

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 44

September Term, 2016

JOHN HENRY HIRS

v.

KADRI LIIS HIRS

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Berger, J.

Filed: February 9, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellee, Kadri Liis Hirs (“Mother”), filed a petition for a protective order in the Circuit Court for Anne Arundel County against appellant, John Henry Hiirs (“Father”), her ex-husband, alleging abuse against the parties’ minor child. After holding a hearing, the court found that the alleged abuse had occurred and granted a final protective order against Father.

On appeal, Father presents seven questions¹ for our review, which we have consolidated and rephrased as a single question:

¹ The questions, as presented by Father, are:

1. Did the court sufficiently question the minor child witness for understanding truthfulness and the ramifications of lying before allowing the child’s testimony?
2. Was the court’s decision legally correct in balancing the testimony of a minor child witness and proof of credibility within the Rules of Evidence vs. the testimony of an adult witness and a corroborating child witness at the scene of the event in question?
3. Was the court’s decision further invalid by not just determining if the minor child was capable in determining truthfully the color of a shirt, but by not further in complexity determining in a situation where pulling an older child that is hitting and on top of a younger child/brother off of is not an act of willful aggression against older child but rather an action in the effort to protect the younger child?
4. Was the court legally correct in allowing the minor witnesses [sic] testimony without ascertaining the emotional stability and cognizance of the child witness considering the seriousness of the claims?
5. Was the court legally correct in its eventual acceptance of a child witness’s testimony as of greater credibility over the contradictory adult witness’s testimony, despite both parties (the adult and the child) direct placement in the event in question?

Whether the circuit court erred and/or abused its discretion in its consideration of the evidence presented and determination that Father had abused the minor child.

Perceiving no error, we shall affirm the judgment of the circuit court.

BACKGROUND

This case involves narrow issues relating only to the issuance of a final protective order. As such, we set forth only the facts relevant to this appeal.²

The parties are the parents of two minor children, K., born November 30, 2007, and A., born March 1, 2010. In the parties' 2013 judgment of divorce, the parents were granted joint legal and shared physical custody of the children.

The incident that precipitated Mother's filing of a petition for a protective order occurred on December 2, 2015 at Father's home. K., who was eight years old at the time, was injured when he hit his head against a wall. Father and K. characterized the cause of

-
6. Was the court legally correct i[n] dismissing the testimony of an adult witness, simply by the claim of an injured child that the adult was the cause of the injury? E.g., if a room full of adults claim an event is an accident, but a single child witness claims all the adults are guilty, are all the adult's testimonies then considered moot simply because the claimant is a child? What rights are provided to an adult or parent if accused by a child that has happened to have sustained an injury in the presence of said adult?
 7. Did the court sufficiently consider the credibility of the adult's testimony consistent with the occurrence of events as possibility of the injury to the child being an accident rather than an act of willful maliciousness?

² The parties' divorce case remains active in the Circuit Court for Anne Arundel County.

the injury differently. According to Father, K. was injured accidentally after Father attempted to intervene during a fight between K. and A. Father testified that K. slipped and fell, hitting his head against the wall. According to K., Father pushed him into the wall because Father thought K. was going to attack A. K. was later diagnosed with a concussion due to the injury.³

On December 7, 2015, Mother filed a petition for a protective order, alleging abuse of K. by Father. Mother was granted a temporary protective order and a hearing was scheduled for December 15, 2015. The hearing was later postponed to December 22, 2015. After hearing testimony from both parties as well as hearing from K. himself, the circuit court found that Father had abused K. and granted Mother a final protective order until May 22, 2016. This appeal followed.

STANDARD OF REVIEW

We set forth the applicable standard of review for the issuance of domestic violence protective orders in *Piper v. Layman*, 125 Md. App. 745 (1999), as follows:

The burden is on the petitioner to show by [a preponderance of the] evidence that the alleged abuse has occurred. If the court finds that the petitioner has met the burden, it may issue a protective order tailored to fit particular needs that the petitioner has demonstrated are necessary to provide relief from abuse. When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that

³ Both parties raised issues before the circuit court relating to whether Father should have responded differently to K.'s injury and whether Father should have sought medical attention more quickly. The circuit court made it clear to the parties that it was "not interested in how you treat" the injury, but "want[ed] to know . . . whether [Father] caused" the injury.

its findings are clearly erroneous. As to the ultimate conclusion, however, we must make our own independent appraisal by reviewing the law and applying it to the facts of the case.

Id. at 754 (citations and internal quotation marks omitted).⁴

DISCUSSION

On appeal, Father asserts that the circuit court improperly permitted K.'s testimony without properly qualifying the minor child's competence. Father further asserts that the circuit court improperly credited K.'s testimony while discrediting Father's testimony. We are unpersuaded by Father's allegations of error and shall affirm.

First, we comment briefly on whether the issues raised in this appeal are moot, given the expiration of the final protective order on May 22, 2016.⁵ "A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy." *Coburn v. Coburn*, 342 Md. 244, 250 (1996). Generally, we dismiss moot cases and do not address the merits. *Id.*

At first glance, this case appears to be moot due to the expiration of the final protective order. We have commented, however, that

[i]n light of the stigma that is likely to attach to a person judicially determined to have committed abuse subject to protection under the Domestic Violence Act, we think that the

⁴ Until October 1, 2014, the evidentiary standard for a final protective order required that abuse be proven by clear and convincing evidence. Since October 1, 2014, the preponderance of the evidence standard has applied. 2014 Md. Laws, Ch. 111, codified at Md. Code (1984, 2012 Repl. Vol., 2016 Suppl.), § 4-506 of the Family Law Article.

⁵ Mother did not file a brief in this appeal and Father did not address any issue with respect to mootness in his brief. We address the issue *sua sponte* in order to explain why we address the merits in this case.

expiration of the protective order does not automatically render the matter moot. The review of such finding on appeal, and the potential for vacation of the order, thereby removing the stigma, gives substance to the appeal.

Piper, supra, 125 Md. App. at 753 (internal citations and internal quotations omitted). Furthermore, in addition to potential stigma from a finding of abuse, when an individual has been found to have abused a child, there are significant ramifications relating to custody in the future. Under Maryland law, a party to a child custody hearing who has previously abused a child shall be denied custody and unsupervised visitation “[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party[.]” FL § 9-101. Accordingly, we shall address the merits of Father’s appeal.

We now turn to the merits of Father’s appeal and address Father’s contentions that the circuit court improperly permitted and inappropriately credited the testimony of K., a minor child. “The determination of a child’s competence is within the sound discretion of the trial judge.” *Perry v. State*, 381 Md. 138, 148 (2004) (citations omitted). The burden is upon the opponent of a witness to prove that a witness is incompetent. *Id.* We review a trial court’s determination of a child’s competence for abuse of discretion. *Id.*

Critically, Father raised no argument before the trial court with respect to K.’s competence. Pursuant to Maryland Rule 5-601, children are presumed to be competent witnesses. *See also Stoddard v. State*, 389 Md. 681, 741 (2005) (“Maryland Rule 5-601 creates a presumption that every person, including a child, is competent to be a witness.”). Indeed, the Court of Appeals has explained that “the test for determining the competence of a child witness is not age but rather whether the witness has intelligence enough to make

it worthwhile to hear him [or her] at all and whether he [or she] feels a duty to tell the truth.” *Id.* (alterations in original) (internal quotation and citation omitted). “When a facially valid challenge is presented, the court must make some inquiry, sufficient to allow it to determine whether the witness, including a child witness, is competent.” *Id.* (citing *Perry, supra*, 381 Md. at 146-47.)

Here, Father raised no challenge to K.’s testimony. Mother specifically requested that the court hear from K. privately. Father lodged no objection to Mother’s request. After hearing testimony from both of the parents, the circuit court judge asked to have K. brought into the courtroom and for the parents to leave the courtroom while the court heard from the minor child. Father raised no objection, nor did Father request that K. be qualified in any way. After the circuit court’s interview of K. was complete, the parents returned to the courtroom and the circuit court judge summarized K.’s testimony. Again, Father lodged no objection to K.’s testimony.

Furthermore, even if Father had raised an objection to K.’s testimony, an objection alone does not trigger the need for *voir dire* of the child. In *Perry, supra*, the Court of Appeals explained:

In addition, as a means of guidance for the trial courts, we hold that *if* a substantial question as to a child’s competency is raised, ordinarily, the trial judge should conduct a *voir dire* hearing outside the presence of the jury . . . [I]n a case where the objecting party states that a child is seven years old and baldly asserts that the child lacks the ability to understand the difference between truth and fiction, without more, a substantial question as to competency has not been raised.

381 Md. at 157. In *Perry*, unlike in this case, the defendant expressly objected to a minor child's testimony and challenged the minor child's competence. *Id.* at 141-42. The defense asked the court to *voir dire* the child outside of the presence of the jury, but the circuit court denied the defense request and instead permitted the parties to ask the witness questions relating to her competency during direct and cross-examination. *Id.* at 142-43. The Court of Appeals held that the circuit court had not abused its discretion, commenting that "the procedure that should be employed to determine a child's competency is . . . within the trial court's discretion." *Id.* at 157.

The *Perry* Court further commented that it saw "no reason why the onus should have been on the trial judge to jump in and ask defense counsel if he would like to ask additional competency questions of the child." *Id.* at 156 n. 9. Similarly, in this case, we see no reason why the circuit court should have been required to *sua sponte* engage in a competency analysis of K. Pursuant to Maryland Rule 5-601, K. was presumed to be a competent witness. No challenge to K.'s competency was raised at all, let alone a "substantial question as to competency" as the Court explained was required in *Perry*. *Id.* at 157. As such, we reject Father's contentions that the circuit court erred in its qualification of K.⁶

⁶ Because this issue was not raised below, we do not address Father's arguments with respect to the requirements for competence which were set forth in *Perry, supra*, namely, the witness's (1) capacity for observation; (2) capacity for recollection; (3) capacity for communication; and (4) sense of moral responsibility to tell the truth. 381 Md. at 149.

Father further asserts that the circuit court erred by crediting K.'s testimony while discounting Father's own testimony. It is well-established that the weighing of contradictory evidence is within the province of the trial court, not the appellate court. *See, e.g., Smith v. State*, 415 Md. 174, 185 (2010). The Court of Appeals has explained:

Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.

Id. The circuit court was entitled to credit the testimony of K. and discredit the testimony of Father with respect to the cause of K.'s injury. We will not second guess the circuit court's credibility determination on appeal.

The circuit court's factual findings were supported by evidence presented and were not clearly erroneous. The protective order issued by the circuit court, which permitted supervised visitation every Saturday as well as on alternate Sundays, was tailored to the particular needs of this case. Accordingly, we shall not disturb the circuit court's ruling on appeal.

**JUDGMENT OF THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY AFFIRMED. COSTS
TO BE PAID BY APPELLANT.**