Circuit Court for Howard County
Case No.: C-13-FM-22-002230

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1725

September Term, 2023

STEPHAN MCKENZIE

v.

LAKISCHA FORTSON

Zic,
Albright,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 10, 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 between Stephan McKenzie ("Father"), appellant, and Lakischa Fortson ("Mother"), appellee,[1] regarding their minor child, S., who was born in 2019. On August 24, 2023, the Circuit Court for Howard County entered an order granting the parties joint legal custody and shared physical custody of S. Father noted a timely appeal from that order, and presents one question for our consideration:

> Did the circuit court err or abuse its discretion in its order granting the parties joint legal and shared physical custody of S.?

For the reasons set forth below, we shall affirm the circuit court's decision.

BACKGROUND

The parties, who were never married, have the one child together. When they began living together in 2021, S. was almost two years old. Each of them also had another child. Mother has an eighteen-year-old son, who was about to enter college at the time of the underlying proceedings. Mother's son lived with the parties and S. Father has a nine-year-old son who has autism. He lives primarily in Elkton, Maryland with his mother, but visits Father every weekend and lives with him during the summers. Mother was a stay-at-home parent until May 2022 and, thereafter, she worked in the accounting department of a biotech company. Father has worked as a health insurance analyst for the federal government.

On December 27, 2022, Father filed a complaint for custody in which he sought joint legal and joint physical custody of S. Specifically, he requested "50% of the year

[1] Father is proceeding on appeal, as he did below, in proper person. Mother, who proceeded in proper person below, did not note an appeal and did not file a brief in this case.

within MD with both parents and to alternate holidays every-other year." In Mother's answer to the complaint, she denied that S. lived with Father and requested that his complaint be dismissed or denied. An evidentiary hearing before a magistrate was held on July 11, 2023. The parties were the only witnesses to testify at the hearing.

Father testified that during the COVID-19 pandemic and thereafter, he teleworked full-time. According to Father, S. went with Mother when the parties separated, but he continued to watch her during the day until S. started daycare. When asked what would be "the right schedule" for S., Father stated "definitely [to] be able to see both parents equally through our seven-day week." He proposed shared physical custody with S. staying with him on Sunday, Monday, and Tuesday nights, with Mother on Wednesday and Thursday nights, and with the parties alternating the weekends. The parties lived about ten minutes apart from each other and S.'s daycare was also about ten minutes away from Father's house. Father agreed to Mother's selection of the daycare center because Mother qualified for, and received, a scholarship that reduced the total monthly cost to $400.

Mother left the family home in May 2023 and, for a short time thereafter, lived with her aunt and uncle, who watched S. when she was at work. On May 20, 2023, Mother moved into her own one-bedroom apartment with S. Mother testified that she and S. shared a queen-size bed and that she was setting up "a little area" with a television for the child. Mother acknowledged that she applied for, and received, a scholarship that allowed S. to attend her current daycare center. At some point prior to the time S. started attending the daycare center, Father watched S. during the day when Mother was at work. Mother testified that her job was "pretty flexible." She worked "eight hours a day, sometimes

more, sometimes less[,]" from "[a]bout 9:30 until about 4:30, 5:00." She was sometimes able to work from home, and "might work from home for four hours."

According to Mother, Father's nine-year-old son received therapy for two hours every Sunday in Father's home and, after the therapy session, he went to a local library to receive extra help from a tutor. Father also did "some type of electrical work" to earn extra money.

Mother suggested that Father have S. from Sunday evenings, after he returned from dropping off his son, through Tuesday mornings when he would drop off S. at daycare. On occasions when S. did not attend daycare, she would stay with Father while Mother was at work. At the time of the hearing, it had been "weeks" since S. had had an overnight visit with Father. Mother acknowledged that she did not always grant Father's requests for overnight visits but "only because [she] just want[ed] [S.] to be on a schedule."

Mother expressed concern that Father kept unsecured firearms in his home. She testified that on one occasion, she found a gun in a basket of socks, and when she asked Father to move it, "it took two days" for him to do so. Mother also testified that on one occasion when Father was outside with S., he could not locate the child. In addition, Father's son, on one occasion, had knocked over S. and "busted" her lip, but she recognized that he did not understand what he did.

A few weeks after the hearing, the magistrate issued a written report and recommendations. The magistrate found, among other things, that each party's home was appropriate for the child, that Mother had "shown herself to be a more careful caretaker than [Father] has at times[,]" that "[F]ather has left a gun in the open accessible to the child

and even when asked by [Mother] to put the gun away he did not." The magistrate further found that the "child goes to bed late, at about 10 p.m.[,]" that "[b]oth parents are likely capable of making good decisions for the child[,]" that "[i]t is in the best interests of the child that [she] be maintained in the primary custody of [Mother]" but with "frequent access with [Father,]" and that the child "should be able to have time with [Father] when he has the child's sibling and also have one on one time with [Father]." The magistrate recommended, *inter alia*, that the parties be granted joint legal and shared physical custody of S., that Father be granted access every other weekend and on Wednesday evenings from after daycare or school until 8 p.m., that Mother shall open a child support account, and that the parties pursue "the setting of Maryland Guidelines support for the child."

On August 22, 2023, which was more than ten days after the filing of the Magistrate's Report and Recommendations, Father filed exceptions to the Magistrate's Report and Recommendations. They were dismissed because they were not timely filed. In a written order dated August 24, 2023, the circuit court granted the parties shared physical custody and joint legal custody[2] of S. with Mother having "tie breaking authority in the event of a bona fide disagreement[.]"[3] The child's primary residence was to be with

[2] With joint legal custody, "both parents have an equal voice in making [long range] decisions [of major significance concerning the child's life and welfare], and neither parent's rights are superior to the other." *Taylor v. Taylor*, 306 Md. 290, 296 (1986).

[3] With joint physical custody, the parents share or divide custody of the child, "but not necessarily 'on a 50/50 basis.'" *Santo v. Santo*, 448 Md. 620, 627 (2016) (quoting *Taylor*, 306 Md. at 297). Both parents have "'the right and obligation to provide a home for the child and to make' daily decisions as necessary while the child is under that parent's care and control." *Id.* (quoting *Taylor*, 306 Md. at 296).

Mother "subject to liberal and regular access reserved to" Father. Father was granted access with S. every other weekend from Friday after daycare until Monday and every Wednesday evening. The court set forth a detailed schedule for holidays and summer vacations, ordered Mother to "open a child support account with the Bureau of Support Enforcement," and ordered "that the parties shall pursue the setting of Maryland guidelines support for" S.

APPEALABILITY

On the day of the magistrate's hearing, but after it had been concluded, Mother filed a counter-claim for custody and child support. There is no indication in the docket entries that the counter-claim has been addressed by the circuit court. The right to appeal is granted by statute and "must be legislatively permitted." *In re C.E.*, 456 Md. 209, 220 (2017). Generally, appeals may only be taken from final judgments. *See* § 12-301 of the Courts and Judicial Proceedings ("CJP") Article of the Maryland Code. But a litigant may appeal from certain interlocutory orders. Relevant to this case, CJP § 12-303(3)(x) permits an appeal of an interlocutory circuit court order "[d]epriving a parent . . . of the care and custody of his child, or changing the terms of such an order[.]" We conclude, therefore, that Father's appeal is properly before us.

DISCUSSION

Father challenges the circuit court's custody determination on the grounds that it contradicts findings of fact and recommendations set forth in the Magistrate's Report and Recommendations. In particular, and after the magistrate found Mother should have primary custody, he points to the magistrate's determination that he should be given ample

time and frequent access to S. He argues that despite that finding, and the fact that the parties live very close to each other and to the child's school, the circuit court granted him only every other weekend and Wednesday evening visits with S. According to Father, that schedule fails to provide ample time for him and the child to form a strong relationship. He points out that when the parties lived together, he cared for the child during the day while teleworking, and maintains that the court's order "only assists the child in believing that one parent is the parent and decision maker while the other parent is a visitor which they must gain permission to see or speak with." As he sees it, more overnight visits could have been allowed.

We understand that Father would have preferred a different custody arrangement, but that is not the standard by which an appellate court reviews the circuit court's custody decision. *See Gizzo v. Gerstman*, 245 Md. App. 168, 206 (2020) (holding that appellant's "arguments fail to show that any of the trial court's findings were unsupported by sufficient evidence or that the court's reasoning was irrational"). When a party fails to timely file exceptions, "the court may direct the entry of the order or judgment as recommended by the magistrate." Md. Rule 9-208(h)(1)(B). In such cases, "'any claim that the [magistrate's] findings of fact were clearly erroneous is waived.'" *Dillon v. Miller*, 234 Md. App. 309, 317 (2017) (quoting *Miller v. Bosley*, 113 Md. App. 381, 393 (1997)). In the case at hand, Father does not challenge any of the magistrate's findings of facts. His challenge relates to the circuit court's disposition of the case based on the facts found by the magistrate.

Although bound by the magistrate's findings of fact, we may review the circuit court's application of those findings in reaching its custody decision. *Id.* (citing *Miller*, 113 Md. App. at 393); *accord Barrett v. Barrett*, 240 Md. App. 581, 587 (2019). In doing so, we employ three separate but interrelated standards of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of 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.

Kadish v. Kadish, 254 Md. App. 467, 502 (2022) (cleaned up) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

The abuse of discretion standard "'is premised, at least in part, on the concept that matters within the discretion of the trial court are much better decided by the trial judges than by appellate courts[.]'" *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 242 (2011) (internal quotation marks omitted) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 436 (2007)). It is an abuse of discretion 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." *Santo*, 448 Md. at 625-26 (quotation marks and citation omitted). In other words, we only reverse when a trial court's decision is "well removed from any center mark imagined by the reviewing court[.]" *North v. North*, 102 Md. App. 1, 14 (1994). An abuse of discretion should therefore "only be found in the

extraordinary, exceptional, or most egregious case." *Alexander v. Alexander*, 252 Md. App. 1, 17 (2021) (quotation marks and citations omitted).

Here, there is no reason to believe that the circuit court did not apply the proper legal standards or that it did not consider and rely on the Magistrate's Report and Recommendations in making the ultimate custody determination in reaching a reasonable conclusion that provided Father with time alone with S. as well as time for S. and Father to spend together with her sibling. We perceive no error or abuse of discretion in the custody award, the child access schedule, or any other part of the court's order.[4]

Father also challenges the circuit court's decision to award tie-breaking authority to Mother in the event of a bona fide disagreement. Specifically, he asserts that the order failed to address the removal of S. from Maryland without his knowledge or consent. To address that concern, it is important to explain what is meant by tie-breaking authority. In *Santo v. Santo*, Maryland's Supreme Court affirmed the propriety of awarding tie-breaking authority to one parent when the parties shared legal custody, writing that:

> [i]n a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking provision permit one parent to make the final call. Because this arrangement requires a genuine effort by both parties to communicate, it ensures each has a voice in the decision-making process.
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> * * *

[4] We note that the magistrate correctly recognized in her Report and Recommendations, that "[t]he most important concern of a child custody determination is the analysis of the best interests of the child." Moreover, the magistrate specifically referenced and considered the factors discussed in *Taylor*, 306 Md. 290, and *Best v. Best*, 93 Md. App. 644 (1992).

> We require that the tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children.

Santo, 448 Md. at 632-33.

In *Santo*, the father argued that a circuit court could grant one parent sole custody, or both parents joint legal custody, but did not have the option to create '"hybrids of the two."' *Id.* at 631. The Supreme Court disagreed and held that an award permitting both parents an equal voice in decision-making but also giving one parent the ability to make a final decision after good faith discussions was permissible. "[S]uch an award is still consonant with the core concept of joint custody because the parents must try to work together to decide issues affecting their children." *Id.* at 633. The Court noted that "[t]he requirement of good faith communication between the parents helps to ensure the parent with tie-breaking authority does not abuse the privilege of being a final decision-maker. And a court has the means to sanction a breach of good faith." *Id.* at 634.

In other words, just because the circuit court granted Mother tie-breaking authority does not mean that she has no obligation to engage in good faith communication with Father, who has an equal voice in decision-making regarding S. If Mother abuses her privilege as the tie-breaker, Father can then ask the court to impose appropriate sanctions. Moreover, if Mother were to relocate the child from Maryland without his consent, Father would have a good faith basis for pursuing a modification of custody based on a material change in circumstances, and the circuit court could consider a change in both physical and legal custody. *See Domingues v. Johnson*, 323 Md. 486, 498-99 (1991) (noting that the mother's relocation to Texas might constitute a change in circumstance sufficient to justify

a change in custody); *Braun v. Headley*, 131 Md. App. 588, 613 (2000) ("[T]he relocation of appellant to another state, can, under Maryland law, constitute the material change in circumstances necessary to trigger the best interests analysis.").

For those reasons, we are not persuaded that the circuit court was required to foresee a child's best interest in an unknown future and spell out in its written order every possible scenario when ordering joint legal custody with tie-breaking authority to Mother. In short, we perceive no error or abuse of discretion in the custody award, the child access schedule, or any other part of the court's order.

ORDER OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.