Circuit Court for Charles County
Case No.: C-08-FM-23-000328

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2258

September Term, 2023

DANIEL ALEGBELEYE

v.

LIBBY NOELL

Ripken,
Kehoe, S.,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 9, 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).

Daniel Alegbeleye ("Father"), appellant, appeals from an order of the Circuit Court for Charles County awarding Libby Noell ("Mother"), appellee, sole legal custody and primary physical custody of the parties' child. Father timely appealed the circuit court's order and presents the following questions, which we have rephrased as follows:[1]

1. Whether the trial court abused its discretion in awarding Mother sole legal custody and primary physical custody of the child.

2. Whether the trial court erred by admitting evidence related to an alleged domestic violence incident.

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

The parties' one minor child ("Child") was born in 2022. The parties were never married and ceased living together on February 20, 2023. On March 3, 2023, Father filed a complaint for custody and child support, requesting joint legal custody with tie-breaking authority for medical and educational decisions, and shared physical custody. Mother filed an answer and countercomplaint, denying the allegations in the complaint, and requesting sole legal and primary physical custody. On August 21, 2023, a *pendente lite* hearing was held and the court awarded the parties joint legal and shared physical custody on a one week on/one week off basis.

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[1] The questions as presented by Father are:

1. Whether the Trial Court abused its discretion in awarding Appellee sole legal custody and primary physical custody of the parties minor child rather than awarding shared physical custody.

2. Did the Trial Court erred [sic] by admitting into testimony and evidence unsubstantiated prejudicial claims/documents?

A two-day merits trial was held on November 13, 2023 and January 3, 2024. Both parties were represented by counsel. The following facts were elicited at the trial: Mother resides with Child in Charles County in the home the parties acquired together. Mother testified that the parties plan to sell the home and she expects to move to Arlington, Virginia, or Prince George's County, though her plans were not "concrete yet." Mother works at PPG Industries in Washington, D.C., earning $70,000 per year. She works full-time from 6:30 a.m. to 3:30 p.m., and her father, Timothy Noell, takes care of Child while she is at work. Father resides in Silver Spring with his parents and three siblings. Father works remotely, earning a base annual salary of $50,000 and commissions of approximately $20,000 annually.

Father testified that the parties had discussed sharing custody on a fifty/fifty basis, splitting the week from Sunday to Wednesday and Wednesday to Sunday. He stated that the parties followed the fifty/fifty custody plan on only one occasion. Mother denied that the parties had reached an agreement on shared custody. Mother explained that she and Father split custody during the week of February 27, 2023 because they both had planned travel that week. Following their week of shared custody, the parties were unable to agree on a weekly custody arrangement.

On January 12, 2024, the court, after a virtual hearing, placed its oral ruling on the record and entered a written order on March 4, 2024. The circuit court, determining that joint custody was not appropriate, set forth an access schedule for shared physical custody, and awarded Mother sole legal custody. The specific findings of the court will be reviewed in more detail in our discussion of the issues presented.

STANDARD OF REVIEW

The standard of appellate review of a circuit court's child custody determination 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).

The discretion to make custody decisions is vested in the trial court because the judge, unlike an appellate court, is in the best position to see the witnesses and the parties, hear the testimony, weigh the evidence, and determine the outcome that will serve the best interest of the child. *In re Yve S.*, 373 Md. 551, 585-86 (2003). A court abuses its 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, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Gizzo*, 245 Md. App. at 201.

DISCUSSION

1. The trial court did not abuse its discretion in awarding Mother sole legal and primary physical custody

Father contends that the circuit court abused its discretion in awarding Mother sole legal custody and primary physical custody of Child. Father argues that "it would have

been justifiably reasonable to award the parties joint legal and a form of shared physical custody."

Father devotes a section of his brief to detailing evidence presented at the *pendente lite* hearing and disputing various findings of the court in the *pendente lite* and the exceptions hearings. Because the custody issues decided at the *pendente lite* hearing became moot upon the final determination of custody at the merits hearing, we will not address Father's challenges to the circuit court's *pendente lite* and exceptions rulings. *See Cabrera v. Mercado*, 230 Md. App. 37, 87 (2016) (explaining that any relief this Court could grant for alleged errors in the emergency temporary custody order would have no consequence where the final custody order is in place).

Mother asserts that the circuit court properly addressed the relevant factors in determining that it was in Child's best interest to award Mother sole legal and primary physical custody, and the court's findings were supported by evidence in the record.

In any child custody case, "[t]he best interest of the child standard is the overarching consideration[.]" *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013). For that reason, "[t]he best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Taylor v. Taylor*, 306 Md. 290, 303 (1986).

In *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1978), this Court set forth ten factors to be considered when making a custody determination: (1) the fitness of parents; (2) the character and reputation of the parties; (3) the desires of the natural parents and any agreements between the parties; (4) the

potentiality of maintaining natural family relations; (5) the preference of the child; (6) any material opportunities affecting the future life of the child; (7) the age, health, and sex of the child; (8) the residences of parents and opportunity for visitation; (9) any length of separation from the natural parents; and (10) any prior voluntary abandonment or surrender.

In *Taylor*, the Supreme Court of Maryland provided additional factors with particular relevance to joint custody, some of which overlap with the *Sanders* factors: (1) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (2) the willingness of the parents to share custody; (3) the fitness of the 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) demands of parental employment; (9) the age and number of children; (10) the sincerity of the parents' requests; (11) the parents' financial status; (12) any impact on state or federal assistance; (13) benefit to parents; (14) and any other relevant factors. *Taylor*, 306 Md. at 304-11.

In this case, the circuit court considered the relevant factors in light of the evidence presented. In regard to the capacity of the parents to communicate and reach shared decisions affecting the child's welfare, the court found that "there is really no evidence of capacity [to communicate.]" The evidence showed that the parties "communicate through lawyers, sometimes through text, sometimes they don't respond to each other, or one doesn't respond to the other . . . [t]o the point where, for whatever reason, [Father] doesn't even feel that he can send a message that says basically . . . '[w]hen can I see my

daughter?"' The court found that "[t]here is a fundamental lack of trust here, and . . . the relationship . . . is characterized by high emotions."

In considering the parents' willingness to share custody, the court found that the parties had difficulty co-parenting. The court found that both parents seemed to have "the proper intentions" and both parents desired time with Child. There was no evidence that either parent was unfit or that the parties' character and reputation were of concern.

The court found that there was no agreement between the parties regarding custody. The court observed that Child had the opportunity to have relationships with family members other than the parents, and Child's material opportunities were "about the same" with both parents.

Regarding any potential disruption of Child's social life, the court noted that although Child is not of school age, there could be disruption to Child's social life if Child moved to Silver Spring because Child is often cared for by the maternal grandfather. The court noted that the grandfather, who testified at trial, had a positive relationship with Child. But we are not persuaded that the circuit court prioritized the grandfather's bond to Child over Father's bond as Father argues.

The court noted that Child was one year of age and far too young for the court to know Child's desires. Regarding the demands of employment, the court noted that both parents were employed. Mother worked outside the home, returning home by 4:30 p.m., and Father's work schedule was flexible.

With respect to the parents' residences, the court noted that Mother's residence in Brandywine was "a fit and proper place." The court appreciated that Child had been in the

same home for most of her life, explaining that "less change, generally speaking, is a good thing[,]" and Child's familiarity with that home was a strong factor in the court's decision. The court characterized the environment of Mother's home, consisting of Mother and Child, as "more conducive[,]" whereas Father had multiple people residing in his residence, and there was "clutter and mouse poison there."

Father's contention that the circuit court failed to consider Mother's "strong desire to relocate out of the State of Maryland with [Child] and that the present location was subject to change" is not supported by the record. The court specifically considered the fact that Mother had indicated that she may want to move residences either to Prince George's County or Arlington, Virginia, but had not made plans to do so. The court explained that "the proximity of the parental homes really is one of the things that makes this case complex. This is a very close case." In considering joint custody, the court expressed concern about a one-year-old child enduring long car rides between Charles County and Montgomery County, especially on a schedule that required multiple days of travel every week. The court also looked ahead to Child entering school, and noted that a week on/week off schedule would not be "doable" during the school year in light of the distances between the parties' residences. Under the circumstances, the circuit court determined that a fifty/fifty custody arrangement was neither fair to Child nor in Child's best interest.

The court awarded Father visitation with Child on alternating weekends. The court permitted, but did not require, additional weekday visitation for two hours every week at a

location not more than ten miles from Child's residence, in an effort to avoid the difficulties of Child enduring long car rides between residences in a single day.

The court thoroughly considered the *Sanders* and *Taylor* factors in determining the custody arrangement that was in Child's best interests. While we recognize that no single factor in a custody determination is dispositive, the parties' ability to communicate is "of paramount importance" in deciding whether to award joint custody. *Reichert v. Hornbeck*, 210 Md. App. 282, 306 (2013) (citing *Taylor*, 306 Md. at 303). Importantly, "[w]hen the evidence discloses severely embittered parents and a relationship marked by dispute, acrimony, and a failure of rational communication, there is nothing to be gained and much to be lost by conditioning the making of decisions affecting the child's welfare upon the mutual agreement of the parties." *Taylor*, 306 Md. at 305.

Father contends that "it would have been justifiably reasonable to award the parties joint legal and a form of shared physical custody." The availability of a reasonable alternative, however, is not the applicable standard for setting aside the circuit court's decision. In considering "close-call" cases such as this, we have explained:

> "[W]here custody might well have been awarded to either parent, [it] aptly demonstrates the advisability of leaving to the [circuit court] the delicate weighing process necessary in child custody cases; *to disturb the award here would require that we substitute our judgment for that of the [circuit court]*, and an appellate court sits in a much less advantageous position to assure that the child's welfare is best promoted."

McCarty v. McCarty, 147 Md. App. 268, 273 (2002) (quoting *Davis v. Davis*, 280 Md. 119, 131-32 (1977)).

To set aside the trial court's award of sole legal custody and primary physical custody to Mother, we would have to conclude that the trial court's decision was an abuse of discretion; that is, that it was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994). The record before us provides no support for that conclusion. Rather the court's evaluation of the evidence, and its consideration of the *Sanders* and *Taylor* factors, supports the court's determination that awarding sole legal custody and primary physical custody to Mother was in Child's best interest and not an abuse of discretion.

2. The circuit court did not abuse its discretion in overruling Father's objection to evidence related to an alleged domestic violence incident

On appeal, Father argues that the circuit court abused its discretion in admitting "highly prejudicial" evidence regarding an alleged domestic violence incident. He contends that the evidence was not relevant, and the foundational requirements for authentication of the evidence were not met. Father further asserts that he was prejudiced by Mother's failure to produce photographs related to the incident in discovery.

Mother responds that Father's arguments are without merit because Mother's testimony sufficiently identified the date the photographs were taken, and contrary to Father's assertion, the photographs were produced in discovery. Mother further contends that Father's argument that she failed to comply with discovery is unpreserved because he did not raise the argument at trial.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. A ruling that evidence is legally relevant is a conclusion of law, which we review *de novo*. *See Smith v. State*, 218 Md. App. 689, 704 (2014). As to whether relevant evidence is unfairly prejudicial, we review a court's determination for abuse of discretion. *Id.*; *see, e.g.*, *Webster v. State*, 221 Md. App. 100, 113 (2015). As long as the trial court's decision is reasonable, the appellate court will not disturb that decision on appeal. *Peterson v. State*, 196 Md. App. 563, 585 (2010).

At trial, Father's counsel argued that evidence of the domestic violence incident was not relevant because it occurred prior to the birth of Child.[2] The circuit court overruled Father's objection, finding that the evidence was relevant to the parents' ability to communicate and co-parent. We conclude that the evidence was relevant to the court's custody determination and thus, it was within the trial court's discretion to admit the evidence. *See A.A. v. Ab.D.*, 246 Md. App. 418, 447 (2020) (holding in the context of a custody case that the trial court's exclusion of evidence of the father's past conduct precluded the trial court from properly assessing father's fitness to have custody of his children).

Under Maryland Rule 5-901(a), authentication of evidence "is a condition precedent to its admissibility, and the condition is satisfied where there is sufficient evidence 'to

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[2] In his brief, Father incorrectly asserts that he objected to the relevance of the domestic violence incident on the basis that Mother had dismissed her petition for a protective order concerning the incident.

support a finding that the matter in question is what its proponent claims.'" *Sykes v. State*, 253 Md. App. 78, 91 (2021) (quoting Md. Rule 5-901(a)). "The process of authentication refers to 'laying a foundation' to admit 'nontestimonial evidence [such] as documents and objects' sufficient to establish 'a connection between the evidence offered and the relevant facts of the case.'" *Reyes v. State*, 257 Md. App. 596, 629 (2023) (quoting *Jackson v. State*, 460 Md. 107, 115-16 (2018)). Under the pictorial testimony method of authentication, photographic evidence may be authenticated through the testimony of a witness with personal knowledge of the subject depicted. *Id*. at 630. When a party challenges the admission of evidence on authenticity grounds, "we review the trial court's decision for abuse of discretion." *Sykes*, 253 Md. App. at 90.

Mother identified two photographs that she claimed had been taken on April 2, 2022, the day following the alleged domestic violence incident, depicting injuries to her eye and face. Father's counsel objected to the admission of the photographs because there was no date or time on the photographs and "no chain of authentication[.]" The circuit court admitted the photographs over Father's objection.

The photographs introduced into evidence were sufficiently authenticated by Mother's testimony that the photographs of her face were taken on April 2, 2022. *See* Md. Rule 5-901(b)(1) ("Testimony of a witness with knowledge that the offered evidence is what it is claimed to be" satisfies the requirements for authentication.). Indeed, "[t]he standard for admissibility is low[.]" *Reyes*, 257 Md. App. at 630. We perceive no abuse of discretion in the circuit court's admission of the photographs.

Father did not raise before the circuit court the argument now made on appeal that the photographs were not produced to him in discovery. Arguments raised for the first time on appeal are not preserved for review. *See Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal."); *Stewart-Bey v. State*, 218 Md. App. 101, 127 (2014) (limiting appellate review to "the ground assigned" in the objection during trial (cleaned up)); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). In this case, Father did not argue before the circuit court that the photographs were not produced in discovery and we will not address that contention for the first time on appeal.

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