Circuit Court for Washington County
Case No. C-21-FM-23-000910

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0278

September Term, 2024

ASHLEY N. POOLE

v.

ANTONYO C. WILSON-THOMPSON

Nazarian,
Friedman,
Zic,

JJ.

Opinion by Nazarian, J.

Filed: October 28, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Ashley N. Poole ("Mother") and Antonyo C. Wilson-Thompson ("Father") became embroiled in a custody battle over their two children. Mother sought sole legal and physical custody and Father sought joint legal and physical custody. The Circuit Court for Washington County granted the parties joint legal and physical custody and gave Mother tie-breaking authority and, although not before it, the court terminated Father's child support obligations. Mother appeals and asks us to reverse those decisions. We affirm the first and reverse the second.

I. BACKGROUND

For eight years, dating back to around 2014, Father and Mother were involved romantically and lived at Mother's home with Mother's child from a previous relationship. The couple never married but had two children of their own—A, born on February 15, 2017, and B, born on July 26, 2019.[1] Three years after B's birth, in 2022, the couple separated.

After the couple split, Father began making child support payments to Mother. Father also met Keshia Simmel ("Fiancée") and moved in with her. Like Mother, Fiancée has children from a prior relationship. Since separating, Father and Mother attempted to share custody of A and B, but after some disputes, litigation ensued.

Mother filed a Complaint for Custody of A and B on June 14, 2023. In the Complaint, she sought sole legal and primary physical custody of the children with visitation for Father. Father filed an Answer and asked the court to dismiss Mother's

[1] We refer to the children as "A" and "B" to protect their privacy.

Complaint. He also filed a counterclaim that sought joint legal and physical custody of A and B.

On October 21, 2023, the couple agreed on and memorialized a parenting plan ("Agreement"). The Agreement granted Mother sole physical custody of A and B but gave both parents joint legal custody of the children. That arrangement also covered information sharing between Father and Mother, A and B's schooling, the parents' visitation schedule during the school year, the parents' birthdays, the holidays, and finally, the parents' financial and other additional agreements. Under the Agreement, Mother would have A and B from Monday to Thursday and every other Friday, and Father would have the children every Thursday evening and drop them off at school on Friday mornings. Additionally, the Agreement gave Father visitation with the children every other weekend from Friday evening to Monday morning. That schedule would remain in place for A and B's winter, summer, and spring breaks. The Agreement also acknowledged the parents' child support case and stated that forthcoming hearings would resolve that obligation.

The parties were scheduled for a *pendente lite* hearing before a family magistrate on February 13, 2024. Mother didn't appear; Father did. At the hearing, the magistrate acknowledged the parties' Agreement and the fact that Father and Mother had followed it generally. Father, however, asked for shared physical custody by alternating parenting time with Mother week to week, a request the magistrate denied. Given the Agreement and the fact that both parties had signed it, the magistrate ordered Father and Mother to continue abiding by it and noted that Father could raise custody at the merits hearing. The court then

issued a Custody and Visitation *Pendente Lite* Order enforcing the magistrate's recommendations.

The circuit court held a merits hearing on March 7, 2024. This time, both parties were present. After opening statements, the court heard testimony from Mother, Father, and Fiancée. Both parties participated fully and directly—the court gave both an opportunity not only to be heard but to respond to the other, and the court witnessed the parents' demeanor as it heard their disagreements (which included rather blunt and colorful characterizations of the other and admissions of things they had said and that the children had overheard). The parties introduced documentary evidence to which neither party objected. Importantly, both parties asked the court to modify the custody terms of the Agreement, specifically those related to parenting time. They did not present an agreed upon set of terms for the court to approve, however. The parties agreed on most things, and commendably so, but both wanted the court to deviate from the terms of the Agreement in its ultimate order and asked the court to resolve their differences.

After the merits hearing, the court granted Father and Mother joint legal and physical custody and awarded Mother tie-breaking authority. The court stated that Father was to have A and B every other week, beginning on Thursday evening and ending the following Thursday evening. The court also incorporated the information-sharing provision, the holiday schedule, the parents' birthday provisions, and the financial and additional agreements provisions from the Agreement. Finally, the court terminated

Father's child support obligation other than his obligation to repay arrears. Mother subsequently noted a timely appeal.

We add additional facts as appropriate below.

II. DISCUSSION

Mother presents two issues for our review, which we restate as follows: (1) whether the circuit court abused its discretion by awarding Father and Mother joint legal and physical custody and awarding tie-breaking authority to Mother; and (2) whether the circuit court erred as a matter of law by terminating Father's child support obligations.[2] As to the first question, we hold that the circuit court did not abuse its discretion. As to the second, we hold that the circuit court erred by terminating child support on this posture.

A. The Circuit Court Did Not Abuse Its Discretion In Its Custody Ruling.

Appellate courts "review a trial court's custody determination for abuse of discretion." *Santo v. Santo*, 448 Md. 620, 625 (2016). A trial court abuses its discretion where "'no reasonable person would take the view adopted by the [trial] court' or when the court acts 'without reference to any guiding rules or principles.'" *Id.* at 625–26 (*quoting In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997). An abuse of discretion

[2] Mother listed the Questions Presented in her brief as follows:

I. Whether the trial court erred as a matter of law in disregarding the parties' parenting plan agreement.
II. Whether the trial court erred in modifying the child support order issued in a separate case not before the court.

Father did not file a brief.

may also occur where the trial court's ruling is "clearly against the logic and effect of facts and inferences before the court or when the ruling is violative of fact and logic." *Id.* at 626 (internal quotations omitted). Nevertheless, this standard is deferential, and we won't reverse a trial court decision unless that decision is "well removed from any center mark imagined by the reviewing court." *Id.* (internal quotations omitted). As in all child custody disputes, the best interest of the child guides our review, as it did the trial court's determination. *Id.*

Mother argues on appeal that once she and Father entered into a parenting agreement, "the agreement conclusively resolved the issue of custody, and the litigation should have concluded with the entry of a consent order." Father hasn't filed a brief, so we don't know his response. But Mother's suggestion that the circuit court failed to enforce a uniformly agreed set of terms misapprehends the case the circuit court decided. Although the Agreement resolved many of the issues that couples bring before courts in custody disputes, both parties asked the circuit court to modify portions of the Agreement relative to parenting time. Moreover, Mother doesn't identify any specific deviations from the Agreement or explain why the court erred in ruling as it did. Ultimately, though, the parties asked the court to award custody in a manner that deviated from the terms of the Agreement, and the court's decision to split parenting time as it did and to award tie-breaking authority to Mother was altogether reasonable and appropriate on this record.

1. The pendente lite *order.*

Although Mother didn't ask the circuit court to enforce the Agreement as written at the merits stage, she seems to be arguing that the Agreement had some sort of preclusive effect (although, again, it's not clear what). In fact, the parties were seeking deviations from the Agreement even at the *pendente lite* phase. And although, as we'll discuss, the family magistrate followed the Agreement at that point, that decision didn't bind the circuit court to follow it, especially where the parties asked for deviations.

Child custody cases often begin with a *pendente lite* determination. *Frase v. Barnhart*, 379 Md. 100, 111 (2003). A *pendente lite* ruling serves as a temporary resolution, pending a ruling on the merits, that affords immediate stability for the parties' children. *Id.* It is not meant to have a permanent effect—it remains subject to a full evidentiary hearing and final resolution of the dispute. *Id.* And a *pendente lite* order does not bind the circuit court when it makes its final resolution. *Id.*

In this case, a family magistrate held a *pendente lite* hearing and the court issued an order on February 13, 2024. The magistrate recognized the Agreement, noting a paragraph in it that claimed the custody dispute was effectively resolved. The magistrate also recognized that Father's request for shared physical custody, an alternating week-to-week schedule with Mother, deviated from the Agreement.

Nobody filed exceptions to the magistrate's recommendation. But as the magistrate recognized, the *pendente lite* recommendation was subject to the pending merits hearing, which was less than a month away on March 7, 2024. In other words, the *pendente lite*

order acknowledging Father and Mother's Agreement remained in effect until the merits hearing but did not bind the circuit court nor compel a particular result at the merits hearing. *See Kerns v. Kerns*, 59 Md. App. 87, 97 (1984) (recognizing that even though *pendente lite* order awarded parent custody, that award was "by virtue of a *temporary, pendente lite* order to remain effective only until there could be a final adjudication of the custody dispute" (emphasis in original)).

2. Taylor-*made custodial findings.*

After the merits hearing, the circuit court granted Father and Mother joint legal and physical custody. The court also awarded Mother tie-breaking authority in connection with any decisions regarding A and B for which she and Father can't agree. Nevertheless, Mother argues these were erroneous decisions that warrant reversal. We disagree.

There are two kinds of custody: legal and physical. "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." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). Joint legal custody grants both parents an equal voice in making those decisions, and neither parent has rights superior to the other. *Id.* Joint legal custody also takes "multiple forms," one of which is joint legal custody with a tie-breaking provision. *Id.* at 303. This approach allows the parents to decide matters affecting their children together, but if they can't, the parent awarded tie-breaking authority makes the final call. *Santo*, 448 Md. at 632–33.

Physical custody, also called parenting time, is "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." *Taylor*, 306 Md. at 296. Joint physical custody "may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights." *Id.* at 297.

When a circuit court determines custody, particularly whether to award joint or sole legal custody, it considers the "*Taylor* factors," as first enumerated by the Maryland Supreme Court in *Taylor v. Taylor*: (1) the parents' capacity to communicate and reach shared decisions affecting the children's welfare; (2) the parents' willingness to share custody; (3) the parents' fitness; (4) the relationship established between each child and each parent; (5) the children's preferences; (6) the potential disruption of the children's social and school lives; (7) the geographic proximity of the parental homes; (8) the demands of each parent's employment; (9) the age and number of the children; (10) the sincerity of the parents' requests; (11) the parents' financial statuses; (12) the impact on state and federal assistance; and (13) the benefit to the parents. *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 255–56 (2021). The court does not weigh these factors equally—the parents' capacity to communicate with each other and reach shared decisions affecting the children's welfare is the most important factor. *Taylor*, 306 Md. at 304.

In this case, the circuit court analyzed the factors properly when granting Father and Mother joint legal and physical custody and awarding Mother tie-breaking authority:

- **The fitness of the parents:** "Both parents appear fit. They appear to be interested sincerely [in] the [wellbeing] of their children. They are involved in their lives. It is clearly evident that the [Mother] has taken steps to address the difficulties academically and behaviorally that [A] has. [Father] has also taken steps to make sure that the children have a place where they can have the proper accommodations when they are at his home and he clearly demonstrates an interest [and] desire to be involved in their life to a greater extent than [has] already occurred. And he has regularly been involved with them since this parenting plan was put in place."
- **The request of each parent and the sincerity of the request:** "As I indicated both parents are sincere in their request. I think they are sincere that they want what is best for the wellbeing of their children." During the merits hearing, Mother detailed A's medical issues and how Mother had to take A to numerous medical appointments. Because of these issues, Mother said that too much change is detrimental for A, but she acknowledged that the children need a relationship with Father.
- **Any agreements between the parents:** "Obviously, there was an existing parenting plan. The testimony before the Court was that that is generally been working. The Court places great reliance on the fact that there is a plan in place. It was agreed to and that, that it has been working."
- **The willingness of the parents to share custody:** "There has been expressions of desire to act as co-parents. There has also been indications before the Court today that both parents believe that it is important for the children to have a good relationship with the other parents and they have taken acts to foster that relationship and to maintain that relationship."
- **Each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest:** "[T]he Court finds that the parents take satisfactory steps in these regards and are making efforts to keep their children involved with the other parents as well as to integrate the children with their stepsiblings." For example, A and B share a room with Fiancée's daughter when they stay with Father.

- **The age and number of children:** "[Mother] has an 18-year-old son. [Fiancée] has an 11-year-old daughter and a 13-year-old son."
- **The ability of the parents to communicate and to reach shared decisions affecting the child's welfare:** "It exists. I think it's fair to say that it could be strengthened. There is evidence before the Court and admissions from the parties that they do have difficulty communicating. That there is a preference that they communicate directly with one another only and not with significant others. And that they prefer that those communications preferably be by text message or something that is not as volatile. The Court will tell you that there is an App called App Close. A-P-P C-L-O-S-E. That is specifically for people in co-parenting relationships. It facilitates communications. And I'm going to order you to communicate with that manner. I assume you both have smart phones."
- **Parental employment and opportunities for time with the child:** "There's been testimony before the Court that both parents are able to accommodate the children's schedule, get them to appointments. There's testimony that [Father] is willing to provide transportation to schools and to appointments. That will be expected. It is important that the children receive the care that they need to address their issues. So, you may be driving up and down 70 a lot but that needs to occur."
- **The relationship established between the child and each parent:** "The Court finds that it's a well-established relationship." There was also no testimony to the contrary.

The circuit court weighed the evidence carefully and we see no abuse of discretion in its decision to award joint custody with a tie breaker to Mother under these circumstances. Even so, Mother asserts that because the parties had reached an Agreement, the court needed to justify the deviation and explain how deviating from that Agreement was in the children's best interest. We disagree for a number of reasons.

First, the court weighed the relevant factors in a manner consistent with the best-interests standard. The court highlighted, for example, that Father and Mother sought custody sincerely and that both wanted "what is best for the wellbeing of their children."

In assessing the parental employment and opportunities for time with the children, the court noted that Father would be "expected" to transport the children to school and medical appointments and that this obligation would burden Father, as he "may be driving up and down [Interstate] 70 a lot, but that needs to occur." And in light of the testimony about A's extensive medical history, including how A benefits from consistency, the parenting time allocation, with each parent having one full week with the children at a time, seems consistent with A's best interest.

Second, even if these parents struggle to communicate (and some of their exchanges during the merits hearing suggest as much), the court still had ample evidence to support its decision to award joint custody with a tiebreaker. Because parents' ability to communicate is the most important factor under *Taylor*, "[o]nly where the evidence is strong in support of a finding of the existence of a significant potential for compliance with this criterion should joint legal custody be granted." *Id.* at 307. The court acknowledged that communication was a weakness for the parties in this case, finding it "fair to say that [this factor] could be strengthened." The record nonetheless supported the court's finding that the parents had that potential. The court identified a solution, an app called App Close that "is specifically for people in co-parenting relationships . . . [to] facilitate[] communications," and directed them to use it. The court also pointed out that Father and Mother's Agreement had "been working," and credited Father's testimony that communication between him and Mother had been "good since this court and stuff started."

The court had a sufficient basis to find that these parents have the potential to communicate well enough to manage joint legal and physical custody.

Third, both parents sought deviations from the terms of the Agreement and the circuit court wasn't bound at the merits stage, by virtue of the magistrate's *pendente lite* recommendation, to enshrine the Agreement exactly as written. *Frase*, 379 Md. at 111. The court didn't abuse its discretion by considering the parties' requested deviations from their earlier Agreement—deviations motivated, they claimed, by the experience of trying to implement the Agreement—and resolving their differences.

Fourth, the court's decision to award Mother tiebreaking authority was grounded amply in the evidence adduced at the merits hearing. Mother testified about A's extensive medical history and her role in ensuring that A received the appropriate treatment. In awarding Mother tie-breaking authority, the court cited the fact that Mother had "taken the lion share of the work up until this point with seeing to [the children's] medical, dental needs and appointments," and therefore afforded Mother's contribution greater weight. *Santo*, 448 Md. at 646 ("[A] court . . . ruling on a custody dispute may, under appropriate circumstances and with careful consideration articulated on the record, grant joint legal custody to parents who cannot effectively communicate together regarding matters pertaining to their children . . . [and] include tie-breaking provisions in the joint legal custody award.").

In sum, the record supports the circuit court's weighing of the relevant custody factors, we see no abuse of discretion in the court's decision to award joint legal custody

with tie-breaking authority to Mother and to allocate parenting time as it did, and we affirm the custody portion of the judgment.

B. The Circuit Court Erred in Terminating Father's Child Support Obligation.

One more issue remains. In addition to the custody rulings, the circuit court terminated child support and directed Father to "follow up with DSS to confirm termination." Mother argues that the court lacked jurisdiction over the child support case and could not terminate Father's support obligation. We reach the same conclusion as Mother but for different reasons: (1) Father did not file a motion to modify his support obligations; and (2) the court did not have statutory authority to terminate Father's support obligations without one. This issue turns on questions of statutory construction that we review *de novo*. *Kpetigo v. Kpetigo*, 238 Md. App. 561, 569 (2018); *Walter v. Gunter*, 367 Md. 386, 392 (2002) ("[W]here the order involves an interpretation and application of Maryland statutory and case law, [the appellate court] must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review.").

The relevant statute contains two provisions for modifying a child support award: (a) "The court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance"; and (b) "The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification." Md. Code (1988, 2019 Repl. Vol.), § 12-104 of the Family Law ("FL") Article. Neither provision authorized a change in child support in this case on this posture.

Under FL § 12-104, a circuit court may not retroactively modify a child support obligation to a date *before* a support obligor—in this case, Father—files a motion to modify that support. *Id.* We examined this statute's legislative history in *Harvey v. Marshall*, 158 Md. App. 355 (2004), *aff'd*, 389 Md. 243 (2005), and held that the General Assembly, "in using the term 'modify' in FL section 12-104 simply followed the language of the Federal statute, intending to prohibit, *inter alia*, the courts from wiping out an arrearage accrued during periods before the filing of a motion for modification." *Id.* at 370. As such, there is no statutory or case law authority to modify a child support order without a petition for modification.

Here, there is no record of Father ever moving to modify or terminate the existing child support order. To be sure, the circuit court entered that child support order before determining custody. But the statute required Father unambiguously to file a motion to modify the child support order *before* the court could consider modifying it. This is important because the child support can't be modified without the moving party demonstrating first that there has been a material change in circumstances. Because Father never filed a motion to modify, this prerequisite wasn't (and couldn't be) met, and the circuit court lacked the authority to modify the existing child support obligation. *See O'Brien v. O'Brien*, 136 Md. App. 497, 509 (2001), *rev'd on other grounds*, 367 Md. 547 (2002) (recognizing that because parent never moved to modify child support order against him, circuit court could not retroactively modify order, and parent could not unilaterally stop paying child support until filing and succeeding on motion).

In addition, the circuit court's order states that the child support was "terminated," but the statute provides no authority to terminate support altogether. The Maryland Supreme Court addressed this in *Wills v. Jones*, 340 Md. 480 (1995), noting that if the circuit court in that case intended to terminate the father's child support obligation, it lacked statutory authority to do so. *Id.* at 486. The Court reasoned that theoretically, a court could relegate one's child support obligation to $0 a month if that obligor's income was low enough, such as when an obligor is incarcerated. *Id.* at 487. But even in those situations, the obligation remained: even though that person would not be paying anything, the support order would not be eliminated but would remain subject to a change in future circumstances that might warrant an increase. *Id.* The statute does not contain any provision that would justify terminating an obligor's child support obligation entirely.

For these reasons, we reverse the portion of the circuit court's order terminating Father's child support obligation.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE DIVIDED EVENLY.