Circuit Court for Frederick County
Case No. 10-C-13-002794

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1817

September Term, 2019

SHELTON ALEXANDER, ET AL.

v.

TAMARA ALEXANDER

Meredith,
Graeff,
Eyler, James R.
Senior Judge, Specially Assigned

JJ.

Opinion by Eyler, J.

Filed: June 1, 2020

Shelton Alexander ("Father"), appellant, appeals from an order entered by the Circuit Court for Frederick County granting Tamara Alexander ("Mother"), appellee, sole legal and primary physical custody of the parties' 13-year old son, S; establishing a weekend and summer access schedule for Father; detailing a holiday visitation schedule; ordering Mother to maintain S on her health insurance; and ordering Father to pay $1,723.69 per month in child support. Father poses three questions,[1] which we have condensed and rephrased as two:

> I. Did the trial court err or abuse its discretion by granting Mother sole legal custody and primary physical custody of S?
>
> II. Did the trial court err in its calculation of child support?

We answer both questions in the negative and so affirm.

[1] The questions as posed by Father are:

> I. Whether the court erred by granting the appellee sole legal custody of the minor child?
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> II. Whether the court erred by granting the appellee primary physical custody and substantially reducing appellant's time with the minor child?
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> a. Whether the court erred in failing to consider the agreements between the parties.
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> b. Whether the court erred in failing to consider the parties' potential for maintaining natural family relations.
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> c. Whether the court erred in failing to consider the parties' ability to meet the child's needs
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> d. Whether the court erred in in disregarding the child's preference.
>
> III. Whether the court erred in determining child support.

FACTS AND PROCEEDINGS

The parties were married in 2004, S was born in 2006, and they were divorced on July 28, 2014. In their divorce judgment, which this Court affirmed, the parties were granted joint legal custody of S, with Mother having tie-breaking authority; shared physical custody on an alternating week-on/week-off schedule; and Father was ordered to pay $157 per month in child support. *Alexander v. Alexander*, No. 2189, Sept. Term 2014 (filed July 16, 2015).

Less than a year later, Mother moved to modify custody to grant her sole legal and primary physical custody of S and Father filed a counter-motion seeking sole legal custody. Ultimately, the parties reached an agreement that was entered on September 9, 2016 as a consent custody order ("2016 Consent Order"). That order established a new 50-50 shared physical custody schedule that gave each parent primary physical custody of S during the school year in alternating 8-week blocks and, during the summer, in alternating 2-week blocks. During the school year, the party without primary physical custody received alternating weekend visits with S, as well as one weeknight dinner and a nightly telephone call with S. The 2016 Consent Order also modified legal custody to give Father sole decision-making authority regarding major religious and educational decisions and Mother sole decision-making authority regarding major health decisions; permitted each party to choose one extracurricular activity for S; ordered that neither party would pay child support; required the parties to work with a parenting coordinator

to devise a new holiday schedule; and required them to consult a special magistrate before initiating any non-emergency litigation.

In the nine months after the 2016 Consent Order was entered, Father moved for contempt and to enforce the order and filed an *ex parte* motion for emergency relief and Mother filed an *ex parte* motion for emergency relief. In July 2017, Father moved to modify custody, visitation, and child support. He asked the court to grant him sole legal and primary physical custody of S. In October 2017, Mother filed a counter-motion, likewise asking the court to grant her sole legal and primary physical custody of S. Both parties argued that there had been a material change of circumstances in that they were unable to effectively co-parent, that the other party was failing to abide by the terms of the 2016 Consent Order and interfering with the other party's access to S, and that they were unable to reach joint decisions in S's best interests.

On March 28, 2018, following a hearing, the circuit modified the 2016 Consent Order *pendente lite* to grant Mother primary legal and physical custody of S, with Father granted access to S every other weekend and alternating Wednesday overnights. After Father's motion for reconsideration was denied, he appealed the *pendente lite* order to this Court. *Alexander v. Alexander*, No. 175, Sept. Term 2018 (filed November 1, 2018). We affirmed the order and it remained operative until the court held a merits hearing and entered the final custody order that is the subject of the instant appeal.

The merits hearing spanned eleven days between March 19, 2019 and August 8, 2019. The parties both were represented by counsel at the hearing and S's interests were

represented by an appointed best interests attorney ("BIA"). In his case, Father testified and called Mother; Amy Alexander, his current wife; Annie Alexander, his mother; and two family friends. In her case, Mother testified and called Father; Jennifer Dougherty, her adult daughter from a previous relationship; her first cousin; the pediatric endocrinologist treating S; and an attorney in a family law practice who testified as an expert relative to attorneys' fees. The BIA did not call any witnesses but advised the court of S's wishes with respect to physical custody.

The evidence at trial established the following. Mother, who was age 51 at the time of trial, lived in a single-family home in Frederick. Her household consisted of her and S. S's maternal grandmother lived across the street and they often spent time with S's half-sister, her husband, and her children. S was cared for in the home of a close family friend, Dana White, after school on Tuesdays and Thursdays. Mother worked in Rockville as the manager of supervisor training and certification for a federal agency under the Department of Health and Human Services. She ordinarily teleworked Monday and Friday each week but had the flexibility to telework at any time.

Father lives in a 5-bedroom house in Frederick with his wife; their 4-year old daughter and infant daughter, who was born during the trial; and his wife's teenage son from a prior relationship, as well as S. Father's wife also has another son who was in the military and did not live with them. Father was employed as a program manager for Alcatel-Lucent and his wife was employed with United Healthcare. They both were permitted to telework full-time.

S had been diagnosed with Type 1 diabetes on May 14, 2018, shortly after the *pendente lite* order was issued, and required daily insulin injections and glucose monitoring, but his health was stable. Since then, the parties had disagreed about the management of S's diabetes. Two weeks after S's diagnosis, Father made a report to the Frederick County Office of Child Protective Services ("CPS"), alleging that Mother was neglecting S's health and was failing to adequately manage his insulin regimen. The resulting CPS investigation did not substantiate Father's allegations. The CPS investigator found that Mother was extremely organized in her management of S's insulin and that she communicated regularly with S's doctors. This was confirmed by S's endocrinologist, who testified that S's diabetes was being well-managed by both of his parents and that he was "medically stable" and healthy. Mother testified that she and Father each made reasonable judgment calls about how to treat S's diabetes. Father testified at trial that he still had concerns about Mother's management of S's diabetes, however.

The parties also had significant disagreements about S's extracurricular activities. S participated in flag football that Father coached; basketball that Father coached; attended a church where Father was the youth pastor and leader of the youth group; and participated in plays at the church that Father directed. Father interpreted the 2016 Consent Order granting him sole decision-making authority with respect to religion to mean that Mother was obligated to bring S to Father's church on Sundays when S was in her care even though Mother did not attend the church. He also expected Mother to

rigidly adhere to the requirement for a nightly phone call with S during her primary custody periods even if S had spent most of the evening with Father already at a sports practice or a church activity.

Father and Mother agreed that the continuation of joint legal custody was untenable, but each advocated that they were better suited to be the sole decision-maker. Father maintained that physical custody should continue to be shared on a 50-50 basis, though on a more traditional schedule than the 2016 Consent Order. Mother argued that S was thriving under the *pendente lite* order and that she should continue to have primary physical custody of him. She asserted that the Wednesday overnights with Father were too disruptive, however, and should be eliminated, and that weekend access during the school year should be from Friday until Sunday evening, not until Monday morning. The BIA agreed with Mother's position with respect to legal and physical custody, though he had advised the court that S's desire was for physical custody to be shared between his parents on a 2-week on/2-week off schedule.

On August 16, 2019, the court convened to issue its ruling from the bench. The court addressed all the pertinent best interest factors set out in *Taylor v. Taylor*, 306 Md. 290 (1986), and *Montgomery County v. Sanders*, 38 Md. App. 406 (1977). It found that both parties are fit and have good characters and reputations. They lived near each other and within the same school zone for S and each maintained a stable and appropriate home for their son. Aside from the significant litigation expenses each was incurring, the parties both were financially stable. Father worked from home and Mother worked

outside of the home, but each had other adults in supporting roles to assist them. S was an emotionally healthy and academically successful rising 8th grader. He had been diagnosed with Type 1 diabetes on March 14, 2018.

Father and Mother each sincerely desired more time with S and believed that they were best equipped to make decisions in his best interests. They were unable to agree on how to accomplish that, however, and had demonstrated an inability to work together. The court found that the "distrust between the parties [was] so great" that they were "completely unable" to communicate to reach shared decisions. Consequently, the court determined that joint legal custody was no longer manageable or in S's best interests and had to decide which parent was "most likely to not exclude the other parent" and to "consider the other parent in making decisions[.]"

The court concluded that Mother was more likely to support S's relationship with Father. It cited examples of Mother giving S extra time with Father for special family events and reasoned that she had shown herself to be better able to put aside her dislike and distrust of Father and to put S's interests first. The court also pointed to evidence that Father presumed that Mother's intentions were nefarious, to the detriment of S, including when he reported Mother to CPS relative to her care of S shortly after he had been diagnosed with diabetes and when he reported S's daycare provider to animal control after their dog scratched S. The court also found that Father had shown a lack of respect for boundaries. For example, Father had signed S up for basketball and football on teams that he coached with practices scheduled on weeknights when S ordinarily

would be with Mother and then demanded that Mother permit S to speak to him by telephone after the practices, further limiting S's time with her.

Mother also was better able to maintain S's relationship with Father and Father's extended family. The court cited numerous examples, including Mother's willingness to let S spend time with Father and his wife at the hospital when their youngest daughter was born.

S's preference, as communicated by his appointed counsel, was that he wanted to be "out of the middle" of his parents' disputes and would like to alternate custody on a 2-week on/2-week off schedule. S was close with both Mother and Father, but their relationships differed. Father promoted physical activity for S, which was important given his diabetes diagnosis, and participated in many athletic pursuits with him. The court was concerned, however, that Father involved himself in almost all of S's activities when they were together, from coaching his sports teams to leading his youth group. Mother encouraged S in artistic and culinary arts and was more likely to let S engage in independent activities. Nevertheless, S often slept in Mother's bed when in her care, which the court found was not "developmentally appropriate," as Mother herself acknowledged. The court found that both parents met S's religious/spiritual and educational needs.

Mother was better able to consider and act on S's needs, independent of her own needs. Father had demonstrated a tendency to exclude Mother, through his scheduling of S's extracurricular activities.

Balancing all the factors, the court determined to grant Mother sole legal and primary physical custody of S. Father was granted access to S every other weekend from after school on Friday until Monday morning, plus every Wednesday evening for church youth group from 6:30 p.m. to 8:15 p.m. The court laid out a detailed holiday schedule and granted each party two-week blocks in July with S, with the order of the blocks alternating year to year.

Turning to child support, the court ordered Father to pay $1,723.69 per month by an earnings withholding order. That amount included certain monthly health expenses for S that were not covered by insurance. We shall discuss how the court reached that amount, *infra*.

On August 27, 2019, the court issued a custody order encompassing these terms.[2] This timely appeal followed.

DISCUSSION

I.

Father challenges the trial court's decision to grant Mother sole legal and primary physical custody of S. "Physical custody . . . 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." *Taylor*, 306 Md. at 296. "Legal custody carries with it the right and obligation to make long range decisions involving

[2] Following the trial court's oral ruling, but prior to its written order, Father moved for reconsideration. That motion was denied by order entered October 4, 2019.

education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id*. "Joint legal custody means that both parents have an equal voice in making those decisions and neither parent's rights are superior to the other." *Id*.

"The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child." *Shunk v. Walker*, 87 Md. App. 389, 396 (1991). When a party seeks a change in an established custody or visitation order, however, a trial court must

> employ a two-step analysis. First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner* [*v. Wagner*, 109 Md. App. 1, 28 (1991)]. 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). In making a best interests determination, the court must "evaluate each case on an individual basis[.]" *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013). This Court and the Court of Appeals have identified a multitude of non-exclusive factors that may be pertinent in making that individualized analysis, including: (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) the age, health, and sex of the child; (8) residences of the parents and opportunity for visitation; (9) length of separation from the natural parents; (10) prior voluntary abandonment or surrender; (11)

capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (12) willingness of parents to share custody; (13) relationship established between the child and each parent; (14) potential disruption of the child's social and school life; and (15) demands of parental employment. *Sanders*, 38 Md. App. at 420; *Taylor*, 306 Md. at 304-11.

In assessing a trial court's determinations with respect to legal and/or physical custody, this Court applies

> three interrelated standards of review . . . [as] described . . . in the case of *In re Yve S.*, 373 Md. 551 (2003):
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> > . . . . When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. 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 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.
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> *Id*. at 586. Therefore, the reviewing court gives "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id*. at 584. Further, we acknowledge 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 [it] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] 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" child. *Id*. at 585-86.

Reichert, 210 Md. App. at 303-04 (citation omitted).

A. Legal Custody

Father maintains that the trial court's decision to award Mother sole legal custody "did not comport with the evidence" and amounted to a "harsh and draconian sanction." He asserts that to the extent there was evidence supporting a reduction in his decision-making authority, the court could have modified legal custody without depriving Father of any input, such as by granting Mother tie-breaking authority.

The evidence adduced at trial, which included hundreds of emails and text messages exchanged between the parties, overwhelmingly showed that Father and Mother were unable to communicate and reach joint decisions concerning S's welfare. They had shared joint legal custody, in various permutations, since their divorce in 2014. None of the less drastic measures to improve the parties' communication, including tie-breaking authority granted to one parent and dividing decision-making authority by subject matter, had succeeded. The circuit court reasonably found that the parties' inability to communicate or to reach mutual decisions was a change in circumstances that impacted S's welfare and supported a modification of joint legal custody. *See Taylor*, 306 Md. at 305 ("When the evidence discloses severely embittered parents and a relationship marked by dispute, acrimony, and a failure of rational communication, there

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 the parties.").[3]

The trial court made non-clearly erroneous findings that, as between the parties, Mother was the parent who was less likely to exclude Father from decisions and was more likely to consider S's best interests in making decisions, rather than her own interests. These findings were grounded in the evidence that Mother shared information with Father; encouraged S's interests even when they diverged from her preferred activities for him and encouraged him to pursue those activities independent of her. In contrast, the court found that Father was more likely to view Mother as an adversary in all their interactions and that he tended to micromanage S's educational, extra-curricular, and religious pursuits and to be overly involved in those activities. These findings amply supported the trial court's ultimate decision to award Mother sole legal custody of S and it did not abuse its broad discretion in so ruling.

B. Physical Custody

Father maintains that the trial court erred and abused its discretion by modifying physical custody to make Mother S's primary physical custodian and to significantly limit Father's access periods. He asserts that the court failed to give proper consideration

[3] It is worth noting that both parties advocated for a modification of legal custody at trial based upon the inability to communicate but argued that the other party was the source of the impasse. It is only on appeal that Father suggests that joint legal custody should have been continued.

to four custody factors, all of which weighed in favor of maintaining a 50/50 shared physical custody schedule.

First, the Father asserts that the court gave insufficient consideration to the parties' agreement to share physical custody on a 50/50 basis in the 2016 Consent Order. Though he acknowledges that both parties moved to modify that order, he argues that that was because the 8-week on/8-week off schedule was not working, not because S's interests would be served by spending less time with either parent. Second, he argues that the court failed to properly weigh the evidence relative to the "potential to maintain natural family relations" factor. In his view, the evidence showed that Father had a "tight knit" family and that the change in shared custody under the *pendente lite* order, as well as Mother's actions prior to that order, interfered with S's relationship with Father's extended family. Third, Father contends the circuit court clearly erred by finding that Mother was better able than him to meet the needs of an athletic, biracial, practicing Christian teenage boy, emphasizing the outsized role he played in S's sports, church activities, and in helping S to understand and have pride in his racial identity. Finally, Father argues that the court ignored S's stated preference, as conveyed by the BIA, for continued 50/50 shared custody.

All of Father's arguments go to the weight of the evidence and the inferences to be drawn from it. It is not our role as an appellate court to reweigh the evidence and make an independent determination of S's best interests. The trial judge presided over an 11-day custody trial, observed the parties, made credibility assessments and was far better

situated to make the individualized and nuanced custody decision than this Court. The court's detailed findings on all the custody factors makes clear that it considered all the evidence but drew different inferences from the evidence than advocated by Father. It did not clearly err in any of its factual findings or abuse its discretion in its conclusion that S's interests would best be served by spending less time transitioning between two households, by permitting Mother to make most of the day-to-day decisions for S, and by limiting S's exposure to the acrimony between his parents.

II.

Father contends the trial court abused its discretion in calculating child support in this above-the-guidelines case. He asserts that the court improperly included speculative expenses for health insurance and for extraordinary healthcare expenses for S and failed to account for Father's reasonable expenses in setting the amount of child support.

Mother responds that the court did not clearly err in finding that the expenses reported by her were reasonable and did not abuse its discretion in its ultimate award. We agree.

Pursuant to Md. Code, Fam. Law § 12-204(d) (1984, 2012 Repl. Vol., 2018 Supp.), when the "combined adjusted actual income exceeds the highest level specified in the [child support guidelines], the court may use its discretion in setting the amount of child support." Here, the court found that the parties' combined adjusted actual income came to $19,459 per month. The highest level specified in the guidelines is $15,000 per month.

A child support award ordinarily will not be reversed absent an abuse of discretion. *See Walker v. Grow*, 170 Md. App. 255, 266 (2006). If "the order involves an interpretation and application of Maryland statutory and case law, [however,] our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review.'" *Id.* (quoting *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556 (2002)). In an above-guidelines case, the court's exercise of its discretion is informed by "several factors, including: the parties' financial circumstances, the reasonable expenses of the child, and the parties' station in life, their age and physical condition, and expenses in educating the child." *Smith v. Freeman*, 149 Md. App. 1, 20 (2002) (cleaned up). The "rational[e] of the [g]uidelines still applies" in an above-the-guidelines case, however. *Malin v. Mininberg*, 153 Md. App. 358, 410-11 (2003).

The trial court first calculated child support by using the "SASI-CALC" software. It found that Mother earned $9,232 per month and Father earned $10,227 per month. Mother's costs for childcare for S was $200 per month and for S's health insurance through her employer was $279 per month. Uninsured extraordinary medical expenses for S were $339 per month. The court calculated the total monthly child support obligation for S to be $3,402 and that Father's share of that amount was $1,730.

Alternatively, the court calculated child support by evaluating the reasonable expenses Mother, as the primary caregiver, was incurring to provide for S. The court went line-by-line through Mother's financial statement and determined if each expense attributed to S was reasonable and, if not, determined the reasonable amount that could be

attributed to his care. Using this approach, the court calculated Father's child support obligation to be $1,723.69 per month.

Finally, the court calculated child support by extrapolating from the child support guidelines figure. Using this approach, the court determined that Father's monthly obligation would be $1,788.95. The difference between the highest child support figure (extrapolation method) and the lowest figure (financial statement) was $65 per month. The court determined to use the lowest figure and ordered Father to pay $1,723.69 per month in child support.

Father takes issue with the court's finding that Mother's cost for health insurance attributable to S was $279 per month. According to Father, the evidence as to the amount of Mother's health insurance premium that was paid for S was speculative and, in any event, it was unreasonable for the court to order Mother to insure S since the evidence showed that the cost for Father to insure him was significantly lower.[4] Mother testified that the cost for S was $279 per month. The court did not clearly err by relying on that testimony. Further, the court did not abuse its discretion by determining that Mother, as the primary physical custodian, should maintain S on her health insurance. The court was not required to assess if this was the least expensive option and we perceive no error in

[4] Father also contends that the court ordered him to maintain a supplemental policy for S but failed to account for the cost he incurred. The court ordered Father to "continue to carry [S] as secondary insurance *as long as there is no additional premium attributable to him*." (Emphasis added.)

the court's inclusion of Mother's expense for health insurance in its calculation of child support.

Next, Father contends the court erred by including $339 per month in "extraordinary medical expenses" because Mother's testimony about how she calculated that expense relied upon an inadmissible spreadsheet that she had prepared, with assistance of counsel. Father's counsel did not object to Mother's testimony about the extraordinary expenses incurred for S's diabetes care by reference to that exhibit, which she properly used to refresh her recollection as to the amounts. She detailed the expenses for supplies, medication, and equipment that were not covered by insurance. *See* FL § 12-201(g) (defining "extraordinary medical expenses" to mean "uninsured expenses over $100 for a single illness or condition[,]" including "uninsured, reasonable, and necessary costs for . . . any chronic health problem"). The trial court did not clearly err by relying upon Mother's detailed testimony in this regard.

Father also contends that the trial court failed to consider his financial resources and ability to pay child support in the amount ordered. The court had presided over an 11-day trial, reviewed both parties' testimony and their financial statements and had made findings with respect to their income and expenses relative to its decision not to award attorneys' fees. The court was not obligated to make explicit findings about

Father's ability to pay child support in this above-the-guidelines case and its ultimate child support order was not an abuse of discretion.[5]

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

[5] On April 8, 2020, Father filed an appendix with this Court comprising information pertaining to an emergency motion he filed in the circuit court after the final custody order that is the subject of the instant appeal. He also sought mandamus relief relative to the emergency motion, which this Court denied by order entered April 29, 2020. Mother has moved to strike the appendix. We shall grant the motion to strike as the contents of the appendix are not properly before us.