Circuit Court for Frederick County
Case No.: C-10-FM-20-000919

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2160

September Term, 2023

JAMAL EL BYAD

v.

ANDRESSA MARTINS DO AMARAL

Shaw,
Zic,
Albright,

JJ.

Opinion by Shaw, J.

Filed: July 18, 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).

Appellant, Jamal El Byad ("Father"), appeals from an interim custody and access order entered by the Circuit Court for Frederick County granting he and Appellee, Andressa Martins Do Amaral ("Mother"), joint legal custody of their three minor children, with Mother to have primary physical custody of the oldest and youngest children, and Father to have primary physical custody of the middle child. Weekend and holiday visitation schedules were included in the order. Father appeals the judgment, presenting two issues for our review[1]:

I. The court erred in entering a custody order absent an agreement of the parties.

II. The court erred in entering a custody order without hearing testimony or evidence.

For the following reasons, we shall affirm the judgment of the circuit court.[2]

FACTUAL AND PROCEDURAL BACKGROUND

[1] In the table of contents section of Father's appellate brief, he raises a third argument: "The trial court did not err in awarding counsel fees to the appellee [Mother]." Because he fails to raise this argument in either his questions presented or argument sections of his brief, we shall not address it. *See* Md. Rule 8-504(a)(6) (appellant's brief "shall" include "[a]rgument in support of the party's position on each issue" raised); Md. Rule 8-504(c) (an "appellate court may dismiss the appeal or make any other appropriate order with respect to the case" for noncompliance with this Rule); and *Oak Crest Village, Inc. v. Murphy*, 379 Md. 229, 241 (2004) ("'[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it.'") (quoting *DiPino v. Davis*, 354 Md. 18, 56 (1999)).

[2] Mother did not file an appellee brief in this case. While an appellant's appeal may be dismissed if she or he fails to file a timely conforming brief, an appellee merely forfeits the right to present argument, if she or he has not filed a timely conforming brief. *See* Md. Rule 8-502 (discussing the requirements for filing an appellate brief).

Mother and Father met in Brazil and came to the United States in 2012 because of Father's line of work. The parties, who never married, are the parents of three minor children: a son, V., born in 2006, and two daughters, F. born in 2012 and Y. born in 2013.

In 2019, the parties separated, and on January 8, 2020, the parties consented to an order in the Circuit Court for Fairfax County, Virginia, agreeing to joint legal custody and shared "50/50" physical custody of the children. Both parties subsequently moved to different residences in Frederick County, Maryland. About six months later, Mother registered the Virginia child custody consent order in the Frederick County Circuit Court.

On June 22, 2021, Father filed a motion to modify custody, seeking custody of all three children. Over the next couple of years, the parties engaged in protracted and highly contentious custody litigation. Custody has still not been resolved and a custody hearing on the merits is scheduled for January 2025.

At the end of 2021, the circuit court entered two final protective orders, finding by a preponderance of evidence that Mother had abused F. and Y. (Mother pinched F.'s ear and hit her knee with a slipper that had a hard sole and berated Y.). The court granted legal and physical custody of the daughters to Father, with Mother to have supervised visitation. The protective orders were effective through September 27, 2022. A best interest attorney was appointed by the court.

On August 25, 2022, the court entered an interim access order granting Mother physical custody of V. with unsupervised visits with Father, and supervised visits by Mother of F. and Y. every week for four hours. The court subsequently entered a consent

order requiring the parties to participate in supervised therapeutic visitation services to improve family relationships, particularly between Mother and F.

A merits hearing set for January 2023 was postponed at Father's request and re-scheduled for March 7-8, 2023. On those dates, several of the parties' witnesses testified, including Mother and an appointed family court custody evaluator. The oldest child, V., spoke privately in chambers with the judge. The custody evaluator recommended that Mother have sole legal and physical custody of V.; Father to have sole legal and physical custody of F.; and Father to have sole legal custody and the parties share physical custody of Y., with a week on/a week off access for each parent. At the conclusion of the second day of the hearing, the court determined that a third day was needed to hear from all of the witnesses. The court re-scheduled the merits hearing for October 17-19, 2023, and treated the March hearing as a pendente lite hearing that it continued until May 2023.

On May 4th, the judge spoke to both girls privately in chambers. He then issued a pendente lite order from the bench and later in writing. The order granted Mother sole legal and primary physical custody of V.; Father sole legal and primary physical custody of F., with Mother to have therapeutic visitation; and the parties to have shared, legal and physical custody of Y. This order was to remain in effect until the October merits hearing.

Roughly three weeks later, the best interest attorney filed an emergency motion to amend the May 4th pendente lite order. The motion sought to remove Y. from Father's care because Father was allegedly engaging in parental alienation, resulting in Y. resisting transfers from Father's care to Mother's care. The next day, the court granted the motion and entered a second pendente lite order granting Mother sole legal and physical custody

of Y., until the next review hearing on June 2. All other terms of the May 4th pendente lite order remained the same.

At the June review hearing, the best interest attorney argued that "Father is engaging in a very steadfast parental alienation campaign . . . [of] both of these girls." The court wanted to speak to Y., but because she was not present, the court continued the hearing until the status conference scheduled for later in June. At that hearing on June 27, 2023, the court spoke to Y. privately in chambers, after which the court stated to the parties:

> THE COURT: All right. Again, I will tell you, you have a lovely daughter. She is truly lovely. Unfortunately, your daughter is in the middle of the two of you, and it's a really hard place for her to be. She doesn't feel -- well, first of all, she says she's absolutely fine at her Mom's, she's doing well, things are going good, she misses her father, she does not feel comfortable -- or she feels like she is upsetting people when she leaves Dad's house to go to Mom's.
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> Sometimes this is a direct result of a parent putting pressure on a kid, and then sometimes this is a result of a kid figuring out, seeing two siblings who've picked sides, chosen a side, and recognizing it's her turn, and that's very difficult. I feel terrible for her because she loves both of you very much. She wants to be with both of you, but she recognizes that the transfers are very, very hard because she feels like she's letting one of you down.
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> I realize you're -- you don't like each other, but I implore both of you to figure out a way to communicate and co-parent together. This little girl needs you all to do this.
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> * * *
>
> I don't know what to say, but that is what she said. She doesn't feel like she is -- despite the fact she enjoys spending time with her mother, she doesn't feel as if she is supposed to enjoy spending time with her mother. So here we are, and she can't guarantee me, despite having spent the last month with her mother, that if she goes to Dad's house, she isn't going to refuse to go back again despite the fact that she enjoys being with her mother, which is so very sad, and I don't know how to work that because this child needs both a mother and a father. I recognize these two older kids have drawn a … line in the sand and that's what it is, but this little one is screaming for both of you to be part of her life.

The court reported that Y. did not want to go to Father's house after the hearing. The court ordered the parties to choose a mutual date quickly for another pendente lite hearing.

Less than two months later, the court held a status hearing, at which time the court orally ruled from the bench for the parties to have joint legal custody of Y. because Mother changed Y.'s elementary school from one in Father's district to one in Mother's district. The court filed a third amended pendente lite order reflecting its oral ruling, and also stated that all other items of the May 4th pendente lite order remained in effect. The next day, the court entered a fourth pendente lite order, clarifying that Y. was to attend the specified elementary school nearest to Father that she had attended before Mother changed her schools. Again, all other terms of the May 4th pendente lite order were to remain in effect.

About two weeks later, on September 8, 2023, the best interest attorney filed another emergency motion to set aside the third and fourth pendente lite orders because Father had not transferred Y. to Mother for visitation as required, and Y., who was now in Father's physical custody, refused to return to Mother.

On September 25, 2023, a pendente lite hearing was held. Both parties, their attorneys, and the children's best interest attorney were present. Y. spoke privately to the judge in chambers, after which the court ruled from the bench. The court ordered the parties to share physical custody of Y. until the merits hearing scheduled for October 17-19, with Father to have Y. for the first eleven days, switching on October 6, and Mother to have Y. for the remaining eleven days and until after the three-day merits hearing.

At the end of September, Mother's attorney filed a motion to strike his appearance, and on October 17, the parties appeared with their counsel for the merits hearing. The

court held the motion to strike in abeyance, encouraged the parties to agree to a temporary consent custody order, and directed the parties to find a new date for a merits hearing in order to allow Mother to hire new counsel. Over the next two days, the parties tried to reach a temporary custody agreement off the record but to no avail.

A week later, on October 25, 2023, the court entered a fifth pendente lite order based on the September 25, 2023, pendente lite hearing. The court awarded the parties joint legal custody of Y., and then reiterated its earlier oral pendente lite order on September 25, that physically, Y. was to continue in Father's care until October 6, and then transfer to Mother's care. All other terms of the May 4th pendente lite order were to remain the same.

The court granted Mother's attorney's request to strike his appearance on November 3, 2023. The same day, the court granted the best interest attorney's request to strike her appearance.[3] On November 7, 2023, the court entered a written interim custody and access order. The court granted the parties joint legal custody of all three children. Mother was to have primary physical custody of V. and Y.; Father was to have primary physical custody of F. The parties were ordered to engage in reunification therapy with a stated therapist within five days of the order and to split the cost of the therapist. Weekend visitations and a holiday schedule were included. A five-day merits hearing was set for January 6-10, 2025.

[3] Roughly eight months earlier, on March 4, 2023, Father had filed a motion to strike the best interest attorney, which the court denied. The best interest attorney subsequently filed a motion to withdraw.

Father filed a motion to vacate the interim custody and access order, arguing that the court erred because it did not receive evidence or hear testimony to determine the best interest of the children. On December 22, 2023, the court denied Father's motion to vacate. Father timely appealed.

DISCUSSION

I.

Father first argues that the circuit court erred in entering "a custody order absent an agreement of the parties." He then cites law concerning consent orders, arguing that because the parties never signed a consent order, the court erred in entering an order. We hold Father's argument is without merit. While the parties did not consent, it is well established that a court has the authority to enter a custody order under the Maryland Family Law Article and applicable case law.

II.

Father next argues that the court erred in entering a custody order without hearing testimony or taking evidence. He contends that if the parties are unable to agree to custody, "the court *must* conduct" an evidentiary hearing to determine custody based on the best interest of the minor children. He cites *Wells v. Wells*, 168 Md. App. 382, 397 (2006) and *A.A. v. Ab.D.*, 246 Md. App. 418, 444-47, *cert. denied*, 471 Md. 75 (2020) to support his argument. He concludes that because the court did not conduct an evidentiary hearing, the circuit court "had no basis to consider the best interest factors and to make a custody determination." We hold that the court was not required to conduct a hearing before

entering a pendente lite custody order and further that the court's order was supported by evidence in the record that it was in the children's best interest. We explain.

Standard of Review

The standard of appellate review of a circuit court's custody determinations is as follows:

> The appellate court will not set aside the trial court's factual findings unless those findings are clearly erroneous. To the extent that a custody decision involves a legal question, such as the interpretation of a statute, the appellate court must determine whether the trial court's conclusions are legally correct, and, if not, whether the error was harmless. The trial court's ultimate decision will not be disturbed unless the trial court abused its discretion.

Gizzo v. Gerstman, 245 Md. App. 168, 191–92 (2020) (citations omitted).

Pendente lite/interim access custody orders

The order from which Father appeals is titled an interim access order, but the order was filed as a pendente lite order.[4] These terms are interchangeable in the context of this case as both orders are meant to be temporary. *See Knott v. Knott*, 146 Md. App. 232, 260 (2002) ("An interlocutory order by definition is temporary and not final.") (citing Black's Law Dictionary, 819 (7th Edition 1999)). The Maryland Supreme Court has discussed the purpose of a pendente lite order.

> Child access (custody and visitation) orders are ordinarily of two types. The normal progression of a contested child access case is for there

[4] Preliminarily, we note that Father's appeal of the pendente lite custody order is properly before us. Generally, pendente lite custody orders are appealable when the order "[d]epriv[es] a parent ... or natural guardian of the care and custody of his child, or chang[es] the terms of such an order." *See* Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x) and *Frase v. Barnhart*, 379 Md. 100, 119-20 (2003).

> first to be a *pendente lite* determination, designed to provide some immediate stability pending a full evidentiary hearing and an ultimate resolution of the dispute. The child is often traumatized enough by the separation that engenders the dispute, and, to the extent possible, the courts look to avoid any further unnecessary immediate disruptions in the child's life. A *pendente lite* order is not intended to have long-term effect and therefore focuses on the immediate, rather than on any long-range, interests of the child. As a result, although it should not be changed lightly, lest the stability intended by it be diminished, it is subject to modification during the pendency of the action, as current circumstances warrant, and it does not bind the court when it comes to fashioning the ultimate judgment.
>
> At some point, hopefully with dispatch, the issue comes before the court for "final" resolution, either through agreement of the parties or on evidence presented at a trial conducted by the court or a master appointed by the court. The court then has the benefit of either an agreement or the full record of evidence, and, based thereon, it renders a "final" decision that disposes of the petition in terms of what is in the long-term overall best interest of the child.

Frase v. Barnhart, 379 Md. 100, 111–12 (2003) (footnote and citations omitted).

The "primary goal" in a custody determination "is to serve the best interests of the child." *Conover v. Conover*, 450 Md. 51, 60 (2016). *See Wagner v. Wagner*, 109 Md. App. 1, 38 (the best interest standard is "*the* dispositive factor on which to base custody awards.") (emphasis in original), *cert. denied*, 343 Md. 334 (1996). This over-reaching standard applies to pendente lite custody orders. *See Malik v. Malik*, 99 Md. App. 521, 525 (1994). *See also Kovacs v. Kovacs*, 98 Md. App. 289, 312 (1993) ("The proper standard the court should use to determine a change of custody from a pendente lite order is and continues to be what is in the best interest of the child."), *cert. denied*, 334 Md. 211 (1994). In making a custody determination, the court "examines numerous factors and weighs the advantages and disadvantages of the alternative environments." *Montgomery County*

Dep't. of Social Services v. Sanders, 38 Md. App. 406, 420 (1977) (citation omitted).[5] *See also Taylor v. Taylor*, 306 Md. 290, 304–11 (1986).[6]

However, "a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion." *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003). *See also Gizzo*, 245 Md. App. at 195-96 ("Generally, even where the trial court must issue a statement explaining the reasons for its decision, the court need not articulate every step of the judicial thought process in order to show that it has conducted the appropriate analysis.") (citations omitted) and *Wagner*, 109 Md. App. at 50 ("[W]e presume judges to know the law and apply it, even in the absence of a verbal indication of having considered it.").

[5] In *Sanders,* we set out the following non-exclusive factors for a circuit court to consider in child custody determinations: 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) the ability to maintain 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 parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender. *Sanders*, 38 Md. App. at 420.

[6] In *Taylor,* the Maryland Supreme Court considered the following factors as relevant in making joint custody determinations: 1) capacity of the parents to communicate and to 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) other factors. *Taylor*, 306 Md. at 304-11.

Father argues that the court erred in not holding an evidentiary hearing before issuing its interim access order. Father cites no case law to support his assertion, and we are aware of none that would require a court to conduct an evidentiary hearing before issuing a pendente lite order. Father is not arguing that the court considered improper factors in making its pendente lite custody determination, only that the court could not make a determination of the best interest of the child without an evidentiary hearing.

In our view, the record makes clear that the circuit court was aware of the requisite best interest analysis and rendered an appropriate decision based on the unique circumstances of this case. During the eight months between the first (continued) merits hearing in March and the circuit court's interim access order in November, the parties and their respective attorneys were before the court no less than seven times. The judge spoke directly to all three children in private meetings in chambers and heard testimony and argument regarding the parties' relationship with each other, with their children, their character, and their living arrangements. At the September 25 hearing, the court spoke specifically about the best interest standard and Father's attorney reminded the court that it must make a custody determination in the best interest of the children. Under these circumstances, we conclude that the court's pendente lite custody determination was based on sound legal principles and the court did not err or abuse its discretion.

The cases cited by Father, *Wells*, *supra*, and *A.A.*, *supra*, are easily distinguishable.

In *Wells,* we held that the trial court abused its discretion in a divorce action when it denied wife's motion to vacate a default judgment on the issues of child custody, support, visitation, use and possession, equitable distribution, and alimony, without holding a full

evidentiary hearing on wife's allegation that husband obtained the default judgment by fraud. *Wells*, 168 Md. App. at 397. In *A.A*, a motion to modify custody case, we stated that a "child's best interests are best attained when the court's decision is as well-informed as possible." We held that even though Mother's discovery responses were deficient, the trial court's discovery sanction at a full-merits custody hearing were in error as it effectively precluded the court from considering potentially significant evidence relevant to the *Sanders/Taylor* factors in determining what custody arrangement would be in the children's best interest. *A.A.*, 246 Md. App. at 444-49.

Both of those cases concerned a full-merits custody hearing (or the lack of one) on a motion before the court, not pendente lite or interim custody order, which as discussed above are temporary, with a full-evidentiary hearing to come. In each, unlike the case before us, the court ruled that one of the parties was prohibited from presenting evidence because of a procedural issue. That is not the situation before us where, as here, a full-evidentiary hearing has not yet been held and the circuit court has never affirmatively ruled that a party was precluded from presenting evidence.

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