Circuit Court for Charles County
Case No.: C-08-FM-20-000106

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 222

September Term, 2022

TEIVON JOHNSON

v.

J'VAUGHN HOLMES

Kehoe,
Zic,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: November 29, 2022

This is an appeal from a judgment of the Circuit Court for Charles County, the Honorable Makeba Gibbs, presiding, that granted J'Vaughn Holmes's petition for modification of a foreign custody order pertaining to M.[1] and awarding full legal and physical custody of M. to Mr. Holmes. The appellant is Teivon Johnson, who presents six issues, which we have reworded and reordered:

> 1. Should we consider Mr. Johnson's appellate contentions that (a) he should be treated as a *de facto* parent of M., or (b) he should be treated as having parental rights that supersede the constitutional rights of Mr. Holmes?
>
> 2. Did the court err in excluding evidence and testimony about events prior to 2017, when the original custody order was issued?
>
> 3. Did the court err in excluding testimony from M.'s half-brother?
>
> 4. Did the court abuse its discretion by restricting expert testimony to one witness?
>
> 5. Did the court abuse its discretion by failing to elicit and/or consider M.'s wishes?
>
> 6. Did the court abuse its discretion in awarding sole legal and physical custody of M. to Mr. Holmes and in entitling Mr. Johnson to visitation with M. at Mr. Holmes' discretion?[2]

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[1] We will refer to the child who is the subject of these proceedings as "M." The initial is chosen at random. Neither her first name nor her surname begins with that letter. This this is intended to protect M.'s privacy interests and we mean no disrespect.

Additionally, the parties have been referred to in various ways in the parties' briefs and the record. For the convenience of the reader, we will substitute the parties' names for all inconsistent references, without brackets, when quoting from the briefs or the record.

[2] Mr. Johnson articulates the issues as follows:

BACKGROUND

This case arises out of a custody dispute between M.'s biological father, Mr. Holmes, and her maternal uncle, Mr. Johnson. In 2011, M. was born to Mr. Holmes and Ms. Tenika R. while Mr. Holmes was in a preexisting relationship. For the first years of her life, Mr. Holmes had a limited relationship with M. On August 18, 2015, shortly before M.'s fourth birthday, Ms. Fontanelle was shot to death in her home in the District of Columbia. M. and her half-brother, A'mari Fontanelle, were eyewitnesses to their mother's death. Mr. Johnson, Ms. Fontanelle's brother, subsequently assumed care of both minor children.

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1. Did the court err in failing to recognize Appellant as a *de facto* parent? Or in the alternative, if [the] [c]ourt did not find that Appellant was a *de facto* parent, did [the] court err in not allowing Appellant an opportunity to present evidence as to the Burak factors allowing a third party to be granted custody superseding the [c]onstitutional rights of a biological parent?
2. Did the court err in failing to give weight to the status quo?
3. Did the court err in failing to elicit and/or consider the child's wishes?
4. Did the court err in excluding testimony of a key witness, A'mari Fontanelle, solely because he was not on the witness list?
5. Did the court err in excluding evidence and testimony about events prior to 2017, when the original custody order was issued?
6. Did the court err in allowing the [duly] appointed Best Interest Attorney and Privilege Attorney to use her role to restrict expert testimony only to one witness?

Proceedings in the Superior Court of the District of Columbia

On August 28, 2015, Mr. Johnson filed a complaint for third-party custody of M. in the Superior Court of the District of Columbia. Mr. Holmes filed a counter-complaint for custody. At the time of their initial filings, both men were seeking sole legal and physical custody of M., with visitation awarded to the non-custodial individual.[3] On August 31, 2015, Mr. Johnson filed an emergency motion for custody of M., and the court held a hearing on the same day. The court granted Mr. Johnson temporary sole legal and physical custody of M. based on exceptional circumstances—namely the passing of M.'s mother. Mr. Holmes was granted court-ordered visitation with M.

In October and November of 2016, the court conducted a three-day trial to determine custody and visitation. On July 5, 2017, the court issued an order awarding joint legal custody of M. to Mr. Johnson and Mr. Holmes, with Mr. Johnson having final decision-making authority. Further, Mr. Johnson and Mr. Holmes were awarded joint physical custody of M., with Mr. Johnson having primary physical custody. Mr. Holmes was awarded custody of M. every other Wednesday afternoon after school dismissal or

[3] Both parties later amended their requests for relief; Mr. Johnson sought primary physical and primary legal custody, while Mr. Holmes sought joint physical custody with equally shared custody between the parties and joint legal custody with final decision-making authority.

therapy to Sunday evenings at 7:00 p.m., at which time M. would be returned to Mr. Johnson.[4]

In a written memorandum opinion, the court noted that Mr. Holmes' limited prior relationship with M., in contrast to M.'s strong relationship with Mr. Johnson and her other maternal family members, weighed heavily in support of the custody decision. Moreover, the court paid particular attention to the relationship between M. and her brother, finding that:

> The minor child views A'mari, who also witnessed the murder of their mother, as her brother, best friend, protector, and confidant. The bond between siblings was furthered strengthened by the fact that they were both present when their mother was murdered and the minor child may not be able to emotionally handle being further separated from her brother, which would occur if Mr. Holmes were awarded fifty percent physical custody. This Court concludes, that especially since Mr. Johnson is also A'mari's caretaker, Mr. Johnson is in the better position to provide the minor child with the appropriate continuity of care and a stable and permanent home.

On December 23, 2019, Mr. Johnson filed an emergency motion to modify custody in the Superior Court for the District of Columbia seeking sole legal and physical custody of

[4] Prior to making the custody determination, the court also made determinations regarding third-party standing and the parental presumption. The court found that, pursuant to the District of Columbia Code § 16-831.02(a)(1)(C), Mr. Johnson had standing "to seek third party custody of M. because M. was living with him at the time Mr. Johnson filed his custody complaint and because granting the relief requested by Mr. Johnson was necessary to prevent harm to M." The court further found that, pursuant to District of Columbia Code § 16-831.07(a)(2)-(3), "the parental presumption in favor of Mr. Holmes is rebutted by clear and convincing evidence, given the exceptional circumstances presented in this case."

M., based on allegations of abuse that M. made against Mr. Holmes. The court denied the request for an emergency hearing for three reasons: (1) Mr. Johnson had not alleged that M. was at "significant risk of immediate significant danger"; (2) it was unclear to the court whether it retained continuing jurisdiction to modify the custody order, since both men and M. were by then residing in Maryland; and (3) that M.'s abuse allegations had been reported to the appropriate authorities for further investigation. On January 6, 2020, Mr. Johnson filed a motion for expedited reconsideration, proffering that Mr. Holmes threatened to beat M. if she did not express a desire to live with Mr. Holmes full-time. On January 14, 2020, the court issued an order finding that Mr. Johnson's additional assertion was a sufficient basis to temporarily suspend Mr. Holmes' upcoming visitation with M. so that the existing custody dispute could be litigated in the appropriate Maryland court.[5] The Superior Court's order was subsequently filed and registered in the Circuit Court for Charles County, and both Mr. Johnson and Mr. Holmes petitioned that court for modification of the order.

Proceedings in the Circuit Court for Charles County

In February 2021, Mr. Johnson, Mr. Holmes, and M.'s best interest attorney entered into a pendente lite consent order which reestablished Mr. Holmes' access to M. Later

[5] Although the parties' briefs are silent as to whether, and if so, how, the abuse allegations were resolved, there is nothing in the trial court's decision that suggests that either Mr. Holmes or Mr. Johnson threatened M.

that year, the court held a four-day hearing on the merits. At the conclusion of the trial, the court issued detailed findings of fact and conclusions of law in the form of a bench opinion that extended over nineteen pages of transcript.

We will discuss the relevant portions of the court's findings and conclusions later in this opinion. In summary, the court found that there had been material changes in circumstance since the issuing of the Superior Court's original order in July 2017. The court noted the passage of time since M.'s mother's death, the fact that A'mari no longer resided with Mr. Johnson, and the growth of Mr. Holmes' positive relationship with M. The court granted Mr. Holmes sole legal and physical custody of M. with the proviso that Mr. Johnson may be provided with liberal opportunities for visitation with M. at Mr. Holmes' discretion.

THE STANDARD OF REVIEW

There are several ways in which a trial court can commit reversible error in custody disputes. *See In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). First, a trial court can make findings of fact that are clearly erroneous. *Id*. In reviewing for clear error:

> The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence. It is thus plain that the appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only

> determine whether those findings are clearly erroneous in light of the total evidence.

Ryan v. Thurston, 276 Md. 390, 392 (1975) (cleaned up).

Second, a judge can apply incorrect legal standards. Appellate courts review the trial court's legal reasoning without deference to the trial court's decision-making process. *Ta'Niya C.*, 417 Md. at 100.

Finally, trial courts often make decisions based upon consideration of multiple factors about which reasonable minds can and do differ. Judgments resolving child custody disputes falls into this category. *Santo v. Santo*, 448 Md. 620, 625 (2016). Accordingly, we will vacate a trial court's ultimate custody decision only when we have concluded that the trial court abused its discretion. *Ta'Niya C.*, 417 Md. at 100.

Review for abuse of discretion is highly deferential to the trial court. Appellate courts do not reverse a discretionary ruling by a trial court simply because the appellate judges would have made a different decision. *See North v. North*, 102 Md. App. 1, 14 (1994). Instead, appellate courts should affirm a discretionary decision unless it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017) (quoting *North*, 102 Md. App. at 14). To put it another way, a trial court abuses its discretion only when "no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles." *Santo*, 448 Md. at 625–26 (cleaned up).

ANALYSIS

1. De facto parentage and third-party custody

Mr. Johnson argues that the trial court erred in declining to recognize him as M.'s *de facto* parent per the Court of Appeals' holding in *Conover v. Conover*, 450 Md. 51, 62 (2016). Alternatively, he argues that he should be afforded the rights of a parent based upon his close familial relationship with M., per the Court's holding in *Burak v. Burak*, 455 Md. 564 (2017). Neither of these contentions is persuasive.

First, as Mr. Holmes points out, arguments that were not raised to the trial court are not preserved for appellate review. Moreover, whether Mr. Johnson was M.'s *de facto* parent is not outcome determinative because the trial court afforded him parental status per the teachings of *Burak v. Burak*, but simply did not find in his favor.

In putting all of this into context, we'll begin by reviewing the holdings of *Conover* and *Burak*.

Conover v. Conover

When there is a child access dispute between a fit parent and a private third party, the Court of Appeals has held that "the rights of parents to custody of their children are generally superior to those of anyone else." *Conover*, 450 Md. at 74; *see also McDermott v. Dougherty*, 385 Md. 320, 353 (2005) (In a child custody dispute between a parent and a non-parent, "both parties do not begin on equal footing in respect to rights to care, custody, and control of the children. The parent is asserting a fundamental constitutional right. The third party is not." (cleaned up)). For these reasons, a third party seeking

custody "must come before our courts possessed of at least *prima facie* evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought." *Best v. Fraser*, 252 Md. App. 427, 436 (2021) (quoting *Koshko v. Haining*, 398 Md. 404, 440 (2007)).

In *Conover*, the Court established a narrow exception to these principles by recognizing *de facto* parent status. 450 Md. at 85. The Court explained that "*de facto* parent" typically describes "'a party who claims custody or visitation rights based on the party's relationship, in fact, with a non-biological, non-adopted child.'" *Id*. at 62 (citing *Janice M. v. Margaret K.*, 404 Md. 661, 681 (2008), *overruled by Conover v. Conover*, 450 Md. at 85).

To determine when an individual is a *de facto* parent, the Court adopted a four-part test previously articulated by the Supreme Court of Wisconsin in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (1995). The elements of the *Conover* test are:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
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> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; *and*
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Conover, 450 Md. at 74 (emphasis added).

In *Conover,* the Court also made clear the legal effect of *de facto* parent status:

> We hold that *de facto* parents *have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances* before a trial court can apply a best interest of the child analysis. The best interest of the child standard has been "firmly entrenched in Maryland and is deemed to be of transcendent importance." *Ross* [*v. Hoffman*, 280 Md. 172, 174–75 (1977)]. With this holding we fortify the best interest standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships.

450 Md. at 85 (emphasis added).

Burak v. Burak

In *Burak,* the Court addressed the legal standards applicable in cases where a third party seeks an award of custody from a parent in a factual context different from that presented in *Conover*. In *Burak*, the third parties seeking custody were the child's grandparents, and the part of the Court's analysis in *Burak* that is relevant to Mr. Johnson's appellate contention is the Court's synopsis of factors relevant to overcoming the presumption of parental fitness:

> We conclude that a court, in determining whether a parent is unfit, may consider whether: (1) the parent has neglected the child by manifesting such indifference to the child's welfare that it reflects a lack of intent or an inability to discharge his or her parental duties; (2) the parent has abandoned the child; (3) there is evidence that the parent inflicted or allowed another person to inflict physical or mental injury on the child, including, but not limited to physical, sexual, or emotional abuse; (4) the parent suffers from an emotional or mental illness that has a detrimental impact on the parent's ability to care and provide for the child; (5) the parent otherwise demonstrates a renunciation of his or her duties to care

> and provide for the child; and (6) the parent has engaged in behavior or conduct that is detrimental to the child's welfare. [W]e conclude that "neglect" for the purposes of a finding of unfitness means that the parent is either unable or unwilling to provide for the child's ordinary comfort or for the child's intellectual and moral development.
>
> * * *
>
> [W]e hold that [these] factors . . . are not the exclusive criteria by which a court must rely to determine whether a parent is unfit, but should, nonetheless, serve as a guide for the court in making its findings.

455 Md. 648–49.

Preservation of the issues for appellate review

Maryland Rule 8-131(a) states (emphasis added):

> Ordinarily, the appellate court will not decide any other issue unless it *plainly appears by the record to have been raised in or decided by the trial court*, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The Court of Appeals has explained that appellate courts:

> have discretion under Maryland Rule 8–131(a) to address an issue that was not raised in or decided by the trial court, however. It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007).

A trial court "can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling."

Apenyo v. Apenyo, 202 Md. App. 401, 425 (2011). Courts do not err by failing to consider issues not presented to them.

During the trial, Mr. Johnson never asserted that he was M.'s *de facto* parent. Mr. Holmes never argued that he wasn't. Unsurprisingly, the court did not address the issue of *de facto* parentage in any fashion. Mr. Johnson's appellate contentions on this issue are not preserved, but, even if they were, they would be unpersuasive.

There is nothing in the trial court's legal and factual analysis of the evidence that suggests that the court was proceeding under the assumption that Mr. Johnson was required to demonstrate that Mr. Holmes was an unfit parent or that Mr. Johnson was required to show exceptional circumstances warranting an award of custody to him.[6] Instead, the court framed its analysis by applying the relevant factors for resolving a custody dispute between natural parents identified in *Taylor v. Taylor*, 306 Md. 290, 303–11 (1986). It is pellucidly clear that the trial court sought to identify the custodial arrangement which would be in the best interest of M. which is "of transcendent importance" in child custody disputes between parents. *Ross v. Hoffman*, 280 Md. 172, 175 n. 1 (1977). In other words, the court based its analysis on the implicit assumption that Mr. Johnson had the *quasi*-parental status afforded by *Burak*

[6] Nor does it appear that Mr. Holmes presented such an argument to the trial court.

Mr. Johnson also asks us to address whether the trial court erred by prohibiting him from "present[ing] evidence as to the *Burak* factors [which] allow[] a third party to be granted custody." *See Burak*, 455 Md. at 564. Mr. Johnson asserts that the trial court erred by refusing to permit him to introduce records of therapists who counseled M. after her mother's death. We will address the merits of this contention in part 4 of this opinion. At this juncture, it is enough to say that the trial court never imposed an obligation on Mr. Johnson to rebut the presumption that Mr. Holmes was a fit parent.

2. The trial court's refusal to admit evidence regarding events prior to 2017

Mr. Johnson next asserts that the trial court erred in excluding evidence regarding Mr. Holmes's financial circumstances, arrest record, and other court proceedings that occurred prior to 2017, when the Superior Court of the District of Columbia entered judgment awarding joint legal custody to the two parties. He argues that under *Wagner v. Wagner*, 109 Md. App. 1 (1996), a trial court must consider any evidence that supports the child's best interest, no matter when in time the proffered evidence occurred.[7] Mr. Johnson's argument is unpersuasive.

It has long been settled under Maryland law that custody should not be changed absent a material change in circumstances and an assessment of what would currently be

[7] Mr. Johnson misreads *Wagner.* The Court explained that "[a] final [custody] order moots the issues that might have existed earlier in the proceedings." 109 Md. App. at 22.

in the child's best interest. *See McCready v. McCready*, 323 Md. 476, 481 (1991). Writing for this Court in *McMahon v. Piazze*, Judge Lawrence F. Rodowsky explained that this rule is based upon principles of claim and issue preclusion and operates to avoid relitigation of the same issues. 162 Md. App 588, 593–94 (2005). Moreover, the material change in circumstances standard and the best interest of the child standard are inextricably related. 162 Md. App 588, 593–94 (2005). In other words, "[a] change in circumstances is 'material' only when it affects the welfare of the child." *Id*. at 594 (citing *McCready*, 323 Md. at 482).

Applying the teachings of *McMahon v. Piazze* to the case before us, the events that took place before 2017 do not, and as a matter of law cannot, constitute a material change in circumstances. Allowing the introduction of such evidence would only serve to relitigate the initial custody dispute. The trial court most certainly did not abuse its discretion by prohibiting Mr. Johnson from introducing evidence about what occurred in the period before the 2017 litigation.

3. Did the court err in excluding testimony from M.'s half-brother?

At trial, Mr. Holmes objected to Mr. Johnson calling A'mari, Mr. Johnson's nephew and M.'s half-brother, as a witness. Mr. Holmes asserted that Mr. Johnson failed to identify A'mari as a witness during discovery and other pre-trial proceedings and should therefore be barred from calling him as a witness. Counsel for Mr. Johnson conceded that the omission of A'mari from discovery responses or a pretrial statement was an oversight, and the following colloquy took place (emphasis added):

[Counsel for Mr. Johnson]: I also realize that based on . . . so, on defendant's filings, it seemed like one of the bases for a change in circumstance was that A'mari no longer lives at home with Mr. Johnson. But that was . . . has not been raised as an issue.

* * *

So I don't know if that is a change in circumstance that they are no longer arguing. It is true, I didn't realize it until just now, that A'mari was not listed as a witness. *But he is . . . he is M.'s older brother, and he can testify as to his own relationship with his uncle, as well as his observations of [M.] with his uncle. But really, my main . . . my main desire in calling him was to refute the allegations that Mr. Johnson had thrown him out of the home*.

The Court: Okay. They haven't presented that.

[Counsel for Mr. Johnson]: They have not presented that, Your Honor.

The Court: Okay.

[Counsel for Mr. Johnson]: So, if they have . . . *if they have removed that as one of the factors for their motion, or one of the changes in circumstance, then I don't see I need to call A'mari, other than as another observer of that relationship between Mr. Johnson and [M.]*.

The Court: I mean, if they elicit that testimony through your client, then I don't know why they can't still argue it, but—

[Counsel for Mr. Johnson]: Well then...then I would want to call—

The Court: Well, you are not on notice of that at this point, though. I don't know. I will let them respond to that. So you are still wanting him to testify? You're saying if they have not—

[Counsel for Mr. Johnson]: I would like him to testify.

The Court: No, no, no, you are saying if they are not—

[Counsel for Mr. Johnson]: *If they are not raising that as an issue . . . . [T]hen he is not as salient as a witness.*

[Counsel for Mr. Holmes]: *We certainly are raising it as an issue. We can get it through Mr. Johnson*, but—

[Counsel for Mr. Johnson]: *But of course, A'mari's testimony as to what happened is also, again, critical to what otherwise is just Mr. Johnson's word*.

> [Counsel for Mr. Holmes:] Quite frankly, Your Honor, we don't really . . . that is not even relevant, whether he was thrown out or he left of his own accord. The fact is that he is not there and he hasn't been there. And that is the only thing that really matters. So, I don't see a reason to get into—
>
> [Counsel for Mr. Johnson]*: Well, based on their filings, they were certainly making a big distinction as to Mr. Johnson's fitness, claiming that he had thrown his nephew out. And that has been refuted in court documents, which I could ask Your Honor to make judicial notice of?*
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> The Court: Well, I don't know how they are going to get in into evidence, unless your client testifies to that. So, they certainly can ask him on cross-examination about that if it is related to your direct. But the fact that he is not there, I mean, that is a pretty straightforward question. *Everything else, I will just take it as it comes in the . . . during the testimony of your client.*
>
> [Counsel for Mr. Johnson]: Thank you, Your Honor.

Maryland Rule 2–433(a)(3) gives trial courts broad discretion for remedying discovery violations, including the ability to prohibit the violating party from entering designated matters into evidence. However, the scope of the court's discretion is limited in a child custody case because in such cases "the very object of the suit is [the child] whose best interest transcends that of either formal litigant." *Flynn v. May*, 157 Md. App. 389, 391 (2004); *see also A.A. v. Ab.D.*, 246 Md. App. 418, 447 (2020), *cert. denied sub nom*. *Daneshpour v. Ahmad*, 471 Md. 75 (2020) ("Plainly, a child's best interests are best attained when the court's decision is as well-informed as possible.").

In *A.A.*, and after reviewing the development of the concept of "the best interest of the child" in custody cases, this Court explained:

> In sum, our decisional law has long recognized that a court commits legal error when it makes a decision that impacts a custody determination without first considering how that decision will affect the child's

> "indefeasible right" to have his or her best interest considered. *As a matter of first impression, we hold that it was error for the court to impose a discovery sanction that precluded the court from receiving evidence without first ascertaining whether the evidence was relevant [i.e. relevant to the Sanders-Taylor factors*[8]] in determining which custody arrangement was in the best interest of the children.
>
> * * *
>
> [I]n a child custody case, the court's independent obligation to the child requires that, before ordering the exclusion of evidence as a sanction [for a discovery violation], the court *should take a proffer or otherwise ascertain what the evidence is that will be excluded*, and then assess whether that evidence could assist the court in applying the *Sanders-Taylor* factors in its determination of the best interest of the child[ren].

A.A., 246 Md. App. at 448–49 (emphasis added, brackets in original).

Returning to the present case, we conclude that the trial court substantively complied with our holding in *A.A*. When Mr. Holmes objected to A'mari's testimony, the court attempted to ascertain what A'mari would testify about, and asked Mr. Johnson's counsel how she intended to get it into evidence. At the time, Mr. Johnson's counsel's explanation of what she intended to elicit from A'mari if he testified was somewhat open-ended:

> he is M.'s older brother, and he can testify as to his own relationship with his uncle, as well as his observations of M. with his uncle. But really, my main . . . my main desire in calling him was to refute the allegations that Mr. Johnson had thrown him out of the home.

[8] A reference to *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986). We will discuss these cases later in this opinion.

Counsel also made it clear that, if Mr. Johnson did not testify as to the circumstances surrounding A'mari's departure from the Johnson household, the need for his testimony would be "less salient."

Based on this, the trial court's decision to defer a final decision as to whether A'mari would testify until Mr. Johnson himself testified was certainly a reasonable one. And, as it turned out, (1) Mr. Johnson did not testify about the circumstances surrounding Amari's departure from his household, (2) no additional proffers were made as to what A'mari would testify about, and (3) counsel for Mr. Johnson made no additional attempts to call A'mari as a witness. It is difficult to see what more the trial court could have done.

4. Did the court err in restricting expert testimony?

Since a time shortly after her mother's death, M. has been treated by mental health therapists. Initially, she was treated by therapists at the Wendt Center in the District of Columbia. At some point, she was counseled by Stefanie Whalen, MA, LCPC. At trial, M.'s counsel waived M.'s therapist-patient privilege as regards to Ms. Whalen and she testified at trial as both a fact and an expert witness. Mr. Johnson objected to this at trial. On appeal, he renews his assertions that the best interest attorney "took every step possible to block testimony from the Wendt Center." Further, he contends that by "[e]xcluding this evidence [the trial court failed] to consider factors that are relevant to what is in the child's best interest," and that "[t]his is an error requiring de novo review so that this testimony and evidence can be entered into the record and considered by the deciding judge." This argument is unpersuasive.

The relevant statute is Courts & Jud. Proc. § 9-109, which states in pertinent part (emphasis added):

> (b) Unless otherwise provided, in all judicial, legislative, or administrative proceedings, *a patient or the patient's authorized representative has a privilege to refuse to disclose*, and to prevent a witness from disclosing:
>
> (1) *Communications relating to diagnosis or treatment of the patient*;
>
> * * *
>
> (c) If a patient is incompetent to assert or waive this privilege, a guardian *shall* be appointed and shall act for the patient. A previously appointed guardian has the same authority.

In *Nagel v. Hooks*, the Court of Appeals held that a child under the age of ten years was not competent to waive a testimonial privilege. 296 Md. 123, 127 (1982). The Court also held that a trial court's duty to appoint a guardian is mandatory. *Id.* at 128.

In *Nagel*, the Court made it clear that it is the role of the patient's guardian, and not the court, to decide whether the privilege should be waived. In the present case, the trial court appointed M.'s best interest attorney as her guardian pursuant to § 9-109. The authority to waive the privilege in whole or in part, was vested in the guardian, to be exercised by the guardian based upon her assessment of what was in M.'s best interest. The trial court was without the authority to require M.'s best interest attorney to waive her client's privilege regarding therapy she received at the Wendt Center. There is no basis for us to afford appellate relief to Mr. Johnson on this issue.

5. Did the court err in failing to elicit and/or consider M.'s wishes?

Mr. Johnson asserts that the trial court erred by not interviewing M. or conducting a query to determine if she was competent to testify.

As this Court held in *Wagner*, "[w]hen making a custody determination, a trial court is required to evaluate each case on an individual basis in order to determine what is in the best interest of the child." 109 Md. App. at 38–39 (citing *Bienenfeld v. Bennett-White*, 327 Md. 625 (1992)). Further,

> [the] factors the trial court *may use* in this determination include: Among other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.

Gillespie v. Gillespie, 206 Md. App. 146, 173 (2012) (citing *Wagner*, 109 Md. App. at 39) (emphasis added).

Mr. Johnson reads *Gillespie* as imposing a mandatory requirement on trial court judges and asserts that "the court explicitly lists the *preference of the child* as a factor the court must consider when making a custody decision." (emphasis in the original.) He is wrong. As a general rule, "may" is permissive and "shall" is mandatory. *Compare* BLACK'S LAW DICTIONARY 1172 and 1653 (11th ed. 2019) (definitions of "may" and "shall.") When we said in *Gillespie* that the court "may consider" the following factors, we meant that the court was authorized but not required to do so. A trial judge is

empowered to exercise their discretion and weigh relevant factors to determine what is in the best interest of the child. Indeed, "[c]ustody cases involve too many people, conditions, and human emotions to be reduced summarily to a mere mathematical process." *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406, 421 (1977).

Further, whether the trial court chooses to elicit the preferences of a minor child through an interview with the child is within the court's discretion. *Marshall v. Stefanides*, 17 Md. App. 364, 369 (1973). In this case, the trial court elected not to interview a ten-year old child who had previously experienced the trauma of witnessing her mother's murder and require her to choose between two much-loved parental figures. We find no abuse of discretion.

6. Did the court abuse its discretion in failing to give weight to the status quo when making its custody and visitation determination?

Mr. Johnson asserts that "[t]he modifying court failed to give any deference to the status quo and issued an order that uprooted six years of a routine, comforting, loving, and supportive environment without any consideration to how such an upheaval would impact the child."

When courts are faced with the prospect of modifying a custody award, they "generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child." *Montgomery County*

Dept. of Social Services v. Sanders, 38 Md. App. 406, 419 (1977); *see also Taylor v. Taylor*, 306 Md. 290, (1986). As we have stated above, a trial judge may consider,

> [a]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.

Gillespie, 206 Md. App. at 173 (citing *Wagner*, 109 Md. App. at 39).

In applying these factors, "the fact finder is called upon to evaluate the child's life changes in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Sanders*, 38 Md. App. at 419.

Here, the court applied the prescribed factors and, in a bench opinion that extended across twenty pages of transcript, issued a detailed and carefully-reasoned decision as to what custody arrangement would be in M.'s best interest. There is no reason for us to reiterate each step of the court's reasoning. What is important for our purposes is that Mr. Johnson has not persuaded us that any of the trial court's factual findings were clearly erroneous or that the court abused its discretion. Because it is the trial court that is "entrusted with great discretion in making decisions concerning the best interest of the child[,] the trial court's decision governs, unless the factual findings made by the trial

court are clearly erroneous or there is a clear showing of an abuse of discretion" *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (cleaned up).[9]

Because "[n]othing in [the trial court's] well-reasoned ruling can be described as anything remotely resembling an abuse of judicial discretion," *St. Cyr v. St. Cyr*, 228 Md. App. 163, 201 (2016), we have no basis to interfere with its resolution of this extremely difficult custody dispute.

THE JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

[9] In his brief, Mr. Johnson asserts that the trial court ignored Mr. Johnson's positive attributes as a parent. This is not correct. The court described him as "a responsible man with young children" who was "really stepping up in responsibility to [M.'s deceased mother] and to his young children and wife" and that the evidence showed both parties were "loving, caring, and responsible."