Circuit Court for Montgomery County
Family Law No. 127986

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1194

September Term, 2016

ANTHONY PHILLIPS

v.

CHRISTINA FITZGERALD

Eyler, Deborah S.,
Reed,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: February 21, 2017

FACTS AND LEGAL PROCEEDINGS

The parties, Anthony Phillips (Father) and Christina Fitzgerald (Mother), have a daughter, M.P., born 25 January 2012. Phillips lives in Germantown, Maryland. Fitzgerald lives in Poolesville, Maryland. M.P. attends preschool at Fox Chapel Elementary School in the father's neighborhood. She is slated to begin kindergarten in the fall of 2017, giving rise to the primary conflict in this case: Phillips would like M.P. to continue her schooling at Fox Chapel; Fitzgerald would like her to attend Poolesville Elementary School.

The Circuit Court for Montgomery County held a child custody hearing on 25-26 July 2016 to resolve the parents' initial general custody dispute. Fitzgerald sought sole legal and primary residential custody of M.P. Phillips sought the obverse for himself, with reasonable visitation to the mother. Fitzgerald called several witnesses at trial, including Rhee Howard, a custody evaluator for the court. Howard testified, as an expert witness, regarding her 5 November 2015 report analyzing the parties' parental fitness. She stated that, "for a couple of years," the parties had followed a custody agreement in which M.P. stayed with Phillips Tuesdays through Fridays and with Fitzgerald Fridays through Tuesdays.

> Both of the parties at that time were telling me they were satisfied with the schedule which roughly split the week in half and [M.P.] had been living on that schedule for a couple of years, so I didn't see a reason to change it.

According to Howard, this agreement evolved originally to accommodate the parties' work schedules, but, at the time Howard evaluated their parental fitness, Phillips was unemployed, and, by the end of the evaluation, "both parties wanted and needed to

change their work schedules." Howard recommended, nonetheless, maintaining the custody agreement. In her report, she recommended, based on her observation of Phillips's unreasonable "animosity, distrust[,] and suspicion" of Fitzgerald, that the mother should have legal custody and the authority to determine what school M.P. would attend.

At the conclusion of the custody hearing, the judge announced his factual and legal conclusions. The judge found both parties fit parents "on a certain level." He found also that "[t]here has been a de facto . . . agreement between the parties in terms of the structure of the time. . . . And I find, frankly, that but for the impending decision about school, the parties would be fine with it."[1] After describing the distance between Germantown and Poolesville as "not that far," the judge found that the schools in each location were equivalent fundamentally, with modest differences in that, remaining enrolled at Fox Chapel would ensure some level of continuity with local friends, and on the other hand, transferring to Poolesville would put M.P. in the same school attended by her two older half-siblings.

The judge awarded the parties shared residential custody and joint legal custody, maintained the parties' de facto access schedule "agreement," and granted Fitzgerald

[1] The judge elaborated briefly on his finding of the "de facto agreement:" ". . . they'll never testify under oath that they agreed to this in the words of their conduct, which evidences an agreement, I find, is that, as set forth by the social worker, that [Phillips] would have the child Tuesday, Wednesday, and Thursday nights . . . and then the child would be with [Fitzgerald] for the other nights. So it's a, they have a de facto agreement, 3/4, 3/4, 3/4."

"tiebreaking authority on health, education, and welfare." Judgment was entered on 5 August 2016. On 17 August 2016, Phillips filed 1) a motion for the circuit court to revise its judgment to grant the father "tie-breaking authority as to the child's education" (which motion was denied by the circuit court on 8 September 2016)[2] and 2) a timely notice of appeal. On 12 September 2016, this Court ordered the appeal to proceed.

Phillips presents the following questions for our consideration:

> 1) Was the court's decision to have the child travel by car back and forth to school about an hour a day four days a week for about 12 years clearly against logic when the child could walk daily to and from a school located behind the father's backyard?
>
> 2) Should this Court give the father tie-breaking authority as to legal custody or tie-breaking authority as to the child's education?
>
> 3) Should this Court change the custody order so that during the school year, the father would pick up the child at the mother's home every Sunday evening and drop the child off at the mother's home every Friday evening?

STANDARD OF REVIEW

In 2016, the Court of Appeals articulated the standards of judicial review applicable to child custody disputes:

> We review a trial court's custody determination for abuse of discretion. This standard of review accounts for the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses.
>
> Though a deferential standard, abuse of discretion may arise when no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles. Such an abuse may also occur when the court's ruling is clearly against the logic and effect of facts and inferences before the court or when the ruling is violative

[2] The docket sheet in the record indicates that the circuit court denied by order on 8 September 2016 Phillips's motion to revise, but the record does not include the order.

> of fact and logic. Put simply, we will not reverse the trial court unless its decision is well removed from any center mark imagined by the reviewing court.
>
> The light that guides the trial court in its determination, and in our review, is the best interest of the child standard, which is always determinative in child custody disputes.

Santo v. Santo, 448 Md. 620, 625–26, 141 A.3d 74, 76–77 (2016) (quotation marks and citations omitted).

ANALYSIS

Phillips argues that "the trial court's decision is contrary to logic and contrary to the child's best interest" because its grant of tie-breaking authority to the mother, who wants M.P. to begin school in Poolesville in the fall of 2017, means that, in light of the shared custody arrangement, "the child will have to be driven by car 50 to 60 minutes a day for three days a week (Wednesdays, Thursdays, and Fridays), and 25 to 30 minutes to school on Tuesday mornings." He catalogues a number of potential future benefits that could accrue to M.P. were she to attend school in Germantown,[3] and requests that we take one of three suggested actions:

[3] In his brief, Phillips lists the following factors:

1. She may sleep later.
2. She will have more time to do homework instead of having to spend about an hour in a car many days going back and forth from the father's home to the school in Poolesville.
3. She may have the pleasure of walking to and from school with her friends.
4. When the roads are snowy and icy, she will be able to get to school more often.
5. She is less likely to be tardy or absent from school when the school is only feet from her home.

> (1) Give [father] tie-breaking authority as to legal custody; or (2) give [father] tie-breaking authority as to education. . . . The most **logical** solution and the one preferred by [father] is the third option: During the school year, [father] should be allowed to pick up the child from her mother's home on Sunday nights, and drop off the child on Friday nights at her mother's house.

Fitzgerald answers that: 1) the circuit court judge did not abuse his discretion in awarding tie-breaking authority to the mother; 2) Phillips's argument is a request that we substitute our judgment for the trial court; and, 3) Phillips's argument hinges on the location of the school M.P. will attend in the future, an unripe issue at present.

For the reasons set forth below, we agree with Fitzgerald that the circuit court judge did not abuse his discretion in awarding tie-breaking authority to the mother. The judge reviewed thoroughly the factors Maryland courts are to consider with respect to custody disputes between biological parents. He reviewed also the custody evaluator's report and asked probing questions of the evaluator during the custody hearing. After reasoned deliberation, the judge issued a reasonable order, in the best interest of the child, that did not violate logic.

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6. If she becomes ill during school hours, it will be easier for her to walk with her dad the few feet to his house. Mr. Phillips is a stay at home dad when he is not working at Bob Evans as a cook during the weekends.
7. [This appears to us to be a duplication of #4 above].
8. The child can take more time for having a healthy breakfast.
9. The child has more time to read in the morning and after school.
10. The child will have more time in the afternoons to interact with her cousins, aunts, and uncles. She enjoys interacting with these family members.
11. The child may have lunch at home with her father if she wants to have lunch at home.

"The light that guides the trial court in its determination, and in our review, is 'the best interest of the child standard,' which 'is always determinative in child custody disputes.'" *Santo v. Santo*, 448 Md. 620, 626, 141 A.3d 74, 77 (2016) (quoting *Ross v. Hoffman*, 280 Md. 172, 178, 372 A.2d 582 (1977)).

> Where modification of a custody award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child. Unfortunately, there is no litmus paper test that provides a quick and relatively easy answer to custody matters. Present methods for determining a child's best interest are time-consuming, involv[ing] a multitude of intangible factors that ofttimes are ambiguous. The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication. The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess.
>
> What critics of the "judicial prognostication" overlook is that the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. The court's prediction is founded upon far more complex methods than reading tea leaves. The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health[,] and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.
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> **While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor** such as the financial situation or the length of separation.

Montgomery Cty. Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 419–21, 381 A.2d 1154, 1163 (1977) (citations omitted) (emphasis added).

In *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986), the Court of Appeals revisited the criteria used to determine the custody arrangement that serves best the interests of the child. The court reviewed the following factors, noting that the list was "not intended to be all-inclusive, and a trial judge should consider all other circumstances that reasonably relate to the issue:" capacity of the parents to communicate and to reach shared decisions affecting the child's welfare, willingness of parents to share custody, fitness of parents, relationship established between the child and each parent, preference of the child, potential disruption of child's social and school life, geographic proximity of parental homes, demands of parental employment, age and number of children, sincerity of parents' request, financial status of the parents, impact on state or federal assistance, and benefit to parents. *Taylor*, 306 Md. at 304–11, 508 A.2d at 971–74.

In 2016, the Court of Appeals considered again the factors to be reviewed in a custody determination in *Santo v. Santo*, 448 Md. 620, 640, 141 A.3d 74, 85 (2016). The court renewed its affirmation of the aforementioned *Taylor* factors, and added the following to its analysis: character and reputation of the parents, agreements between the parties, parents' ability to maintain relationships between the children and others who may affect the children's best interests, and parents' ability to maintain a stable, appropriate home. *Santo*, 448 Md. at 640–42, 141 A.3d at 85–86.

In the present case, the circuit court judge reviewed the following criteria in his oral opinion:

- **Fitness of the parents**: "So are they [the parties] fit on a certain level? Yes. . . . the child, I find, is safe in the care and custody of both parents."
- **Character and reputation of the parties**: "So I find them both to be of appropriate, the requisite character and fitness."
- **Requests of each parent**: "So I find that you're both sincere, and that you've both requested substantial parental time, not simply Disney time with the child."
- **Agreements/Willingness to Share Custody**: "There has been a de facto, I find, agreement between the parties in terms of the structure of the time. . . . I find, historically, they have been willing to share custody." The judge noted also the father's history of "intemperate remarks" directed at the mother.[4]
- **Each parent's ability to maintain the child's relationships with the other parent, siblings, and other family members**: "I find that each parent is more than able to maintain the child's relationships with everyone on the plane[t] except the other parent."
- **Other children**: "Although the plaintiff has other children, I find that factor, in this case, to be neutral. . . . It's not that she's struggling in that regard, or overburdened or underburdened. Other people are taking care of it."

[4] The judge noted, in particular, a 2014 text message from Phillips to Fitzgerald in which he stated, "Oh and another thing . . . I will pay someone to beat your ass in front of your kids (of course while [M.P.] is with me) so they can watch you get a royal beat down. And yes you can save this to show the cops but unfortunately fights happen everyday so you can't blame me lmao!!" ["lmao" is an internet-slang acronym substituting for "laughing my ass off"].

- **The capacity of the parents to communicate and to reach decisions**: "Here, I find the parties have the capacity to communicate if they want to do it, and if they keep their animosity or ill-feeling toward each other in check, which may come over time with age as the child matures."
- **Geographic proximity**: "Here, I find that's actually, given the work situations of the parents, a plus, because it is, the homes, albeit from Germantown on the one hand, to Poolesville on the other, they're not that far. And given the age of the child and the work circumstances of the parents, it is not problematic in this case."
- **The ability of each parent to maintain a stable and appropriate home for the child**: "Yes, both parties are able, but neither party is able on their own. But for the gifts, directly or indirectly of their families, neither parent would be able to maintain a stable home for this child."
- **Financial status of the parents**: "Both, absent parental or taxpayer assistance, are under water. Neither is financially stable. Neither is financially independent."
- **The demands of parental employment and opportunities for time with the child**: "Here, they're equal, because neither parent, because of their elections, have demanding careers at this point. . . . this is not a case where the demands of parental employment play any significant role, in my judgment."
- **Age, health, and sex**: "Sex is almost always neutral, Maryland being a gender-neutral State."

- **The relationship established between the child and each parent**: "Here, it's both good."
- **Length of separation of the parents**: "Approximately two years. It doesn't militate, the separation timepiece doesn't militate one way or the other in this case."
- **Potential for disruption**: "Nothing's being disrupted yet in terms of school or social life."
- **Impact on state or federal assistance**: "There's no evidence it will be either given or take[n] away because of whatever I do, so I can't utilize that factor."
- **The benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child**: "[B]y sharing, to a large degree, residential custody, each parent will have quality time with the child, school time, and play time."
- **Impending enrollment in kindergarten**: ". . . I consider both elementary schools to be equal because I have nothing to the contrary, in terms of the curricula and the quality of the education . . . ." The court noted also the "modest differences" that attending Fox Chapel would ensure continuity with friends, and on the other hand, Poolesville would allow M.P. to attend the same school that her half-siblings attend. The judge was unswayed by arguments about "what's convenient, what's easy, what's local," stating that "in terms of the hard stuff, the metrics, student/teacher ratios, programs, I didn't hear any of that from either side." "To me, [the factor of education is] not of sufficient weight, one way or the other, to make that kind of a

> decision as to legal custody. And I'm not going to make it on the basis of convenience or mere continuity. . . ." Later, the judge stated, "given that father is working outside the home only three days a week on weekends, he has plenty of time to take the child from Germantown to Poolesville to go to elementary school."

Based on a holistic evaluation of these factors, the judge awarded joint legal custody and granted tie-breaking authority to the mother, to be exercised only after "good-faith, sincere, honest discussions, consultations, and only when there's an impasse . . . ." The judge stated, moreover, that, if Fitzgerald abuses the tie-breaking authority, he would not hesitate to revisit the matter and revoke the authority. This determination aligns with the *Santo* decision, wherein the Court of Appeals upheld the circuit court's award of joint custody with tie-breaking authority granted to the mother in a situation where the parents had a history of interpersonal communication breakdowns (albeit seemingly of a greater degree than perhaps existed here).

Phillips's abuse of discretion argument elevates the factors of geographic proximity and education above all others, violating the common law standard that "[courts] will generally not weigh any one [factor] to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor." *Sanders*, 38 Md. App. at 420–21, 381 A.2d at 1163. Focusing solely on these factors, Phillips argues that the judge's award of tie-breaking authority to Fitzgerald will deny a cascade of hypothetical future benefits to M.P. that would result from attending school in Phillips's neighborhood, such as sleeping in longer in the

mornings.[5] Were we to grant Phillips this inch, he would leverage it into a mile by requesting modification of the shared custody arrangement, to which he had agreed prior to trial (implicitly, at the very least; the judge referred to it as a "de facto" agreement).

In this case, the factors of geographic proximity and education do not outweigh all of the other common law criteria required to be weighed in determining a custody arrangement in the child's best interests. The trial judge's decision to award joint custody with tie-breaking authority granted to the mother was reasonable and consistent with relevant guiding principles, case law, and logic; thus, it was not an abuse of discretion.

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

[5] *See supra* note 3.