Circuit Court for Baltimore County
Case No. 03-C-18-012819

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 13

September Term, 2020

JESSICA LEA BAFFORD

v.

KELLY LEE BAFFORD

Graeff,
Leahy,
Shaw Geter,
JJ.

Opinion by Graeff, J.

Filed: September 29, 2020

On February 4, 2020, Jessica Bafford ("Mother"), appellant, and Kelly Bafford ("Father"), appellee, were granted a Judgment of Absolute Divorce in the Circuit Court for Baltimore County. The court awarded Father sole legal and physical custody of the parties' eight-year-old daughter ("M.B.") and ordered that visitation with Mother must be supervised. Mother was ordered to pay child support, equal to the amount of the social security benefits she receives monthly on behalf of M.B., plus arrears to be paid from the sale of the marital home. Both parties' requests for alimony and attorney's fees were denied.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly:

1. Did the circuit court abuse its discretion in awarding Father sole physical and legal custody of the minor child, with only restricted, supervised access to Mother?

2. Did the circuit court err in including the cost of private school tuition in the child support and arrears calculation?

3. Did the circuit court abuse its discretion in denying Mother alimony and attorney's fees?

For the reasons set forth below, we shall affirm in part and vacate in part the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father were married in 2009 and purchased a house in Reisterstown shortly thereafter. In December 2011, M.B., the parties' only child, was born. During the summer of 2018, heavy rain caused a pool of standing water to form on the side of the house, with resulting mold in the house. Mother subsequently became ill, and in late

November 2018, she temporarily left the marital home with M.B. and stayed in a hotel. The parties had the house tested for mold a few days later, and the contractor found "fairly normal" levels of mold spores in the basement. On November 29, 2018, the contractor performed remedial work, guaranteeing it for two years.

On December 3, 2018, as a result of irreconcilable marital troubles and the continuing health issues Mother experienced in the marital home, Mother permanently moved with M.B. to a hotel. Father's access to M.B. from December 2018 to April 2019 was limited to phone calls, aside from a handful of brief visits in December 2018 when Mother returned with M.B. to retrieve some personal items.

On December 21, 2018, Father filed a Complaint for Limited Divorce or in the Alternative, Absolute Divorce. Mother filed an answer, as well as a counterclaim for limited divorce. In April 2019, M.B. moved back into the marital home with Father.[1] On May 28, 2019, the parties agreed to an Interim Consent Order, which provided Father with primary physical custody and Mother with liberal visitation. On December 6, 2019, Father filed a supplemental complaint for absolute divorce.

I.

Circuit Court Hearing

On January 15–21, 2020, the Circuit Court for Baltimore County held a hearing**.** A central issue was whether Mother and M.B. suffered from Chronic Inflammatory Response

[1] The Best Interest Attorney explained that she had insisted to Mother that Father have access to M.B., and because M.B. was then re-exposed to the mold in the marital home, Mother did not "want to have the child around her and expose herself[.]"

Syndrome ("CIRS") due to mold exposure, and whether Mother's preoccupation with her health and M.B.'s health would negatively impact M.B. if Mother was awarded custody and visitation.

Father testified to the breakdown of the parties' relationship, including Mother's mental health issues and her tumultuous relationship with Father's two adult children, Kate and Jeffrey, from a prior marriage. He stated that M.B. was very fond of Kate, but Mother did not permit M.B. to spend time with Kate or allow Kate or Jeffrey in the house towards the end of the marriage.[2]

Father testified that he was requesting sole legal and physical custody, with supervised visitation for Mother, because he was concerned that Mother would push unnecessary medical procedures on M.B. based on symptoms that he did not believe existed. He introduced a detailed list of symptoms that Mother had listed that M.B. had from January 24, 2019, to March 12, 2019, i.e., the period prior to the Interim Consent Order, when M.B. was residing exclusively with Mother. The symptoms, entered almost daily, included pain in various extremities, burning in her mouth, nausea, headaches, eye irritation, and more. At times, Mother noted that M.B. was "unable to walk" or stand.

Father testified that, since M.B. had moved back into the marital home with him in April 2019, she had not exhibited any of the symptoms described by Mother. The only

[2] Father introduced a list of "rules" that Mother had proposed for the household during the marriage. He testified that, although he acquiesced at the time to avoid conflict, he found some of the rules to be excessive. As relevant to the circuit court's ruling, one of the rules was that M.B. was not permitted to "participate in contact sports, nor high impact activities."

sickness M.B. experienced while she resided with him was a cold with a cough that went away within a week and a contact rash that was successfully treated within a few days with hydrocortisone. Other witnesses, including Father's first wife, his adult daughter, and his sister-in-law, all testified that they had spent time with M.B. during this period and had not observed any of the symptoms claimed by Mother. M.B.'s pediatric records similarly did not show any complaints about pain. Although Mother and M.B. communicated almost exclusively by phone during this time, Father expressed concern that Mother was convincing M.B. that she was sick when she was healthy.[3]

Various medical professionals testified regarding the legitimacy of CIRS and the health of Mother and M.B. Dr. Lauren Mendelsohn-Levin, M.B.'s pediatrician since 2017, was admitted as an expert in pediatric medicine. She testified that her office treated M.B. for a cold and conjunctivitis during a check-up in January 2019 and did not note any findings consistent with mold exposure at the time. On December 19, 2019, M.B. had symptoms of an upper respiratory virus accompanied by a fever, but her fever was going down at the time, her chest was clear, and "there was nothing indicative of a bacterial infection." She did not observe any issues with M.B.'s lungs that would indicate respiratory issues related to mold exposure. When asked if she had any reason to believe that M.B. suffered from a mold related illness, Dr. Mendelsohn-Levin testified that she

[3] From April 2019 to January 2020, Mother had only two in-person visits with M.B. (November 29, 2019, and December 15, 2019), but they spoke several times a day on the phone.

"had no reason to believe based on her physical findings and [M.B.'s] reported self-limited illnesses that . . . [M.B.] was anything different than a healthy child."[4]

Dr. Kenneth Schuberth, an expert in pediatric allergies and immunology, testified that he conducted a court-ordered "Independent Medical Examination" on M.B. in June 2019. After reviewing M.B.'s medical history, he did not find any "significant evidence of allergy tendencies or allergy family tendencies[,]" and the physical exam he conducted showed that M.B. was in good health. He then performed an allergy puncture skin test for five "common indoor and outdoor molds," and M.B. tested negative for all of them. As a result, he made the following conclusions and recommendations:

> [A]fter examining [M.B.] and finding that she had a history that did not suggest mold sensitivities, secondly a physical exam that was really entirely normal and did not show any signs of mold or disease and, in fact, she was quite a healthy and active and talkative young girl and having allergy tests that were entirely negative, my conclusion was that I could not find any evidence either on history, physical or on laboratory testing of what we call specific IGE mediated mold sensitivity. I didn't recommend that she needed any further treatment for mold abatement or mold removal from the environment at that time because I did not feel there was any evidence of any specific problem related to mold allergy.

When asked about the scientific validity of CIRS, Dr. Schuberth testified that "the diagnosis really has no validity at all," and it is "not really a known diagnosis that people in scientific medicine would respect." On cross-examination, Dr. Schuberth conceded that

[4] Dr. Mendelsohn-Levin testified that she did not make a diagnosis of Munchausen's Syndrome by Proxy, in which a caregiver imposes non-existent symptoms upon a child to make the child seem ill.

he was not an expert in CIRS or non-allergy mold related illnesses. He stated that CIRS "was one of those illnesses that [is] often claimed in alternative medicine circles."

Dr. David Waltos, a psychiatrist employed by the Office of the Court Psychiatrist, testified that he conducted a court-ordered examination of Mother and gave a written report on her mental health. The report stated that Mother had a long history of mental illness, including somatic symptom disorder,[5] depression, post-traumatic stress disorder, and borderline personality disorder. When asked whether Mother's mental health issues or physical symptoms could impact her ability to parent, Dr. Waltos stated that "[t]hey potentially could," but it did not "necessarily mean that they would." He explained:

> [Mother] clearly cares for her daughter. I think my concern is that her anxiety about her illness could potentially get in the way of a healthy relationship with her daughter. I'm not saying that it would, but even to this point she is so afraid to even be in her daughter's presence, at least that is what she told me because of the potential for her getting – [Mother] that is – getting sicker, I can't imagine that is a great message for a seven-year old girl. But in terms of predicting X or Y amount of damage, I can't do that.

Dr. Waltos further testified that Mother appeared "very concerned about the presence of mold" in the marital home and was "extremely anxious" about the physical effects it was having on her health and M.B.'s health. Mother was convinced that both she and M.B. suffered from CIRS and the condition was genetic. He stated that Mother had been advised by her clinician to restrict contact with M.B., Father, and the marital home, and that Mother was "reluctantly" "[k]eeping a distance" from M.B. as a result. Although

[5] Dr. Waltos defined somatic symptom disorder as "extreme anxiety about a physical symptom to the point where the symptom or symptoms become the center of a person's life."

Dr. Waltos was unable to say that Mother's physical symptoms were solely the product of her mental health issues, he testified that he believed that her anxiety was exacerbating the symptoms.

Dr. Waltos testified that he was "not an infectious disease or mold specialist," but he had done "some reading" about CIRS. He described it as a "controversial topic" in the medical field and noted that he was able to identify only "one peer reviewed article in a medical journal" on the syndrome, and it was "not recognized as a diagnosis that has a code assigned to it." Dr. Waltos explained that the biggest proponent of CIRS was a Maryland physician named Dr. Shoemaker, who had attempted to develop a list of symptoms and a diagnostic label. Dr. Waltos' concern, however, was that the symptoms identified by Dr. Shoemaker as being indicative of CIRS are general symptoms that could apply to any number of disorders.

Mother introduced two experts who testified to the validity of CIRS and their diagnoses. Dr. Lynese Lawson, a physician specializing in CIRS, testified that CIRS occurs when an individual is exposed to "biotoxins through food, air, water, or a bug bite" and cannot genetically produce the "antibody to address the exposure."[6] Approximately one in four individuals are unable to "mount an antibody response for those toxins," but the syndrome has not attracted much attention because it is often misdiagnosed. With

[6] Dr. Lawson testified that she completed Dr. Shoemaker's certification program in CIRS in 2017, and the method to diagnose someone with CIRS comes from Dr. Shoemaker's "protocol."

respect to Dr. Waltos' testimony that CIRS was not a recognized condition in the medical profession, Dr. Lawson explained that it was an "emerging field" that has been recognized by "many other physicians," and has been the topic of discussion at numerous conferences she has attended.[7] She stated that she has treated approximately 150 patients for CIRS and some have made full recoveries.

Dr. Lawson diagnosed M.B. with CIRS following a series of tests in February 2019. She saw M.B. only on the day she ran the tests and did not have the opportunity to treat her. She recommended at the hearing, however, that M.B. be "retested" and prescribed medication. If left untreated, Dr. Lawson warned that M.B. could suffer from cognitive or psychiatric disorders. Dr. Lawson stated that, if the marital home was a contaminated environment and M.B. was not receiving treatment for CIRS, she would expect M.B. to display symptoms.

Dr. Lawson further testified that she had diagnosed Mother with CIRS. Mother had "improved tremendously" as a result of the administered medical treatment plan, but she was not "100 percent better by any means." She had advised Mother that M.B. could bring home "micro toxins" that were imbedded in "porous items," like clothing, if she was in an environment such as school or a home where the toxins were present. Because Mother is "very reactive" to these toxins, Dr. Lawson suggested to Mother that M.B. change clothes

[7] Dr. Lawson acknowledged, however, that CIRS was not recognized by any of the prominent medical associations aside from the World Health Organization, which recognizes the "connection between exposure to water damaged buildings and the resulting mold related illnesses."

and wash or shower before she interacts with Mother. Dr. Lawson did not tell Mother that she could not see M.B., but Mother reported to Dr. Lawson that she had "not been able to spend any extended amount of time with [M.B.]" because the interaction aggravated Mother's symptoms.

Dr. Scott McMahon also testified as an expert on CIRS.[8] Although he had not examined M.B., he had reviewed Dr. Lawson's notes regarding M.B.'s test results and saw that she was "positive for six out of the ten markers," which rendered the CIRS diagnosis "undeniable." He stated that it was possible that, even if M.B. did not display symptoms currently, she could do so before adulthood, and M.B. would have a "genetic predisposition [for CIRS] for the rest of her life."

Mother testified that M.B. had displayed various symptoms of CIRS, such as difficulty remembering things and trouble walking. She brought M.B. with her when she moved into a hotel because they were both "reacting to the house in the same way." She did not allow M.B. back to the house for in-person visits with Father from January 2019 to April 2019 because of the mold.

After M.B. began living with Father in the marital home in April 2019, Mother sometimes cancelled scheduled visitations or cut them short because she felt very sick and her symptoms were escalating. Between June 2019 and November 2019, she did not request to see M.B. due to health concerns. She stated that she felt M.B. was being

[8] Dr. McMahon similarly testified that his training in CIRS was with Dr. Shoemaker. He completed Dr. Shoemaker's certification program in 2013.

"medically neglected" in Father's care because Father did not accept the CIRS diagnosis and did not allow Dr. Lawson to provide treatment. When asked about the discrepancy between her reports of M.B.'s symptoms and the testimony of numerous individuals that M.B. was consistently healthy, Mother stated that M.B. "did not feel safe telling anyone, other than [her], what she was experiencing." Mother testified that, given the parties' communication issues and disagreement about M.B.'s health, she did not think joint legal custody was tenable.

With respect to M.B.'s education and the parties' finances, Father testified that the parties had agreed to send her to Sacred Heart, a private parochial school, prior to their separation. Initially, Father paid 70% of the tuition cost and Mother paid 30%, based on their respective incomes. After the separation, however, when M.B. was re-enrolled for the following year, Father requested a 50/50 split, but Mother responded that she could not afford to pay any of it. Father paid $9,823.13 for M.B.'s annual tuition in June 2019 and did not receive any contribution from Mother. Mother testified that, although she wanted M.B. to remain enrolled at Sacred Heart and to continue to split the tuition cost based on their respective incomes, she was currently running a deficit of $8,000 each month, and realistically, she would not be able to pay any portion of the tuition bill. Father testified that, even if Mother was not ordered to contribute, he would "do everything that [he] could" to pay for the tuition costs to allow M.B. to continue at Sacred Heart.

Father also testified that, although M.B. was primarily residing with him under the Interim Consent Order, he had not received the social security disability payments

($1,186/month) that Mother receives on behalf of M.B. each month. Mother stated that she did not give these payments to Father when M.B. was in Father's care because she was focused on paying her rising medical and legal bills and getting her own health in order to properly support M.B. Mother acknowledged that she had withdrawn $13,500 from a UTMA (Uniform Transfers to Minors Act) account, which she had independently set up for M.B.'s schooling, to pay her hefty medical bills. Mother proffered in her financial statement that she spent $5,171.58 per month on her medical expenses, including approximately $4,000 per month for supplements, but her gross income from social security disability benefits was $5,050 per month, including M.B.'s $1,186 payment.

In closing, Father requested sole legal and physical custody of M.B. and that Mother's visitations be supervised. The Best Interest Attorney ("BIA"), appointed to represent M.B.'s interests, recommended the same. The BIA shared Father's concerns about Mother convincing M.B. that she was sick when no one else had witnessed the symptoms and described this as "very troubling" behavior that could potentially have a "deep psychological impact on the child." In particular, the BIA stressed her recommendation that visitation, both in-person and by phone, be "strictly supervised" for M.B.'s safety.

Mother requested sole legal custody, or, in the alternative, joint legal custody with tiebreaking authority in her favor. If the court were inclined to grant Father sole legal custody, she requested that legal custody be "carved out into parts" because there was no evidence that the parties were unable to compromise on non-medical decisions such as

education, religion, and discipline. With regard to physical custody, Mother requested custody "on an escalated basis." Counsel proffered that this arrangement would entail slowly increasing the time Mother spent with M.B., until eventually they arrived at "50-50 access week-on/week-off."

II.

Circuit Court Ruling

On January 24, 2020, the circuit court issued its oral ruling. After granting the parties a divorce, and noting that the parties had reached an agreement on all property issues, the court then addressed what it characterized as the major, if "not the singular," dispute regarding M.B., i.e., her health and whether she suffered from CIRS. The court then reviewed the factors used to determine the appropriateness of joint legal custody.

With respect to the parties' ability to communicate, the court noted that Mother was convinced that M.B. was sick with CIRS and required treatment, this was a consuming concern for her, and Father was convinced that M.B. was healthy. Based on these genuinely held, but diametrically opposed, beliefs, the court found that there was "no realistic possibility that the parties can communicate and reach shared decisions [a]ffecting [M.B.'s] welfare." The court noted that both parties testified that they could not communicate and sought sole legal custody, although Mother sought, as an alternative, tie breaking authority.

With respect to Mother's fitness as a parent, the court found that Mother's "health and health concerns have caused her to make some decisions which are not in [M.B.'s] best interest," citing several examples, discussed in further detail *infra*. The court found that there would be a "significant disruption" to M.B.'s life if the court were to grant Mother sole custody, noting that M.B. had been living exclusively with Father for the last nine months, with limited visitation with Mother, Mother likely would resume the CIRS treatments, although Father said M.B. displayed no symptoms, and Mother likely would not allow M.B. to spend time with Father's adult children, including Kate, with whom M.B. was very close.

Addressing the parties' financial status, the court noted that Father made $45 an hour working 40 hours a week. Mother did not work because she had been determined to be disabled. She received $3,864 a month in disability income, plus $1,186 for M.B.

The court next addressed physical custody.[9] The court noted that Father believed that Mother was projecting illness onto M.B., and he thought it was in M.B.'s best interest for Mother to have only supervised access. The court stated that, if M.B. truly had the severe symptoms reported by Mother, an eight-year-old child "simply wouldn't be able to keep [them] to herself." It found more credible the evidence that M.B. was healthy and stated that it would be "exceedingly detrimental to her health if she is made to feel sick." If M.B. were with Mother, "she will be loved dearly, but she will be treated as a very sick

[9] The court noted that many of the factors used to determine physical custody are the same as legal custody, so it did not repeat those factors on the record.

little girl." The court further found that, if Mother had custody, M.B. would not "be permitted to engage in contact or strenuous sports" and would be "kept from her half-siblings" and Father's other family members. The court stated:

> I just can't stress enough that both parents love this little girl and neither would intentionally hurt her, but I find that [Mother] is singularly focused on health, her health and [M.B.'s] health, and she cannot be dissuaded from the view that [M.B.] is sick and needs treatment and that is not an opinion that I share.[10]
>
> [M.B.]is loved. If anyone, other than [Mother], saw any issue I believe and I find that person would speak up, that person would encourage the parents to seek treatment.

In conclusion, the court stated:

> I have considered the testimony provided, the arguments of counsel, I have considered all of the required factors, and I find that it is in [M.B.'s] best interest that her father have sole legal and sole physical custody. I find that [M.B.] is healthy and that currently her mother is so consumed with her own health issues and . . . she will treat [M.B.] like a sick child, she will convince [M.B.] that she is sick, and she will severely impact [M.B.'s] ability to have a happy and healthy childhood even though that is not her intention. I hope sincerely that this will change. I'm sure that [Mother] is working diligently with her health care providers, but for now all access will have to be supervised.

Turning to child support, the court calculated Father's gross monthly income, based on his testimony that he earned $45 an hour for 40 hours a week, with two weeks' vacation, to be $7,500. Mother's gross monthly income, using her stipulated amount of $5,050, minus M.B.'s social security payment of $1,186, was $3,864 per month. *See Tucker v.*

[10] The court found it significant that Dr. Lawson had only seen M.B. once and Dr. McMahon had only reviewed Dr. Lawson's records.

Tucker, 156 Md. App. 484, 493 (2004) (Trial court may not include a child's social security benefits in the calculation of a parent's income.).

The court accepted Father's stipulated expenses, including the $839.43 per month for M.B.'s tuition at Sacred Heart. It noted that both parties wanted M.B. to continue her schooling there, so it included the tuition cost in its support calculation. In doing so, the court stated the following:

> I also really struggled with whether Sacred Heart was something that should be included. You know, she is in second grade. It has hardly been long-standing family tradition. But they did discuss it and they both wanted Sacred Heart in the end. . . . But they are both happy with Sacred Heart so I left that in.

After assessing the parties' finances, in light of the guidelines, the court calculated that Mother had a support obligation of $1,279/month. The court chose to deviate downward "as a result of [Mother's] mental health issues, her fixed income, [and] her current inability to work outside the home." Accordingly, it set the obligation at $1,186, i.e., the amount of M.B.'s disability payments. Mother also was ordered to pay $9,488 in arrears, $1,186 per month for the eight months since the Interim Consent Order that provided Father with temporary custody.[11]

The court next addressed the issue of alimony and the pertinent factors pursuant to Md. Code Ann. (2019 Repl. Vol.), § 11-106(b) of the Family Law Article ("FL"). The court stated that it believed Mother wanted to work, but it was unclear whether she would

[11] The Judgment for Absolute Divorce ordered that these arrears were to be "deducted from the sum [Father] is to pay [Mother] for the purchase of [Mother's] interest in the marital home."

ever become "wholly or partly self-supporting" due to her disabilities. With respect to the parties' financial needs and resources, the court stated that it found Father's financial statement to be reasonable, and he did not have the means at that time to meet his own needs, much less to pay alimony. With respect to Mother, the court noted that she listed $5,000 per month for hotel stays, but she testified that she was working on finding an apartment that would be closer to $2,000 per month. Additionally, her medical expenses were very high, with supplements not covered by insurance costing approximately $4,000 per month.

The court ultimately concluded that, although Father was in a slightly better financial situation than Mother, "[t]here is not enough money or not much money and [Father] does not have the ability to pay alimony." It denied Mother's request for alimony.

With respect to attorney's fees, the court noted the large amount of fees involved, stating that the only issue before the court concerned M.B. and "[w]hy that cost $200,000, I do not know." Accordingly, the court denied Mother's request for attorney's fees. The Judgment of Absolute Divorce ("Order") memorializing these terms was entered on February 4, 2020.

On February 14, 2020, Mother filed a Motion to Amend Judgment of Absolute Divorce, raising various issues with the court's final Order, including a lack of clarity surrounding her access to M.B.'s records and the terms and scope of the supervised visitation. On March 25, 2020, Mother filed a supplement to this motion, requesting that the court amend its Order to provide her with unsupervised and liberal visitation. Mother

further requested that the court reevaluate the child support award and the denial of attorney's fees and alimony.

The court held a hearing on May 27, 2020. It denied Mother's supplemental motion, but it granted in part and reversed in part the original motion to amend. The amended order, entered on June 8, 2020, clarified Mother's access and visitation. The order provided, among other things, that Mother could have "independent access to [M.B.'s] medical dental, and educational records" and can attend M.B.'s school functions "so long as [Mother] does not have the opportunity to converse privately" with M.B.

With respect to the terms of visitation, the amended order provided that supervised visitation could be held once per week on a Saturday or Sunday for no more than two hours. Mother must provide Father with 48 hours' notice and include information regarding the name of the supervisor and the time and location of the visit. The parties were ordered to agree on a list of acceptable supervisors, and Mother was assigned the costs for professional supervision if necessary. The order further stated that, during supervised visitation, Mother "shall never have the opportunity to converse privately" with M.B.

This appeal followed.

DISCUSSION

I.

Child Custody & Visitation

A.

Standard of Review

In reviewing a child custody case, "Maryland appellate courts apply three different but interrelated standards of review." *In re Adoption of Cadence B.*, 417 Md. 146, 155 (2010). The Court of Appeals has recently described these standards as follows:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] [i]f 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 some 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.

In re Adoption/Guardianship of C.E., 464 Md. 26, 47 (2019) (quoting *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010)) (alteration in original). Additionally, with regard to visitation orders, this Court has explained that such orders generally are "within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion." *Brandenburg v. LaBarre*, 193 Md. App. 178, 186 (2010) (quoting *Barrett v. Ayres*, 186 Md. App. 1, 10 (2009)).

In assessing whether the court's ultimate decision is an abuse of discretion, we are mindful that

> [q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. In sum, to be reversed the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

In re Shirley B., 419 Md. 1, 19 (2011) (quoting *In re Yve S.*, 373 Md. 551, 583–84 (2003)).

B.

Parties' Contentions

Mother argues that the circuit court erred in awarding Father sole legal and physical custody of M.B., giving her only restricted supervised visitation. She asserts that the court's factual and legal findings "do not logically flow from the testimony and/or evidence presented[.]"

With respect to physical custody, she contends that there was no evidence to support a factual finding that Mother had caused or will cause M.B. any harm, and the finding of harm was based entirely on speculation and mere presumption. She asserts that, absent evidentiary support for a finding of actual or potential harm, she is "entitled to liberal and unsupervised access" with M.B.

With respect to legal custody, Mother asserts that the circuit court found that the "singular issue" was their disagreement regarding M.B.'s health and whether the diagnosis of CIRS was valid. She contends that this single issue "cannot be a reasonable basis for sole custody to be awarded to [Father] over [Mother] when less restrictive measures may be put in place (e.g. tie breaking authority for medical issues, etc.)."

Father contends that the court properly awarded him sole legal and physical custody with only restricted, supervised access to appellant. He asserts that Mother mischaracterizes the proceedings in the circuit court because the issue was not whether she and M.B. had been diagnosed with CIRS, but whether CIRS was a medically recognized condition and whether Mother's preoccupation with physical health posed a potential threat to M.B. "by convincing an apparently healthy child that she also was ill." He argues that a court may place restrictions on visitation based on potential harm, and there was ample evidence to require supervised visitation based on potential harm.

C.

Analysis

It is well-settled that "a parent has a fundamental right to the care and custody of his or her child." *Boswell v. Boswell*, 352 Md. 204, 217 (1998). *Accord In re Adoption No. 10941*, 335 Md. 99, 112 (1994) ("The right of a parent to raise his or her child . . . is so fundamental that it may not be taken away unless clearly justified."). The State, however, has an interest in protecting a child's best interest as *parens patriae*. *Boswell*, 352 Md. at 218.[12] "[T]he State's interest in disputes over visitation, custody, and adoption is to protect" the best interests of the child. *Id.* at 219. "Thus, while a parent has a fundamental right to raise his or her own child, this Court has held that the best interests of the child

[12] *Black's Law Dictionary* (11th ed. 2019) defines "*parens patriae*" as "the state in its capacity as provider of protection to those unable to care for themselves."

may take precedence over the parent's liberty interest in the course of a custody, visitation, or adoption dispute." *Id.*

In Maryland, trial courts must consider multiple factors when accessing the best interest of the child in a custody and visitation dispute. These factors include:

> (1) The fitness of the parents;
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> (2) The character and reputation of the parties;
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> (3) The requests of each parent and the sincerity of the requests;
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> (4) Any agreements between the parties;
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> (5) Willingness of the parents to share custody;
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> (6) Each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest;
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> (7) The age and number of children each parent has in the household;
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> (8) The preference of the child, when the child is of sufficient age and capacity to form a rational judgment;
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> (9) The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;
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> (10) The geographic proximity of the parents' residences and opportunities for time with each parent;
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> (11) The ability of each parent to maintain a stable and appropriate home for the child;
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> (12) Financial status of the parents;
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> (13) The demands of parental employment and opportunities for time with the child;
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> (14) The age, health, and sex of the child;

> (15) The relationship established between the child and each parent;
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> (16) The length of the separation of the parents;
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> (17) Whether there was a prior voluntary abandonment or surrender of custody of the child;
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> (18) The potential disruption of the child's social and school life;
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> (19) Any impact on state or federal assistance;
>
> (20) The benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child;
>
> (21) Any other consideration the court determines is relevant to the best interest of the child.

Azizova v. Suleymanov, 243 Md. App. 340, 345–46 (2019), *cert. denied*, 467 Md. 693 (2020). *Accord Santo v. Santo*, 448 Md. 620, 640–42 (2016); *Taylor v. Taylor*, 306 Md. 290, 304–11 (1986).

"Under long-existing Maryland law and the 'cloak of constitutional protection,' a non-custodial parent has a 'reasonable' right to liberal visitation with his or her child." *Jose v. Jose*, 237 Md. App. 588, 604 (2018). Any restrictions or limitations placed on visitation must be reasonable and in the best interest of the child. *Id.*; *Boswell*, 352 Md. at 220. "In situations where there is evidence that visitation may be harmful to the child, the presumption that liberal unrestricted visitation with a non-custodial parent is in the best interests of the child may be overcome." *Id.* at 221.

In cases where restricted visitation "is requested on the basis of actual or potential harm to the child, courts apply a best interest of the child standard concurrently with

adverse impact, granting the . . . restriction only upon a showing of actual emotional or physical harm to the child." *Id.* at 225. Consequently, there must be a nexus between the "parental issue and any adverse impact on the child's overall well-being." *Azizova*, 243 Md. App. at 347; *Boswell*, 352 Md. at 236.

> The Court of Appeals has explained, however, that courts are not required to
>
> > sit idly by and wait until a child is actually harmed by liberal unrestricted visitation. If there is sound evidence demonstrating that a child is likely to be harmed down the road, but there is no present concrete finding of harm, a court may still consider a child's future best interests and restrict visitation. The need for a factual finding of harm to the child requires that the court focus on evidence-based factors and not on stereotypical presumptions of future harm.
> >
> > Therefore, before a trial court restricts the non-custodial parent's visitation, it must make specific factual findings based on sound evidence in the record. If the trial court does not make these factual findings, instead basing its ruling on personal bias or stereotypical beliefs, then such findings may be clearly erroneous and the order may be reversed. In addition, if a trial court relies on abstract presumptions, rather than sound principles of law, an abuse of discretion may be found.

Boswell, 352 Md. at 237.

Here, the court found that M.B.'s pediatrician and family members believed that M.B. was healthy, and they had never witnessed the symptoms reported solely to Mother. The court's finding in this regard is not clearly erroneous. *See Starke v. Starke*, 134 Md. App. 663, 683 (2000) (Where the credibility of a witness or the weight of the evidence is in dispute, the fact finder cannot be clearly erroneous.).

With regard to the actual and potential harm stemming from Mother's sincerely held belief that both she and M.B. are sick and in need of specialized treatment, the court heard

four days of testimony focusing predominantly on this issue. It concluded that Mother's health concerns had negatively impacted M.B., citing numerous examples where Mother's actions were not in M.B.'s best interest. These instances included Mother "severely curtail[ing]" Father's access to M.B. for months due to health concerns, despite reasonable requests for visitation, pulling M.B. out of productive therapy because of Mother's refusal to sign a release form for school records, and Mother's "illogical" refusal to sell the marital home, which created a financial burden preventing M.B. from taking piano and horseback riding lessons.[13]

Moreover, the court identified distinct, future harms, based on testimony, that potentially would occur if Mother was awarded custody and liberal visitation. This potential harm included isolation from family members, inability to participate in certain extracurricular activities, being made to take extreme precautionary safety measures when she interacts with Mother, and forced treatments that, pursuant to the court's finding that M.B. was healthy, were medically unnecessary. Although there was no definitive evidence that Mother's health issues would impact her ability to parent M.B., Dr. Waltos testified that they "potentially could."

Based on the court's consideration of the required factors, it determined that it was in M.B.'s best interest for Father to have sole physical custody and for Mother's visitation

[13] Mother testified that she was resisting efforts to sell the marital home because she believed the items inside had made her sick, and as long as Father remained in the house with those belongings, she knew "exactly where the problem is." She stated that she wanted "his things tested and verified as safe" before they were moved.

to be supervised. We perceive no error or abuse of discretion in this regard. *See Azizova*, 243 Md. App. at 347 (Maryland Courts "have time and time again affirmed custody determinations where the trial judge embarked upon a thorough, thoughtful and well-reasoned analysis congruent with the various custody factors.").

Similarly, with respect to legal custody, the court carefully and extensively considered the requisite factors and determined that it would be in M.B.'s best interest for Father to have sole legal custody. Given the record here, including that the parties each requested sole legal custody, this ruling was not an abuse of discretion.

Although we affirm the court's custody ruling granting Father sole legal and physical custody of M.B., and granting Mother only supervised visitation, we conclude that the provision in the Amended Judgment of Divorce that Mother "shall never have the opportunity to converse privately with" her daughter is overly restrictive. Mother is only seeing M.B. for two hours a week and preventing a young girl from having any private conversation with her mother as she grows up, without a more direct showing that it would be harmful to the child, is overly broad and an abuse of discretion. Accordingly, we vacate that portion of the order and remand for the circuit court to delete or amend that portion of the order.

II.

Child Support

Mother contends that the circuit court erred by including the cost of M.B.'s private school tuition in its calculation of child support. She argues that the court failed to properly

consider and apply the requisite factors to determine whether M.B. has a "particular educational need" to attend private school. Mother requests that this Court reverse the support award and remand to the circuit court for recalculation of child support and arrears.

Father contends that Mother does not have standing to assert that the court erroneously included school tuition in the child support calculation because Mother was required to pay child support only in the amount equal to the social security disability payment she receives for M.B., i.e., to surrender the check to Father. Accordingly, he asserts that she, "in fact, pays no child support," and the child support award should be affirmed.[14]

This Court has explained the standard of review for child support determinations as follows:

> Ordinarily, child support orders are within the sound discretion of the trial court. *Walker*, 170 Md. App. [255,] 266, 907 A.2d 255 [(2006)] (citing *Shenk v. Shenk*, 159 Md. App. 548, 554, 860 A.2d 408 (2004)). Nonetheless, "where the order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Id.* (quoting *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556, 813 A.2d 334 (2002)).

Reichert v. Hornbeck, 210 Md. App. 282, 316 (2013).

[14] In her reply brief, Mother argues that she has standing to raise this issue because, although the amount she is ordered to pay is equal to the social security payments, the support obligation "stands alone as a separate enforceable award," and "[i]f and when the [M.B.'s] social security payments cease, the award of child support remains." We agree, and therefore, we will address Mother's argument on the merits.

Child support awards are governed by FL § 12-204, which provides guidelines for determining support obligations proportionate to the income of each parent. It also "specifies the expenses that shall or may be added to the basic support obligation, including expenses for private education." *Ruiz v. Kinoshita*, 239 Md. App. 395, 429 (2018).[15] FL § 12-204(i)(1) provides that "any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child" "may be divided between the parents in proportion to their adjusted actual incomes[.]"

This Court has explained that, in considering whether a child has a "particular educational need," to attend private school, the court should consider a "non-exhaustive list of factors," including:

> (1) "[T]he child's educational history," including how long the child has attended a school, the "need for stability and continuity[,]" and the proportion of the parents' income the child would have received had the parents stayed together;
>
> (2) "[T]he child's performance while in private school";
>
> (3) The "family history" of attending a particular school, particularly if it is religiously affiliated;
>
> (4) Whether the parents decided prior to the divorce to send the child to the private school;
>
> (5) Other facts specific to the case that may impact the children's best interests;
>
> (6) "[T]he parents' ability to pay[.]"

[15] FL § 12-204 was amended by the General Assembly during the 2020 Legislative Session. 2020 Md. Laws Ch. 142. Those amendments, however, do not alter the subsection pertinent to this appeal. *Id.*

Ruiz, 239 Md. App. at 429–30 (quoting *Witt*, 118 Md. App. 155, 170 (1997)).

The court need not explicitly discuss each factor as long as it is clear that the court considered them. *Id.* at 430–31. This Court reviews the trial court's factual findings regarding these factors for clear error. *Fuge v. Fuge*, 146 Md. App. 142, 180, *cert. denied*, 372 Md. 430 (2002).

Mother argues that the court made no findings regarding factors (2), (5), and (6). We can easily dispose of the contention regarding the second and fifth factors, which the court clearly considered.

With respect to the second factor, M.B.'s performance at Sacred Heart, the court stated: "I was told that [M.B.] does well in school, and this is absolutely supported by her report cards that were admitted into evidence." With respect to the fifth factor, other "facts specific to the case that may impact the children's best interests," the court stated that the parents were both happy with M.B.'s education at Sacred Heart, they wanted her to continue there, and her teacher reported that she is doing well there with regard to "both academics and work habits[.]"[16]

The main thrust of Mother's argument, however, pertains to the sixth factor, i.e., the parents' ability to pay. As we explained in *Witt*, 118 Md. App. at 171, although this is "not the primary factor, it is vital for a court to consider whether a parent's financial obligation

[16] Although not specifically mentioned in the court's ruling, there was testimony that the parties initially enrolled M.B. at Sacred Heart because she was being bullied at public school. Mother testified that, since M.B. began attending Sacred Heart, there had not been any bullying incidents.

would impair significantly his or her ability to support himself or herself as well as support the child when the child is in his or her care."

Here, the court reviewed both parties' financial situations. There was a lengthy discussion about Mother's ability to pay for private school as follows:

> [MR. WEISMAN]: And are you okay with sharing school expenses based on income?
>
> [MOTHER]: That seems fair.
>
> [THE COURT]: You know, I grant you that it seems fair. But if I am to believe Defense Exhibit 2, you're $8,000 in the hole every month. So, how is it that you're going to be able to pay any share of [M.B.'s] school?
>
> [MOTHER]: Thank you for your observation. That's the question that I have, too.
>
> [THE COURT]: I'm just saying I can't reconcile it. You are saying that you are willing to pay for your percentage of school when you say that your expenses are—what was it, $12,000.00 or whatever? I mean, it is $8,000.00 short every single month.
>
> [MOTHER]: Yes, Your Honor.
>
> [THE COURT]: So, realistically, [Appellant], if I'm to believe this financial statement, you can't possibly pay for [M.B.'s] schooling.
>
> [MOTHER]: I agree. I think I should have qualified my statement by if one looks at income alone that seems fair and not the whole situation.
>
> [THE COURT]: Well, right. I mean, can you pay for [M.B.'s] school?
>
> [MOTHER]: Not based on my current health and the fact that I can't work. If I could work, I would make it work.
>
> [THE COURT]: I'm just going to suggest, because I think there are more questions to come, I have literally written in my notes she is okay sharing school expenses, but that is ridiculous.

This colloquy reflects the view that Mother did not have the ability to pay tuition. Because the court did not explain how it factored in Mother's ability to pay and whether this "financial obligation would impair significantly [Mother's] ability to support [herself]," *Witt*, 118 Md. App. 171, we cannot address whether the award of child support was an abuse of discretion. Accordingly, we vacate the child support award and remand for further proceedings.[17]

III.

Alimony and Attorney's Fees

Mother contends that the circuit court erred by denying her request for alimony and attorney's fees. She asserts that, although the court found that it was unclear whether she could become self-supporting, the court focused too heavily on Father's ability to meet his own needs. She argues that the "only explicit reason" the court provided for not awarding her alimony was that, after all of Father's reasonable expenses, there was no money left over to pay Mother alimony. Mother asserts that this calculation was flawed because the child support calculations erroneously included the private school tuition, and absent the inclusion of such expenses, Father could afford to pay alimony to Mother. She argues that the court improperly "tied not only alimony, but also counsel fees to the payment" of the private school tuition, and therefore, these decisions need to be reconsidered.

[17] We note that Father testified that, even if Mother was not ordered to contribute to tuition, he had enough money in his own UTMA account to pay for a year or two, and then he would "make sacrifices" and revise his budget to find a way to pay for it.

Father asserts that, even if the private school tuition costs were eliminated from the support calculation, he still would have inadequate funds to pay alimony. He argues that the court's decision not to award alimony should be affirmed. He further argues that the court properly denied Mother's request for attorney's fees after finding that Mother was not justified in spending the amount she spent on litigation costs.

Pursuant to FL § 11-106(b), trial courts must consider the following factors when determining whether alimony is appropriate:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
>
> (10) any agreement between the parties;
>
> (11) the financial needs and financial resources of each party, including:
>
> > (i) all income and assets, including property that does not produce income;

(ii) any award made under §§ 8-205 and 8-208 of this article;

(iii) the nature and amount of the financial obligations of each party; and

(iv) the right of each party to receive retirement benefits; and

(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Here, the court examined each of these factors and concluded that alimony was not appropriate in this case, in part, because there was "only so much money" between the two parents, and Father did "not have the ability to pay alimony." Thus, the court's alimony determination relied heavily on Father's financial situation, the evaluation of which may change after remand and reconsideration of the child support issue. Accordingly, we vacate the alimony determination and remand with the support issue for reconsideration. Although the court's denial of Mother's request for attorney's fees appeared to rest primarily on a different ground, because we are vacating and remanding the child support and alimony rulings, we will do the same regarding the denial of the request for attorney's fees. *See Turner v. Turner*, 147 Md. App. 350, 400–01 (2002) (When this Court vacates

and remands an award for alimony, a monetary award, or counsel fees, "we often vacate the remaining awards for re-evaluation.").

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED, IN PART, AND VACATED, IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY.