UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2189

September Term, 2014

SHELTON L. ALEXANDER

v.

TAMARA ALEXANDER

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 16, 2014

*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.

Shelton Alexander, the appellant, and Tamara Alexander, the appellee, were divorced in the Circuit Court for Frederick County.[1] The divorce judgment, as revised, granted the parties joint legal and shared physical custody of their son, with the parties alternating physical custody on a week to week basis. Mother was granted tie-breaking authority. Father was ordered to pay $157 per month in child support and to pay health insurance premiums for his son.

Father appeals, presenting seven questions for our review,[2] which we have condensed

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[1]For ease of discussion, we shall refer to the parties as Father and Mother.

[2]The questions as posed by Father are:

1. Did the lower Court err by refusing to exclude from evidence at trial all the evidence and records that had arisen from or been a part of a District Court case, which was over 17 years old, in which expungement orders had been granted and the record had been sealed?

2. Did the lower Court err in violating the court's own ruling concerning the use of sealed information, for the sole purpose of determining the truthfulness of both parties, forcing the Appellant to testify about an expunged record, and then making an expunged record a part of a public document?

3. Did the lower Court err in rejecting Appellant's request for First Right of Refusal and proposing 3rd-party care for the minor child in the absence of the Appellee?

4. Did the lower Court err in excluding Plaintiff's additional income, ignoring the Appellant's business losses established by Appellant and Appellee during the trial, and omitting healthcare (including extraordinary healthcare) expenses paid by Appellant when determining child support?

5. Did the lower Court abuse it's [sic] discretion in ignoring both domestic violence protective orders and a history of conflict between Appellee and Appellant in decisions concerning the minor child, when it awarded joint legal

(continued...)

and rephrased:

I. Did the trial court err by admitting into evidence and referencing in its revised opinion a foster care application completed by Father in which he disclosed details about a criminal charge against him and the entry of probation before judgment that had since been expunged from his criminal record?

II. Did the trial court abuse its discretion by not ordering that Father would have a right of first refusal if Mother was unable to care for their son during the periods when their son was in Mother's custody?

III. Did the trial court err in its calculation of child support?

IV. Did the trial court abuse its discretion by awarding the parties joint legal custody and by giving Mother tie-breaking authority?

V. Did the trial court abuse its discretion by denying Father's motion to alter or amend the revised divorce judgment without holding a hearing?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

[2](...continued)
custody to both parties?

6. Did the lower Court abuse it's [sic] discretion in awarding the Appellee tie-breaking authority based upon verbal testimony that was refuted with documented evidence during trial?

7. Did the lower Court abuse its discretion in the court's denial of the Appellant's Motion to Alter and Amend without granting a hearing as requested, when the motion cited several incorrect findings and statements made by the court in its Judgment of Absolute Divorce that were used in determining the court's final custody order and when new evidence was provided substantiating claims made by the Appellant during trial, which had a direct impact on the safety of the minor child?

Father and Mother were married on October 23, 2004. Their marriage produced one child, a son named Shelton, who is now eight years old. From a previous relationship, Mother has an adult child, Jen Doughtery.

At all relevant times, the parties lived in a home they rented in Frederick. In 2012, they applied to become foster parents through the Frederick County Department of Social Services ("FCDSS"). Their application was approved and foster children were periodically placed in their home.

Father, age 44, is employed by Alcatel Lucent, earning $102,000 annually. He works from home and, as a result, is able to transport Shelton to and from school on a daily basis and to care for him after school.

Mother, age 46, is employed by FEMA, earning $83,183 annually. Mother typically works from home two or three days a week and works on-site at her office in Emmitsburg the rest of the week. Her job involves significant travel, but her travel schedule is set well in advance.

The parties separated on April 13, 2013. Mother moved out of the marital home and began renting a home nearby. In April 2014, Mother began renting a five-bedroom, single family home in Frederick. This home is located in the school district for the public elementary school where Shelton is enrolled in the second grade. Doughtery, who as mentioned is Mother's adult daughter, her ten-year old daughter, and her two-year old son,

live in this home with Mother.[3] Mother and Doughtery split the $2,195 monthly rent for the home, with Doughtery paying slightly more than half. Mother, Shelton, and Mother's granddaughter, have bedrooms on the second floor of the home, while Doughtery and her son have bedrooms in the basement of the home.

Father rents a townhome in Frederick. His townhome is not in the school district where Shelton is enrolled, but is located nearby.

During their separation, Father and Mother, by agreement, alternated custody of Shelton every three days. Both parties found this schedule unduly disruptive to their son's life and unmanageable.

On August 22, 2013, Mother filed a complaint for custody. Father filed a counter complaint for limited divorce. Mother later amended her complaint to seek an absolute divorce. Father subsequently filed a counter-complaint for absolute divorce. In her second amended complaint, Mother sought, as relevant here, sole legal and physical custody of Shelton and child support. In his counter-complaint, Father sought joint legal custody, with tie-breaking authority, or, in the alternative, sole legal and primary physical custody. He asked the court to grant both parties a right of first refusal if either party could not care for Shelton when he was in their custody.

The court held a merits trial over four days in July 2014. In her case, Mother testified

[3]Doughtery has a third child who does not reside with her. She is married, but she and her husband are estranged and he does not reside with her.

and called three witnesses: a coworker, a friend, and her mother. In his case, Father testified, called his mother as a witness, and recalled Mother. Mother and Father testified generally about their involvement in raising Shelton and about the conflicts between the parties since they separated. Mother's witnesses testified that she is a loving and involved mother. Father's mother testified that he is the primary caregiver for his son and is a loving and involved father.

On July 28, 2014, the court entered a judgment of absolute divorce and memorandum opinion. On August 13, 2014, the court entered an amended judgment of absolute divorce and a revised memorandum opinion.[4] We shall discuss the court's findings with respect to custody and child support, *infra*.

On August 25, 2014, Father filed a motion to alter or amend the amended judgment and revised opinion.[5] He also requested an *in banc* review by a three-judge panel pursuant to Rule 2-551, but later dismissed this request.

On November 20, 2014, the court denied all pending motions, including the motion to alter or amend the amended judgment and revised opinion.

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[4]The amended judgment differed from the original judgment only in that it required Father to continue to pay Shelton's health insurance premiums.

[5]The docket entries reflect that the amended judgment and revised opinion were "filed" on August 11, 2014, but were "entered" on August 13, 2014. The latter date controls for purposes of the timeliness of the motion to alter or amend. The tenth day after August 13, 2014 fell on a Saturday. Thus, Father had until the following Monday, August 25, 2014 to file a motion to alter or amend within the ten-day window that operated to toll the running of the time to file a notice of appeal. *See* Md. Rule 2-534; *Pickett v. Noba, Inc.*, 122 Md. App. 566, 571 (1998). Father filed his motion on August 25, 2014.

On December 18, 2014, Father noted the instant appeal.[6]

DISCUSSION

I.

As mentioned, in 2012, Father and Mother applied to FCDSS to become foster parents. In the portion of the application completed by Father, he disclosed that more than 15 years prior, when he was in his mid-twenties, he had been charged with a crime arising from his relationship with a 16-year old girl. The charge resulted in a disposition of probation before judgment. Father successfully expunged the disposition from his record.

During discovery in the divorce case, Mother's counsel deposed Father. She asked him if he ever had been arrested and if he ever had been charged with a crime. He answered "no" to both questions.

On June 23, 2014, Mother's counsel subpoenaed the custodian of records for the FCDSS to appear in court on the first day of trial and produce any records it had pertaining to Father, including his application to be a foster parent. The FCDSS moved to quash the subpoena or, in the alternative, for the court to enter a protective order with respect to its records.

On the first day of trial, the trial judge met in chambers with counsel for the parties

[6]Because, as noted, Father's motion to alter or amend tolled the running of the thirty-day period in which to appeal, his notice of appeal, filed within thirty days after the entry of the order denying that motion, was timely and preserved his challenges to the amended judgment and revised judgment, as well as his challenge to the denial of his motion to alter or amend.

and the attorney representing FCDSS. Pursuant to that off-the-record discussion, the court announced on the record that it was entering a protective order limiting disclosure of the records to the parties and their attorneys. Thereafter, FCDSS furnished to counsel a CD containing the relevant records.

On cross-examination, Father was asked whether he had been truthful in his deposition testimony when he stated that he never had been arrested. He answered that he had been truthful based upon his understanding of the law. He then was asked about the foster care application he had completed. Father's counsel objected, arguing that the prior criminal disposition disclosed in that application was not relevant and, even if relevant, the application did not show that Father had been arrested or charged with a crime, just that a probation before judgment had been entered against him. Mother's counsel responded that it was impossible for a probation before judgment to be entered against someone who had not been charged or arrested. She argued, moreover, that she did not intend to question Father about the charge itself, but merely to "challeng[e] his credibility." The court overruled the objection and allowed the questioning, opining: "I think, um, this is a fair question to ask, uh, dealing with the witnesses [sic] credibility assuming that he has previously testified or given any discovery responses under oath, um, to the contrary." Mother's counsel moved for the introduction of the foster care application into evidence. The court admitted it over objection.

On redirect examination, Father explained that he believed that it was "illegal for

someone to even ask you questions about something that has been expunged." Therefore, when he was asked in deposition questions concerning his criminal record, he believed he did not have to answer "Yes." At the conclusion of the trial, the court ordered the FCDSS exhibit sealed.

It its discussion of the "[c]haracter and reputation of the parties" in the court's revised opinion, it referenced the fact that Father had "acknowledged having been given probation before judgment approximately 17 years ago when he was in his mid-20s and involved with a 16 year old girl." The court found that both parties' character and reputation was "generally good."

Father asserts that the trial court erred by permitting Mother's counsel to question him about the foster care application in which he disclosed the entry of the probation before judgment because it had been expunged from his record and because any relevance was substantially outweighed by the danger of unfair prejudice. He also asserts that this evidence was admitted in violation of Md. Code (2001, 2008 Repl. Vol., 2014 Supp.), section 10-108(a) of the Criminal Procedure Article ("CP"). Finally, he maintains that the trial court violated its own ruling when it referenced Father's prior criminal charge in its revised memorandum opinion as evidence relevant to the "character and reputation of the parties."

Mother responds that the court properly permitted limited questioning on the subject of Father's probation before judgment to test Father's credibility, given that he had stated during his deposition that he never had been arrested, and properly admitted the FCDSS

records into evidence for that limited purpose.

We perceive no error. As a general rule, relevant evidence is admissible. Md. Rule 5-402. Relevant evidence nevertheless may be excluded by the trial court within its discretion if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. In the instant case, the court admitted evidence that Father had reported on his application to be a foster parent that he previously had been charged with a crime and had been given probation before judgment because that evidence tended to show that Father had lied about his criminal history during his deposition. It was admissible for this limited purpose. The court, as the trier of fact in this matter, also concluded that the relevance of the evidence for that purpose was not substantially outweighed by the danger of unfair prejudice to Father. The court did not abuse its broad discretion by admitting the evidence to impeach Father's credibility.

The trial court also did not violate CP section 10-108(a). That section prohibits any person from "open[ing] or review[ing] an expunged record or disclos[ing] to another person any information from that record" absent a court order from the court that ordered the record expunged. In the instant case, Father had disclosed his own expunged record in his foster care application. It was that application, not the expunged record, that the trial court admitted into evidence. CP section 10-108(a) has no bearing on this evidentiary ruling.

Finally, although the trial court in fact referenced Father's criminal charge in its revised opinion, the existence of the charge plainly did not have an impact on the court's ultimate custody ruling. The court found both Father and Mother to be fit and proper parties to share joint legal and physical custody of their son.

II.

Father contends the trial court erred by denying him a "right of first refusal" when Mother is unable to care for Shelton during a week when she is supposed to have him in her physical custody. Mother responds that the trial court did not abuse its discretion in declining to include a right of first refusal in its custody order.

This Court recently explained the standard of review applied to custody decisions:

> "[T]his Court reviews child custody determinations utilizing three interrelated standards of review. The Court of Appeals described the three interrelated standards in the case of *In re Yve S.*, 373 Md. 551, 819 A.2d 1030 (2003):
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> > . . . . [W]e point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8–131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.
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> *Id*. at 586, 819 A.2d 1030. Therefore, the reviewing court gives "due regard ... to the opportunity of the lower court to judge the credibility of the witnesses." *Id*. at 584, 819 A.2d 1030. Further, we acknowledge 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 [it] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] 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" child. *Id*. at 585–86, 819 A.2d 1030.

Reichert v. Hornbeck, 210 Md. App. 282, 303-04 (2013) (citation omitted).

In its revised opinion, the court explained that since their separation the parties had been sharing custody of Shelton by consent on a three-day alternating schedule. The court found that the parties were in agreement that that arrangement was creating conflict and was too disruptive to their son's schedule. With respect to Father's request for a right of first refusal, the court emphasized that while Mother regularly traveled for work, she had testified that her schedule was flexible and planned well in advance, suggesting that she could arrange for her travel to be during weeks when Shelton was not in her care. Moreover, when Mother was unable to care for Shelton, he would be cared for by Mother's adult daughter or his maternal grandmother. In light of these facts, the court found that granting Father a right of first refusal would "set[] up an opportunity for additional conflict" between the parties and, for that reason, would not be in the best interests of the child. We perceive no abuse of discretion by the court in so finding.

We reject Father's assertion that by not granting him a right of first refusal, the court granted rights to a third party custodian, violating his constitutional right to raise his child. The court awarded Father and Mother joint legal and shared physical custody of Shelton.

While Shelton is in Mother's custody, she has decision making authority to leave him in the care of a responsible adult, just as Father has the same authority during the periods when Shelton is in his custody. This case did not involve third party custody and the case law cited by Father is inapposite.

III.

Father contends the trial court erred by "excluding" Mother's "additional income" and "ignoring" his "business losses [and] extraordinary healthcare expenses" when calculating child support. We address each contention in turn.

Father argues that the trial court erroneously excluded from its income calculations Mother's "per diem" expense reimbursements and rent she received from Doughtery. Mother testified that FEMA paid her a "per diem" that varied, but did not exceed $40 per day, when she traveled for work. That amount covered meals and incidentals. Father asserts that pursuant to Md. Code (1984, 2012 Repl. Vol., 2014 Supp.) section 12-201(b)(3)(xvi) of the Family Law Article ("FL"), this was part of Mother's actual income. That section provides that actual income includes "expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business *to the extent the reimbursements or payments reduce the parent's personal living expenses*." (Emphasis added.) In the instant case, the evidence did not show that the per diem payments received by Mother reduced her personal living expenses. Rather, the evidence showed that those payments reimbursed her for expenses she would not have incurred but for her business

related travel. For that reason, the court did not err by not including those amounts in its calculation of Mother's actual income.

Mother also testified that she paid $1,050 in rent each month and that Doughtery paid $1,150 in rent each month for the home they shared. Father asserts that this amounted to rental income that Mother received from Doughtery. We disagree. Mother and Doughtery shared a home and shared the rent expenses associated with their home. Mother accurately reported her share of the rent on her long-form financial statement. She did not realize any income from Doughtery paying slightly more than half of the rent for the house that they shared and the court did not err by not including those monies as income to her.

Father argues that the court should have deducted from his gross income approximately $10,000 in business losses he incurred in 2013. He cites to his 2013 tax return, on which he reported these business losses. Mother responds that the trial court made a non-clearly erroneous finding that Father earned $102,000 annually based upon his long form financial statement admitted into evidence at trial. We agree. Father reported his gross income as $8,500 per month. The court extrapolated from that amount to reach the annual gross income figure it used in its child support calculations. Father may not be heard to complain that the income figure he supplied to the court is erroneous.

Finally, Father contends the court erred by not including in its calculation of child support the amounts he had and will continue to pay for Shelton's "extraordinary medical expenses" and the amount he was ordered to pay for Shelton's health insurance premiums.

With respect to the medical expenses, although Father indicated on his financial statement that he paid for Shelton's ophthalmological, dental, and health expenses, amounting to $166 per month, he did not testify to the nature of these medical expenses or introduce any evidence about them. We perceive no error by the court in not including those expenses in its calculation of child support.

In the revised judgment, Father was ordered to "continue to pay for the minor child's health insurance." Father argues that pursuant to FL section 12-204(h)(1), the cost of Shelton's health insurance should have been "added to the basic child support obligation and . . . divided by the parents in proportion to their adjusted actual incomes." Father reported on his financial statement that he paid $131.50 per month for health insurance premiums for himself. He does not point us to any evidence in the record showing how much, if any, of that premium payment was for Shelton's health insurance. On this basis alone, the trial court did not err by failing to include the cost of health insurance for Shelton in its child support calculation. Father may move to modify child support on this basis if he can present evidence of the cost of Shelton's health insurance and if the inclusion of that amount would affect the amount of Father's child support obligation.

IV.

Father contends the trial court abused its discretion by awarding the parties joint legal custody because the evidence showed that they were unable to reach "collaborative decisions" during their separation and they had a track record of conflict, as evidenced by the

entry of a final protective order against Mother. Alternatively, he argues that if joint legal custody was appropriately ordered, the court nevertheless abused its discretion by granting Mother, and not him, tie-breaking authority.

As discussed, the court's ultimate custody determination is reviewed for abuse of discretion. The court found that the parties had co-parented their son with little conflict during their marriage, but that, since their separation, they had had "considerable difficulty reaching joint decisions." The court determined, however, that by giving one parent tie-breaking authority and by establishing a set custody schedule, including holiday and summer visitation, the sources of conflict would be lessened and the parties could collaborate to make joint decisions for their child. The trial judge presided over a four-day trial and heard considerable testimony from Mother and Father and their witnesses. He plainly was in the best position to assess the potential for the parties' to cooperate to co-parent their son and we will not second guess his ultimate ruling that joint legal custody was in the best interests of Shelton.

The trial court's assessment that Mother was better suited to have tie-breaking authority also will not be disturbed on appeal. The court found that Father was more prone to exclude Mother from joint decisions and, on this basis, determined to award Mother tie-breaking authority. This determination turned on the court's credibility findings and we give due deference to the court's finding.

V.

Finally, Father contends the trial court erred by denying his motion to alter or amend the amended judgment and revised opinion. In that motion, in addition to raising the same arguments he raises on appeal, Father argued, *inter alia*, that he had evidence that Doughtery's husband had since moved back into the home she shared with Mother and that two other people also had moved into that home[7]; that the court should have included Shelton's birthday in the holiday schedule; that the court erroneously found as a fact that Shelton took medication for ADHD when it was Mother who was prescribed that medication; that it was Shelton's preference to live with Father; and that the access and vacation/holiday schedules were not "supported by the evidence." Father argues, moreover, that the court should have held a hearing on his motion.

The trial court did not abuse its broad discretion in denying Father's motion to alter or amend the judgment and it was not required to hold a hearing on Father's motion to alter or amend before denying it. Md. Rule 2-311(e) ("When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.").

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

[7]The parties currently are litigating a motion to modify custody in the circuit court based in part on these allegations of changed circumstances.