

Circuit Court for Montgomery County
Case No. 171679FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1845

September Term, 2021

A.L.

v.

F.K.

Nazarian,
Zic,
Tang,

JJ.

Opinion by Zic, J.

Filed: July 22, 2022

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, A.L. (“Mother”), and appellee, F.K. (“Father”), are the parents of two minor children, H., born in October 2018 in Maryland, and B., born in April 2021 in Connecticut.¹ In February 2021, Mother and H. moved to Connecticut. In March 2021, the Circuit Court for Montgomery County entered an Interim Consent Order, which granted an alternating custody schedule where H. would spend three weeks with Mother in Connecticut and one week with Father in Maryland each month. On January 21, 2022, a pendente lite custody hearing was held before the circuit court. Following this hearing, a Pendente Lite Order was entered on January 25, 2022, which changed the custody schedule of H. to two weeks in Connecticut and two weeks in Maryland.

Mother presents the following three questions for our review, which we have rephrased²:

1. Did the circuit court abuse its discretion by holding a custody hearing without first resolving threshold jurisdictional questions under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”)?

¹ To preserve anonymity, we have chosen to represent these children with randomly assigned initials.

² Mother phrased her questions presented as follows:

- I. Did the pendente lite [judge] abuse his discretion when he proceeded [to the] custody hearing without first resolving threshold jurisdictional questions?
- II. Did the pendente lite judge improperly base his ruling on an agreement regarding custody jurisdiction[,] which he erroneously believed applied to custody?
- III. Did the pendente lite judge properly apply the best interest analysis in making his custody determination?

2. Did the circuit court err by failing to apply the objective rule of contract interpretation to the Interim Consent Order?
3. Did the circuit court err or abuse its discretion in applying the best interest of the child analysis when making its custody determination?

For the reasons that follow, we conclude that the first question is moot, and the second question is not preserved. We answer the third question in the negative. Accordingly, we affirm the judgment of the Circuit Court for Montgomery County.

BACKGROUND

When H. was 14 days old, he was diagnosed with a serious medical condition and has since been diagnosed with other medical conditions.³ As a result, H. has multiple medical specialists and receives weekly therapies.⁴ H. sees a specialist in Florida for his one particularly serious medical condition. His other weekly therapies were initially received in Maryland but are now received in Connecticut.

After a domestic violence incident between Mother and Father in October 2020, Mother took H. and left the home she shared with Father. After this incident, Mother filed for a temporary protective order against Father. Following a hearing, a final protective order was entered against Father by the District Court of Maryland for Montgomery County. Mother was pregnant with B. when this incident occurred.

³ At the pendente lite hearing on January 21, 2022, Mother and Father described H.'s serious medical condition to affect H.'s physical and cognitive abilities.

⁴ This includes at-home applied behavior analysis therapy five days a week.

Interim Consent Order

In January 2021, the parties attended mediation and reached an agreement that was set forth in the Interim Consent Order (“ICO”) entered by the circuit court. The order was dated February 22, 2021 and entered on March 9, 2021. The ICO became effective retroactively “on January 30, 2021, and the access schedule . . . [was to] continue in effect until July 24, 2021, further agreement of the parties, or further Order of Court.”

The ICO addressed temporary custody, access, and support of H. and contained a detailed access schedule for the period between January 30, 2021 and July 24, 2021. Pursuant to the schedule, H. spent three weeks in Connecticut and one week in Maryland each month. Further, the circuit court ordered the parties to attend additional mediation to discuss a schedule for the period when the ICO would no longer be in effect.

The ICO stated the following regarding Maryland’s jurisdiction over H.:

ORDERED, that as a matter of law and upon consent of the parties, Maryland is [H.]’s Home State as defined in Section 9.5-101 (h) of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act (“MUCCJEA”). The parties agree that Maryland is [H.]’s Home State under the MUCCJEA. The parties further agree that [H.]’s presence in Connecticut shall constitute a temporary absence only from Maryland. [Mother] shall not file an action for custody of [H.] in any state other than Maryland prior to the court’s determination of custody in this matter

Further, the ICO stated that “the parties shall have joint legal custody of [H.], including but not limited to, the selection of any medical providers who may provide diagnosis, care, and/or treatment to [H.] while he is in Maryland or Connecticut.”

Mother’s Move to Connecticut and Interim Custody Schedule

Mother moved to Connecticut with H. in February 2021. B. was born in Connecticut in April 2021. Mother filed for custody of B. in the Superior Court of Stamford-Norwalk, Connecticut. Subsequently, Father filed a motion to dismiss B.’s case in Connecticut “on the grounds that Maryland is a more convenient forum and . . . [to] transfer jurisdiction over the issue of custody of [B.] to Maryland.”

In June 2021, Father filed a second amended complaint in Maryland, seeking custody of both children. On July 13, 2021, Mother filed a “Motion for the Court to Decline to Exercise Jurisdiction [Over B.] and Dismiss [Father]’s Amended Complaints . . . or, in the alternative, Request for an Inter-Judicial UCCJEA Hearing” (“Motion to Decline Jurisdiction Over B.”). On September 3, 2021, a hearing on Mother’s Motion to Decline Jurisdiction Over B. was held before the circuit court. The court took the matter under advisement.

Following a mediation session, the parties agreed to an interim custody schedule that would last until the final custody hearing, which was scheduled for September 2021. Pursuant to the interim custody schedule, the parties exchanged H. every two weeks from the end of July 2021 until the final custody hearing scheduled for September 2021. The final custody trial on the merits, however, was postponed to April 2022. A Consent Order was entered on September 17, 2021, which directed the parties to attend another mediation session to establish a third interim schedule until the April 2022 trial. The Consent Order further stated that the terms of the ICO were to “remain in full force and

effect.” Father was unable to see H. from September 18, 2021 to October 23, 2021 due to disagreements with Mother about the custody schedule. On October 8, 2021, Father filed an emergency motion for temporary restraining order and preliminary injunction.

On October 28, 2021, pursuant to the UCCJEA, the judges of both Maryland and Connecticut communicated “regarding the appropriate jurisdiction to hear and determine custody and visitation issues arising between the parties.”

In December 2021, Mother filed a complaint for custody of H. in Connecticut. On December 13, 2021, Mother filed a second “Motion to Decline Jurisdiction [over H.] and Request for Inter-Judicial UCCJEA Hearing” in the Circuit Court for Montgomery County (“Motion to Decline Jurisdiction Over H.”).

Pendente Lite Hearing

A pendente lite hearing was held on January 21, 2022. At the time of the hearing, the circuit court had yet to rule on either Mother’s Motion to Decline Jurisdiction Over B. and Motion to Decline Jurisdiction Over H. The court declined to consider these issues relating to the UCCJEA during the hearing.

On January 25, 2022, the circuit court entered a Pendente Lite Order that established an alternating schedule for H., which specified that H. was to spend two weeks with Father in Maryland and two weeks with Mother in Connecticut.⁵ On January 26, 2022, Mother filed this appeal.

⁵ The Pendente Lite Order states that “Father shall have access with [H.] in alternating two-week intervals . . . followed by Mother having custody of [H.] for two weeks and continuing back and forth in that fashion.”

Subsequent Events

On February 28, 2022, the Superior Court of Stamford, Connecticut concluded that Connecticut is B.’s home state but declined to exercise jurisdiction on inconvenient forum grounds. The Connecticut court accordingly dismissed the custody action concerning B. “in favor of the already pending Maryland custody action.”

On March 25, 2022, the Circuit Court for Montgomery County denied Mother’s Motion to Decline Jurisdiction Over B. and denied Mother’s Motion to Decline Jurisdiction Over H. The final custody hearing on the merits was not held in April 2022, but instead was postponed to October 2022.

I. STANDARD OF REVIEW

“Whether the [circuit] court correctly asserted jurisdiction is an issue of statutory interpretation that we review de novo to determine whether the court was legally correct.” *Cabrera v. Mercado*, 230 Md. App. 37, 80 (2016). Additionally, the Court of Appeals has articulated the three distinct standards of review applied to child custody disputes:

When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Maryland Rule 8-131(a)] applies. [Second], if it appears that the [hearing 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 [hearing court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [hearing court’s] decision should be disturbed only if there has been a clear abuse of discretion.

Burak v. Burak, 455 Md. 564, 616-17 (2017) (alterations in original) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

II. ANALYSIS

A. The Issue of Whether the Circuit Court Abused Its Discretion by Not Addressing the Jurisdictional Issues Under the UCCJEA at the Pendente Lite Hearing is Moot.

Mother argues that the circuit court “abused [its] discretion and erred as a matter of law when, over Mother’s objection, [it] proceeded with the [pendente lite] [h]earing on [H.] without first resolving outstanding jurisdictional issues under the [UCCJEA].” She contends that “no pendente lite hearing should occur at all while relevant jurisdiction issues remain pending,” and that by not resolving the jurisdictional issues, the court was prevented from “considering an important best interest factor—relationship with siblings.” She asserts that the court abused its discretion by failing to properly “distinguish between the overlapping but separate issues, and actively relying on disputed facts that should (and would) have been resolved in the course of a preliminary jurisdictional hearing.” In response, Father argues that “there was never an issue regarding Maryland being [H.]’s [h]ome [s]tate and Maryland having exclusive jurisdiction to determine custody of [H.]”

Maryland codified its version of the UCCJEA at §§ 9.5-101 to 9.5-318 of the Family Law Article. *Cabrera*, 230 Md. App. at 73. Section 9.5-206(a) provides:

Except as otherwise provided in § 9.5-204 of this subtitle, [which governs temporary emergency jurisdiction,] a court of this State may not exercise its jurisdiction under this subtitle if, at the time of the commencement of the proceeding, a

proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this title, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum under § 9.5-207 of this subtitle.

Moreover, “[i]f a question of existence or exercise of jurisdiction under this title is raised in a child custody proceeding, the question, on request of a party, shall be given priority on the calendar and handled expeditiously.” Md. Code Ann., Fam. Law § 9.5-106.

The issue of whether the court should have resolved the UCCJEA jurisdictional issues before the pendente lite hearing, however, is moot. “We, generally, do not decide moot questions.” *Montgomery County Off. of Child Support Enf’t ex rel. Cohen v. Cohen*, 238 Md. App. 315, 330 (2018). “A question is moot if, at the time it is before th[is] [C]ourt, there is no longer an existing controversy between the parties so that there is no longer any effective remedy which th[is] [C]ourt can provide.” *Id.* (quoting *Att’y Gen. v. Anne Arundel County Sch. Bus Contractors Ass’n*, 286 Md. 324, 327 (1979)).

After the pendente lite hearing, the court in Connecticut dismissed B.’s custody action “in favor of the already pending Maryland custody action” relating to H. and declined to exercise jurisdiction on inconvenient forum grounds. Moreover, the Circuit Court for Montgomery County denied Mother’s Motion to Decline Jurisdiction Over B. and Motion to Decline Jurisdiction over H. Accordingly, Maryland has jurisdiction over both H. and B. There is no longer a jurisdictional dispute, and this Court cannot provide an effective remedy.

B. The Issue of Whether the Circuit Court Erred By Failing to Apply the Objective Rule Of Contract Interpretation to the Interim Consent Order is Not Preserved.

Mother argues that the circuit court erred by incorrectly interpreting the “temporary absence” provision of the ICO and the restrictions it imposed on Mother. She contends that the “temporary absence” provision was unambiguous and “referred to threshold jurisdictional issues under the UCCJEA, not physical custody.” Further, she contends that the circuit court incorrectly based its “interpretation of the ICO on the representations of Father and parol evidence, without considering the actual language of the agreement.” In response, Father argues that Mother waived this issue and failed to preserve it for appellate review. We agree with Father.

“Generally, in order to ‘preserve’ an issue for appellate review, the complaining party must have raised the issue in the trial court, or the issue was decided by the trial court.” *Nalls v. State*, 437 Md. 674, 691 (2014) (citing Md. Rule 8-131(a)). “Although this Court has the discretion to review unpreserved errors, the Court of Appeals has explained that ‘appellate courts should rarely exercise’ their discretion under [Maryland] Rule 8-131(a).” *Harris v. State*, 251 Md. App. 612, 660 (2021) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007) (explaining that the interests of “fairness and judicial efficiency” require challenges to “be presented in the first instance to the trial court so that (1) a proper record can be made . . . and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge”)); *Nalls*, 437 Md. at 691

(stating that an issue is waived on appeal “if a party fails to raise a particular issue in the trial court, or fails to make a contemporaneous objection”).

Mother’s arguments are not preserved for appellate review because she did not raise her contentions at the pendente lite hearing. Mother did not request that the court interpret the ICO, and she never argued that the court incorrectly interpreted the ICO. She did not object to the manner in which Father and the circuit court used the terms “temporary,” “temporary absence,” or “temporarily.”⁶ Indeed, the circuit court did not construe the meaning of “temporary absence” within the context of the ICO. Consequently, we decline to address the merits of Mother’s arguments.

C. The Circuit Court Did Not Abuse its Discretion Because it Considered the Appropriate Factors and the Best Interests of the Child in Making the Pendente Lite Custody Schedule.

Mother argues that the circuit court’s ruling at the pendente lite hearing—that H. was to alternate between Mother and Father every two weeks—was not based on the best interests of the child and that the ruling did not follow from the evidence before the court.

⁶ For instance, Father testified without objection that “[H.] would be with [Mother] temporarily in Connecticut” and that “the stay for [H.] in Connecticut was temporary.” And on cross examination of Mother, Father’s counsel asked Mother the following: “And you also agreed that [H.]’s presence in Connecticut shall constitute a temporary absence only from Maryland, correct, ma’am?” Mother responded, “Yes.”

During Mother’s closing argument, the circuit court stated that “[Mother and Father] agreed that she would temporarily go to Connecticut.” Mother’s counsel answered, “They did, but then it turned out through no fault, anybody’s fault, it turned out -- I think they entered into the ICO with the understanding that we’re going to have an answer by September and nobody’s fault, it didn’t happen.” The court also stated “[b]ut from January to June your client changed her mind.” Mother’s counsel responded, “Yes, she did.”

She further alleges that although the court analyzed several mandatory best interest and joint custody factors, the analysis was insufficient. Father responds that the court’s ruling was “based on findings of fact that [were] not clearly erroneous and [were] in [H.]’s best interests.”

In child custody cases, the Court of Appeals has explained that the circuit court’s authority “is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interests of the child.” *Santo v. Santo*, 448 Md. 620, 627 (2016) (quoting *Taylor v. Taylor*, 306 Md. 290, 301-02 (1986)). When “determining whether joint custody is appropriate,” there are numerous factors to consider. *Santo*, 448 Md. at 627 (quoting *Taylor*, 306 Md. at 303 (noting that no factor “has talismanic qualities, and that no single list of criteria will satisfy the demands of every case”)).

These factors include the following, but is not an exhaustive list:

- (1) fitness of the parents;
- (2) character and reputation of the parties;
- (3) desire of the natural parents and agreement 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 of visitation;
- (9) length of separation from natural parents; and
- (10) prior voluntary abandonment or surrender.

J.A.B. v. J.E.D.B., 250 Md. App. 234, 253 (2021) (citing *Montgomery County Dep’t of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1978)). In *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978), this Court explained that when determining the best interests of the child, the circuit court must consider the

unique circumstances of each case. *Id.* at 419 (“At the bottom line, what is in the child’s best interest equals the fact finder’s best guess.”).

Here, the circuit court considered the following factors concerning the best interests of the child:

I have to consider the *Sanders* factors, 38 Md. App. 406 (1977). Or *Taylor v. Taylor* factors, 306 Md. 296 (1986) case. It tells the [c]ourt factors to consider. To always to have that beacon on what is the best interest of [H.]? Not the best interest of [Father], not the best interest of [Mother], but [H.]

Fitness of the parents. I find both parents are fit and proper parents. I’m very impressed by the hard work they’ve done with such a challenging job. They’ve been all over this. So, I tip my hat to them for the hours they’ve spent online, phone calls, doctors’ appointments in just three years.

* * *

Character and reputation of the parties. I didn’t hear a lot of testimony on that one way or the other. . . . There’s the charge of domestic violence against [Father]. Again, I didn’t hear much on the history or evidence. . . . It’s hard for this [c]ourt to make a ruling on that. I’ll defer that to the trial judge. Otherwise, I didn’t hear much character evidence either way about each other

* * *

The request of [each] parent and the sincerity of each request. I find both parents to be sincere in their request. They seem to both love this child to pieces and want to spend time with him.

* * *

Willingness of the parents to share custody. Well, in the abstract, yes, they don’t want to -- each is saying the right

thing, they don't want to take the child away from the other parent. . . .

Each parent's ability to maintain the child's relationship with the other parent, siblings, relatives[,] and any other person who may psychologically affect the child's best interest. . . . [T]his is not a full-blown custody hearing. But I've got [Father], [Mother] A sister and brother I thought. Maybe a sister in the area. . . . A brother and sister-in-law and a total of about I guess six cousins in the area give or take. So, each side has people

Age and number of children each parent has in the household. [Father] didn't have any. And [Mother] has the younger brother. In reference to the child, the child is sufficient age. That's a nonfactor in this case.

The capacity of the parents to communicate and each share decisions affecting the child's welfare. . . . [T]hey have the capacity to communicate. But there's just a healthy amount of animosity and it's hard . . . to coparent together. . . . There are some hopeful things in the texts and emails to be honest. Seeing they're able to communicate so yes, they do have the ability to.

Geographic proximity of parents' residences. The parties agree with my googling of 265.5 miles and five hours and three minutes nonstop if traffic cooperates.

The ability of each parent to maintain a stable and appropriate home for the child. We didn't go into details like we do in a full-blown hearing. But I have no doubt each home is appropriate and stable for [H.].

Financial status of the parents. [Father] makes 165 for the year plus a small bonus. [Mother]'s about 115. They got good, steady jobs with good outfits and not crazy hours. That bleeds into factor 13 the demand of parents' employment and opportunity to parent the child. [Mother]'s able to work apparently remotely full time. [Father] part time he can do remote.

Age, health and sex of the child. This 3-year-old boy has got serious health issues that were previously referenced.

The relationship status between the child and each parent. Again, it's not -- I don't have a full evaluation of all that in this [pendente lite] hearing. But I'm quite sure as much as this child can he's not able to verbally articulate anything, but I'm sure there's a great bond, as much as can be with this child with both parents although [Mother]'s spent more time recently with the child.

The length of the separation of the parents. They separated and lived in the same house until over a year ago and come to an agreement since then when a [domestic violence incident] happened. So, it's been over a year.

The potential disruption of a child's social and school life. That's not a factor but it is, if you call it school where he is, he's got four services going on right now in Connecticut that have been started and it's well documented by [Mother]. So, there will be disruption I'm going to call it social life. Not a school life but it is very, very I think important in my view very important therapy that he's having and child services.

The circuit court also noted several additional factors, which it deemed inapplicable.⁷ It made the following finding regarding H.'s best interest:

And looking at all those *Taylor* factors what's in the best interest of the child? I mean it's clearly in [H.]'s best interest to have both parents involved in his life as with every child. Especially for him now as a young child and especially somebody with his issues that he has going on.

⁷ The circuit court considered the following factors to be inapplicable: "state or federal assistance," the existence of a de facto parent, and "prior voluntary abandonment or surrender of custody of a child."

The circuit court’s findings were supported by the evidence in the record and were not clearly erroneous. And its consideration of the factors concerning H.’s best interests amounted to more than a “robotic recitation” as Mother alleged in her brief. The court considered the relevant best interest of the child factors as set forth in *Taylor* and *Sanders* and its detailed findings indicate that it considered the evidence in the record. The court has broad discretion to “determine what disposition will best promote the welfare of the [child]” because it is in a better position to listen to testimony and view the witnesses and the parties; it is not this Court’s function to reweigh the evidence. *Burak*, 455 Md. at 617 (quoting *In re Yve S.*, 373 Md. at 586). Therefore, we conclude that the circuit court did not abuse its discretion in concluding that it was in H.’s best interest to spend two weeks with Mother and two weeks with Father each month.⁸

For all the foregoing reasons, we affirm the judgment of the Circuit Court for Montgomery County.

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

⁸ We are aware that the custody schedule arose from a pendente lite hearing and that the final merits custody hearing has yet to be held. Given H.’s young age and medical conditions, we recognize that the circuit court’s Pendente Lite Order is not the final resolution, but merely a temporary one.