UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1937

September Term, 2016

JEFFREY FABERMAN

v.

HEATHER RODRIGUEZ

Woodward, C.J.,
Eyler, Deborah S.,
Graeff,
JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 17, 2017

Jeffrey Faberman ("Father"), the appellant, appeals from an order entered by the Circuit Court for Montgomery County denying his motion to dismiss a motion to modify custody, visitation, and child support filed by Heather Rodriguez ("Mother"), the appellee, and from the final order modifying custody. He presents two questions, which we have rephrased:

> I. Did the circuit court err by not dismissing Mother's motion to modify custody when she had not first attempted in good faith to resolve the dispute with a parenting coordinator, as required under the then governing custody order?
>
> II. Did the circuit court err or abuse its discretion by modifying physical custody to grant Mother 50/50 access?

For the following reasons, we answer these questions in the negative and shall affirm the orders of the circuit court.

FACTS AND PROCEEDINGS

Mother and Father are the parents of one daughter, Sophia, who is now 5 years old. They have never been married. They met in April 2010 and four months later Mother moved into Father's house in Rockville. In December 2010, Mother learned she was pregnant, and in August 2011 Sophia was born. In December 2011, Father filed in the circuit court a complaint to establish paternity. On February 27, 2012, the court entered an order establishing paternity and awarding the parties shared custody of Sophia. Thereafter, Father moved out. The parties continued to share custody of Sophia on a 50/50 basis, alternating day-on, day-off.

When the parties met, Mother was married to, but separated from, her now ex-husband, Toby Prudhomme. Mother and Mr. Prudhomme have a daughter together who is now 12 years old. They share custody of their daughter, but Mother has primary residential custody.

Mother is employed as a general manager for Temple Allen Industries, a company that designs and manufactures robotic surface prep material for the aerospace industry. In 2013 and 2014, Mother was required to travel a great deal for her job. She typically travelled out of state one to two weeks per month. Since 2015, she no longer has been required to travel and she has worked from home on a regular basis. Mother earns $72,000 annually.

When Mother and Father met, Father was working as the fitness manager at the Westwood Country Club in Vienna, Virginia. After eight years in that position, he left in June 2016, and enrolled in graduate school to obtain his Master's Degree in secondary education. After he completes his graduate degree, he plans to teach high school history and physical education. In September 2016, Father began working part-time at Temple Beth Ami, teaching Hebrew School 6 hours per week, at $36 per hour. Father also receives supplemental income of at least $1,500 per month from his parents.[1]

When Sophia was a baby and toddler, she was cared for in the parties' homes by a nanny. In the Fall of 2014, she was enrolled in Potomac Nursery School from 9 a.m.

[1] The court found that he likely receives significantly more money than this from his parents.

until noon five days a week. In Fall 2015, Father enrolled her at Temple Beth Ami for preschool, which also is a half-day program.

On September 17, 2012, Father filed a complaint for custody in the circuit court seeking sole legal and primary physical custody. Mother counterclaimed, also seeking sole legal and primary physical custody.

On May 16, 2013, when Sophia was 20 months old, the parties entered into a consent custody order ("May 2013 Custody Order"). The pertinent terms were as follows. The parties would have joint legal custody of Sophia and would cooperate in making all decisions about her health, education, religion, and other matters of importance. In the event that an agreement could not be reached, Father would have tie-breaking authority. Father would have primary residential custody of Sophia; and Mother would have custodial access every other weekend, from between 4 p.m. and 6 p.m. on Friday until 9 a.m. on Monday, and an additional overnight every Tuesday or Thursday, from 4 p.m. until 9 a.m.[2] The parties agreed to an alternating holiday schedule. In the summer, each party would spend two non-consecutive weeks with Sophia until she turned 5 and thereafter could elect to spend two consecutive weeks with her. If either party could not care for Sophia during his or her scheduled access periods (and if Sophia was not at school or being cared for by an agreed upon nanny), the other party had the first option to care for her. The parties further agreed to "the appointment

[2] This schedule was to remain in place until Sophia enrolled in school on a full-time basis. Thereafter, the Tuesday/Thursday overnights would cease and be replaced with a Wednesday overnight each week from 4 p.m. until the start of school the next day.

of a mutually agreeable Parenting Coordinator ["PC"] to be selected within twenty-one (21) days of the entry of the [May 2013 Custody Order]"; to split the PC's fees evenly; to meet individually with the PC within 45 days after the entry of the May 2013 Custody Order; and to have joint meetings with the PC at least every 60 days for six months and as needed thereafter. Mother was to pay Father $700 per month in child support.

Following the entry of the May 2013 Custody Order, Mother and Father selected Karen Robbins as their PC and began seeing her. Sometime after June 2014, Ms. Robbins terminated her contract with the parties.

On January 6, 2014, Father filed a motion to modify custody. He alleged that since the entry of the May 2013 Custody Order, Mother had been acting in an "erratic and irresponsible manner"; that she was "refus[ing] to communicate with [him] in an open, honest manner"; that she had "refused to provide [him] with basic information relating to the overnight residence where she stays with [Sophia]"; and that she had made "bizarre and unsettling" accusations about his conduct during custody exchanges. He further alleged that, by agreement, neither party was adhering to the access schedule in the May 2013 Custody Order and that the use of a PC had not "enabled the parties to improve their co-parenting relationship." Father asked the court to grant him sole legal and physical custody of Sophia and to modify child support.

Mother filed a counter-complaint to modify custody. She alleged that Father's "controlling behavior and inability to work collaboratively with the [PC]; his "desire to continue on with litigation"; and her "ability to recognize the child [sic] needs and

behaviors in a way that will help her progress through childhood," all were material changes justifying a modification of custody. She asked the court to modify legal custody to eliminate Father's tie-breaking authority, to modify physical custody to "expand [her] access with the minor child," and to modify child support.

On July 3, 2014, the parties entered into a second consent custody order ("July 2014 Custody Order"), modifying certain terms of the May 2013 Custody Order. The pertinent modified terms were as follows. Mother would continue to have alternating weekend access, beginning at 6 p.m. Friday and ending on Monday morning at the time Sophia was to begin school. The weeknight visits were eliminated. Instead, Mother received an additional week of access during the summer and an additional 12 days during the year, with those dates to be determined in consultation with the PC; and the entirety of spring break after Sophia was enrolled in school. All custody exchanges were to take place outside the parties' homes or, if on a school day, at the school. If Mother needed to cancel her access period, she was required to give Father notice in writing at least 24 hours in advance. If Mother was late for drop-off on more than two successive occasions or if she failed to give 24-hours notice of a cancellation, her next scheduled access period would be cancelled.

The parties further agreed that they would

> retain a successor [PC] (which [sic] shall be selected by the parties' counsels [sic] or, in the event they are unable to agree, shall be designated by the Court), and such [PC] shall assist them in communication and parenting concerns, and the parties shall meet with the [PC] every other month, during the first six months after the date of entry of this order and neither party shall commence litigation on any matter relating to custody or

> access unless the party has requested and attempted in good faith to resolve the dispute first, with the assistance of the [PC.]

Mother was to pay $900 per month in child support. All terms of the May 2013 Custody Order that were not expressly modified remained in full force and effect.

As we shall discuss in more detail *infra*, following the entry of the July 2014 Custody Order, Mother and Father were not able to reach an agreement on the appointment of a "successor" PC, and none ever was appointed.

A year and three months later, on October 15, 2015, Mother filed a motion to modify legal and physical custody and a petition for contempt. She alleged that since the entry of the July 2014 Custody Order, Father had "undertaken a course of action to exclude [her] from all decision-making with respect to [Sophia]." Specifically, he refused to provide her with the name of Sophia's pediatrician and to advise her of medical treatment and diagnoses Sophia had received; refused to provide her more than "cursory information" about Sophia's daycare provider; unilaterally enrolled Sophia in Jewish day school; unilaterally decided that Sophia would be raised in the Jewish faith; and denied her her right of first refusal to care for Sophia when he was not exercising his scheduled custodial time. She further alleged that she and Father had only just selected a PC, but that no "parent coordinator activities ha[d] commenced."[3] Mother asked the court to modify legal custody to award her sole legal custody (or, alternatively, to continue the joint legal custody but grant her tie-breaking authority); to grant her primary physical

[3] In fact, the PC selection referenced by Mother was not agreed to by Father.

custody; to modify child support; to hold Father in contempt for violating the July 2014 Custody Order; and to award her attorneys' fees.

Father moved to dismiss Mother's motion to modify custody. He asserted that Mother was obligated under the terms of the July 2014 Custody Order to cooperate with him to select a successor PC and to make a good faith effort to resolve the dispute with the assistance of the successor PC prior to commencing any litigation. He characterized the PC provision of the order as an agreement to mediate and maintained that Mother's refusal to mediate in compliance with the agreement deprived the court of subject matter jurisdiction.

On November 19, 2015, Father filed a counter-complaint to modify custody and child support. He alleged that by her own choice Mother was disinterested and uninvolved in decisions pertaining to Sophia's education; that Mother had withheld information from Father about medical care for Sophia; that Mother behaved in an "erratic and unreliable" manner; that she insisted on bringing third parties to Sophia's doctor's appointments, without Father's consent; and that she had made extended visits to Sophia's preschool with third parties that were disruptive to the school and caused concern to the preschool staff. Father asked the court to grant him sole legal custody; to modify physical custody consistent with Sophia's best interests; to modify child support; and to award him reasonable attorneys' fees.

On January 15, 2016, the court held a hearing on Father's motion to dismiss. At the conclusion of the hearing, the court denied the motion. The court reasoned that

because the parties never agreed to the appointment of a PC and Father failed to take any action to cause the court to appoint a PC, as provided for in the July 2014 Custody Order, he had waived the provision of the custody order requiring the parties to engage in good faith efforts with a PC to resolve the dispute before initiating litigation. The court further reasoned that Father's action in filing his own motion to modify custody without first engaging in good faith efforts to resolve the dispute also amounted to a waiver of the PC provision; and that the appointment of a PC would be fruitless given the parties' level of conflict.

In March 2016, the court appointed a best interests attorney ("BIA") to represent Sophia.

The modification merits trial went forward over three days in August 2016. In her case, Mother testified and called one witness, Erin Petrie, Sophia's former nanny.

Mother testified that she was seeking a modification of custody because Father was freezing her out of decision making and because, as the access schedule stood, she only saw Sophia three days out of every two week period. Mother explained that she had agreed to that access schedule in July 2014 because she was traveling frequently during the week for work and because she was granted additional access to be determined in consultation with the successor PC. Now that she no longer was required to travel for work, she could accommodate a more regular access schedule. According to Mother, Sophia had said that she missed seeing her and wanted to spend more time with her. Sophia also wanted to spend more time with Mother's older daughter.

When Sophia was in Mother's custody on alternating weekends, she and Mother spent their time playing and hanging out together at her house or nearby. Mother did not ordinarily schedule extra-curricular activities or playdates for Sophia because their time together was so limited that she wanted to spend it only with Sophia. Sophia was often "clingy" with Mother and resisted going to bed. As a result, Mother often let Sophia sleep in bed with her. Mother recognized that Sophia needed to learn to sleep in her own bed at Mother's house. Sophia often became very upset at the end of the access periods and did not want to leave Mother. Mother believed that if she were awarded additional access, Sophia would have less difficultly sleeping at her home and less difficultly transitioning at the end of the access periods.

Mother described her brief romantic relationship with Father as "really volatile" and said that he was "physically and verbally and sexually abusive" to her. In the less than two years that they were together, Father had "kicked [her] out" of the house three times. Since July 2014, Mother and Father had communicated solely by e-mail. Mother was fearful of Father and, in December 2015, had hired an officer from the Montgomery County Police Department to accompany her to appointments and custody exchanges during his off-duty hours.

Mother testified about an incident that had occurred at Sophia's 3-year checkup with her pediatrician in August 2014. On the day of the appointment, Sophia was in Mother's custody. Mother took Sophia to her regular pediatrician at Potomac Pediatrics in Rockville. She was accompanied by a male colleague and a female friend. She and

the two others sat down in the waiting room and Sophia sat on Mother's lap. Father also came to the appointment. According to Mother, he approached her "out of nowhere and started trying to pull Sophia out of [her] arms." Mother begged Father to stop. Her male colleague then stepped in to try to block Father. Father "threw up his elbow" and hit Mother's colleague and then "shoved him." At that point, Mother called 911. The police responded to the pediatrician's office and spoke to both parties. No charges were filed.

Following that appointment, Potomac Pediatrics notified Father that Sophia could no longer be a patient at their office. Mother testified that she did not receive any notification and that Father did not tell her.

On November 6, 2014, Father selected a new pediatric practice for Sophia: Pediatric Care of Rockville ("PCR"). He completed an intake and medical history form for the practice. He listed himself as Sophia's father and his new wife as Sophia's step-mother. (Father and his then wife were married on September 30, 2014, and have since divorced.) He did not give Mother's name or contact information on the form, nor did he give Sophia's half-sister's name in the section for siblings. He also did not inform Mother of the change in Sophia's pediatric care.

On the morning of January 20, 2015, a day that Sophia was in Mother's care, Mother called Potomac Pediatrics to schedule an appointment because Sophia had awoken with a cough. She was informed that Sophia was no longer a patient at the practice. Just after 9 a.m., Mother emailed Father to ask why he had not told her that Sophia was no longer a patient at Potomac; asking him for the name of Sophia's current

pediatrician; and advising him that Sophia was sick and that Mother was taking her to urgent care. Mother took Sophia to Right-Time Medical Center, an urgent care practice. Father responded ten minutes later, saying that Sophia was "supposed to be in school or with [him]" at that time. He did not respond to Mother's question about the pediatrician. At 9:35 a.m., Mother emailed Father to let him know that they were finished with the appointment and that she would drop Sophia off whenever he wanted. She also asked him to answer her questions from the first email. Father's response, two minutes later, was "Right now." He again did not answer her questions. Mother told Father she would be there by 10:45 a.m. Ultimately, Mother dropped Sophia off to Father at a Starbucks near his house.

For the next 11 months, Mother repeatedly asked Father to provide her with the name of Sophia's pediatrician and he repeatedly refused. During that time, Sophia was treated at PCR on nine occasions. She was administered vaccines. She was prescribed antibiotics. She was diagnosed with a benign heart murmur. She was referred to an allergist for testing, which revealed a tree pollen allergy. Mother was not told about any of these diagnoses or test results.

The notes from the appointments and telephone contacts at PCR reflect that Father told the practice on more than one occasion that he disbelieved Mother's descriptions of symptoms Sophia was experiencing; that he believed she was trying to make him "look bad"; and that he believed that the real cause of certain respiratory symptoms that Sophia

was experiencing was a cat allergy and that Mother had a cat. Mother testified that she did not have a cat.

On the evening of Sunday June 7, 2015, while Sophia was in Mother's care, she experienced a barking cough and difficulty breathing. Mother called 911 and Sophia was transported by ambulance to the emergency department at Shady Grove Medical Center. She was seen just after 8 p.m., was diagnosed with croup, administered a steroid, and released.

The next morning, Mother emailed Father to inform him of Sophia's visit to the emergency department and sent him a copy of the discharge paperwork, which recommended that Sophia be seen for follow up with her pediatrician that day. She asked Father to let her know the appointment time and location so that she could come. Meanwhile, at 9:45 a.m., Father called the pediatrician's office, advised them that Sophia had been seen at Shady Grove the prior night for croup, and further advised that she did not actually have croup, just post-nasal drip. Sophia was seen by her pediatrician later that same day. Her symptoms had resolved and no further treatment was deemed necessary. Mother was not informed about the visit or given the identity of the pediatric office.

The issue of Father's refusal to provide Mother with the name of Sophia's pediatrician came to a head just before Christmas in 2015. Sophia had had a cough since November 2015. On Sunday, December 20, 2015, Mother emailed Father that Sophia had been "struggling with a cough all weekend" and that it seemed to be getting worse.

The next day, Father called the pediatrician and reported that while Sophia had been in Mother's care over the weekend, she was coughing and that Mother was "insisting on [an] evaluation." Father made an appointment for Sophia, but called back later that day and cancelled it.

The custody access schedule provided that Sophia would be in Father's care on Christmas Eve through noon on Christmas day; then in Mother's care through noon on December 26; then in Father's care until December 29, 2015 at noon; and then in Mother's care for a full week.

Father emailed Mother on Christmas to let her know that Sophia had a "little congestion" but was otherwise fine. That evening, Mother emailed Father, saying that Sophia was still congested and asking whether she had been seen by her pediatrician recently. Father responded that she had not been seen. On December 26, 2015, Mother emailed Father that Sophia's cold had worsened, she was not eating, and she was coughing. Mother asked Father to arrange for Sophia to been seen by her pediatrician between then and December 29th and to advise Mother if he scheduled an appointment so she could attend. Father responded that Sophia was doing fine and he would let Mother know if anything changed.

On December 28, 2015, Father took Sophia to an urgent care center. Father emailed Mother and told her that Sophia had been diagnosed with post-nasal drip; that she did not have strep, pneumonia, or bronchitis; she was not running a fever; and there were no antibiotics that would help her.

The next day, Father took Sophia to her pediatrician's office to follow up. She was diagnosed with bronchitis and prescribed a 10-day course of Amoxicillin. Father said that he preferred to wait to begin the antibiotic and the doctor agreed that this was reasonable, but directed him to fill the prescription if Sophia's cough persisted and to call if her condition worsened.

Later that day, after Sophia was in Mother's care, Father emailed Mother that there was "[n]o new diagnosis, no new information."

That evening, Mother emailed Father observing that if he had been concerned enough about Sophia's health to have taken her to "back to back" appointments, he was putting her health at risk by not providing Mother with the name of her pediatrician. She added that Sophia was "clearly sick" and asked again for the name of her pediatrician so she could follow up if necessary and avoid an unnecessary trip to the emergency room. Father responded that Mother was behaving "bizarre[ly]" by acting as if Sophia were "seriously ill" and needed to go to the hospital. He told her to "[s]top emailing [him] with false accusations and look after [her] daughter."

Mother responded the next day to remind Father that her request was

> simple and straightforward: who should I call, as I have questions that, if I can get answers to, could be very helpful in determining whether or not I have to take Sophia to see a pediatrician during business hours or the ER after hours? I am her mother, I am entitled to this information, and you are withholding this information. You haven't told me any specifics of what the doctor said, what is her treatment, whether she is taking any medication, etc. Why?

Father responded that Mother was "misinformed" and that she needed to re-read his prior emails. He asked Mother to keep *him* posted about how Sophia was doing, but noted that she had been "fine" when Mother picked her up the day before.

On December 31, 2015, at 11:31 a.m., Mother emailed Father and advised that Sophia was now running a fever, had a "persistent cough," and had an upset stomach. She asked him to provide the name and phone number for Sophia's pediatrician. If she did not receive that information by 2 p.m., she was considering taking Sophia to the emergency room or an urgent care center.

Fifteen minutes later, Father called the pediatrician and reported that Sophia was in Mother's care and that Mother reported that Sophia had a fever and a stomach ache, but that he disbelieved her. He received a call back from a nurse about 20 minutes later. He was told that if what Mother was reporting was true, he should tell her to begin the course of Amoxicillin. Father said he would tell Mother to call them.

Father waited twenty minutes before emailing Mother. By then, the pediatrician's office was closed for the rest of the day through New Year's. Father gave Mother the name, address, and phone number for the pediatric practice. He falsely told her that he had spoken to Sophia's doctor who had only then prescribed an antibiotic for Sophia (when in fact, he had not spoken to a doctor *and* it had been prescribed two days earlier); that he would fill the prescription and she could get it from him; and that the doctor advised that Sophia should start the antibiotic immediately. He told her that Lindsey, the nurse he had spoken to, was still there and that Mother could call to speak to her.

Mother called the practice and spoke to the on-call doctor just before 6 p.m. She was told that she could begin the course of antibiotics, but that she might also want to have Sophia seen that day if her symptoms were worsening. Mother decided to take Sophia to an urgent care center before beginning the Amoxicillin. Sophia was evaluated and had a chest x-ray, which revealed pneumonia. She also was diagnosed with an ear infection. She was prescribed a different antibiotic to treat her pneumonia. Mother emailed Father and told him of Sophia's diagnosis. Mother advised that she would schedule a follow up visit for Sophia with her regular pediatrician for Saturday, January 2, 2016, and would let him know the time.

On January 1, 2016, Mother called the pediatric practice to advise them of the pneumonia diagnosis and that Sophia now was dry heaving. Father also called the pediatric practice that day. He noted that he was concerned about Sophia, advised that Mother might try to bring a third party to the appointment the next day, and said he did not consent to her doing so.

On January 2, 2016, Mother and Father both attended Sophia's follow-up appointment at her pediatrician's office. Father brought his mother with him. Mother brought a "friend" who did not come into the exam room. Sophia's symptoms had improved and there were only mild "crackles" in her lungs. She had a second follow-up appointment on January 8, 2016. Father, Mother, and Father's mother attended that appointment. Sophia's exam was normal.

Mother also testified that Father cut her out of decisions pertaining to Sophia's religious and educational upbringing. Father is Jewish. Mother was raised Catholic, but is not practicing. According to Mother, during their relationship, Mother and Father celebrated Christian holidays with Sophia and Father never expressed any interest in raising Sophia in the Jewish faith. The May 2013 Custody Order and the July 2014 Custody Order, both of which were entered by consent, do not include any Jewish holidays in the shared holiday schedule.

On September 1, 2014, when Sophia was 3 years old, Father emailed Mother as follows:

> I'm deciding which faith to raise Sophia under and looking to hear your view as well. As I was raised Jewish, have Jewish parents, a Jewish girlfriend who lives with Sophia and myself, and went to school in Israel, I would like to raise Sophia to be Jewish, especially as you aren't religious. None of this is news to you as I expressed this to you in the past as well as in my deposition.

He further advised that he wished to enroll Sophia in Hebrew School at the same time she would begin elementary school. He noted that he had "no issue with [Mother] celebrating Christmas and Easter etc. with her but please appreciate that her Jewish education takes priority. What are your thoughts?"

Mother responded that she agreed that faith was important and that she wanted Sophia to be exposed to "a variety of religious points of view so that she can take away the best they have to offer and choose for herself later in life." She asked Father to elaborate about Hebrew School and to explain how it would "integrate with Sophia's primary education and her routine."

Father's response, in its entirety, was as follows: "No problem, I'm glad that you agree Sophia's Jewish faith is important. I'll keep you up to date with Sophia's Jewish education and upbringing. Thanks and have a great day[.]"

Mother responded that same day saying that she agreed that Sophia's Jewish *and* Catholic faiths were important and asking Father to please answer her questions. Father responded that a "child cannot be raised with conflicting faiths" because that would cause "confusion and turmoil." He explained that, because Sophia spent considerably more time in his care and his girlfriend was Jewish, it would not "make sense to raise her Catholic." Thus, she would be raised Jewish.

Mother asked Father if he was exercising his tie-breaking authority. He did not respond. She emailed him again almost 2 weeks later to ask for a response. He then responded that he didn't know what she was talking about and that his answer was "VERY clear" from their prior correspondence. (Emphasis in original.)

There was no further discussion of the matter for 18 months. Then, in March 2016, after Mother moved to modify custody, Father emailed her to advise that he planned to register Sophia for Hebrew School in September 2016. The classes were every Sunday from 8:45 a.m. to 10:45 a.m. He asked Mother to please agree to take Sophia on her weekends so as "not [to] interfere with her religious upbringing." Mother responded that she opposed his suggestion until Father was willing to engage in meaningful discussion about Sophia's religious upbringing.

Mother testified that Father also unilaterally decided to enroll Sophia at Temple Beth Ami for pre-kindergarten for the 2015-2016 school year and to enroll her at Fallsmeade Elementary School, a Montgomery County public school, for kindergarten. Neither party lived within the zone for Fallsmeade, but Father applied for Sophia to enroll as an out-of-zone student.

Mother asked the court to modify custody to a 50-50 shared access schedule so Sophia would "get to enjoy both . . . of her parents." She advocated for a week-on, week-off schedule with exchanges occurring early in the day on Sundays, so as to limit the parties' contact with each other and to give Sophia time to transition into each party's home before bedtime. She also asked the court to modify legal custody to divide tie-breaking authority between the parties. In light of Father's history of denying her medical information, she wanted to be given tie-breaking authority on medical decisions. Father could retain tie-breaking authority on educational decisions. She did not think either party should have tie-breaking authority on religious decisions.

Ms. Petrie testified that she worked for Father as Sophia's nanny from July 2012 through September 2014. During that time, she worked at Father's home from 5 a.m. until noon Monday through Friday because Father worked the early shift at the country club. Father abruptly terminated her employment in September 2014 after she dropped Sophia off at preschool. He called her and told her not to return the next day because he "couldn't trust [her] anymore." Ms. Petrie believes she was terminated because Father learned that she had communicated with Mother about Sophia's extracurricular activities

and had sent Mother a picture of Sophia in her ballet outfit. Father had instructed Ms. Petrie not to share information with Mother.

Since Ms. Petrie had been fired, she had socialized with Mother and Sophia on several occasions. She testified that Mother and Sophia have a wonderful relationship and that Sophia loves spending time with Mother.

In his case, Father testified and called five witnesses: Elizabeth Petrolli, Sophia's therapist since May 2016; Rachel Spiegel, a friend; Michelle Sarris, a licensed clinical social worker who was acting as Father's parenting coach; Jennifer Vector, Sophia's former pre-kindergarten teacher; and Mr. Prudhomme, Mother's ex-husband.

Father testified about many of the same incidents and conflicts covered by Mother. Sophia had been in Mother's care for between 5 and 7 days before the August 2014 Potomac Pediatric appointment, and he "desperately missed" her. When he arrived and saw Sophia sitting with Mother, he immediately went over to see her. Mother's male colleague "cut [him] off" and "physically pushed his body weight onto [Father] to prevent [him] from moving." Father pushed back and then Mother "started to scream for 9-1-1." He said that Potomac Pediatrics terminated Sophia as a patient shortly thereafter because they were unhappy with Mother causing a scene in the lobby.

Father acknowledged that, after that incident, he refused to tell Mother the name of Sophia's new pediatrician's office. He justified that refusal for three reasons. First, he blamed Mother for causing Sophia's termination from Potomac Pediatrics. Second, Mother "accuse[d] him of physical violence, rape, sexual assault" and it caused him a

great deal of "stress." Third, in his view, it made Sophia uncomfortable when Mother brought unrelated third parties to the appointments. He acknowledged that he often brought his mother to appointments.

Father described Sophia as the "[h]appiest kid [he'd] ever seen." He said he and Sophia maintained a "busy" schedule, with extracurricular activities or playdates ten out of every fourteen days. Mother had Sophia in her custody three out of every fourteen days, meaning that Sophia had only one unscheduled day with Father every two weeks. Sophia was enrolled in t-ball, a handwriting class, swimming, ballet, tumbling, and yoga. Father also took her to bounce houses, mini golf, the movies, paddle boating, and the pool. He never told Mother about any of these activities.

On cross-examination, Father acknowledged that during his deposition he had testified that he was unsure if Mother "love[d]" Sophia and he remained of that opinion. He also had testified at his deposition that he did not think that Mother "really ha[d] any positive attributes as a parent" except that she did "a good job of bathing [Sophia]."

Father also admitted on cross-examination that, within the past year, he had hired a private investigator to follow Sophia and Mother when Sophia was in Mother's care, and the private investigator had placed a tracking device on Mother's car.

Father also testified that Mother had taken Sophia to the emergency room or urgent care on several occasions and had not informed him until later.

According to Father, Mother refused to communicate with him directly—by phone or in person—which made it difficult for them to make shared decisions about Sophia.

That was the reason he believed they needed a PC. He claimed to have sent Mother numerous names for possible successor PCs after Ms. Robbins quit. Mother refused to select one. Father had begun seeing one of those individuals, Ms. Sarris, individually.

With respect to religious upbringing, Father testified that he had always made clear to Mother that he planned to raise Sophia in the Jewish faith, and she had never objected or expressed any interest in raising her as a Catholic.

Ms. Petrolli, a licensed certified clinical social worker, testified as a lay witness that she had been Sophia's treating therapist since May 2016. She and Sophia had met five times and had had one session via Facetime. In June 2016, she agreed to informally mediate with the parties to try to reach an agreement about summer access. The parties and Ms. Petrolli met at her office and reached an agreement that would have given Mother significantly more access during the summer, but many of her access days were weekdays. Later that same day, Ms. Petrolli learned that Mother had changed her mind about the schedule because she realized she could not coordinate the access days with her work schedule on such short notice.[4]

Ms. Petrolli also testified that Mother had sought her advice about helping Sophia to sleep better at Mother's house and about helping her older daughter not to feel

[4] Mother testified that during that meeting, she had felt fearful about turning down Father's suggestions for additional access beginning as soon as the next day because she did not want to appear disinterested in spending more time with Sophia. After the meeting, however, she spoke to her boss about it and he was unable to let her take time off on such short notice. She did not explain why she did not seek to coordinate a new schedule, however.

resentful of Sophia. In Ms. Petrolli's view, Father was a good parent and was very in tune with Sophia. She thought he overscheduled her a little bit, however. Ms. Petrolli testified that Mother's house was a little "less structured" and that Mother had a "hard[er] time setting limits and boundaries." Mother had told Ms. Petrolli that she had trouble disciplining Sophia because she saw her so little.

Ms. Sarris testified that Father contacted her in early 2014 and that since that time, she had been working with him as a parenting skills coach. Ms. Robbins, the parties' former PC, had told Father that he acted "defensive" during sessions and he wanted to work on that and on his co-parenting skills. She specifically advised him about how to "better communicate" with Mother, including how to write emails and information sharing. Ms. Sarris believed that Father was very "child-focused" in his parenting and that he "value[d] [Sophia's] time with [Mother]."

Ms. Spiegel testified that her son was a close friend of Sophia's from Beth Ami. She had observed Father with Sophia on numerous occasions and believed he was a very good father.

Ms. Vector testified that she had been Sophia's pre-kindergarten teacher at Beth Ami. Sophia was a "terrific student." Father was very involved in Sophia's schooling. Mother had attended one of the two parent-teacher conferences at Beth Ami, while Father had attended both. She observed Mother to have a "loving" and "warm" relationship

with Sophia. Mother also had attended a Passover Seder at the school. She had brought her therapist with her to that event.[5]

Mother's ex-husband, Mr. Prudhomme, testified that he was married to her for nine years. While he and Mother shared custody of their daughter, recently she had begun refusing to see her father. Mr. Prudhomme testified that according to Mother their daughter stopped seeing him because she became aware that Mr. Prudhomme was speaking to Father and his lawyer about the instant case.

In closing, Mother's counsel reiterated that it was Mother's position that 50/50 physical access and joint legal custody with divided tie-breaking authority was in Sophia's best interests. Father's counsel advocated for very little change in the access schedule because, in his view, Sophia was thriving and happy. Child's counsel advocated for a gradual increase in Mother's access, but not a 50/50 split.

The court held the matter *sub curia*. On October 17, 2016, the parties appeared for the court to announce its ruling. After reviewing the procedural background, the court turned to the threshold issue of whether there had been a material change in circumstances affecting Sophia's best interests. It found that there had been multiple material changes, including Father's "systematic approach to exclude [Mother] from decision-making," and Sophia's desire to spend more time with Mother.

[5] Mother explained in her testimony that because she was raised Catholic and did not speak Hebrew, she was concerned that she would not understand the Passover Seder. Mother's therapist was Jewish and offered to come along to help her feel more comfortable and more fully experience the Seder.

The court emphasized that the bulk of the evidence showed "[F]ather's dictatorial and cruel treatment of [Mother] . . . and, inferentially, So[ph]ia." The evidence was "overwhelming," in the court's view, that Father was attempting to "cut[] [M]other out of So[ph]ia's life" and that, particularly in the area of medical decisions, that that had been to the "detriment of So[ph]ia."

Most significantly, Father had refused to disclose Sophia's pediatrician to Mother for over a year. The court expressed shock that a "parent would do that to a mother or a child," noting that as a result of Father's deliberate conduct, Mother had been forced to take Sophia to the emergency room on more than one occasion. Moreover, when Mother asked for information, Father treated her dismissively. This was especially troubling in light of Sophia's history of croup. The court found that Father had "intentionally mislead [M]other regarding So[ph]ia's health, potentially putting [her] health at risk."

The court found that Father had repeatedly abused his tie-breaking authority by refusing to engage in good faith discussions about Sophia's religious upbringing and her education, detailing the overwhelming evidence that Father made unilateral decisions about these topics without any attempt to seriously listen to Mother.

Turning to the joint custody factors identified in *Taylor v. Taylor*, 306 Md. 290 (1986), the court made the following pertinent findings. Father's capacity to communicate and make joint decisions was "[n]onexistent," but Mother was "willing to try to make shared decisions." Mother also was willing to share custody, while Father was not. Sophia had a loving relationship with both parents. While a change in Sophia's

custody schedule would be disruptive in the short term, it was an ideal time to make a change because she was young and was just starting kindergarten. The parties lived near each other. Both parents were sincere in their requests for modification.

The court further found that Father's "controlling and dictatorial approach to allowing access and information about So[ph]ia to [M]other [was] shocking to the point where it's detrimental to So[ph]ia's health" and was another "factor" affecting the best interest analysis. The court opined:

> [Father] sees virtually no use to [M]other and would, if he could, remove [her] from the child's life. He has even requested to remove [M]other's maiden name of Rodriguez from So[ph]ia's name. He fired the child's nanny because she gave information about So[ph]ia to the mother such as a picture of So[ph]ia in a ballet [costume].
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> ***
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> The Court finds that [F]ather's animosity towards [M]other has clouded his judgment and has prevented the parties from making important collective decisions on behalf of So[ph]ia.

Turning to the *Montgomery County Department of Social Services. v. Sanders*, 38 Md. App. 406, 420 (1978), factors, the court made the following pertinent findings. It found that Father's character was controlling, rigid, and "dictatorial" and Mother seemed to have difficulty making decisions. The court did not have concerns about Mother's ability to parent, however. With respect to the parties' wishes, Mother wanted significantly more access and Father wanted to maintain the status quo. On the potentiality of maintaining natural relations factor, the court found that Sophia wanted to spend more time with her half-sister.

In light of these findings, the court decided to modify legal and physical custody. It noted that its modification of physical custody would mean a significant "departure from the status quo," but determined that this was the only schedule that would alleviate the "toxic" level of conflict between the parties and serve Sophia's best interests. The court ordered that the parties would continue to share joint legal custody, but that Mother would have tie-breaking authority on medical decisions and religious decisions, while Father would have tie-breaking authority on educational decisions.

With respect to physical custody, the court ordered a "step down" from the status quo. Beginning on Thursday, October 20, 2016, Mother would have custody of Sophia from Thursday after school through Sunday morning. The following week, Mother would have custody of Sophia from Friday after school until Sunday morning. Thereafter, continuing through the end of the calendar year, the parties would share custody of Sophia on a "2-5-2-5 basis."[6] Beginning January 1, 2017, the parties would share custody of Sophia on a week-on, week-off basis with exchanges to occur on Sunday at 5 p.m. All custody exchanges would occur at a shopping center near the parties' homes. After the week-on, week-off schedule began, Sophia was to be allowed a telephone call or Facetime session with the non-custodial parent every Wednesday at 7 p.m. The court ordered a shared holiday access schedule that allowed Father to have

[6] The court referenced an attached access calendar to specify how this schedule would work. That access calendar does not appear in the record, however. We presume that the court ordered a schedule whereby each party had Sophia in their custody for one 2-day period and one 5-day period in each two-week block.

Sophia in his custody for Jewish holidays and Mother to have Sophia in her custody for Christian holidays, with the parties splitting secular holidays and school breaks.

The court also modified child support, made contempt findings, and denied the parties' requests for attorneys' fees. Those rulings are not challenged in the instant appeal.

The court entered a modified custody order on October 28, 2016.[7] This timely appeal followed.

DISCUSSION

I.

Father contends the circuit court erred by denying his motion to dismiss Mother's motion to modify custody. He maintains that dismissal was required because Mother failed to comply with the provision of the July 2014 Custody Order requiring her to refrain from initiating litigation until she had "attempted in good faith to resolve the matter with the assistance of a [PC]." Since the court found that Mother bore more of the blame for the failure of the parties to agree to a successor PC, Father asserts that the fact that there was no PC in place at the time Mother filed her motion to modify did not excuse her non-compliance.

[7] Two modified custody orders were entered on October 28, 2016, one dated October 17, 2016, and an amended order dated the next day. We refer to the amended modified custody order.

Mother responds that the circuit court correctly ruled that Father waived this contention by his failure to seek appointment of a successor PC by the court and by his decision to file a counter-motion to modify custody.

The July 2014 Custody Order was entered on July 3, 2014. It required the parties' attorneys to cooperate to select "a successor [PC]" and, "in the event they are unable to agree, [to permit the PC to be] designated by the Court." The parties agreed to meet with the PC "every other month, during the first six months after the date of entry of this order," *i.e.*, through January 3, 2015, and not to "commence litigation on any matter relating to custody, or access unless the party has requested and attempted in good faith to resolve the dispute first, with the assistance of the [PC]."

The exhibits attached to Father's motion to dismiss show that in the two months following the entry of the July 2014 Custody Order, Mother's then counsel and Father's then counsel ("Ms. Lynch") exchanged emails regarding the selection of a successor PC. Mother's counsel suggested one name (Dr. Gail Thornburg).[8] Neither party's counsel pressed the issue, however, and no successor PC was selected.

Sometime in early 2015, Mother's counsel withdrew from the case. In March 2015, more than six months after the entry of the July 2014 Custody Order, Mother corresponded directly with Ms. Lynch about the selection of a PC. She explained that it was her understanding that her former attorney and Ms. Lynch had "selected a [PC] but

[8] Father maintains that Ms. Lynch sent a list of names to Mother's counsel. The record reflects that Ms. Lynch recalled having proposed three names, but that neither she nor Mother's counsel had been able to locate the list of names.

for whatever reason the [PC] ha[d] not been put in place." She asked Ms. Lynch to send her the name and number of the selected PC. If she was incorrect and no successor PC had been selected, however, Mother asked Ms. Lynch to send her the names and numbers of potential PCs.

Ms. Lynch responded that Mother's former attorneys had not "responded to [her] request for approval for a [PC]." She added that at that time, the "[PC] [Father] wishe[d] to utilize [was] Michele Sarris."

As discussed, *supra*, Ms. Sarris was then acting as Father's parenting coach. Mother contacted Ms. Sarris and learned that she was working with Father individually.

On March 18, 2016, Mother emailed Ms. Lynch stating that she thought it would be best if the parties selected a PC who had "no prior experience with either of [them]" and noted that that was "not the case with [Ms.] Sarris." She asked Ms. Lynch to suggest "a few people" with "no prior history" with her or Father.

On March 24, 2015, having received no response, Mother emailed Ms. Lynch again to follow up about the PC issue. Ms. Lynch responded that she no longer was representing Father and was not authorized to respond on his behalf.

Five months later, however, in August 2015, Ms. Lynch was again representing Father. Mother also was represented, having retained new counsel. Ms. Lynch emailed Mother's new counsel, noting that she understood that there was "a deadline by which [she] was to notify [him] of a [PC]." She stated that she had been "waiting for over six

months for [Mother] to choose a [PC]"; that Mother had "the list from which to choose"; and that Father's counsel should let her know Mother's choice.

The record does not reflect any further discussions about the selection of a successor PC. Neither party moved for the court to appoint a PC at any time prior to the filing of Mother's motion to modify custody, which, as mentioned, was in October 2015.[9]

On January 15, 2016, the court held a hearing on Father's motion to dismiss. Father took the position that the provision of the July 2014 Custody Order requiring the parties to select a successor PC and to attempt, in good faith, to resolve any disputes with the assistance of that PC prior to initiating litigation was akin to a mediation agreement. Mother responded that the PC provision was not a mediation agreement, and that Father had waived that provision by not seeking to have the court appoint a PC and by filing his counter-motion to modify, also without having made a good faith attempt to resolve the matter with the assistance of a PC.

After hearing argument, the court ruled that Father's failure to seek "the intervention of the Court to have the [PC] appointed . . . in the face of [the] failure [of the parties] to act" amounted to a modification of the PC agreement in the July 2014 Custody Order or, alternatively, amounted to a waiver of that agreement. The court further

[9] On June 24, 2016, Mother moved for the court to appoint a PC (and in a restated motion filed on July 15, 2016). Father opposed her motion, as did the BIA. Both Father and the BIA argued that given that the merits trial was scheduled to take place within a matter of months, the propriety of the appointment of a PC should be reserved for after a decision on the merits. They also took issue with many of the proposed terms of the proposed PC's contract. By order entered July 29, 2016, the court deferred a decision on Mother's motion until the merits hearing.

determined that Father's conduct in filing his own motion to modify also amounted to a waiver. Finally, the court ruled that it would be a "waste of money and time" to appoint a PC at this stage and that it was in Sophia's best interest for the cross-motions for modification to be determined on the merits.

We agree with the circuit court that, to the extent that the parties' agreement to select a successor PC was enforceable,[10] Father waived that provision by not taking action to cause the court to appoint a PC after he and Mother reached an impasse *and* by filing his own motion for modification of the July 2014 Custody Order without first complying with the PC provision. "Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) (citation omitted). The undisputed record reflects that both parties reached out to try to select a PC following the July 2014 Custody Order, but that no selection was made. Having failed to elect to seek court intervention, as the custody order allowed, Father may not be heard to complain that Mother's inaction resulted in the failure to select a successor PC. There being no PC appointed, and both parties having waived their right to the appointment of a PC by their inaction, Mother

[10] We note that the parties' agreement was not in compliance with Rule 9-205.2, which permits a court to appoint a post-judgment PC by consent of the parties, but requires that any order include the PC's name, address, and phone number; and specify any decision-making authority delegated to the PC (as permitted by the Rule). In the case at bar, the parties did not consent to the appointment of a PC. Rather, they consented to work together to choose a PC and, if they failed to reach an agreement, to seek court intervention to appoint a PC. It is questionable whether the court could have appointed a PC, however, if the parties no longer were in agreement that a PC should be appointed or if they did not agree as to a particular PC.

could not have attempted to resolve the instant dispute with the assistance of a PC prior to bringing her modification motion.

The circuit court also correctly ruled that the appointment of a PC would have been futile. The parties' inability to cooperate to select a PC was indicative of their level of conflict and distrust. The allegations made by the parties in their cross-motions to modify custody and visitation were not minor disputes about schedules, but fundamental disagreements about religion, medical care, and the sharing of decision-making authority. A PC could not have resolved the issues, and the dismissal of Mother's motion in order to permit the appointment of a PC would only have unnecessarily delayed the merits hearing.

Finally, in an equity proceeding involving a child, it is the best interests of the child, not the interests of the parents, that are paramount. Mother alleged in her motion to modify custody that Father was withholding from her crucial medical information to the detriment of Sophia's health. Those allegations, which were borne out by the ultimate findings on the merits, were not of the type that could be resolved by a PC and necessitated an evidentiary proceeding to determine whether a modification of custody and visitation was required to protect and advance Sophia's best interests. For all these reasons, the court did not err by denying Father's motion to dismiss.

II.

Father contends the circuit court clearly erred or abused its discretion by modifying physical custody to grant the parties shared physical access on a 50/50 basis

because the court's findings did not support a modification of residential custody. He points to the evidence that Sophia was happy, well-adjusted, and thriving under the existing access schedule. He asserts that the evidence that Sophia was "older, and that she loves and misses her Mother" did not support a modification of physical custody because to hold otherwise would be "violative of the interests in maintaining stability and finality" in custody cases.

Mother responds that the court made non-clearly erroneous factual findings that supported its determination that it was in Sophia's best interests to modify legal *and* physical custody and that its ultimate custody determination was not an abuse of its broad discretion. We agree.

"[T]his Court reviews child custody determinations utilizing three interrelated standards of review." *Reichert v. Hornbeck*, 210 Md. App. 282, 303–04 (2013).

> "When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8–131(c)] applies. [Secondly,] [i]f 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) (quoting *Davis v. Davis*, 280 Md. 119, 125–26 (1977)). The governing standard in all decisions concerning custody and visitation disputes between fit, natural parents is the best interests of the child. *See, e.g.*, *McDermott v. Dougherty*, 385 Md. 320, 354 (2005) (best interest of the child is the "central consideration"); *Taylor*, 306 Md. at 303 (standard is of "paramount concern" and

"transcendent importance"). While a trial court must "look at each custody case on an individual basis to determine what will serve the welfare of the child [or children]," *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996), the court may be guided by a nonexclusive list of factors relevant to the best interest inquiry:

> 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.

Sanders, 38 Md. App. at 420 (citations omitted). "The best interest of the child is . . . not considered as one of many factors, but as the objective to which virtually all other factors speak." *Taylor*, 306 Md. at 303.

In the case at bar, the court made non-clearly erroneous factual findings that Father was dictatorial, controlling, and cruel in his treatment of Mother; that he was dismissive of her concerns about Sophia's health, even while withholding from her information that would have permitted Mother to make informed decisions about Sophia's medical care; and that he did not value Mother's contributions to Sophia's life and, if he could, would remove her from Sophia's life entirely. The court found, moreover, that Father's conduct in this regard was detrimental to Sophia's health and well-being both because his withholding of information put Sophia's physical health at risk and because it raised general concern about his parenting of Sophia. The court found that Father was likely trying to "influence [Sophia] to be more disposed to him than

[Mother]" by scheduling so many extra-curricular activities for her during his time, knowing that because Mother's time was so limited she could not do the same. The court determined that even with the changes to legal custody, Mother's role in Sophia's life would continue to be undermined by Father unless she was permitted to share equally in all aspects of Sophia's care, and, significantly, that it was in Sophia's best interest for Mother to play a much larger role in her life than she had been. These findings plainly supported the court's ultimate conclusion that it would be in Sophia's best interest for Mother and Father to be awarded shared physical custody, with a transition period over two and one-half months to permit Sophia to acclimate to the change.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.