Circuit Court for Prince George's County
Case No.: CAVD21-8748
Case No.: CAD15-2693

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1080, September Term, 2021

No. 1081, September Term, 2021

No. 1756, September Term, 2021

LOREN EVANS JONES

v.

ANTIONE WELLS

Berger,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Ripken, J.

Filed: March 14, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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

These consolidated appeals arise from a lengthy custody battle between Appellant Loren Evans Jones ("Mother") and Appellee Antione Wells ("Father") over their daughter, M. (the "Child").[1] In a previous appeal, this Court affirmed the Circuit Court for Prince George's County's modification of the parties' original consent agreement, changing the terms under which they shared physical custody (the "First Modification Order").[2] *See Jones v. Wells*, No. 778, 2021 WL 4169200, at *1 (Md. App. Sept. 14, 2021) ("*Jones I*"). While that appeal was pending, custody disputes continued, and Mother filed a petition for a protective order against Father, which Father contested. The court awarded pendente lite custody to Father (the "Pendente Lite Order") and, later, ordered a second modification of custody terms (the "Second Modification Order"). Mother noted three timely appeals, in which she challenges the denial of her petition for a protective order (No. 1080, Sept. Term 2021); the Pendente Lite Order (No. 1081, Sept. Term 2021); and finally, the Second Modification Order (No. 1756, Sept. Term 2021).[3]

ISSUES PRESENTED FOR REVIEW

Mother raises four issues for our review, which we reorder and restate as follows:

I. Whether the circuit court erred or abused its discretion in finding that

[1] Although Father's first name is spelled "Antoine" in some pleadings, transcripts, and captions, including our prior appeal, Father testified that the correct spelling is "Antione."

[2] As discussed, *infra*, although it is not the first time that the court has addressed the parties' custody disputes, for clarity in this appeal, we shall refer to this October 2020 order as the First Modification Order.

[3] As Mother acknowledges, her appeal of the Pendente Lite Order was mooted by the superseding Second Modification Order. Additionally, Mother does not present any arguments that expressly support her challenge to the court's denial of her petition for a protective order.

there was a material change of circumstances warranting modification of custody.

II. Whether the circuit court erred or abused its discretion in modifying the shared physical custody schedule.

III. Whether the circuit court erred or abused its discretion in awarding Father sole legal custody.

IV. Whether the circuit court judge displayed "personal bias" against Mother.[4]

For the following reasons, we shall dismiss the appeal of the Pendente Lite Order in No. 1081, Sept. Term 2021, and affirm both the order denying Mother's request for a protective order in No. 1080, Sept. Term 2021, and the Second Modification Order in No. 1756, Sept. Term 2021.

[4] Mother identifies the following four issues in her brief:

Issue 3.
Did the trial court abuse its discretion when its expressed tentative views of the merits and prejudicial statements about the Appellant evidenced personal bias in rendering its final decision?

Issue 4.
Did the trial court err when it found that the denial of access time and effort to alienate Plaintiff from Minor Child is a material change in circumstance that impacts the Minor Child's relationship to her father?

Issue 5.
Did the trial court abuse its discretion when it found that the Plaintiff is best equipped to make sound legal decisions and ordered that the Plaintiff shall have sole legal custody of [the Child]?

Issue 6.
Did the trial court err and or abuse its discretion when it found that it is in the best interest of the minor child to award shared physical custody to the parties in light of the totality of the record, the Appelle [sic] being found **responsible** for unsubstantiated sexual abuse of [the Child] by the Prince George's County Child Protective Services, and Dr. Dana Cunninham's court report?

FACTUAL AND PROCEDURAL BACKGROUND

A. Proceedings Through the First Modification Order

In *Jones I*, this Court reviewed the custody battles that began in 2018. Summarizing the family background, we explained:

> [The Child] was born on February 26, 2014, to [Mother] and [Father]. Mother and Father, who never married, lived together but separated around the time [the Child] was born. After the parties separated, [the Child] resided with Mother, but Father, by both parties account, remained "actively involved" in [the Child]'s life.
>
> When [the Child] was about one year old, Father filed a complaint to establish custody and visitation of [the Child] in the Circuit Court for Prince George's County, and on October 21, 2015, the parties executed a custody consent order, which was not docketed until January 15, 2016. Among other things, the parties agreed to joint legal custody of [the Child], with Mother having tie-breaking authority; Mother to have primary residential custody; and Father to have unsupervised visitation two to three overnights per week, weeks over the summer, and specified holidays. The consent order further granted FaceTime or other video chat program access once per day when [the Child] was in the care of the other parent, and the parties were to divide all medical co-pays.

Jones I, 2021 WL 4169200 at *1 (footnote omitted).

Mother and Father began to disagree about Father's access to the Child after Mother claimed the Child was sexually abused while in Father's care. Custody disputes ensued. Mother challenged the terms of their consent agreement; however, Father denied all allegations of abuse, and a subsequent investigation by the Charles County Department of Social Services ("DSS") ruled out[5] any abuse. *Id.* at *1. In May of 2018, Mother and Father

[5] "Ruled out" is defined as "a finding that abuse, neglect, or sexual abuse did not occur." FL § 5-701(w).

entered a temporary consent order in which they supplemented the terms of the January 15, 2016, consent order with the condition that Father would not leave the Child unsupervised with his girlfriend's son.[6] *Id.*

Mother continued to make allegations of sexual abuse against Father and his girlfriend's son on the Child's behalf. *Id.* at *2. She filed several new motions to terminate Father's visitation rights and modify custody, and Father, again, denied all allegations of abuse. *Id.* A subsequent DSS investigation ruled out abuse. *Id.* In August of 2018, the juvenile court conducted a hearing on the parties' motions. *Id.* Per an agreement between the parties, the court vacated the temporary consent order and issued an order reducing Father's visitation with the Child to three weekends a month plus specified holidays and weeks during the summer. *Id.*

Following the agreement to the modified custody agreement, Mother continued to report that Father was physically and sexually abusing the Child, and Mother, again, filed motions seeking termination of Father's visitation rights. *Id.* Father continued to deny the allegations, and both the Charles County DSS and Howard County Police Department conducted investigations, which ruled out any abuse. *Id.* The court held another hearing on the matter in November of 2018 and ordered that the visitation schedule set forth in the August 2018 order remain in effect. *Id.*

Shortly after the court issued the November 2018 order, Father filed a motion for contempt against Mother for denying him his right to visitation because Mother continued

[6] Mother alleged that the Child had disclosed that Father's girlfriend's "grade-school-aged" son had also sexually abused her. *Jones I*, 2021 WL 4169200, at *2.

to restrict Father's access to the Child and file emergency motions for termination of Father's visitation rights. *Id.* The court appointed a best interest attorney ("BIA") for the Child and requested that the Prince George's County DSS file a report regarding all the abuse allegations Mother had made up to that point. *Id.*

In October of 2019, the court held a hearing at which it heard arguments addressing the Prince George's County DSS report, which "summarized the nine reports of abuse of [the Child] by Father, made in the three different counties between July 18, 2018, and May 31, 2019, and noted that each investigation, which included a forensic interview of [the Child], had ruled out abuse." *Id.* at *3. The report concluded with the following statement:

> This minor child has been the subject of multiple interviews, medical exams, and five forensic interviews with no disclosure of sexual abuse. Three different jurisdictions have conducted investigations and the same conclusion, has been reached. It appears that the child is being put in the middle of an adult custody battle. Clinical impressions suggest that the child may have been coached to make these allegations as they are unfounded or inconsistent when professionally assessed by trained interviewers or detectives.

Id. At the conclusion of arguments, the parties agreed to a consent order in which the court granted Father three weekends a month of visitation with the Child. *Id.*

Approximately two weeks later, Mother filed another motion for contempt, seeking to modify custody. *Id.* Mother alleged, in part, that Father had denied her FaceTime calls with the Child while she was in his care and that Father had failed to pay certain medical expenses. *Id.* Father denied these allegations and filed a cross-motion for contempt, and the parties appeared before the circuit court in December of 2019 to address the motions. *Id.*

Two witnesses testified at the December 2019 hearing. First, an expert in clinical psychology with a specialty in trauma testified that Mother first brought the Child in for treatment in September of 2018, claiming that the Child had made disclosures that Father and Father's girlfriend's son had sexually abused the Child. *Id.* The expert testified that she met with the Child four times, for about an hour each visit, and that, during those sessions, the Child did not disclose any allegations of sexual assault and disclosed only a physical interaction with the Father's girlfriend's son. *Id.* Based on her training and experience, the expert opined that the Child did not display any evidence of trauma. *Id.* However, the expert did advise that the Child should continue to receive counseling to process her experiences because of "the dynamics in the family." *Id.*

Next, the Child's then-current therapist testified that, between March of 2019 and October of 2019, she filed eight reports with the Prince George's County DSS, based on the Child's disclosures to her of physical and/or sexual abuse. *Id.* Because the Child was five-years-old at the time and had a "limited concept of time," the Child's therapist testified that she did not know whether the disclosures represented separate incidents. *Id.* Furthermore, the therapist testified that she was unaware that DSS had ruled out all reports of abuse and that Mother had filed emergency protective orders after each disclosure the Child had made to her. *Id.*

The Child's BIA raised concerns about the Child's welfare, citing the impact of Mother's continued abuse allegations and access restrictions:

> [T]his child has been subject to . . . forensic reports, interviews, [and] police detectives. She's four and almost now five years old. . . . [I]t's just making a traumatic experience for this little girl that . . . truly doesn't have to be. . . . I

> know it's a huge decision for the Court, but this has to stop, Your Honor, because all these reportings and the therapist and everything, it's really harming my client. It's not fair.

Id. at *4.

In a bench ruling, the circuit court denied both contempt petitions and Mother's request to modify custody. *See id.* The court subsequently entered a written order that "Father's visitation [was] to continue for three weekends each month, and alternating weeks over the summer months and certain holidays." *Id*. In addition, the court ordered that the Child resume therapy at Father's expense. *See id.*

Before the court signed a written order, both parties challenged the terms of the court's bench ruling. Two months later, Mother returned to court, seeking "to remove [the Child]'s best interest attorney, which Father opposed[,] and the court denied." *Id*. In February of 2020, Mother filed another "motion for contempt, alleging that Father had refused to pay the cost of [the Child]'s therapy." *Id*. In June of 2020, Father filed a cross-motion for contempt on the ground that Mother "had denied him visitation with [the Child] since March 6." *Id*. In July, Mother moved to "alter or amend" the December 10, 2019, custody order, "alleging, among other things, that [the Child] continu[ed] to make sexual and physical abuse disclosures about Father since the hearing," *Id*. Father opposed the motion.

Following an evidentiary hearing on September 23, 2020, the circuit court reiterated and affirmed its ruling, "nunc pro tunc," as of the December 10, 2019, hearing. *Id.* The following week, on October 2, 2020, the court entered an order finding Mother in contempt for failing to afford Father access to the Child and granting Father 59 overnights with the

Child to make up for the access Mother had denied to him. *Id.* at *5. The court additionally denied Mother's request to remove the Child's BIA and her motion for contempt for Father's failure to pay therapy expenses. *Id.* Treating Mother's motion to alter or amend judgment as a motion to modify custody, the court denied relief, explaining:

> This Court takes these allegations very seriously and is very conscious of the repeat[ed] nature of these allegations. On seven different occasions, Child Protective Services, from three different jurisdictions, have investigated Defendant's concerns and each time have issued a communication of "No Finding of Abuse" or closed the case without any further action. Defendant has not provided this Court with new evidence of abuse and therefore, this Court finds no material change in circumstance. Defendant's Motion to Alter or Amend is denied.

Id. at *5. Mother filed a timely appeal from the juvenile court's order, and Father filed a timely cross-appeal, which he later dismissed. *Id.*

B. Petitions for a Protective Order, Contempt, and Custody Modification

While Mother's appeal from the First Modification Order was pending in this Court, Mother continued to restrict Father's access to the Child and filed two more petitions for a protective order based on new reports of sexual abuse. In November of 2020, just weeks after the First Modification Order was entered in October, Mother reported to police and child protective services ("CPS") that the Child made a new disclosure of abuse. Mother subsequently petitioned the Circuit Court for Prince George's County for a protective order based on the alleged disclosure. Following a January 5, 2021, hearing,[7] the court denied Mother's request for a protective order and ordered Mother to resume Father's access to

[7] The records transmitted to this Court do not include a transcript of this hearing.

the Child.

Mother did not resume Father's access, as ordered, until June. Instead, she petitioned to modify custody and visitation. Father cross-petitioned for sole legal and physical custody and asked the court to hold Mother in contempt for denying him access to the Child. While those new matters were pending, Mother lodged another report of abuse, based on an alleged disclosure the Child made on July 18, 2021, when Mother picked her up after a weekend with Father. On July 22, Mother obtained a temporary protective order from the Circuit Court for Montgomery County. On August 8, 2021, the matter was transferred to the Circuit Court for Prince George's County.[8] On September 10, 2021, the circuit court held an evidentiary hearing on all the pending petitions for protection, contempt, and custody modification.

C. September 10, 2021, Hearing on Petitions for Protection, Contempt, and Modification of Custody

At the hearing on September 10, 2021, the circuit court considered all pending petitions for protection, contempt, and custody modification. The court received evidence and arguments from Mother, Father, and the BIA.

Mother presented the testimony of a Prince George's County police officer who had responded to Mother's July 2021 report of sexual abuse. After speaking to the Child, the officer followed protocols, which included contacting CPS and directing another corporal

[8] On August 18 and August 31, 2021, the Circuit Court for Prince George's County extended the "Temporary Protective Order from Montgomery County . . . until 9-3-2021 because DSS report not complete" and "[r]eset" the request for a "Final Protective Order" to the same day. On September 3, 2021, the court extended the Temporary Protective Order pending a "Final Protective Order Hearing" scheduled for "9-10-2021."

under his supervision to complete a report. Based on hearsay and other objections, the court did not admit that report into evidence.

Mother next presented the testimony of a forensic nurse examiner who conducted a SAFE[9] exam on the Child at a Frederick hospital on July 18, 2021. According to the nurse, the child reported "burning on urination" and pain in one of her legs. She found "a couple of bruises on the shins of her legs" and one "on the side of the left calf." The hospital report regarding the examination was excluded on hearsay grounds.

Testifying on her own behalf, Mother explained that when she picked up the Child on July 18, 2021, following a visit with Father, the Child was "very quiet and . . . looked down." Mother asked the Child "if anything happened that she did not like." Based on the Child's response, Mother called multiple hospitals and "learned there was an on-call forensic nurse" at Frederick Memorial Hospital. According to Mother, who witnessed the examination, the Child's "labia was red and ha[d] signs of irritation."

Mother testified that she immediately emailed the BIA "to inform her that [the Child] made a disclosure" and of the steps Mother had taken "based on that disclosure." On July 20, Mother filed a Petition for a Protective Order on behalf of [the Child] in the District Court of Maryland in Montgomery County because "there was a custody order in place" that Mother "did not want to defy."

On July 22, the Montgomery County District Court issued a temporary protective order. On July 29, Mother took the Child "to the Child Advocacy Center in Anne Arundel

[9] "SAFE" stands for sexual assault forensic examination, the purpose of which is to collect evidence from an alleged sexual assault.

County for a forensic interview" that was videorecorded. Father and the BIA objected to the admission of the recording, and the court sustained, declining to admit the recording into evidence. The court advised Mother that "anything that happened after July 21st" was not relevant, noting that, although Mother "reported the incident to three, four, five, six different authorities," DSS had not yet issued a report.

Next, the court asked Mother to address the cross-petitions for contempt and Father's request to modify custody. Mother explained that since September 23, 2020, when the court held her in contempt and ordered her to provide Father access that included 59 "makeup" days, Mother had sought a protective order "after about the third visit" the Child had with Father because she observed a change in the Child's demeanor. According to Mother, the Child went from "bright and bubbly, energetic, charismatic, [and] loud" to "very quiet and dejected" with losses of appetite, sleep, and interest in schoolwork. Around November 1, 2020, Mother saw the Child, while "in the middle of playing, . . . mak[e] pelvic thrust movements" with "moaning and groaning," and Mother asked the Child "where she learned such behavior." Based on her responses, Mother petitioned for a protective order and continued to deny Father access. The court ultimately denied the petition for lack of evidence.

Father responded that his contempt petition encompassed "mostly" the period after the protective order was denied on January 5, 2021, until he received "limited visitation in the end of June, July of 2021." The BIA agreed that none of Mother's testimony regarding prior reports of abuse was "relevant to the question of whether . . . [Mother] had a basis to legally refuse to grant access when an existing court order was in place."

The court repeatedly attempted to focus Mother on why she continued to deny Father his court-ordered access to the Child. The court summarized the pattern of proceedings as follows:

> If I understand what you've been arguing now for the third or fourth time on this particular series of motions is that visitation resumes for a couple weeks. You then go file a request for a protective order. Temporary protective order is granted. During the time period that the temporary protective over is in place, you denied visitation. Court ordered [sic] most likely says that he can't have visitation. . . . [T]hen there's finally a hearing. At the hearing, the protective order is denied, not issued. We then have a couple more visitation sessions. Again, you file, based upon an allegation and we repeat the process.

The court reminded Mother that, "going back to last fall," she had "been found in contempt and [Father] [had] been awarded 59 days of backup time that he still [had] not received" and that "[b]efore [Father] even got a chance to get his 59 days of backup time, additional time was lost" for which the court could "order additional makeup days." According to the court, "[t]he bigger question" was whether "custody should be changed" given the "total pattern" of Mother's continued allegations and filings.

Regarding modification of custody, Mother argued that neither DSS, a licensed social worker, psychologist, nor psychiatrist had made a finding that she had "caused mental injury or harm" to the Child. Mother asserted that she had been the Child's "primary caregiver since birth," and that "because of [Father's] profession, he [could not] commit to being a full-time caregiver for [the Child]." Mother asserted that Father's family members lacked the "flexibility" "to be readily available and willing and able to provide care."

As evidence of her fitness to have sole or primary custody, Mother pointed to CPS's approval of her as a caregiver for her minor nephew, Father's lack of involvement in the

Child's schooling other than picking the Child up, and Father's failure to call the Child when not in his care, including on the Child's birthday. Mother testified that she earns "about 200 [dollars] a month" from her online boutique and receives $850 in child support from Father, who also covers the Child's medical, dental, and vision insurance. Mother asserted that her schedule enabled her to take the Child to her doctors' appointments or "in the event of an emergency." In contrast, should Father be awarded primary custody, Mother claimed that the Child would "be[] shuffled around to five other people to take care of her" if Father were "to be called in to work," and, in Mother's view, that "would not be in [the Child's] best interest."

Regarding schooling, Mother explained that the Child was continuing to attend an elementary school in Clinton, as "a virtual learner," because Mother was "temporarily residing in" a two-bedroom apartment in Gaithersburg while she was "going through a divorce" and awaiting a pendente lite hearing on her request for "exclusive use and occupancy of that home."[10] Although Mother admitted that she did "not believe virtual learning [was] in [the Child]'s best interest" because she believed the Child "would like to be in the classroom," Mother maintained that "the virtual learning piece was just a temporary solution because [they had] been displaced." On cross-examination, Mother acknowledged that the Child "would flourish more in the classroom," but, until she learned "more from [her] divorce matter," Mother could not estimate how long the Child would

[10] Mother informed the court that, in the two-bedroom apartment, her mother, stepfather, and nephew were sharing the master bedroom, the Child was sleeping in the second bedroom, and Mother was sleeping on the couch.

continue to attend school virtually. However, she indicated that her request for use and occupancy of the marital home would be "determined in October." In addition, Mother noted that Father had not talked to her about his plans to change the Child's school.

Mother conceded that even after the court held her in contempt for denying Father court-ordered access to the Child in September of 2020, and even after the court denied her motion for a protective order in January of 2021, she withheld access from Father until after June 21, 2021. However, Mother argued that her "actions were based on what [she] was told" regarding the sexual abuse disclosures and, thus, "were reasonable" and "in good faith." Mother maintained that the Child was not safe under the then-current custody agreement because Father should not have unsupervised access. In response, Father argued that Mother should be held in contempt for failing to comply with court orders to resume visitation.

When the court asked Mother whether she and Father could "have a parental conversation and make joint decisions concerning [the Child]," Mother answered, "No." She claimed that Father was "not able to put his personal feelings about [her] to the side in order to be able to effectively co-parent about decisions that impact [the Child]." When the court asked Mother if she had discussed the Child's education with Father since November of 2020, Mother answered, "He doesn't call," but asserted that Father remained "listed on all of [the Child's] educational forms." In response, Father testified that Mother was "very argumentative" and used "vulgar language" when he had tried to communicate with her. Father believed Mother was intentionally trying to "alienate" him from the Child, explaining:

> I know about the school that [the Child] [is] going to the day before I'm going to pick her up. We never had any conversation before. I found out that my daughter was baptized through a Facebook post. We had no conversations about that. [Mother] tries to tarnish my name. She sent my mom e-mails saying that I'm beaten [sic] on my daughter . . . . which is not true. We're constantly here every other month for allegation after allegation after somebody did this, somebody did that.

The court concluded that it could "clearly make a finding" that Mother and Father "[could not] communicate about the best interest of their daughter." Father responded that it was important to additionally establish that Mother was "willfully not communicating" and "excluding [Father] from education, from medical appointments, from anything" that Mother had raised as evidence of "all these wonderful things" she does for the Child.

Next, the court put on the record that Mother asked for the court to interview the Child, to which Father and the BIA objected on the ground that interviewing the Child was unnecessary. Noting that the court had "had the opportunity to review the interview with the Anne Arundel County Child Protective Services officer," the court made "observations of the [Child's] maturity, how reluctant she was to focus her attention span," and "her sensitivity." As such, the court concluded that it would not be beneficial to interview the child at that point.

With respect to modification of custody, Father argued that there were several material changes warranting modification in favor of awarding him sole legal and physical custody of the Child. Father contended Mother's "pattern of behavior" in which she "[would not] stop filing frivolous orders of protection against [Father]" and "alienating" the Child from Father was having a negative impact on the Child's wellbeing. Father testified that Mother's "repeated actions towards" him were impacting the Child because

it was the Child who was "getting interviewed," "poked and prodded," and "taken to multiple therapists just in a year." Father further argued that Mother had continuously shown "that she is not going to comply with this Court's order . . . as it pertains to visitation, custody or access," evinced by the fact that Father had only seen the Child "[s]even days since November of last year." Finally, Father asserted that Mother's marital and housing changes amounted to a material change in circumstances because they had resulted in the Child "living in a two-bedroom apartment with five other people."

Mother countered that her "actions were not willful" and that she only blocked Father's access after the Child "made another disclosure." Mother noted that neither the DSS report nor the "pending psychological evaluation" were completed, and she maintained that she was "the only person" who was willing to "safeguard [the Child]." In her view, Father had "demonstrated a patter[n] of abuse over a long period of time" and "simply [had not] got caught yet."

In rebuttal to Mother's request for a protective order, Father cited the lack of any evidence or finding that he had abused the Child. He argued that the "testimony of a forensic nurse that . . . [the Child] had two small two-centimeter circular bruises on her left leg" was inconsistent with "[t]he testimony taken in the petition for order of protection to indicate that [Father] was violently abusing his daughter." He suggested that someone of his size—"six foot three, 245 pounds"—"would cause more than a two-centimeter bruise on a seven-year-old's legs." Father and his sister had previously testified that, on the day of the alleged abuse, Father's sister was with Father and the Child "the entire time," and she witnessed no abuse. Instead, Father and his sister testified that the Child "was happy,"

"playing," and "bubbly" "until it came time . . . to take [the Child] back to [Mother]," at which time the Child "became sullen and withdrawn."

The BIA then reported on her "extensive investigation" to the court, which included two interviews of the Child, two observations of the Child with Father, interviews of both parents, and a review of the allegations in Mother's petitions. In her first interview of the Child on July 14, 2021, the BIA observed that the Child was "very shy" and "reserved." The BIA further noted that the Child "[did not] like virtual school" and "want[ed] to see her friends," opining that the Child "might do better if she went back to school in person." During the hour-long interview, the Child did not tell the BIA anything "untoward" or disclose "anything about any abuse or any physical assault by her father." Instead, the BIA reported that the Child indicated "that she has fun with her father and she likes seeing him" and his dog. The BIA testified that at the second court-ordered interview on August 7, which lasted "for over an hour . . . with no one present," the Child repeated that "she likes seeing her father" and "talked about her relationship with the dog, Easel," "going to Six Flags," and "having fun."

Significantly, the BIA reported that the Child may have been coached to make the abuse allegations:

> [T]hen [the Child] said out of the blue, "I was told to tell you[,]" and then she proceeded to make the allegations that you heard in this case more than once. And she indicated that her father had punched her with his fist repeatedly on front shin of her leg. And I asked her to demonstrate the punch. She . . . punched the chair repeatedly very hard. And when I observed her legs, I only saw a small bruise that she had on her leg and a keloid scar that looks like an injury from a long time ago.

> When I asked her did she feel any pain, she said she never cried. She never screamed. All she said, one time, was "Ow". And then she went back to watching television according to what she told me about what happened.
>
> She then went home with her mother later that day. Nothing else happened. We stayed at home after that and we went and watched TV with my nana.
>
> The most important thing that happened at the second interview on August 7th of 2021 in my office was the child, casually having conversation, asked me do I work all year long. And I said I do. And then she asked me "Do you work all the time? Don't you get a summer break?" And I said, "No. I have to work all year." She then said to me, I can get what I want if I make something up. She proceeded to coach me on saying I can get out of work by saying my friend is having a baby. Or I can say I'm sick so that I can take a break and not have to work. When I explained to her that I don't have a baby, she said, "Well, then just make something up to get what you want." This came out of a seven-year-old child in my office.

At the second interview, the BIA also inquired about the Child's reasons for not disclosing any incidents during their first interview. The Child responded, "Well, you never asked me what he did so I didn't tell you." The BIA thus inferred "that the child was repeating things that were said to her and repeating things she was told to say and that she also couldn't remember everything that she was supposed to say." In the BIA's view, this explained why the Child's relay of information was "very jumbled." As the BIA further explained, she "deliberately asked [Father] to raise his fist" and about his height and weight because she "wanted [the court] to see that a man of that size punching a child repeatedly . . . on the legs would injure her." According to the BIA, "common sense" showed that the Child's information regarding the abuse was "implausible."

Next, the BIA recounted observations made during a short courthouse visit the Child had with Father on August 19 and then during a supervised visit the week before the September 4 hearing. The BIA described the Child's response toward Father as

"comfortable[]," "relaxed," and "very natural," noting that the Child "hugged him and smiled when she saw him" and "laughed out loud" while they were playing together. The BIA emphasized that the Child did not display any fear towards her father during either visit. However, the BIA conveyed that, "as soon as her mother showed up, [the Child] clammed up," "was looking down," and "didn't have the free demeanor that she had throughout her visit with her father."

The BIA further explained that she was "unable to report . . . that there[] [was] any reason why [Father] would not be granted sole legal and sole physical custody" if the court was "inclined to do so." The BIA expressed concern that it was not in the Child's best interest "to have her parents constantly in [court] arguing about all manner of things none of which have been proven by anyone[.]" The BIA was "not convinced" Mother was correct in claiming there was "an ongoing investigation" because, when Mother subpoenaed CPS, DSS "filed a motion to quash it and [the court] granted that motion." Furthermore, the BIA had "been unable to obtain any information" indicating that a report was coming from DSS.

The BIA advised the court that she believed Mother and Father did not have the ability to communicate in good faith or in the best interest of the Child. Because the BIA did not "think that [Father] [had] received information in a fair manner that would allow him to participate with the child," the BIA recommended an order requiring the parents "to use a communication app" like "ourfamilywizard.com." Given "the pattern" of Mother's allegations, the BIA opined that the court could "reasonably expect new litigation in approximately two and a half weeks to three weeks" from the hearing date because Mother

indicated that the complaints were going to continue "over and over." As for the 59 days of makeup time, the BIA predicted that there would "probably be a lot more than that" given the "constant litigation."

At the conclusion of the hearing, the court found that there was insufficient evidence to support Mother's latest abuse allegations, that multi-jurisdictional confusion had delayed the receipt of a DSS report, and that the parents could not communicate in the best interest of the Child. With respect to the cross-petitions for contempt and custody modification, the court agreed with the BIA that the constant litigation due to Mother's repeated abuse allegations was negatively impacting the Child's life, stating, "No one who's seven years old should have gone through what this young lady has gone through." Based on that assessment, the court found "that there was a material change" and applied the relevant best interest factors in making its physical and legal custody determination.

After separately reviewing each factor, the court temporarily awarded Father sole legal and physical custody, giving Mother supervised visitation, pending a final hearing scheduled for December 16, 2021. Mother noted timely appeals from both the denial of a protective order and the Pendente Lite Order, docketed in this Court as No. 1080, Sept. Term 2021, and No. 1081, Sept. Term 2021, respectively.[11]

[11] On September 17, 2021, Mother petitioned for injunctive relief. The court denied that petition, "not[ing] that there is a Pendente Lite Order governing issues of custody and visitation in Case No. CAD15-02693," which was "set for a Permanent Custody Hearing on December 16, 2021 at 9 am" and "that this pending hearing will resolve any outstanding issues of custody and visitation more expeditiously than the appeal process."

D. Affirmance of the First Modification Order

While the protective order, contempt, and custody proceedings were taking place in the Circuit Court for Prince George's County, Mother's appeal from the First Modification Order was pending in this Court. On September 14, 2021, four days after the hearing on the petitions for protection, contempt, and custody modification, but before the circuit court filed its Pendente Lite Order, this Court filed its opinion in *Jones I*, affirming the First Modification Order, which expanded Father's access to the Child. *See* 2021 WL 4169200, at *8–9.

As this Court noted, under section 9-101.1(b) of the Family Law Article, a court deciding custody or visitation issues must consider "evidence of abuse by a party against . . . any child residing within the party's household[.]" Md. Code Ann., Fam. Law ("FL") § 9-101.1(b). Under section 9-101(a), "[a] trial court must find a party has abused a child by a preponderance of the evidence before denying a party custody or visitation." *Jones I*, 2021 WL 4169200, at *6 (citing *Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 682 (2014)). This Court rejected Mother's argument that the circuit court erred in failing to find that the Child "was physically or sexually abused" by a preponderance of the evidence, explaining that

> [s]ince Mother began making accusations that Father and/or Father's girlfriend's son had committed sexual/physical abuse of [the Child] during visitations, there has been no evidence supporting those allegations. On the contrary, and as the juvenile court noted, every one of the almost dozen reports investigated by the relevant counties' DSS have determined that the allegations were unfounded. [The Child] has undergone five forensic interviews, three different jurisdictions of child protective services have conducted investigations, and all have ruled out the allegations of abuse. As noted in the Prince George's County DSS report ordered by the court before

> the December 10, 2019 hearing, "[i]t appears that the child is being put in the middle of an adult custody battle. Clinical impression suggests that the child may have been coached to make these allegations as they are unfounded and inconsistent when professional[ly] assessed by trained interviewers or detectives."
>
> In sum, Mother has failed to show by a preponderance of the evidence that [the Child] was abused by Father. Accordingly, we are persuaded that the juvenile court did not abuse its discretion by granting Father increased visitations with [the Child].

Id. at *7–8.

E. The Second Modification Order

After the court issued the Pendente Lite Order, awarding Father sole legal and physical custody, Mother unsuccessfully moved to recuse the circuit court judge based on allegedly biased statements during a hearing on August 6, 2021.[12] On October 20, 2021, the Prince George's County DSS notified Father that Mother's report of suspected child abuse had been found to be "unsubstantiated."[13]

On December 16, 2021, the court considered any additional evidence and arguments the parties wished to present concerning custody modification. On December 20, the court entered a written order modifying custody based on the arguments and evidence presented "throughout the year of 2021." The court amended that order on January 18, 2021, and issued the Second Modification Order.

In this Second Modification Order, the circuit court found that Mother's persistent interference with Father's access to the Child and related reports of abuse constituted a

[12] The record does not contain a hearing transcript from this date.

[13] "Unsubstantiated" is defined as "a finding that there is an insufficient amount of evidence to support a finding of indicated or ruled out." FL § 5-701(aa).

material change in circumstances warranting the change from joint custody to sole legal custody for Father. The court also modified the shared physical custody arrangement, from Mother having the Child on weekdays during the school year and Father having custody on three weekends per month, to Father having the Child on weekdays during the school year and Mother having the Child on weekends. During summer breaks from school, the court ordered physical custody to continue alternating weekly.

In support of its material change finding, the court cited Mother's "numerous allegations that [Father] sexually and physically abused the Minor Child," which were investigated and "each time found" to be "unsubstantiated or ruled out." The court acknowledged that in October of 2021, Prince George's County CPS found Mother's most recent allegation of abuse "unsubstantiated" rather than "ruled out," but the court did not agree with Mother that such a finding "suggest[ed] some sort of guilt." To the contrary, the court found that Mother had "not produced competent, credible evidence that abuse occurred by a preponderance of evidence standard." Based on those findings, the court denied Mother's petition to modify legal and physical custody.

The court found merit in Father's counter-petition seeking to modify custody. The court explained that, in contrast to the lack of evidence supporting Mother's reports of sexual abuse, "[t]here [was] evidence that [Mother] engaged in a pattern of alienation," including Mother's "numerous unsupported allegations that [Father] sexually and physically assaulted" the Child. The court found that Mother's intentional denial of access time to Father was "a material change in circumstance that impact[ed] the Minor Child's relationship to her father."

After addressing each of the statutory factors pertinent to physical and legal custody, which we discuss in greater detail, *infra*, the court declared "all prior Pendente Lite Orders . . . null and void," and found that Father was "best equipped to make sound legal decisions" for the Child. The court concluded that it was in the Child's best interest for Father to have sole legal custody and for physical custody to be shared and modified such that Father had weekday custody during the school year rather than Mother.

Mother subsequently noted this timely appeal from the Second Modification Order (No. 1756, Sept. Term 2021). As explained, we consolidated it with her pending appeals from the September 10, 2021, orders denying her a protective order (No. 1080, Sept. Term 2021) and establishing custody pendente lite (No. 1081, Sept. Term 2021). Although the three appeals were stayed pending the circuit court's en banc review of the Second Modification Order, they are now ripe for review.[14]

STANDARD OF REVIEW

There are three interrelated standards that govern this Court's review of a circuit court's custody determinations. First, we review a juvenile court's factual findings for clear error. *See In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). Second, we review a juvenile court's legal conclusions de novo. *See In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017). Finally, we review the juvenile court's ultimate conclusions for abuse of discretion. *See In re Yve S.*, 373 Md. 551, 583 (2003). An abuse of discretion has been defined as "where no reasonable person would take the view

[14] Although Father and Mother were represented by counsel during portions of the circuit court proceedings, both are *pro se* in these appeals. Father did not file a brief.

adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Id*. (internal quotation marks and citation omitted).

The overarching consideration in custody and visitation disputes is protecting the best interests of the child. *Boswell v. Boswell*, 352 Md. 204, 219 (1998). Maryland "recognizes that in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent." *Id*. at 220. Regarding visitation, "the non-custodial parent has a right to liberal visitation" with their child "at reasonable times and under reasonable conditions." *Id*. at 220–21. However, the parent's right is not absolute and "may be restricted or even denied" when the child's best interest is at stake, such as in "situations involving sexual abuse, physical abuse, and/or emotional abuse by a parent." *Id*. at 221. "Custody and visitation determinations are within the sound discretion of the trial court, as it can best evaluate the facts of the case and assess the credibility of witnesses." *Id*. at 223; *see In re Yve S.*, 373 Md. at 585–86 (emphasizing that the trial court "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").

DISCUSSION

Mother does not dispute that the Second Modification Order supersedes prior custody-related orders, including the denial of her motion for a protective order and the Pendente Lite Order. Rather, as we understand Mother's arguments, she challenges the circuit court's finding that there was a material change of circumstances warranting

modification, its decisions to modify physical and legal custody, and what she perceives as judicial bias in favor of Father. In her brief, Mother argues:

> The trial court erred in determining that [Father] proved that there had been a change of circumstances affecting [the Child's] welfare since the entry of the last custody [order]. The trial court's findings on September 10, 2021 and December 16, 2021 were not supported by competent evidence or the record. Rather, there is evidence that the trial court was guided by its own personal beliefs in fashioning an outcome and abused its discretion see *Azizova v. Suleymanov*, 243 Md. App. 340, 348 (2019). The [error] is not harmless considering "[the Child] is a seven-year old girl. She is physically healthy, but numerous psychological experts, the Parties, and the Court agree that she requires psychological therapy to address the allegations in this litigation." . . . The merits of this case present[] this Court with a matter of public concern and will establish a rule for future conduct regarding custody cases involving child abuse allegations.

We address each challenge in turn below.

I. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN FINDING A MATERIAL CHANGE OF CIRCUMSTANCES WARRANTING MODIFICATION OF CUSTODY.

Mother disputes the circuit court's finding that there was a material change in circumstance based on her persistent interference with Father's access to the Child. Mother asserts that Father "failed to present any evidence bearing upon [the Child]'s wellbeing or how her life was materially impacted since the entry of the last order." To the contrary, Mother cites the testimony of the BIA that the Child's relationship with Father remains close as evidence "that the denial of access time and effort to alienate [Father] from Minor Child" does not amount to a material change in circumstance. Likewise, Mother contends that the Child's report card showing that she "was a consistent high achieving academic scholar" is inconsistent with the court's finding that the Child was affected by Mother's

persistent reports of abuse. Instead, Mother posits, "the trial court's findings were guided by its own personal beliefs" and "stereotypical presumptions of future harm."

This Court recently summarized the standards governing custody modification:

> Our courts engage in a two-step process when presented with a request to modify an existing custody order. First, the circuit court must assess whether "there has been a material change in circumstances." "A material change of circumstances is a change of circumstances that affects the welfare of the child." Second, should the court find a material change in circumstances, "the court then proceeds to consider the best interests of the child as if the proceedings were one for original custody." The trial court is thus required to evaluate each case on an individual basis to determine what is in the best interests of the child.
>
> In analyzing the best interests of the child, we are guided by the factors articulated in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977), and, with particular relevance to the consideration of joint custody, *Taylor v. Taylor*, 306 Md. 290, 304–11 (1986). In *Sanders*, this Court listed ten non-exclusive factors: (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. 38 Md. App. at 420.
>
> In *Taylor*, the Court of Appeals enumerated thirteen specific, non-exclusive factors, including some that overlap with the *Sanders* factors: (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; and (13) benefit to parents. 306 Md. at 304–11.
>
> Courts are not limited by any particular list of factors but are instead vested with wide discretion in making decisions concerning the best interests of children. *Azizova v. Suleymanov*, 243 Md. App. 340, 345 (2019); *see also Taylor*, 306 Md. at 303 (in noting "transcendent importance" of child's best interests, stating that no one factor "has talismanic qualities, and that no

> single list of criteria will satisfy the demands of every case" (citation omitted)).

Kadish v. Kadish, 254 Md. App. 467, 503–05 (2022) (some internal citations omitted).

A change in circumstance is material when it affects the best interest of the child. *See McCready v. McCready*, 323 Md. 476, 481 (1991); *Kadish*, 254 Md. App. at 503. Significantly, there need not be an identified harm to the child. *See Domingues v. Johnson*, 323 Md. 486, 499 (1991). Instead, it is sufficient for the court to find "that changes have occurred which, when considered with all other relevant circumstances, require that a change in custody be made to accommodate the future best interest of the child." *Id.*

In *Kadish*, this Court affirmed the trial court's finding of a material change sufficient to warrant modifying custody where a mother had failed to abide by court orders and created chaotic custody exchanges. 254 Md. App. at 485–88. The mother had additionally made three calls to CPS to examine the child for signs of abuse while she was in the father's custody, resulting in the child being "woken up in her home, taken from her bed and at one point taken to Hopkins for an examination." *Id.* Likewise, in *Wagner v. Wagner*, 109 Md. App. 1 (1996), a mother blocked the father's contact with their child for two months, during which the mother "could not be located." *Id.* at 33. Emphasizing that the child was "at the center of the dispute between [the] parents" and "relocated twice in as many years," this Court held that the mother's "attempts to discontinue [the father's] visitation" with the child and her "attempts at subterfuge" had "vitiated" "the presumption of continuity and stability in favor of the original custodial parent" underlying the material change requirement. *Id.*

Here, the record supports the court's finding of material change warranting modification of custody. As in *Kadish* and *Wagner*, the circuit court found that, because of Mother's refusal to allow Father his court-ordered access to the Child and her persistent abuse reports triggering a series of investigations, there was a material change in circumstance warranting modification. Even after several judicial interventions and court orders, Mother continued to interfere with Father's access to the Child by making additional unsubstantiated reports of abuse, refusing to allow Father his custody days, and failing to notify him of significant matters in the Child's life. Mother admitted that, although the court found her in contempt and ordered makeup time for Father due to her interference with the court-ordered custody schedule, she continued to deny Father's access to the Child. When her prior abuse allegations were ruled out, Mother quickly made new reports. As a result, the Child was deprived of access to her father and subjected to additional investigations, including physical examinations, interviews, and courthouse proceedings, all of which contributed to the Child's psychological stress, for which she requires ongoing therapy.

Mother also conceded that it would be in the Child's best interest for her to attend school in-person, rather than continue virtual learning, but that Mother's change in residence pending her divorce rendered that option unavailable. Neither the Child's demonstrations of love and trust toward Father during the BIA's observations, nor the Child's academic record, precluded the court from determining that Mother's persistent interference with Father's court-ordered access to the Child, repeated reports of unsubstantiated abuse, and change in residence created material change that was contrary

to the Child's best interest.

Therefore, based on this record, we find no error or abuse in discretion in the circuit court's determination that modification of custody was warranted to protect the best interest of the Child.

II. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN AWARDING SHARED PHYSICAL CUSTODY.

Mother challenges the circuit court's modification of the custody arrangement, in which the court awarded Father, rather than Mother, primary physical custody during the school-year weekdays. Mother contends that the court erred or abused its discretion in determining that modification would be in the Child's best interest because Father was "found responsible for unsubstantiated sexual abuse of [the Child] by the Prince George's County Child Protective Services[.]" In Mother's view, the circuit court was mistaken in treating the unsubstantiated finding as lacking probative value and in treating its Second Modification Order as "moot[ing] the issue that existed earlier in the proceedings."

Reviewing both the record and the law, we explain why we conclude that the court did not err or abuse its discretion in modifying physical custody.

A. Standards Governing Child Custody

When determining the child's best interest regarding custody, "neither parent has a superior claim to the right to custody." *Caldwell v. Sutton*, 256 Md. App. 230, 265 (2022) (citing *McDermott v. Dougherty*, 385 Md. 320, 353 (2005)). Rather, the court reviews numerous factors bearing on "the child's life chances in each of the homes competing for custody and then . . . predict[s] with whom the child will be better off in the future."

Sanders, 38 Md. App. at 419; *see Taylor*, 306 Md. at 304–11; *Azizova*, 243 Md. App. at 344–46; *see also* CYNTHIA CALLAHAN & THOMAS C. RIES, FADER'S MARYLAND FAMILY LAW § 5-3(a), at 5-9 to 5-11 (6th ed. 2016). Each factor is important, and courts do not weigh any one of them "to the exclusion of all others." *Sanders*, 38 Md. App. at 420. We view "all evidence contained in an appellate record . . . in the light most favorable to the prevailing party below[,]" *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996), giving "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *In re Yve S.*, 373 Md. at 584.

B. Relevant Record

In its written order, the circuit court made the following findings regarding the "non-exhaustive" factors for physical custody:

> 1. **Fitness of the parents**
>
> Both Parties consistently argued that the other is an unfit parent. Mother has consistently accused [Father] of sexually and physically abusing the Minor Child. Certainly, [Mother's] pattern of alienating [Father] from the Minor Child is a major concern to the Court. However, both Parties appear ready and able to care for the Minor Child, even if they cannot get along with each other. If the Parties would comply with the Court's Orders, both parents are fit.
>
> 2. **Character and Reputation of the Parties**
>
> Both Parties called family members as witnesses who testified as to the Parties' character. The testimony showed that both Parties are capable and committed parents. However, the record clearly shows that [Mother] wants to discharge or sue anyone who disagrees with her assertions.
>
> 3. **Desire of the Natural Parents and Agreement Between the Parties**
>
> The Parties currently have no ability to agree on anything. While there was previously a custody arrangement between the two, it fell apart shortly thereafter and gave way to this litigation. Both Parties need to develop skills to assist them in making joint decisions.
>
> 4. **Potentiality of Maintaining Natural Family Relations**
>
> The Minor Child clearly has a strong connection to both her maternal and paternal families. There was testimony that the Minor Child has a

particularly strong bond with her maternal grandmother with whom she's spent many years. There was also testimony that the Minor Child shares a bond with [Father's] family who expressed that they treat her like their own child. This Court does not doubt that these strong bonds will be maintained by both Parties.

5. **The Preference of the Child**

   This factor was not considered. The Minor Child in this case is too young to express a preference.

6. **Material Opportunities Affecting the Future Life of the Child**

   [Father] is employed as a Prince George's County police officer, and [Mother] is unemployed. Both Parties reside in homes belonging to other family members. There is no clear evidence to support a preference as to future material opportunities.

7. **Age, Health, and Sex of the Child**

   [The Child] is a seven-year-old girl. She is physically healthy, but numerous psychological experts, the Parties, and the Court agree that she requires psychological therapy to address the allegations in this litigation.

8. **Residences of the Parents and Opportunity for Visitation**

   The Parties reside about an hour drive from each other. The Court does not anticipate that this drive will pose a barrier to meaningful access for visitation.

9. **Length of Separation from Natural Parents**

   The Minor Child has been involved in both Parties' lives since her birth. While the Court notes that various custody arrangement alters the amount of time the Minor Child spends with either parent at a given point, both parents remain unyielding in their willingness to be involved in her life.

10. **Prior Voluntary Abandonment or Surrender**

    There is no evidence to suggest that either Party has voluntarily abandoned or surrendered the Minor Child in this case.

C. Analysis

Mother does not dispute that the circuit court considered the custody factors relevant to its decision to award shared physical custody. Instead, she contends that the court "abused its discretion when it precluded [the Child's] CPS forensic interview video recording" and failed to credit the testimony she presented from the forensic nurse and police officer. Citing such evidence, Mother disputes the court's determination that she

failed to "produce[] competent credible evidence that abuse occurred by the preponderance of evidence standard."[15]

We are not persuaded that the court erred or abused its discretion in refusing to admit the recording into evidence because Mother failed to establish sufficient grounds to overcome Father's hearsay objections. *See* Md. Rule 8-502.[16] Hearsay is not admissible except as provided by rule, statute, or constitutional provision. *Id.* The court did not err in refusing to admit the recording because the video was offered for the truth of the out-of-court statements made by the Child, who was not subject to cross-examination.

As for the testimony of Mother's two witnesses, the court was not required to credit that evidence as proof that the alleged abuse in fact occurred. We note that both the nurse and the police officer received the reports of abuse from Mother and the Child. Because neither witnessed the Child's interactions with Father, the witnesses' accounts of what the Child told them were inadmissible hearsay. *See* Md. Rule 5-802. To the extent that the two witnesses conducted investigations, each was permitted to testify about those steps. We discern no error or abuse of discretion in the court's consideration of their testimony for that limited purpose.

[15] Although the court excluded the Child's videorecorded interview, we note that the court did review the recording for the purpose of evaluating Mother's request that the court interview the Child. The court subsequently concluded that interviewing the child would not be beneficial at that time "based on [its] observations of the [Child's] maturity" and "how reluctant she was to focus her attention span[.]"

[16] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c).

As previously stated, factual findings are "not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley*, 109 Md. App. at 628. We find substantial evidence to support the court's findings and reasonable grounds for the resulting determination that modified physical custody arrangements, in which Father is awarded physical custody on school-year weekdays, Mother on school-year weekends, and each parent on alternating weeks over the summer, are in the Child's best interest.

We reiterate that, the most important factor when determining whether shared physical custody or joint legal custody would be in a child's best interest, is the capacity of the parents to communicate and to reach shared decisions affecting that child's welfare. *See Taylor*, 306 Md. at 303–07. Here, although the court found both parents to be "capable and committed" and credited them with maintaining the Child's "strong connection to both her maternal and paternal families," the court also found "the record clearly shows that Mother and Father "cannot get along with each other" and that Mother opposes "anyone who disagrees with her assertions." We agree.

The record supports these findings. For example, at the September 10, 2021, hearing, Mother implored the court to interview the Child after Father and the BIA objected to the necessity of an interview. The court declined to do so "because of what she's been put through" due to "the seriousness of the allegations." Although Mother testified that she attempts to communicate with Father about the Child, Father disagreed. He testified that Mother is "very argumentative" when he attempts to communicate with her, that she "uses vulgar language against [him]," and "tries to keep [him] out of every portion of [the

Child's] life."

Father testified about Mother's efforts to alienate him, citing Mother's failure to discuss what school the Child would be attending, that he found out the Child had been baptized through a Facebook post, and that Mother had sent emails to Father's mother saying that he had "beaten on" the Child. Mother admitted that, during the time in which she had sole physical custody, she denied Father his court-ordered access to the Child, prompting the court to hold her in contempt. Furthermore, despite Mother's multiple reports of abuse, investigators ruled out all but one report, which was found to be unsubstantiated. We find no error in the court treating that finding as evidence that Mother's persistent allegations were not supported by sufficient evidence to justify her refusal to comply with the court's order to give Father access on specified days.

We conclude that the court reviewed the evidence with respect to each of the relevant legal factors, that the court's factual findings are supported by substantial evidence, and that the court did not abuse its discretion in modifying physical custody to give Father custody during school weeks, Mother custody during weekends, and both parents custody on alternating weeks during summer breaks.

III. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN AWARDING FATHER SOLE LEGAL CUSTODY.

Mother contends that the circuit court erred or abused its discretion in awarding Father sole legal custody. Again, we disagree and explain.

A. Standards Pertinent to Legal Custody

As the Supreme Court of Maryland (then named the Court of Appeals of

Maryland)[17] explained in *Taylor*, the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare is "the most important factor" in determining the appropriateness of joint legal custody. 306 Md. at 304.

> Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.
>
> * * *
>
> Blind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon the warring parents will bring peace, is not acceptable

Id. at 304, 307.

B. Relevant Record

In its written order, the circuit court concluded "that [Father] is best equipped to make sound legal decisions" based on the following "non-exhaustive factors" bearing on legal custody:

> **1. The Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare**
>
> The Court finds that the parents lack the ability to communicate with each other. The unnecessary disputes during the Pendente Lite Order exemplify this discord. The Court acknowledges that the initial Pendente Lite Order, which provided for supervised visitation at [Father]'s Mother's home was ill-advised when it ultimately resulted in law enforcement officers being called. Both Parties testified as to different accounts of what occurred during those 90 days. Regardless of which story is true, both Parties cannot maintain amicable relations at this time. It is in the Minor Child's best interest that her parents develop the skill and trust to reach joint decisions and to civilly communicate with each other.

[17] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

2. Willingness of Parents to Share Custody

This litigation, at its core, had both Parties seeking sole legal and physical custody to the exclusion of the other parent. As previously, discussed, [Father] and [Mother] have a volatile communicative relationship in the best of times. While in the past, the Parties have sought sole custody, it is in the Minor Child's best interest that both parents remain involved in her life.

3. Fitness of Parents

As previously discussed, both Parties clearly do not get along, and [Mother's] actions are promoting alienation between [Father] and Minor Child. [Mother] is bright and a resourceful person who has strength to successfully raise her child. She needs to work with [Father] to successfully raise their daughter.

4. Relationship Established Between the Child and Each Parent

The Minor Child . . . has a strong relationship with both [Father] and [Mother]. Both Parties care for their daughter and have taken steps to care for her well-being. The Minor Child, in turn, expresses that she loves both parents.

5. Preference of the Child

This factor is not considered since the Minor Child is too young.

6. Potential Disruption of Child's Social and School Life

While this litigation persisted throughout the year, it is not evident that it disrupted much of the Minor Child's social and school life. The Court is confident that the Minor Child's life will not be disturbed as students shift from remote learning during the COVID-19 Pandemic to more in-person school settings. [Father] testified that the Minor Child is making new friends at his neighborhood and at school.

7. Geographic Proximity of Parental Homes

As previously discussed, [Father] and [Mother] live about an hour from each other. The Court anticipates that this distance will, at best, be a minor nuisance in the long-term.

8. Demands of Parental Employment

[Mother] is unemployed. [Father] is a police officer. [Father's] profession is highly demanding with ever-changing schedules and long hours. However, there is ample evidence that [Father's] family is able and willing to assist [Father] should he be unavailable due to work demands. See [Father's] Exs. 1, 2 ¶ 11.

9. Age and Number of Children

The Minor Child is seven (7) years old at this time. Both [Father] and [Mother] have other children. There is evidence that both Parties are fully capable of caring for the financial and emotional needs of the Minor Child in this case in addition to those of their other children.

10. Sincerity of Parents' Request

This Court is satisfied that both parents are sincere in their request and love for the Minor Child.

11. Financial Status of the Parents

[Mother] is unemployed, but her family is present and supportive in her life, which lessens financial strains. [Father's] employment as a police officer provides him a steady source of income, including a pension program that will permit him to retire earlier than most workers. See [Father's] Ex. 9

12. Impact on State and Federal Assistance

There is no evidence as to this factor.

13. Benefit to Parents

Access to the Minor Child will be beneficial to both parents after this litigation. Both Parties and their families care for the Minor Child and a reasonable degree of access on both sides will foster the bond and ensure it remains intact for years to come.

C. Analysis

The evidence supports the circuit court's conclusion that Mother and Father are not ready, willing, or able to make joint decisions in the Child's best interest. As we have detailed, over the course of this three-plus-year custody battle, the ability of these parents to cooperate has deteriorated to the point of constant litigation. The court cited continuing conflict after the Pendente Lite Order went into effect, resulting in police being called during a supervised visit at Father's mother's home. Because we do not have the transcript from the December 16, 2021, hearing, Mother cannot challenge that finding.

In any event, consideration of that evidence is unnecessary for this Court to agree with the circuit court that Mother and Father "lack the ability to communicate with each other" and "cannot maintain amicable relations" sufficient to share legal custody. Indeed, Mother does not dispute that conclusion.

The court considered the *Taylor* factors relevant to legal custody, including

Mother's history of attempting to alienate Father from the Child. That factor, along with Mother's inability to communicate with Father and to comply with court orders regarding custody, supports the court's award. Because we find that the court predicated its decision to award Father sole legal custody on correct legal principles, that the court's factual findings regarding the appropriate factors are not clearly erroneous, and that the court did not abuse its discretion, we shall affirm the Second Modification Order. *See Barton v. Hirshberg*, 137 Md. App. 1, 24 (2001).

IV. THE CIRCUIT COURT WAS NOT UNFAIRLY BIASED AGAINST MOTHER.

Mother argues that the circuit court expressed "tentative views on the merits of this case" in a manner reflecting "an opinion that derives from an extrajudicial source," citing *Liteky v. United States*, 510 U.S. 540, 555 (1994). In support, she contends that the following colloquy between the court and Father, during an August 6, 2021, hearing on the cross-petitions to modify custody, shows unfair bias in favor of Father:

> [THE COURT]: "How are you going to be able to handle full custody?"
>
> [COUNSEL FOR FATHER]: "We were actually just talking about that your Honor."
>
> [THE COURT]: "[Father], here is what I want you to do, I want you to prepare testimony and tell me how you are going to handle full custody. You know, taking her to school . . . I want you to tell me how you are going to do that on the 19th."

According to Mother, this dialogue demonstrates "[t]he trial court's tentative view of the merits before the conclusion of the evidentiary investigations," which, she believes, reveals the court's bias against her that was "deriv[ed] from an extrajudicial source." Mother

therefore questioned the court's impartiality and, shortly thereafter, filed a motion of recusal.

Because the record transmitted to us does not include the transcript upon which Mother predicates her claim of error, she cannot prevail on appeal. *See Kovacs v. Kovacs*, 98 Md. App. 289, 303 (1993). Nevertheless, even assuming the accuracy of the excerpted colloquy, we find no merit in Mother's bias claim.

Litigants are entitled to a fair and impartial judge and, therefore, may request recusal based on an actual or apparent bias "when a reasonable person with knowledge and understanding of all the relevant facts would question the judge's impartiality." *In re K.H.*, 253 Md. App. 134, 154 (2021). However, instances of bias warranting recusal or appellate relief are rare,[18] and "[t]he party requesting recusal has a heavy burden to overcome the presumption of impartiality[.]" *In re K.H.*, 253 Md. App. at 154.

> To overcome the presumption of impartiality, the party requesting recusal must prove that the trial judge has a personal bias or prejudice concerning him or personal knowledge of disputed evidentiary facts concerning the proceedings. Only bias, prejudice, or knowledge derived from an extrajudicial source is 'personal.'

Id. at 154–55 (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993)).

We are not persuaded that Mother satisfied her burden of showing a "personal bias or prejudice" warranting disqualification or recusal. The cited colloquy concerned what

[18] *See, e.g.*, *Liteky*, 510 U.S. at 555–56 (clarifying that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible").

Father should address at the next hearing on his petition seeking sole legal and physical custody of the Child. We do not interpret this exchange to be an indication that the trial court favored Father over Mother. Instead, the court was following up on Mother's argument that Father's work schedule would prevent him from fulfilling his parental duties. The court merely alerted Father that he should be prepared to testify about how he would handle the Child's needs if he was awarded physical custody on school days.

Viewed in context, the challenged remarks provided appropriate guidance to the parties for the next hearing. By pointing out that Father should address that concern at the upcoming modification hearing, the judge implicitly indicated that he had *not* yet determined whether a change in the existing custody order would be in the Child's best interest. Rather than suggesting a predisposition toward Father, the court was attempting to focus future proceedings on the relevant custody factors. Furthermore, as the extensive findings in its subsequent written order demonstrate, the court considered all the evidence in light of those factors before deciding to modify custody.

Likewise, the record does not support Mother's contention that the judge developed a personal bias predicated on extra-judicial knowledge or evidence. "Where knowledge is acquired in a judicial setting, or an opinion arguably expressing bias is formed on the basis of information acquired from evidence presented in the course of judicial proceedings before him, neither that knowledge nor that opinion qualifies as 'personal.'" *Jefferson-El*, 330 Md. at 107. We discern nothing in this record to suggest that the court acquired any knowledge or developed a bias based on something other than the extensive judicial proceedings. *Cf. In re K.H.*, 253 Md. App. at 155 (finding "nothing in the record to suggest

that any knowledge regarding this matter on the part of the judge was acquired through any avenue other than the judicial proceedings in the matter, over which the judge had presided for approximately three years").

Because we conclude that Mother did not overcome the strong presumption that the court was impartial, we find that the court did not abuse its discretion in denying Mother's motion for recusal or by otherwise depriving Mother of a fair hearing.

IN NO. 1080, SEPT. TERM 2021, ORDER DENYING PROTECTIVE ORDER, AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN NO. 1081, SEPT. TERM 2021, APPEAL FROM PENDENTE LITE ORDER DISMISSED. COSTS TO BE PAID BY APPELLANT.

IN NO. 1756, SEPT. TERM 2021, CUSTODY MODIFICATION ORDER DATED JANUARY 22, 2022, AFFIRMED. COSTS TO BE PAID BY APPELLANT.