Circuit Court for Montgomery County
Case No. 156169FL

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 0788

September Term, 2023

Ashwini Vinod Sabnis

v.

Saurav Kumar Mohanty

Graeff,
Leahy,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 27, 2023

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Ashwini Vinod Sabnis ("Mother") and Saurav Kumar Mohanty ("Father") are the parents of two minor children: a daughter, M. age 14; and a son, V., age 11. Mother left the family in January 2015, and the marriage ended in divorce five years later, in January 2020. Within the year, Mother embarked upon a vicious campaign to subvert the court's joint custody order. In time, Father petitioned the Circuit Court for Montgomery County to modify custody. After a two-day evidentiary hearing with a ruling on the third day, the court granted Father sole legal and physical custody of the minor children and Mother limited supervised visitation.

Mother filed a timely appeal. She presents five questions for our review,[1] and clarifies that, although she "disagrees with many of the trial court's findings of facts[,]" she "is not appealing those findings of facts due to the very high bar, and focuses this appeal on errors of law." We have reordered and recast Mother's questions presented as follows:

[1] The questions presented in Mother's brief are:

I. Did the trial court err as a matter of law when it delegated the issue of Mom's right to physical custody to a non-judicial officer?

II. Did the trial court abuse its discretion when it denied Mom's request for a custody evaluation and discovery to corroborate the children's claims of physical and sexual abuse by Dad?

III. Did the trial court abuse its discretion when it ordered that Mom have only limited and supervised visitation?

IV. Did the trial court err as a matter of law when it failed to award Mom child support for the period in which she had sole temporary custody of the children?

V. Did the trial court err in awarding Dad attorney's fees?

1. Did the trial court err or abuse its discretion in modifying the existing custody order to grant Father sole legal custody and primary physical custody and to allow Mother only supervised visitation with the children?

2. Did the trial court abuse its discretion when it denied Mother's request for a custody evaluator?

3. Did the trial court err as a matter of law when it delegated the issue of Mother's access to the children to a non-judicial officer?

4. Did the trial court abuse its discretion when it declined to award Mother retroactive child support?

5. Did the trial court abuse its discretion in awarding Father attorneys' fees?

We affirm in part and reverse in part. We affirm the court's custody determination delivered in a comprehensive oral ruling in which the court thoroughly reviewed the evidence presented, explained all credibility determinations, and correctly applied the *Sanders-Taylor* factors. Next, we discern no abuse of discretion in the motion court's decision to deny Mother's motion for a custody evaluator. We also hold that the trial court did not abuse its discretion in granting Father attorneys' fees or in denying Mother retroactive child support. However, we hold that the court did err as a matter of law when it conditioned the future expansion of Mother's visitation rights solely upon the recommendation of the family reunification therapist. The delegation of Mother's custodial rights to a non-judicial officer without judicial oversight violates her fundamental right to raise her children. Accordingly, we vacate that portion of the order and remand this case to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

Mother and Father married on July 27, 2006. They are the parents of a daughter, M., born in August 2009, and a son, V., born in August 2012. In January 2015, Mother left the marital home in Connecticut, and moved first to New York, and then to Oklahoma, leaving the two children in Father's care.

On August 13, 2016, Father emailed Mother informing her that he was taking the children and moving to Canada due to requests from his employer to "take a team and lead there." Father also informed Mother through "text, … [and] phone call[,]" and Mother did not object. In February 2017, Father moved with the children to Arlington, Virginia. Shortly after, Mother told Father that she intended to file for divorce. Father next informed Mother that he was moving to Maryland for a job; however, he did not move to Montgomery County Maryland until March 9, 2018. [2]

Mother stated, in her first session with Dr. Thornburgh, that when she picked up M. and V. from school in Arlington, County, Virginia, [3] she was shocked to learn about the children's impending move to India. Father, however, testified that he did not attempt to abduct the children to India.

[2] Mother argues that Father intentionally misrepresented his whereabouts as an attempt to evade litigation. Father denies that he intentionally misled Mother and that his then current job had extended his contract, resulting in him remaining in Virginia until March 2018.

[3] Despite living in Montgomery County, Maryland, at the time, the children were enrolled in Arlington County Public Schools, because Father was waiting until Spring Break to transfer the children to a Maryland school.

The Emergency Motion and Action for Divorce

The next day on March 23, 2018, Mother filed an Emergency Motion to Prevent Removal of Children from United States and the Jurisdiction of the Court ("Emergency Motion") in the Circuit Court for Arlington County, Virginia. The court entered an immediate order that enjoined the children's removal from the Washington, D.C. metropolitan area, required Father to surrender the children's passports to the Court, and granted Mother additional parenting time when she was in the area.

That same day, Mother brought an action for divorce, which was later dismissed by the Virginia court for lack of jurisdiction and the Circuit Court for Montgomery County, Maryland, assumed jurisdiction over the case. Mother moved to Chevy Chase, Maryland on February 12, 2019, and nominally began a 2-2-5-5 schedule with the children. However, Father "did not agree to this schedule" and noticed the deleterious effect Mother's "sudden re-appearance" had on the children's lives**.** Thus, on February 20, 2019, Father filed an Emergency Motion to prevent Mother from "imposing a 50/50 schedule on the Parties' children" and a motion to appoint a best interests attorney.

The Circuit Court for Montgomery County convened a two-day contested hearing beginning on May 28, 2019. In July the court entered a custody order granting both parties joint legal and physical custody of M. and V., and awarding tie-breaking authority for educational and medical decisions to Mother and tie-breaking authority for religious decisions to Father. Then on January 29, 2020, the court entered a judgment of absolute divorce, reserving the issue of child support to the custody modification hearing scheduled

for May 11, 2020. The parties have been embroiled in contentious litigation over custody of the children since that time.

The First Modification

Unfortunately, the children struggled with their mental health during the divorce and custody proceedings, expressing dangerous ideations and engaging in self-harm. On March 6, 2019, V.'s school informed Father that V. was verbalizing his desire to hurt himself, and Father took him to a crisis center. Mother, a psychiatrist herself, attempted to place both V. and M. in therapy with Dr. Michelle New, and Mother filed an Emergency Motion to Modify Legal Custody when there was a delay in processing Father's consent form.[4] The circuit court granted the motion on September 9, 2019, for the limited purpose of engaging Dr. New.

The Allegations of Abuse and the Temporary Protective Order

On September 2, 2020, M., then aged 11, allegedly reported to Mother that Father had physically and sexually abused her. Three days later, Mother filed a petition for a temporary protective order, which the court granted on September 17, 2020, prohibiting Father from having contact with the children. During this time, M. was hospitalized and

[4] After Dr. New's request on August 26, 2019, Father signed and released the consent form for V. on September 5, 2019. Dr. New responded to Father's email on that day and informed Father that he needed to sign an additional form. Father signed and sent Dr. New the additional form for V. around noon on September 9, 2019; however, Mother had already filed an emergency motion to modify custody on the same day. Father had expressed on August 7, and on September 4, that he did "not want [M.] to see the same therapist" as V. and instead provided Mother with a list of therapists within his insurance network. Father never signed the consent paperwork for M. prior to the circuit court granting the September 9, 2019 Emergency Motion.

diagnosed with Post-Traumatic Stress Disorder. After the circuit court heard Mother's Petition for a Final Protective Order, on October 15, 2020, the court determined that she had not met her burden of proof and dismissed the petition.

Based upon the allegations of abuse, Montgomery County Police arrested Father and held him without bond, charging him with two counts of rape in the second degree and one count of sex abuse of a minor. Father was eventually released from detention on November 16, 2020, under the condition that he have no contact with M. and Mother. The Court conducted an emergency custody modification hearing and entered a temporary order on November 20, 2020, granting Mother sole legal and physical custody of the children and ordering that Father have no contact with the children or their schools. Due to the Covid-19 pandemic, Father's criminal hearing was delayed for nearly a year until the State entered a *nolle prosequi* to all counts of the indictment and closed the case.

Mother pursued discovery of records from DSS and Shady Grove Adventist Hospital relating to the children's abuse allegations, which Rosalyn Otieno, the Best Interest Attorney ("BIA"), opposed, asserting that the patient/psychologist privilege was not waived for either of the children. The court quashed on the grounds that child welfare records are statutorily mandated as strictly confidential. Maryland Code (2019 Repl. Vol., 2023 Supp.), Human Services Article, § 1-202; *see also*, *Nagle v. Hooks*, 296 Md. 123, 128 (1983) (holding that when a child is too young to waive psychiatrist-patient privilege, the court must appoint a guardian acting in the best interests of the child, and the parents may not agree nor refuse to waive the privilege on the child's behalf). Mother, unable to use

the DSS or the hospital records in court, filed a motion for a custody evaluation. Again, the BIA replied and requested the Court deny the motion because the BIA had already done the "identical job" identified in the motion.

The Reunification Order

On February 15, 2022, the court awarded Father supervised visitation and appointed Dr. Gail Thornburgh to facilitate M.'s and V.'s reunification with Father. The order allowed six weekly visits, per child, through the Supervised Visitation Program, with Father having *pendente lite* supervised visitation with the children "once per week with each child separately (total of 2 visits per week) . . . for six weekly visits per child." After the six weekly visits, Father would have *pendente lite* supervised access Wednesday and Sunday evenings.

In April 2022, during M.'s and Father's first—and only—reunification session with Dr. Thornburgh, M. accused Father of living his dreams through her and her brother; claimed that she was hit with metal hangers and broken dishes on her head; and claimed that "One time, Father touched her." On August 1, 2022, M. entered an inpatient residential treatment program, Embark, and remained there for 12 weeks. While M. was at Embark, Father was unable to communicate with M.'s therapists or with M. because Embark mistakenly believed that there was a court order prohibiting Father from having any contact with her. On October 24, 2022, M. was discharged from Embark, and she began attending a partial hospital program (PHP), which is a "step down program for [children] coming out of residential [treatment]." Father was unable to meet with M. after her release from the

PHP program because Mother "left Embark with the impression that Father was to have no contact." Father finally met with M.'s therapist "towards the last two weeks" of her treatment in the intensive outpatient program (IOP).

Over the next six months, Father filed several motions to reinstate the joint legal custody awarded in the July 25, 2019 Custody Order, and Mother filed oppositions to Father's orders as well as her own cross-motions. The dispute culminated in 2023 in a custody modification hearing on June 5-6, the court's ruling on June 8, and the custody modification order that is the subject of this appeal.

The Evidentiary Hearing

At the opening of the custody modification hearing, the judge announced that she would reserve her decision on whether to interview the children *in camera* to assess their credibility,[5] and the BIA then raised her opposition to allowing the children's mental health records to come into evidence. Father produced several witnesses, including V.'s therapist, a visitation supervisor, an expert witness on parental alienation, an expert witness on risk for sexual abuse of children, several friends and family members, Mother's boyfriend Dr. Brian Meek, and himself. Mother testified on her own behalf and presented no other witnesses.

Dr. Mindy Thiel, V.'s therapist, testified that V. expressed hatred for his Father during the majority of their sessions. Dr. Thiel testified that V. indicated that Father left his sister alone in the woods when she was three years old. She also stated that V. disclosed

[5] The court ultimately decided to interview the children in chambers on June 6, 2023.

that Father frequently beat him "to a whole other level" and alleged incidents in which Father smashed plates on his head. V. told Dr. Thiel that he did not feel safe around Father and asked her to stop the reunification sessions with Father and Dr. Thornburgh because they were triggering for him. Dr. Thiel testified that since his treatment with her, V.'s "violent thoughts or actions toward his father" had ceased.

Ms. Maeve McGrath, the owner/operator of Supervised Visitation and Investigations testified that she supervised two sessions between the children and their paternal aunt, Dr. Mohanty. Ms. McGrath related that the sessions went poorly, with M. refusing to converse directly with Dr. Mohanty and complaining that Dr. Mohanty sided with Father and protected him. Ms. McGrath characterized V.'s behavior as "disrespectful and rude" towards his aunt and said that V. was "very vocal" about not wanting to be there.

Father offered Ms. Michele Sarris as an expert on custody evaluations, reunification therapy, supervised visitation programs, and alienation. Ms. Sarris stated that she reviewed psychological reports of the children, court orders, and various communications to render her opinion about the current custody situation, and that she did not find the children's allegations of abuse credible and pointed out that the State dropped Father's criminal prosecution. Ms. Sarris testified that there had been "a history of gatekeeping," and explained the five factors that supported her opinion that alienation had occurred. Ms. Sarris recommended that Father and V. attend an intensive program such as Turning Point for Families in Austin, Texas, which is a four-day intensive reunification program that uses a 90-day no contact agreement between the preferred parent and the children. On cross-

examination, Ms. Sarris admitted that she was unaware that prior to Mother's sole custody of the children, V. had some very concerning ideations and that M. was engaging in self-harm.[6]

Dr. Christopher Kraft, Director of Clinical Services at the Sex and Gender clinic at Johns Hopkins School of Medicine, testified as an expert in the area of sexual function and deviancy, including risk for sexual abuse of children. While Dr. Kraft stated that he reviewed all documents, including police reports and CPS reports, he clarified these did not include any underlying reports from the initial investigation that yielded an "indicated" finding. He did review the CPS reports that said the allegations were "unsubstantiated[.]"Dr. Kraft examined and evaluated Father for any risk of inappropriate sexual behavior with children. Dr. Kraft concluded that there was no indication of deviancy and did not find anything of concern or a risk of danger to the children.

Father's younger sister, Ms. Sudipta Mohanty, testified that she stayed with the family beginning from March 16, 2020, to April 3, 2021, during which time Father had the children four days a week. Ms. Mohanty testified that the children "were very happy." Ms. Ishani Rey, Ms. Mohanty's daughter, also testified, explaining that she stayed with the family from mid-May to mid-August 2020, as she was an international student. Ms. Rey

[6] Mother moved to Chevy Chase, Maryland, in February 2019, and gained more access to the children. The record reveals that V. went to a crisis center on March 6, 2019, and Mother admitted on cross examination that the children began receiving intermittent psychological counseling since September 2019 for severe emotional distress and prior statements of self-harm. During Oral Argument, Father's counsel suggested that there was a causal relationship between Mother moving to Maryland and imposing a visitation schedule and the children suffering from the increased access.

stated that she did not see anything of concern between Father and the children. Father's older sister, Dr. Smita Mohanty, testified that she had known the children since their birth. Dr. Mohanty stated that she visited the children four or five times a year, and when she was not visiting, she talked to the children using video chat. Dr. Mohanty said that she had a very close relationship with the children but that later on, during the supervised visits, the children were "rude, hostile, disrespectful" and "not the children that [she] knew in 2019." Dr. Mohanty never saw anything in the children's interactions with Father that would cause her to feel concern for them.

Father's friend, Mr. Munish Sawhney testified that he had known Father since around 2018 and was very familiar with Father and the children. Mr. Sawhney stated that he had never seen anything out of the ordinary with Father and the children and that his own son, who is friends with V., had spent many nights at Father's house and was "quite happy there." His wife, Ms. Ekta Sawhney, testified that she also knew Father and the children socially and from cultural activities at the Hindu temple. She stated that she observed affection between Father and his children and in her opinion believed that he is a fit and proper person to have custody of his children.

Mr. Dinesh Tiwari, a friend of Father from the Hindu temple**,** stated that he had taught both M. and V. as part of the cultural program at the temple. He did not observe any abnormal behavior between Father and the children; he did not witness Father discipline the children; he found the children to be respectful and polite; and he did not notice any bruises on either of the children.

Father testified that he raised his children independently for five years, and they were "thriving" under his care. He explained that he had full custody of his children until July 2019, when the custody arrangement changed to Father having four nights and Mother having three nights after the July 2019 custody order. Father testified that he never tried to abduct the children and move them to India, and he only took the children to Canada because of his job. Father stated that he informed Mother he was going to Canada with the children, and she did not object to the move.

Father detailed his involvement in the children's recreational activities, social life, and care. He entered several videos and pictures into evidence from 2019 and 2020 before he was arrested, which depict Father playing with the children who appear happy. Father also showed a video, from August 24, 2019, which was about a month or so after the custody order. Although the video did not have audio, it shows Mother and Father having an argument as Mother is dropping the children off with Father, partly due to Mother closing the door on M.'s feet. Father testified that M. and Mother were arguing, and that Mother had threatened to "take [M.'s] dad to court."

Father testified that he had not seen the children outside of reunification therapy since September 2, 2020, largely due to the criminal charges that were filed against him. Father stated that when he was held in detention, "about six people" brutally beat him, and he was sent to the hospital. Father suffered from emotional injuries resulting in nightmares about the attack, but he recovered after using medication. Father testified that he was unable to see M. while she was at Embark, because the in-patient treatment facility's

administrators mistakenly believed that there was a no-contact order in place, and he had only had one reunification meeting with M. at Dr. Thornburgh's office, which occurred on April 15, 2022. Father stated he planned to take the children to intensive reunification therapy, as recommended, at a facility called Turning Point in Austin, Texas.

When asked about how he typically disciplined the children, Father testified that he first tried a time out, but if that did not work, then he took away a privilege like the iPad. He admitted that he has spanked the children, "very occasionally, maybe … a couple of times in a year." When he spanks the children, he uses his hand and spanks them either on the hand, sometimes on their backs, and sometimes on their thighs.

Mother testified that M. struggled with mental health issues and took different types of medication—one for depression, one for anxiety and panic attacks, one for focus and attention, and one for anxiety that caused M. to pull her hair out. Mother testified that M. had completed an in-patient residential program, a partial hospital program (PHP) in Cabin John, Maryland, and then an intensive outpatient program (IOP) where she received individual group therapy, art therapy, and recreational therapy. She testified that M. is diagnosed with major depressive disorder, post-traumatic stress disorder, anxiety disorder, and attention deficit disorder. At the time of the trial, M. did not have a therapist, even though Mother contacted her insurance company and forwarded a list of provider names to her counsel. According to Mother, the BIA provided one therapist's name a week before the trial.

Mother claimed that V. had dangerous ideations and M. had been self-harming prior to the initial custody order. She stated that she had observed that V. was "really scared to go inside" the reunification sessions facilitated by Dr. Thornburgh and had at times refused to attend them. She said that for about a day and a half after the sessions, V. was withdrawn, skipped meals, and tried to self-soothe by holding his dog stuffed animal. Mother also testified that Father had never given her money for the support of the children after the divorce.

Dr. Brian Meek testified that he is in a romantic relationship with Mother, assisted with her legal fees, and financially supported her. He stated that he observed "a loving . . . [and] happy relationship" between the children and Mother when he visited.

Dr. Gail Thornburgh's Deposition

Dr. Gail Thornburgh, the appointed reunification therapist, submitted her deposition to be read at the hearing because her health precluded her presence. Dr. Thornburg deposed that, during the intake session on November 16, 2022, which took place on Zoom, that V., then age 10, was "very angry" and said he wanted to kill Father. In their next meeting on December 7, 2022, which included Mother, V. stated that Father touched him inappropriately and that his aunt, Dr. Mohanty, "saw us get spanked and did nothing." Dr. Thornburgh testified that she found it unusual that V. never again mentioned the alleged

sexual abuse after this session with Mother, and when asked about it during the December 7, 2022 reunification session, V. stated that "Dad didn't touch him."[7]

Dr. Thornburgh described the December 31, 2022 meeting with V. and Dr. Mohanty. V. repeated the allegation that Dr. Mohanty stood by and watched while Father spanked him, and V. responded to Dr. Mohanty's denials by yelling and cursing. V. called Dr. Mohanty "She," and when Dr. Thornburgh asked him what his aunt's name was, he said he did not remember.

During their first reunification session with Father, according to Dr. Thornburgh, V. yelled and cursed and wanted to end the session early. While they extensively discussed the alleged physical abuse, V. did not mention anything further about sexual abuse beyond the December 7, 2022 session with Mother. The next meeting on January 25, 2023, was in-person, and V. and Father sat next to each other approximately two-and-a-half feet apart. In the meeting, V. said that Father beat him with a "belt, hangers, [and] threw things at him." Father continued to say in a "soft voice" that he did spank V. with his hand, but he never hit him with these household objects. In later sessions, V. stated that Father beat him with a hanger while they were on a trip. V. changed the details of the account from being beaten with a wooden hanger, to a plastic one, and from getting beaten in front of the car to in the hotel room. Dr. Thornburgh said that V. was "unable to recount the story and keep the details in any order."

[7] According to Dr. Thornburgh's session notes from April 13, 2022, V. stated that when he was 7 years old, "dad came into the shower … squeezed his nuts and put his finger in his butt hole."

Dr. Thornburgh observed that V. enjoyed talking about India but hid his smile with his stuffed animal dog. V. alleged the physical beatings in every session, but he was unable to repeat the stories in a consistent fashion. Dr. Thornburgh noted that V. used the phrase "whole other level" nearly every time he mentioned being spanked and reported that V. made an uncharacteristically precocious statement about Father imposing his dreams on his children. Dr. Thornburgh found it "amazing" that both children "came up with the same" accusation that she had been "paid off[.]" Dr. Thornburgh noticed other adult-like language, such as when V. stated "[y]ou're trying to guilt trip me" and when he called his father a "psychopath" and a "con artist." V. was unable to explain what those words meant, and when asked, V. responded "[d]on't get into my dictionary." Observing that both children were using the same phrases, Dr. Thornburgh opined that at a minimum there had been some kind of information sharing, but she was unable to affirmatively state whether Mother was programming the children or if V. was influenced by the authority of the teenager M.

Dr. Thornburgh testified that V. also told implausible stories, such as his insistence that Father smashed plates on his head. After Dr. Thornburgh dropped a plate on the ground and it did not shatter, V. changed his story to allege that Father had smashed the plates on M.'s head. V. also said that he witnessed things that would have been chronologically impossible, such as M. being left alone in the woods when she was a baby. When Dr. Thornburgh brought up that smashing plates on a head would cause a hospital

visit or that V. was too young to have the memory of M. being left in the woods, V. did not respond.

Father told Dr. Thornburgh about the time when Mother left the children when they were ages 2 and 4 "all of a sudden" and moved out of state. Father indicated that Mother "had very little contact with the kids" and he was happy to provide her time with the children when she did return. Mother told Dr. Thornburgh that she had left M. and V. to care for her other child, a six-year-old daughter from a previous marriage. Mother stated that before she left Connecticut, Father "ran her practice and the billing[,]" which led to Mother losing her medical license.

Dr. Thornburgh acknowledged that she had only had one session with M. because reunification work "would require [M. to do] some work with an individual therapist to lay the groundwork to be able to move forward[,]" and no such therapist was in place.

The Bench Ruling and Custody Modification Order

On June 8, 2023, the judge delivered an oral ruling in which she detailed her findings of fact in support of her determinations. The judge began by identifying material changes in the circumstances of the case since the prior custody order was issued in 2019. Then the judge turned to address those *Taylor* factors[8] that she could resolve readily under the facts

[8] The *Taylor* Court enumerated major factors that should be considered in determining whether joint custody is appropriate. The factors are:

> 1) "Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare"; 2) "Willingness of Parents to Share Custody"; 3) "Fitness of Parents"; 4) "Relationship Established Between the Child and Each Parent"; 5) "Preference of the Child"; 6) "Potential Disruption of Child's Social and

(continued)

of the case. Among other things, the judge concluded that: 1) both children have stated their preference is to live with Mother; 2) geographic proximity is not an issue because both parents live in Montgomery County, Maryland; 3) there are no issues concerning employment; 4) neither party has difficulty in being able to financially care for the welfare of the children; 5) there is no capacity for the parents to communicate; and 6) the parents are not willing to share custody. *See Taylor v. Taylor*, 306 Md. 290, 308-311 (1986).

Turning next to the relationship and fitness of the parents, the judge determined that "Mother is not a fit and proper person to have care and custody of these children." Among the reasons given for this finding, the judge pointed to Mother's failure or inability to restrain M. from acting out. The judge referred to Dr. Thornburgh's testimony that on March 18, 2023, she observed M. exiting Mother's car yelling, "what the fuck did she do?" On the other hand, the judge observed that the language that the children used in their sessions with Dr. Thornburgh was "not the language of children. They were adult phrases, adult words, and they're not kid issues." The judge explained:

> [V.] is constantly saying the father lies about the mother and painted her as a bad person. The father stole a lot of stuff. He demanded to know if the father was stalking him. . . .
>
> Father got fired from jobs and jobs. How would he know that? They moved everywhere and mom did not know. How would he know that? All information coming from Mother.

School Life"; 7) "Geographic Proximity of Parental Homes"; 8) "Demands of Parental Employment"; 9) "Age and Number of Children"; 10) "Sincerity of Parents' Request"; 11) "Financial Status of the Parents"; 12) "Impact on State or Federal Assistance"; 13) "Benefit to Parents"; and 14) "Other Factors".
Taylor v. Taylor, 306 Md. 290, 304-311 (1986).

> He says that the father is the one brainwashing him. The father wants us to live his dreams. If fun times were had, it did not take away from the bad. He says, you are not a Father figure, well what does that mean? He's asked. He had no - - he didn't know what it was.

The judge expounded that when asked what it meant that father puts all of his dreams on the children, V. "said, when things didn't go according to the plan for Father, Father would have the children do things because it was dad's dream." The judge related that she did "not believe that such a detailed level of understanding" was normal for a child V.'s age. "And he adds that Father wanted us to do all those activities because he did not get to do it. Again, a level of analysis that is not normal and the Court does not believe it came from him."

It was very troubling, the judge said, that V. established "boundaries" with friends and accused not only the members of Father's family, but also all of the doctors of "being on dad's side." The judge explained:

> [V.] is perpetually upset with Dr. Greenberg and is accusing her of recording the sessions, accusing Dr. Thornburgh of being on dad's side, and then when, in one of the sessions, Father asks [V.] if he saw any of his friends, his response, they are not my friends anymore. . . . I'm done with that family and that he has boundaries related to those people that he will not share. This is Dr. Greenberg relaying what he was saying. . . .Boundaries.
>
> What child, at age of 11, is saying, they're not my friends anymore, when there is not a scintilla of evidence that there was a fight between any of these children.

Another circumstance that the court found disconcerting was that both children used the same phrases. At one point in her ruling, the judge provided the following example:

> There was no allegation of any abuse by the aunts in this case, yet, they get thrown in. Both children are saying, [the aunt] saw us get spanked and did nothing.

> [V.] could not even remember his aunt's name. Same thing with [M.] when the Court met with her. It was completely feigned. She struggled, I don't know the name, and the Court asked her several times, was there a nickname? Under no set of facts does that make any sense, that these children, who had a very close, intimate relationship with their aunts, so close that in March of 2019, Mother was saying [M.] wants to see the aunt, I'll drop her off.
>
> It is patently not credible that they don't remember their aunt's name. And they both are - - all the time, they're saying that if Dr. Greenberg was not there, the aunt would be cursing and yelling. Exact same thing . . . Exact same words.
>
> And then when the aunt asks if [M.] ever loved her, [M.] says, yes. And then she clicks right into, but we're focusing on the future now. Those are not the words of a child.

The judge similarly found that V.'s explanation of events "makes no sense[.]" For instance, the judge doubted V.'s story that Father smashed plates on his head because there was no record of hospitalization or visible injuries. The judge observed that V.'s stories changed when Father confronted V. with contrary evidence. During a reunification session with Father and Dr. Thornburgh, V. described being beaten with a hanger on a family ski trip, but Father argued that the memory must be false because "they never went on a ski trip with just their family[,]" and if Father had beaten V. with a hanger, the other families who went with them on the trip would have noticed. One of the most heart-wrenching moments, the judge observed, was when V. tried to hide his smile when describing a trip because "he fear[ed] [someone else] would be unhappy if he had a positive moment with [his] father."

The judge found that the allegations of sexual abuse by the children included phrases taught to them by their mother**.** She observed that many of the children's stories were "incredulous, inconsistent, there was no detail, no timeframe . . . and there was a robotic

repeat of everything." The judge cited numerous improbabilities that undermined the credibility of the children's allegations of physical and sexual abuse. The judge noted that [V.] only made one reference to any sexual abuse and the beginning of his sessions with Dr. Thornburgh, and none thereafter during the next 13 sessions. The judge was skeptical of M.'s explanation for why she sustained no marks on her body, which was that "her skin just got darker instead of there being a scar." The judge also found that the stories M. told, such as Mother being "pregnant 26 times" and Father "dislocat[ing] Mother's jaw[,]" were not credible. M., the judge observed, was "assertive, very ,very and this is a strange thing . . . she wanted to come in here and testify in court. She offered at the - - she said, I want to go there. She was happy to talk about these issues." At the conclusion of M.s interview, the judge noted:

> [M.] completely feigned what she thought it would look like if you were upset of [sic] terrified to be with a dangerous man, her Father. There was nothing about her affect that even remotely seemed credible . . . She was happy to be here to say all of these things. And it's that similar smiling aggression that Dr. Thornburgh notes in her records all the time about M.

Returning to Mother's behavior, the judge reviewed the efforts by Mother to keep court orders permitting Father to have contact and access to information about M. from the Embark program, and chronicled Mother's more recent failure to set up any therapy sessions for M. The judge also addressed Mother's fabrication of charges against Father:

> Mom told the detective in the criminal case that was filed that the father had been dismissed from the NEA by—because of an assault charge; a sexual assault charge. I absolutely do not credit that testimony. I believe she said it, all with the goal to keep him locked up. I credit Father's testimony, there was not a single piece of documentary evidence in support of that statement, none. . . that's information readily available, not offered.

> Mom also told the police that . . . father himself was sexually abused by a babysitter when he was a minor child. Isn't that convenient.
>
> Mother is a psychiatrist. Many people know that you perpetuate your abuse, and so what a convenient lie. I observed the [F]ather when he was testifying about that, he said, absolutely not.

In the judge's view, the most telling "indication of Mother's true motive" was "her natural instinctive response" to a question posed by her attorney on direct examination, "why don't you trust [Father]?". Instead of discussing the alleged abuse of the children, Mother "flared up" and described how Father "withdr[ew] [her] IRA accounts, emptied [her] accounts, called Fidelity posing [as her] . . . and [took out] two credit cards in [her] account for $35,000[.]" The judge noted that Mother did not even mention her children in her response and stated that her motive was "[a]ll money. . . and anger about [the] divorce and the monies he stole."

The judge expressed that she had "few concerns about the fitness of [] Father, that he . . . posed or poses, any danger of harm to the children." The judge credited the testimony of Dr. Kraft who had "conducted a psychosexual examination of Father and opined that Father did not pose a danger or risk of committing sexual abuse against the children." The judge acknowledged, however, that Father "is far from perfect." The judge criticized Father for taking the August 2019 video that showed him and Mother arguing in the lobby of Father's home. She found Father's decision to film the fight in front of the children demonstrated "exceedingly bad judgment, but that's normal bad judgment." By contrast, the judge found that Mother's creation of the two and a half years of estrangement between Father and the children was "the worst that you could ever get in terms of completely

damaging these children." Thus, Mother was "an immediate, persistent danger to these children."

Based upon these findings, the judge granted Father sole legal and physical custody of M. and V. She ordered Father to identify an individual therapist for M. and continue reunification therapy in consultation with mental healthcare specialists with both children. Father must have an adult third party of his choosing at his home at all times until the reunification therapist is able to certify that substantial progress has been made with reunification.

The judge granted Mother supervised visitation with the children every other Saturday or Sunday from 12:00 p.m. to 5:00 p.m., on Mother's Day from 12:00 p.m. to 5:00 p.m., and on the children's birthdays from 5:00 p.m. to 8:00 p.m. The judge prohibited Mother from attempting to contact or approaching the children, including at their school, at any time other than during the supervised visitation. She ruled that Mother's visitation:

> may be suspended by Father upon written confirmation and notification to both parties from a mental health specialist that a recommended reunification program requirement is that Mother, who has been determined by the Court to be the alienating parent, should not have access to the children for a fixed period of time.
> This suspended access for Mother may not exceed 90 days.

Further, the judge ruled that "upon the reunification therapist's written opinion to the parties that substantial progress has been achieved between Father and children[,]" Mother may have increased supervised access with the children.

Utilizing the Child Support Guidelines,[9] the judge ordered Mother to pay Father $1,500 per month in child support. She further found that Mother "did not have substantial justification for bringing these proceedings," and ordered Mother to pay Father's attorneys' fees in the amount of $80,000. Finally, the judge found that awarding any amount of child support arrears would produce an inequitable result and denied the request. The judge followed her bench ruling with a written order on June 8, 2023.

Mother filed this timely appeal on June 16, 2023.

DISCUSSION

I.

Custody Modification

A. Parties' Contentions

Mother contends that the circuit court failed to give due consideration for the best interests of the children by limiting her access to them "to just a few hours of supervised visitation every other week,[ ] plus time . . . on their birthdays and on Mother's Day." Mother asserts that the court's modification order "isolates the children" from her, akin to "a termination of [her] parental rights." Mother relies on *North v. North*, emphasizing two central precepts: 1) the paramount importance of the child's best interests; and 2) a parent's "natural and legal right" to access the child at reasonable times (quoting *North v. North*,

[9] Maryland Code (1984, 2019 Repl. Vol., 2023 Supp.), Family Law Article ("FL"), §§ 12-201 through 12-204.

102 Md. App. 1, 12 (1994) (in banc)). Additionally, she claims that the "abrupt and extreme change" in custody caused "immediate and traumatic upheaval" in the children's lives. According to Mother, the modification order did not provide the children with an opportunity to emotionally or logistically prepare for the sudden change, and the court did not consult the children's therapists to assess the impact on their mental health.

Mother contends that we cannot determine if the restrictions placed on her access to the children had any reasonable relationship to the court's objective because the trial court was "silent on the objectives it hoped to achieve[.]" Beyond having reasonable access to the children, the court must ensure that the limitations placed on visitation are reasonable. Quoting *Boswell v. Boswell*, 352 Md. 204, 220 (1998), Mother argues that "[v]isitation rights, however, are not to be denied even to an errant parent unless the best interests of the child would be endangered by such contact." She highlights the absence of an explanation from the trial court on how she poses a danger to the children justifying such limited access. In effect, the modification order grants Father "full control over the supervised visits," which Mother argues is unreasonable and punitive under the principles espoused in *North*, 102 Md. App. at 14-15 (requiring that limitations on visitation must have a "reasonable relationship to [the court's] announced objective.").

Father counters that the court based the custody modification on the court's consideration of the children's best interests, taking into account the "harm Mother inflicted on her children[.]" Father cites to *Boswell,* 352 Md. at 219, for the precept that, although parents have a fundamental liberty interest to raise their children, "the best

interests of the child may take precedence." Here, the trial court granted the children access with Mother while "protecting them from the harm she's inflicted[.]" According to Father, Mother's flawed argument "overlooks the trial court's well-supported findings of the Mother's abhorrent behavior which, in summary, was to manipulate M. and V. to make false allegation of abuse by their [F]ather, to have them maintain the scheme of fraudulent abuse allegations, to preclude them from having any interaction with Father for over two years, to isolate the children from their friends . . . [and] their parental relatives." Father contends that it is within the trial court's discretion to determine what limitations on Mother's access to the children are reasonable. Father avers that the court's determination that "Mother is unfit and an immediate and persistent danger" to the children due to Mother's "manipulat[ion]" and "alienation" is substantially supported in the findings of fact, justifying the limitation on Mother's access and the award of sole custody to Father.

Father dismisses as hyperbole Mother's contention that the restrictions imposed on her visitation rights are tantamount to a termination of her parental rights. Father quotes from *In re Adoption/ Guardianship of Rashawn H.,* 402 Md. 477, 498-99 (2007), explaining that "[t]he deficiencies that may properly lead to a finding of unfitness or exceptional circumstances in a custody case will not necessarily suffice to justify a TPR judgment. For one thing, those deficiencies may be temporary and correctable — sufficiently severe to warrant denying custody or visitation at a particular point in time[.]" Therefore, Father posits that the trial court's finding that the children would derive some benefit from their relationship with Mother does not contradict the court's finding that

Mother is an immediate danger to them; rather, "the trial court's finding reflects the complexity of custody cases." *Id.* Finally, Father contends the court did consider the children's best interests in beginning Father's primary residential custody immediately, with the caveat that his access would be in the presence of a trusted third party until the children have fully transitioned to living with Father again.

B. Legal Framework

We review child custody modifications by utilizing three interrelated standards of review. The Supreme Court of Maryland delineated the criteria as follows:

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

In re Yve S., 373 Md. 551, 586 (2003) (third and fourth alterations in original) (emphasis removed) (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1977)).

We accord great deference to the trial court, as it is "in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id.* at 586. When reviewing the circuit court's findings of fact, we apply the clearly erroneous standard, and we will only disturb the decision if there has been a clear abuse of discretion. *Id.* We recognize that "it is within the sound discretion of [the circuit court judge] to award custody

according to the exigencies of each case," and we may only interfere "on a clear showing of abuse of discretion." *Id.* at 585-86.

In reviewing a request to modify custody, the trial court first assesses whether "there has been a material change in circumstances[,]"and then turns to consider the best interests of the child. *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012) (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)). The burden lies with the moving party to show 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." *Sigurdsson*, 180 Md. App. at 344 (citations omitted). If no material change is demonstrated, the court's inquiry stops. *Braun v. Headley*, 131 Md. App. 588, 610 (2000).

In *McCready v. McCready*, Judge John F. McAuliffe, writing for the Maryland Supreme Court, expounded on what a material changes of circumstances entails:

> 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 that instance, appellant would be correct in stating that the absence of a showing of a change in circumstances ordinarily is dispositive, and that the chancellor does not weigh the various factors to determine the best interest of the child.
>
> 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. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

323 Md. 476, 482 (1991).

Once a material change is established, the court proceeds to consider the best interests of the child "as if it were an original custody proceeding." *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). Factors articulated in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977) and later in *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986) guide the trial court's determination, and our analysis on appeal, of what is in the best interests of the child[ren].[10]

The trial court is not limited by the enumerated factors but is vested with "wide discretion" in determining what is in the best interests of the child. *Azivova v. Suleymanov*,

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[10] The *Taylor* Court enumerated major factors that should be considered in determining whether joint custody is appropriate. The factors are:

> 1) "Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare"; 2) "Willingness of Parents to Share Custody"; 3) "Fitness of Parents"; 4) "Relationship Established Between the Child and Each Parent"; 5) "Preference of the Child"; 6) "Potential Disruption of Child's Social and School Life"; 7) "Geographic Proximity of Parental Homes"; 8) "Demands of Parental Employment"; 9) "Age and Number of Children"; 10) "Sincerity of Parents' Request"; 11) "Financial Status of the Parents"; 12) "Impact on State or Federal Assistance"; 13) "Benefit to Parents"; and 14) "Other Factors".

Taylor v. Taylor, 306 Md. 290, 304-311 (1986) (emphasis omitted).

> In *Sanders*, this Court listed ten non-exclusive factors, including: 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.

Montgomery County Department of Social Services et al. v. Rebecca Sanders, 38 Md. App. 406, 420 (1977) (citation omitted).

243 Md. App. 340, 345 (2019) (citation omitted). When considering the *Sanders-Taylor* factors, the court must consider a multitude of factors and assess the situation under the "totality of the situation[.]" *Jose v. Jose*, 237 Md. App. 588, 600 (2018) (quoting *Best v. Best*, 93 Md. App. 644, 656 (1992)); *see also Taylor*, 306 Md. at 303 (holding that no single factor holds "talismanic qualities, and [] no single list of criteria will satisfy the demands of every case").

Decisions concerning visitation "are within the sound discretion of the trial court" and are only subject to review if there "has been a clear abuse of discretion." *In re Billy W.*, 387 Md. 405, 447 (2005). The non-custodial parent is typically granted "liberal visitation" rights under "reasonable conditions[.]" *Boswell*, 352 Md. at 220-21 (quoting *Myers v. Butler*, 10 Md. App. 315, 317 (1970)). However, when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child. *Radford v. Matczuk*, 223 Md. 483, 488 (1960).

C. Analysis

We observe that Mother's reliance on *North v. North*, 102 Md. App. 1 (1994) (in banc), is misplaced. Contrary to Mother's argument relying on *North*, which involved a denial of overnight visitation based on concerns unrelated to parental fitness, this case presents different circumstances. In *North*, we determined that the circuit court's "denial of overnight and extended visitation was not based on any findings of unfitness[,]" but was solely based on shielding his children from exposure to the father's "homosexual lifestyle[.]" *Id.* at 12 (1994). We held this concern to be no fit basis to deny overnight

visitation, because "Mr. North was [no] more likely to expose the children to 'events or functions' espousing a homosexual lifestyle on Friday or Saturday evening than during the afternoon." *Id.* at 16. Our decision underscored that denying visitation based solely on shielding children from a parent's lifestyle was not justified. However, the court's decision did not grant an unconditional entitlement to visitation but emphasized that reasonable restrictions could be imposed. As such, *North* supplies us no reason to modify our analysis in this case.

It is well established that "[w]hen the custody of children is the question, 'the best interest[s] of the children is the paramount fact. Rights of father and mother sink into insignificance before that." *A.A. v. Ab.D.*, 246 Md. App. 418, 441 (2020) (quoting *Kartman v. Kartman*, 163 Md. 19, 22 (1932)). The record in this case is replete with evidence that the court hewed to this principle. Preliminarily, and as previously noted, the trial judge delivered an extensive ruling in which she engaged in extensive fact-finding under each of the applicable *Sanders-Taylor* factors. The court's best interests' analysis followed a multi-day hearing during which eleven witnesses testified. Moreover, to ensure that the children's best interests were in the forefront of the judge's considerations, the judge interviewed both M. and V. separately, *in camera*.

The judge discussed, in detail, her reasons for awarding primary physical custody of M. and V. to Father and explained why she was limiting Mother's access to supervised visitation. Initially, we highlight that, following the decision of the State's Attorney to enter a *nolle prosequi* on all criminal charges against Father and the decision by Child

Protective Services to modify its initial finding of abuse from indicated to unsubstantiated, the trial judge made an independent finding that she had "few concerns about the fitness of [] Father, that he . . . posed or poses, any danger of harm to the children." The judge explained that she also credited the testimony of Dr. Kraft who had "conducted a psychosexual examination of Father and opined that Father did not pose a danger or risk of committing sexual abuse against the children."[11]

Conversely, the trial judge determined that Mother "was not a fit and proper person to have custody[,]" due to numerous findings, which included her determinations that Mother fabricated charges against Father, and that the children's allegations of sexual abuse by Father included phrases taught to them by their Mother**.** The judge's ruling is

[11] Although neither party raises any issues on appeal under Section 9-101 of Family Law Article, we observe that the statute requires that where a court has "reasonable grounds" to believe that a child has been abused or neglected, the court must evaluate the likelihood of abuse or neglect to reoccur. FL § 9-101(a). Specifically, the statute commands as follows:

> **Determine if abuse or neglect is likely**
>
> (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.
>
> **Deny custody or visitation if abuse likely**
>
> (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.

FL § 9-101 (emphasis added).

awash with concern over the children's behavior and mental states, chronicling the many "incredulous, inconsistent, … nonsensical, and … robotic" statements made by them. The judge pointed to Dr. Thiel's testimony and Dr. Thornburgh's deposition admitted into evidence. Both of the mental health professionals observed adult-like language and recitations of stories that were not credible.

The judge noted that the children's deteriorating mental states correlated to their increased time with Mother, beginning in 2019, and pointed out Mother's efforts to prevent Father from having access to them. The judge found Mother's behavior in estranging the children from Father for "[t]wo and a half years" by making false allegations of abuse was "the worst that you could ever get in terms of completely damaging these children." Accordingly, given that the trial judge deemed Mother "an immediate, persistent danger[,]" we conclude that the judge was acting decisively in the children's best interests to prevent further harm. We hold that the judge did not abuse her discretion in awarding Father primary legal and physical custody and allowing, at least initially, only supervised visitation with Mother. However, as we explain in section III of our discussion, our concern is with the judge's delegation to a non-judicial officer—without oversight by the court—the authority to decide whether and when Mother's access to the children may be revoked or expanded.

II.

Appointment of Custody Evaluator

A. Background

On January 20, 2022, Mother filed a "Motion for Custody Evaluation", requesting the appointment of a court-appointed custody evaluator. The motion stated that a custody evaluator would be able to review pertinent records related to the children, conduct observations, and provide custody recommendations. The BIA opposed Mother's motion, initially expressing surprise at the timing, deeming it "very unusual" to request a Custody Evaluation so late in the proceedings just before the Merits Hearing. Also, the BIA pointed out that Mother had not responded to the request to mutually select a neutral therapist to assist with any possible supervised or unsupervised access or reunification issues.

The BIA highlighted that, despite her twelve-month appointment, Mother had not sought a custody evaluation until the BIA filed a "Statement of Non-Waiver of Privilege." This statement informed the parties of the BIA's objection to the children being called as witnesses at the trial. The BIA argued that appointing a custody evaluator would duplicate her own efforts. She explained that she had already interviewed mental health professionals and "reviewed voluminous mental health and other medical records," informing her decision not to waive the children's mental health privilege.[12] She had

[12] Mother issued a *subpoena duces tecum* and notice of deposition to the designee of the Montgomery County Child Welfare Services ("CPS") and to the designee of Shady Grove Adventist Hospital ("Shady Grove"). The circuit court quashed both motions on account of the privileged information that was requested. Mother again attempted to gain records relating to the children's mental health and filed a *subpoena duces tecum*, which was served on Dr. Lisa A. Lenhart on March 14, 2023. On April 14, 2023, the BIA filed a (continued)

essentially performed the same role as the custody evaluator and appointing one would "essentially start this case all over again," which, in her opinion, was not in the best interests of the children.

In his opposition, Father argued that Mother's "eleventh-hour Motion" was a delay tactic to prevent the children from being with him.

Ultimately, the motions court denied Mother's Motion for Custody Evaluation. The motions judge disagreed with Mother's counsel that there was "no evidence" and explained that "the privilege itself, it doesn't really shut off much except not having [the] children's innermost thoughts, that are expressed in a therapeutic setting, [] spread throughout the courtroom to be subject to direct and cross and redirect and recross[.]" The judge asserted: "[m]y concern is, what is a custody evaluation going to tell us?" The court recounted all of the interviews that the children had already been subject to during the criminal investigation, and asked "what's the benefit to another interview, when [the children are] in therapy, they're already going to be having reunification therapy with Gail Thornburgh . . . and that information is going to be relevant to the Court as well?" The judge also pointed out that the BIA was handling the privilege issue very well, and was interviewing "whoever anybody's asked her to interview." The judge concluded that she did not "hear[] anything that tells me that there is a benefit to these children and to this family for yet another investigation to be conducted" and noted that "it is not the court's function to assign

Motion for a Protective Order, again asserting the non-waiver of privilege related to the children's medical and mental health records.

custody evaluations to be conducted to help counsel determine what evidence they're going to have to present."

B. Parties' Contentions

Mother contends that due to the motion court's pre-trial denial of her Motion for Custody Evaluation, the trial court lacked essential facts for ruling in the children's best interests. Mother asserts that the BIA's "non-waiver of privilege" for reports about the children's mental health treatment prevented Mother from obtaining information about her children's mental or physical health.[13] She states that her attempts to obtain this information through *subpoenas duces tecum* were consistently denied by court orders, leaving her without vital information concerning the children's allegations of physical and sexual abuse, and leaving her with no option other than to move for an independent custody evaluation.[14] Mother disputes the BIA's contention before the motions court that assigning a custody evaluator would be duplicative, emphasizing the "vastly different role[s] and purpose[s]" of a custody evaluator compared to the BIA. She asserts that the court's denial

[13] The BIA did make a partial waiver in regard to V.'s current therapist, Dr. Thiel, but denied all other current or prior statements from therapists.

[14] Mother issued a *subpoena duces tecum* and notice of deposition to Montgomery County Child Welfare Services ("CPS"), seeking documents and information regarding the children's allegations of abuse. She also issued a *subpoena duces tecum* and notice of deposition to Shady Grove Adventist Hospital ("Shady Grove"), seeking the children's forensic records and information regarding the alleged abuse. Mother notes that CPS downgraded the findings in their reports from "indicated" to "unsubstantiated." Unsubstantiated, according to the Code, means "a finding that there is an insufficient amount of evidence to support a finding of indicated or ruled out." FL § 5-701(aa).

of her Motion for Custody Evaluation amounted to an abuse of discretion[15] and "effectively deprived Mom and the trial court of critical evidence" regarding the children's mental health and their allegations of abuse. Mother points out that "[t]here was no evidence or testimony from any neutral mental health professional[s]" who could properly make recommendations regarding custody and access. For example, she maintains that Dr. Thiel, who was engaged to treat V., did not "opine on whether. . . the alleged abuse occurred" and Dr. Kraft made his determination that Father was not a risk to sexually abuse the children based on "information provided by Dad or Dad's agent." Mother also claims that Dr. Thornburgh, whose role was to reunify the children with Father, did not make recommendations in regard to custody, and Michele Sarris, who was retained by Father as an expert witness, admitted that she was "unable to assess custody and access . . . because she did not . . . meet with the children or Mom." Mother adds that only a custody evaluator would have the specialized training to interview the children, and that the trial judge, who admitted she was "not a physician," lacked the expertise to determine that the children did not demonstrate "a shred of fear or child-like innocence." (internal citations omitted).

In response, Father argues that the motions court properly considered the children's best interests when it denied Mother's Motion for Custody Evaluation. He states that the motions judge was justified in her concern that a custody evaluation would have forced the

[15] We note that, despite Mother's representation at the outset of her brief that she is only challenging errors of law in this appeal, her question presented and her arguments challenging the court's denial of her motion refer to the court's "abuse of discretion."

children to be interviewed "yet again as they had already been interviewed extensively many times by a slew of professionals for the criminal case[.]" Father questions Mother's "stated purpose" for engaging a custody evaluator, asserting it was merely to uncover information "advantageous to Mother's counsel[,.]"

Father finds it "outrageous" that Mother questions the ability of the trial judge who conducted the merits hearing to determine the children's credibility now on appeal, pointing out that she raised no "concerns with [the judge's] educational and professional background" when *she* initially asked the trial judge to conduct the *in camera* interviews. Father also notes that the trial court's finding that the children's testimony was not credible was consistent with the observations made by the children's therapists.

Finally, Father contends that Mother had sufficient evidence to bring to the custody modification trial and that her motion amounted to a "fishing expedition to salvage her troubled case." He asserts that the BIA's decision to maintain privilege did not "shut off much except not having [the] children's inner most thoughts, that are expressed in a therapeutic setting, not spread throughout the courtroom[.]" Thus, Father argues that the motions court acted in the children's best interests and did not abuse its discretion when declining to appoint a custody evaluator.

C. Legal Framework

An abuse of discretion occurs only when the custody award is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 686

(2014) (quoting *North v. North*, 102 Md. App. 1, 14 (1994) (in banc)). However, "before we look through that lens in a child custody case, we must be satisfied that the court has applied the best interests of the child standard in its determination." *A.A. v. Ab.D.*, 246 Md. App. 418, 441 (2020). As we already explained above, the best interest standard "is firmly entrenched in Maryland and is deemed to be of transcendent importance." *Ross v. Hoffman*, 280 Md. 172, 174-75 (1977) (footnote omitted).

Maryland Rule 9-205.3 governs custody and visitation-related assessments and defines a "[c]ustody evaluator" as "an individual appointed or approved by the court to perform a custody evaluation." Md. Rule 9-205.3(b)(4). To conduct a custody evaluation the custody evaluator undertakes a comprehensive "study and analysis of the needs and development of a child" and of the parties' parenting capacities. Md. Rule 9-205.3(b)(3). Under the Rule, the court "*may* appoint or approve any person deemed competent by the court to perform a home study." Md. Rule 9-205.3(c)(2) (emphasis added). The parties, by agreement, may request the court to enter a consent order approving the parties' agreement and selection of a custody evaluator. Md. Rule 9-205.3(e)(2)(A). The court, at that point, "*shall* enter the order if . . . the court finds that the custody evaluator has the qualifications. . . and that the agreement contains the relevant information[.]" *Id.* (emphasis added). In the absence of a selection by the mutual consent of the parties, the court may use its discretion to appoint a custody evaluator. Md. Rule 9-205.3(e)(2)(B). However, a custody evaluation is not mandatory and denial of a motion to appoint a custody evaluator is not a *per se* abuse of discretion. *See Powers v. Hadden*, 30 Md. App. 577, 587-88 (1976)

(affirming a custody award in the absence of an investigative report where "testimony was abundant and visual evidence was also introduced" to establish a sufficient record for the court's decision).

Our courts have recognized that, under certain circumstances, an investigation is warranted to enable the court to determine the best interests of the child. *See, e.g. Shanbarker v. Dalton*, 251 Md. 252, 257, 259 (1968) (citing a then-prevalent "strong presumption" that a parent who has committed adultery "is not a fit and proper person to have custody[,]" which "may be overcome by a strong showing of facts and circumstances" to the contrary, and holding that the custody determination should have been deferred until the court was in receipt of investigations and reports of qualified agencies) (citations omitted); *Ouellette v. Ouellette*, 246 Md. 604, 608 (1967) ("We think that the determination of [parental fitness], due to the ages of the children, should have been deferred until after a qualified agency had made an investigation for the chancellor as to what would be in the best interest of the children[.]"); *Jester v. Jester*, 246 Md. 162, 170-71 (1967) (holding that where "there is nothing in the record which would contradict appellant's fitness as custodian of the child" and "witnesses testified that the child was generally well cared for by appellant[,]" there was insufficient evidence to award custody to appellee without an investigative report).

Regarding the disclosure of the children's mental health information, we have long recognized that communications between psychiatrists, psychologists, mental health specialists, and licensed social workers are privileged. Maryland Code (1973, 2020 Repl.

Vol.), Courts and Judicial Proceedings Article ("CJP") § 9-109. The statute provides, in pertinent part:

> Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing:
>
> (1) Communications relating to diagnosis or treatment of the patient; or
>
> (2) Any information that by its nature would show the existence of a medical record of the diagnosis or treatment.

CJP § 9-109(b). Further, the Supreme Court of Maryland has held that "when a minor is too young to personally exercise the privilege of nondisclosure, the court must appoint a guardian to act, guided by what is in the best interests of the child." *Nagle v. Hooks*, 296 Md. 123, 128 (1983). Where a patient—or, as here, a best interest attorney acting on a minor's behalf—asserts the patient-therapist privilege, "[d]ocuments claimed to be privileged remain presumptively privileged even from *in camera* inspection." *Balt. City Police Dep't v. State*, 158 Md. App. 274, 288 (2004) (quotation marks and citation omitted). *See also Reynolds v. State*, 98 Md. App. 348, 366 (1993) ("Records containing information about communications between the patient and the psychiatrist or psychologist are presumptively privileged."); *Kovacs v. Kovacs*, 98 Md. App. 289, 308 (1993) (stating that a child's patient-psychologist privilege "cannot be waived during a custody hearing, even when the parents agree, unless the chancellor appoints a guardian to make that decision."). Accordingly, "[t]he burden is on the party seeking production to make a preliminary showing that the communications or documents may not be privileged[.]" *Reynolds*, 98 Md. App. at 365 (quoting *Hamilton v. Verdow*, 287 Md. 544, 566 (1980)).

Analysis

We hold that the motions court did not abuse its discretion by denying Mother's Motion for Custody Evaluation and in upholding the BIA's assertion of privilege over certain communications between the children and mental health professionals. The court's decisions align with the children's best interests, reflecting a similar approach taken in *C.M. v. J.M.*, where we determined that minimizing further trauma to the children justified the court's chosen method of questioning. 258 Md.App. 40, 66-66 (2023) (holding that there was "no abuse of discretion by the trial court in deciding to question the children in the manner it did to minimize any further trauma to the children"); *see also, Marshall v. Stefanides*, 17 Md. App. 364, 369 (1973) ("We recognize that a child . . . could be subject to severe psychological trauma because of a custody case. We are confronted, therefore, with an attempt to balance the right of the parents to present evidence . . . against possible severe psychological damage to the child.").

As was the case in *Powers v. Hadden*, there were sufficient facts on the record for the judge to make a custody evaluation without a third-party custody evaluator. 30 Md. App. 577, 587 (1976). Here, the BIA had reviewed volumes of records and interviewed everyone the parties requested she interview. The motions court appropriately upheld the privilege asserted by the BIA over the children's mental health documents, as these materials are presumptively privileged and can be waived unless the BIA determines it is in the children's best interests. CJP § 9-109(b). Moreover, as the motions court observed, "the privilege itself, it doesn't really shut off much except not having [the] children's

innermost thoughts, that are expressed in a therapeutic setting, [] spread throughout the courtroom[.]"

In light of the multiple investigations and interviews that had already been conducted in the history of the underlying case, and keeping the children's best interests front and center, the motions court appropriately trained her inquiry on whether it was necessary to force the children to be subject to further interviews in another investigation. The appointment of a custody evaluator, *vel non*, is within the court's discretion. *Karinikas*, 209 Md. App. at 590. We discern no abuse of discretion by the motions court in denying Mother's Motion for Custody Evaluation and observe that there was more than sufficient evidence before the trial court to make the necessary determinations under the *Taylor-Sanders* factors to modify custody in accordance with children's best interests.

III.

Delegation of Decision-Making to a Non-Judicial Officer

A. Parties' Contentions

Mother contends that the custody modification order is unlawful as it delegates custodial decision-making authority to a non-judicial officer by authorizing Father to suspend Mother's supervised custody for up to 90 days upon recommendation by a mental-health specialist who deems it necessary for reunification. The modification order also grants the reunification therapist the ability to increase Mother's access to the children if she determines that there has been substantial progress in reunification between Father and the children.

Mother cites three cases to support her argument that custody modifications cannot be overseen solely by non-judicial officers: *Shapiro v. Shapiro*, 54 Md. App. 477 (1983); *In re Mark M.*, 365 Md. 687 (2001); and *Meyr v. Meyr*, 195 Md. App. 524 (2010). Mother argues that by delegating the authority to the reunification therapist, the custody modifications "will never be subject to judicial review." Furthermore, Mother argues that the order gives Father "the sole and absolute discretion" to select the reunification therapist, and the reunification therapist's purpose is to reunify the children with Father.

Father, in return, says Mother's reliance on *Shapiro* is misplaced because in *Shapiro*, the visitation order that the Court reversed had denied Father all access for an indefinite period of time, while in the present case, Mother has supervised access that can only be suspended. (*Citing Shapiro* at 483). Father agrees with Mother that our decision in *Meyr,* is "instructive in determining the issues in this matter." There we held that the order permitting the BIA to coordinate the children's reunification therapy for "as long as she deems said therapy is needed" was not an improper delegation of judicial decision-making authority. *Meyr,* 195 Md. App. at 547-549. Father argues that here, as in *Meyr*, the circuit court resolved the primary issues of custody and visitation, and that scheduling issues—which, according to Father, include suspending visitation for 90 days—are ancillary to the "primary issues of custody and visitation." Father notes that Mother, like the father in *Meyr*, is free to petition the court to modify or terminate the therapy "should circumstances warrant."

B. Legal Framework

Whether a trial court has made an improper delegation of authority is a question of law that we review without deference. *In re Mark M.*, 365 Md. 687, 704-05 (2001); *Meyr*, 195 Md. App. at 546. The jurisdiction of equity courts to determine custody and visitation is codified in statute. FL § 1-201(b)(5). "Child custody and visitation decisions are among the most serious and complex decisions a court must make, with grave implications for all parties." *Conover v. Conover*, 450 Md. 51, 54 (2016). Accordingly, our case law has "made clear that a court may not delegate to a non-judicial person decisions regarding child visitation and custody." *Van Schaik v. Van Schaik*, 200 Md. App. 126, 134 (2011) (citation omitted); *In re Mark M.*, 365 Md. at 704 (holding, in a CINA proceeding, that a court "may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person") (citation omitted); *In re Justin D.*, 357 Md. 431, 447 (2000) (noting that jurisdiction over visitation resides with the equity courts.)

The juvenile court, in *In re Justin D.*, delegated decision-making authority to the Department of Social Services ("DSS") over visitation between the children and their mothers in two consolidated cases. 357 Md. at 434. In Justin's case, the extant court order leading into a review hearing provided, in relevant part, that Justin's visitation with his parents was to be supervised, with no overnight visitation, and that "[v]isitation with the parents was to be 'under the direction' of DSS and" Justin's half-sister. *Id.* at 438-39. At the review hearing, Mother contended that the juvenile court needed to decide whether and when there would be overnight visitation and that the court could not delegate that decision to DSS. *Id.* at 439. The juvenile court advised Mother that she should first attempt to

resolve any dispute about visitation with DSS and Justin's attorney, and entered another order leaving visitation with Mother, as before, under the direction of DSS. *Id.*

Before the Supreme Court of Maryland, Justin's Mother challenged the juvenile court's order as a "complete denial of visitation, except as determined by DSS" and, she argued, that it amounted to "an unlawful delegation of judicial authority, not only to an executive agency, but to a party in the case." *Id.* at 443. The Supreme Court of Maryland agreed. *Id.* at 449. The Court acknowledged that, "absent some express provision in the order to the contrary," the parties may depart from the court's ordained visitation schedule, if mutually convenient to do so, without seeking modification of the order. *Id.* at 448. And, even recognizing the heightened oversight responsibility of the juvenile court in a CINA case, the Court observed that, "it is not inappropriate for the court to permit DSS, with the concurrence of the parent, to determine whether *additional* visitation or *less* restrictive conditions on visitation are in order." *Id.* at 449-50. Still, the Court underscored that the juvenile court "may not delegate its responsibility to determine the minimal level of appropriate contact between the child and his or her parent or other guardian[.]" *Id.* at 449 (citation omitted). *See also In re Mark M.*, 365 Md. at 708 (holding that "the juvenile court's denial of visitation was a proper exercise of its discretion" but its declaration that "visitation will not occur until his therapist recommends it" was "an improper delegation of its specific statutory obligation to make the requisite finding prior to granting visitation.") (citations omitted).

An older opinion from this Court, *Shapiro v. Shapiro*, is equally instructive. 54 Md. App. 477 (1983). In *Shapiro*, the juvenile court's judgment provided that the child's mother would have full custody of the child, while the father would have no right of visitation until the psychiatrist recommended that the visitations should commence. *Id.* at 479. The psychiatrist was also authorized to determine the terms and guidelines of the visitation. *Id*. We held that "a denial of visitation until such visitation is recommended by the child's physician . . . constitute[d] an improper delegation of judicial responsibility[.]" *Id.* at 484 (citations omitted). While a judge may base her decision regarding custody or visitation on the opinions of experts, the "ultimate decision must be that of the chancellor, not the expert." *Id*. We instructed that equity courts have jurisdiction over custody and visitation and that "[t]here is no authority for the delegation of *any portion* of such jurisdiction to someone outside the court." *Id.* at 484 (emphasis added).

We distinguished between a court's delegation to a third party of authority to oversee family therapy, "a matter ancillary to child custody," versus the authority to make a custody determination in *Meyr v. Meyr*, 195 Md. App. 524, 548 (2010). Mr. and Mrs. Meyr, the parents of two children, were granted a limited divorce and were ordered to undergo family reunification therapy "for as long as [the Best Interest Attorney] deems . . . therapy [was] needed by the family." *Id.* at 541. On appeal, Father contended that "the trial court exceeded its authority when it delegated to the best interest attorney the decision of how long family reunification therapy is to continue." *Id.* at 545. Ms. Meyr argued that the court did not delegate authority to "determine either when visitation would occur or

resume or how long therapy would continue[,]" but rather, the court delegated authority to the BIA "to coordinate the therapy already in place[.]" *Id.* at 546. We held that the order was not an improper delegation of judicial authority because the primary issues relating to custody and visitation were already resolved. The scheduling and coordination of family therapy was "a matter ancillary" to the primary issues of custody and visitation. *Id.* at 549.

C. Analysis

We hold that the custody modification order's delegation to Father and a mental health care specialist, without judicial oversight, of the power to decide the contours of Mother's visitation and access to her children, including whether and when visitation may be increased or suspended entirely for ninety days at a time, was an improper delegation of judicial authority.

The court's modification order limits Mother's access to her children under a restrictive supervised visitation schedule while Father and the children are undergoing reunification therapy. We have already discussed why the court was within its authority to do this under the facts and circumstances of this case. However, the court erred when it provided in the modification order that:

> Mother's supervised access, pursuant to this interim order, may be suspended by the father upon written confirmation and notification to both parties from a mental health specialist that a recommended reunification program requirement is that Mother, who has been determined by the Court to be the alienating parent, should not have access to the children for a fixed period of time.

We note that the provision that any suspended access for Mother may not exceed 90 days does not rectify the problem. The authority to totally suspend a parent's visitation

rights is consigned to the equity court, although that decision may certainly be made by the court at the request of a party upon a recommendation of a mental health specialist. Moreover, although the modification order does contain the terms and details of a "regular schedule" for Mother's access to the children, Mother's access rights thereunder are subject to "the reunification therapist's written confirmation to the parties that substantial progress has been achieved between Father and children." In *Mark M.*, we held that it "is the province of the court, not the province of the therapist, to determine when or whether visitation is appropriate" and, therefore, "[v]esting the therapist . . . with complete discretion to deny or permit visitation by the petitioner constitutes an improper delegation." 365 Md. at 709-10. "While '[t]he court is entitled to rely on expert opinion in making a decision, . . . the decision must be that of the court, not the expert.'" *Id.* (quoting *In re Justin D.*, 357 Md. at 447).

This case is readily distinguishable from *Meyr*, in which we held that the trial court did not err in delegating authority to the BIA to coordinate the children's reunification therapy for as long as the BIA deemed necessary. We explained that such a scheduling matter was ancillary to the matters of custody and visitation, which the court had already resolved. Here, the terms of the modification order delegating the court's power to decide Mother's access to her children are clearly not ancillary to matters of custody and visitation. Accordingly, we must vacate the modification order and remand the case to the circuit court for further proceedings consistent with this opinion. Under the revised modification order, the court shall determine the "minimal level of appropriate contact between" Mother

and the children. *In re Justin D.*, 357 Md. at 449 (citation omitted). We leave the trial court with remedial flexibility to determine whether or not any further evidentiary hearing or briefing is necessary.

IV.

Retroactive Child Support

Parties' Contentions

In the original Complaint for Divorce, the issue of child support was deferred until the hearing on custody modification. From November 20, 2019, until June 8, 2023, Mother had temporary sole physical custody of the children during which she paid all the children's expenses. In the underlying proceeding, the trial court opted not to award retroactive child support, citing concerns that it would "produce an inequitable result." According to Mother, the trial judge did not use the Maryland Child Support Guidelines, which she argues, was required by statute**.** Mother cites to *Knott v. Knott*, which held that the trial court's failure to follow the statutory scheme was reversible error. 146 Md. App. 232, 256 (2002).

Father contends that the trial court did not abuse its discretion in denying Mother's request for child support arrearages because, for many years, Father had primary custody of the children and "[i]f anything . . . would most likely have been entitled to child support from July 1, 2019, until November 2020." Father also highlights that, due to "false charges pending against him," he was unable to secure employment. He argues that the judge's decision against awarding child support arrearages likely stems from Mother's "own

reprehensible conduct." Father acknowledges the statute requiring the trial court to award child support arrears but contends that the statute permits the court to decline such arrears if the award would result in inequities.

Furthermore, Father argues that the judge awarded Father "less than half the amount the child support guidelines stated he should receive" due to the expenses Mother will incur under the modification order.

LEGAL FRAMEWORK

A. Standard of Review

Ordinarily, child support orders fall within the sound discretion of the trial court. *Shenk v. Shenk*, 159 Md. App. 548, 554 (2004). An abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court"; "when the court acts without reference to any guiding rules or principles"; "when the court's ruling is clearly against the logic and effect of facts and inferences before the court"; or "when the ruling is violative of fact and logic." *Santo v. Santo*, 448 Md. 620, 625–26 (2016) (quotations omitted). However, "where the order involves an interpretation and application of Maryland statutory and case law, [our] Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Knott v. Knott*, 146 Md. App. 232, 246 (2002) (quoting *Walter v. Gunter*, 367 Md. 386, 392 (2002)). Maryland Rule 8-131(c) guides our review of an action tried without a jury. We "review the case on both the law and the evidence [and] will not set aside the judgment of the trial court on the

evidence unless clearly erroneous[.]" Md. Rule 8-131(c). We also "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

B. Legal Framework

As a fundamental matter, "child support" is generally defined, in the context of family law, as "[a] parent's legal obligation to contribute to the economic maintenance and education of a child until the age of majority" or other specified milestone. *Child Support*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the more specific context of custody or divorce actions, it refers to "money owed or paid by one parent to the other for the expenses incurred for children of the marriage." *Id.*

The Maryland Child Support Guidelines ("the Guidelines") were enacted in 1989 with the aim of ensuring that the child maintains the same standard of living as if the parents continued to live together.[16] The guidelines must be used "in any proceeding to establish or modify child support[.]" FL § 12-202(a)(1). In cases where the combined adjusted actual income[17] exceeds $30,000, "the court may use its discretion in setting the amount of child support." FL § 12-204(d)-(e). "[I]n an above-Guidelines case, 'the court may employ

[16] The Maryland Child Support Guidelines were initially advisory, but by 1990, the guidelines became mandatory as part of The Family Support Act of 1988. CYNTHIA CALLAHAN & THOMAS C. RIES, FADER'S MARYLAND FAMILY LAW § 6-3(a) n.31 (5th ed. 2011).

[17] The phrase "[c]ombined adjusted actual income" is defined as the "combined monthly adjusted actual incomes of both parents." FL § 12-201(f). In turn, the phrase "[a]djusted actual income" is defined by FL § 12-201(c) to include "actual income minus: (1) preexisting reasonable child support obligations actually paid; and (2) except as provided in § 12-204(a)(2) of this subtitle, alimony or maintenance obligations actually paid."

any rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it.'" *Kaplan v. Kaplan*, 248 Md. App. 358, 387 (2020) (quoting *Malin v. Mininberg*, 153 Md. App. 358, 410 (2003)). The court, in its significant discretion, must balance "the best interests and needs of the child with the parents' financial ability to meet those needs." *Id.* at 388 (quoting *Ruiz v. Kinoshita*, 239 Md. App. 395, 425 (2018)).

"There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines [] is the correct amount of child support to be awarded" but that presumption of correctness "may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." *Beck v. Beck*, 165 Md. App. 445, 449-50 (quoting FL § 12–202(a)(2)(ii); other citation omitted).

In *Voishan v. Palma*, 327 Md. 318, 322 (1992), Judge Howard S. Chasanow explored the legislative history of the Guidelines. The General Assembly enacted the guidelines to comply with Federal Law,[18] aiming to (1) "remedy a shortfall in the level of awards"; (2) "improve the consistency, and therefore the equity, of child support awards"; and (3) enhance "the efficiency of court processes for adjudicating child support[.]" *Voishan v. Palma*, 327 Md. 318, 322 (1992) (quoting OFFICE OF CHILD SUPPORT ENF'T, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL RECOMMENDATIONS AND FINAL REPORT (1987)).

[18] 42 U.S.C. §§ 651-667 and 42 C.F.R. § 302.56 (1989) are the Federal counterparts.

If the court deviates from the application of the guidelines, "the court shall make a … finding on the record stating the reasons for departing from the guidelines." *Beck*, 165 Md. App. at 451 (quoting FL § 12–202(a)(2)(v)). We note that FL § 12-104(b) explicitly permits the court to retroactively modify a child support award to correspond with the date of the filing of the motion for modification. However, "it is within the discretion of the trial court to determine whether and how far to apply a modification" under § 12-104(b). *Ley v. Forman*, 144 Md. App. 658, 677 (2002). The Guidelines specify that the award of child support generally originates from the date of filing the pleading, "[u]nless the court finds from the evidence that the amount of the award will produce an inequitable result[.]" FL § 12-101(a)(1). Maryland law affirms that "[t]he court *may* award child support for a period from the filing of the pleading that requests child support." FL § 12-101(a)(3) (emphasis added). The discretion to award retroactive child support is vested in the trial court. *Caccamise v. Caccamise*, 130 Md. App. 505, 518 (2000).

C. Analysis

Mother asserts her entitlement to child support for the nearly two years she was the primary parent, contending that the judge erred by not applying the Guidelines when deciding against awarding child support arrearages. We maintain that the judge did not err in refusing retroactive child support and that it acted wholly within its discretion. Absent legal error or an abuse of discretion, we defer to the trial court's discretionary determination.

In this case, it is apparent that the judge carefully balanced the equities and interests of both parties. The downward adjustment of child support for Father acknowledged the additional costs Mother would incur for ongoing visitation. While the judge utilized the Guidelines to determine future child support, the decision on whether to award child support retroactively was entirely in the judge's discretion. Therefore, we hold that the trial court did not err in declining to award child support arrearages and acted within its discretion.

V.

Attorneys' Fees

A. Background

In addressing the parties' requests for attorneys' fees, the judge enumerated the statutory requirements that mandate that a court make findings with respect to the financial status of each party as well as whether there was substantial justification "for bringing, maintaining, or defending the proceedings." The judge found that Mother "did not have substantial justification for bringing these proceedings." While evaluating financial statements, the judge found that both parties had the ability to pay attorneys' fees. The judge carefully considered the attorneys' fees themselves and found that "the experience, reputation, and ability of all of the attorneys in this case more than justified their hourly rates." The judge also observed that the BIA "really did minimize the amount of cost on an hourly basis to the parties."

Finding the BIA's fees "well within that of a reasonable range," the judge ordered both parties to pay the BIA's attorneys' fees. Having found Mother "not justified in bringing this proceeding," the court ordered Mother to pay attorneys' fees to Father's counsel in the total amount of $80,000.

B. Parties' Contentions

Mother asserts that the trial court committed legal error by ordering her to pay Father's attorneys' fees.[19] She disputes the judge's rationale, which stated that Mother lacked "substantial justification for bringing these proceedings[,]" arguing that the assessment failed to consider the merits of each motion in the context of when it was filed. Mother maintains that should the modification order be reversed, the trial court's award of attorneys' fees must also be vacated and reconsidered.

To the contrary, Father argues that the trial court's decision to grant him reasonable attorneys' fees was not an abuse of discretion, given Mother's lack of justification for initiating the proceedings. He contends that since Mother's counsel did not challenge the court's finding that she lacked justification for initiating the proceedings was clearly erroneous, her challenge on appeal is not preserved. Lastly, Father argues that, as there is "no reversible error" on the merits, the plea to vacate attorneys' fees upon reversal remains "unavailing."

LEGAL FRAMEWORK

[19] Mother was ordered to pay $80,000 for Father's attorneys' fees in quarterly installments.

A. Standard of Review

The award of attorneys' fees in family law cases is subject to an abuse of discretion standard. *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 756 (2017) (citing *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002)). "An award of attorneys' fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citation omitted). To determine whether the trial court abused its discretion, we examine the court's application of the statutory factors in making the award. *Id.*

B. Legal Framework

Section 12-103 of the Family Law Article is the statutory provision that allows a trial court to award counsel fees in a proceeding related to a modification of custody, support, or visitation. Before a court awards costs and attorneys' fees, the court considers: (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding. FL § 12-103(b). Although the court has broad discretion regarding attorneys' fees, it is still "bound to consider and balance the considerations contained in FL § 12-103." *Best v. Fraser*, 252 Md. App. 427, 438 (2021) (quoting *Frankel v. Frankel*, 165 Md. App. 553, 589 (2005)). Thus, "[d]enial of a request for attorney[s'] fees without consideration of the statutory factors has been deemed reversible error." *Id.* at 438 (citations omitted).

In exercising its discretion, trial court must consider: "(1) whether the [fee] was supported by adequate testimony or records; (2) whether the work was reasonably

necessary; (3) whether the fee was reasonable for the work that was done; and (4) how much can reasonably be afforded by each of the parties. The court should make this award based on these considerations." *Lieberman v. Lieberman*, 81 Md. App. 575, 601-02 (1990).

Analysis

The trial court is required to find substantial justification under FL § 12-103(b) and then review the reasonableness of the attorneys' fees, as well as the financial statuses and the needs of each party. While the trial judge in this case possessed broad discretion to determine whether to award attorneys' fees, she clearly articulated the basis for granting the BIA's and Father's attorneys' fees. We hold that the trial judge exercised her discretion appropriately because the record reflects that she carefully examined the parties' financial statements, the reasonableness of the legal fees incurred, the needs of the parties, and whether there was substantial justification under FL § 12-103(b). Consequently, we affirm the trial court's award of attorneys' fees to Father.

V.

CONCLUSION

We find that the circuit court acted in the best interests of the children and did not err or abuse its discretion when granting Father sole custody of M. and V., as well as when it declined to assign a custody evaluator, awarded Father attorneys' fees, and denied Mother's request for retroactive child support. However, we hold that the trial court erred when it delegated its judicial authority to determine visitation rights to a non-judicial officer. Accordingly, we remand the case to the circuit court with instruction to vacate the

portion of the order that delegates authority to a non-judicial officer without court review. The remaining provisions of the court's order remain in full force and effect.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART: CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE SPLIT BETWEEN THE PARTIES.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0788s23cn.pdf