Circuit Court for Baltimore City
Case No. 24-D-21001021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 461

September Term, 2021

Miguel Vicente

v.

Laurie Vicente

Friedman,
Shaw Geter,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.
Concurring Opinion by Friedman, J.

Filed: January 10, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On a petition filed by appellee, the mother of a ten-year old child (who, to provide some protection of his privacy, we shall refer to as "the child"), the Circuit Court for Baltimore City granted a one-year Final Protective Order against appellant, the child's father, based on a finding of statutory physical abuse of the child. The basis for that finding, captioned as "Description of harm," was "Alternating extreme hot and cold water on minor child in the shower."

The order enjoined appellant from abusing or threatening to abuse the child, directed that he immediately surrender all firearms to the City Police Department, and that he refrain from possessing a firearm during the pendency of the order. The Order also required the parties immediately to refer the child for a comprehensive behavioral assessment.

In this appeal, appellant contends that the court erred in finding an abuse and in relying on hearsay statements of the child and his two siblings. He argues that there was no substantial evidence that the child's health or welfare was harmed or was at substantial risk of harm, of an intent on his part to injure the child, or of reckless conduct on appellant's part. Instead, he claims, the evidence showed that any injury to the child was accidental or constituted reasonable parental discipline.

BACKGROUND

Appellant and appellee are divorced; they share custody of their three children, who split their time between the two homes on a weekly basis. At the time of the relevant events, appellant had very recently remarried.

This case had its origin on March 29, 2021, when appellee applied to the District Court for Baltimore County for a protective order based on two events that the child had revealed to her three days earlier, when he and his two siblings returned to her custody after spending a week with appellant and his new wife. One event arose when the child was confined to a chair as punishment and would not stop crying. Appellant, the child said, picked him up, put him in a shower, turned on the water to cold, and, when he complained that the cold water was hurting him and asked appellant to stop, appellant turned the hot water on, which was "burning," and the child again asked him to stop. There was evidence that event occurred on either March 8 or March 11, 2021.

The second event occurred on March 25 when appellant allegedly dragged the child through the house, during the course of which he put his hand over the child's mouth and nose, making it hard for the child to breathe. According to the mother, the child had a two-inch bruise on his waist and a scratch on his face. Based on the second event, the court granted a Temporary Protective Order on March 29, 2021, finding that there were reasonable grounds to believe that appellant "PLACED HAND OVER NOSE CAUSED CUT ON FACE AND BRUISE ON SIDE." The court twice extended the

Order and referred the matter to the Department of Social Services (DSS) for an investigation and report.

DSS, through social worker Sarah Henry, filed its report on April 11, 2021. Ms. Henry recounted her conversations with appellee, appellant, the child, and the child's siblings. With respect to the shower incident, the child said that he was sitting in a chair in the living room crying because appellant had accused him of not completing a school assignment that the child thought had been completed, that appellant brought him upstairs to calm him down, and that "being in the shower with the water turned hot and cold was painful." The child showed Ms. Henry "the bruising on his left side where he stated his father held him down inside his father's bedroom." The child's brother stated that, during that incident, the child "had difficulty breathing" and that the father's action "resulted in the scratch on the left side of [the child's] face." Despite those incidents, the children said they had no fear for their safety in appellant's home. The child's sister said that she thought an incident such as that was not likely to reoccur.

In discussing appellee's concerns, appellant told Ms. Henry that the child was screaming and very upset about his homework assignments, which had been an ongoing problem over the past year of remote learning, and that he was prone compulsively to throw tantrums and scratch his own face when he was upset. He said that when the child "is in the throes of defiance," he must pick the child up, like a baby, and take him to his

bedroom to calm him down. He added that he would like to have the child evaluated by a therapist but that appellee, due to her religious beliefs, was not receptive to that.

Two days after receipt of the report, the District Court transferred the case to the Circuit Court for Baltimore City for a Final Protective Order hearing pursuant to Rule 3-326 (c) because of a pending custody case in that court. The Circuit Court held a hearing a week later, on April 20, 2021.

Appellee, as the petitioner, was the first witness. She identified emails she had sent to appellant on March 12 and March 26 informing appellant of what the children had told her regarding the two incidents. Without objection, those emails were admitted into evidence. In one of the emails, she said that the child had told her that "you put your hand over his mouth and nose and pushed his face down making it difficult for him to breath[e]," that "you forced him to take an ice cold shower while he cried under the water saying it was hurting him, he said that you made him take a hot shower" and that "[h]e said you did this as punishment." Also admitted without objection were photographs of the child showing a bruise and a scrape on the child's face. Ms. Henry testified as well and essentially confirmed what she said in her report regarding her conversations with the children, with appellant, and with appellee.

Appellant's new wife testified that the child was never dragged through the house, that he scratched his own face, which he did when he was upset, and that, on the earlier occasion, appellant put him in the shower to wake him up because he fell asleep instead

of doing his homework and, when appellant tried to wake him up, the child threw a temper tantrum.

Appellant was the last witness. He basically confirmed what he had told Ms. Henry. He said that he had put the child in a shower on earlier occasions and did not believe that he was hurting the child by doing so.

The court recognized that there were two very different versions of what occurred and clearly credited the evidence provided by the children, through both their mother and the social worker. The court said:

> "I listened carefully to the evidence. Perhaps I heard the testimony of the witnesses differently than you all did. The respondent [meaning appellee] called the CPS worker Ms. Henry who tells me about the referral, who tells me about speaking to the children, who tells me that the children confirm a version *of both incidents*, confirmed by the children, evidence elicited by the respondent. The respondent [appellee] calls his [appellant's] new wife . . . who confirms that on March 8th dad places [the child] in the shower. She's not there, so she doesn't know what temperature the water is, but [the child] has confirmed to the case worker that the water was uncomfortable, and the allegation is that the water is alternating hot and cold." (Emphasis added)

Although apparently accepting the children's version of both events and notwithstanding that the District Court had based its temporary protective order on the "dragging" event, the Circuit Court focused on the shower incident. As noted, the Final Protective Order was based solely on that incident: "Alternating extreme hot and cold water on minor child in the shower."

In a parting comment, however, the court criticized appellant's new wife for inducing the child's meltdown that led to the "dragging" event either 14 or 17 days later.

DISCUSSION

Appellant makes three principal attacks on the court's judgment:

(1) That the court committed reversible error in finding that appellant had committed child abuse because (A) the ultimate basis of the finding was the shower incident, but, in the parting comment, the court relied on the lead-up to the other incident, which was unrelated to the shower incident; (B) the court's finding that the respective temperatures of the alternating cold and hot water were extreme had no evidentiary foundation, there being no evidence of what those temperatures were or how long the child was subjected to them; (C) there was no evidence of physical injury to the child or evidence that the child's health or welfare were harmed or were at substantial risk of being harmed; (D) there was no evidence of any intent to injure the child; and (E) the protective order statute (Md. Code, Family Law Article (FL), § 4-501(b)(2)) excludes from the statute reasonable corporal punishment of a child administered by a parent so long as it is not a gratuitous attack.

(2) That this Court should not affirm the Final Protective Order based on the dragging, scrape, and bruise incident because the order was not based on that incident; and

(3) That the court erred in relying on the statements of the children, which constituted inadmissible hearsay and lacked reliability.

We shall deal with appellant's first two complaints together but take up first the third complaint.

Statements of the Children

The recitation of what the children told their mother came into evidence twice. First, it was through the emails that she sent to appellant upon the return of the children to her custody, which were admitted into evidence as Exhibit 1 without objection from appellant. Second, it came in through the testimony of Ms. Henry, who was appellant's witness and to which no objection was made by appellant. His third complaint is not preserved for appellate review.

The Two Incidents – Context

In her petition for a protective order, appellee sought protection for all three children but alleged as the basis for the order only the two incidents described above, which involved only the one child, and both the temporary and final orders addressed only that child. The temporary order stated that "the court made the following finding:" (1) the child and appellee were persons entitled to relief; (2) "[t]here are reasonable grounds to believe that the respondent committed the following act(s) of abuse: Statutory abuse of child (physical) Description of harm PLACED HAND OVER NOSE CAUSED

CUT ON FACE AND BRUISE ON SIDE" and (3) that "based on the foregoing," the court ordered that appellant not threaten or abuse the child and surrender any firearms.

That, along with two extensions of it by the District Court, was the Order that accompanied the transfer of the case to the Circuit Court for a hearing on a Final Protective Order. In the Circuit Court proceeding, appellee assumed that the dragging incident was the issue although it is clear that both incidents had been alleged in the petition and evidence was presented regarding both. The Circuit Court, quite properly, did not believe that it was limited only to the "dragging" incident simply because that was the basis of the temporary order.

The Final Protective Order – the one now before us – followed the format of the temporary order. It stated, in relevant part, that the court made "the following findings;" that "there is a preponderance of evidence to believe that the respondent committed the following act(s) of abuse: Statutory abuse of a child (physical) On 04/20/21 Description of harm: Alternating extreme hot and cold water on minor child in the shower" and that "[b]ased on the foregoing findings" the court ordered respondent not to abuse or threaten to abuse the child, surrender firearms, and to refer the child for a comprehensive behavioral assessment.

Both the temporary and final protective orders are on forms developed by the Domestic Violence/Peace Order Subcommittee of the Domestic Law Committee of the Maryland Judicial Council and are posted on the Judiciary website. Although not

mandated by statute or Rule, they go through an extensive and collaborative development process. They have an official imprimatur and are intended to provide at least guidance, if not more than mere guidance, to judges in how to implement the statutory requirements. Statutory relief must be based on findings that justify it, and those findings must be stated in the Order, so that the parties and any reviewing court will know the basis for it.

The Dragging, Bruising, Scraping Incident

Despite some initial confusion about the matter, the evidence, in the end, showed that the dragging incident was a separate event that occurred on March 25 – either 14 or 17 days after the shower incident. The two events arose from separate "meltdowns" by the child and were not connected. Both were alleged by appellee in her petition for a protective order, evidence was offered that both had occurred, the temporary order was based solely on the dragging incident, and the Circuit Court clearly found that both had occurred, although it based its Final Protective Order only on the shower incident.

Although our decision as to whether there was abuse in this case must focus on the shower incident because that was the sole basis of the Final Protective Order, the dragging incident is not irrelevant. We are guided in that conclusion by what the Court of Appeals said in *Coburn v. Coburn*, 342 Md. 244, 258-59 (1996), albeit in a different context. The issue there was whether an act of *prior* abuse was relevant and could be considered in issuing a protective order based on a *subsequent act*. The Court said:

> "We believe that excluding evidence of past abuse would violate the fundamental purpose of the statute, which is to prevent future abuse. The statute was not intended to be punitive. Its primary aim is to protect victims, not punish abusers. Whether a respondent has previously abused a petitioner is important and probative evidence in determining the appropriate remedies. Protective orders are based on the premise that a person who has abused before is likely to do so again, and the state should offer the victim protection from further violence."

See also *Morgan v. State*, 252 Md. App. 439, 457 (2021).

Surely, if evidence of a *prior* act of abuse is admissible and relevant in assessing the nature of a subsequent act, a *subsequent act* of abuse may be admissible and relevant in assessing the nature of an alleged prior act. Appellant and his new wife testified that appellant never abused the child and that putting the child in an "ice cold" and then "burning" shower was for the sole purpose of calming him down (or waking him up) and not as punishment. Evidence that, on a later occasion, appellant dragged the child through the house, interfering with the child's ability to breathe and causing a bruise and scratches, may be considered by the court in assessing the truth of that assertion.

The Shower Incident

The critical issue regarding the shower incident, and thus the Final Protective Order, is whether there was legally sufficient evidence to establish that the incident constituted an act of child abuse, as that term is defined in Md. Code, FL §§ 4-501(b) and 5-701(b). In resolving that issue, we are mindful that, to justify a Final Protective Order, the court must find by a preponderance of the evidence that the alleged abuse has occurred. *See* FL 4-506 (c)(1)(ii). In judging that issue, we "must consider the evidence

produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed." *Clickner v, Magothy River*, 424 Md. 253, 266 (2012). If the trial court's decision involves the interpretation of a statute, we must determine whether the trial court's conclusion was legally correct. *Id.*

The evidence here was clearly sufficient to show that appellant forcibly took the child, put him in a shower that was cold enough and then hot enough to cause the child pain and tearful requests on his part for appellant to stop. It is clear as well that this was not done for the purpose of washing or cleansing the child. Appellant and his new wife claimed alternatively that it was done to calm the child or to wake him up. The court found that it was done to punish the child, and we cannot say that the court's assessment was clearly erroneous. But did it constitute abuse?

The term "abuse" is defined in two different sections of the Family Law Article – § 4-501(b) and § 5-701(b). Section 4-501 is part of Title 4, Subtitle 5 of the Family Law Article. Title 4 deals generally with spouses. Subtitle 5 deals with domestic violence; it extends beyond just spouses, however, and applies to violence committed against both adults and children. That subtitle focuses on protecting vulnerable victims through protective orders entered by judges or District Court commissioners, often by removing the abuser from the home and prohibiting the abuser from contacting the victim. Section 7-501 is part of Title 5 dealing generally with children. Subtitle 7 deals specifically with

child abuse. It focuses on protecting children, mostly through administrative measures undertaken by DSS, in extreme cases by removing the child from the home to a place of safety. Notwithstanding the different focuses, there is an overlap in those definitions.

Section 4-501(b) defines "abuse" as including any act that *causes* serious bodily harm, places a person eligible for relief *in fear of* imminent serious bodily harm, or constitutes an assault in any degree. Subsection 4-501(b)(2) expressly adds that, if the person is a child, "abuse may also include abuse of a child, as defined in Title 5, Subtitle 7 of this article" but that nothing in Title 4, subtitle 5 "shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child."

Section 5-701 (b) defines "abuse" as including "the physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed," but does not include physical injury by accidental means. Although that definition does not expressly include the exception for parental discipline stated in § 4-501(b), the Court of Appeals has made clear that that exception applies to child abuse as defined in § 5-701(b) as well. If the alleged conduct falls within the scope of reasonable corporal punishment inflicted by a parent, it is not child abuse under either section. *Charles County v. Vann*, 382 Md. 286, 303 (2004).

Appellant argues that the shower event could not constitute abuse because "there is just no evidence as to the actual temperature of the water." We reject that proposition.

The child reported that the water that he was forced to stand under was "ice cold" and then "burning hot," that it was painful, that he was crying, and that he asked his father to stop. The law does not require a person who would do such a thing, much less the victim, to carry a thermometer with him to measure the precise temperature of the water. Appellant contends as well that any harm to the child was accidental. How harm to a child from being deliberately and forcibly placed under ice cold and burning hot water can be accidental is a mystery to us.

The crux of the issue is the scope of FL § 4-501(b)(2)(ii); when does punishment of a child by a parent cross over the line to abuse? The answer appears to be (1) when it is a gratuitous attack not intended as an exercise of parental discipline, of punishing or disciplining the child for the child's betterment or welfare, or (2) even when intended as parental discipline, is unreasonable – extends beyond the bounds of moderation and is inflicted with a malicious desire to cause pain. *See Bowers v. State,* 283 Md. 115, 126 (1978); *Fisher and Utley v. State*, 367 Md. 218, 274-79 (2001); *Charles County v. Vann, supra,* 382 Md. 286, 300-05; *Anderson v. State*, 61 Md. App. 436 (1985). As the *Anderson* Court put it, "[t]here simply is no privilege, even within the context of administering ostensible child discipline, for excessive, cruel, or immoderate conduct." *Id.,* at 446.

The *Charles County* Court noted that the various scenarios "cannot be adjudicated without considering the law in view of the applicable facts." *Charles County,* 382 Md. at

299. Our focus, then, is on whether the shower incident exceeded the permissible scope of parental discipline.

There was no evidence that putting the child in the shower was a gratuitous act of simply inflicting pain on the child. Appellant and his new wife said that it was either to calm the child or wake him up, and the child confirmed that to Ms. Henry. Appellant told Ms. Henry that the child was strong-willed and sometimes throws tantrums and that when the child is the "throes of defiance," he must pick [the child] up "like a baby" and bring him upstairs to his bedroom to calm him down.

It is not clear from the record whether the child had his clothes on when placed in the shower. At oral argument and without objection, appellee advised the Court that the child had his clothes on when forced into the shower. The child said that he was in pain the entire time he was in the shower, but all corporal punishment is painful to some extent; that, presumably, is its therapeutic purpose.

As noted, there was no evidence here of any physical injury to or scalding of the child's body or fear on his part of imminent serious bodily harm. There was no evidence of how long the shower lasted or of any continuing pain or discomfort once the shower ended. There was no evidence of psychological injury to the child from the incident. When the shower was over, the child joined the family for dinner. On the other hand, the child described the cold shower as "ice cold" and the hot shower as "burning" and said, without contradiction by appellant, that it was painful, that he was crying the entire time,

and that he asked his father to stop. The trial court found that punishment to be "extreme."

Putting a child in a cold shower to calm him down (or to wake him up) or a hot shower, in and of itself, may not be so outrageous as to exceed the bounds of parental supervision and discipline. Forcibly immersing and keeping a child under *ice cold* water followed by *burning hot* water is another matter. We agree with the trial court's conclusion that *that* conduct is extreme and can exceed the legitimate scope of acceptable corporal discipline. In making *that* judgment, the trial court, assessing the credibility of the witnesses, could consider the evidence regarding the other incident, of interfering with the child's breathing and dragging him through the house, causing a bruise and facial lesions. The court was entitled to view all of the evidence and all of the circumstances that may shed light on whether *the* shower, not just any shower, constituted an impermissible extension of reasonable, moderate discipline and supervision.

We find no legal error or abuse of discretion in the trial court's findings and judgment.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.

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The circuit court judge said that she "sustain[ed] the allegations," by which I understand her to have meant that she sustained both of the allegations made in the petition. This includes both the March 8 (or 11) shower incident, in which the Father used alternating extremely hot water and extremely cold water on the victim, Petitioner's Ex. 1 (e-mails and text messages to Father concerning the incident); Slip Op. at 14-15; and the March 25 dragging, bruising, scraping incident, in which the Father dragged the victim through the house causing visible scrapes and abrasions, and also placed his hand over the victim's nose and mouth, cutting off his air supply. Petitioner's Ex. 2 (photographs of victim's bruise and scrape); Hr'g Tr., 20 (Mother testifying that "his father had gotten upset at him, had chased him, dragged him through the house…[,] he put his hand over his face, over his mouth and his nose"); Slip Op. at 2. There was more than sufficient evidence in the record to sustain both of these findings by a preponderance of evidence and, as a result, I, too, would have affirmed the circuit court.

I write separately, however, because I disagree with my colleagues in the majority about the meaning and interpretation of the protective order form. My colleagues in the majority read the last line of the protective order form, which requires the trial court to type in a "description of harm" and on which the trial court mentioned only the shower incident, as a limitation on the circuit court's oral ruling. Slip Op. at 8-9 ("findings must be stated in the Order"). It is with this aspect of the majority's ruling that I take issue. I don't agree that this blank for a "description of the harm" on the protective order form is, or is even intended, to serve this purpose:

- Nothing in the enabling legislation requires a trial court to record a finding of fact on the Order. In fact, the General Assembly was crystal clear that a protective order must contain only two things: (1) a description of the acts that the Order prohibits, MD. CODE, FAM. LAW ("FL") § 4-506(d), and the duration of those prohibitions, § 4-506(j); and (2) notice to the respondent. FL § 4-508*; see also* ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND JUDGE'S DOMESTIC VIOLENCE RESOURCE MANUAL 30 (2017) ("The final protective order must include: The type(s) and duration of relief being granted[; and] [n]otices required by federal and state law"). It does not require a written finding of fact.

- Nothing in the Maryland Rules requires the trial court to record a written finding of fact on the Order. *See* MD. R. 9-307 ("Only a judge may issue a final protective order. Final protective orders are governed by [FL] §§ 4-505(d) and 4-506.").

- The protective order form itself suggests to the contrary. The protective order form provides a mere three lines of space for a "description of harm." If the folks that created the form, slip op. at 8 (identifying authorship of form), meant for this to be a written finding of fact, they should have labelled the space, "Finding of facts to support the finding of abuse" (or something like that) and allowed more than three lines for the description.

- More importantly, for its analysis to work, the majority's opinion must treat the words "harm" and "abuse" as synonyms. Thus, when the protective order form asks for a "description of *harm*," the majority believes that the trial judge was required to provide a description of the *abuse*. That conflicts with the statutory definition of abuse, however, which is an act that causes harm not the harm itself. FL § 4-501(b)(1) ("'Abuse' means … (i) an act that causes serious bodily harm"); *see also* FL § 5-701(b)(1). The majority errs by treating abuse and harm as synonyms. The protective order form, by its terms, requires a description of the *harm* not, as the majority holds, the *abuse*. Thus, I don't think the protective order form even does what the majority says it does.

- Moreover, if my colleagues in the majority are correct that the protective order form itself—absent a formally-adopted statute

> or rule—can impose a requirement that the trial judge make a written finding of fact about the abuse, I think it has constitutional problems. Ordinarily, of course, the General Assembly alone makes the laws and establishes legal requirements. MD. CONST., Art. III, §§ 1, 56. In the area of legal practice and procedure, however, the General Assembly shares that power with the Court of Appeals. MD. CONST., Art. IV, §18(a) ("The Court of Appeals … shall adopt rules and regulations concerning the practice and procedure in and the administration of … courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise *by law*" (emphasis added)); *Schlick v. State*, 238 Md. App. 681, 691 (2018) (explaining operation of Art. IV, §18(a)). Thus, the power to create a requirement of a written finding of fact regarding the nature of the abuse belongs either, as I believe, exclusively to the General Assembly or, if the requirement is characterized merely as an aspect of legal practice and procedure, jointly to the General Assembly and the Court of Appeals. But I categorically reject the idea that an enforceable legal requirement for a trial judge to make a written finding of fact can be created, no matter how solemnly and carefully, by another, lesser body within the judiciary.
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> - In practice, I understand that trial judges fill out by hand a worksheet prepared for these purposes and often leave typing the protective order form to their courtroom clerks. If the majority is right and trial judges are required to write a finding of fact on the protective order form sufficient to withstand appellate parsing, I respectfully suggest that some emphasis on this point at the Judicial College would be appropriate.

At worst in this case, there was a conflict between the transcript of the judge's oral ruling and the written order. As I understand it, however, when there is a conflict between the judge's oral ruling and the written order, the oral ruling prevails. As Judge Deborah S. Eyler described it in the context of criminal sentencing: "When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails." *Douglas v. State*, 130 Md. App. 666, 673 (2000). I don't know why

this rule would be limited to the criminal sentencing context. In the absence of such a limitation, I think that if there is a conflict between the written protective order form and the transcript of the judge's oral statement, the transcript should prevail. If so, we can and should review both grounds and, as discussed before, we should affirm on both grounds. As a result, I concur in the judgment of this Court.