Circuit Court for Howard County
Case No. 13-C-15-103363

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 304

September Term, 2020

E.S.

v.

S.S.

Fader, C.J.,
Kehoe,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: November 19, 2020

We are once again called upon to review a decision from the Circuit Court for Howard County regarding the custody and visitation of E.S.'s ("Mother") and S.S.'s ("Father") two minor children. In an order dated March 30, 2018, the trial court awarded Father unsupervised visitation. Mother appealed that decision, and on March 12, 2019, this panel vacated and remanded that award because the court failed to make statutorily required findings regarding the likelihood of further abuse pursuant to Md. Code (1984, 2019 Repl. Vol.), § 9-101 of the Family Law Article ("FL").[1] *E.S. v. S.S.*, Nos. 363 & 3101, Sept. Term, 2018 (filed March 12, 2019), slip op. at 6. Following remand, the trial court received "pre-trial statements" and scheduled a status conference. After hearing argument,[2] the trial court issued a Supplemental Memorandum Opinion and corresponding Order for Custody and Access wherein it again granted Father unsupervised visitation.

Mother timely appealed and presents the following questions for our review, which we have consolidated and rephrased as follows[3]:

[1] We note that FL § 9-101 has not been amended since 2006.

[2] The court received no evidence at the status hearing.

[3] Mother's questions presented read as follows:

1. Did the Circuit Court violate Section[] 9-101 of the Family Law Article in awarding unsupervised visitation to a parent whom the [c]ourt found abused the children, based on the [c]ourt's express reasoning that the children are older now, they can report any abuse and the reported abuse occurred five years ago[?]

2. Under Section 9-101, did the Circuit Court abuse its discretion by awarding unsupervised visitation to a parent who abused the children without holding a

1. Did the circuit court err in awarding Father unsupervised visitation?

2. Did the circuit court err in making an "adverse finding" against Mother concerning her response to a rehabilitation program in which Father participated?

3. Did the circuit court err in denying Mother's motion to conform the record?

We shall vacate the court's judgment awarding unsupervised visitation and remand for further proceedings. Regarding the second and third issues presented, we perceive no reversible error.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the extensive record in this case, and because we must remand for further proceedings, our factual and procedural recitation is mostly limited to the events that

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hearing to explore the [c]ourt's concerns about the parent['s] ability to control his anger and to hear proffered evidence that there had bee[n] further abuse?

3. Did the County Circuit Court abuse its discretion in awarding unsupervised visitation to a parent who was found to have physically and emotionally abused the children where the parent denies his abuse under oath, lacks credibility and insight, refuses to accept responsibility or undertake therapeutic intervention, and will not acknowledge the harm he caused the children?

4. Did the Circuit Court abuse its discretion by making an adverse finding against a party who made well-founded objections to evidence based on relevancy?

5. Did the Circuit Court abuse its discretion by refusing to consider a party's motion to conform the record to reflect that the [c]ourt had ordered an opposing party to attend a program where the [c]ourt credited that party for voluntarily attending the program, and a supporting affidavit contains as exhibits emails between the parties' counsel and chambers in which both parties' counsel referred to the [c]ourt as having ordered the party's attendance?

transpired since we issued our unreported opinion on March 12, 2019. As basic background, we note that the parties married on November 29, 2008, and Mother filed a complaint for limited divorce in April 2015. *E.S.*, slip op. at 3. Mother filed an amended complaint for absolute divorce in April 2016, and after twelve days of trial spanning nearly a year and a half[4], the circuit court issued its Memorandum Opinion. *Id*. The Memorandum Opinion detailed numerous instances in which Father physically abused the minor children, and physically and sexually abused Mother. The trial court awarded Mother sole legal and primary physical custody, but, despite its extensive findings of abuse, awarded Father unsupervised visitation with the children. *Id*.

Mother appealed the court's decision granting Father unsupervised visitation. In an unreported opinion filed on March 12, 2019, we relied on the express language of FL § 9-101 to vacate and remand the court's award of unsupervised visitation. That section provides,

> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

[4] The last day of trial was September 5, 2017. The court did not issue its order granting the absolute divorce, however, until March 30, 2018.

Because the trial court found that Father had abused the children, but did not explicitly find that there was no likelihood of further abuse, we vacated and remanded the trial court's award of unsupervised visitation.[5] *E.S.*, slip op. at 6-7.

Following our remand, on May 29, 2019, the parties appeared before a magistrate for a scheduling conference. At the end of that proceeding, as the parties and their attorneys prepared to leave the courtroom, Father yelled and made a threatening gesture in Mother's direction. These actions caught the attention of a courtroom deputy sheriff who, with Father's counsel, escorted Father out of the courtroom. As a result of this incident, Mother sought a protective order against Father. On June 20, 2019, the parties appeared for a hearing concerning Mother's requested protective order. After receiving testimony and reviewing video footage of the incident, the trial court found that Father's actions constituted abuse towards Mother. Accordingly, the court granted her request for a protective order, forbidding Father from contacting, calling, writing, or harassing Mother.[6] Father did not appeal the granting of the protective order.

The parties subsequently filed pre-trial statements in advance of the status conference to address this Court's remand. At the status hearing, Father argued that the court's March 30, 2018 order awarding him unsupervised visitation could be salvaged by

[5] We addressed several other issues in our unreported opinion, including a subsequent appeal—Appeal No. 3103, Sept. Term 2018. *E.S.*, slip op. at 14. Those issues are not relevant here.

[6] The parties appeared before the same judge who has overseen the divorce and custody proceedings.

the trial court simply reciting the "magic words" in FL § 9-101 that there was no likelihood of further abuse. Based on the events that occurred in the courtroom that led to the issuance of the protective order, the trial court expressed concern regarding whether Father could be trusted to control himself in private with the children. In response, Father's counsel assured the court that Father was simply frustrated with having to pay legal fees.

Mother's counsel echoed the court's concern that Father's behavior in the courtroom demonstrated that he could not control himself. Additionally, Mother's counsel alleged that, subsequent to the court's March 30, 2018 order, Father engaged in further abusive behavior against the children. According to Mother's counsel, Father had been referring to the parties' daughter as "fetus," and further asserted that an incident occurred in a store wherein, although not "malevolent," Father apparently struck the parties' son in the groin area. Citing these instances, Mother's counsel argued that there were still "concerns about his continuing behavior." The court concluded the hearing by informing the parties that it would issue a supplemental memorandum, and that if the court required any further testimony, it would notify the parties in that memorandum.

On April 30, 2020, the trial court issued its Supplemental Memorandum Opinion and Order for Custody and Access. The court awarded Father unsupervised visitation and, once again, Mother has appealed. We shall provide additional facts as necessary.

DISCUSSION

I. THE COURT'S AWARD OF UNSUPERVISED VISITATION

As previously noted, in the first appeal we held that the court's award was deficient

because the court failed to determine whether abuse or neglect to the children was likely to occur as required by FL § 9-101. Although the court ostensibly rectified that error in its Supplemental Memorandum Opinion by expressly finding that abuse is not likely to occur, the court erred by ignoring our prior admonition that it should not rely on the fact that the "children are older and can protect themselves" as a basis for unsupervised visitation. Moreover, despite its express concerns about Father's behavior emanating from the courtroom assault, the court failed to articulate how or why those concerns were resolved in Father's favor.

In its Supplemental Memorandum Opinion, the court acknowledged that, in its original memorandum opinion, it found that Father had abused both children. In recounting its prior findings, the court noted that Father had received "glowing reports" from visitation supervisors and had attended a domestic violence program geared toward veterans. The court then addressed the courtroom assault against Mother that led to the issuance of a protective order. The court stated,

> Prior to June 2019, this [c]ourt was comfortable in finding that there is/was no likelihood of future abuse towards the children; however, the [Father] committed an assault upon the [Mother] in the courthouse in front of lawyers, court employees, and a deputy sheriff. **If he cannot control himself in the presence of these individuals in a courthouse, then this [c]ourt has concern as to how [Father] will be able to control himself around the children. The [Father's] actions towards the [Mother] causes concern for this [c]ourt.**

(Emphasis added).

In the next paragraph of its Supplemental Memorandum Opinion, the court gave its reasoning to support unsupervised visitation despite Father's recent assault of Mother:

> Although this [c]ourt has concerns about [Father's] conduct and behavior towards [Mother] and her counsel, this [c]ourt specifically finds that there is no likelihood of future abuse towards the children if custody or visitation rights are granted. Moreover, **all of the abuse presented to the [c]ourt as it relates to the children occurred prior to July 2015, almost 5 years ago. Now, the children are much older and can express themselves if any inappropriate behavior occurs.**

(Emphasis added).

We interpret this passage to mean that the court's finding of "no likelihood of future abuse" was based on: 1) the fact that the child abuse occurred "almost 5 years ago," and 2) that because of the children's ages, they will be able to report any further abuse. We expressly rejected the latter rationale in our prior opinion, where we stated,

> We further reject Father's argument that the court complied with FL § 9-101(b) by finding that the "children are older and can protect themselves" and that Father's parents "are available to make observations." That the children may be able to "protect themselves" from abuse or that others may be available to witness such abuse is antithetical to the statute's purpose. *Cf. In re William B.*, 73 Md. App. 68, 77 (1987) ("The judge need not wait until the child suffers some injury before determining that he is neglected.").

E.S., slip op. at 6, n.2. That the court again relied on the age of the children and their ability to report abuse as a relevant factor in weighing the likelihood of further abuse constituted error. On remand, the court must consider the likelihood of further abuse, *not the ability of the children to report that abuse*.

Additionally, we see no resolution of the court's explicit concerns resulting from the courtroom assault. We have no issue with the court's statement that "[i]f [Father] cannot control himself in the presence of these individuals in a courthouse, then this [c]ourt has concern as to how [Father] will be able to control himself around the children." But

the court never explained why its concerns emanating from this recent assault were dissipated or eliminated. In other words, how did the court's "concern" become "no concern"?

We note that FL § 9-101.1 provides, in relevant part, that

> (b) In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:
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> (1) the other parent of the party's child;
>
> (2) the party's spouse; or
>
> (3) any child residing within the party's household, including a child other than the child who is the subject of the custody or visitation proceeding.
>
> (c) If the court finds that a party has committed abuse against the other parent of the party's child, the party's spouse, or any child residing within the party's household, the court shall make arrangements for custody or visitation that best protect:
>
> (1) the child who is the subject of the proceeding; and
>
> (2) the victim of the abuse.

We recently noted that

> The Court of Appeals has explained that FL § 9-101 often "needs to be considered together" with FL § 9-101.1 [*In re Adoption No. 12612 in Circuit Court for Montgomery Cty.*, 353 Md. 209, 229, 725 A.2d 1037 (1999)]. That section "deals not just with abuse [or neglect] by a party . . . against a child but also with abuse by that party directed against the other parent of the child or the party's current spouse." *Id*. at 236, 725 A.2d 1037. According to the Court of Appeals, the "legislative history of § 9-101.1 indicates recognition by the Legislature of a deep concern over the effect on a child of being in the maelstrom of *any* domestic violence within the home, including the abuse of adults and other children, whether or not those victims are related to the child whose custody or visitation is at issue. *Id*. at 236-37, 725 A.2d 1037. In the process of enacting FL § 9-101.1, the General Assembly considered "the adverse effects on children from abusive households generally, *not only the psychological harm derived from witnessing violence directed against other household members, but also the greater likelihood, statistically demonstrated, that violence directed against*

> *others, including adults in the home, will eventually be directed against them as well*[.]" *Id*. at 237, 725 A.2d 1037.

Gizzo v. Gerstman, 245 Md. App. 168, 193-94 (2020) (second emphasis added). We acknowledge that the language in "FL § 9-101.1 is by no means identical to or equivalent to the language used in FL § 9-101." *Id.* at 197 ("Section 9-101 states that the court 'shall determine' the likelihood of further child abuse or neglect" whereas "section 9-101.1 states that the court 'shall consider' evidence of abuse by a party against the child's parent."). To be clear, we are not holding that the court's failure to specifically refer to FL § 9-101.1 constituted error. Indeed, we commend the court for recognizing that the courtroom assault against Mother was directly relevant to possible further abuse of the children. Instead, we see no explanation in the court's Supplemental Memorandum Opinion why its explicit "concern as to how [Father] will be able to control himself around the children" no longer existed. *Cf. id.* at 196 (noting that "the court fully articulated the rationale for its conclusion that there was no likelihood of further abuse or neglect"). In other words, the courtroom assault appropriately caused the court to have "concern" about Father's future behavior toward the children, including the possibility of future abuse, yet we fail to see how the court ultimately resolved that concern, let alone in Father's favor. The court must resolve this discrepancy on remand. *See Maddox v. Stone*, 174 Md. App. 489, 502 (2007) (recognizing that although the abuse of discretion standard of review is highly deferential, "we nevertheless will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant

facts and circumstances that resulted in the *exercise* of discretion").[7]

II. PARTICIPATION IN THE STRENGTH AT HOME PROGRAM

Mother's second argument focuses on a statement in the trial court's first opinion issued in March 2018. Referring primarily to the "Strength At Home" program, the court concluded that Mother's actions to "do any and everything to discredit any program or services that [Father] engages in" were "clearly inappropriate and are not in the children's best interest." Mother contends that "[t]here was no evidence to support the finding[,]"and asks us to vacate this finding because she claims that it "may support adverse inferences" or "may still prejudice her" in future litigation.

We decline Mother's request to vacate the court's finding concerning her conduct. First, there is no evidence that the trial court relied on this specific finding when it issued its April 30, 2020 Supplemental Memorandum Opinion and Order, *i.e.*, the judgment Mother appealed in this case. Second, pursuant to our practice of not rendering advisory opinions, we will not comment on an issue that may never arise. *See Hickory Point P'ship v. Anne Arundel Cty.*, 316 Md. 118, 130 (1989) ("[R]endering purely advisory opinions [is] a long forbidden practice in this State." (quoting *Hatt v. Anderson*, 297 Md. 42, 46 (1983))). That Mother *may* suffer "adverse inferences" or "prejudice" in future litigation is

[7] Mother alleges that the court erred in failing to receive evidence of Father's abuse of the children subsequent to the issuance of our reported opinion. The transcript of the status hearing does not reveal a specific request that the court receive such evidence. We presume that the court on remand will consider any allegations of abuse or neglect that have occurred since the issuance of our first unreported opinion.

speculative and, as such, we decline to consider the issue.

III. MOTION TO CONFORM THE RECORD

Finally, Mother contends that the court erred in denying her "Motion to Conform the Record." Mother's motion concerned a January 27, 2017 conference call involving both attorneys and the trial judge. Mother insists that, during the conference call, the trial judge *ordered* Father to attend the "Strength At Home" program rather than merely *suggest* his participation. Because the court in its March 30, 2018 opinion noted that Father participated in the program the court "suggested," Mother requested the court to correct its opinion to reflect that the court actually ordered Father to participate in the program. The court declined to do so.

On appeal, Mother argues that "[t]o the extent the [c]ourt relied on [Father's] attendance at the program, it erred." She further seeks a remand hearing to consider "the extent the [c]ourt will rely on crediting his attendance as voluntary."

Mother has failed to direct us to any part of this extensive record that supports her underlying premise that the court based its decision on Father's voluntary, as opposed to mandatory, participation in the "Strength At Home" program. The court's March 30, 2018 order places no significance on whether the program was mandatory or simply optional. Rather, Father's attendance was mostly notable for highlighting what the court perceived to be Mother's obstructionist efforts in seeking to discredit the program.

We also note that the conference call with the court was not on the record. Although counsel on both sides may have thought the court ordered Father's participation in the

program, the court did not issue an order compelling Father's attendance in the program, nor do we see any evidence that the judge himself thought that he ordered such attendance as a result of the conference call. We conclude that the court did not err or abuse its discretion in denying Mother's Motion to Conform Record.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.