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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 363 & 3103

September Term, 2018

E.S.

v.

S.S.

Fader, C.J.,
Kehoe,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: March 12, 2019

In this case involving two consolidated appeals, Appeal No. 363 arises from a judgment issued by the Circuit Court for Howard County on March 30, 2018, granting appellee S.S.[1] ("Father") unsupervised visitation with his two children. Appellant E.S. ("Mother") challenges that decision. Mother's principal contention on appeal is that, in light of the circuit court's finding that Father abused the children, the court erred in awarding unsupervised visitation without specifically finding "that there is no likelihood of further child abuse" as required by Md. Code (1984, 2012 Repl. Vol.) § 9-101(b) of the Family Law Article ("FL"). Mother presents the following issues for our review, which we have consolidated and rephrased:

I. Did the circuit court violate FL § 9-101 in awarding unsupervised visitation to Father, who the court found had abused the children, in the absence of a specific finding that there is no likelihood of further abuse?

II. Did the circuit court abuse its discretion in precluding expert testimony concerning rehabilitation of child abusers?

III. Was the court clearly erroneous in finding that Mother attempted to interfere with Father's visitation?

IV. Did the circuit court err in excluding as hearsay testimony that Mother said "stop" during an incident where Father was allegedly raping Mother?

V. Did the circuit court violate FL § 9-101.1 by requiring Mother to keep Father "informed by e-mail or text message as to all of the children's school, health, and extracurricular activities?"

[1] Given the sensitive nature of the facts in this case, we use the parties' initials in order to protect their privacy.

We answer the first question in the affirmative, and shall reverse the judgment of the circuit court and remand for further proceedings. Additionally, we hold that the court erred in finding that Mother attempted to interfere with Father's visitation, and that the court also erred in excluding testimony that Mother said "stop" when Father was allegedly raping her. Because we are reversing and remanding, however, the court may revisit these issues to the extent they are relevant in determining Father's visitation with the children.

With Appeal No. 363 pending, Mother filed a motion in our Court to stay the circuit court proceedings in an effort to prevent Father's unsupervised visitation. We granted Mother's motion to stay in an order dated June 29, 2018. Following our order, Father sought to obtain supervised visitation with the children, which Mother opposed. On December 17, 2018, the circuit court granted Father's request for supervised visitation and designated Father's mother as the visitation supervisor. Additionally, on November 29, 2018, Mother sought modification of the March 30, 2018 order as it pertained to her court-ordered communication with Father, which the circuit court denied without a hearing.

Mother then noted Appeal No. 3103, and presents the following issues which we have consolidated and rephrased:

I. Did the circuit court abuse its discretion under FL § 9-101 and § 9-101.1 when it appointed Father's mother as the visitation supervisor for Father's visitation with the children?

II. Did the circuit court err in dismissing Mother's Motion for Modification of Judgment?

We conclude that the circuit court, under the particular circumstances present here, abused its discretion by appointing Father's mother as the visitation supervisor. We further

conclude that the circuit court erred by summarily dismissing Mother's Motion for Modification of Judgment. Both of these issues must also be addressed by the circuit court on remand.

FACTUAL AND PROCEDUURAL BACKGROUND

Because the parties do not substantially challenge the circuit court's fact-findings, we rely on the court's memorandum opinion in recounting the history of this case. The parties were married on November 29, 2008. Mother initiated the divorce by filing for a limited divorce in April 2015; in April 2016 she filed an amended complaint for absolute divorce. The trial was originally scheduled for three days in May 2016, but did not conclude until over a year later in September 2017 after twelve days of trial. Most of the trial concerned legal and physical custody of the parties' two children, A. and M. As will be discussed *infra*, Mother presented extensive testimony about Father abusing her and the children. In its memorandum opinion, the court awarded Mother sole legal and primary physical custody of the children, but granted Father unsupervised visitation on alternating weekends and holidays, after school on Wednesdays, and two non-consecutive weeks during the summer. The court further required Mother to keep Father informed of the children's school, health, and extracurricular activities by e-mail or text. We shall provide additional facts as necessary to resolve the issues raised on appeal.

STANDARD OF REVIEW

We review child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the three

interrelated standards as follows:

> [W]e point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586.

DISCUSSION

Appeal No. 363

I. Mother's Challenge to the Visitation Award

Mother first argues that the circuit court misapplied FL § 9-101, which requires the court, after finding reasonable grounds to believe a party has previously abused or neglected a child, to assess the likelihood of further abuse. Specifically, Mother points out that the court found that Father had abused A. and that statements Father made about M. amounted to abuse. She also notes that visitation had been previously supervised "due to [Father's] treatment towards the children . . . as well as for the safety of the children." Given the court's finding of abuse, Mother maintains that the court erred by granting Father unsupervised visitation without making the predicate finding that "there [was] no likelihood of future abuse."

At oral argument, Father acknowledged that the court did not expressly find that there was no likelihood of future abuse. Nevertheless, relying on the principle that a trial

judge is presumed to know the law and apply it correctly, Father asserts that the court implicitly found no likelihood of future abuse. Father directs us to evidence that he had supervised visits with the children for which he received "glowing reports" from the visitation supervisors, and that he was attending a therapeutic program known as "Strength at Home." He further points out that the court found:

> that the children are older and can protect themselves or voice any concerns if anything inappropriate occurs during access with [Father]. Additionally, [Father] lives with his parents and they are appropriate people to be involved with the children and are available to make observations of [Father] and children when they are in the home.

Thus, according to Father, the circuit court complied with the mandates of FL § 9-101. We disagree.

Maryland case law coincides with Mother's interpretation of FL § 9-101. In *In re Adoption No. 12612*, the Court of Appeals held that, when there are reasonable grounds to believe that a child has been abused or neglected, the court must determine "whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party." 353 Md. 209, 238-39 (1999) (quotation marks omitted). Additionally, the Court held that where there is abuse or neglect, the court should deny custody and unsupervised visitation unless the court specifically finds that "there is no likelihood of further child abuse or neglect." *Id.* at 239. In *Baldwin v. Baynard*, we construed FL § 9-101 as follows:

> Pursuant to FL § 9-101, the court must engage in a two step process. First, the court must consider whether there are reasonable grounds to believe that a child has been abused or neglected by a party to the proceedings. The preponderance of the evidence standard applies when the court determines whether reasonable grounds exist. Second, the court must determine whether it has been demonstrated that there is no likelihood of further abuse or neglect

> by the party. The court is explicitly prohibited from granting custody or unsupervised visitation to a party who has abused or neglected a child unless the court *specifically finds* that there is no likelihood of further abuse or neglect. Moreover, [t]he burden is on the parent previously having been found to have abused or neglected his or her child to adduce evidence and persuade the court to make the requisite finding under § 9-101(b).

215 Md. App. 82, 106 (2013) (emphasis added) (citations and quotation marks omitted).

In this case, it is undisputed that the court found that Father had abused the children. Having made that finding, FL § 9-101(b) prohibited the court from granting Father unsupervised visitation with the children unless the court specifically found that there was no likelihood of further abuse or neglect. *See id.* Nowhere in the court's twenty-three-page memorandum opinion did the court make the statutorily required finding concerning the likelihood of further abuse. Absent such a finding, the court clearly erred in granting Father unsupervised visitation with the children.[2] *See In re Adoption No. 12612*, 353 Md. at 239 (noting that FL § 9-101 "does not envision an appellate court assuming the required finding from other disparate statements by the trial judge").

For the circuit court's benefit on remand, we reiterate that the court must strictly comply with the mandates of FL § 9-101. Having found that Father had abused the

[2] We reject Father's contention that we can affirm because the circuit court implicitly found that there was no likelihood of further abuse. 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.").

children, the court "shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted" to Father. FL § 9-101(a). The court may not grant custody or unsupervised visitation "[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect." FL § 9-101(b). If Father cannot sustain his burden of demonstrating that there is no likelihood of further abuse or neglect, the court may only grant supervised visitation, but only if that visitation arrangement "assures the safety and the physiological, psychological, and emotional well-being of the child[ren]." FL § 9-101(b).[3]

II. Expert Testimony Regarding Father's Rehabilitation

Mother next argues that the circuit court erred by preventing her from introducing expert testimony regarding Father's rehabilitation and the rehabilitation of abusers, generally. Specifically, at the conclusion of the eleventh day of trial, Mother, for the first time, requested that Lisa Nitsch, a proffered expert in abuser rehabilitation: 1) be permitted to evaluate Father and then provide testimony about whether the "Strength at Home" program benefitted Father; and 2) testify about the rehabilitation of abusers generally. Mother's counsel argued that Ms. Nitsch's testimony would be helpful in light of Father's testimony that he had, at the trial court's suggestion, begun attending the Strength at Home program. The court noted that Ms. Nitsch was never previously identified as an expert and

[3] We decline Mother's invitation that we *instruct* the circuit court to require Father to be "evaluated by a child abuse expert" and engage in therapy "with a therapist to whom [the] custody evaluation is provided."

that it was "late" to do so. Ultimately, the court declined to allow Mother to call Ms. Nitsch, relying on the fact that the trial had spanned nearly a year and a half without notice of this witness, and denied her request "to introduce an expert [at] this late stage knowing that this [had] been [Mother's] position from Day 1."

On appeal, Mother contends that the court abused its discretion by refusing to allow her to use Ms. Nitsch as an expert. She contends that the central issue of this case—the potential harm Father poses to the children—could not be answered without Ms. Nitsch's testimony regarding Father's rehabilitation and evidence concerning the rehabilitation of child abusers.

"[It] is well settled that the 'admissibility of expert testimony is within the sound discretion of the trial court, and its action will seldom constitute a ground for reversal.'" *Brown v. Contemporary OB/GYN Assocs*., 143 Md. App. 199, 252 (2002) (quoting *Pepper v. Johns Hopkins Hosp*., 111 Md. App. 49, 76 (1996)). We discern no abuse of discretion here. As to Mother's request to produce expert testimony concerning the rehabilitation of abusers generally, the court correctly noted that Father's alleged abuse was known "from Day 1." Accordingly, the court did not abuse its discretion in precluding Mother from calling Ms. Nitsch because Mother could have identified her as a potential witness months earlier. We likewise see no abuse of discretion in the court's denial of Mother's request for Ms. Nitsch to interview and evaluate Father after the eleventh day of trial–and more than a year and a half after the trial commenced. *Cf. Shelton v. Kirson*, 119 Md. App. 325, 333 (1998) (finding that the trial court did not abuse its discretion in preventing a party

from naming an expert witness more than a year after expiration of the disclosure period). Had the court granted Mother's request, the interview and evaluation of Father would have caused further delay, an important consideration in this custody case that required more than a year and a half to conclude.

III. Interference with Father's Visitation

Mother next argues that the circuit court incorrectly concluded that she interfered with Father's visitation based on interactions she and her counsel had with two separate visitation supervisors: Elizabeth Benitz and Frank Zapuchek. According to the trial court's opinion,

> Ms. Elizabeth Benitz had an incident with [Mother's] counsel, during a visit where counsel touched her in order to serve her with a subpoena. Ms. Benitz became upset, and subsequently filed criminal charges against counsel and declined to continue as the supervisor. The criminal charges were subsequently dismissed by the State's Attorney. . . .
>
> After Mr. Zapuchek testified [at trial], [Mother] contacted Mr. Zapuchek's ex-wife and attempted to obtain information about his relationship with his ex-wife, any mistreatment, and any other matters that can be used against Mr. Zapuchek. [Mother's] counsel also went to the courthouse in Anne Arundel County and copied Mr. Zapuchek's file and wanted to admit it in this case for consideration by [the trial court]. This conduct by the [Mother] and her counsel is an attempt to have Mr. Zapuchek disqualified or removed by [the trial court], and is inappropriate.

We assume that these conclusions may have factored into the court's decision to award Father unsupervised visitation.

This Court has previously stated that "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Anderson v. Joseph*, 200 Md. App. 240, 249 (2011) (quoting *Hillsmere Shores Improvement Ass'n, Inc. v.*

Singleton, 182 Md. App. 667, 690 (2008)). On this record, it is unclear what facts in evidence the trial court relied upon to support its finding of interference. We explain.

On September 2, 2016, Ms. Benitz filed a motion to quash subpoena in which she claimed that, in attempting to serve her with the subpoena, Mother's counsel struck her in the neck and shoulder region, causing her to feel harassed and violated. In her appellate brief, Mother correctly claims that "Ms. Benitz never testified under oath about the matter." Not only did Ms. Benitz not testify under oath, but she never affirmed under penalty of perjury that the facts alleged in her motion to quash were even true. On the contrary, Mother's counsel filed an affidavit in opposition to Ms. Benitz's motion to quash wherein counsel swore under penalty of perjury that he simply "reached out with the Subpoena to brush [Ms. Benitz's] shoulder and as she turned to him, moved the subpoena toward her right hand touching her again on the arm." Because the court never conducted an evidentiary hearing to resolve this dispute, there was no competent and material evidence in the record to support the conclusion that Mother interfered with Father's access through her counsel's interaction with Ms. Benitz. Accordingly, a finding of interference based on Ms. Benitz's motion to quash was clearly erroneous.

Similarly, we see no evidentiary foundation to support the court's finding that Mother inappropriately interfered with Father's visitation as a result of actions she took with respect to Mr. Zapuchek. Although Mr. Zapuchek testified at the trial on January 6, 2017, his testimony preceded Mother's alleged inappropriate actions regarding Mr. Zapuchek. The purportedly inappropriate act was articulated in Father's August 8, 2017

petition for contempt, wherein he alleged that Mother had improperly interfered with his access to the children by contacting Mr. Zapuchek's ex-wife. According to an attachment to the contempt petition, Mother, at her attorney's suggestion, contacted Mr. Zapuchek's ex-wife on July 31, 2017, to inquire about his "behavior, including any history of violence or threats, his treatment of women . . . and possible gambling problems."

Like Ms. Benitz's motion to quash, no one affirmed under penalty of perjury that the accusations in the petition for contempt were accurate. In fact, on the twelfth day of trial—September 5, 2017—the trial court decided that it would not hold a hearing on the contempt petition, but stated that "the issue is going to have to be addressed at some way, shape or form." Despite that statement, the court never made any findings concerning this issue based on competent evidence. To the extent the court ultimately used these unsupported incidents to find that Mother had interfered with Father's access, it erred.

In sum, we see no competent and material evidence in the record to support the trial court's finding that Mother interfered with Father's access. Nevertheless, because we are remanding this case for future findings as required by FL § 9-101 as explained above, the trial court will have the opportunity to revisit this issue. On remand, the court, in its considered discretion, may receive evidence on this issue as it deems necessary to determine appropriate visitation access.

IV. Exclusion of Hearsay Evidence

Mother next argues that the trial court improperly excluded certain testimony as hearsay. Specifically, at trial on May 17, 2016, Mother's mother, E.M., attempted to testify

that on one occasion, she heard Father having nonconsensual sex with Mother, and that she heard Mother tell Father to "stop it." Father's counsel objected to the admission of the testimony that Mother said "stop it." The trial court excluded the testimony as inadmissible hearsay, stating that, although "stop it" is a command, "a [hearsay] statement can be a command. It can be an order. It could be whatever. Correct? Isn't it still a [hearsay] statement whether or not it's a command or not under the hearsay rule?"

Maryland Rule 5-801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "In general, orders and commands are not factual assertions" for purposes of the rule against hearsay. *Wallace-Bey v. State*, 234 Md. App. 501, 539 (2017). In fact, this Court has expressly noted that "[t]he out-of-court command, 'Stop!' can be, by its very nature, neither true nor untrue, so it does not qualify as an assertion." *Id*. (internal quotation marks omitted) (quoting *Fair v. State*, 198 Md. App. 1, 18 (2011)). Because the statement at issue was a command, it was neither true nor untrue, and did not constitute hearsay. Accordingly, the trial court erred in excluding the testimony that E.M. heard Mother tell Father "stop it." Because we are remanding this case, the trial court may, in its discretion, receive evidence on this issue to the extent it relates to visitation

V. Required Contact by E-mail or Text Message

Mother's final argument in Appeal No. 363 is that the court improperly required her to communicate with Father. In the court's memorandum opinion, the court, after awarding Mother sole legal custody, ordered that Father "is entitled to know about the children's

school activities, doctors, extra-curricular activities, and any other programs, and [Mother] shall keep [Father] informed by email or text message as to all of the children's school, health, and extracurricular activities so that he may be involved." Mother argues that this was error because "[i]t was improper to require [Mother], a domestic violence and rape survivor, to communicate with her abuser. The arrangement encourages [Father] to respond to [Mother's] messages and to engage in communication that may emotionally harm [Mother]." Unfortunately for Mother, she failed to preserve this concern in the proceedings below.

During closing arguments on September 5, 2017, Mother's counsel told the court:

> As far as coordination between the parties, we're asking that [Mother] have sole custody but there's still, if you were to grant visitation, there are going to be coordination issues that inevitably come up.
>
> There are two alternatives that we would ask you to consider. You could have -- you could appoint a visitation coordinator to – that of course would be a fee. . . . [I]f you either go with a visitation coordinator, that's one option. Or you could have, I know that there are websites which are Court oriented, I don't have the names. I got a name from a client; I can get other names and work with [Father's counsel], if you were inclined *where the parties can type in messages to each other*. (Emphasis added).

Although Mother acknowledged that "coordination issues . . . inevitably come up" in visitation, she never specifically requested the court to limit the manner of communication with Father in light of her allegations of domestic violence and abuse.

This Court has previously stated that,

> Under Maryland Rule 8-131(a), this Court will "[o]rdinarily . . . not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." The purpose of this rule is to "require counsel to bring the position of his client to the attention of the lower court at the trial

> so that the trial court can pass upon, and possibly correct any errors in the proceedings." *Clayman v. Prince George's Cty*., 266 Md. 409, 416 (1972).

Chimes v. Michael, 131 Md. App. 271, 288 (2000). By not bringing this specific issue to the attention of the trial court, Mother deprived the trial court of the opportunity to pass upon, and possibly correct, the communication issues she now raises in this appeal. Accordingly, this issue is not preserved for our review.

Appeal No. 3103

I. Appointment of Father's Mother as Visitation Supervisor

After Mother noted Appeal No. 363, she filed in this Court a "Verified Motion to Stay Circuit Court's Order Relating to [Father's] Unsupervised Visitation of Minor Children." On June 29, 2018, we granted Mother's motion to stay the circuit court's judgment "to the extent it permits unsupervised visitation." In a footnote to our June 29, 2018 Order, we stated that "Nothing in this Order precludes the trial court from authorizing supervised visitation during the pendency of this appeal." Seizing upon that footnote, Father filed in the circuit court a motion in which he sought visitation access with the children with his parents designated as visitation supervisors. Mother opposed Father's request and the court held a hearing on October 11, 2018. At the October 11, 2018, hearing, the court heard argument by counsel, but received no testimony or other evidence. At the conclusion of the hearing, the court took the matter under advisement. On December 17, 2018, the court issued an order granting Father visitation access upon the condition that Father's mother supervise the visitation.

Mother challenges the court's decision to appoint Father's mother as the visitation supervisor. Specifically, Mother claims that the court erred in appointing Father's mother as the visitation supervisor because there were no facts in evidence to satisfy the statutory requirement that the "supervised visitation arrangement . . . assures the safety and the physiological, psychological, and emotional well-being of the [children]." FL § 9-101(b). Father responds that, in its March 30, 2018 memorandum opinion, the court found that Father's parents were "appropriate people to be involved with the children and are available to make observations of the [Father] and children when they are in the home."

We agree with Mother that the court erred in appointing Father's mother as the visitation supervisor. The court made no finding that Father's mother could assure "the safety and the physiological, psychological, and emotional well-being of the [children]" as expressly required by FL § 9-101(b). Indeed, there is no evidence of her ability to satisfy the statutory mandate that any court-ordered supervised visitation assure the children's safety and well-being. That the court found in its memorandum opinion issued nine months earlier that Father's parents were "appropriate people to be involved with the children" does not suffice. We therefore vacate the December 17, 2018 Order.

II. Dismissal of Mother's Motion to Modify

As previously stated, in its March 30, 2018 Order, the court required that Mother "keep [Father] informed by email or text message as to all of the children's school, health, and extracurricular activities." Eight months later, Mother sought to modify that provision based upon allegedly abusive e-mails from Father which she claimed "triggered the [Post

Traumatic Stress Disorder] that [Father] caused by his abuse." On January 7, 2019, the court denied Mother's Motion to Modify without further explanation. Considering the well-pleaded facts in Mother's Motion to Modify, we conclude that Mother sufficiently alleged a material change in circumstances that occurred after issuance of the court's March 30, 2018 Order requiring e-mail or text message communication related to the children, *viz.*, Mother's allegation that Father's abusive e-mail communication on November 10, 2018, "triggered [her] PTSD." *See Parker v. Hamilton*, 453 Md. 127, 132-33 (2017) (recognizing that, before a trial court may dismiss a cause of action, it "must assume the truth of all well-pleaded relevant and material facts . . . as well as all inferences that reasonably can be drawn therefrom"). Accordingly, the court erred in summarily dismissing Mother's motion to modify.

IN APPEAL 363: JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

IN APPEAL 3103: JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS IN BOTH APPEALS TO BE PAID BY APPELLEE. MANDATE TO ISSUE FORTHWITH.