Circuit Court for St. Mary's County
Case No. 18-C-13-260

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 778

September Term, 2019

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JOHN DURNIAK

Appellant/Cross-Appellee

v.

MICHELLE BOURDELAIS

Appellee/Cross-Appellants

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Reed,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Reed, J.

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Filed: June 16, 2020

*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.

John Durniak ("Father") and his former spouse, Michelle Bourdelais ("Mother") brings this case for our review amidst a long and tumultuous child custody dispute involving their minor daughters K and S. The Circuit Court for St. Mary's County held hearings on April 11, 2019, May 13, 2019, June 3, 2019, June 11, 2019 (chambers conference), and June 17, 2019 concerning, in relevant part, Mother's Motion to Modify Child Support, Motion to Modify Visitation, and Petition for Contempt (for denial of visitation). Also, before the court was Father's Motion to Reduce Attorney Fee Awards to Judgment for the prior unpaid attorney's fees awards. On June 21, 2019, the court issued an Opinion & Order, which Father timely appealed and Mother cross-appealed. In bringing this appeal, Father presented the following questions, which we have rephrased:[1]

[1] John Durniak has presented the following questions in his appeal from the Opinion and Order issued by the court on June 21, 2019:

1. Whether the lower court erred in finding that a material change in circumstances exists?
2. Whether the lower court erred by admitting into evidence and/or considering the substance of a home study report over a hearsay objection and without sworn testimony in support thereof?
3. Whether the lower court erred and/or abused its discretion by awarding unsupervised visitation in direct contravention of the lower court's written findings of fact and against the logic and effect of facts and inferences before the court?

Michelle Bourdelais presented the following questions in her cross-appeal:

1. Did the trial court abuse its discretion in awarding to Appellee limited visitation with her two teenage daughters, where the trial court found there to be material changes of circumstances warranting a modification of the visitation order?
2. Did the trial court err in entering money judgments in favor of Appellant and against Appellee, where, among other things, the judgments all arose from prior-issued proceedings and orders, including one that had been vacated, where Appellant and his attorney submitted false and fraudulent invoices in the prior proceedings?
3. Did the trial court err in denying Appellee's Petition to Modify Child Support where, among other things, (a) the trial court refused to provide Appellee the opportunity to call witnesses or otherwise present evidence, (b) the trial court

I. Did the circuit court err by allowing unsworn testimony regarding a home study report and by considering the report, among other evidence, when finding that a material change of circumstances existed to award Mother unsupervised visitation of the children?

II. Did the circuit court err in entering money judgments in favor of Father against Mother?

III. Did the court err in its handling of Mother's Petition to Modify Child Support?

For the following reasons, we affirm Issues I and II, we vacate and remand Issue III.. On cross-appeal, Mother presented the following questions, which we have also rephrased:

I. Did the trial court abuse its discretion by awarding Mother limited visitation?

II. Did the circuit court err in entering money judgments in favor of Father against Mother?

III. Did the circuit court err in entering money judgments in favor of Father against Mother?

Considering our decision on Father's Issue III, we remand Mother's Issue I for reconsideration in accordance with this opinion. We find no error as to Issues II and III.

## FACTUAL AND PROCEDURAL BACKGROUND

The parties were previously married and lived in Richmond, Virginia. In 2009, Father had relocated to St. Mary's County, Maryland. In 2012, Mother obtained a judgment for absolute divorce in the Circuit Court for St. Mary's County where Father had relocated.

refused to consider Appellee's transportation costs for the visitation exchanges or the parties' extraordinary medical expenses?

The parties shared two minor children K and S. After their divorce, custody and child support proceedings commenced in the State of Virginia. The Virginia custody order was subsequently registered in St. Mary's County, Maryland on January 10, 2013 in a separate case known as *John Durniak v. Michelle Bourdelais*, Case No. 18-C-12-1676.

The instant civil action began on February 22, 2013 when Mother moved to modify the Virginia custody order. Mother sought sole legal and primary physical custody of the girls, whereas, Father sought legal and physical custody. The circuit court found in favor of Father, and Mother appealed. In *Michelle Bourdelais v. John Durniak*, No. 2389, September Term, 2013, filed December 4, 2014 ("*Bourdelais I*"), this Court vacated the circuit court's judgment and remanded the case back for a full evidentiary hearing on legal and physical custody, child support, and attorney's fees awards. Following a retrial, the circuit court issued an order in June of 2015, awarding sole legal and physical custody to Father and ordering Mother to pay $478 in child support, plus 50 percent of the children's uninsured and unreimbursed medical expenses. Mother was found in contempt for violating the custody order on July 23, 2015. She appealed. In *Bourdelais v. Durniak*, Case No. 1154, September term 2015, filed April 8, 2016 ("*Bourdelais II*"), this Court remanded to the lower court to strike its finding of contempt because it did not contain a purge provision and to strike the contempt and attorney's fees award of $4,783.[2] All other provisions of the award were affirmed.

Father subsequently petitioned the circuit court to modify the Mother's visitation

[2] On April 8, 2016, the circuit court vacated its prior order of contempt and attorney's fees.

with the girls to supervised visitation. The court granted his petition on January 28, 2016 and entered its order on February 4, 2016. Shortly after, Father filed a petition for contempt against Mother for having unsupervised contact with the girls. The court heard Father's petition on May 13, 2016 and issued an order on June 10, 2016, finding Mother in contempt. The June 10, 2016 order also modified Mother's visitation by eliminating Mother's overnight visitation. Mother appealed again in *Bourdelais v. Durniak*, Case No. 602, September term 2016, filed February 3, 2017 ("*Bourdelais III*"). On Appeal, this Court affirmed the circuit court's contempt finding but vacated "the portion of the June 10 Order eliminating Mother's overnight visitation." *Id.* at 7. We further explained, "that the June 24, 2015 custody order, as modified by the February 4, 2016 Order, [was] reinstated as the operative custody order unless and until the circuit court decides otherwise."

While *Bourdelais III* was pending, Father made another request to modify visitation. On January 3, 2017, the circuit court held a hearing on Father's petition. During this hearing, Helena Weisl, a child therapist and expert witness, testified expressing concern that Mother's statements to the girls needed to be monitored. Weisl ultimately recommended that Mother's access with the children be therapeutically supervised. The circuit court found the existence of a material change in circumstances affecting the health and welfare of the children and issued an order dated January 4, 2017 (hereafter "Pax Order"), requiring Mother's access with the girls to be therapeutically supervised through Pax River Counseling. Father was also awarded $l ,701 in fees against Mother. Shortly after, "[u]pon receiving information from the PAX River Counseling, LLC about recent developments," the circuit court issued an order on February 8, 2017 prohibiting Mother

"from having any contact with any personnel or patients at PAX River Counseling, LLC by any means — directly, indirectly, or through a third party."

However, in anticipation of the *Bourdelais III* decision, the circuit court scheduled a status hearing for May 15, 2017 to address the Court's decision regarding the custody and visitation issue. In light of this hearing, the court ordered, among other things, for Mother to have supervised visitation with the girls, including overnights, and ordered Annette Quimby as the authorized supervisor. This order was issued on June 2, 2017[3] (hereafter "Quimby Order").[4]

On July 2, 2017, Mother filed a Petition of Contempt against Father, alleging that he failed to comply with the Quimby Order.[5] The contempt hearing was held on November 16, 2017 in which the court ordered from the bench that Mother pay $9,480 in fees to Father. No order was issued until April 2018; however, the order did not address visitation, Mother's contempt petition against Father, nor did it vacate the prior fees award as mandated in *Bourdelais II*.

Further proceedings ensued regarding custody and visitation. On July 15, 2018, Mother filed a motion requesting, in part, to modify the visitation contained in the Pax Order. The parties filed multiple pleadings with the court before it appeared for a status hearing on August 15, 2018. On that date, the court attempted to arrange for visitation,

[3] Mother states in her brief that the order was entered on June 5, 2017.

[4] Mother alleges in her brief that the order was entered on June 5, 2019. The order was actually filed by the court on June 9, 2017.

[5] Later supplemented on September 25, 2019.

however it struck all discussed visitation from docket entry because of Mother's interruptions.

On December 4, 2018, the parties appeared before the court for a review hearing. At that time, Father filed a Motion to Reduce Attorney Fee Awards to Judgment due to Mother's failure to pay the prior-issued fees awards. From then until February of 2019, parties filed several motions, those most relevant being motions to expedite and proceed with a final custody order. Also, between December 2018 and June 2019, the court issued several *pendente lite* orders each providing for unsupervised visits between Mother and the girls: two in December 2018, two in May 2019, and two in June 2019. However, due to the unavailability of the prior judge, the parties' case was reassigned on April 2, 2019. On April 23, 2019, Mother filed an Amended Contempt & Modification of Visitation & Child Support pleading. The circuit court held hearings on April 11, 2019, May 13, 2019, June 3, 2019, June 11, 2019 (chambers conference), and June 17, 2019 concerning Mother's motions, as well as, Father's Motion to Reduce Attorney Fee Awards to Judgment.

At the April 11, 2019 hearing, the court, Father, and the girls learned for the first time that Mother had moved and was living in Florida. Upon Mother's request, the circuit court issued an Order of Court for Home Study on May 17, 2019, to access the suitability of Mother's home for Florida visitation with the girls. During the June 3, 2019 hearing, the court heard telephonic testimony from Margot Logan, licensed investigator and author of the home study report. Logan's testimony was not made under oath or affirmation of truthfulness, however, neither party objected to that fact. Moreover, during her direct examination, the court limited Logan from describing Mother's home stating, "we have the

report…I don't need her to redo the report." However, the report was not formally entered into evidence. Nonetheless, Father made a hearsay objection to its admission and reliance by the court. The court conceded to Father's hearsay argument, however, reasoned that the photographs in the home study report would provide, "an objective eyeball or two on the residence." The court accepted the entire report. Also, on this hearing date the court separately interviewed K and S who were 16 and 13 years old, respectively. Both girls testified to wanting to spend more time with their mother.

During the May 13, 2019 hearing, the circuit court began its substantive inquiry into Mother's motion to modify child support and visitation. The court led Mother's direct-examination. After having answered a few questions concerning her current child support obligation and the parties prior request to modify their child support obligations, Mother requested that the court first address the money judgments, child custody, and visitation issue because those findings would "impact child support" and her "change of circumstance [] arguments." The court proceeded with the direct examination, asking questions primarily to the issue of custody and visitation. Moreover, the court noted that it would not get "to the child support issue for a long while," and that it would "start with the custody and visitation request." Having heard Mother's testimony concerning these issues and her contempt petition, the court asked Mother to state her request of the court. She laid out her request concerning visitation, access, and her request to find Father in contempt for denying visitation with the girls.

After a lengthy back and forth between Mother and the court, the court then asked counsel of Father to call his client and proceed with his direct examination. Counsel began

asking Father substantive questions regarding the PAX Order and his concerns surrounding Mother's ability to provide for the children while they are in her care. After the direct examination, the court inquired if Mother would like to proceed to cross-examine Father or conclude for the day to accommodate Mother's need to catch her flight back to Florida. Mother continued and asked Father, "Did I ever see my daughters during the Annette Quimby order? Even one time did you allow access when Annette Quimby's order was in place?" After Mother expressed her discontent with his response, the court took over, leading Father's cross examination and asking questions to the issue of visitation and the girls' schedule. Before concluding for the day, the court authorized Mother to have physical access with the girls for June 1, 2019 and allowed for contact via text, email, or FaceTime on Mondays, Wednesdays, Fridays, and Sundays."

The hearing resumed on June 3, 2019, however, parties disputed whether Mother had rested her case concerning child support modification. Nonetheless, the court proceeded to solicit an argument on child support modification and prohibited Mother from introducing additional evidence. The court stated, "[a]rgument is argument of what I did hear last time. What I heard last time -- so we can't -- you can't give me figures of what you have paid because it wasn't testimony." Although the court later indicated it was "fine with reopening to get incomes and fine with having Mr. Durniak file a short form" to supplement what was already entered into evidence, the court proceeded to illicit argument from the parties and did not allow Mother to enter additional evidence that she alleged was relevant to the issue.

On June 21, 2019 the court issued an order resolving, in relevant part, Mother's

Motion to Modify Child Support, Motion to Modify Visitation, Petition for Contempt (for denial of visitation), and Father's Motion to Reduce Attorney Fee Awards to Judgment. The June 21, 2019 order (hereafter "Opinion & Order") modified Mother's visitation from therapeutically supervised to unsupervised and provided for Florida visitation with K only. Mother's Petition for Contempt and Motion to Modify Child Support were both denied, however, the court granted Father's Motion to Reduce Attorney Fee Awards to Judgment.[6] Both parties appealed the Opinion & Order for our review.

## DISCUSSION

### *I. Visitation Modification*

#### A. Parties' Contentions

Father argues that the Pax Order, requiring Mother's visitation of the children to be therapeutically supervised, is controlling and operative, and the circuit court had no basis to modify the order allowing for unsupervised visitation. He also contends that the court improperly considered the unsworn, hearsay testimony of Margot Logan, the author of the home study report. Opposing Father's contentions, Mother argues that the home study report was properly considered, and Father waived his objection to Logan's unsworn testimony by failing to object at the hearing. In all, Mother avers that circuit court's Opinion & Order issued on June 21, 2019 properly modified visitation with the children,

[6] The circuit court ordered the following judgment amounts for Father against Mother on the following dates:

1. $4,783 for attorney's fees entered on July 23, 2015
2. $8,694 for attorney's fees entered on May 13, 2016
3. $1,701 for attorney's fees entered on January 3, 2017
4. $9,480 for attorney's fees entered on November 16, 2017

however, the order should have permitted visitation in Florida for both children, not only for K.

## B. Standard of Review

Maryland appellate courts apply three different, yet interrelated, standards of review in child custody disputes. *See In re Adoption of Cadence B.*, 417 Md. 146, 155 (2010). The clearly erroneous standard is applied when this Court scrutinizes the factual findings of the trial court. *Id*. The harmless error standard is applied if it is determined that the trial court erred as a matter of law, and if such error is prejudicial, this Court will order further proceedings in the circuit court. *Id*. Finally, the abuse of discretion standard is applied when this Court reviews the circuit court's ultimate conclusions. *Id*. If the conclusions are founded on sound legal principles and based upon factual findings that are not clearly erroneous, the circuit court's decision will not be disturbed.

## C. Analysis

### *i. Admitting and relying on hearsay*

Father contends that the circuit court improperly allowed hearsay testimony concerning a home study report, which was not ultimately entered into evidence, and inappropriately relied on such evidence to support its order to modify visitation. In contrast, Mother argues that the home study report was properly considered, and Father failed to object to testimony derived from hearsay statements.

Under Maryland law, a court is permitted to consider home study reports when making custody determinations. Md. Code Ann., § 3-819.2 (West 2019). Maryland Rules' defines home study as "an inspection of a party's home that focuses upon the safety and suitability

of the physical surroundings and living environment for the child." Md. Rule 9-205.3. Similar to home study reports, this Court has previously noted that:

> Statements contained in a custody investigation report have no special indicia of reliability. They are generally not under oath and often emanate from people having overt or covert bias. In many instances, the statements represent subjective feelings and perceptions rather than objective observations or empiric data. Their usefulness to the court is only as strong as their reliability, and that requires that they be subject to challenge in essentially the same manner as any other critical evidence.

*Denningham v. Denningham*, 49 Md. App. 328, 335–36 (1981). In other words, the reports are subject to Maryland's evidentiary rules, particularly the admission of hearsay statements that are at issue before this Court.

Hearsay is statutorily defined 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." Md. Rule 5-801. Maryland Rule 5-802 prohibits the admission of hearsay evidence unless otherwise permitted by a rule exception or constitutional provision or statute. Moreover, in order to preserve the issue of improperly admitted evidence on appeal, the petitioner must have objected to the admission of evidence "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 2-517(a).

In the present matter, Father claims that the home report was never formally entered into evidence. At the June 3, 2019 hearing, Ms. Logan testified to have authored the home study report and explained the basis of her findings. On direct examination, Ms. Logan was asked to describe the home she had investigated,

however, the court interjected stating, "[w]ell, we have the report…I don't need her to redo the report." At that juncture, it is clear that both parties, including the judge, had access to the home study report. Moreover, the judge's limitation of Ms. Logan's testimony signifies that the court was either already familiar with the contents of the report or would soon become familiar before issuing its order. Either way, it is clear from the record that Father knew the court had the report, yet he did not object to the means in which the report was entered into evidence. For this reason, Father's objection on appeal is waived for failure to raise the issue at the hearing.

Father did however preserve his hearsay objection to the home study report. Prior to Logan's telephonic testimony, Father argued, "the report is entirely made up of hearsay, it's the writer's statements, and [Ms. Logan] is not here. It's hearsay, within hearsay, within hearsay. [Ms. Logan] quotes the witnesses[']bald statements, and then she quotes what she says the witnesses say, third parties [are] saying. So none of that can come in." The court conceded saying, "I agree with you it's all hearsay, hearsay within hearsay, but at least it gives the court…an objective eyeball or two on the residence." Although the court had access to the entire report, there is no indication that it relied on any hearsay statements when issuing the Opinion & Order. True to its word, the court considered the photographs of Mother's residence and showed the photographs to K during her interview with the court. When issuing its order, the court relied on testimonial evidence of K's desire to visit her Mother in Florida, not on any hearsay statement contained in the home study report. For this

reason, we hold that the court did not abuse its discretion when relying on the home study report in its Opinion & Order.

*ii. Admission of unsworn testimony*

Father also contends Ms. Logan's testimony should be stricken from the record because the circuit court improperly considered her unsworn testimony in violation of Maryland Rule 5-603. The rule provides that:

> Before testifying, a witness shall be required to declare that the Witness Will testify truthfully. The declaration shall be by oath or affirmation administered either in the form specified by Rule 1-303 or, in special circumstances, in some other form of oath or affirmation calculated to impress upon the witness the duty to tell the truth.

However, the Maryland rule requiring parties to preserve the issue for appeal is controlling. *See* Md. Rule 2-517(a). This Court has previously held that an "[o]bjection to a witness' testifying who has not made an oath or affirmation will be considered waived unless made before the testimony or, if the witness is not on the stand as soon as it should be apparent that the witness is testifying." *Schaefer v. Cusack*, 124 Md. App. 288, 313 (1998). The proper time for Father to have raised his objection to Logan's unsworn testimony would have been before she testified about the home study report. Because the issue was not raised during the hearing, it is waived for purposes of this appeal.

*iii. Modifying Visitation*

Father argues that the evidence before the court was insufficient to warrant a modification of the Pax Order. He contends that Mother has not satisfied her burden of showing the existence of a material change of circumstances or that it is in the girls' best interest to allow her unsupervised visitation. He further contends that Mother's actions and

behavior since the Pax Order were negative and contrary to the best interest of the children, thereby, supporting the continued existence of therapeutically supervised visits. Mother contends that the Opinion & Order modifying visitation was proper because the Pax Order was illusory and inoperative, and a material change of circumstances warranted the modification. She further contends that although the circuit court properly awarded her unsupervised visitation with the girls, the court should have permitted Florida visitation for both girls, not only for K.

This Court will not set aside the factual findings of the court below unless such findings are clearly erroneous. *See In re Yve S.*, 373 Md. 551, 585 (2003). When determining if a modification of custody is warranted, the circuit courts applies a two-step inquiry. *See e.g.*, *Wagner v. Wagner*, 109 Md. App. 1 (1996). The threshold question asks whether there has been a material change of circumstances, i.e. a change that affects the welfare of the child. *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012). If the moving-party satisfies its burden by proving a material change in circumstances, that party must then satisfy the courts' secondary, yet more paramount inquiry: "what is the best interest of the child[?]" *Gillespie*, 206 Md. App. at 173; *See Wagner v. Wagner*, 109 Md. App. 1, 29 (1996). In short, "there can be no modification of custody unless a material change of circumstance is found to exist. Even if a material change is found to exist, however, custody can only be modified if it is in the best interest of the child to do so." *Wagner, 109 Md. App.* at *29.*

Although custody modification is considered under a two-step inquiry, the Court of Appeals has clarified that the "two-step process is sometimes considered concurrently, in

one step, i.e., the change in circumstances evidence also satisfies—or does not—the determination of what is in the best interest of the child." *Id.* at 28. Even if the evidence supporting a change of circumstances does not independently satisfy what is in the child's best interest, the evidence will often lend support when resolving the second inquiry. *Id.* For this reason, the two-steps are more often resolved simultaneously. *Id*. Thus, in discerning whether a material change exists, we will examine whether such changes relate to the welfare of the child. *Braun v. Headley*, 131 Md. App. 588, 610 (2000). We are guided by the following factors, which include, but are not limited to:

> (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender.[7]

*Id.* at 610–11 (quoting *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977)(internal citations omitted)).

In its Opinion & Order, the circuit court found the Pax Order to be operative. The court stated that "the purpose of the therapeutic supervision was to work with the mother and children to foster a healthy relationship with Mr. Durniak." However, due to Mother's

[7] This numerical list of factors was expanded in *Taylor v. Taylor*, 306 Md. 290 (1986) to included: capacity of parents to communicate and to reach shared decisions affecting child's welfare; willingness of parents to share custody; relationship established between child and each parent; potential disruption of child's social and school life; geographic proximity of parental homes; demands of parental employment; age and number of children; sincerity of parents' request; financial status of parents; impact on state or federal assistance; and benefit to parents. *Id.* at 303–11.

behavior with PAX River Counseling, therapeutic visitation was infeasible.[8] The court further considered the fact that both K and S went to individual counseling, and that K testified that further counseling would not be beneficial. For this reason, the circuit court found that a material change in circumstances existed.

The circuit court's reliance on the guiding factors is evidenced in its Opinion & Order. In discerning the best interest of the child, the circuit court considered the testimony of the eldest child, K who was 16 years old at the time of the June 3, 2019 hearing. The circuit judge found "[i]n all of the court's interview with K, she expressed a desire to visit her mother and spend more time with her mother." The court found that the arranged weekend visit, "went well" and that K "reiterated her desire to spend part of her summer in Florida with her mother." Moreover, the court gave due consideration to K's maturity, explaining "at the age of 16 [K] clearly has a voice in the proceedings." The court also considered S's testimony, who was 13 years old at the time. S similarly testified that the arranged visitation went well, and she would like to spend more time with her mother. The court ultimately found that it was in the best interest that the girls have "**both** parents in their lives." (emphasis added). In light of the court's findings, its decision to eliminate *therapeutically* supervised visitation with both girls was warranted.

Notwithstanding, the court made additional findings tending to undermine Mother's ability to maintain a healthy relationship with Father for the girls' wellbeing. Specifically, the court stated that, "[Mother] has shown a pattern of behavior over the last seven years—

[8] There was also testimony from Mother that PAX River Counseling had not offered therapy services for a few years.

she complies with orders that she approves and ignores or disobeys those that she disapproves." Further, "[Mother's] history is not stable. She is a rolling stone." Having weighed the "evidence, testimony, reviewed all the previous court orders, three appellate decisions, and the desires of the two children," the court found, in part, that Mother's actions and behaviors made it difficult to balance fostering a relationship between her and the girls without deteriorating the girls' relationship with their father. The court further added that it "does not have confidence in the stability of her housing and her ability to support herself and her children while they are in her care." Given the court's conflicting statements regarding unsupervised visitation generally, we cannot say that the removal of all supervised visitation was not clearly erroneous. Thus, we vacate the portion of the order eliminating supervised visitation and remand to the circuit court for further explanation as to the basis of its judgment.

## *II. Money Judgments*

### A. Parties' Contentions

Mother contends that the court must vacate the award of attorney's fees that arose from the contempt hearing held on July 23, 2015 and reverse the award of attorney's fees that arose from the contempt hearing on November 16, 2017. Father argues in his reply brief that Mother's claims are time barred because the amounts and awards granted in the June 21, 2019 order are enrolled and were not appealed within 30 days of their entry. *See* Maryland Rule 8-202(a) ("Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken.")

Mother also argues that Father's request for entry of money judgments based on the prior-issued court orders should have been rejected on grounds of res judicata. She contends that Father's claims were litigated previously and resulted in final orders by the circuit court. Further, he had an opportunity to request attorney's fees in his pleadings. Thus, the claim should have been precluded from the Opinion & Order. In his reply brief, Father argues that his request to enter the judgments were not to relitigate the fees previously awarded, rather to request that the prior awards be entered as judgments to allow for various collection mechanisms, such as a levy or garnishment.

We agree with Father's contention that Mother's claim arising from the contempt hearing on November 16, 2017 is time barred and was not adequately preserved for review. Thus, we will not address the merits of the award. Moreover, during the oral arguments of this appeal, both parties agreed that the July 23, 2015 order, which awarded Father $4,783 was stricken by this Court in a previous decision, and thus, was included in error. For this reason, we remand the issue back to the circuit court to remedy the improperly included award. Further, we disagree with Mother that the court violated the principles of res judicia when entering the unpaid fee awards as money judgments.

**B. Standard of Review**

Although the award for attorney's fees are typically within the discretion of the circuit court, when the court's order "involves an interpretation and application of Maryland statutory and case law," this Court "must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 391–92, (2002) (internal marks omitted). Here, we review whether the Opinion

& Order, entering Father's award's of attorney fees as money judgments, was legally correct.

**C. Analysis**

Maryland Rule § 2-703(g) provides, in part, "the grant or denial of an award of attorneys' fees may be included in the judgment on the underlying cause of action or in a separate judgment, as directed by the court." If a debtor fails to pay the attorney's fees, the creditor can turn to Rules § 2-631 and § 2-633 to have the judgment enforced against the debtor. Maryland Rule § 2-631 narrows the means of enforcing money judgments to codified law, whereas, § 2-633 enables judgment creditors to "obtain discovery to aid enforcement of a money judgment (1) by use of depositions, interrogatories, and requests for documents, and (2) by examination before a judge or an examiner as provided in section (b) of this Rule."

In the present case, the circuit court considered four separate court orders from St. Mary's County Circuit Court, for the following dates and judgment amounts: (1) July 23, 2015 in the amount of $4,783; (2) May 13, 2016 in the amount of $8,694; (3) January 3, 2017 in the amount of $l ,701; and (4) November 16, 2017 in the amount of $9,480. For each of these orders, Father had filed petitions for contempt against Mother for her failure to pay the ordered attorney's fees. Despite the contempt findings, Mother had not complied with the court orders or paid the fees. The circuit court did not relitigate the merits of attorney's fees awards, instead, the court exercised its authority to reduce the fees to judgment pursuant to § 2-703(g). In doing so, the court did not err as a matter of law. Hence, we affirm the money judgments entered.

### *III. Modifying Child Support*

Mother contends that the circuit court erroneously denied her request to modify child support on the basis that: (1) the hearing to modify child support never actually commenced and concluded; (2) the court erroneously refused to consider extraordinary medical expenses when calculating child support; (3) circuit court refused to consider the visitation schedule or her transportation cost; and (4) the circuit court had the means to determine the parties' income and child-related expenses to justify a finding that a material change in circumstances existed. In response, Father argues that Mother made numerous assertions in her brief that she failed to support by reference to the record. Moreover, Father alleges that a request to modify child support was previously litigated and denied on June 12, 2018, and since then, Mother has not established the existence of a material change of circumstances to warrant a modification. On this issue, we find that Mother was not adequately afforded an opportunity to present evidence in support of her petition to modify child support.

Upon review of the circuit court's decision regarding whether or not to modify child support, we will defer to "the sound discretion of the trial court, so long as the discretion was not arbitrarily used or based on incorrect legal principles." *Smith v. Freeman*, 149 Md. App. 1, 21 (2002). We have also acknowledged "that, because the best interest of the child is of "paramount importance" in a child custody and support case, the child has an "indefeasible right" to have the custody determination made only after a full evidentiary hearing involving both parents. *Wells v. Wells*, 168 Md. App. 382, 395 (2006) (quoting *Flynn v. May*, 157 Md. App. 389, 408–411, (2004) (explaining the trial court abused its

discretion by ordering a change in the physical custody of the minor without allowing parties to present witness testimony or other evidence in support of their petition)); *see also Simms v. Maryland Dep't of Health*, 240 Md. App. 294, 326 (2019) ("Maryland proceedings are to be tested by fundamental fairness [-] the touchstone of due process. The cornerstone of due process is notice and the opportunity to be heard.") (internal marks and citations omitted).

In the instant case, the circuit court began its substantive inquiry into Mother's motion to modify child support during the May 13, 2019 hearing. The court made the following statements on record:

> And then today, May 13th, we have the following issues: [Mother's] motion to modify child support; [Mother's] motion to modify visitation; [Father's] motion for appropriate relief as it applies to the 529 plans pursuant to their divorce decree; [Father's] motion to reduce prior sanctions of attorney's fees to a judgment.
>
> ***
>
> So it's my understanding, [Mother], that the first issue we are going to hear today is your motion to modify -- you can do it in either order you would like, motion to modify child support, and motion to modify visitation. Do you agree with those two things?
>
> MS. BOURDELAIS: Um, yes, Your Honor.

After having answered a few questions concerning her current child support obligation and the parties prior request to modify their child support obligations, Mother requested that the court first address the money judgments, child custody, and visitation issue. Mother hoped to address child support last "because overnights in another state, transportation costs, and other variables that will come into play during the visitation and custody aspect

will then impact child support." The court proceeded by calling Mother as a witness and led the direct examination asking questions primarily to the issue of custody and visitation. The court stated:

> We are not getting to the child support issue for a long while. We are going to start with the custody and visitation request. What I would like to hear, because I am now the assigned judge, is what is happening in [Mother's] life, what she is doing, where she is living, we don't have to have the address at the moment, and what her request is.
>
> And then I am going to hear from [Father]. And I am going to hear where, although I know because I talked to your girls, where you are living, what you are doing. I know you have a sailing passion, for example. And I put that on the record last time.

The court continued its questioning of Mother and inquired about her assertion that Father interfered with her right to visit their children.

The court steered Mother's testimony asking, "What else would you like to tell me as to the issue of the visitation and the access?" After Mother continued to make her case concerning the visitation, the court inquired, "[s]o what is your request of the court?" Mother laid out her request concerning visitation, access, and request to find Father in contempt for denying her visitation of the girls. After a lengthy back and forth, the following statements were made on record:

> THE COURT: So from May 15 --
> [MOTHER]: I never saw my kids.
> THE COURT: -- through November 17 --
> [MOTHER]: Never saw my kids.
> THE COURT: -- zero access, zero phone contact, and zero supervised visitation.
> [MOTHER]: Thank you, Your Honor.
> THE COURT: Thank you.
> Call your client, [Father's counsel].
> [FATHER'S COUNSEL]: Yes, Your Honor. I will call

[Father] to the stand.

At this junction, Father's attorney began asking him substantive questions regarding the Pax Order and his concerns surrounding Mother's ability to provide for the children while they are in her care. After the Father's direct examination, the court inquired if mother would like to proceed to cross-examine Father or conclude for the day to accommodate Mother's need to catch her flight back to Florida. Mother continued to plead with the court concerning Father's contempt imploring, "I haven't even been able to ask him did I ever see my daughters. I just would like to ask him one question…Did I ever see my daughters during the Annette Quimby order? Even one time did you allow access when Annette Quimby's order was in place?" The court then changed course and permitted Mother to ask Father the question proceeding to cross-examination. After Mother expressed her discontent with his response, the court asked mother if it could ask the questions of Father. The court continued the examination of Father, asking questions to the issue of visitation and the girls' schedule. Before concluding for the day, the court authorized Mother's physical access with the girls for June 1, 2019 and allowed for contact via text, email, or FaceTime on Mondays, Wednesdays, Fridays, and Sundays."

The hearing resumed on June 3, 2019. The court correctly stated when looking at the child support issue, it will "go from June 12 of '18 to today, June 3 of '19. It will be [Mother's] burden to show whether or not anything has changed. If it hasn't, then what Judge Femia ruled a year ago is the rule of the case." At this time, counsel for father incorrectly represented to the court, "it was my understanding [Mother] presented her child

support case and rested, and she presented her visitation case and rested." While the court referred to its notes on the matter, Mother properly reminded the court that "[Father] only testified on the custo[dy] -- on the visitation contempt, as part of [her] visitation contempt, as part of [her] amended motion for change of visitation and visitation contempt," and that was all she had "questioned him on." She explained that neither she or the court "got to asking him about his income." The following discussion ensued:

> [FATHER'S COUNSEL]: …[Mother] presented her case and rested. I called my client. I wouldn't be presenting my case unless she had rested.
> [MOTHER]: I didn't rest.
> THE COURT: Well --
> [FATHER'S COUNSEL]: Well, there is no other way we could have gone forward in that fashion.
> THE COURT: Okay. Don't interrupt him, please. So finish up.
> [FATHER'S COUNSEL]: And as the court is aware, it is her burden to prove all the elements, and she didn't.
> [MOTHER]: I didn't even rest. He was on the stand when we like left.
> THE COURT: My testimony -- the testimony I had from [Father] was his age, his profession, how long he has been a resident, has to do mostly with custody issues, visitation issues. I don't see in my notes any testimony as to income, but the point [Father's counsel] is making, [Mother], is we had a myriad of issues on the table last time, as we do today, that your motion for the child support, [Father's counsel's] position is you put on your case and we are done.
> [MOTHER]: I dealt with --
> THE COURT: Do you disagree with that?
> [MOTHER]: I disagree.

The court did not adequately afford Mother an opportunity to present evidence and procedurally erred when it rested mother's case on its own initiative. The court then proceeded to solicit Mother's argument on the issue of child support stating, "[a]rgument is argument of what I did hear last time. What I heard last time -- so we can't -- you can't give me figures of what you have paid because it wasn't testimony." Although the court

later indicated it was "fine with reopening to get incomes and fine with having Mr. Durniak file a short form" to supplement what was already entered into evidence, the court proceeded to illicit argument from the parties and refused to allow Mother to enter additional evidence to support her case. In doing so, the court committed reversable error. Thus, we remand the issue of child support modification back to the circuit court to afford Mother the right to a full evidentiary hearing. We will not address the issue of transportation expenses or extraordinary medical costs for they may or may not be relevant to the modification of child support.

## CONCLUSION

Accordingly, we reverse the portion of Circuit Court of St. Mary's County's order eliminating supervised visitation and remand for further proceedings consistent with this opinion and in consideration of any court order issued subsequent to the June 21, 2019 Opinion & Order. We vacate the improperly included fee award of $4,783 arising from the July 23, 2015 hearing and affirm all other fees entered as money judgments consistent with this opinion. We remand the issue of child support modification back to the circuit court for further proceedings consistent with this opinion.

**JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE ALLOCATED 33% TO THE APPELLANT AND 67% TO APPELLEE.**