck driver and was not prepared to assume the responsibility. Notwithstanding that Mother and Father had not agreed upon the summer-long custody exchange, Mother dropped the minor child off with Father on Father's Day with the intention of leaving the child with him for the summer.

Father testified about what happened:

> [W]e discussed [] me keeping her for the summer. I, I said no to her. [] I have to set up daycare, I have to have the stuff in order and then I'm a truck driver, so I have to get things in order. [Mother's] like okay, that's fine. So she br[ought] her and also [] she had like a lot of clothes when she brought her that weekend which was, I believe it was Friday and she gave her to me, but she wouldn't walk up to my house for some reason. So as I proceeded in the, in my house with my, with our daughter she left a whole bunch of bags in my garage . . . attached with it w[ere] WIC vouchers. So my aunt and I, we all assumed, my family was like she's not coming back to get her. So Sunday comes, which is Father's Day, I texted her and I said, []what time are you coming to get [the minor child] and she sent me the text back and said, [] I'm not coming back and get her.

The text message from Mother—time stamped June 16, 11:55 a.m.—read:

> Good afternoon. I was in church. Happy Father's day. I will not be coming back to pick up [the minor child]. I need a break. You her father there is nothing wrong with you.

Mother also testified that she told Father via text message that "he needed to use his resources. I was not coming to get [the minor child]. He needed to use his resources to help out with her."

Upon learning that Mother was not planning to return for the child, on June 20, 2013, Father, *pro se*, filed a complaint for custody in the Circuit Court for Baltimore County stating that "[i]t is in the best interest of the child to be in my custody because: [Mother] is unemployed with two children and has explained via text that she needs a break from parenting [the minor child]." Father requested that the court grant him sole legal and sole physical custody but allow Mother to have visitation every other weekend. Rather than immediately answer Father's complaint filed in Baltimore County, on June 28, 2013, Mother filed a complaint for custody in the Circuit Court for Frederick County.

In her *ex parte* emergency petition for custody, Mother alleged that Father refused to return the child and had gone to an unknown location. Mother's request for *ex parte* relief and emergency custody was granted on July 1, 2013. The order provided that Father could request a hearing on the matter, and, on July 3, 2013, Father responded, through counsel, to the *ex parte* order and filed a motion to vacate.

On July 8, 2013, both Mother and Father appeared before the Frederick court for a hearing on the motion to vacate. After hearing testimony from both parties, the court dismissed the *ex parte* order granting emergency custody to Mother, determined that the custody case would remain open in Frederick County, and postponed any further actions to allow Mother time to obtain counsel.

A few days after the hearing, Mother went to Father's home to visit the minor child. Mother testified that Father only allowed her to visit with the child for 20 minutes, so she decided she would take the child with her. Mother testified that "[a]t that point . . . neither one of us had custody. So at that point he could not stop me from leaving with [the minor child]." This action resulted in an altercation between the parties that precipitated a 911 call. Each party alleged assault against the other, and Mother testified that both she and the child fell on the ground during the tussle.

On that same day, July 13, 2013, Father petitioned the Circuit Court for Baltimore County for a protective order against Mother. Finding that Father was a person eligible for relief and finding by clear and convincing evidence that Mother had committed "act(s) of abuse: Assault in any degree," the Baltimore County court issued a final protective order providing *inter alia* that, for a period of one year from July 15, 2013, Mother shall not contact Father, enter his residence, and shall stay away from Father except to facilitate any child visitation ordered.[3] Thereafter, Father filed an answer and counter-complaint for custody in the Circuit Court for Frederick County on September 18, 2013.

[3] The July 15, 2013, protective order also temporarily addressed custody and visitation of the minor child. The order provided, in pertinent part:

> 6. Custody shall remain joint.
>
> 7. Visitation with [minor child] is granted to JAMILA MEYERS BEGINNING WEDNESDAY 07/17/13: RESPONDENT HAS [minor child] FROM SUNDAY AT 9AM UNTIL WEDNESDAY AT 5PM; JENNIFER DINKINS TO DROP CHILD OFF SUNDAY AT 9AM TO PETITIONER, AND RESPONDENT TO PICK UP CHILD AT COOKIE CASTLE DAYCARE ON WEDNESDAY AT 5PM . . .

Following an initial conference before the Family Law Magistrate on November 4, 2013, the circuit court in Frederick entered a *pendente lite* consent order governing custody and visitation of the minor child. The order, dated November 6, 2013, provided that Father would have physical custody of the child from Sunday at noon through Wednesday at 5:00 p.m., and that Mother would have custody the rest of the week. As with their previous arrangements, the parties had difficulty adhering to the visitation schedule.

Problems began with the first scheduled visitation when Father failed to have the child at the designated pick-up location; therefore forcing Mother to retrieve the child from Father's grandmother's home. Thereafter, according to Father's testimony, Mother failed to deliver the minor child for his visitation period on ten different occasions, resulting, at one point, in Father not seeing the child for "a month or better." Mother also testified that she missed several of her own visitation periods due to circumstances beyond her control, including car trouble and illness.[4] Mother acknowledges that, of the eighty visits that were scheduled between July 17, 2013, and the custody trial, she missed or altered a significant number for various reasons.

[4] Although Mother, in her brief, states that 21 of the eighty scheduled visits/exchanges involved documented incidents, it appears from the record that some of the exchanges for which Mother claims there was no reported issue are those during which Mother was scheduled to pick up the minor child but already had the child by virtue of not delivering the child for Father's previous scheduled visitation time. On these occasions, arguably, Mother construes keeping the child through both parties' visitation periods as an issue-free transition. Thus, the actual number of visitation exchange problems that occurred between Mother and Father is unclear from the record on appeal.

During Father's testimony, with no objection from Mother, the court admitted text messages between the parties regarding visitation around the Thanksgiving holiday in 2013. A text message from Mother on November 23, 2013, at 12:11 p.m., stated:

> Hello [A]ndre we need to discuss holiday plans soon but since I had her for both major holidays last year we can split this year. I won't be dropping her off tomorrow because we are going to [NC] for thanksgiving.

Father testified that, when he disagreed with Mother's plan to take the minor child out-of-state during his scheduled visitation time, Mother refused to change her plans. After a short text message exchange, Father responded:

> I do not agree with you taking [the minor child] during my access period. I intend on picking [the child] up tomorrow.[I] have joint legal custody and you cannot make unilateral decisions regarding [the child].

Mother responded five minutes later, stating simply, "[h]ave a nice holiday." Both parties acknowledge that Father was not permitted visitation with the child during that period around Thanksgiving.

The case proceeded to a merits hearing on April 23, 2014[5], during which the court was presented with numerous e-mails and text messages between the parties relating directly to custody and visitation arrangements, as well as the testimony of two witnesses regarding the child-care environment during visits with Mother and Father. Mother called witness Adelaide Tetteh. Ms. Tetteh, who was Mother's neighbor in the Community

[5] The record discloses that at least one mediation attempt failed. On November 18, 2013, the circuit court signed an order directing the parties to participate in in-house mediation. The parties participated in mediation on January 23, 2014; however, Mother failed to appear for the second scheduled mediation session on February 19, 2014. No further attempts at mediation appear in the record.

Action Agency shelter, testified that the minor child resided with Mother in the shelter from birth (July) to November with the exception of a brief period of time during which Mother was ill. During that time, she testified she believed that the minor child resided temporarily with Mother's family members. On cross-examination, Ms. Tetteh acknowledged that she and Mother had been living in a shelter, and that "[a] shelter is a place where you go where you have no other home to live at. You're consider[ed] homeless so you live in a shelter." She also testified that Mother resided at the shelter for approximately nine months, including a period of time before the minor child was born. When recalled as a rebuttal witness, Ms. Tetteh testified that she was aware that Mother had transportation issues that limited her ability to meet Father for visitation exchanges. She also testified that the minor child was generally well-dressed and well-cared-for when in Mother's custody.

Father, however, testified that the minor child was not well-cared-for based on his observations at visitation exchanges where Mother arrived with the child wearing no shoes, no pants, and no jacket during the fall. Ms. Clark, Father's mother, confirmed this testimony, contending that the minor child was sometimes not properly clothed or bathed while in Mother's custody. Father also testified regarding an incident in which the minor child was bleeding from severe eczema.[6] Father maintains that he texted Mother a picture of the injury and called her to request the child's medical card in order to take her to a

[6] Mother admitted on cross rebuttal examination that she sent the minor child to Father without the medicine that had been prescribed by a doctor for the treatment of the child's eczema.

doctor, but received no response from Mother. Unable to reach Mother to obtain the medical cards, Father took the minor child to Mother and requested that she take the child to the doctor. However, Father testified that to his knowledge, Mother did not take the child to a doctor.

Father recounted other occasions on which Mother refused to supply medical and insurance records necessary for the care of the minor child. Father testified that he first requested copies of the medical cards for the child around the time the parties first went to district court in July 2013.[7] Father sought access to the minor child's shot records so that he could make daycare arrangements, as well as to see whether the child's shots were up-to-date before the child's first birthday. However, Father testified that he only received the medical card and shot records via subpoena in April of 2014 (eight months later).

In her testimony, Mother initially maintained that Father had asked for the medical card on only one prior occasion. However, on cross rebuttal examination Mother testified that Father had been requesting the minor child's shot records from her for months. Mother further testified that she refused to provide them to Father every time he asked, "[b]ecause he refused to let me know what the daycare was so I did not send the shot records because I did not have no type of daycare information. I wasn't just [going to] hand over her information."

[7] Two e-mails authored by Father, dated July 1, 2013, were also admitted into evidence and reflect that Father first requested access to medical information for the minor child at that time.

In regard to his financial status, Father testified that, as a truck driver making approximately $50,000.00 per year, he is financially able to provide for the minor child, and that he has help in the form of family members with whom he resides. Regarding her financial status, Mother testified that, since August 2013, she has been employed at the Employment Resource Center at the Frederick County Department of Social Services at a rate of ten dollars per hour for 40 hours per week.

In closing, Mother requested that the circuit court put "something in place where it's [] convenient and it's adequate enough where [the minor child] gets . . . the joy of both her parents." Counsel for Father, in closing, stated:

> The Court has ample testimony before it to demonstrate that no matter what the Court orders [Mother] is not going to follow it. There have been three court orders put in place for [Mother's] benefit with regards to custody and care of this child. For all three orders [Mother] has refused to obey it. She has given the Court various reasons as to why she would not provide access to [Father].
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> * * *
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> [Father] testified that he's had a stable job. He's been at his job for the past seven [] years. He lives in a home that has six bedrooms, that [the minor child] has the ability to have her own bedroom, that if he is unable to get to [the minor child] for daycare to pick her up that his girlfriend is able to do that. If the girlfriend is not able to do it th[e]n [his] Mom is able to step in. [Father] has more than adequate help. [Father's] [] situation is [] just more stable financially and there is no just reason to subject this child to the continued inconsistent and [] negligent manner in which [Mother] continues to conduct herself.

After closing arguments, the circuit court resolved to take the case under advisement and call another hearing for ruling.

On May 15, 2014, the circuit court held a hearing to announce its ruling awarding sole legal and primary physical custody of the minor child to Father. Judge O'Connor explained:

> With regard to the request of each parent and sincerity of their requests the [] requests of the parties concerning custody while they [] are somewhat sincere are in direct conflict with each other as to who should have legal and physical, primary physical custody of the child. [Mother's] request for a change of custody was partially motivated by the fact of her own conveniences. The current physical shared arrangement interferes with her ability to care for her other child. With regard to the previous agreements between the parties, there was a consent order entered by the Court on November 4th of 2013, pendente lite order in which both [Mother] and [Father] shared physical custody, both having parenting time with the minor child. This [] shared physical custody arrangement provided an opportunity for the parties to exercise shared physical custody, but as the Court notes, [] that arrangement did not work particularly well.
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> * * *
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> Candidly, the parties had considerable difficulty abiding by [the November 6, 2013] pendente lite order. [Mother] on multiple occasions both before and after the pendente lite order denied access to [Father] with the minor child and failed to exercise her own access with the minor child. . . .With regard to the willingness of the parents to share custody, it's clear that the [] parents are not willing to do so, and . . . were unable to effectively share custody pursuant to the pendente lite order. [Mother] on several occasions failed to pick up the minor child from [Father] and also failed to deliver the minor child to [Father] in accordance with [the November 6, 2013] order. [Mother] has also denied [Father] visitation and taken the minor child out of the state to North Carolina without giving [Father] advice in advance that she was intending to do so. So . . . with regard to physical custody it's . . . the Court's opinion that the best interest of the child is served by awarding primary physical custody . . . to [Father] with access to [Mother].
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> With regard to legal custody the parties have not demonstrated the ability to communicate effectively with each other concerning the child's welfare.
>
> * * *

> [T]he Court does award sole legal and primary physical custody of the minor child [] to [Father] with reasonable access and visitation afforded to [Mother].

The circuit court's ruling granted Mother visitation and access every other weekend beginning Friday at seven p.m., two extended two-week visitations in the summer, visitation on Mother's day, visitation on the minor child's birthday, and visitation on some holidays.[8] The order setting forth the court's ruling was entered on the docket on May 19, 2014. On May 28, 2014, Mother filed a motion for a new trial and stay of the court's May 19 order. That motion was summarily denied by the circuit court on July 28, 2014.

Mother filed a notice of appeal on August 27, 2014. Thereafter, in September of 2014, Father sought a determination of child support arrearages and a wage withholding order in the circuit court. On November 27, 2014, the circuit court entered a consent order resolving those issues. On December 3, 2014, this Court filed an order directing the parties

[8] Mother has not challenged the circuit court's award of child support in this appeal. We note , however, that regarding child support, the circuit court stated:

> [T]he Court has examined the financial information provided and has established a child support award in accordance with the child support guidelines based on the parties' current income and expenses. The evidence was presented at trial that [Father] pays $25 per day for childcare for the minor child. He is currently employed full-time as a truck driver earning $50,000 a year. [Mother] does not incur childcare expenses, but has been employed since August with the Frederick County Department of Social Services earning $10 per hour. . . . So the Court is calculating the child support award based on [Father's] income of $50,000 and year [Mother's] earnings of $10, 40 hours a week, taking into consideration . . . $125 per week of child care expenses that [Father] will incur[,] then has arrived at . . . a child support obligation of $442 per month which the Court determines to be just and appropriate. That will be [Mother's] child support obligation as it relates to the minor child effective from the date of the Court's order.

to participate in alternative dispute resolution ("ADR"). In ADR the parties were unable to resolve the issues on appeal, and we entered an order terminating ADR and directing the parties to proceed with the appeal.

DISCUSSION

I.

Preliminarily, we must address Appellant's Motion to Strike Portions of Appellee's Brief filed in this Court through counsel Rufus Meyers, Esq., on August 26, 2015. The motion asserts that Father's brief violates Maryland Rule 8-504 by (1) failing to cite to the pages of the record extract in support of its factual assertions and (2) by referencing documents—the *ex parte order* entered by the Circuit Court for Frederick County on July 1, 2013, and the July 13, "interim protective order" issued by the Baltimore County District Court—which Mother maintains are not properly part of the record in this case. Mother requests that this Court strike those portions of Father's brief that fail to comply with Rule 8-504.

We acknowledge that Father's brief does contain numerous factual assertions for which there is no citation to the record extract. Based on our own painstaking review, we have been able to determine that all of those factual assertions find support in the record.[9]

[9] Regarding the *ex parte* order, it is clear that it is a part of the record of the relevant proceedings in this case compiled by the circuit court and need not have been admitted into evidence for this court to consider it as part of the record on appeal. *See* Md. Rule 8-413(a) ("The record on appeal shall include (1) a certified copy of the docket entries in the lower court, (2) the transcript required by Rule 8-411, and (3) all original papers filed in the action in the lower court except a supersedeas bond or alternative security and those other items that the parties stipulate may be omitted."). Finally, regarding the July 13, 2013, interim protective order, the circuit court did accept into evidence the July 15, 2013 final protective

We decline to exercise our discretion to apply Rule 8-504 and strike the briefing as requested. *See Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 94 (citation omitted) (denying Wife's motion to dismiss based on Husband's failure to provide sufficient references to the record extract and his inclusion of statements unsupported by evidence produced at trial, where Wife suffered no prejudice), *cert. granted sub nom. Li v. Lee*, 432 Md. 211 (2013) and *aff'd,* 437 Md. 47 (2014). However, we recognize Mother's contention that she was "constrained to respond to [Father's] unsupported assertions to protect and preserve [her] rights in this appeal," and, thereby, incurred additional counsel fees in the preparation of her reply brief. Where the failure of one party to comply with this Court's rules regarding the contents of briefs and/or extracts has resulted in the parties incurring additional expense, we have previously exercised our discretion to assign a portion of the costs in this Court to the appellees, despite an affirmance. *See, e.g., French v. Hines*, 182 Md. App. 201, 268 (2008); *LaForce v. Bucklin,* 260 Md. 692, 273 A.2d 144 (1971). That is what we shall do in the present case.

II.

The appellate courts of Maryland practice a limited review of a circuit court's decision concerning a custody award. *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996). In

order which provides, in pertinent part: "[t]he parties have agreed to waive the Temporary Protective Order hearing." The only reference to an earlier interim order made by Father is followed immediately by the reference to the July 15, 2013, final order and it is upon that final order that Father relies in his arguments before this Court. We see no utility in striking Father's brief.

Davis v. Davis, the Court of Appeals outlined the three methods of review employed by appellate courts in child custody cases:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8–131(c)] applies. If it appears that the chancellor 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 appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

280 Md. 119, 125-26 (1977) (footnote omitted).

A. The Best Interest of the Child Standard

In any child custody case, the best interest of the child is the paramount concern. *Taylor v. Taylor*, 306 Md. 290, 303 (1986) (citing *Ross v. Hoffman,* 280 Md. 172, 175 n.1 (1977) (characterizing the best interest of the child standard as being "of transcendent importance" and the "sole question")). We have recently emphasized that "[t]he best interest of the child standard is the overarching consideration in all custody and visitation determinations." *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013). Thus, the best interest of the child is "not considered as one of many factors, but as the objective to which virtually all other factors speak." *Taylor*, 306 Md. at 303. In other words, the best interest of the child has been deemed "the goal that all other factors seek to reach." *Gillespie v. Gillespie*, 206 Md. App. 146, 173 (2012) (citing *Wagner*, 109 Md. app. at 39).

In *Taylor v. Taylor*, the Court of Appeals stated that "[l]egal 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." 306 Md. 290, 296 (1986) (citations omitted). Where a court is determining whether joint legal custody is in the best interest of the child, the Court in *Taylor* set out certain factors to be considered.

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

See Taylor, 306 Md. at 304-311. The *Taylor* Court also clarified that in determining legal custody:

> [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. 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 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.

Id. at 304 (emphasis in original).

Addressing joint physical custody, the *Taylor* Court stated:

> 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.

> Joint physical custody is in reality "shared" or "divided" custody. Shared physical custody may, but need not, be on a 50/50 basis.

Id. at 296-97 (footnote omitted). The Court in *Taylor* highlighted six of its enumerated factors that apply to *both legal and physical custody*: (1) Fitness of Parents; (2) Potential Disruption of Child's Social and School Life; (3) Geographic Proximity of Parental Homes; (4) Demands of Parental Employment; (5) Financial Status of the Parents; (6) Impact on State or Federal Assistance. *Id.* at 308-10.

In *Viamonte v. Viamonte*, 131 Md. App. 151, 158-59 (2000), this Court noted that the analysis for legal custody explicitly includes considerations applicable to physical custody. Further, this Court deemed it appropriate to consider additional factors from *Montgomery County v. Sanders,* 38 Md. App. 406, 419-20 (1978) and *Shunk v. Walker,* 87 Md. App. 389, 397 (1991). *Viamonte*, 131 Md. at 157-58. In *Gillespie v. Gillespie*, 206 Md. App. 146, 174 (2012), we reproduced the list of factors from those three cases, and, in addition to the six factors from *Taylor*, we stated that a court determining an appropriate *physical* custody arrangement should also consider:

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

Finally, when considering joint legal and/or joint physical custody, the Court of Appeals cautioned that "[t]he enumeration of factors appropriate for consideration in a joint

custody case is not intended to be all-inclusive, and a trial judge should consider all other circumstances that reasonably relate to the issue." *Taylor*, 306 Md. at 311. Indeed, we have recognized that, in making a custody determination, the circuit court must sometimes "weigh the advantages and disadvantages of the alternative environments." *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (citing *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977)), *cert. granted*, 432 Md. 211 and *cert. dismissed as improvidently granted*, 436 Md. 73 (2013), *reconsideration denied* (Jan. 23, 2014).

B. The Circuit Court Considered Appropriate Factors

Mother argues that the circuit court failed to properly consider the factors in making its custody determination and/or abused its discretion in awarding sole legal and primary physical custody to Father. In reaching its decision in this case, the circuit court considered "a multitude" of factors, first being the fitness of the parents. In its oral ruling on May 15, 2014, the circuit court stated:

> The evidence establishes that [Father] is a fit and proper parent to have sole legal and physical custody, primary physical custody of the child. Indeed there was testimony presented by [Father's] Mother that both parties are fit and proper parents for the minor child. However, the evidence presented indicated that [Mother] lived in a homeless shelter with the minor child shortly from the time she was born [] until November 2012 without advising [Father] or his family of this fact. The evidence also presented, established that at several of the exchanges of the minor child [Mother] had not properly clothed or bathed the minor child. Specifically, there was testimony that the minor child did not have shoes or socks at several of the exchanges, was wearing a soiled diaper and was not clean. This evidence is indicative of a failure to properly care for the minor child.

Regarding the character and reputation of each parent, the court found that the "reputation of both parties is good although the Court does note that while the parties filed

protective orders against each other there is no evidence that would reflect adversely on either of their character or reputation beyond the filing of those petitions." Similarly, as noted *supra*, the court found that both parents were sincere in their requests for custody of the child.

The circuit court also addressed the ability of each parent to maintain the child's relationship with the other parent, and the geographic proximity of the parents' residences. The Court stated:

> I will note that both parties agree that it is in the minor child's best interest that she spend time with both parents and foster a relationship with each of them, but they also agree that it's not in the minor child's best interest to attend two different daycare providers and have a split schedule.
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> * * *
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> With regard to the geographic proximity of the parties' residences and the opportunities for time with each parent there is a distance, considerable distance. [Father] currently resides in Baltimore . . . . Mother resides in Frederick . . . . Although the distance does not preclude each parent spending time with the child, it does not lend itself to a shared physical custody arrangement and it is in this Court's view that primary physical custody with [Father] is in the child's best interest.

The court also examined the ability of each parent to maintain a stable and appropriate home and stated:

> [I]t is clear that [Father] is able to maintain a stable and appropriate home for the child. However in the past [Mother] has been unable to do so. When the child was initially born [Mother] had been living in a homeless shelter and continued to do so for several months after the child's birth. [Mother] lived with the child in a homeless shelter until November 2012 and during this time did not advise [Father] of his family or seek to have their assistance. While [Mother] is now employed full-time . . . and has secured housing, [] it is the view of the Court that [Father] is able to maintain a more suitable and stable home for the minor child given the stability in his employment and circumstances.

Additionally, referencing the custody exchange around Father's day 2013, the court noted that "there was at least one prior incident where [Mother] left, abandoned, surrendered if you will custody [o]f the minor child to [Father]." The court also noted that, with regard to the impact of its ruling on state and federal assistance, Mother would no longer be able to provide state-assisted health coverage for the minor. Notwithstanding that fact, the court found it was in the child's best interest that sole legal and primary physical custody be awarded to Father.

Regarding the health and disposition of the minor child, the court noted that the child "appears from the evidence to be a healthy and happy child" and that both parties show a genuine affection for and genuine bond with the child. Because of the tender age of the child, the circuit court deemed the child's preference, as well as the child's school and social life to be non-factors.

Most importantly, in making its determination of whether to award joint custody, the court addressed the willingness of the parents to share custody and their ability to communicate effectively regarding the welfare of the child. *See Taylor*, 306 Md. at 304. The court stated:

> With regard to the willingness of the parents to share custody it's clear that the [] parents are not willing to do so, and . . . were unable to effectively share custody pursuant to the pendente lite order.
>
> * * *
>
> With regard to legal custody the parties have not demonstrated the ability to communicate effectively with each other concerning the child's welfare. Concerning, upon reviewing the factors set forth in *Taylor v. Taylor* concerning legal custody arrangements, [the] Court notes that a [] principle

> consideration is the ability of the parties to communicate concerning the welfare of the child, and in this particular case the parties have not demonstrated the ability to do so, including among other times [Mother's] decision to drop the child off and leave the child for an entire summer with [Father] without advising him ahead of time of her intention to do so, taking the child out of the state without letting him know, and failing to appear for the exchanges and giving [Father] advance notice thereof.

Having determined that the inability of the parties to communicate precluded a joint legal custody arrangement, it is clear that the circuit court considered factors in accordance with the above-cited precedent that are appropriate in "weigh[ing] the advantages and disadvantages of the alternative environments" presented by the parents. *See Karanikas*, 209 Md. App. at 590 (citation omitted). As the Court of Appeals stated in *Taylor*:

> Formula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made. At best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but in doing so we recognize that none has talismanic qualities, and that no single list of criteria will satisfy the demands of every case.

306 Md. at 303. Accordingly, we perceive no error in the judgments of the circuit court.

C. It Was Not Necessary to Find Mother an Unfit Parent

Mother contends the circuit court erred in finding that she was an unfit parent. However, the circuit court appears to have made no such finding, nor is such a finding necessary for the court to award sole custody to one parent. *See Domingues v. Johnson*, 323 Md. 486, 492 (1991) ("Notwithstanding the oft-repeated reference in the cases to 'fit' and 'unfit' parents, it is quite often the case that both parents are entirely 'fit' to have legal and/or physical custody of a child, but joint custody is not feasible. In such cases, the

[court] must exercise [its] independent discretion to make the decision.").[10] Indeed, the circuit court, in its oral ruling, acknowledged that testimony had been presented that both parties were fit and proper parents. Thus, the circuit court did not err by making such a finding.

D. The Circuit Court's Factual Findings Were Not Clearly Erroneous

Mother also contends that the circuit court erred in making conclusions of law based on findings of fact not supported by the trial evidence. However, Mother's arguments on appeal fail to allege with specificity what incorrect conclusions of law the court made. Rather, Mother continues to argue that the factual findings of the court were incorrect or that incorrect inferences were drawn therefrom. For example, Mother contends that

> [t]he Court found that on several occasions, [Mother] failed to pick up the child from [Father] before and after the Pendente Lite Order was issued. But, as discussed *supra*, [Mother] visited [the minor child] during her scheduled visits unless extenuating circumstances prevented her from doing so (i.e. car problems, her son's illness, [Mother's] illness, an approaching winter storm, [the minor child] was not at the designated exchange location). . . . Accordingly, the Court's finding of fact that [Mother] did not exercise her visitation rights based upon that evidence is an abuse of discretion that resulted in an erroneous finding of fact and conclusion of law.

[10] A finding of unfitness need only be made when a third-party—such as a grandparent—seeks to obtain custody over the objection of a natural parent. *See, e.g.*, *Janice M. v. Margaret K.*, 404 Md. 661, 695 (2008) (holding that a third party, had to show that the biological mother was unfit or that exceptional circumstances existed to overcome the biological mother's constitutionally protected liberty interest in the care, custody, and control of her child); *Koshko v. Haining*, 398 Md. 404, 428-29 (2007); *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007) ("[I]n a parent-third party custody dispute, the initial focus must be on whether the parent is unfit or such exceptional circumstances exist, for, if one or the other is not shown, the presumption applies and there is no need to inquire further as to where the best interest of the child lies.").

Plainly, in this passage Mother concedes to having missed a number of scheduled visitations (by her own count she missed 24% of her scheduled visitations from January to March of 2014). Thus, as in the majority of her arguments on appeal, Mother is not challenging the first-level fact-finding of the court; rather, she challenges the weight that the circuit court accorded to those facts in reaching its decision.

Mother also relies heavily on her argument that the circuit court erred in finding that she was homeless or resided in a homeless shelter with the newborn minor child. She does not dispute, however, that she and her two children resided in the Frederick Community Action Agency shelter for a period of months. Rather, she maintains that the shelter was not a "homeless shelter" but was a shelter for homeless *or* under-employed persons seeking housing assistance. Regardless of the precise characterization given to the shelter, Mother's failure to tell Father about her living situation was evidence of her inability to communicate important information to Father about the child's welfare. We must emphasize that we affirm the court's ruling not because living in a homeless shelter or in transitional housing makes someone an unfit parent—an assumption which is repugnant to the letter and spirit of the law—but because the court was within its discretion to consider those facts as they pertained to communication between the parties and to other relevant custody factors including the financial status of the parents, the residences of the parents, and the material opportunities affecting the future life of the child.

Additionally, Mother contends that the court erred in determining that her ability to communicate was less acceptable than Father's when both parties were equally ineffective and combative. Again, Mother misinterprets the significance of the circuit court's finding.

As noted above, the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare is the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant to a consideration of shared physical custody. *Taylor*, 306 Md. at 304. Further, "[b]lind 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." *Id.* at 307.

In the present case, the circuit court necessarily examined the parties' ability to communicate and found that "[w]ith regard to legal custody the parties have not demonstrated the ability to communicate effectively with each other concerning the child's welfare." Notably, Mother does not dispute that the parties have been unable to communicate, and, at oral argument before this Court, both parties conceded that Mother and Father have been and remain unable to communicate effectively and peacefully regarding the child's welfare. Thus, an award of joint custody was inappropriate, and the degree of culpability attributed to each parent is immaterial.

Mother's various assaults on the factual findings of the circuit court fail to establish that those findings were clearly erroneous. A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it. *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010) (citing *Solomon v. Solomon*, 383 Md. 176, 202 (2004)). On appeal we must consider the evidence produced at the trial and, giving due regard to the opportunity of the circuit court to judge the credibility of the witnesses, if sufficient evidence was presented to support the circuit court's determination, it is not clearly erroneous and cannot be disturbed. *Davis*, 280 Md. at 122; Md. Rule 8-131. This Court is

constrained by the record on appeal and cannot declare that the factual findings of the circuit court in this case are without competent and material support in that record. We affirm.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED.

APPELLANT TO PAY 50% OF THE COSTS; APPELLEES TO PAY 50% OF THE COSTS.