Circuit Court for Calvert County
Case No. 04-C-15-001543

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 58

September Term, 2018

JEANNE PERKINS

v.

PRESTON PERKINS

Leahy,
Reed,
Fader

JJ.

Opinion by Leahy, J.

Filed: November 13, 2018

The parties here, Jeanne Perkins (Appellant) and Preston Perkins (Appellee), were married for eight years and had two children, Cn.P and Ce.P., before they divorced in 2014. Soon thereafter, Jeanne[1] moved to Missouri and Preston retained primary physical custody of the children pursuant to a custody order entered in the Circuit Court for Calvert County in June 2016. Preston sought to modify the custody arrangement in September 2017 based on issues with Jeanne's mental health, as well as allegations that she was combative and hostile and had violated a peace order entered against Jeanne in favor of Preston's new wife. Jeanne responded by filing a counter-petition for custody and two petitions for contempt against Preston. The parties then engaged in a series of protracted discovery disputes and, just prior to the merits hearing, Jeanne's counsel withdrew with Jeanne's consent. Jeanne failed to appear at the hearing on her counsel's motion to withdraw or the court's evidentiary hearing eight days later, on January 11, 2018. Preston and his counsel apprised the court at the hearing that Jeanne had contacted them to inform them that she had been hospitalized for some time leading up to the hearing and would not be in attendance. Jeanne failed to contact the court.

The court held an evidentiary hearing on the merits of the parties' cross-complaints for custody without Jeanne present. Jeanne's mental health and its impact on the children was a focal point of the testimony and evidence at the hearing. The circuit court concluded that it was in the children's best interest to award Preston sole legal and physical custody,

[1] For the sake of clarity and meaning no disrespect, we will refer to the parties by their first names. *See Karsenty v. Schoukroun*, 406 Md. 469, 477 n.2 (2008).

and permit Jeanne only supervised visitation, which Preston could limit, in his discretion, whenever Jeanne was in "an unhealthy mental state." The court also awarded Preston $4,462.50 in attorney's fees based on Jeanne's tactics during discovery and the lack of merit in her motions for contempt.

Jeanne, under new representation, moved for a new trial, arguing in large part that she was unable to attend the January 11 hearing or seek a continuance because she had been hospitalized from January 1 through January 10. The court denied her motion without a hearing and Jeanne appealed. She presents several questions for our review, which we have rephrased and consolidated as follows:[2]

1. Did the trial court abuse its discretion by denying Jeanne's motion for a new trial without a hearing on the motion?

2. Did the trial court abuse its discretion by awarding Preston $4,462.50 in attorney's fees?

We affirm the trial court's denial of the motion for a new trial. On the issue of attorney's fees, we vacate the court's award and remand for the court to consider the factors set out in *Lieberman v. Lieberman*, 81 Md. App. 575 (1990), and balance the parties'

[2] The questions presented by Jeanne in her brief on appeal are:

1. Did the trial court abuse its discretion by denying the motion for [a] new trial?

2. Did the trial court abuse its discretion by refusing to conduct a hearing on the motion for [a] new trial?

3. Did the trial court abuse its discretion by requiring the appellant to pay $4,462.50 in attorney's fees?

financial statuses and needs as required by Maryland Code (1999, 2012 Repl. Vol.), Family Law ("FL"), § 12-203.

BACKGROUND[3]

The Parties' Divorce and Initial Custody Agreements

Jeanne is a veteran of the U.S. Airforce. Preston works for Amazon at night and on weekends. Jeanne and Preston were married for eight years, during which time they had two children: Cn.P., born in 2010, and Ce.P, born in 2012. Ce.P. suffers from leukemia.

Difficulties in the marriage coalesced when Jeanne retired from the Airforce, suffered a stroke, and learned of Preston's affair with his ex-wife, Fran Hodges. After Jeanne's stroke, Preston was compensated as Jeanne's caregiver by the Department of Veteran's Affairs. During the latter part of the marriage, Jeanne was diagnosed with PTSD, anxiety, and depression. The couple divorced in 2014 and agreed to a consent order governing custody. Thereafter, Jeanne moved to Missouri and lived with her mother, and Preston remarried Fran.

On December 24, 2015, Preston filed a petition for emergency custody and termination of visitation in the Circuit Court for Calvert County, alleging that Jeanne was no longer taking the medication she was prescribed for her mental illnesses. Following mediation, the parties resolved their custody issues and the circuit court entered an order on June 16, 2016, awarding primary physical custody to Preston, and joint legal custody to

[3] The following facts are drawn largely from the testimony that was presented as well as other documents and media that were before the circuit court during the one-day motions hearing on January 11, 2018.

Jeanne and Preston, with tie-breaking authority to Preston. The court ordered the parties to confer on all matters regarding the religion, education, and medical care of the children. The latter point was particularly salient because of Ce.P.'s leukemia. The court ordered a summer and holiday visitation schedule that provided Jeanne the ability to visit the children on regularly scheduled holidays in Maryland or a mutually-agreed upon location, provided she gave Preston at least 14 days' notice. The order required the parties to split evenly the children's uncovered medical bills and for Jeanne to pay $1,370.00 in child support. The court also ordered Jeanne to attend appointments with her mental health and medical providers and to remain compliant with her medication regimen.

Just over a year later, on August 21, 2017, the court entered another consent order governing the means and manner of communication between the parties. The order mandated that the parties communicate only through the program "Our Family Wizard,"[4] not visit each other without notice, not contact or harass each other's families, and that Jeanne not remove the children from school or daycare without first entering into a prior written agreement with Preston.

Allegations of Parental Alienation and Poor Mental Health

On September 5, 2017, Preston filed a "Complaint for Modification of Order of Court, and Other Relief," which was docketed and treated as a petition to modify the parties' consent order. Preston alleged that Jeanne did not abide by the custody

[4] "Our Family Wizard is a subscription-based website which is designed as a medium for divorced or separated parents to communicate and manage issues regarding shared parenting." *Wilcoxon v. Moller*, 132 So. 3d 281, 284 (Fla. Dist. Ct. App. 2014).

arrangements and had not provided him with evidence of her treatment, per the court's June 16 order. He also alleged that Jeanne was excessively texting, calling and emailing, and that she was generally combative and hostile, leading Preston and Fran to seek police intervention and Fran to obtain a peace order against Jeanne. Preston requested sole legal custody of the children, that Jeanne's visitation with the children be supervised, that Jeanne attend anger management and parenting classes, and that Jeanne "cooperate" with Fran regarding the children's transportation. Along with the request for modification, Preston filed a motion for a psychological evaluation of Jeanne. The court entered an order the next day, on September 6, ordering Jeanne to complete a psychological evaluation.

Pre-Hearing Motions and Discovery Disputes

Jeanne filed a petition for contempt on September 26, 2017. A week later, on October 1, 2017, she also filed a "counter-complaint" to modify the custody arrangement. The petition for contempt alleged that Preston failed to provide information regarding the children's schooling and Ce.P.'s leukemia updates, and that he failed to allow the children to communicate or visit with Jeanne. In the "counter-complaint," Jeanne alleged that Preston was alienating her from the children, had refused her visitation, and had ignored her communications through Our Family Wizard. Jeanne refuted Preston's assertions in his motion to modify custody modification and requested a "more specified visitation schedule" with the children in anticipation of her move to Maryland.

Jeanne responded with a "counter-complaint" and then an "amended counter-complaint" which she filed on October 30, 2017. In this pleading, Jeanne announced her plans to move to Maryland in January 2018, and requested sole or shared physical and legal

custody of the children, or in the alternative, shared physical and legal custody. She also requested a reduction in her child support obligation, asserting that the children no longer have daycare needs and that Preston's income had increased significantly. She requested the court order Preston to provide her with the children's educational paperwork, and for the court to order Preston to not limit her contact with the children. She also asked for attorney's fees and costs.

Several issues arose between the parties during the discovery that followed. Jeanne did not answer any of Preston's document production requests and objected to many of his interrogatories on a myriad of grounds. Additionally, Jeanne was late answering Preston's request for admissions, which led Preston to move, pursuant to Maryland Rule 2-424(b), to strike her admissions of fact and to deem facts admitted. On December 11, 2017, Jeanne filed a motion *in limine*, asking the court to bar Preston from seeking supplemental discovery. That same day, she also filed a second petition for contempt, alleging that Preston did not inform Jeanne of the children's whereabouts during certain family trips, that he restricted her communication with the children, and that Preston and Fran engaged in different forms of parental alienation, such as forcing the children to call Fran "mom" and Appellant "Ms. Jeanne." The court immediately issued a show cause order, requiring Preston to appear and show cause why the court should not grant Jeanne's motion for contempt and attorney's fees.

Two days later, on December 13, Preston sent Jeanne his discovery responses and apologized for the tardiness in a letter from counsel. He also disputed Jeanne's grounds for objection in the interrogatories and served her with supplemental interrogatories.

The circuit court held a pre-trial conference in chambers on December 19. At the conference, the parties discussed with the court Preston's grounds for modification; Jeanne's violation of the peace order; Jeanne's mental health evaluation in Missouri, which Preston was to pay for; and the discovery issues, including Jeanne's pending motion *in limine*. The court noted that Jeanne "needs to respond" to discovery.

On December 22, Preston sent a supplemental interrogatory to Jeanne which sought information about Jeanne's upcoming relocation to Maryland. He also filed an opposition to Jeanne's motion *in limine*; an opposition to her petition for contempt, which he supported with several exhibits; and a motion to compel discovery, which included several exhibits and a request for attorney's fees associated with discovery.

Jeanne's counsel, Ms. Tamara Fowler, moved to withdraw her representation on January 1, stating that "both parties agreed to sever the [attorney-client] relationship" based on a "mutual agreement" that the relationship was no longer "mutually satisfactory." The circuit court held a hearing on Ms. Fowler's motion on January 3, which Preston and his counsel, Ms. Aimee West, attended, but Jeanne did not. She could not be reached by telephone. The court ordered Jeanne to "appear in person for court date 01/11/18 and 01/12/18." The court noted that if Jeanne were to represent herself, she "must follow up and provide discovery to counsel."

On January 5, Ms. Fowler filed the results of Jeanne's psychological evaluation with the court.[5] Three days later, the court entered several orders: the court granted Ms.

[5] The evaluation, which a Missouri-licensed psychologist conducted in October of 2017, described Jeanne's "motherly love and a sense of joy and pride she receives from

Fowler's motion to withdraw and struck her appearance, denied Jeanne's motion *in limine*, and reserved on Preston's motion for attorney's fees. Preston filed his financial statement with the court on January 10.

The Custody Hearing

On January 11, 2018, the circuit court held a hearing to resolve the issues of custody modification and contempt of court. Preston was present and represented by Ms. West. Jeanne was again not present and, at this point, was no longer represented by counsel. The court began by addressing Jeanne's absence.

Ms. West informed the court that she had heard by email from Ms. Fowler, Jeanne's former attorney, that Jeanne was unable to attend the hearing. The following colloquy ensued:

> THE COURT: We had a hearing last week, the 3rd, I remember it, and I allowed Ms. Fowler to withdraw. I made it clear that we were going forward with the hearing today, and Ms. Perkins is not here.
>
> Have you had any contact with –
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> MS. WEST: I have, yes, Your Honor. So yesterday morning Ms. Fowler, as a courtesy, contacted me via email to say that Ms. Fowler [sic] contacted her indicating she wasn't going to be able to make it this morning. Ms. Fowler represented in her email to me that she had told Ms. Perkins of the need to communicate to the Court and to us if there was going to be any continuance request.
>
> THE COURT: Or to appear by phone, which I was intent on denying.

being a mother," and "did not find any substantiation or justification for restricting Ms. Perkins's access to her children." The psychologist noted that while Jeanne suffered from depression and anxiety, her symptoms had improved through medication and counseling. The psychologist expressed concerns "about the potential parent alienation efforts by Mr. Preston Perkins and Mrs. Fran Perkins, based on Ms. Jeanne Perkins's reports and descriptions of various situations . . . that resulted in sabotaged visitations/contact with her children."

[MS.] WEST: Okay.

THE COURT: But I haven't received anything, and my secretary is not here, but I checked her phone before I came in just for this purpose, there is nothing on the phone.

MS. WEST: Then subsequent to that I received two emails from Ms. Perkins directly to myself. Actually I think she may have sent one to my assistant that was forwarded to me, just saying that Ms. Fowler was no longer representing her. She indicated that she had been hospitalized for a period of time, and that she was released, but that she wasn't going to be able to make it. I really did not say anything else. She asked if there was any agreement. I said there is no agreement. So that's really the substance of the communication I have had with her. I mean she is certainly aware of today's hearing dates.

THE COURT: All right. Well, I'm intent on going forward today. So I am ready to hear whatever evidence that you all want to put on.

MS. WEST: Thank you, Your Honor.

The court then proceeded with the evidentiary hearing. Preston was the only witness. He described Jeanne's mental illness and alleged her mental health was declining. He described several disturbing Facebook Live videos that depicted Jeanne engaging in erratic behavior and noted her recent involuntary psychiatric hospitalization. Preston testified that, in addition to Jeanne sending up to 30 messages per day on Our Family Wizard, she also contacted him multiple times a day by text and phone, despite the restrictions on such forms of communication in the consent agreement. In regard to Jeanne's interactions with the children's other caregivers, he stated that she had never visited Ce.P's physicians in order to learn how to care for him. He also related that she went to the boys' daycare center one time to give the boys iPhones, and that he thought such a gift inappropriate.

Preston entered nine exhibits into evidence. He provided the court with several Facebook videos Jeanne posted online, one of which featured Jeanne "pulling her hair out in clumps," another featured Jeanne speaking about "murder" and "exile with the children," and another showed Jeanne shaving her head. A "FaceTime Live [sic]" video of Jeanne showed her replaying a voice message left for one of her sons, in which she told her son she would see him in "God's righteous kingdom." Another video depicted Jeanne saying, what Preston described as, "something to the effect of a serial killer's dream murdering the children" and going into "exile."

Phone records showed Jeanne's frequent texts, phone calls, and communications through Our Family Wizard. One text allegedly from Jeanne stated that she "doesn't have to take any medicine and there is nothing wrong with" her. Jeanne's messages through Our Family Wizard, dated from December 22 to January 1, the day of Jeanne's first hospitalization**,** contain coherent questions about custody and visitation, as well as incoherent and violent references to Biblical characters.

Preston asked for attorney's fees associated with the two contempt orders filed by Jeanne and for her refusal to reasonably comply with his discovery requests. The contempt orders filed by Jeanne alleged various forms of parental alienation, two of which Preston was able to contradict outright through the introduction of records, including copies of the children's school and daycare contact information that he provided to Jeanne.

Preston informed the court that Jeanne receives over $3,000 per month from the VA for being 100% disabled, and that she receives $1,200-$1,300 per month from the Social Security Administration for being 100% disabled. He contended that Jeanne has no

significant household expenses because she lives with her mother and the property is owned outright. Preston also described Jeanne's lifestyle, which he considered lavish, because Jeanne flew herself, her mother, and Cn.P. first class for summer visits.

As to the calculation of attorney's fees, Ms. West described the fees she charged Preston in association with abusive discovery, as well as for attorney's fees associated with the two petitions for contempt and the amended complaint:

> MS. WEST: Trying to be as user friendly as possible. It's a total of $4,462.50 that we are attributing to Ms. Perkins. And actually, if I am being blunt, Your Honor, to Ms. Perkins and her lawyer as well, because the motion in limine that they filed to try and avoid answering that one interrogatory, I think Your Honor will recall, the lengthy totally baseless objection, those didn't come from Jeanne Perkins, and there really was no good faith basis for all that.
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> * * *
>
> So that's what we are asking for, Your Honor. It's a total of $4,462.50. And I attributed 2,800 of that to discovery related, and I attributed half of that 2,800 to Ms. Fowler, because I think it was conscious choices without basis, and so that's the division of that amount that we are asking for.

The Trial Court's Decisions

The trial judge ruled from the bench, noting that he "rarely" did so, but would in the instant case because "the evidence [was] clear and overwhelming." On Jeanne's absence, the judge stated

> I wish Ms. Jeanne Perkins was here to at least give some account of herself, and perhaps shed some light on some of the postings that the Court has seen, and maybe answer some questions about some of the written postings that the Court has seen, and for no other reason at least to give me a bigger perspective on some of the issues.

The judge continued, rendering his findings. The court found that since the June 16, 2016 order, there had been a material change in circumstances. The parties had "reached a point where they cannot work together, and it's largely because of what the Court will conclude is Ms. Jeanne Perkins' mental health issues."

Regarding Jeanne's health, the court found that "Ms. Jeanne Perkins [was] clearly raving" and had made veiled threats to harm herself and potentially the children. On the children's health, the court noted that Ce.P. suffers from a very serious illness requiring well-informed care. The court found that Jeanne hadn't contacted Ce.P.'s health care providers and hadn't become sufficiently educated about "what is needed to keep [Ce.P.] happy and healthy." That led the court to conclude that "should she be given access to the child, that the child's health and welfare may be in danger," and that the boys could be placed "in outright danger of harm or neglect."

The court found that it was in the children's best interest to award sole legal and physical custody to Preston, with supervised visitation to Jeanne. The court explained the new custody and visitation arrangement was imperative not only to protect Ce.P.'s health, but also "for Cn.P.'s mental health and just physical well-being." The judge concluded that the new arrangement was "in their best interest that until such time as [Jeanne] can come in and demonstrate that she is mentally fit and mentally able to—physically able to take care of the children[.]" The court awarded Preston "the sole discretion to cut off, limit access if he finds that [Jeanne] is in an unhealthy mental state."

The court entered its written order that same day, January 11. The order specified that the parties should contact each other only through Our Family Wizard. It granted

Jeanne supervised visitation with the children the second weekend of each month, from 10:00am to 2:00pm on both Saturday and Sunday, as well as on enumerated holidays. The order instructed Jeanne to attend all her mental health appointments, to take her psychiatric medicine, and to keep Preston apprised of her compliance. On attorney's fees, the ordered Jeanne to pay Preston $4,462.50.

Jeanne's Motion for a new Trial

On January 25, 2018, Jeanne, represented by new counsel, moved for a new trial and asked the court to vacate all rulings it made when she failed to appear at the January 11 merits hearing. In her motion, Jeanne asserted the following claims:

- She was unable "to maintain certain aspects of her regimen[]" to curtail the effects of her PTSD and depression, causing police to detain her from January 1 to 2, 2018, at which point she was held for an involuntary psychiatric evaluation.

- "As a result of the psychiatric evaluation, [she] was hospitalized from December 29, 2017, to January 10, 2018. While hospitalized, Jeanne [] was not permitted to contact anyone outside of the hospital. Accordingly, Jeanne [] was unable to communicate with her attorney, unable to notify the Court of her unavailability, and unable to notify Preston [] or his counsel that she was committed and unable to appear in Court."

- She was in either police custody or hospitalized from January 1 to January 10.

- She was unaware that Ms. Fowler withdrew as counsel or the court's discovery rulings because of her hospitalization.

- She "made attempts to communicate with the Court" through hospital staff, "by requesting that staff contact the Court and her counsel to obtain a continuance of the trial date when she became aware that she would not be released in time to travel to Maryland."

- She could not attend the January 11 hearing because of her hospitalization and detainment by police but she "exercised due diligence in attempting to notify the Court."

According to Jeanne, "she was not in a proper mental state to adequately defend against the Complaint or to prosecute the Counter-Complaint" on January 11. Jeanne argued that vacating the January 11 order was in the children's best interest and "in the interest of substantive justice and fair play" for three main reasons. First, she was unable to attend or participate in the proceeding because of her involuntary commitment, medication, and mental state. Second, the children, as a matter of law, have the right to have their best interests considered at a "full evidentiary hearing and not a default hearing," at which the court hears evidence from only one parent. And third, as a parent, she has a fundamental right to participate in her children's custody determination. Accordingly, Jeanne concluded, because the trial court would have been required to grant her a continuance based on her hospitalization, it "stands to reason" that the court should grant her a new trial because her hospitalization left her unable to seek a continuance.

Jeanne submitted an affidavit along with her motion. In the affidavit, she avers that she was transported by ambulance to the VA Regional Hospital for bronchitis on January 1, 2018; that she was discharged the same day, stopped by the police, and transported by the police to Prescott Memorial Hospital; that she was discharged from Prescott Memorial Hospital and then held overnight by the police at the police station; that the police transported her to Prescott Memorial Hospital for a court-ordered 96-hour psychological evaluation on January 2, 2018; and finally, that she was transferred to the VA Medical Center, where she remained from January 4 through January 10, 2018. Jeanne swore in her affidavit that from January 1 through January 10, she "did not have access to [her] cellular phone, contact numbers, or other personal belongings" and she "was unable to

communicate with [her] attorney and [] was unable to notify [] Preston [] or the Court of [her] unavailability." The exhibits to Jean's affidavit included, a medical bill and record; a bill from the ambulance service, dated January 1, 2018; as well as medical records from the VA Medical Center, which indicate an admission date of January 4 and a "check out" of January 10, 2018.

Preston opposed Jeanne's motion. He noted that Jeanne consented to her attorney's motion to withdraw prior to January 1. He outlined several communications from Jeanne, including one to Preston's counsel on January 10 to say, "Ms. Fowler did an excellent job advocating for [Cn.P.] and [Ce.P.], but I will carry the journey forward . . . ." He related another email his counsel received on January 10, this one from Ms. Fowler, stating that she "just received correspondence from [Jeanne] stating that she will not be able to be in Maryland for the trial date. I informed her of her obligation to inform the court and yourself of any request for a continuance, but I am not sure as to whether she will do so." Jeanne also contacted Preston on the morning of Wednesday, January 10, via Our Family Wizard, stating "Why did the boys not call Saturday? You had the numbers to reach me. Please ensure they FT tonight." Preston submitted that these contacts showed that Jeanne could have contacted the court to ask for a continuance.

In Preston's view, Jeanne's account of events supported the court's finding that supervised visitation at Preston's discretion was in the children's best interest: she failed to follow her medication regimen, had contact with police that prompted a psychiatric evaluation and hospitalization, and admitted that she was not in the proper mental state to participate in trial. Additionally, Preston represented that Jeanne continued to harass him

via Our Family Wizard, continued to harass Fran at work in violation of the peace order, and refused to provide a letter from her psychiatrist pursuant to the court's order.

The trial court denied Jeanne's motion for new trial without a hearing, entering its order on February 21, 2018. Jeanne noted her timely appeal to this court on March 13.

DISCUSSION

I.

New Trial

Jeanne argues that the trial court abused its discretion by denying her motion for a new trial for two main reasons. Her first argument proceeds as follows: the trial judge would have abused his discretion by denying her a motion for continuance based on her hospitalization, had she sought one, and her hospitalization left her unable to seek a continuance; therefore, she is entitled to a new trial. Relying on cases in which the trial court abused its discretion by denying a parent's motion for continuance in a custody hearing, Jeanne urges us to treat her motion for a new trial like the motion for a continuance she did not file. Jeanne's second argument is that the trial judge abused his discretion because he denied her and her children their right to a full evidentiary hearing on the children's best interests, as opposed to a default hearing.

Preston's general response is that the trial judge did not abuse his discretion because the outcome of the custody hearing was equitable: Jeanne still has visitation and access to the children and may seek modification of the custody arrangement at any time she can demonstrate that she is mentally healthy. Preston distinguishes those cases in which courts denied a parent's motion for continuance, asserting: "[Jeanne] failed to appear for a

scheduled trial date, failed to file a motion for a continuance, and failed to provide reliable documentation to prove that she was unable to appear trial."

Maryland Rule 2-533 permits a party in a civil action to move for a new trial within ten days after entry of the final judgment. Md. Rule 2-533(a). The decision to grant a new trial "is within the sound discretion of the trial court and its ruling is ordinarily not reviewable on appeal." *Titan Custom Cabinet, Inc. v. Advance Contracting, Inc.*, 178 Md. App. 209, 231 (2008) (citations omitted). The Court of Appeals has observed that the trial court's discretion will "rarely, if ever, be disturbed on appeal." *Buck v. Cam's Broadloom Rugs*, 328 Md. 51, 59 (1992).

The trial judge's discretion is not, however, unlimited. The court's discretion is "at its highest when the motion for a new trial 'did not deal with the admissibility or quality of newly discovered evidence, nor with technical matters,' but instead asked the trial court to draw upon its view of the weight of the evidence." *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 102 (2007) (quoting *Buck*, 328 Md. at 59). This is because of the trial judge's "unique opportunity" to observe "nuances, inflections, and impressions never to be gained from a cold record." *Buck*, 328 Md. at 59. Given this opportunity, the trial judge is entitled to "believe or disbelieve, accredit or disregard, any evidence introduced." *Edsall v. Huffaker*, 159 Md. App. 337, 342 (2004). It is not for the reviewing court to determine on appeal how the trial judge should have weighed each item of evidence. *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1975). Therefore, we will not disturb the trial court's sound discretion "except for the most compelling reasons." *Mack Trucks, Inc. v. Webber*, 29 Md. App. 256, 270 (1975).

A. Jeanne's Failure to Seek a Continuance

We begin with Jeanne's assertion, unsupported by legal precedent, that this Court should treat the trial court's denial of a new trial as a denial of a continuance because "Jeanne could not contact the Court to seek a continuance or apprize the court of her situations, because of the Hospitalization." Jeanne's argument is not supported by the record of the January 11 evidentiary hearing. Preston's counsel, Ms. West, informed the trial judge that Ms. Fowler, Jeanne's former counsel, informed her that Jeanne "wasn't going to be able to make it this morning." Ms. West also relayed to the court that Jeanne had emailed her "saying that Ms. Fowler was no longer representing her," and "indicat[ing] that she had been hospitalized for a period of time, and that she was released, *but that she wasn't going to be able to make it*." (Emphasis added). From this, Ms. West concluded, "I mean she is certainly aware of today's hearing." The court then proceeded with its evidentiary hearing in Jeanne's absence. In Preston's testimony at that hearing, he confirmed that he "received several phone calls from the hospital, one of them being [] on the 3rd." Additionally, Jeanne sent eight messages to Preston on January 1, the first day of her hospitalizations, through Our Family Wizard, and sent him a message on January 10, the day before the hearing, to ensure that he make children available to FaceTime later that day.

Rather than refuting Ms. West's or Preston's characterization of the facts or the evidence, Jeanne quotes extensively from Ms. West's statements and Preston's testimony to support her contention that the trial court knew that she was hospitalized and should have delayed the proceeding. In fact, Jeanne asserts that "[t]he uncontroverted evidence"

before the trial court included that "Jeanne notified Preston's attorney and her former attorney of her unavailability" but "Jeanne was not able to communicate with the trial court due to the [h]ospitalization." Jeanne does not explain how she remained able to communicate with Preston, Ms. Fowler, and Ms. West, but could not contact the court. Given that the hearing took place on January 11 and Jeanne was discharged on January 10, she offered no reason why she could not have contacted the court the morning of the trial. Despite Jeanne's status as a *pro se* litigant, "[i]t is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel." *Dep't of Labor, Licensing and Regulation v. Woodie*, 128 Md. App. 398, 411 (1999). The appropriate remedy for an inability to attend trial is a continuance. *See* Md. Rule 2-508.

Although Maryland Rule 2-508 allows for the court to grant continuances, to "continue or postpone a trial or other proceeding as justice may require," either on its own initiative or on motion by any party, the decision to do so is within the trial court's sound discretion. *Thanos*, 220 Md. at 392. We cannot say that the trial judge abused his discretion here by denying Jeanne a continuance she never sought, particularly when the "undisputed facts" before the court demonstrate that Jeanne was capable of outside communication during the period in question.

Nor can we say the trial judge abused his discretion by denying Jeanne a new trial based on any new information Jeanne provided about her hospitalization. The information Jeanne provided in her motion and supporting affidavit, though more specific, was largely known and discussed at the January 11 hearing. As we just discussed, Ms. West made the

court aware that Jeanne had been in contact with her former attorney and that Jeanne indicated that she was released from the hospital but would not be able to attend the hearing. Jeanne's communication with Preston and the two attorneys made the court aware that Jeanne was capable of communicating with the court but simply failed to do so. When confronted with this information a second time, the trial court apparently remained unconvinced that Jeanne's explanation justified a new trial. The trial judge was entitled to "believe or disbelieve" the parties and information before the court, *Edsall*, 159 Md. App. at 342, and we will not disturb that discretion on appeal.

B. Full Evidentiary Hearing

Jeanne also insists that she is entitled to a new trial because the hearing that was conducted was legally insufficient to adjudicate custody without her present. She contends that the January 11 hearing—what she refers to as a default hearing—fell short of the full evidentiary hearing that she says was necessary to determine her children's best interests and preserve her fundamental right as a parent to be present at any adjudication of her children's custody.

Preston retorts that the information in Jeanne's motion "supported the trial court's findings that [Jeanne] was mentally unstable and required supervised visitation." As for Jeanne's contention that the court held a default hearing, Preston observes that the hearing was a "full[] evidentiary hearing," at which the judge considered abundant evidence, including videos and photographs of Jeanne, as well as her own social media posts.

As an initial matter, Jeanne is correct that children have an indefeasible right to have their best interest considered in a full evidentiary hearing. *Wells v. Wells*, 168 Md. App.

382, 397 (2006) (citing *Flynn v. May*, 157 Md. App. 389, 407 (2004)). A parent also has a right "to be given a reasonable opportunity to be present at any judicial proceeding where the issue is whether or not the parent should be permitted to have custody of its own child." *In re McNeil*, 21 Md. App. 484, 496 (1974). We will explain, however, that the trial court's decision to proceed without Jeanne, under the circumstances, was in the children's best interests, and did not deprive Jeanne of her fundamental rights.

This Court reversed a trial judge's decision to proceed with a custody hearing without a parent present in *In re McNeil*, 21 Md. App. at 484. Mrs. McNeil had previously petitioned for her children to be committed to Social Services because she was unable to care for them, before petitioning to review the commitment six months later, alleging that she was then able to care for the children. *Id.* at 486. A Juvenile Court Master held a hearing, at which Mrs. McNeil and several medical witnesses appeared, and entered an order recommending that the children be returned to Mrs. McNeil's custody. *Id.* Social Services filed exceptions, however, so the circuit court scheduled a *de novo* hearing to re-consider who should have custody of the children. *Id.* Prior to the hearing, Mrs. McNeil called the court to inform the trial judge that she could not appear in court because her child was sick; her attorney appeared in her stead and asked that the case be continued. *Id.* at 487, 496. The trial judge denied the continuance and, after an evidentiary hearing, denied Mrs. McNeil's motion to rescind the children's commitment. *Id.* at 493.

On appeal, this Court concluded that the decision to proceed in Mrs. McNeil's absence was a "grave and serious error," and "was arbitrary and unreasonable." *Id.* at 496-97. Noting the irony that Mrs. McNeil's motion was dismissed at a hearing she could not

attend because she was caring for her ill child, this Court reasoned that the trial court's "concern for the convenience of the other witnesses in the case who were present in the courtroom" should not have outweighed Mrs. McNeil's right as "a parent to be present at a hearing involving the custody of her child." *Id.* at 499. This Court also observed that Mrs. McNeil had appeared at all prior hearings and that her testimony could have been important to the best-interest determination because she would have testified that one of her children dropped from 36 pounds to 25 pounds when the child was placed into foster care. *Id.* at 498. Taken together, these facts convinced this Court that Mrs. McNeil's case was "one of those exceptional instances where the refusal to grant a continuance was so arbitrary as to constitute a denial of due process." *Id.* at 499 (citing *Thanos*, 220 Md. at 393 (holding that it was error to deny a plaintiff a continuance based on her inability to attend trial despite medical certification of the plaintiff's disability)). This Court cautioned the limits of its holding, however: "We do not hold that it is never permissible to hold a custody hearing in the absence of one or both parents. Under some circumstances such a hearing could be necessary and proper, but no such circumstances were present in the instance case." *Id.*

In *Flynn v. May*, this Court addressed the applicability of the default-judgment rule to custody proceedings. 157 Md. App. 389, 391 (2004). After Mr. May filed an action against Ms. Flynn for custody of their children as well as child support, Ms. Flynn, proceeding *pro se*, filed her answer with the court but did not certify service of process. *Id.* at 392. Because of her ineffectual attempt to answer, the court entered an order of default against Ms. Flynn, which she failed to challenge within the required 30 days. *Id.*

at 393. Despite the default order, the court provided Ms. Flynn notice of the custody hearing it would hold. *Id.* at 395. Ms. Flynn appeared at the hearing with five witnesses, but the court informed her that she was precluded from offering (or even proffering) evidence. *Id.* at 396. The court then awarded custody to Mr. May without hearing any evidence concerning the fitness of either parent; the court heard only testimony of the child's age and sex. *Id.* at 397. Ms. Flynn then retained counsel and moved to alter or amend the judgment, which the court denied without a hearing. *Id.* at 399.

This Court on appeal rebuked the trial court's focus on technicalities over justice. *See id.* at 403. We stated that a "default judgment cannot substitute for a full evidentiary hearing when a court, in order to determine custody, must first determine the best interest of the child." *Id.* at 407. And "[t]here was obviously no way that an informed decision as to the best interest of [the child] could have been made based only on the information that he 1) was seven years old and 2) a boy." *Id.* at 410. Reiterating that a child has "an indefeasible right to have any custody determination concerning him made, after a full evidentiary hearing, in his best interest," we instructed that a child does not lose that right based on his or her parent's procedural pleading deficiency. *Id.* at 411. Therefore, it was an abuse of the trial court's discretion to order a change in custody "without permitting witnesses to testify or other evidence to be offered." *Id.*; *see also Wells v. Wells*, 168 Md. App. 382 (2006) (holding that it was an abuse of discretion to deny a mother's motion to vacate an order of default regarding custody without a full evidentiary hearing when the mother alleged that she was found in default because her ex-husband, with whom she lived, had hid the court summonses and orders when they came in the mail).

Applying the foregoing principles to the facts before us, we cannot say that the trial judge abused his discretion here by denying Jeanne's motion for a new trial without holding another evidentiary hearing. Despite Jeanne's contrary characterization, the trial court here did not find her in default or hold a "default hearing." The court did not, like the court in *Flynn*, enter an order of default against Jeanne and prohibit her from introducing evidence. *See* 197 Md. App. at 396. Instead, the court held an evidentiary hearing during which testimony and evidence was presented, including videos that Jeanne herself posted on Facebook Live in which she is speaking menacingly and relating fantastical thoughts about serial killers and going into exile with the children. The court also learned that Jeanne interacted inappropriately with her children—in one instance telling her eight-year-old child that she would see him in "God's righteous kingdom." In its ruling limiting Jeanne's custody rights, the court lamented the apparent deterioration of Jeanne's mental health, noted her threats to harm herself, and observed that Jeanne failed to educate herself on how to care for Ce.P. with his leukemia. This led the court to conclude that "should she be given access to the child, that the child's health and welfare may be in danger," and that the boys could be placed "in outright danger of harm or neglect."

Additionally, the judge also knew at the time of the evidentiary hearing that Jeanne had been hospitalized and released but did not contact the court or appear at the hearing. Unlike Mrs. McNeil, Jeanne did not contact the court to seek a continuance. *See In re McNeil*, 21 Md. App. at 496. A parent is entitled to only a *reasonable* opportunity to attend a custody adjudication. Jeanne's opportunity was reasonable. She had notice of the hearing and failed to appear or to contact the court to notify it of her absence. We cannot

say that the court's decision to proceed without Jeanne was arbitrary or that it deprived her of a reasonable opportunity to be present at the custody adjudication. *See id.*

The reasons that Jeanne provided for her absence in the motion for a new trial only served to reinforce the court's decision that the ruling was in the children's best interests. Jeanne's motion revealed to the court that she failed to maintain her medication regimen to treat her mental illnesses; had interactions with police that prompted them to seek a psychiatric evaluation and her hospitalization; and that the results of her psychiatric evaluation led her to be held involuntarily. In the motion Jeanne admitted that "she was not in a proper mental state to adequately defend against the Complaint or to prosecute the Counter-Complaint."

We conclude that the court's decision to hold its evidentiary hearing in Jeanne's absence and deny her motion for a new trial without another hearing was not an abuse of discretion. As the trial judge noted in his ruling, Jeanne may "come in and demonstrate that she is mentally fit and mentally able to—physically able to take care of the children" as soon as she is able, in order to have unsupervised access to the children.

II.

Attorney's Fees

Jeanne asserts the trial judge abused his discretion by awarding Preston attorney's fees. She says that the court lacked the necessary information to consider the parties' financial needs and resources and points out that Preston's last-minute financial statement presented to the court just prior to the hearing was not admitted into evidence. Furthermore, evidence of Jeanne's finances came from Preston's uncorroborated testimony

about her income, benefits, and expenditures. Even if some of the court's $4,462.50 award was for the $2,800 in fees Preston incurred based on discovery disputes, Jeanne urges that the remainder of the award was granted erroneously.

Preston counters that Jeanne "acted in bad faith through the litigation," and recounts her "uncooperative" behavior during discovery as well as her two motions for contempt, which Preston says, "were proven at trial to be blatantly false." Because Jeanne's contempt motions and her discovery "failures and obstructive behavior were without substantial justification," Preston concludes that the trial court was within its discretion to award fees.

The trial judge explained his award of attorney's fees as follows:

> Okay. Now, let me talk about attorney's fees. As Ms. West knows, you know, I don't generally grant attorney's fees, but in a case like this where I have heard the discovery issues, I have dealt with counsel in chambers and in court on those issues, I have ruled that, especially when interrogatory 25 I think it was, that Ms. Perkins should have answered that right off the bat without any complicating procedural maneuvers taken to get out of answering that.
>
> I have also looked at the request for contempt, and I'm glad we went through some of those things, because just on their face, I was concerned that some of those things may not have been accurate, to be quite frank, just based on what I have been able to glean through interactions with counsel and Mr. Perkins. So I was glad that we went through some of those examples where the allegations were clearly rebutted by evidence to the contrary.
>
> Without disparaging counsel's efforts, I will say that it seems to me that many of the issues that were raised and litigated could have been avoided or not even raised at all, and still counsel could have been a zealous advocate for her client without resorting to name calling and vexatious litigation, the vexatious filing of some claims, put it that way.
>
> For those reasons, and the fact that Ms. Jeanne Perkins seems to be able financially to be able to shoulder some of the costs for actions which I think were in her and her counsel's, they should be solely attributed to her, I will award attorney's fees. I didn't feel that, as I usually do, that there was a legitimate earnest difference of opinion about things. *I honestly believe in this case much of the dispute could have been avoided over some of this discovery. I will award attorney's fees in the amount of $4,462.50 reflecting*

> *counsel's need to respond to these contempt petitions, and to prepare answers, as well as the discovery issues that were raised and litigated*. So I will award fees in that amount. I will say that it shouldn't be too great a hit based on what I heard about her income that that be paid within 60 days.

(Emphasis added).

The award of costs and counsel fees in family law cases is governed by FL § 12-103, which provides:

> (a) *In general*. The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or
>
> (2) files any form of proceeding:
>
> (i) to recover arrearages of child support;
>
> (ii) to enforce a decree of child support; or
>
> (iii) to enforce a decree of custody or visitation.
>
> (b) *Required considerations.* Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.
>
> (c) *Absence of substantial justification.* Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

FL § 12-103.

In a domestic relations case, we review an award of attorney's fees for abuse of discretion. *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002). "Abuse of discretion is determined by evaluating the judge's application of the statutory criteria as well as the considerations of the facts of a particular case." *Ledvinka v. Ledvinka*, 154 Md. App. 420, 430 (2003). This Court affords deference to the circuit court in its application of the law

to the facts due to its greater familiarity with the many factors to be considered, including the financial status, resources, and needs of the parties. *Ridgeway v. Ridgeway*, 171 Md. App. 373, 388 (2006). The circuit court's failure to consider statutory factors, however, constitutes legal error. *Malin v. Mininberg*, 153 Md. App. 358, 435 (2003).

This Court considered a trial court's award, following a hearing to modify child support, of $5,000 in attorney's fees to a mother in *Lieberman v. Lieberman*, 81 Md. App. 575, 600 (1990). The mother in that case had a negative net worth and the father had a net worth over $1,000,000. *Id.* at 579. The cost of the mother bringing the action, which the court deemed to be substantially justified (having found in the mother's favor), was $14,769.50. *Id.* at 600. The trial court found that the father had already paid $1,000 toward the mother's fees and awarded the mother another $5,000. *Id.*

On appeal, this Court noted the discrepancy between the parties' financial statuses and ability to support their financial needs, and focused on the seemingly arbitrary nature of the court awarding only part of the fees the mother incurred: "What . . . could have accounted for an award that provides less than 41 percent of the costs and fees incurred? We simply cannot tell. On the bare record and in the absence of any reason, the award could be deemed arbitrary." *Id.* at 601. Judge Rosalyn Bell, speaking for this Court, continued: "Since we do not know why the trial judge awarded such a lesser sum, we cannot properly assess his exercise of discretion. We will therefore remand for him to consider *and articulate* his basis for the amount awarded." *Id.* (emphasis added). This Court instructed the trial court, on remand, to base its award on "(1) whether the $14,769.50 was supported by adequate testimony or records; (2) whether the work was reasonably

necessary; (3) whether the fee was reasonable for the work that was done; and (4) how much can reasonably be afforded by each of the parties." *Id.* at 601-02. *See also Fitzzaland v. Zahn*, 218 Md. App. 312, 331 (2014) (affirming the trial court's applications of the *Lieberman* factors to order the mother to pay $7,500 of $33,642.12 in attorney's fees that the father incurred because the mother's lack of substantial justification in bringing her custody petition extended the trial by two days).

The Court of Appeals framed more precisely the requisite analysis for FL § 12-103(b)(1)-(2) in *Davis v. Petito*. 425 Md. 191, 199-206 (2012). In *Petito*, the primary custodial parent, the mother, filed to modify child custody, alleging that the father had sexually abused their daughter. *Id.* at 195. The mother paid for private a private attorney before ultimately securing *pro bono* legal representation; the father paid for a private attorney for the duration of the proceedings, spending substantially more on legal services. *Id.* at 196. The trial court awarded the father attorney's fees based on his great substantial justification in defending himself, as well as the fact that the father had accrued significantly more debt associated with the trial than the mother. *Id.* at 196-97. The court arrived at the award by "divid[ing] the amounts paid by the parties to their respective private counsel; according to their relative income." *Id.* at 204-05.

After this Court affirmed, the Court of Appeals granted certiorari and reversed. *Id.* at 193-95. The Court ruled that "Section 12-103 contemplates a systematic review of economic indicators in the assessment of the financial status and needs of the parties, as well as a determination of entitlement to attorney's fees based upon a review of the substantial justification of each of the parties' positions in the litigation, mitigated by a

review of the reasonableness of the attorneys' fees." *Id.* at 206. Looking to the text of § 12-203 and the precedent applying that provision, the Court derived "that financial status and needs of each of the parties must be balanced in order to determine ability to pay the award to the other; a comparison of incomes is not enough." *Id.* at 205. Because the trial court had considered the fees the father paid as well as the debt he incurred to pay those fees (essentially double-counting the cost of the fees) but failed to consider the mother's needs, "such as her lack of savings or disposable income," the Court determined that the trial court had failed to adequately compare the parties' financial statuses and needs, and remanded the case for the trial court to consider the statutory factors set out in FL § 12-203. *Id.* at 206. *See also Ledvinka*, 154 Md. App. at 432-33 (holding that the trial court's award of fees, based only on its finding that the mother proved the father "ha[d] the ability to pay," included insufficient findings of fact and precluded this Court from "properly review[ing] the decision").

Returning to this case, Jeanne does not contest the court's findings that "many of the issues that were raised and litigated could have been avoided or not even raised at all," which, as Preston points out, would satisfy a finding that her claims were not substantially justified. Instead, Jeanne's argument on appeal focuses on the remaining factors the court must consider under FL § 12-203.

In its decision to award fees to Preston, the trial court considered only Jeanne's apparent ability to pay (which the court based on Preston's testimony regarding his perception of Jeanne's financial status and needs). But that testimony suggested that Jeanne had no rent or mortgage payments because she was living with her mother.

According to the pleadings filed by Jeanne, however, Jeanne planned to move to Maryland in January, the same month as the hearing. The record does not have any information about if and when she moved, or whether her disability income would be sufficient to cover her living costs in Maryland, which may now include sizeable rent or mortgage payments. Furthermore, although Preston submitted a financial statement to the court the day prior to the January 11 hearing, Preston's financial status and needs were not discussed at the hearing or by the court in its ruling. The court applied no "systematic review of economic indicators in [its] assessment of the financial status and needs of the parties," *Petito*, 425 Md. at 206; and it failed to balance the parties' statuses and needs "to determine [Jeanne's] ability to pay the award to [Preston]." *Id.* at 205. As the Court of Appeals has made clear, "a comparison of incomes is not enough." *Id.* Neither is simply determining one party's ability to pay. *Ledvinka*, 154 Md. App. at 432. FL §12-203 requires the court "to consider and balance all of the factors . . . before awarding attorney's fees." *Fitzzaland*, 218 Md. App. at 333.

Accordingly, we must vacate the court's award of attorney's fees and remand the case, so that the court can consider, on the record, the *Lieberman* factors and adequately balance the parties' financial statuses and needs as FL § 12-203 requires.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED IN PART; JUDGMENT RELATING TO ATTORNEY'S FEES VACATED. CASE REMANDED IN PART AS IT RELATED TO ATTORNEY'S FEES FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. PARTIES TO PAY THEIR OWN COSTS.