Circuit Court for Harford County
Case No. C-12-FM-21-000472

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 0707

September Term, 2023

SHANE HASTINGS TUNNEY

v.

RUTH MARIA KARIN TUNNEY

Arthur,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned)

Opinion by Shaw, J.

Filed: January 8, 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 its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case arises from a custody dispute in the Circuit Court for Harford County. On March 29, 2021, Appellant Shane Hastings Tunney filed a Complaint for Custody of his minor child, D.T., whom he shares with his former wife, Appellee, Ruth Maria Karen Tunney, a native of Sweden. On June 5, 2023, following a hearing, the court granted the parties joint legal custody and shared physical custody. The court granted Appellee primary physical custody of D.T. and awarded her child support. On June 6, 2023, Appellant noted this timely appeal raising four questions:

1. Did the court err and abuse its discretion in its application of the best interest of the child standards?

2. Did the court err and abuse its discretion when it inaccurately stated the standard regarding modifications of custody, and did it rely on that misunderstanding in fashioning a resolution?

3. Did the judge abuse his discretion in failing to disqualify [himself] in this matter, and in relying upon out of court information as a basis of his decision?

4. Did the court err and abuse its discretion in failing to impute income to Appellee, and in failing to conduct an analysis of child support?

BACKGROUND

Appellant, Shane Tunney, and Appellee, Ruth Tunney, were married in 2018. The parties initially met while working in the film industry and beginning in 2019, as a result of the COVID-19 pandemic, work slowed down and the parties experienced financial strain in their efforts to maintain a life in New York City. In June of 2020, Appellee found out that she was pregnant. The parties then decided to move to Harford County, Maryland into

a garage that was remodeled into a living space/apartment at Appellant's parents' home. During that time, Appellee and Appellant worked for the Tunney family business.

After the move, the couple's relationship became strained. Multiple disputes occurred as a result of Appellee removing items from Appellant's parents' home without permission, discovery of an unexplained tracking device found by Appellee on the car she drove, Appellee's concerns about secondhand smoke, and Appellee's dog not being welcomed at the property. Arguments erupted frequently. At one point, Appellant threatened to obtain a protective order against Appellee if she did not agree to go to marriage counseling. Appellee obliged but the counseling proved unfruitful, and the disagreements continued.

On March 9, 2021, D.T. was born, and later that month on March 29, 2021, Appellant filed a Complaint for Custody and Appropriate Relief in the Circuit Court for Harford County. Appellant asserted that on March 24, 2021, "an incident occurred where [Ms.] Tunney aggressively grabbed Mr. Tunney's chest, while [Ms.] Tunney was breastfeeding the infant child." Appellant contended that Appellee was not using her prescribed depression and anxiety medication and that since the birth of D.T., "[Ms.] Tunney has exhibited tendencies that would suggest that she is suffering from psychological issues." Appellant requested "sole legal and primary physical custody" of D.T. "both *pendente lite* and on the merits of this case" while Appellee "receive[d] appropriate mental health care … to ensure [D.T.'s] health and safety." Appellant claimed that he would be able to provide for himself and provide the child with a "safe and stable

residence and is able to ensure that [Ms.] Tunney is able to remain at the marital residence while she receives appropriate care."

On April 9, 2021, Appellant filed a motion with the court, asking the court to prevent Appellee from relocating out of state with their minor child. He requested an expedited *pendente lite* hearing be scheduled, that the couple be granted joint legal custody of D.T. on a *pendente lite* basis, and that the matter be referred to the "Office of Family Court Services for Mediation Evaluation. . . ." Appellant's motion was denied by the court.

On April 12, 2021, Appellee filed a counter-claim for absolute divorce, or in the alternative, limited divorce. Appellee claimed that Appellant was emotionally abusive "to the point where [she was] in fear" of her and D.T.'s safety and requested sole physical and sole legal custody of D.T. She also claimed that Appellant was "not a fit and proper person to have physical and legal custody" of D.T. The court issued a *pendente lite* order that required the parties to attend marriage counseling.

On May 14, 2021, Appellant's parents posted a notice on the door of the garage/apartment demanding Appellee vacate the premises or face a wrongful detainer action. On May 26, 2021, Appellee left the Tunney family residence with D.T. and moved to Tampa, Florida.

Thereafter, several hearings were scheduled to address questions raised by Appellant about Appellee's mental health, the safety and developmental progress of D.T. in Appellee's care, and whether Appellee would abscond to Sweden with D.T., given her lack of family in the United States. The court ordered the parties to undergo mental health evaluations. The court also ordered testing of D.T. at the Kennedy Krieger Institute

("KKI") to assess whether developmental delays were present. The results showed that D.T.'s development was, overall, "age appropriate."

On December 19, 2022, a merits hearing commenced. Appellant's father, Joseph Tunney, was the first witness. He testified that he had concerns about Appellee based on his perception of her self-imposed isolation with D.T. from the rest of the Tunney family. He acknowledged that Appellee had concerns about D.T. being exposed to second-hand smoke due to him and his wife smoking. He testified that Appellee threatened to move to Sweden with D.T. and that his son, Appellant, was not able to regularly spend time with D.T. He stated that Appellee caused him and his wife "constant stress" and that resulted in him demanding that Appellee vacate the property. As for Appellant's relationship with D.T., Joseph Tunney testified that Appellant is a "wonderful father" and Appellant and D.T. "get along unbelievabl[y]," following a schedule every time the two are together, in person or on Facetime. He also testified that Appellant has a stable job with the family's company, and a stable home in the converted garage on the family's property.

The next witness was Dr. Michael Gombatz, who was accepted as an expert in psychology and parenting assessments. Dr. Gombatz was appointed by the court to conduct a psychological evaluation of Appellant, Appellee, and D.T. Dr. Gombatz reported that Appellee's "results generated an invalid profile because of the minimization and denial of all symptoms." He also testified that Appellant generated a typical test, with "no serious personality disorder or serious psychopathology." Angela Joyce, an Uber driver, also testified. Ms. Joyce had no personal knowledge about any incidents between

Appellant and Appellee. However, she stated that she and Appellee talked about the stress Appellee felt while living at the Tunney residence during an Uber ride.

Dr. Paul Rogers, a pediatrician, testified as an expert in neurodevelopment assessments. He reviewed D.T.'s medical records and conducted a Clinical Adaptive Test Milestone Scale ("CLAMS")[1] evaluation of D.T. Dr. Rogers testified that D.T.'s weight, while in Appellee's care, was a concern as it was "way under what we'd expect for the developmental age and for chronological age." Dr. Rogers also testified about an Age Screening Questionnaire completed by another physician where it was reported that D.T. presented some concerning delays in his developmental skills and documented an "intervention plan" to address weight gain and motor skills. In addressing his September 2022 CLAMS evaluation, Dr. Rogers stated that D.T. showed "some mild delay in expressive skills, but his receptive language skills for this - - what he understands is age appropriate." Dr. Rogers also testified about an acute second-degree burn D.T. experienced while in Appellee's care.

Appellant testified that from October 2021 to December 2022, he was able to visit D.T. in Tampa, Florida approximately twenty-three times. He detailed the visitation schedule, the process for making trips to Tampa, the costs associated with flights and hotels, his routine with D.T. during his visitation time including where the two stayed, and

[1] CLAMS is a tool that was "developed to provide pediatricians with a technique to assess infants and toddlers with suspected developmental delay[s]." R. C. Wachtel, *CAT/CLAMS: A Tool for the Pediatric Evaluation of Infants and Young Children With Developmental Delay*, 33 SAGEJOURNALS, 410 (1994).

how he planned meals and excursions. Appellant expressed concerns about Appellee's struggle to abide by the court-ordered visitation schedules but stated that he was willing to seek advice through counsel. Appellant also spoke about his concerns regarding Appellee's lack of baby proofing in the home and her resistance to seeking medical attention for the second-degree burn D.T. sustained. Lastly, Appellant testified about the stable home he would be able to provide D.T., which included: a medical provider, financial stability, schooling, and a work/home life balance, if D.T. were to reside in Maryland. When asked about Appellee's parenting, Appellant stated:

> There's no question she loves [D.T.]. She cares for him very well. She looks out for him. I hope she wants what's best for him, as much as I do. Are there things to work [on]? Absolutely.
>
> . . . .
>
> She makes him happy. She gives him energy. She communicates with him. She got him on his feet, keeps him talking, hopefully keep[s] him healthy.
>
> . . . .
>
> Happy and health that's all I can ask.

When asked whether there could be an appropriate visitation schedule with D.T. living in Florida, Appellant stated, "it would be [a] very difficult model of access to propose and then adopt," and that "[t]he gap needs to be closed. A reasonable distance needs to be agreed upon."

Appellee testified that she intended to remain in Florida. She testified about the safe community she lives in, how well D.T. is developing, and the overall stability of the home she created for D.T. and herself. She characterized the interactions with Appellant as civil despite their disagreements, and about her ability to keep Appellant informed of D.T.'s

progress and medical concerns. Appellee also testified that she considered herself self-employed but relies on support from her family in Sweden and child support provided by Appellant. She stated that her unemployment was due, in part, to the fact that D.T. was still young, having turned two years old a few days prior to the hearing.

On April 20, 2023, the court issued its opinion from the bench. The court granted the parties joint legal and physical custody of D.T. Appellant was awarded tie-breaker authority concerning D.T.'s international travel, and Appellee was granted primary physical custody and child support.

STANDARD OF REVIEW

This Court's review of child custody determinations from the circuit court includes three standards of review. *Reichert v. Hornbeck*, 210 Md. App. 282, 303 (2013) (citing *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012)). The appellate court scrutinizes the factual findings of the lower court under the clearly erroneous standard. Md. Rule 8-131(c). If, however, the lower 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." *In re Yve S.*, 373 Md. 551, 587 (2003). Lastly, when the ultimate conclusion of the lower court is under review, the trial court's decision should only be disturbed if there has been a clear abuse of discretion. *Id.*

An "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) (citing *Boswell v. Boswell*, 352 Md. 204, 224 (1998)).

A trial court's decision is not clearly erroneous "if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). An abuse of discretion occurs where "'no reasonable person would take the view adopted by the [trial] court.'" *Santo v. Santo*, 484 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

DISCUSSION

I. The circuit court did not err or abuse its discretion in applying the best interest of the child standards.

Appellant contends the hearing court abused its discretion in allowing Appellee to maintain D.T.'s residence in Florida. He asserts the court's decision was "not supported by the evidence presented, nor [was] the access schedule aimed at achieving the best interest of the minor child." Appellant contends the best interest factors weigh in his favor. Appellee, on the other hand, argues that the court "analyzed all the relevant factors" and correctly concluded "that the best interests of DT were to have the mother not be separated from her child, but that the father will have frequent visitation – every month."

In resolving child custody disputes, Maryland courts focus on "the best interest of the child." *Taylor v. Taylor*, 306 Md. 290, 303 (1986). The factors enunciated in *Montgomery Cnty. Dep't of Soc. Servs v. Sanders*, 38 Md. App. 406, 420 (1978), and *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986), are the guiding principles for courts to use in analyzing custody cases. The most important factor to be considered is the parents' ability to communicate and to reach shared decisions. *Taylor*, 306 Md. at 304.

This Court's decision in *Sanders* provided ten non-exclusive factors. They include: "(1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between 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 the parents and opportunities for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender." *Sanders*, 38 Md. App. at 420.

In *Taylor*, the Supreme Court of Maryland provided a list of factors that include: (1) capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11) financial status of the parents; (12) impact on state or federal assistance; (13) benefit to parents; and (14) any other factor the court deems relevant. *See Taylor*, 306 Md. at 304-11. The *Taylor* factors work in tandem with the *Sanders* factors to aid the trial court in determining what is ultimately in the "best interest of the child." *Taylor*, 306 Md. at 290.

In the present case, the court examined the *Sander*s/*Taylor* factors and made the following factual findings:

> *The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare*.

The court determined that the parties could communicate effectively with one another. The court stated, "as of late the communication has actually been, from [the court's] standpoint, pretty good." Acknowledging that communication was not always great, the court found that the parties "are actually doing better and [it did] believe they have the capacity to communicate with each other." The attorneys for both parties posited that email and text communication had been effective, and the court agreed.

The fitness of the parents.

The court determined that the parents were fit stating, "despite the best efforts of counsel and the parties, both the mother and father here are fit to have custody of their child." Notwithstanding allegations about the parties' personal issues and past conduct, the court stated, "I actually have to support both parents in what they have been able to do and I encourage them to keep it up."

The character and reputation of the parties.

The court considered the reputation of Appellant and Appellee, noting that "again this factor doesn't denigrate against either party." The court highlighted that "much was made of what mom is doing online," and allegations Appellee was attempting to monetize D.T.'s online presence. The court concluded that "people post things online all the time too much." The court did not find that her online presence was a negative factor in evaluating her character or reputation.

The requests of each parent and the sincerity of the requests.

While the record does not reflect a clearly delineated examination of this factor, based on the court's analysis of Appellant and Appellee's fitness to co-parent, the court emphasized the efforts and sincerity of both parties. The court stated that the parties demonstrated their ability to provide stable and loving homes, and to communicate with one another for the betterment of their child.

Any agreements between the parties.

The court noted that the parties had entered into a number of agreements during the course of the proceedings, including one "for the father to keep D.T. on his health insurance."

Ability to Maintain Family Relations.

In considering this factor, the court highlighted the "modern age" that we are in, how the Tunney family relations are being maintained, and the ability for the family to stay connected. The court also noted the importance of D.T. knowing "his grandparents on both sides," and that based on testimony from the Tunney family, D.T. has a relationship with Appellant's father, who D.T. refers to as "pop-pop." Again, the court observed that "the communication" between the parties "has actually been . . . pretty good[,]" and the court determined that family relations could be maintained.

Child's preference.

In considering this factor, the court observed that "[D.T.] is too young" for the court to consider his preference.

Material opportunity for the child.

In considering the material opportunities, the court found that D.T. would be afforded opportunities under the care of both of his parents.

Age, health, and gender of minor.

The court considered the age, health, and gender of D.T., noting that as D.T. gets older, he may want to do things with his dad like fishing but that "right now maybe that is not a big thought or idea, but it is going to happen over time or at least there is a big percentage that that is going to happen."

Geographic proximity of each parent.

The court stated that "[t]his factor frankly doesn't detract negatively against either parent." The court noted that, although "each parent has a suitable residence for [D.T.]," the "issue is location." Nonetheless, the court articulated that "there hasn't been an extended time away from the parent where the [c]ourt need worry about reunification. There has been no abandonment or surrender of custody at all."

Based on its analysis of the factors, the court awarded the parties joint legal custody of D.T. Appellant was awarded tie breaking authority concerning international travel and possession of important documents such as D.T.'s passport, and in choosing visitation weekends. As for residency, the court stated that D.T. could remain with Appellee in Florida but that she "cannot leave or change the residency where she is without filing the appropriate motion under the Family Law Article in this case." With respect to physical custody, the parties were ordered to share joint physical custody "as close to 50-50 as possible," assigning Appellant and Appellee two weeks per parent, on and off and during

"school time of year." The court designated "one extended weekend with the father in Florida," that is no less than four days, "as agreed by the parties and one week with the father in Maryland for four days." As for child support, the court ordered Appellant to maintain health insurance for D.T., and to continue to pay $553 per month directly to Appellee.

In our view, the court neither erred nor abused its discretion. The court carefully evaluated the appropriate factors, made factual determinations based on the testimony presented and detailed its findings. The court's decision, therefore, is in accord with the best interest standard. We hold that the court's decision also did not constitute an abuse of discretion. An abuse of discretion occurs where "'no reasonable person would take the view adopted by the [trial] court.'" *Santo v. Santo*, 484 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). Here the court's findings and conclusions were well within the parameters of reasonability.

II. The circuit court did not err in stating that age may be a material change in circumstances for a future custody modification determination.

Appellant contends despite the court stating that D.T.'s aging may present grounds for a "material change" in the custody order, age is not a "material change." Appellant asserts that the court's reliance on this reasoning as grounds to implement an order that limits Appellant's mandatory custody to four days every two weeks during school months was improper. Appellee argues the court's mention of age and material changes was merely to provide information and was not a basis for its decision-making.

Appellant relies on this Court's decision in *McMahon v. Piazze*, 162 Md. App. 588, 591 (2005), to support his argument. In *McMahon*, the appellant requested a modification of a custody order and listed age as a factor that could materially change the existing order. *McMahon*, 162 Md. App. at 591. At the hearing, the court held that age, among a number of other factors, did not amount to a "sufficient material change in circumstances . . . to bring it to the level of being heard," and granted the appellee's motion to dismiss. *Id.* at 593. On appeal, we affirmed the court's decision to dismiss the appellant's motion holding that, "[t]he allegations of fact are extremely general" and that "[n]o nexus between the facts and the conclusion can be inferred, other than by speculation." *Id.* at 597.

The present case is quite different. It does not involve a modification of an existing order but rather whether an initial custody order should be granted and its parameters. As we see it, the hearing court's statement that age could be a material factor in the future was a mere comment that was not reflective of the issues before it. There is no indication, from the record, that the court's statement served as a basis for making its custody determination.

III. The trial judge did not err or abuse his discretion in declining to recuse himself.

Maryland Rule 18-102.11(a) provides in pertinent part that:

> (a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:
>
> > (1) The judge has a personal bias or prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding.
> >
> > (2) The judge knows that the judge, the judge's spouse or domestic partner, an individual within the third degree of

> relationship to either of them, or the spouse or domestic partner of such an individual:
>
> > (A) is a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
> >
> > (B) is acting as an attorney in the proceeding;
> >
> > (C) is an individual who has more than a de minimis interest that could be substantially affected by the proceeding; or
> >
> > (D) is likely to be a material witness in the proceeding.

After reviewing the evidence presented at the hearing, and *prior* to the court's analysis of the best interest factors and custody decision, the court stated, "[t]here is obviously influence of the Tunney family in Harford County. It's plain and simple. They are a well known family in the community. They have a great reputation. And [Appellee] is alone in the world in Harford County and could not agree with her husband [] where to raise the child and left."

As a result of these statements, Appellant argues the judge acted improperly and should have recused himself. Appellee, on the other hand, contends the court's reference to the Tunney family was "not a dark conspiracy or result of off the records research," but rather "an offhand compliment" and "not important to the decision nor prejudicial to the appellant."

We agree. The statements by the judge do not indicate a personal bias or prejudice nor a lack of impartiality or fairness. Simply acknowledging members of a community and their standing does not, alone, constitute improper behavior by a judge. There, also, is nothing in the record that supports Appellant's argument that the court relied on out of court information in making its decision. We observe, further, that Appellant did not raise

an objection and did not file a motion to reconsider or otherwise bring to the hearing court's attention his request for recusal. It is, therefore, not a basis for appeal.

IV. The court must calculate child support using the statutory requirements.

Appellant argues that because the court "never made a finding of fact regarding Mr. Tunney's income," given that it "did not prepare, or apparently consider any calculation of child support pursuant to the mandatory child support guidelines," and did "not conduct a voluntary impoverishment analysis" on Appellee, the court erred in awarding Appellee child support for D.T.

Appellee argues the circuit court was correct in not imputing income to her because D.T. was not yet two years old at the time of the hearings. In support of her argument, Appellee cites to Md. Code, Family Law 12-204(b)(3) which provides that:

> (3) a determination of potential income may not be made for a parent who:
>
> . . . .
>
> (ii) is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible.

We note that D.T. turned two on March 9, 2023, and the court rendered its decision from the bench in this matter on April 20, 2023. As such, the protections afforded under Md. Code, Family Law 12-204(b)(3) for parents caring for children under the age of two years old do not apply. We observe, also, that the record does not include a determination by the court of the parties' income, the guidelines calculation, or whether Appellee was voluntarily impoverished as argued by Appellant.

Md. FL § 12-204(a)(1) requires that:

> (a)(1) The basic child support obligation shall be determined in accordance with the schedule of basic child support obligations in subsection (e) of this section. The basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes.

The hearing court is bound to analyze a child support claim in accordance with the statute. We, therefore, shall remand this matter for further consideration and a determination of child support.

CONCLUSION

In conclusion, we leave undisturbed the hearing court's decision granting joint physical and legal custody to the parties. We vacate the court's child support order and remand for the court to articulate its reasoning for child support, in light of this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND VACATED IN PART; JUDGMENT VACATED AS TO CHILD SUPPORT ORDER; CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COST TO BE DIVIDED BETWEEN THE PARTIES.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0707s23cn.pdf