Circuit Court for Montgomery County
Case No. 143372FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0392

September Term, 2020

TAMMY ALLISON HOLLOWAY

v.

STEPHEN WILLIAM HOLLOWAY

Arthur,
Shaw Geter,
Wells

JJ.

Opinion by Shaw Geter, J.

Filed: February 24, 2021

This is an appeal from an order of the Circuit Court for Montgomery County, awarding primary physical custody of the parties' minor child to appellee and joint legal custody to both parties, with final tie-breaking authority to appellee. Appellant timely appealed and presents the following questions for our review:

1. Did the trial court err as a matter of law in denying appellant's Motion to Transfer Jurisdiction and Request for Hearing—without a hearing—when Maryland Rule 2-311(f) requires the trial court to hold a requested hearing before rendering a decision disposing of a defense?

2. Did the trial court err when it held that it had continuing exclusive jurisdiction to entertain appellee's motion to change custody without determining whether the jurisdictional requirements of Md. Code Ann. Fam. Law § 9.5-202(a) were satisfied?

3. Did the trial court err when it determined that it was not an inconvenient forum without a hearing or determining whether the requirements of Md. Code Ann. Fam. Law § 9.5-207(b) were satisfied?

4. Did the trial court err as a matter of law in refusing to consider the earlier court-ordered Custody Evaluator's report and evidence of appellee's history of abusing appellant and anger management problem?

5. Did the trial court take an improperly narrow and biased view of appellant's decision to move to Texas and blame her for leaving?

For reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

Appellant, Tammy Holloway, ("Mother") and appellee, Stephen Holloway, ("Father") were married on January 19, 2014 and are parents of the minor child, T.H., born in 2014. The parties separated in January 2017 and Mother filed a Complaint for Absolute Divorce on March 16, 2017. As part of the divorce proceedings, the court ordered a Custody and Visitation Evaluation which was placed on the record at a status hearing on

August 25, 2017. The evaluation noted, *inter alia*, that there had been incidents of domestic violence between the parties. The evaluator recommended that Mother be awarded primary physical custody and sole legal custody of T.H., and that Mother inform Father of any legal custody decisions made regarding T.H.

On November 6, 2017, the parties entered into an agreement, which was placed on the record. The agreement provided that Mother would have primary physical custody of T.H. The parties also agreed to give 90 days' notice if either party intended to move more than 30 miles from the Washington, D.C. metropolitan area. Following a hearing on the issues of legal custody and child support, the court, on November 20, 2017, granted sole legal custody to Mother and entered an order incorporating the parties' agreement.

In July 2018, Mother, an attorney, requested a position at her employer's Grand Prairie, Texas office. Mother said she requested the transfer because:

> [She's] from Texas. [She] grew up there. All of [her] family is there. All of [her] siblings are there. All of [her] nieces and nephews are there. All of [T.H.]'s cousins are there. There's [sic] no state taxes in Texas. The cost of living is way lower. So, [her] paycheck was way higher and it also gave [her] promotion potential since [she] was the only person that volunteered to go down there when the other attorneys left that office. There were no attorneys there.

After being awarded the transfer, Mother notified Father of her intent to move to Texas via email and certified letter on September 24, 2018. Mother, in her notice, included a proposed modified access schedule that would give Father a total of twenty-five to thirty days with T.H., whereas he had 146 scheduled overnights under their original access agreement.

Father filed a Motion for Modification of Custody on October 22, 2018, seeking

sole physical and legal custody of T.H. On Christmas Day 2018, without notification to Father, Mother moved to Texas, taking T.H. with her. Father filed an Ex-Parte Emergency Petition for Custody and Request for a Hearing on December 31, 2018. Mother filed an Answer to Father's Motion for Modification of Custody, a Counter-Motion for Modification of Access, and a Motion for Modification of Child Support. Mother also filed an Amended Motion for Modification of Access and an Amended Motion for Modification of Child Support. Father filed an opposition, addressing both motions. Following a *pendente lite* hearing on June 10, 2019, the parties entered into an agreement, which they placed on the record. Father received temporary summer access with T.H. for, for 3 weeks in July 2019.

Mother then filed an Answer and Response to Father's Ex-Parte Emergency Petition for Custody and a motion in opposition. On July 3, 2019, a hearing was held on Father's Ex-Parte Emergency Petition for Custody, and the court granted his petition. On July 19, 2019, Father filed an Amended Complaint for Modification of Custody and Mother filed a respective answer. Mother filed a Motion to Transfer Jurisdiction and a Request for a Hearing on August 1, 2019, challenging the court's subject matter jurisdiction and arguing that Maryland was an inconvenient forum. Mother's motion was denied without a hearing.

A hearing on the issues of modification of custody, access, and child support was held on December 23, 2019 and January 2, 2020, and both parties testified. During the hearing, Mother seemed to contend that T.H. might not be safe in Father's care. The following colloquy, in relevant part, occurred:

[FATHER'S COUNSEL]: Did you have any reason to believe that [T.H.]

wasn't safe while he was with Mr. Holloway in 2019?

[MOTHER]: Yes. Yes, and no.

[FATHER'S COUNSEL]: What does that mean, Ms. Holloway?

[MOTHER]: I believe that given the contentious background of Mr. Holloway and I, and the various, the various trials that we've had of over the past three years, and the different orders that have been granted, that I never feel that he would intentionally hurt [T.H.] just because, but I feel like he would do things to hurt me.

[FATHER'S COUNSEL]: Has Mr. Holloway ever hurt [T.H.]?

[MOTHER]: No.

[FATHER'S COUNSEL]: So, why do you feel that Mr. Holloway would suddenly hurt [T.H.] while he was with [T.H.] for three weeks this year?

[MOTHER]: Because Mr. Holloway was physically abusive to me and it didn't start, it didn't start from day one.

[FATHER'S COUNSEL]: Has there been any indication at all that Mr. Holloway has ever been physically abusive to [T.H.]?

[MOTHER]: No.

[FATHER'S COUNSEL]: All right. Do you think it's important for [T.H.] to maintain a relationship with his father?

[MOTHER]: Yes.

[FATHER'S COUNSEL]: And do you think it's important that he has physical contact with his father?

[MOTHER]: Yes.

[FATHER'S COUNSEL]: How important do you think that is?

[MOTHER]: I think it's very important. I think it's in [T.H.'s] best interest to spend time with his father.

[FATHER'S COUNSEL]: Do you think that [T.H.] spending time with Mr.

Holloway helps [T.H.'s] growth?

[MOTHER]: Yes.

[FATHER'S COUNSEL]: Do you believe that Mr. Holloway loves [T.H.]?

[MOTHER]: Yes.

[FATHER'S COUNSEL]: Do you believe that Mr. Holloway would ever hurt [T.H.]?

[MOTHER]: Again—

[FATHER'S COUNSEL]: Not excluding anything regarding you, do you believe that he would ever hurt [T.H.] as a person?

[MOTHER]: That's a very complicated question for me, just given the background, I would hope not. I don't think so, but—

[FATHER'S COUNSEL]: Uh-huh.

[MOTHER]: —there is always the slight possibility.

* * *

THE COURT: My question to her was the last time, because she testified that she was afraid for her safety, so I wanted to know, and I think it's relevant, the last time. So, whatever happened before she got married and in the early years, that's not—

[MOTHER'S COUNSEL]: All right.

THE COURT: —that's not something I'm going to consider.

[MOTHER'S COUNSEL]: Oh, well, I'm going to ask the [c]ourt to look at the custody evaluation in this case.

[FATHER'S COUNSEL]: And I —

THE COURT: *I'm not going to look at the custody evaluation. I mean she, the custody evaluation to me would only be relevant if she felt that her son wasn't safe with Mr. Holloway and she's not saying that.*

> [MOTHER'S COUNSEL]: Well, it goes into detail, as I understand. I'm not [sic], the abuse by Mr. Holloway against her [sic], and then certainly that was read by Judge Salant, I presume, when making his findings in this case, which is very relevant from her overall issue and as early as '17 stating that she
> felt the need at some point in time when things got settled with this divorce situation, she needed to get out of this area, and that is all relevant for the [c]ourt to consider when determining initially what her motive is and what her reasons were for moving out of the area.
>
> THE COURT: *If the last time he assaulted her was January of 2017, I don't find that to be relevant that she left in December of 2018. I just don't.*
>
> * * *

(emphasis added). At the conclusion of the hearing, the court took the matter under advisement. On May 21, 2020, the court issued its memorandum opinion and order, granting in part and denying in part Mother's Amended Motion for Modification of Access and Child Support, and granting Father's Amended Complaint for Modification of Custody. The court awarded primary physical custody of T.H. to Father and joint legal custody to the parties, with final tie-breaking authority to Father.

STANDARD OF REVIEW

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." Md. Rule 8-131. An appellate court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* "As we stated in *Blaine v. Blaine*, 97 Md. App. 689, 707 (1993), we must defer to the fact-finding of the trial court unless it is clearly wrong or an abuse of discretion." *Campitelli v.*

Johnston, 134 Md. App. 689, 698 (2000). "A trial court's findings are 'not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.'" *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). A "trial court's conclusions of law, however, are not entitled to the deference of the clearly erroneous standard." *Friedman v. Hannan*, 412 Md. 328, 336 (2010).

"Whether the trial court correctly asserted jurisdiction is an issue of statutory interpretation that we review *de novo* to determine whether the court was legally correct." *Cabrera v. Mercado*, 230 Md. App. 37, 80 (2016) (citing *Breslin v. Powell*, 421 Md. 226, 277 (2001)). "We review a court's decision whether to decline to exercise jurisdiction in favor of a more convenient forum for abuse of discretion." *Cabrera v. Mercado*, 230 Md. App. 37, 93 (2016).

"We generally review rulings on the admissibility of evidence applying an abuse of discretion standard." *Gillespie v. Gillespie*, 206 Md. App. 146, 165 (2012) (citations omitted).

DISCUSSION

I. Continuing, Exclusive Jurisdiction

Mother argues her motion to transfer jurisdiction was proper and the court erred by not holding a hearing. She asserts the court lacked subject matter jurisdiction and was also an inconvenient forum. Conversely, Father contends Mother waived the issue of jurisdiction when she filed an answer to his Motion for Modification of Custody without raising the defense of lack of jurisdiction.

We observe that under Maryland Rule 2-322(b), lack of subject matter jurisdiction is a permissive defense which "may be made by motion to dismiss filed before the answer, if an answer is required" or "made in the answer, or in any other appropriate manner after the answer is filed." Here, after filing an answer, Mother raised the defense of lack of "continuing, exclusive jurisdiction." As such, Mother did not waive this permissive defense. *See* Rule 2-322(b).

Father also contends the order denying Mother's motion to transfer jurisdiction was a final judgment and was, therefore, immediately appealable. He asserts Mother did not timely appeal and thus she has failed to preserve the issue. We note "[t]he case law makes it clear . . . that [the] denial of a transfer of venue is not immediately appealable, the granting of such a motion is." *Smith v. Johns Hopkins Cmty. Physicians, Inc.*, 209 Md. App. 406, 411 (2013) (alteration not in original). In this case, Mother challenges the denial of her motion to transfer, thus the issue is properly before this Court.

The Maryland Uniform Child Custody Jurisdiction and Enforcement Act, Maryland Code § 9.5-101 *et seq.* of the Family Law Article ("FL") governs subject matter jurisdiction over child custody conflicts that involve multiple states. Md. Code, Fam. Law § 9.5-101 *et seq.*; *see Cabrera v. Mercado*, 230 Md. App. 37, 73–74 (2016). The initial custody order in this case was issued by a Maryland court in accordance with the Act, thus Section 9.5-202 of the Fam. Law Article governs. Section 9.5-202(a) provides that a Maryland court that has made an initial child custody determination retains "exclusive, continuing jurisdiction" over the determination of custody until:

> (1) a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State[.]

Mother argues that, in accordance with Maryland Rule 2-311(f), the court was required to conduct a hearing prior to determining whether the jurisdictional requirements of FL 9.5-202(a) were met. Maryland Rule 2-311(f) provides:

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

Mother properly complied with the requirements of Rule 2-311(f) when she filed her motion entitled "Plaintiff's Motion to Transfer Jurisdiction and Request for Hearing," on August 1, 2019. We conclude that Mother's assertion of lack of jurisdiction was a dispositive defense. *See Logan v. LSP Mktg. Corp.*, 196 Md. App. 684, 696 (2010) ("For a decision to be deemed dispositive of a claim or defense within the contemplation of Rule 2-311(f), it must actually and formally dispose of the claim or defense."). As a result, the court erred in not holding a hearing. *See* Md. Rule 2-311(f). However, the court's failure to hold a hearing was harmless error because, as we discuss below, if the court had held a hearing, it would have determined that Maryland's jurisdiction was proper because Mother

had no bases for her motion. *See In re: Yve S.*, 373 Md. 551, 616–17 (2003) ("[I]t has long been settled policy of this court not to reverse for harmless error . . . [T]his Court will not reverse for an error below unless the error was both manifestly wrong and substantially injurious . . . . [The harmless error analysis] require[s] the resolution of whether the error significantly affected the interests of the complaining party.") (citations and internal quotation marks omitted). *See also Green v. Taylor*, 142 Md. App. 44, 60 (2001) (holding that the trial court's grant of a Rule 2-534 motion after failing to hold a mandatory hearing, in violation of Rule 2-311(e), was harmless error after looking "carefully at the substance" of the motion and concluding that the court's error was not prejudicial to the nonmovant). Further, in our view, a remand of this case would not serve judicial economy. *See Morris v. Goodwin*, 230 Md. App. 395, 411 (2016) ("Such a remand would be an exercise in futility and a waste of judicial resources."); and *Williams v. Prince George's Cty.*, 112 Md. App. 526, 560 (1996) ("a remand would not present the trial judge with an opportunity to adjudicate any legal issues not already addressed in this opinion").

Mother argues the court made no determination as to whether T.H. or either parent had a significant connection to Maryland nor whether there was substantial evidence available in Maryland "concerning [T.H.'s] care, protection, training, and personal relationships[,]" as required by the statute. Mother relies on this Court's decision in *Kalman v. Fuste*, where the original custody order had been issued by a Maryland court and the mother and child lived in Florida from the child's birth until she was five years old. 207 Md. App. 389, 393 (2012). Three years after entry of the custody order, the mother was arrested, charged with theft and drug trafficking, and released on her own

recognizance. *Id.* at 393–94. The father removed the child to Maryland and filed an emergency motion for custody. *Id.* at 394. The circuit court awarded the father temporary sole custody of the child, pending a merit hearing on the emergency motion. *Id.* At the emergency motion hearing, the mother challenged Maryland's continuing jurisdiction and proffered that she intended to pursue custody in Florida, which she argued was the child's proper home state. *Id.* at 397. The circuit court denied the request, stating, in relevant part:

> This [c]ourt had jurisdiction, continues to have jurisdiction of those matters. That's the reason why a petition as to modify were filed including your client, [mother's counsel]. And there is not an existing case in Florida, there has been and continues to be an existing case in the State of Maryland.

Id. at 398. On appeal, we vacated the judgment and "remand[ed] for further proceedings so that the circuit court may proceed under FL § 9.5-202 to determine whether it *can* exercise jurisdiction over [the] case and, after conferring with the Florida court, whether it *should* exercise jurisdiction." *Id.* at 410 (emphasis in original) (alterations not in original). We explained:

> Rather than ruling on whether it did or did not have the required "significant connections" or "substantial evidence" to exercise continuing jurisdiction, the circuit court presumed that it had continuing, exclusive jurisdiction over the custody dispute because Maryland was the decree state and the parties continued to litigate their divorce and its related matters in Maryland. This, however, was an error of law.

Id. at 400. We added:

> FL § 9.5-202(a)(1) grants Maryland continuing, exclusive jurisdiction over the dispute *until* the circuit court determines that this state lacks significant connections or substantial evidence. It is not the intent of the Act, however, to postpone those determinations and thereby extend continuing jurisdiction indefinitely, for this also would defeat the Act's purposes.

> Although the circuit court retained continuing, exclusive jurisdiction over [the child's] custody *until* it found that the requisites of FL § 9.5-202(a) were *not* satisfied by the facts of the case, the court erred when it *presumed* that it retained jurisdiction simply because of the parties' history of litigation in Maryland. This error would have been rendered harmless if the circuit court had other grounds for jurisdiction . . .

Id. at 402 (emphasis in original).

Here, a Maryland court had made an initial child custody determination and as provided by FL § 9.5-202(a), *until* a Maryland court makes a determination otherwise, Maryland retains "exclusive, continuing jurisdiction" over the matter. Father filed a petition for modification of custody on October 22, 2018 and at the time of his filing, both parties and T.H. lived in Maryland. Also, both parties and T.H. lived in Maryland for at least six consecutive months at the time of and immediately preceding Father's filing.[1]

Mother's abrupt relocation to Texas with T.H. occurred on December 25, 2018, yet her motion to transfer jurisdiction was not filed until August 1, 2019. The parties' filings detailed their respective positions. Mother did not assert that there was an existing case in Texas. Mother contended that:

> Maryland no longer has jurisdiction over the matter. Texas is the appropriate forum given the fact that [she] has resided in Texas for over six months with

[1] FL § 9.5-101 defines "home state" as:

> (1) the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding; and
>
> (2) in the case of a child less than 6 months of age, the state in which the child lived from birth with any of the persons mentioned, including any temporary absence.

> [T.H.]; [T.H.] has been enrolled in Texas public schools since January 2019; he has been seeing the same primary care physician in Texas since March 2019; has a dentist in Texas; has a close knit relationship with his similarly aged Cousins, his Aunts, and his Uncles. Furthermore, [her] employer is located in Texas, [she] has the support of her family who reside in Texas.

Father argued that "[s]ignificant evidence exists in Maryland, primarily Montgomery County, Maryland, to indicate that [T.H.] and [Father] have significant connections to Montgomery [C]ounty, Maryland . . . [because Mother, Father, and T.H.] were residents of Montgomery [C]ounty for all of [T.H.'s] life . . . ." He added: "[T.H.] maintains close family and friend relationships in Montgomery County, Maryland as well as his primary child care physician since his birth, whereas his contacts in Texas are all new."

With these arguments and considering the posture of the case, even in the absence of a hearing, Maryland had jurisdiction under FL § 9.5-202(a) because, contrary to the contentions in Mother's motion, there were significant connections with the state, and there was no substantial evidence outside of the state regarding the child's care and or personal relationships. Mother's assertions about connections in Texas were less than a year long, occurring within the nine months prior to her filing and were made during the course of the litigation between the parties, whereas father argued that significant connections and evidence existed because the child had lived his entire life in Maryland. Here, unlike in *Kalman*, there is no indication that the court "presumed that it retained jurisdiction simply because of the parties' history of litigation in Maryland." 207 Md. App. 389, 402 (emphasis omitted).

Assuming, arguendo, the court did not have jurisdiction pursuant to FL § 9.5-202(a), we find that the jurisdictional requirements under FL § 9.5-202(b) were clearly satisfied. Under FL § 9.5-202(b), "*[a] court of this State that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 9.5-201 of this subtitle*." (emphasis added). FL § 9.5-201 provides, in pertinent part:

> (a) . . . a court of this State has jurisdiction to make an initial child custody determination only if:
>
> > (1) *this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State*

(emphasis added). It is undisputed that when the court made its initial custody determination, it had jurisdiction. It was undeniably the "home state" of the child and parents. Further, on October 22, 2017, when Father filed a motion for modification of custody, Maryland remained the "home state" of the child and both parents. As such, the court was within its authority to modify its initial custody determination.

II. Denial of Motion for Inconvenient Forum

Md. Code, Fam. Law § 9.5-207, Inconvenient Forum, provides:

> (a)(1) A court of this State that has jurisdiction under this title to make a child custody determination *may* decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.
>
> > (2) The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

> (b)(1) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction.
>
> (2) For the purpose under paragraph (1) of this subsection, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (i) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (ii) the length of time the child has resided outside this State;
>
> (iii) the distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (iv) the relative financial circumstances of the parties;
>
> (v) any agreement of the parties as to which state should assume jurisdiction;
>
> (vi) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (vii) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (viii) the familiarity of the court of each state with the facts and issues in the pending litigation.

(emphasis added).

"The decision whether to relinquish the court's jurisdiction in favor of a more convenient one is one addressed to the sound discretion of the court." *Miller v. Mathias*, 428 Md. 419, 454 (2012) (citing *Krebs v. Krebs*, 183 Md. App. 102, 117 (2008) (reviewing a court's decision to decline jurisdiction for abuse of discretion). Moreover, "[i]t is a well-established principle that trial judges are presumed to know the law and to apply it

properly." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (citation and internal quotation marks omitted). "[W]e presume judges know the law and apply it 'even in the absence of a verbal indication of having considered it.'" *Marquis v. Marquis*, 175 Md. App. 734, 755 (2007) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 50, *cert. denied*, 343 Md. 334 (1996)).

Mother contends the trial court was required to receive and consider evidence to determine if it was an inconvenient forum. However, in *Odenton Dev. Co. v. Lamy*, the Court of Appeals held that "while it might have been a better practice to hold a hearing, *the rules do not mandate a hearing on a motion to transfer*. Maryland Rule 2-311(f)." 320 Md. 33, 41 (1990) (emphasis added). In *Odenton*, the defendant filed a motion to transfer venue for the convenience of the parties and witnesses and requested a hearing in its pleading.[2] *Id.* at 37–38. The plaintiff filed a motion in opposition and both parties argued their positions in their respective pleadings. *Id.* at 38. The circuit court, without holding a hearing, granted the defendant's motion to transfer. *Id.* Upon review, we held that a hearing was not required by the rules but concluded that "in light of the bare allegations in the pleadings, failure to hold a hearing was an abuse of discretion." *Id.* at 39 (citation and internal quotation marks omitted). The Court of Appeals, however, concluded that a hearing was not required as the allegations were not "quite so bare." *Id.* at 39–40. Here,

[2] The defendant's motion was filed pursuant to Maryland Rule 2-327(c), which states:

> (c) Convenience of the Parties and Witnesses.—On motion of any party, the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice.

we conclude that a hearing was not required as the pleadings sufficiently laid out the parties' positions for the court's consideration. Maryland Rule 2-311(f). *See Odenton*, 320 Md. 33, 41.

III. Admissibility of Custody and Visitation Evaluation

Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the . . . *needless presentation of cumulative evidence*." Md. Rule 5-403 (emphasis added). "[T]he question of the admissibility of evidence is ordinarily 'left to the sound discretion of the trial court,' so that 'absent a showing of abuse of that discretion, its ruling[ ] will not be disturbed on appeal.'" *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 91 (2002) (quoting *Farley v. Allstate Ins. Co.*, 355 Md. 34, 42 (1999)). "The *de novo* standard of review applies to the trial court's conclusion of law that the evidence at issue is or is not of consequence to the determination of the action." *In re Adriana T.*, 208 Md. App. 545, 569 (2012) (citing *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 620 (2011) (citations and internal quotation marks omitted)).

Courts engage in a two-step analysis in considering whether to modify an existing custody or visitation order:

> First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were

> one for original custody. *See id.; Braun v. Headley*, 131 Md. App. 588, 610 [750 A.2d 624] (2000).

McMahon v. Piazze, 162 Md. App. 588, 594 (2005) (alterations in original). "A material change of circumstances is a change in circumstances that affects the welfare of the child." *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). "The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Id.* at 171–72.

Mother argues the circuit court was required to consider the Custody Evaluator's report and the history of abuse between the parties. She points to FL § 9-101, which instructs:

> (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.

(emphasis added). She asserts the circuit court should not have focused solely on whether there was evidence of abuse against T.H. She asserts that a plain reading of Section 9-

101.1 requires the court to consider evidence of abuse of one parent of the other parent.[3] Mother contends the trial court was required to consider the custody evaluation when assessing the best interest of T.H. She argues that in a custody modification hearing, the trial court must look to evidence reflecting a material change in circumstance since the last custody order, but that "an abuser (aggrieved by an adverse ruling) does not get to eliminate consideration of abuse" by filing for a modification a year after entry of the last order.

Father argues the custody evaluation should not have been considered by the circuit court. He contends Mother attempted to relitigate the issue of custody at the modification hearing by requesting the court to consider the custody evaluation.

Both parties cite *McCready v. McCready*, 323 Md. 476 (1991). The Court of Appeals, in *McCready*, held:

> In the limited situation where it is clear that the party seeking modification of a custody order is offering nothing new, and is simply attempting to relitigate the earlier determination, the effort will fail on that ground alone. . . .
>
> In the more frequent case, however, there will be some evidence of changes which have occurred since the earlier determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. . . .

[3] FL § 9-101.1, in relevant part, provides:

> (b) In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:
>
> > (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.

Id. at 482. The Court explained:

> A litigious or disappointed parent must not be permitted to relitigate questions of custody endlessly upon the same facts, hoping to find a chancellor sympathetic to his or her claim. An order determining custody must be afforded some finality, even though it may subsequently be modified when changes so warrant to protect the best interest of the child. As we said in *Hardisty v. Salerno*, 255 Md. 436, 439, 258 A.2d 209 (1969), "[w]hile custody decrees are never final in Maryland, *any reconsideration of a decree should emphasize changes in circumstances which have occurred subsequent to the last court hearing*."

Id. at 481 (emphasis added). The Court added in a footnote:

> The salutary rule that a court does not relitigate an earlier custody order when considering a requested modification of that order does not mean that the court is precluded from considering evidence that was before the earlier court. *See Raible v. Raible*, 242 Md. 586, 594–95, 219 A.2d 777 (1966) (evidence of conduct occurring before earlier order is admissible, not to show whether that order was right or wrong, "but to show some of the past history of the parties insofar as that history might aid the court in appraising their present characters and fitness as custodians").

Id. at 481 n.1.

In the present case, Mother requested the court admit into evidence a 2017 custody evaluation, that was also part of the record of the initial custody hearing, and the court declined. However, during the hearing, Mother testified about the parties' history of abuse, thus making the substance of the custody evaluation, cumulative evidence. *See* Md. Rule 5-403. Thus, the circuit court did not abuse its discretion in failing to admit the evaluation.

More importantly, Mother did not testify that Father ever abused T.H. When asked whether she believed Father would abuse T.H., she replied, "[t]hat's a very complicated question for me, just given the background, I would hope not. I don't think so, but . . . there is always the slight possibility." As such, there were no "reasonable grounds to

believe that [T.H. had] been abused or neglected by a party to the proceeding." *See* Md. Code, Fam. Law § 9-101 (alteration not in original). Further, there were no grounds to believe that abuse was likely to occur in the future. We, therefore, conclude the court was fully able to evaluate the history of abuse between the parties and to appraise the parents' "present character and fitness as custodians," without admission of the custody evaluation. The court did not abuse its discretion.

IV. Court's View of Mother's Relocation

Mother asserts "the trial court took an improperly narrow and biased view of [her] decision to move to Texas and blamed her for leaving." She contends the November 6, 2019 custody agreement was made with an understanding that she intended to relocate to Texas. She argues the court erred in finding that she hid her intention to move to Texas. She points to the court's statement that "[Mother] told [T.H.'s daycare provider] in June 2018 that she and [T.H.] would be moving soon, probably July. There is no indication that this information was shared with [Father]."

Mother also argues the court "appeared to blame [her] for wanting to move to Texas." She points to the court's statement that "[t]here was no evidence that the present custody arrangement agreed to was not in the best interests of [T.H.]." She also cites the court's statement that "her move to Texas is inconsistent with her alleged belief of the importance of T.H. spending time with his father." She further contends the court "appeared to want [her] to return to Maryland[,] asking if she would stay '[e]ven if the [c]ourt orders that [T.H.] return to Maryland?'" Mother argues this Court's decision in *Braun v. Headley*, 131 Md. App. 588 (2000), supports her argument that the court's view

of her intention to remain in Texas was contrary to her "constitutional right to travel, and punishment of a parent for traveling has no place in the analysis." In *Braun*, however, we concluded:

> There is no constitutional infirmity in giving equal status, in determining the child's best interests, to (1) the custodial parent's right to travel, and the benefit to be given the child from remaining with the custodial parent; and (2) the benefit from the non-custodial parents exercise of his right to maintain close association and frequent contact with the child.

Id. at 608. We cited *Domingues v. Johnson*, 323 Md. 486, 501–02, (1991), where the Court of Appeals explained:

> The view that a court takes toward relocation may reflect an underlying philosophy of whether the interest of the child is best served by the certainty and stability of a primary caretaker, or by ensuring significant day-to-day contact with both parents. Certainly, the relationship that exists between the parents and the child before relocation is of critical importance. If one parent has become the primary caretaker, and the other parent has become an occasional or infrequent visitor, evidencing little interest in day-to-day contact with the child, the adverse effects of a move by the custodial parent will be diminished. On the other hand, where both parents are interested, and are actively involved with the life of the child on a continuing basis, a move of any substantial distance may upset a very desirable environment, and may not be in the best interest of the child.

Braun, 131 Md. App. 588 at 609.

Here, in its memorandum opinion, the court discussed Mother's relocation to Texas:

> One of the reasons that [Mother] gave for moving was that she had family in Texas. [Mother's] proposed summer access schedule for [Father] would limit the time that [he] spends with [T.H.] during the summer due to her desire that [T.H.] spend time with his cousins. [Mother] places greater importance on the time that [T.H.] spends with his cousins over the time that he spends with his father. [Father] has family in Virginia whom [T.H.] rarely has an opportunity to see due to [Mother's] unilateral decision to move to Texas. [Mother testified that she moved on Christmas Day so that she and her son could spend the holiday with her family. But [Mother] completely ignored the custody agreement that provided that [Father] had access with

> [T.H.] in the afternoon of Christmas Day. This action further shows to the [c]ourt that [Mother] places her desires and her family above what is the best interest of [T.H.], which is to share the holiday with both parents as they agreed. Yes, [Mother] believes that [T.H.] should spend time with his father—as long as it doesn't interfere with plans she has made with her family.

Based on this record, we find that the court carefully considered whether Mother's move to Texas served T.H.'s best interest. Both parents were interested and actively involved in T.H.'s life on a continuing basis. The court's finding that Mother's move to Texas was a move of "substantial distance [,which] may upset a very desirable environment, and may not be in the best interest of the child," was firmly based on the evidence presented and not bias. *Domingues*, 323 Md. 486, 502 (1991).

Mother also contends that the trial judge "imposed her own personal view on [her] career choices charging [her] with 'instability' because, after a decade with the DOJ, [she] was considering acquiring . . . her mother's private practice law firm in Texas." The court concluded that Mother:

> demonstrated instability, which could detrimentally impact [T.H.]. Although one of the reasons that [Mother] gave for moving to Texas was the promotion potential in the department she works for in the federal government, [Mother] testified that she will be leaving he federal government soon but has no definite plans. [Mother] testified that she intends to take over her mother's law firm in Houston, but could not answer when it will occur or how she will pay for the firm. And, notably, [Mother] was not admitted to the Texas bar at the time of the hearing. Moreover, the [c]ourt finds it irrational for [Mother], who has worked for the federal government for approximately ten years, to think that she can easily take over her mother's firm and begin working in practice areas that she has absolutely no experience in and be able to support herself and her son.

In making a custody determination, a court is required to evaluate all relevant factors, including stability. The court here stated its rationale, providing significant testimony from

Mother about this issue. We note that the trial court is always considered to be in the best position to view the evidence, observe the parties and to make credibility decisions. Further, a trial court's decision in a custody case "founded upon sound legal principles and based upon factual findings that are not clearly erroneous will not be disturbed in the absence of a showing of a clear abuse of discretion." *Lemley v. Lemley*, 109 Md. App. 620, 627–28 (1996) (citations omitted). Here, the court's decision was not beyond the center mark and was not an abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.