Circuit Court for Howard County
Case No. 13-C-15-101991

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1294

September Term, 2016

CARON M. HONG

v.

MICHAEL J. MATSUURA

Berger,
Reed,
Kenney, James. A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 30, 2017

*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.

This case is before us on appeal from a child custody order of the Circuit Court for Howard County. Caron M. Hong ("Mother"), appellant, raises two narrow issues in this appeal. First, Mother asserts that the circuit court erred by ordering joint legal custody with tie-breaking authority to Michael J. Matsuuda ("Father"), appellee, in the event that the parties were unable to reach a shared decision regarding their minor child after having exercised good faith efforts to do so. Mother asserts that the circuit court's tie-breaking determination was based upon Mother's planned relocation to California and that traditional joint legal custody serves the child's best interests regardless of the parties' residences. Mother further asserts that the circuit court erred by denying her post-trial motion to enforce stipulation and/or to alter or amend judgment, arguing that because she no longer plans to relocate, traditional joint legal custody is appropriate. For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

Mother and Father were married on May 15, 2005 in Hawaii. At the time of their marriage, Mother was completing medical school and Father was completing his medical residency. During Father's residency, he joined the United States Air Force. After Mother matched to a residency program in New Jersey, the family relocated. Following the completion of Mother's residency, the family moved to Maryland in 2009. Father was employed at Andrews Air Force Base and Mother first obtained a one-year fellowship at Johns Hopkins Hospital and, in 2010, began working at the University of Maryland Medical School. The parties purchased a home in Laurel, Maryland in 2011, while Mother

was pregnant with the parties' only child. The home in Laurel was roughly equidistant to the parties' respective work locations.

The parties' daughter, K., was born on December 30, 2011. Mother continued working as a physician following K.'s birth. Father worked as a general surgeon with the Air Force until July 2015, after which he became a staff surgeon at MedStar Franklin Square Hospital.

In November 2014, Father told Mother he was unhappy in the marriage and ultimately moved out of the home the parties' shared. After Father expressed his desire to end the marriage, Mother threatened to leave and take K. to Hawaii, where Mother was raised and where Mother's parents continued to reside. Father initially rented an apartment near the marital home and subsequently purchased a home in Ellicott City, Maryland. Following their separation, the parties' ultimately agreed to a shared access schedule pursuant to which K. spent approximately fifty percent of her time with each parent.

Father filed a complaint for custody on January 9, 2015. On March 31, 2015, by agreement of the parties, the circuit court ordered a forensic custody evaluation, to be performed by Dr. John Lefkowitz and Dr. Michelle New. The custody evaluators had several in-person and telephone meetings with each of the parents during April, May, and June 2015. During the same time frame, the custody evaluators observed the parents interacting with K. on several occasions and interviewed third-party collaterals, including extended family, friends, K.'s nanny, and K.'s pediatrician. The custody evaluators engaged in 30.65 total contact hours with the parties and collaterals and ultimately produced a comprehensive 65-page report on June 27, 2015. The report did not mention

any plans for an imminent move by Mother to California. The report recommended that the parties have joint legal and shared physical custody of K., with K. spending half of her time with each parent.

On July 17, 2015, Steven M. Caplan, Esquire, entered his appearance on behalf of Mother on the day of the settlement conference. At the settlement conference, Mother's attorney asserted that the custody evaluation was moot because it did not account for Mother's imminent move to California. Mother, however, had never disclosed her intention to relocate to California at any point during the custody evaluation process. The custody evaluators were subsequently made aware of Mother's plan to relocate, and Dr. Lefkowitz suggested that the parties participate in an addendum to the evaluation. Father agreed to pursue additional evaluation, but Mother did not agree. No additional evaluation was performed and no addendum to the custody evaluation report was prepared.[1]

Prior to trial, the parties reached an agreement with respect to all economic issues. The parties additionally stipulated to joint legal custody of K. and to a 50/50 shared physical custody schedule if they both maintained a residence in the same jurisdiction. The divorce trial proceeded on the contested issues of custody, visitation, and child support. Trial was held over seven days between November 2015 and March 2016. At the conclusion of the hearing on March 1, 2016, the circuit court ordered counsel for each party

[1] Dr. Lefkowitz testified that Mother never told him about her desire or plan to relocate to California, which is why it was not mentioned in the custody evaluation report. The circuit court found that Mother did not disclose her intention to relocate during the evaluation process and specifically found "this has bearing on [Mother's] credibility."

to submit proposed statements of facts and conclusions of law by March 21, 2016, and to return for oral arguments on May 5, 2016. On June 15, 2016, the circuit court issued a memorandum opinion and order awarding Father primary physical custody.[2] With respect to legal custody, the court ordered joint legal custody but granted tie-breaking authority to Father.

On June 27, 2017, Mother filed a motion to enforce stipulation and/or to alter or amend judgment. Mother asked the circuit court to reconsider its decision with respect to tie-breaking authority, noting that the circuit court's order indicated that Father "would be best suited to make tie-breaking decisions given the daily contact he will have with [K.] once [Mother] relocates to California." Mother asserted that, based upon the circuit court's decision, she would no longer be relocating to California, and, therefore, the stated basis for Father's tie-breaking authority no longer applied.

On June 28, 2016, the parties entered into a consent order resolving the shared physical custody issues. The consent order did not modify the circuit court's award of tie-breaking authority to Father. On July 28, 2016, the circuit court denied Mother's motion to enforce stipulation and/or to alter or amend judgment, indicating that the court "decline[d] to exercise its discretionary power to alter or amend a judgment under Maryland Rule 2-534." Mother noted a timely appeal on August 19. 2016.

[2] The circuit court's memorandum opinion addressed the inconsistent positions taken by Mother with respect to her planned relocation. The circuit court observed that Mother testified that if she was not awarded primary custody and K. was not permitted to relocate, that she would stay in Maryland to be with K. The circuit court further observed that Mother, in her post-trial memorandum, indicated that her plan was to unequivocally relocate to California at the conclusion of the litigation.

Additional facts shall be set forth as necessitated by our discussion of the issues on appeal.

STANDARD OF REVIEW

The best interest of the child "is always determinative" in child custody disputes. *Santo v. Santo*, 448 Md. 620, 626 (2016) (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977). We review "a trial court's custody determination for abuse of discretion." *Id.* at 625. "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.'" *Id.* (quoting *Petrini v. Petrini*, 336 Md. 453, 470 (1994)).

"A court can abuse its discretion when it makes a decision based on an incorrect legal premise or upon factual conclusions that are clearly erroneous." *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *In re Yve S.*, 373 Md. 551, 584 (2003). We recognize 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 [the trial judge] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he 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." *Id.* at 585-86.

We have explained that a "court can abuse its discretion by reaching an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous." *Guidash v. Tome*, 211 Md. App. 725, 736 (2013). For an appellate court to reverse a trial court's ruling under this scenario,

> [t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

North v. North, 102 Md. App. 1, 15 (1994).

DISCUSSION

I.

In this appeal, Mother challenges the circuit court's award of joint legal custody with tie-breaking authority to Father. "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." *Taylor v. Taylo*r, 306 Md. 290, 296 (1986). "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." *Id.*at 296. "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.*

In some circumstances, it is appropriate for the parties to have joint legal custody but for one party to possess tie-breaking authority. The Court of Appeals has recently described joint legal custody with tie-breaking provisions as follows:

> In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking provision permit one parent to make the final call. Because this arrangement requires a genuine effort by both parties to communicate, it ensures each has a voice in the decision-making process.
>
> To be sure, the *Taylor* Court's definition of joint legal custody places parents' decision-making rights on an equal footing; indeed, it characterizes their voices as being equal. A delegation of final authority over a sphere of decisions to one parent has the real consequence of tilting power to the one granted such authority.
>
> But such an award is still consonant with the core concept of joint custody because the parents must try to work together to decide issues affecting their children. . . . We require that the tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children.

Santo v. Santo, 448 Md. 620, 632-33 (2016) (internal citation omitted) (emphasis in original).

Mother asserts that the circuit court erred in granting tie-breaking authority to Father in light of the parties' pre-trial stipulation that joint legal custody would be in the best interests of K. Mother observes that the parties' stipulation with respect to joint legal custody constitutes an "agreement or settlement [between them] with respect to the care, custody, education or support of" the parties' minor child, pursuant to Md. Code (1984,

2012 Repl. Vol.), § 8-103(a) of the Family Law Article ("FL"). Mother, however, fails to quote additional language in FL § 8-103(a), which provides that "[t]he court may modify any provision of [such an agreement] if the modification would be in the best interests of the child."

The appellate courts have set forth a non-exhaustive list of factors be considered by a court when determining an appropriate custody arrangement: (1) fitness of the parents, (2) the character and reputation of the parties, (3) the desire of the natural parents and any agreements between them, (4) the potential for maintaining natural family relations, (5) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment, (6) material opportunities affecting the future life of the child, (7) the age, health, and sex of the child, (8) the residence of the parents and opportunity for visitation, (9) the length of separation from natural parents, (10) whether there was prior voluntary abandonment or surrender of custody of the child, (11) potential disruption of the child's social and school life, (12) geographic proximity of parental homes, (13) demands of parental employment, (14) financial status of the parents, (15) impact on state or federal assistance, (16) benefit to parents, (17) capacity of parents to communicate and to reach shared decisions affecting the child's welfare, (18) willingness of parents to share custody, (19) the relationship established between the children and each parent, and (20) the sincerity of the parent's request. *Taylor*, *supra*, 306 Md. at 304-11; *Montgomery Cnty. Dep't of Social Serv. v. Sanders*, 38 Md. App. 406, 420 (1977). Not all of the factors are necessarily weighed equally; rather, it is a subjective determination. *See Taylor*, *supra*, 306 Md. at 303 ("Formula or computer solutions in child custody matters are impossible

because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made."). The capacity of the parents to communicate and reach shared decisions is "the most important factor in the determination of whether an award of joint legal custody is appropriate." *Id.* at 304.

Mother does not argue that the circuit court failed to consider the requisite factors. Indeed, the circuit court's comprehensive and detailed 34-page memorandum opinion makes clear that the court carefully applied each factor to the circumstances of this case.[3] Rather, Mother argues that the circuit court's grant of tie-breaking authority was based only upon the court's order awarding primary physical custody to Father and was unsupported by the court's factual findings. With respect to tie-breaking authority, the circuit court ruled as follows:

> The [c]ourt finds [that] given the physical custody determination, *supra*, as the primary physical custodian, the [Father] will have more involvement in the day-to-day structure of [K.]'s life. The geographic distance between [Mother's] home and [K.]'s primary residence with [Father], is one of the factors the [c]ourt considered in making its decision. The [c]ourt finds [Father] to be best suited to make tie-breaking decisions given the daily contact he will have with [K.] once [Mother] relocates to California. Should the parties be unable to reach a shared decision regarding [K.] after having exercised good faith efforts to do so, [Father] shall have tie-breaking authority.

Mother concedes that the circuit court had the statutory authority to modify an agreement between parents relating to custody, *see* F.L. § 8-103(a). Mother further

[3] Mother expressly "does not take issue with any of the trial court's foregoing findings, analysis, and conclusions" other than its grant of tie-breaking authority to Father.

concedes that a circuit court has broad discretion to fashion custody remedies, including tie-breaking authority. *See Santo*, *supra*, 448 Md. at 632-33. Mother asserts, however, that the circuit court's modification of the parental agreement in this case -- from traditional joint legal custody to joint legal custody with tie-breaking authority to Father -- does not serve K.'s best interests. Specifically, Mother asserts that certain factual findings by the circuit court were inconsistent with an imposition of tie-breaking authority. The court found:

- "[T]hat the parties have the ability to effectively reach shared decisions concerning" K.
- "[T]hat it is in [K.]'s best interest that both parents maintain . . . the high level of involvement in her life."
- "[T]hat both parents are physicians who are educated, knowledgeable and capable of making decisions in [K.]'s life relating to education, health, schooling, extracurricular activities, disciplinary actions, etc."
- "[T]hat joint legal custody is in [K.]'s best interest."

Mother asserts that by awarding Father tie-breaking authority, the circuit court "disregard[ed]" its previous fact-finding and legal conclusions in support of traditional joint legal custody. In our view, the circuit court's custody ruling was consistent with its fact-finding and legal conclusions. A circuit court's award of tie-breaking authority to one parent does not change a joint legal custody award into a sole legal custody award. As we observed in *Shenk v. Shenk*, 159 Md. App. 548 (2004), a trial court's award of joint legal custody with tie-breaking authority to one parent "does not transform the arrangement into something other than joint custody. Instead, it illustrates how the 'multiple forms' of joint

custody can be tailored into solutions for each unique family, in keeping with the 'broad and inherent power of an equity court to deal fully and completely with matters of child custody.'" (quoting *Taylor*, *supra*, 306 Md. at 303).

In *Shenk*, *supra*, we affirmed an award of joint legal custody with tie-breaking authority to one parent when the evidence established that both parents "agreed on the ultimate outcomes of the decisions made on behalf of the children" and there was "no evidence that either party had attempted to turn the children against the other [parent]." 159 Md. App. at 561. We observed that the "most serious" dispute identified by the mother in *Shenk* "involved the children's attendance at a Catholic school, and the father did not question the decision, but only expressed concern that the mother's parents were paying the tuition." *Id.* at 561. In *Shenk*, as in the present case, the court found that "the father's desire to participate in his children's lives was sincere, as was the mother's willingness to involve him." *Id.*

In the present case, the circuit court found that the parents were generally capable of co-parenting effectively and reaching shared decisions with respect to K.'s welfare. The parties did, however, disagree significantly about certain major life decisions for K. Specifically, Mother desired to relocate to California with K., despite the effect such a move would have on K.'s relationship with Father. Indeed, the circuit court expressed concern about Mother's judgment with respect to this plan, commenting that "[t]his proposal by [Mother] causes the [c]ourt great concern, because it does not appear that [Mother] considered the impact such a proposal would have on [K.]." The circuit court found that Mother's proposed plan for K., which involved flying across the country more

than twenty times per year, including "nearly a full day of travel for each flight, through multiple time zones, is not in a young child's best interest."[4] The court further expressed concern about Mother's credibility, observing that Mother failed to disclose her planned relocation to California to the custody evaluators. Although the circuit court specifically mentioned "the geographic distance between [Mother's] home and [K.]'s primary residence with [Father]" as "one of the factors" it considered in making its legal custody determination, the court was certainly permitted to consider other factors as well, including concerns about Mother's judgment and Mother's credibility.

The circuit court expressly ordered that Father is permitted exercise tie-breaking authority only when the parties are "unable to reach a shared decision . . . after having exercised good faith efforts to do so." This provision protects Mother and, more importantly, K., from an arbitrary exercise of the tie-breaking power. *See Santo*, *supra*, 448 Md. at 663 ("[T]he tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children.") (emphasis in original). In order for us to set the tie-breaking provision of the custody order aside, we must conclude that the trial court's decision was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally

[4] The circuit court further commented that Mother's "choice to uproot herself and put over 2,500 miles between her and [Father] is a decision made without considering the *best* interests of" K. (Emphasis in original.) The court found that "[b]y voluntarily choosing to relocate, [Mother] is not putting the needs of [K.] before her own, as she is putting [K.] in the position of being pulled between opposite sides of the country, and between her two parents."

acceptable." *North*, *supra*, 102 Md. App. at 15. The record before us in this appeal does not support such a conclusion.

II.

Mother further asserts that the circuit court erred by denying Mother's motion to enforce stipulation and/or amend the judgment because, after Mother abandoned her plan to relocate to California, the stated basis for the circuit court's grant of tie-breaking authority was no longer applicable.

First, we observe that Mother's motion was not filed until June 27, 2016 -- twelve days after the circuit court's issuance of the judgment of absolute divorce and memorandum opinion on June 15, 2016. Mother moved to alter or amend the judgment pursuant to Maryland Rule 2-534, which provides that "[i]n an action decided by the court, *on motion of any party filed within ten days after entry of judgment*, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment." (Emphasis added.) Mother's motion, therefore, was untimely filed.[5]

[5] Pursuant to Maryland Rule 2-535, a circuit court may, upon motion filed within 30 days after the entry of judgment, "exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534." Mother's motion was not styled as a Rule 2-535 motion. Indeed, Mother specifically moved for relief pursuant to Rule 2-534.

Furthermore, assuming *arguendo* that the motion had been timely filed, Mother's argument would remain unavailing. As we discussed *supra*, the circuit court explained that Mother's anticipated relocation was "one of the factors" it considered when granting Father tie-breaking authority.[6] Furthermore, we emphasize that the decision to grant or deny a motion to alter or amend is within the sound discretion of the trial court. *Steinhoff v. Summerfelt*, 144 Md. App. 463, 484 (2002) ("[T]he discretion of the trial judge is more than broad; it is virtually without limit."). In our view, the circuit court acted within its discretion when denying Mother's motion to alter or amend and/or enforce stipulation.

We note that any party to a custody proceeding is permitted to file a motion to modify custody on the basis of a material change of circumstances that affects the best interest of the child. We do not suggest that Mother's cancelled relocation would support a modification of custody by the circuit court, but only note that a motion to modify would be the proper vehicle for Mother to raise any arguments with respect to whether custody should be modified in light of the fact that Mother appears, at this point, to intend to remain in Maryland.

A motion to alter or amend is not an opportunity for Mother to gain an additional opportunity to relitigate custody issues that were addressed during a seven-day custody trial, throughout which Mother presented her plan to relocate across the country. As we explained in *Steinhoff*, *supra*, 144 Md. App. at 484,

[6] This is contrary to Mother's assertion that the geographic distance between the parties was the "singular, sole and exclusive justification" provided by the trial court in support of its grant of tie-breaking authority to Father.

> a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been earlier but were not. Losers do not enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right.

Accordingly, we hold that, assuming *arguendo* the motion had been timely filed, the circuit court's denial of Mother's post-trial motion would have been a proper exercise of discretion.

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