Circuit Court for Montgomery County
Case No.: C-15-FM-22-000517

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 0505

September Term, 2023

S.K.

v.

A.N.

Berger,
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, J.

Filed: November 7, 2023

S.K.[1] ("Mother"), appellant, and A.N. ("Father"), appellee, are the parents of one minor child, "C". When C was three years old, Father filed a complaint for sole legal custody in the Circuit Court for Montgomery County. A trial on the merits was held on December 7 and December 8, 2022 and February 6, 2023. The court issued an oral opinion on April 18, 2023, awarding the parties shared physical custody according to a graduated access schedule and joint legal custody with tie-breaking authority to Father. On May 23, 2023, the court entered a written custody and child support order. This appeal followed.

Mother presents the following issues for our review, which we have rephrased as follows:[2]

1. Whether the circuit court erred or abused its discretion in excluding certain medical records.

2. Whether the circuit court erred or abused its discretion in excluding evidence and testimony relating to C's school records.

[1] We use the parties' initials to protect the child's privacy.

[2] The issues as presented by Mother are:

1. Whether it was an abuse of discretion and/or contrary to law for the trial court to fail to consider the medical information and medical records related to [C] (4+ year old disabled girl with autism spectrum disorder).

2. Whether it was an abuse of discretion and/or contrary to law for the trial court to fail to consider [C]'s school records and the testimony of MCPS expert (Dr. Julie Shields) related to [C]'s needs as [a] disabled student with autism.

3. Whether it was an abuse of discretion and contrary to law for the trial court to fail to consider [C]'s "best interests" in imposing the access/visitation schedule and the "tie breaker" now specified in the "custody and child support order."

3. Whether the circuit court erred or abused its discretion in ordering a graduated access schedule and tie breaker authority to Father.

FACTUAL BACKGROUND

The parties' one minor child, C, was born in 2018. The parties were never married. They resided together for approximately one year before they separated in 2019.

On February 2, 2022, Father filed a complaint for custody and, on September 9, 2022, an amended complaint for custody. On May 2, 2022, Mother filed an answer and counter-complaint for custody and, on September 11, 2022, an amended answer. Following a hearing, the parties entered into a *pendente lite* agreement, providing that Father pay Mother $600 per month in child support and awarding Mother primary physical custody. The agreement further provided that Father have supervised visitation at the Visitation House every other weekend, and supervised visitation during off weekends by agreement. Following the parties' separation in 2019, Father saw C regularly until December of 2021. Between December 30, 2021 and August 25, 2022, Father did not have any visits with C.

A three-day merits trial was held on December 7 and 8, 2022 and February 6, 2023. Both parties were represented by counsel. The following facts were elicited at the trial. Father is 39 years old. He is an attorney who owns his own practice earning approximately $4,000 per month. He has two current addresses: one in Washington, D.C. and one in Silver Spring, Maryland. He works from his home office in Silver Spring. He testified that his work schedule is flexible, enabling him to be available for C for school pick up and drop offs.

Father testified that he provided financial support to Mother during October and November of 2021 at the time she was evicted from the apartment they had shared. After Mother was evicted from the apartment, she did not allow him to see C. In August of 2022, Father began supervised visits with C. He became concerned about C's delayed speech and learning and contacted Mother regarding his concerns, but she did not respond. He attempted to enroll C in the Montgomery County Movement Center for speech and language therapy but was unsuccessful because Mother declined to participate in the program. Father inquired at C's preschool for information regarding her schooling but the school refused to provide him any information because he was not listed as her father on the enrollment forms. Father asked Mother to complete the forms at the school to provide him access to C's records and she failed to do so.

Mother was 33 years old at the time of trial. She lived with C in a shelter for a period of time after she separated from Father and after she was evicted from her apartment. In April of 2022, she moved into an apartment in Silver Spring, where she currently resides. She works as a nursing assistant, earning approximately $2,496 per month at a rate of $15.65 per hour, 36 hours per week. She testified that she works overnights, Friday to Monday morning, from 7:00 p.m. to 7:00 a.m. and her mother ("Maternal Grandmother") cares for C while she works.

Mother testified that C has autism and requires supervision and security measures to prevent her from wandering. C has difficulty learning to use the bathroom independently and is not potty trained. Mother testified that she believed the best custody arrangement was for her to have primary custody of C to enable her to provide C with stability and the

services she needs. Mother believed that Father was capable of taking care of C during the day, but not overnight because he parties, travels, and drinks alcohol on weekends.

Mother stated that, after several visits, Father had returned C in oversized shoes, clothing that did not belong to her, and soiled clothes. On at least one occasion, he dressed her in clean clothes and returned her soiled clothes in a separate bag. Mother testified that Father did not have stable housing because he lived with a roommate in an environment that was not child-proof and not appropriate for a toddler.

Mother also testified that Father had sexually assaulted her in December of 2018 while she was recovering from her C-Section. She stated that Father attempted to have sexual intercourse with her despite her protest that she had not been medically cleared for intercourse. Subsequently, she filed for a protective order, alleging that Father had abused her and sexually assaulted her.

Maternal Grandmother testified that she was currently living with Mother and C. She had observed Mother tend to all of C's needs and care for C "in some of the most difficult situations." She testified that Mother had taken C to doctors' appointments and speech therapy and consulted with teachers at school. She stated that she never observed Father feed, bathe, or care for C when the parties lived together.

Maternal Grandmother testified that in the summer of 2019, Father attempted to sexually assault her while she was sleeping on the parties' couch. She recalled awakening to Father on top of her, smelling of alcohol, and attempting to have sex with her. Father denied sexually assaulting both Mother and Maternal Grandmother.

Solomon Musoke testified that he had been Father's friend since 2015 and that he was one of the agreed upon supervisors who supervised Father's visits. Mr. Musoke described Father as calm and attentive with C. He testified that based on his experience supervising Father's parenting time, he had no concerns about Father's parenting and he found him to be a fit parent to care for C.

Amanda Taylor testified as an expert in the field of custody evaluations regarding the custody evaluation she completed in this case. In July 2022, Ms. Taylor was assigned to conduct a court-ordered custody evaluation. Ms. Taylor observed Father with C at the courthouse because Mother was not comfortable with Father being observed in his home with C. Ms. Taylor found that Father interacted with C appropriately and she had no concerns about Father's ability to interact with C.

Ms. Taylor also visited Father's home and met Father's roommate. She found the home to be safe and suitable for a child of C's age, noting that C had her own room, bed, and clothing at Father's home. Father reported to Ms. Taylor that his primary concern was Mother's judgment related to C, specifically that she had not adequately addressed C's developmental needs and refused to work with him to put services in place for C. He was also concerned that he and Mother had not been able to communicate effectively or work together to address C's developmental issues.

Ms. Taylor stated that Mother preferred that Father continue to have supervised visitation with C. Ms. Taylor reviewed the Child Welfare Services records from 2019 regarding an investigation of Mother's allegations that Father had returned home intoxicated and was aggressive toward her while C was nearby, placing C in danger. Father

denied Mother's allegations and denied using alcohol since C's birth. Ms. Taylor found that there was no evidence to support either party's claim. A substance abuse evaluation conducted in January of 2019 indicated that Father did not have a substance abuse problem, and Ms. Taylor found no evidence of Father abusing alcohol.

Ms. Taylor noted from her observations of C, and her interview with Patricia Young, the nurse practitioner in C's pediatric office, that C had developmental and learning delays. Ms. Young informed Ms. Taylor that C had been referred to a developmental pediatrician, but she had not received documentation showing that C had consulted a developmental pediatrician. Ms. Young asked Mother about whether she had taken C to a developmental pediatrician and Mother responded to her that she had enrolled C in Head Start and that C was no longer eligible for Child Find. Mother reported that a therapist at the shelter had informed her that it would be best for C to be in school with other children, as children often outgrow the behavioral issues that C had displayed. Ms. Taylor noted that Child Welfare Services had recommended that C be enrolled in the Montgomery County Infants and Toddlers Program in 2019.

Ms. Taylor opined that C's developmental issues had not been properly addressed and Mother had not followed the recommendations made by C's medical provider. In her opinion, Father seemed to understand that intervention was critical, and he had been proactive in finding resources for C. Based on C's young age, Ms. Taylor indicated that it was in C's best interest that both parents be involved in making decisions and obtaining services for her. Ms. Taylor recommended a graduated access schedule to allow the parties time to work toward a shared residential custody arrangement. Based on her concerns

regarding Mother's ability to obtain appropriate support and follow through on referrals for C, and her opinion that Father had been proactive, she recommended that the parties be awarded joint legal custody with Father having tie-breaking authority.

The court issued an oral opinion on April 18, 2023, followed by a written order entered on May 23, 2023, setting forth a graduated access schedule for shared physical custody, and ordering joint legal custody with Father having tie-breaking authority.

As stated above, Mother timely appealed.

DISCUSSION

Standard of review

"Pursuant to Maryland Rule 8-131(c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." *Friedman v. Hannan*, 412 Md. 328, 335 (2010). We scrutinize factual findings under the clearly erroneous standard. *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013). If there is competent evidence produced to support the trial court's findings, its conclusion, based on those findings, is not clearly erroneous. *In re M.H.*, 252 Md. App. 29, 45 (2021) (citing *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). We review the trial court's legal conclusions *de novo*. *Jackson v. Sollie*, 449 Md. 165, 173-74 (2016).

We review a trial court's ultimate determination of custody for abuse of discretion. *Santo v. Santo*, 448 Md. 620, 625 (2016). "An abuse of discretion may occur when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Gizzo v. Gerstman*, 245 Md.

App. 168, 201 (2020). In applying this deferential standard of review, we recognize "the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses." *Id*. (cleaned up). "The trial judge who sees the witnesses and the parties, and hears the testimony is in a far better position than the appellate court, which has only a transcript before it, to weigh the evidence and determine what disposition will best promote the welfare of the child." *Id*. (cleaned up).

1. The trial court did not abuse its discretion in excluding certain medical records

Mother contends that the trial court erred in failing to fully consider certain pediatric medical records from Johns Hopkins Community Physicians ("JHCP"), identified as Defendant's Exhibit 1. She asserts that the records showed that it was Mother, and not Father, who obtained medical services to address C's significant developmental delays. She contends that the court's rejection of those medical records and failure to recognize C as a disabled child with autism led to an erroneous custody decision.

During cross-examination of Ms. Taylor, Mother's counsel sought to admit medical records from JHCP, identified as Defendant's Exhibit 1. Father's counsel objected that he had not received reasonable notice of the documents and had not had an opportunity to review the documents. Mother's counsel stated that the records had been received on the previous day in response to a subpoena. Mother's counsel argued that she sought to introduce the documents to show that Ms. Taylor had reviewed "only part of the record" and based the conclusions in her custody evaluation on a partial record. The court

determined that Father had not been provided reasonable notice of the documents contained in Defense Exhibit 1, and excluded the documents from evidence.

Maryland Rule 2-401(e) requires a party who receives material information before trial to promptly supplement discovery responses. Trial judges have wide discretion in deciding sanctions for discovery failures. *Rodriguez v. Clarke*, 400 Md. 39, 56 (2007); *Sindler v. Litman*, 166 Md. App. 90, 123 (2005) (noting that a trial court has "considerable latitude" in imposing sanctions (quotation marks and citation omitted)). Maryland discovery rules are designed "to encourage liberal discovery and minimize surprise at trial." *Hadid v. Alexander*, 55 Md. App. 344, 350-51 (1983) ("Where a party who is under a duty to supplement information willfully refuses to do so, the amended information should not be admitted into evidence at trial."). We will only reverse a trial court's decision regarding discovery sanctions if the trial court abused its discretion. *Pinsky v. Pikesville Recreation Council*, 214 Md. App. 550, 590 (2013) (noting that a trial court's exercise of discretion in determining if sanctions should be imposed "is reversed on appeal only in the presence of an abuse of that discretion"); *Sindler*, 166 Md. App. at 123 ("[A]ppellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery.").

The excluded medical records were not the only records that showed that Mother had brought C to the pediatrician to address C's developmental delays. The trial court had admitted into evidence the medical record of C's office visit to JHCP on March 25, 2022 as Defendant's Exhibit 2. That medical record stated: "[C] is here with her mother who is concerned about [C]'s development." The trial court also referenced in its opinion some

of the pediatric medical records that it had excluded at trial. The court specifically found that "[C] has autism and some delays in her speech, development, and potty-training." Accordingly, Mother's contention that the court failed to recognize that C is a disabled child with autism whose care has always been provided by Mother and Maternal Grandmother is without merit. Because the record demonstrates that the court considered medical records of C, and clearly recognized that C was a child with autism and developmental delays in making its custody determination, the trial court's exclusion of additional JHCP pediatric records was not an abuse of discretion.

2. The trial court did not abuse its discretion in excluding the testimony of Dr. Shields and certain additional school records

Mother contends that the trial court erred by refusing to allow Dr. Shields to testify and by excluding school records, with the exception of C's Individual Education Plan ("IEP"), and by failing to rely on that evidence in making its custody decision.

Mother's counsel advised the trial court that she sought to call Dr. Julie Shields, a school psychologist, to testify as a fact witness regarding her observations of C. Father's counsel objected, arguing that Mother did not disclose Dr. Shields as a potential witness, and he had not been provided with Dr. Shields' report. After reviewing the report, Father's counsel further objected to Dr. Shields' testimony on the grounds that Dr. Shields' report contained expert opinions and Dr. Shields was not disclosed in discovery as an expert.

The court noted that other "nonprofessional witnesses" had already testified to their observations of C's behavior and questioned the need for additional testimony on that issue. The court expressed concern that Dr. Shields' testimony, in her capacity as an educator

opining on whether C's behavior was age appropriate, would essentially be a "back door" approach to admitting expert testimony. In addition, the court noted that Mother had failed to give reasonable notice to Father that she intended to call Dr. Shields as a witness at trial and failed to produce Dr. Shields' report in discovery. After an extended discussion, the court did not permit Dr. Shields to testify. The record shows that Mother and Father ultimately agreed to stipulate to the admission of Dr. Shields' Pre-Kindergarten Observation form dated January 2, 2022, identified as Defendant's Exhibit 7, and that Mother withdrew Dr. Shields' report marked as Defendant's Exhibit 26.

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court[.]" *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020) (quotation marks and citation omitted). "A trial court's 'action in admitting or excluding [expert] testimony will seldom constitute a ground for reversal.'" *Yacko v. Mitchell*, 249 Md. App. 640, 695 (quoting *Alford v. State*, 236 Md. App. 57, 71 (2018)), *cert. denied*, 474 Md. 737 (2021); *see also Rodriguez*, 400 Md. at 68 (affirming a trial court order precluding expert testimony as a sanction for discovery violations); *Hadid*, 55 Md. App. at 351 (holding that a trial court should have precluded defendant's daughter from testifying where defendant willfully refused to identify her as a witness prior to trial).

Given Mother's failure to identify Dr. Shields as a witness and provide Father a copy of her assessment prior to trial, the trial court's decision to preclude Dr. Shields from testifying and excluding her report was neither erroneous nor an abuse of discretion.

In response to the court's questions as to the relevancy of C's school records, Mother's counsel argued that C's school records were relevant because they showed that

Mother was the moving party who initiated the services that C received at school and that she was attentive and diligent in pursuing services for C. Over Father's objection, the court admitted multiple school records including immunization records, Mother's consent form for an assessment, Pre-kindergarten/Head Start Speech-Language Screening Instrument, and C's IEP. Mother also testified regarding the significance of obtaining an IEP for C:

> [A]s a parent, my concerns, I brought them up to the school and the school, we collaborated together, and we were able to see how best to help [C]. And through the assessments and observations of each individual person, they came up with the IEP that best fits [C] to learn as a preschool child.

There was no dispute that Mother was the parent who had C evaluated for educational services and participated in her IEP. The school records that the trial court excluded were cumulative of evidence previously admitted on that issue and the court's exclusion of additional school records was not an abuse of discretion.

3. The record demonstrates that the trial court considered C's best interest in making its custody decision

Mother asserts that the trial court "fail[ed] to consider [C]'s best interests and Maryland family law when the court approved and entered the May 23, 2023 'Custody and Child Support Order.'" She argues that the trial court failed to perform any analysis of Father's parenting skills before awarding him tie-breaking authority and the court was biased and held "its own preconceived notions about autism and chose not to rely on the experts' opinions." (Emphasis in original.)

Father contends that the trial court addressed the relevant factors in deciding to award the parties shared physical custody and joint legal custody, and the court's decision to award Father tie-breaking authority was supported by evidence in the record.

"[I]n any child custody case, the paramount concern is the best interest of the child." *Taylor v. Taylor*, 306 Md. 290, 303 (1986). For this reason, the child's best interest is "not considered as one of many factors, but as the objective to which virtually all other factors speak." *Id.* The best interest standard is "*the* dispositive factor on which to base custody awards." *Wagner v. Wagner*, 109 Md. App. 1, 38 (1996) (emphasis in original).

In *Taylor*, the Court of Appeals set forth the following factors to be considered in applying the best interest standard, specifically with respect to considering whether joint custody is in the child's best interest: (1) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (2) the willingness of parents to share custody; (3) the fitness of parents; (4) the relationship established between the child and each parent; (5) the preference of the child; (6) any potential disruption of child's social and school life; (7) the geographic proximity of parental homes; (8) the demands of parental employment; (9) the age and number of children; (10) the sincerity of the parents' request; (11) the parents' financial status; (12) any impact on state or federal assistance; (13) the benefit to parents; (14) and any other factors as appropriate. 306 Md. at 304-11. The Court noted that, while "no single list of criteria will satisfy the demands of every case[,]" *id.* at 303, the parties' capacity to communicate is "of paramount importance" in deciding whether to award joint custody. *Gillespie v. Gillespie*, 206 Md. App. 146, 175 (2012).

In this case, the circuit court delivered a 33-page opinion, setting forth in detail its findings of fact, and explaining its analysis of each of the *Taylor* factors. The court's findings with respect to the parties' ability to communicate and the willingness of the

parties to share custody played a large role in the trial court's decision to award joint custody and tie-breaking authority to Father and we will focus our analysis on those issues.

The trial court found that in the beginning of the parties' relationship, it was clear that they communicated about C. Communication between the parties began to break down in November of 2021 after Mother was evicted from the apartment for nonpayment of rent. The court noted that the parties had not made decisions together regarding C since Mother's eviction. Specifically, Mother had enrolled C in Head Start after a therapist at the shelter advised her that C might outgrow her issues, a position that Father and other experts did not share. Mother failed to include Father in C's IEP meetings, ongoing assessments, and failed to share school records with him. Mother also testified that she did not believe it was important that two parents communicate effectively for the benefit of the child. The court found that "[i]t is clear that she does not believe [she] should be required to keep [Father] informed or to consult with [him] regarding any issues."

In contrast, the trial court found that Father "seemed to express more of a willingness to communicate with [Mother]" and understood that "it's critical for both parents to be involved in a child's life." Father also stated that he would be willing to consult with Mother if he was awarded sole legal custody. The court also credited the expert opinion of Ms. Taylor, who recommended that tie-breaking authority be awarded to Father, "based upon his proactivity and recognition of the importance of early intervention." The court also recognized Ms. Taylor's concerns regarding Mother's "ability to follow through." The court noted concerns that, given C's developmental

delays, she had not visited the pediatrician for a period of time from November of 2020 to January of 2022.

The court expressed concern that if Mother were awarded tie-breaking authority, she would not include Father in the decision-making, based on her history of failing to list him on school forms and only recently providing him the name of C's doctors. The court explained its decision as to tie-breaking authority:

> The [c]ourt believes [Father] has attempted to discuss major issues and become more involved in [C]'s life, but [Mother] has been hesitant to provide a response. Because of this, the [c]ourt grants tie-breaking authority to [Father]. However, this does not mean that [Mother] is not to be consulted with regard to the decisions to be made in [C]'s life. [Mother] has a lot of history and information about [C] that is important to consider. So before any decisions are made regarding school, religion or other important medical decisions, the issue is to be put in writing and provided to the other party. The other party shall respond in 48 hours and give their opinion and view. If necessary, additional conversations can occur. If after full discussions they cannot reach a shared decision or are at an impasse, then and only then can [Father] exercise his tie-breaking authority.

Mother argues essentially that the court erred in failing to accept her allegations of Father's ineptitude and failing to adopt her requested custody arrangement. The court found that both parents were fit to have custody of C and that Mother's reasons for denying Father access were unsupported by the evidence. The court also found that Mother's testimony had "strained credibility at various stages of the trial," including her allegation that Father sexually assaulted her.[3]

[3] The trial court also expressed frustration with Mother's failure to provide responsive answers during cross-examination.

We accept the trial court's credibility determinations unless they are clearly erroneous. *See* Md. Rule 8-131(c). We do not re-weigh the evidence and assess witness credibility. *See Keys v. Keys*, 93 Md. App. 677, 688 (1992) ("[E]specially in the arena of marital disputes where notoriously the parties are not in agreement as to the facts, . . . we must be cognizant of the court's position to assess the credibility and demeanor of each witness."). Based on the evidence of Father's interactions with C, and his efforts to be involved in C's life, the trial court's finding that the record did not support Mother's assertions that Father was unfit to share custody with C was not clearly erroneous.

With respect to Mother's allegation that the court's award of joint custody and tie-breaking authority to Father was error because he had never cared for C or provided medical care for her, the court noted that there were no issues with Father's interaction with C, and Father's inexperience could be addressed with parenting education. Accordingly, the court ordered that both parents participate in a parenting class and a co-parenting class.

"[A]n appellate court does not make its own determination as to a child's best interest; the trial court's decision governs, unless the factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007). While Mother had ensured that C received medical care and educational services, there was also evidence that she had ignored Father's requests for early intervention, failed to provide Father access to C's school records, and did not include him in the IEP assessment process. "Ordinarily the best evidence of compatibility with [the ability to communicate] criterion will be the past

conduct or 'track record' of the parties." *Taylor*, 306 Md. at 307. The court believed that the parties were capable of communicating "to reach shared decisions for the welfare of [C], . . . they're just not used to doing so." Here, the trial court's decision that it was in C's best interest that the parties share physical custody according to a graduated access schedule, that they have joint legal custody, and that Father have tie-breaking authority, was not an abuse of discretion.

Finally, we perceive no bias in the court's opinion, specifically the court's comments regarding autism. Mother contends the court's reference to autism as a "genetic issue" and the court's reference to a personal experience of knowing children with autism who are doing well, were inappropriate. We fail to see how the court's comments demonstrated any unfair bias or indicate that the court relied on its own opinion and disregarded the evidence regarding C's autism and her need for developmental and educational services.

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