Circuit Court for Montgomery County
Case No. 131219FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1064

September Term, 2017

NASHWA HOLT

v.

ERIC HOLT

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: April 11, 2018

We are once again called upon to review a child access dispute between Nashwa Holt ("Mother") and Eric Holt ("Father"). Just last year, a panel of this Court affirmed an order of the Circuit Court for Montgomery County which denied Father's motion to modify custody of their twin sons, W. and L. (collectively, the "Twins"). *Holt v. Holt*, No. 1015, Sept. Term 2016 (filed Feb. 10, 2017). This time, Mother appeals two orders issued by the Circuit Court for Montgomery County: 1) an Order Reinstating (Father's) Visitation entered on June 28, 2017; and 2) an Order entered on August 18, 2017, denying Mother's "Emergency Motion to Stay Interlocutory Order to Reinstate Visitations."

In this appeal, Mother presents the following questions:

1. Was the judge's finding that [a]ppellant mother lacked credibility clearly erroneous when it was based on testimony about [a]ppellee father that she never gave, because she had previously offered him custody over a year before the disclosures of sexual abuse, and when the repeated injuries under his care were undisputed?

2. Was the judge's finding that [a]ppellant mother's expert in child abuse lacked credibility and was mother's "cheerleader" clearly erroneous when the judge supported this finding only with his inaccurate assumption that the expert failed to provide the validity or reliability scale of a trauma test in response to his questions?

3. Did the court misapply the law when it reinstated [a]ppellee father's unsupervised visitations without proof that the concerns of abuse or neglect that had caused the suspension of his visitations had been safely addressed?

4. Did the court err when it denied [a]ppellant mother's motion to stay its reinstatement of [a]ppellee father's visitations when the undisputed evidence showed that one of the parties' five year olds had again been seriously injured?

We perceive no error and affirm.

FACTS AND LEGAL PROCEEDINGS

The parties married on November 8, 2005, but separated in December 2008. In January 2009, Father, while on active military duty in Afghanistan, sustained serious injuries from an improvised explosive device ("IED"). Despite their marital difficulties, Mother went to Germany to provide care and support to Father during his recovery. Although it is unclear whether the reunion in Germany was intended as a marital reconciliation, the parties undisputedly separated again in May or June of 2009. They were then divorced in Florida in 2010.[1] The parties reconciled after their divorce and purchased a residence in Maryland in 2011. Despite their history of marital discord, they decided to start a family. The Twins were born prematurely in October 2011.

The parties' reconciliation was short-lived as they separated again in late 2012 or early 2013. On October 9, 2013, the parties entered into a "Marital Separation and Custody Agreement and Child Support Term Sheet" (the "Custody Agreement"), the terms of which were incorporated, but not merged, into an order issued on May 20, 2014, by the Circuit Court for Montgomery County. The Custody Agreement and subsequent order granted the parties joint legal custody with Mother having tie-breaking authority for important decisions related to the children. Mother was awarded primary physical custody of the Twins, but Father was granted a specific visitation access schedule.

[1] The legal validity of the Florida divorce decree is disputed. Its validity, however, is not material to this appeal.

As aptly noted in our 2017 unreported opinion, "[t]he parties have a complicated legal history, with a mutual pattern of filing and dismissing proceedings." *Holt*, slip op. at 4. On December 28, 2016, prior to our affirmance in February 2017 of the circuit court's denial of Father's motion to modify custody, Mother filed an "Emergency Motion to Suspend Father's Access to Minor Children." In her affidavit attached to the Emergency Motion, Mother stated that one of the Twins disclosed to her that Father had abused him. By a consent order dated December 29, 2016, Father's access to the Twins was temporarily suspended. The consent order further provided that "Father may request an immediate hearing regarding this Order." Father requested a hearing, and the circuit court received evidence on June 15-16, 2017.

In a bench opinion delivered on July 27, 2017, the circuit court found "no basis" to conclude that Father had abused or neglected either of the Twins. Accordingly, by an order entered on July 28, 2017, the court reinstated Father's visitation with the Twins. Mother then filed an "Emergency Motion to Stay Interlocutory Order to Reinstate Visitations," which the court denied by an order entered on August 18, 2017. Mother timely noted appeals from both the July 28, 2017 and August 18, 2017 orders. Additional facts shall be provided as necessary to address Mother's appellate contentions.

STANDARD OF REVIEW

This Court conducts only a "limited review" of a circuit court's custody decision. *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996). "[A]n appellate court does not make its own determination as to a child's best interest; the trial court's decision governs, unless the

factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007). "Under the clearly erroneous standard, we look at the record in the light most favorable to the prevailing party, and if there is any competent, material evidence to support the circuit court's findings of fact, we cannot hold that those findings are clearly erroneous." *Fitzzaland v. Zahn*, 218 Md. App. 312, 322 (2014). With regard to the court's ultimate decision on a custody matter, an abuse of discretion exists only if "no reasonable person would take the view adopted by the [trial] court" or the ruling is "clearly against the logic and effect of facts and inferences before the court." *Santo v. Santo,* 448 Md. 620, 625–26 (2016) (quoting *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312 (1997)).

I.

Mother argues that the court's determination that she lacked credibility was clearly erroneous. She raises three points to support her contention that the court erred in its credibility finding against her: 1) that because Mother never testified that Father was a "maltreater," "perpetrator," or "pedophile," the court clearly erred in finding that Mother believed that Father was "a maltreater and a perpetrator"; 2) that the court improperly construed Mother's offer to allow Father to have access to the Twins; and 3) that Father did not contest the veracity of Mother's testimony concerning "black eyes" and other physical injuries the Twins sustained when they were in Father's care. We shall address each of Mother's contentions in turn.

First, Mother's premise for requesting restrictions on Father's visitation was based exclusively on allegations that Father physically and sexually abused the Twins. She testified that W. made a disclosure of sexual abuse in October 2016, and she produced photographic and testimonial evidence to support her contention that Father had physically abused the Twins. Although Mother correctly asserts that, during her testimony, she never expressly characterized Father as a "maltreater," "perpetrator," or "pedophile," the court reasonably inferred that she was making such a claim. Specifically, the trial judge stated, "I understand that [Mother] may believe that [Father] is a maltreater and a perpetrator and that is a subjective belief which she holds and she is entitled to it. However, I respectfully disagree with her." Given Mother's focused attempt to prove Father's sexual and/or physical abuse of the Twins, we perceive no error in the court's assessment that Mother "may believe that [Father] is a maltreater and a perpetrator."

Next, Mother argues that the court improperly held her "willingness to compromise" against her. The following colloquy took place at the end of Mother's direct examination:

> [MOTHER'S COUNSEL]: So what type of relief would you like for your sons?
>
> MOTHER: First, supervised visits. I want to make sure that they're okay. I want it to be in a safe environment for them psychologically and emotionally and physically.
>
> [MOTHER'S COUNSEL]: What about with respect to any treatment for the boys or anything like that?
>
> MOTHER: I think that they need to continue to have to do therapy with the therapist. I think that I, I would hope, I'd like their father to get help. I want them to have a good relationship and want him to be a part of their lives, but

safely. I think it would do them well. I think it would do him well. I think it would do everybody well.

[MOTHER'S COUNSEL]: Okay.

THE COURT: I'm sorry, I'm confused. You say you want your boys to have a good relationship with their father?

MOTHER: I do.

THE COURT: But on the one hand you just told me, your, my words, not yours, that your ex-husband or your husband, as the case may be, is a pedophile on the one hand; on the other hand, you want the boys to have a good relationship with him?

MOTHER: A safe relationship, meaning that doesn't have to be out of their lives and –

THE COURT: If he's a pedophile, why would you want him to be near them at all?

MOTHER: So they have a male figure in their life. I'm just, I've done everything I can to facilitate Eric's rehabilitation, I really have.

THE COURT: Okay.

MOTHER: I have no animosity towards him.

THE COURT: Okay.

Additionally, the court asked Mother why she offered custody to Father in August 2015 in light of her claim that Father abused at least one of the children in March 2015:

THE COURT: Okay. Here's my question. So why in August of 2015 are you, through your lawyer, offering to let him have custody of the children if that's what you think he did?

MOTHER: I, I am (unintelligible). It's been five years. He has terrorized us is the word, I think, is the best word I can use to describe it, he has terrorized us. He has called my partners, I was a partner at one of, in a large anesthesia firm, he's called my partners. He subpoenaed secretaries,

managers, everybody at Shady Grove for apparently no reason other than harassment. He, this is my children's third preschool.

THE COURT: I guess my question is if you believe he's battering these children, why are you offering to give him custody --

MOTHER: Because I was --

THE COURT: -- why are you --

MOTHER: I was told --

THE COURT: -- because he's calling your partners?

MOTHER: No, I was told basically, I wanted to break him out to the fact that we have to stop this. It's not in the children's best interest. The last line is, Eric, this conflict has to end for the children.

In its bench opinion, the court concluded:

[Mother's] explanations are not credible to me. If she in fact believed that [Father] was a) physically abusing the children and b) was a pedophile, which is what she says he is, let's just not, let's just take the window dressing off, the notion that she would allow the children to be within five seconds in his presence is ridiculous. The fact of the matter is she's been at war, I find, with [Father] for years. They're separated, they're together, they're married, they're not married. This is part of that litigation and it's very unfortunate that the children have been placed in the middle but they have but I do not believe for a minute that the [Father] has abused the children in any way shape or form. If I did I would strip him forthwith of any rights of visitation. I wouldn't hesitate. But I don't. And therefore, I can't.

We see no error in the court's inference that a reasonable person would not voluntarily allow child visitation with an abusive parent. Accordingly, we disagree with Mother that the court improperly construed Mother's "willingness to compromise."

In support of Mother's final contention that the trial court clearly erred in finding that she lacked credibility, she argues that "the judge's personal attack on Mother's credibility was a red herring." Specifically, Mother asserts that:

> Father never contested the veracity of her testimony that the three photographed black eyes occurred under his watch. Indeed, he even admitted his presence when two of black eyes occurred. Likewise, he never disputed that the boys had returned to her with many other injuries, including sneaker tread mark abrasions, multiple bruises to parts of their bodies, cuts on their arms and legs, and a bite mark on a leg. He never contested the existence of the boys' disclosures of fear and abuse . . . .

We unequivocally reject Mother's claim that the court's determination that she lacked credibility was a "red herring." The entire trial focused on whether Father physically and/or sexually abused the Twins. Mother produced evidence to support her claims of abuse; Father steadfastly denied any physical or sexual abuse. Given these dichotomous positions, it was the court's obligation to determine whether Father had abused the children, and the court fulfilled that obligation:

> The [Mother] contends that either I should find, as a fact or find that there are reasonable grounds to believe that either or both of the children have been abused or neglected by the [Father]. Respectfully, I find no basis to make such conclusions. I find the opposite. I find by a preponderance of the evidence, which I credit that there are no reasonable grounds to believe that either of these children has been abuse [sic], neglected, physically or sexually by [Father]. I understand that [Mother] may believe that he is a maltreater and a perpetrator and that is a subjective belief which she holds and she is entitled to hold it. However, I respectfully disagree with her.
>
> I have looked at the evidence as a judge looks at evidence, respectfully, dispassionately and clinically to connect dots or to examine gaps in evidence or to decide what makes sense. The [Father] has been, I find investigated by the Air Force. He's been investigated by Montgomery County Child Protective Services three times. He's been investigated by Montgomery County Police. Do I understand that none of those agencies are

> perfect or infallible? Of course, I do. But I take into account the findings which I credit and I credit the testimony and the findings of the departments, lead investigative social worker. She has, I find no, she's not on anybody's side. She is neutral. She is independent. I find that they did their job. I have looked at the forensic medical findings in the record.
>
> There is nothing in the records, which I credit that I can link to any, a) any abuse and b) any abuse perpetrated by the [Father] upon either of these children. Because anybody who knows me knows that if I believe for one minute a) it had been done and b) that he did it I would make no bones about making those findings which I have done in cases where I believe there to have been the case. So, it's not a question of me being shy or retiring or reluctant to do it. If I believe it, here I don't.

In short, the court properly evaluated the evidence, including witness credibility, and was not clearly erroneous in determining that the Twins had not been sexually or physically abused.

II.

Mother next argues that the trial court was clearly erroneous in finding that her expert child psychologist, Dr. Joyanna Silberg, lacked credibility with respect to her conclusions of child abuse. As to Dr. Silberg, the court stated,

> I need to say something about Dr. Silberg. I'm going to say not as much as I'd like to say. First, I don't believe her. I disbelieve her testimony. She clearly came to this case with a view. She clearly, respectfully was wearing a jersey. She did not approach this case, in my judgment, scientifically or clinically. She presented, in my opinion, as a cheerleader. There were tremendous analytical gaps in her testimony. While she is certainly qualified on paper, in this case her opinion in my judgment lacks any credible or adequate factual basis. There are, she couldn't even tell me the validity scale, the reliability scale.
>
> She tried to wave me off, okay, I'm not insulted. I just am stunned that she doesn't know this off the top of her head. This is not, respectfully, that hard. This is something that somebody in her position knows. If she gives a test to somebody that she says is valid and reliable, she will know the

> author, the validity scale when it was done. She'd be able to, like falling off a log. Her offer to get back to me on it was not very reassuring or satisfying and it was emblematic, if you will, of her lack of detail [sic] credible basis for her opinions. She waved off anything that didn't fit with her hypothesis. She disregarded facts that were clearly contrary to hypothesis. I don't believe her to be blunt. I don't believe her. She had no factual basis which I credit. She did not employ methodology which to my mind was sound. This was the case of Walt. She gave me a couple, three I told you so opinions, which as Judge Moylan said, are not worth anything. So I give her opinion zero weight.

Mother takes umbrage with the court's assessment that Dr. Silberg did not substantiate the validity and reliability of the Trauma Symptom Checklist for Young Children test that she administered to Mother. The colloquy between the court and Dr. Silberg illustrates the court's concern about the validity of the test:

> THE COURT: When was it validated?
>
> THE WITNESS: Probably 1992 or 3.
>
> THE COURT: By whom?
>
> THE WITNESS: William Frederick, and there have been multiple tests, multiple validations --
>
> THE COURT: Other than the proprietor or the inventor, who was it validated by?
>
> THE WITNESS: I would have to go back to the literature.
>
> THE COURT: It's a proprietary test, right?
>
> THE WITNESS: It is own [sic] by Psychological Assessment Resources.
>
> THE COURT: Right. And they hold the key, right?
>
> THE WITNESS: They hold the key. Well, you have to buy it from them.

THE COURT: Scoring key, right. So they're the ones -- the ones that sold it are the ones that validated it. Has it been independently validated?

THE WITNESS: There's multiple research on it, yes.

THE COURT: Just give me three.

THE WITNESS: All of them include Frederick as a coauthor. I don't think --

THE COURT: No, I understand that. But who, apart from the people that sell it, validated it?

THE WITNESS: Frederick sold it to PAR, so he didn't, he's not -- he's the scientist. He was at the University of Minnesota.

THE COURT: I know.

THE WITNESS: He and all of his colleagues developed it. There have been multiple tests of it, like Kathleen Faller.

THE COURT: Name --

THE WITNESS: Kathleen Faller is another person.

THE COURT: Where was it published?

THE WITNESS: What has she published?

THE COURT: Where was the validation external to the creator --

THE WITNESS: The Journal of Child Sexual Abuse, she's published.

THE COURT: Volume and year?

THE WITNESS: I'm not sure I could pick through that off the top of my head. But I'll tell you an article I could think of that does have it. It's by Faller and Everson. It's in, I believe, 2013. It's in a journal called The Journal of Child Sexual Abuse, and the name of the article is Base Rapes --

THE COURT: I'm trying to find out --

> THE WITNESS: -- and I could send you a copy. I know that one.
>
> THE COURT: You can't mail me anything, Doctor. I'm trying to find out from your knowledge as an expert, when and how this test was validated.
>
> THE WITNESS: The test was validated on over 1,000 children in multiple settings.
>
> THE COURT: I'm sorry if my questions aren't clear.[2]

As the trier of fact, it was appropriate for the court to inquire about the basis of the expert's opinion. Maryland Rule 5-702 provides that, in determining whether expert testimony will assist the trier of fact, the court shall determine "whether a sufficient factual basis exists to support the expert testimony." Moreover, our Court has reiterated the long-standing principle that it is within the factfinder's province to assess the credibility of an expert:

> Even if a witness is qualified as an expert, the fact finder need not accept the expert's opinion. To the contrary, "an expert's opinion is of no greater probative value than the soundness of his [or her] reasons given therefor will warrant." The weight to be given the expert's testimony is a question for the fact finder. "The trier of fact may believe or disbelieve, accredit or disregard, any evidence introduced. We may not—and obviously could not—decide upon an appeal how much weight must be given, as a minimum to each item of evidence."

Walker v. Grow, 170 Md. App. 255, 275 (2006) (citations omitted); *see also Edsall v. Huffaker*, 159 Md. App. 337, 342-43 (2004) ("A jury is not required to accept the testimony of an expert witness.").

[2] At this point, Father's counsel objected to the admission of the testing evidence on the ground that Mother failed to disclose that Dr. Silberg would be relying on test data. The court sustained the objection.

Here, the court determined that Dr. Silberg was biased and that "[t]here were tremendous analytical gaps in her testimony." In our view, the court was well within its prerogative as the trier of fact to disbelieve Dr. Silberg's testimony and, accordingly, we perceive no error.

III.

In her third argument, Mother asserts that the trial court misapplied the law by requiring "Mother to prove by a preponderance of evidence 'reasonable grounds to believe either or both . . . children have been abused or neglected by [Father].'" We note that "trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008). Here, we see no support in the record for Mother's argument that the court improperly allocated the burden of proof. At the outset of the court's bench opinion, the court stated:

> The parties by consent suspended [visitation] pending the [Father's] right to seek a hearing to have it reinstated. These past two days have been that hearing. The burden I place on the [Father] to persuade me that I should change the status quo from suspension to not suspension.

In light of the court's express recognition that Father had the burden of proof, we reject Mother's claim that the court gave "lip service" to Father's burden of proof. Additionally, after expressly acknowledging Mother's contention that Father had abused or neglected the Twins, the court concluded,

> Respectfully, I find no basis to make such conclusions. I find the opposite. I find by a preponderance of the evidence, which I credit that there are no

> reasonable grounds to believe that either of these children has been abuse [sic], neglected, physically or sexually by the [Father].

In summary, the court properly allocated the burden of proof to Father and, after weighing the evidence, correctly utilized the preponderance of evidence standard in determining whether the children had been physically or sexually abused. That the court disagreed with Mother's assertions of abuse does not equate to error.

IV.

Finally, Mother argues that the circuit court erred in denying her motion to stay the reinstatement of Father's visitation with the children. According to Mother, the court should have stayed its order reinstating visitation because there was "undisputed evidence" that, "[w]hen the extended visitations resumed, [L.] returned with a new black eye."

"The decision whether to grant a motion to stay a proceeding is within the discretion of the trial court, and it is reviewed for an abuse of discretion." *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 450 (2015). At the hearing on the motion to stay, Mother's counsel presented a photograph of L. with a black eye. Father's counsel proffered that the injury was caused when the boys were playing a game involving a hard ball, and that Father promptly sent a text to Mother explaining the cause of the injury. During the motion to stay hearing, the court correctly noted that the existence of a black eye "doesn't mean it's child abuse." The court therefore did not abuse its discretion in denying Mother's motion to stay.

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