Circuit Court for Queen Anne's County
Case No. C-17-FM-20-000286

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1881

September Term, 2021

JARRETT MCGUIRE

v.

JOANNA MCGUIRE

Nazarian,
Zic,
Tang,

JJ.

Opinion by Nazarian, J.

Filed: August 10, 2022

This appeal brings before us the Circuit Court for Queen Anne's County's judgment of divorce between Jarrett McGuire ("Father") and Joanna McGuire ("Mother"). After a merits trial on January 18, 2022, the court issued a Memorandum Opinion and Judgment of Absolute Divorce awarding Mother primary physical custody of the parties' three children and joint legal custody with Mother as tie-breaker. The court also directed that the marital home be sold, with any proceeds shared equally and any deficiency borne by Father, and directed that Father would be responsible for any outstanding balance with the children's daycare provider. Father now argues the trial court erred by (1) excluding evidence of text messages he offered at trial, (2) awarding Mother primary custody, (3) ordering Father to sell the home with liability for any deficiency, and (4) ordering Father to pay past due fees to the daycare. Finding no error, we affirm.

I. BACKGROUND

The parties, married in 2016, have had a short, on-again-off-again relationship involving no fewer than three separate divorce proceedings. They have three children together—two were born during the marriage and the youngest approximately six months after Mother filed this divorce action.

The first divorce action was filed on August 22, 2018 and dismissed three months later without any action. The second divorce action was filed on October 14, 2019, *McGuire v. McGuire*, No. C-17-FM-19-000325 (Cir. Ct. Queen Anne's Cnty. filed Oct. 16, 2018), and voluntarily dismissed on October 13, 2020 after a brief reconciliation between the parties from approximately September 11, 2020 to November 10, 2020.

The parties separated again, and Mother filed this divorce action, their third, on December 14, 2020. After that, the parties shared physical custody of the children going back and forth every other day. They disputed whether there was an agreement over the schedule—and practically everything else—but they did agree that the "back and forth" schedule was not in the children's best interest. Father requested 50/50 shared physical custody on an every-other-week schedule, along with sole legal custody; Mother requested sole physical and legal custody.

A. The Second Divorce Case.

The trial court in this divorce action took judicial notice of the parties' second divorce case, and it provides some useful context. *First*, at some point during the pendency of the second divorce case, Mother filed a protective order against Father. On January 24, 2020, that separate case was withdrawn and dismissed after the court issued a no-contact order in the divorce action that stated, among other things, "that the parties are to have no contact with one another other than by *reasonable* text or email messages."

Second, and especially relevant, is a March 2020 *pendente lite* order that was in effect from March 1, 2020 until October 13, 2020. In that order, the court discussed the parties' history of poor communication, specifically that "[Father] described communication between the parties as 'terrible.' Having reviewed the text messages that were entered into evidence, the court agrees that communication is not great." The court ordered the parties to share legal custody: Mother had primary physical custody and Father had visitation every other weekend with two non-overnight visits per week. Father also

was ordered "not to consume alcohol while the minor children are in his care or are scheduled to be in his care[,]" and was directed to pay $3,355 in child support per month.

During the parties' brief reconciliation in September 2020, Mother became pregnant with the parties' youngest child, dismissed the divorce action (which discharged the March 2020 *pendente lite* order as of that date, October 13, 2020), and the parties switched to an informal joint custody schedule.

B. Current Case Pre-Trial Proceedings.

The reconciliation, however, was short-lived. Mother filed the current action *pro se* on December 14, 2020, requesting primary physical custody, joint legal custody, and child support and health insurance for the children. She asserted that the parties had not agreed to a parenting plan. Father filed a *pro se* answer requesting "that the parties maintain and continue shared physical custody and joint legal custody which has been the status quo since April 2020."

1. The June 2021 pendente lite *order*

The court held another *pendente lite* hearing on April 22, 2021 which resulted in an order dated June 24, 2021. The court noted that Mother was expecting a third child and that Father "raised the issue of paternity," but "he is the presumed father under Maryland law." The court stated that during the parties' brief reconciliation, they "never resumed living together" and "did not resume the custodial arrangement set forth in the *Pendente Lite* Order" from the second divorce case. There was no formal schedule for two months until, the court found, "January 2021, [when] the parties agreed to a shared physical custody

arrangement with the minor children being in [Mother's] care on Monday and Wednesday, in [Father's] care on Tuesday and Thursday and the parties alternating every other weekend."

For purposes of child support, the court found that Father had "stopped paying child support in November 2020 but has been paying $300.00 per week directly to the daycare provider since the separation." The court found at that time, the daycare accounts for the two children were current. Father was ordered to pay child support of $625 per month effective June 1, 2021 and Father was directly responsible for all work-related childcare costs; arrears were reserved for the merits phase.

The parties contested the custody schedule. The court noted that Father relies on his mother to take the children to daycare in the mornings. The court stated that Mother "concede[d] that she agreed to the schedule that is currently [in] place," but "did so with the belief that [Father] would adjust his work schedule on those dates. She did not believe that he would be relying on his mother to take care of the children." However, Father wished to continue the 2-2-3 schedule because he "believe[d] that a 50/50 schedule meets the current needs of the minor children." The court found that Father's mother had "limited responsibilities in the morning" and that Mother "has not provided any reason why it should be changed." The court continued the *status quo* custody "pending the outcome of the case."

2. Discovery issues

Mother obtained counsel on March 5, 2021 and her attorney issued discovery

requests to Father that day. On May 24, 2021, Mother filed a motion to compel and for sanctions, seeking Father's compliance with the discovery motions filed in March. Father, still *pro se*, did not respond directly to Mother's motion to compel discovery, but did file a pre-trial statement on June 14, 2021 accusing Mother of failing to comply with his discovery requests.

The parties' third child was born days before a settlement conference on June 14, 2021. The court noted in a June 15 settlement conference pretrial order "that the parties have agreed to genetic testing regarding the newborn child" and included an order "that all proposed exhibits for trial must be filed, together with a list of exhibits, either through MDEC a minimum of 5 business days prior to trial or directly to the Clerk at least 3 business days prior to trial."

Instead of ruling on Mother's discovery motion filed in May, the court issued an order giving Father until June 22, 2021 to provide discovery responses and warned that further failure of discovery "SHALL result in sanctions, including a reasonable award of attorney's fees as may be requested by [Mother]."[1] On June 23, Father provided Answers to Interrogatories, but produced no documents.

On August 26, 2021, paternity test results confirmed that the third child was Father's, and he was added to the shared custody schedule.

Father obtained counsel on December 21, 2021, four weeks before trial.

[1] While the initial scheduling order included a deadline for discovery of May 10, 2021, it was superseded by the court's June 15 order.

C. Merits Trial.

At the trial on January 18, 2022, the parties disputed divorce, custody, access, child support, and marital property. Both parties testified along with three other witnesses, two for Mother and one for Father. During Mother's case, Mother testified along with her friend Michelle Lee (who was in a relationship with Father during the parties' second divorce action), and Mother's father, Jonathan Mason. Father testified during his case, recalled Mr. Mason, and Father's current girlfriend, Katelyn Turner, also testified on Father's behalf.

Mother testified that the parties reconciled briefly during the pendency of the second divorce case, but that they separated for the final time on November 10, 2020. At the time of this final separation, Mother testified that she wished to go back to the schedule from the *pendente lite* order of the second divorce case:

> I asked to go back to the previous schedule and he did not agree with it. He said that he would take the kids to daycare and he would take care of them in the morning. Then come to find out, he wasn't, he was having his mom do that. So I asked if I could do that instead of his mom and he said no.

Mother stated that she was the primary parent for a majority of the marriage, and that her job is very flexible, where she can rotate shifts and make up hours in emergencies. She stated that she felt forced into the current custody schedule and that it was not in the children's best interest, stating it "is way too much for them . . . ."

Mother characterized communication with Father as "[t]errible[,]" and explained that most of the time Father only responds to her in a group text message with his girlfriend, Ms. Turner, on the message. She also described an incident involving their second child's

scheduled ear tube surgery in 2020. At first, the parties agreed to the surgery, as recommended by two doctors, but COVID delayed it. When it was rescheduled, Father did not want the procedure done, so when he learned Mother rescheduled it, he went to the doctor's office threatening to call the police and prohibited the surgery. Mother also described an incident the day before trial where she arrived at the same child's doctor's appointment only to learn that Father had canceled it without informing her. When she asked Father about it, he didn't answer. Instead, she brought the child to an urgent care facility, where he was diagnosed with a ruptured ear drum.

Finally, Mother testified that their third child was born in June and Father did not ask to see the child at all until the beginning of October, two months after the court-ordered paternity results confirmed that Father was the father. At the time of trial, Father hadn't paid any child support or childcare fees in support of their third child.

During his cross-examination of Mother, Father sought to introduce a large group of text message communications ("Exhibit 8") between the parties. Mother's counsel objected on relevance grounds, complaining that the text messages date back to 2019. She also raised "an ongoing objection to the discovery issue" and referred the court to its June 2021 discovery order:

> This exhibit seems to be 391 pages long. So me and my client have not had a chance to read it. Like I said, it wasn't provided in discovery and we wouldn't have time to read it at this point. So two objections, one for the relevance and one for the discovery issue.

She argued that Father failed to respond to discovery at the settlement conference, the

pendente lite hearing, and at a second settlement conference. Father's counsel admitted that the 391-page document was "served last night," but argued there was no prejudice because the messages are between the parties. Father's counsel responded that "I think it's appropriate that the Court sees the communications between the parties for each separation[,]" and added the evidence was relevant to the "best interests of the child standard . . . ." The court refused to admit the text messages through Mother.

Father testified and provided his side of the story about the canceled ear tube surgery and doctor's appointment for their second child. He explained that, at first, he agreed to the surgery, but the child hadn't had an ear infection in at least a six-month period, and after he spoke with the pediatrician at a regular checkup (Mother was not present) he no longer thought the child needed ear tubes. He stated that Mother decided unilaterally to reschedule the surgery, so Father had to drive to the doctor's office with the March 2020 *pendente lite* order in hand and tell them to hold off. Father testified that Mother later apologized to him about her behavior toward the surgery and "that she was sorry for . . . attempting to force our [child] to get a surgery that was not needed at that time and thanked me for stopping it."

During Father's testimony, his counsel tried again to admit Exhibit 8, arguing "if we're going to decide the best interests of the children, particularly as it pertains to legal custody issues, seeing the actual communication over time between the parties is important." The court again refused to admit Exhibit 8:

> I am not going to admit it. I'm going to leave it out, 391 pages the day before trial.

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> [T]he fact that [Mother's counsel] hasn't had the opportunity or her client to review them, prior to them being presented here today, even if any of those she remembers at some point, she should have had the opportunity to review them and look at them. I'm not going to admit them into evidence.

Father confessed that he stopped making mortgage payments in December 2019. He said that he "was not doing okay when [Mother] kept the kids from me for a month and a half and my priorities were not paying bills and whatnot." He also stated that he could not afford the mortgage due to the March 2020 *pendente lite* order's requirement that he pay $3,355 a month in child support.

Father testified that he wished the current schedule could be modified, stating, "I don't think the every day switch off is best that we have been going under. It's the constant going back and forth. . . . [I]t takes its toll." But Father confirmed that his work schedule typically does not allow him to take the children to daycare in the mornings.

Last, Ms. Turner testified on behalf of Father. She stated that she "normally get[s] the kids ready in the morning and drop[s] them off at daycare." As to the parties' communication through a group text with her on it, she stated Mother "normally reach[es] out to me if [Father] didn't answer her. So it was more of her trying to get me to get [Father] to answer her."

Father sought to introduce other text messages contained in a seventy-five-page document ("Exhibit 10"), and twenty-one pages of text messages ("SMS 1"). Mother objected again that these were provided the day before trial and the court sustained the objection. Otherwise, during Father's case, the court admitted nine of his exhibits, took

judicial notice of the second divorce case's file as requested by Father, and admitted a statement from the children's daycare as a joint exhibit. The court admitted nineteen of Mother's exhibits, which included financial records of both parties and text messages.

D. Memorandum Opinion And Judgment of Absolute Divorce.

The court then issued a thirteen-page memorandum opinion and judgment of absolute divorce which granted the parties an absolute divorce "on the grounds of physical separation for the requisite duration." With respect to marital property, the court ordered the parties to list the marital home for sale immediately:

> Both parties agree that Father has not paid the mortgage on the marital home since December 2019 and that the property has no equity. Mother testified that she would like the home to be listed for sale immediately. Father testified that he would like to refinance the property. Neither party provided the Court with current mortgage statements or with documentation as to the foreclosure status of the property. The Court notes that Father has had the benefit of living in the home for almost two years with various girlfriends, without contributing towards the mortgage.

The court also ordered that Father would be responsible for any deficiencies, but that any net proceeds would be divided equally.

With respect to legal custody, the trial court found that Father's actions demonstrated an inability to successfully communicate with Mother:

> [T]he Court concludes that it is in [the children's] best interest for Mother and Father to have joint legal custody. Mother shall have tiebreaking authority. The Court finds that Father has failed to demonstrate his ability to successfully communicate with Mother, specifically noting two incidents: (1) Mother took their middle child . . . to his scheduled surgery to get ear tubes. Father showed up at the doctor's office and prohibited the

> surgery from occurring, despite the doctor's recommendation for the surgery; and (2) The day before trial, Father cancelled a doctor's appointment for [their middle child] without providing notice to or communicating with Mother. Mother showed up to the appointment with [their middle child] and was turned away.

The court noted its concern that Father consumed alcohol while the "no drinking" order was in place and highlighted two alleged incidents of abuse, which the court found to be "neutral, as both parties are alleged to have conducted themselves poorly."

As to physical custody, the trial court went through each of the *Taylor v. Taylor*, 306 Md. 290, 303 (1986), factors. With regard to the parents' communication, the court found again "that Father has failed to demonstrate his ability to communicate with Mother maturely and in a timely manner":

> Father's communication with Mother was described by Mother as "terrible." Mother testified that most of the time, she receives no response from Father at all and when Father does respond, he will only do so if his girlfriend, Katelyn Turner, is included in a group text message with Mother and Father. Mother also testified (and Father admitted) that on the day before trial, father canceled a doctor's appointment for one of the minor children and failed to advise Mother. Mother showed up at the doctor's appointment with the child and was turned away.

The court found both parents were "fit[,]" but that "testimony was presented causing the Court to have concern over Father's drinking." The court found that "Father's work schedule is not as flexible as Father indicated" and Mother's "employer is 'incredibly flexible,' allowing her to rotate shifts, leave early when needed, and make up hours." The court questioned Father's sincerity in requesting custody of the children "based on his initial refusal to acknowledge paternity of [the youngest child], his continued refusal to pay

any health insurance or daycare costs for [the youngest child] and his current arrearage in daycare payments for [the two older children].” The court concluded that it is in the children’s best interest for mother to have primary physical custody with Father having reasonable access on an every-other-weekend schedule.

Father timely appealed. We discuss additional facts as necessary below.

II. DISCUSSION

This appeal presents the following questions:[2] *first*, whether the trial court abused

[2] Father phrased the Questions Presented in his brief as follows:

> I. Did the trial court err in refusing to consider records of communications between the parties when deciding child custody?
>
> II. Did the trial court make erroneous findings relating to issues of child custody and misapply those findings to the factors referenced in *Montgomery County v. Sanders*, 38 Md.App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986)?
>
> III. Did the trial court err in refusing to afford Father the opportunity to refinance the former Marital Home to save financial loss to both parties and allow the children to attend school in the district the parties agreed upon? Alternatively, did the trial court abuse its discretion in directing that Father be solely responsible for the anticipated deficiency in the sale of the marital home, without limitation, without making any finding related to what that deficiency might be?
>
> IV. Did the trial court err in assigning responsibility to Father for the payment of any and all past due monies demanded from the daycare facility?

Mother briefed her Questions Presented as follows:

> I. Did the trial court abuse its discretionary powers in controlling the trial’s presentation of witnesses and

its discretion in excluding Father's proffered text messages; *second*, whether the trial court properly awarded primary physical custody to Mother; *third*, whether the trial court properly directed Father to sell the marital home and make him responsible for any deficiency; and *fourth*, whether the trial court properly assigned responsibility to Father for any daycare arrearage.

We review a trial court's determination of custody and child support for abuse of discretion. *Santo v. Santo*, 448 Md. 620, 625 (2016) (*citing Petrini v. Petrini*, 336 Md. 453, 470 (1994)). This deferential standard accounts for the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses. *Id.* Similarly, when a discovery violation occurs in a child support and custody matter, we review the trial court's enforcement of sanctions for abuse of discretion. *A.A. v. Ab.D.*, 246 Md. App. 418, 441 (2020). There is an abuse of discretion where "'no reasonable person would take the view adopted by the [trial] court' or when the court acts 'without reference to any guiding principles.'" *Santo*, 448 Md. at 625–26 (*quoting In re Adoption/Guardianship No.*

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exhibits?

II. Did the trial court properly apply the facts of this case to the factors outlined in *Montgomery County v. Sanders*, 38 Md. App. 406 (1977), and its progeny?

III. Did the trial court properly find that the parties' marital home should be sold, and any deficiency therein be assigned to Father for failure to pay the mortgage in over two years?

IV. Did the trial court properly find that Father should be responsible for the past due daycare expenses in lieu of the requested child support arrears?

3598, 347 Md. 295, 312 (1997)). We acknowledge as well the "bedrock principle that when the trial court makes a custody determination, it is required to evaluate each case on an individual basis in order to determine what is in the best interests of the child." *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013) (*citing Gillespie v. Gillespie*, 206 Md. App. 146, 173 (2012)).

A. The Trial Court Did Not Abuse Its Discretion When It Excluded Evidence of the Parties' Communications.

First, Father argues that the trial court abused its discretion in excluding numerous text message exhibits disclosed by Father on the eve of trial. He argues that there was no surprise or prejudice in admitting the evidence because they are communications between Mother and Father, they were properly authenticated, and the proposed exhibits were requested in Mother's discovery requests. Father argues that *A.A. v. Ab.D.* compels a new trial because the court needed to make an inquiry and finding on the record regarding "how such a sanction impacted the best interests of the minor children." Mother responds *first* that the trial court excluded the evidence properly under Maryland Rule 5-403 and, *second*, that the trial court excluded the evidence properly as a discovery sanction. We agree with Mother that the trial court acted well within its discretion in deciding to exclude these text messages.

Father's argument applies the holding of *A.A. v. Ab.D.* too broadly. In *A.A. v. Ab.D.*, the father requested discovery from the mother in connection with his motion for modification of custody. 246 Md. App. at 426. At the modification hearing, father's counsel asked the court to exclude evidence that mother failed to disclose in discovery. *Id.*

at 427. Mother was permitted to testify, but her testimony was extremely limited, *id.* at 430–31—she was not able to call any witnesses, and was only able to introduce evidence that her counsel produced in discovery. *Id.* at 432–33. Ultimately, "approximately 60 of Father's exhibits were introduced and admitted during the two-day evidentiary hearing, whereas Mother introduced two exhibits and had one admitted." *Id.* at 433. On appeal, we held that the trial court erred in failing to inquire as to the content of the testimony before excluding it. *Id.* at 447. Our analysis began from the principle that, in child custody cases, "[c]hildren have an indefeasible right to have their best interests fully considered." *Id.* at 422 (*citing Flynn v. May*, 157 Md. App. 389, 410 (2004)). We held that "procedural defects should not be corrected in a manner that adversely impacts the court's determination regarding the child's best interests." *Id.* at 446. We noted that "[b]ecause the court did not explore what evidence Mother intended to offer, the court could not have known the significance of the proscribed evidence and its potential impact on its ability to determine the best interests of the children." *Id.* at 448.

Father made a satisfactory proffer of the evidence's significance with respect to the best interests of the children. But that proffer, which focused on the history of communication between the parties, revealed that the text messages would have been cumulative to other evidence. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Maryland Rule 5-403. Each of the parties testified at length and the court

admitted several other text message exhibits, including other exhibits offered by Father. Father's testimony was not limited at all—the court still admitted nine of his exhibits, took judicial notice of the second divorce case's file as he requested, admitted the daycare statement as a joint exhibit, and heard from Father's witness, Ms. Turner. Viewed together, the evidence established the parties' history of communication and, more importantly, their recent failures to communicate and the impact those failures had on the children. The exclusion of the text messages did not impair the court's ability to determine the children's best interests and did not, as Father claims here, lead to a one-sided trial.

Moreover, discovery sanctions are intended to "relieve the surprise or prejudice a party suffers when his opponent fails to abide by discovery rules." *Watson v. Timberlake*, 251 Md. App. 420, 437 (2021) (citations omitted). Father's last-minute disclosure deprived Mother and her counsel of the opportunity to review hundreds of pages of text messages in an unfamiliar format. Father's failure to adhere to the trial court's discovery order also justified exclusion of the evidence as a sanction.

We note as well that we will not consider an erroneous evidentiary ruling to be reversible error unless the error resulted in prejudice to the party by "'likely . . . affect[ing] the verdict below.'" *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009) (*quoting Crane v. Dunn*, 382 Md. 83, 91–92 (2004)). Thus, in reviewing Father's challenges to the circuit court's rulings, we are concerned primarily with "not the possibility, but the probability, of prejudice." *Crane*, 382 Md. at 91 (cleaned up). As we discuss below, many other factors unrelated to the excluded evidence influenced the circuit court's custody award, and we

discern no abuse of discretion in the court's exclusion of the evidence as a discovery sanction.

B. The Trial Court Did Not Abuse Its Discretion In Awarding Primary Custody To Mother.

Second, Father argues the trial court erred in awarding primary custody to Mother. Specifically, Father characterizes the trial court's order as having a "sardonic" tone, and complains that "the entire Memorandum gives every possible beneficial inference to Mother" with respect to Father's romantic relationships, "including many that were not possible in light of the testimony and are thus clearly erroneous." These combine, he argues, to establish "some measure of personal prejudice interjected by the trial court" that warrants reversal.

We review child custody determinations against a three-layered standard of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. Secondly, 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.

In re Yve S., 373 Md. 551, 586 (2003) (cleaned up); *see also Taylor*, 306 Md. at 302 (discussing factors relating to best interests of the child for child custody determinations); *Ross v. Hoffmann*, 280 Md. 172, 174–75 (1977) (discussing the best interest of the child standard); *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977) (same). Findings of fact, including determinations about the credibility of witnesses, are

not clearly erroneous "[i]f there is any competent evidence to support the factual findings [of the trial court]." *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (*quoting Fuge v. Fuge*, 146 Md. App. 142, 180 (2002)); *Grimm v. State*, 232 Md. App. 382, 405 (2017). The trial court has the opportunity to observe the parties and witnesses, hear testimony, and make credibility determinations and "is in a far better position than [the] 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." *Davis v. Davis*, 280 Md. 119, 125 (1977); *Innerbichler v. Innerbichler*, 132 Md. App. 207, 229 (2000). An abuse of discretion occurs only when the award of child custody is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 686 (2014) (*quoting North v. North*, 102 Md. App. 1, 13–14 (1994)).

Father analogizes this case to *Azizova v. Suleymanov*, 243 Md. App. 340, 348 (2019), and specifically its holding that we will vacate a custody determination when the circuit court, "while assessing a particular factor, has been guided by their personal beliefs in fashioning an outcome rather than by the evidence . . . ." *Id.* In *Azizova*, we reversed a custody determination when the circuit court improperly weighed evidence about a mother's decision to attend school and work a part-time job when the court found it was not a financial necessity. *Id.* at 364. We found that the circuit court also relied on "stereotypes about the fragility of infancy" that did not apply to the child, who was 31 months old at the time. *Id.* at 373. Additionally, the court determined that the mother was

unable to function in the best interest of the child because of her youth and an incident of drunkenness at which the child was not present, while finding the father able. *Id.* at 374. None of the factual findings in that case linked the mother's behavior to an adverse impact on the child or its development and we held that the circuit court's assumptions were not supported by the evidence. *Id.*

Rather than showing bias, the record here demonstrates that the trial court's findings were supported by competent evidence. Father takes great offense to the trial court's statement that "Father has had the benefit of living in the home for almost two years with various girlfriends" and argues this evidences the court's bias. But the court "note[d]" this fact in its analysis for ordering Father to sell the marital home, not in its custody award.[3] There is otherwise no basis to conclude that the challenged factual findings influenced the court's custody determination. Mother and Father both testified that the shared custody schedule was untenable and not in the best interest of the children. In fact, the circuit court concluded that both parties were fit parents. The trial court's custody decision hinged on five factors that weighed against Father: (1) concerns over Father's drinking, (2) Father's reluctance to provide any support for the parties' third child, (3) the parties' failed

[3] Nevertheless, this finding itself is not clearly erroneous. Father argues that "the only detailed testimony about Father's amorous relationship(s) with third parties only identified one person he actually, truly cohabitated with in the marital home . . . ." But Ms. Lee testified that she stayed overnight in the marital home frequently in 2020, and at the time of the hearing, Ms. Turner was living with Father in the house while the mortgage accumulated penalties and fees. The record from the second divorce case also reveals that at least one woman stayed with Father overnight in the marital home in January 2020.

communications with respect to the children's healthcare and the necessity to have Ms. Turner present on a group text, (4) Father's inability to take the children to daycare due to his work schedule, and (5) Father's failure to make childcare and mortgage payments. So although the circuit court mentioned Father's "various girlfriends[,]" its view of Father's romantic relationships didn't affect the court's ultimate custody determination. *See Crane*, 382 Md. at 91.

Furthermore, each of these findings is supported by the evidence. It was uncontroverted that Father had not paid any support toward the parties' third child and that he was behind on the mortgage and daycare payments because his "priorities were not paying bills" at times. He admitted that he canceled their middle child's doctor's appointment unilaterally the day before trial. Mother and Ms. Turner both testified that the parties communicate through a "group text" with Ms. Turner on it, because Father will not respond to text messages from Mother. Although Father disputes the relevance of Ms. Lee's testimony, she established that he, in fact, violated the second divorce case's *pendente lite* order not to drink alcohol in the children's presence.[4] And most importantly, testimony established that Father's work schedule precluded him from taking the children to daycare in the mornings, and that he needed to rely on others.

Factual findings can only be clearly erroneous if they're inconsistent with the

[4] Ms. Lee stated she was in a relationship with Father from April to September 2020, and she saw Father drinking alcohol in front of the children about two times per week during that time. The *pendente lite* order in the second case was in effect from March 2020 to October 2020, and thus for the entirety of their relationship.

testimony in the record. *In re Yve S.*, 373 Md. at 599; *Michael Gerald D.*, 220 Md. App. at 687 (holding that when the circuit court finds one party more credible than another "[i]t is not our role, as an appellate court, to second-guess those findings"). The extensive support in the record for the circuit court's findings, even if some of the evidence was disputed, precludes us from finding clear error here. Given its thorough review of the relevant factors coupled with the extensive evidence produced at trial to support its findings, the circuit court considered the best interests of the children properly in determining custody. *Santo*, 448 Md. at 642 (holding that circuit court did not abuse its discretion in determining child custody because it reviewed the pertinent factors and gave a "thoughtful, painstaking consideration of the relevant issues affecting the . . . dispute"). Accordingly, we affirm the circuit court's custody award.

C. The Trial Court Properly Ordered Father To Be Liable For Any Deficiency Upon The Sale of The Marital Home.

Next, Father argues the trial court failed to consider the factors listed in Maryland Code (1984, 2019 Repl. Vol.), section 8-205(b) of the Family Law Article ("FL") in assigning to him the responsibility to pay any deficiency that results from the sale of the marital home. Section 8-205(a)(2)(iii) provides that a trial court may order the transfer of ownership of "real property jointly owned by the parties and used as the principal residence of the parties when they lived together . . . ." The court has broad discretion to reach a decision that is fair and equitable under the circumstances, and we review its decision for abuse of discretion. *Lemley v. Lemley*, 102 Md. App. 266, 298 (1994).

Father faults the trial court for its reference to his "various girlfriends" (which we

found above was supported by the record) and for failing to consider that the parties agreed that it was in their children's best interest to attend school in the marital home's school zone. But Mother acknowledged the school zone issue and stated that she didn't know whether Father would be able to stay in the marital home in their preferred school district, so she'd be "okay" with the children going to school in her district.

Moreover, the parties agreed that the marital home lacked equity and that any transfer or sale likely would result in a deficiency. During Mother's testimony, the court admitted a mortgage statement on the marital home showing the total amount due to bring the account current was in excess of $60,000 as of January 1, 2022. Father testified that his mother would co-sign a refinanced mortgage of the property, but Mother, while agreeing initially to allow Father to refinance the property, disputed whether it was possible and complained he had waited too long. Father did not provide any evidence of the value of the home, the status of the mortgage, or anything demonstrating his ability to re-finance the property. The trial court found that had Father kept the mortgage current, the equity could have been preserved, and thus that any deficiency is his fault and should be absorbed by him alone. The court's decision was consistent with the evidence of the parties' finances and conduct, and we see no abuse of the court's broad discretion under FL § 8-205 in its decision to hold him responsible for any deficiency balance at the time the marital home is sold.

D. The Trial Court Properly Assigned Childcare Arrearages To Father.

Lastly, Father argues that the trial court did not have the power to order him to pay

direct daycare expenses through January 31, 2022. This claim has no merit. The court had authority under FL § 12-101(a)(1), which states that "the court shall award child support for a period from the filing of the pleading that requests child support . . . unless such an award would produce an inequitable result." Instead of awarding Mother the daycare arrearages requested December 2020, the court directed Father to make the daycare accounts current. The statements admitted into evidence showed that as of November 2020, when the parties were reconciled, there was a negligible balance of $310. The court's June 2021 *pendente lite* order found that the daycare fees were current, and ordered Father to pay the daycare directly. It was entirely within the court's discretion to find Father legally responsible for all past due payments, and the court ordered Father to pay them properly.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.