Circuit Court for Prince George's County
Case No. CAP 18-03166

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1198 and 1457

September Term, 2020

A. U.

v.

E. P. *et al*.

Kehoe,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: July 9, 2021

These consolidated appeals arise out of an ongoing dispute in the Circuit Court for Prince George's County between A.U. and E.P. regarding custody of their minor child, K.P. Last year, a panel of this Court remanded this case for further proceedings in *A.U. v. E.P.,* No. 1714, Sept. Term 2019, 2020 WL 1922493 (Md. Ct. Spec. App., Apr. 21, 2020) ("*A.U. I*").

In Appeal No. 1198 ("*A.U. II*"), Mr. U. challenges the circuit court's order denying his motion to modify custody after it conducted the hearing required by our mandate in *A.U. I*. In Appeal No. 1457 ("*A.U. III*"), Mr. U. appeals the circuit court's denial of his *ex parte* emergency petition for modification of custody based on events that allegedly occurred after the circuit court entered its judgment. The two appeals were consolidated by an order of the Chief Judge of this Court on April 2, 2021.

Mr. U. presents three issues, which we have consolidated and reworded:

> 1. Did the circuit court abuse its discretion by denying Mr. U.'s motion to modify custody?
>
> 2. Did the circuit court abuse its discretion by denying Mr. U.'s *ex parte* emergency petition for modification of custody?[1]

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[1] Mr. U. articulates the issues as (emphasis in original):

1. Did the trial court err in not realizing that under Fam. Law § 9-101.1 the court is required to be more proactive where domestic violence exists, and not wait until the child is injured or dead?
2. Pursuant to Fam. Law § 9-101.1 can an adjudicated child abuser meet his burden of production and persuasion of showing "*no likelihood of … further child abuse or neglect*" by not coming to court?

For reasons that we will explain, we will affirm the judgment of the circuit court at issue in *A.U. II.* We do not have jurisdiction over the court order at issue in *A.U. III* and will therefore dismiss Appeal No. 1457.

Background

The factual background can be found in *A.U. I* at 2020 WL 1922493 *1–*3 and *8–*9. Relevant for our purposes, in *A.U. I*, the circuit court granted Ms. P. sole legal and physical custody and granted Mr. U. visitation on every other weekend. On appeal, we neither affirmed nor vacated the circuit court's judgment but remanded the case to the circuit court to make findings pursuant to Md. Code, Fam. Law § 9-101.1. Our task to the circuit court included:

> First, the court must determine whether, in fact, Mr. P. abused Ms. P. or any of their children. This includes not only acts of violence but threats of violence as well. The burden of production and persuasion by a preponderance of the evidence as to this issue lies with Mr. U., as he is the party who is claiming that abuse occurred. If he fails to meet his burdens, the trial court's inquiry ends. If, however, he succeeds, then the burden shifts to Mr. and Ms. P. to show that there is no likelihood that abuse will occur in the future. They must establish this by a preponderance of the evidence; they are not required to meet some heightened evidentiary threshold before the court

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3. Did the trial court err in not realizing that the pattern of K.'s unexplained injuries are *indicia* of abuse or neglect, and that K.'s injuries exceeded prior injuries suffered by his maternal siblings before the court intervened with protective order and supervised visitation?
4. Did the trial court misapply the law and abuse its discretion by essentially vouching for a child abuser in its finding of "*no likelihood of ... further child abuse or neglect*" when the adjudicated child abuser never showed up in court and was subsequently arrested?

> can reasonably find that there was no likelihood of further child abuse or neglect.
>
> If the court concludes that there is no such likelihood, then there is no reason to modify the current custody and visitation order. If, however, the court finds that there is a likelihood of further abuse, then the court must consider what arrangements will best protect K. and any other victim(s) from future abuse consistent with the best interest of K. and to incorporate those arrangements in a revised judgment.

A.U. I *9 (cleaned up).

The court conducted the § 9-101.1 hearing on December 16, 2020, and the validity of the court's findings are the issue in Appeal No. 1198. The court found that Mr. U. had satisfied his burden of production and persuasion that Mr. P. had abused or threatened to abuse Ms. P. and/or their child/children. The court based its finding on the domestic violence protective orders granted on behalf of Ms. P. against Mr. P. The court then concluded that, because Mr. U. met his burden, the burden of persuasion shifted to Mr. and Ms. P. to show that there is no likelihood that further abuse will occur in the future. Since Mr. P. was not present at the hearing, the burden fell solely on Ms. P. She testified that there had been no abuse and offered into evidence a Department of Social Services/Child Protective Services investigation and report that found no indication of abuse.

This evidence did not go unchallenged. Mr. U. presented photographs of K. and asserted that they showed that K. had been physically abused. After examining each photograph, the trial court stated that the photos showed "nothing inconsistent with [K.] having normal accidents." Ultimately, the court found Ms. P.'s testimony and the evidence she presented to be more persuasive and reliable. Thus, the court concluded that Ms. P. met

her burden of demonstrating that there was no likelihood of further abuse and denied Mr. U.'s petition for modification of custody. The court entered judgment on December 21, 2020. Mr. U's appeal of the court's judgment is docketed as No. 1198 of the 2020 Term. We will address the merits of Mr. U.'s contentions regarding the court's judgment in part A of this opinion.

In early January, Mr. P. was charged with physically assaulting Ms. P.'s mother, Ms. A., who resides in the P.'s household. Ms. P. sought a protective order against Mr. P., which was granted on January 3, 2021. He was ordered to vacate the family home and not to have any contact with Ms. A., Ms. P., or the children. When Mr. U. learned of this, he filed a verified emergency petition to modify custody on February 17, 2021, in which he sought an *ex parte* order transferring custody of K. to him. Attached to the petition were the docket entries for the domestic violence proceeding. The circuit court found that Mr. U. had failed to show good cause for the relief sought and denied the request for *ex parte* and emergency relief. The court ordered that the case should "proceed in the normal course." In Appeal No. 1457, Mr. U. asserts that the circuit court erred in denying his requests for *ex parte* emergency relief. We will address this appeal in part B of the opinion.

On June 14, 2021, Mr. U. filed a motion asking this Court to "reopen" the record of this case to receive additional evidence of what he terms "'smoking gun' documents" that he asserts undermines Ms. P.'s credibility and shows that K. is in danger of physical injury at the hands of Mr. P. We will address this motion in part C.

Finally, in part D, we have some additional comments for the parties and directions to the circuit court.

The Standard of Review

In child custody cases, we utilize three related standards in reviewing a circuit court's determinations of child custody issues:

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

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (cleaned up).

This Court has recently explained that:

> An abuse of discretion may occur when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court. This standard accounts for the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses. The trial judge who sees the witnesses and the parties and hears the testimony is in a far better position than the appellate court, which has only a transcript before it, to weigh the evidence and determine what disposition will best promote the welfare of the child.

Gizzo v. Gerstman, 245 Md. App. 168, 201 (2020) (cleaned up).

Analysis

A. Appeal No. 1198

Although he frames them somewhat differently in his brief, Mr. U.'s contentions are focused on two aspects of the circuit court's findings and conclusions.

First, Mr. U. argues that the photographic evidence that he introduced at the hearing showed that K. had a "pattern of . . . unexplained injuries," which demonstrated that K. had been abused by Mr. P. and/or Ms. P., neglected by them, or both. The circuit court did not agree: After it reviewed the photographs, it concluded that they showed that the injuries sustained by K. were "scratches, maybe" as a result of "normal accidents" and not "as a result of abuse."[2] Mr. U. states in his brief that the court's conclusions were clearly erroneous and that "the pattern of [K.'s] injuries . . . suggests that [K.] is injured as soon as he returns from visiting with his father, which gives the injuries about two weeks to heal before he visits his father again."

Mr. U. asks this Court to make its own review of the photographs, which we have done. In reviewing for clear error,

> [t]he appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence.

[2] A report by Child Protective Services regarding Mr. U's allegations of abuse was introduced into evidence. The CPS investigator examined the photographs and reached essentially the same conclusion as did the court.

> It is thus plain that the appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence.

Ryan v. Thurston, 276 Md. 390, 392 (1975) (cleaned up).

After reviewing the photographs, we cannot say that the court's conclusions as to what the images depict are clearly erroneous. In effect, Mr. U. is asking us to draw inferences from the photos that are different from those drawn by the trial court. However, it is not our role to second-guess the circuit court as long as its inferences were reasonable. *See Gordon v. Gordon*, 174 Md. App. 583, 626 (2007) (We "may not substitute our judgment for that of the fact finder even if we might have reached a different result.") (cleaned up). Because the court's factual conclusions were reasonable in light of the evidence before it, we cannot disturb them.

Second, Mr. U. contends that the circuit court erred in finding that by a preponderance of the evidence Mr. and Ms. P. met their burden that there is no likelihood of further abuse or neglect. Specifically, he argues that Mr. and Ms. P could not meet their burden of production and persuasion without Mr. P.'s presence in court. Because Mr. P. failed to attend and testify at the hearing, Mr. U. argues that the Mr. and Mr. P. did not meet their burden of showing that there is no likelihood of further abuse.

Although it is troubling that Mr. P. did not attend the hearing, he was not required to attend or testify unless he was summoned, which he was not. Based on the conflicting evidence and testimony presented to it, the court found that Ms. P. had met her burden of showing no likelihood of further abuse. When, as in the present case, the trial court acts as

the finder of fact, the trial judge is "entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness, including testimony that was not contradicted by any other witness." *In re Gloria H.*, 410 Md. 562, 577 (2009) (emphasis in original) (cleaned up). Ms. P.'s testimony provided a legally sufficient basis for the trial court to conclude that it was in K.'s best interest for the original custody arrangement to remain in effect. To be sure, Mr. U. presented evidence to the contrary, but it is the role of the trial court, and not this Court, to decide which version of events was more credible and more persuasive.

The circuit court correctly identified this Court's instructions as to what it should do on remand and followed them to the letter. Based on the record that was before the court, we have no basis to conclude that the court abused its discretion in concluding that no modification to the prior custody order was necessary to protect K., Ms. P., or other members of the P. household from abuse or neglect.

B. Appeal No. 1457

We will next address whether Mr. U.'s appeal from the order by the circuit court denying his emergency petition for modification of custody and related relief is properly before us.

Writing for this Court in *In re D.M.*, ___ Md. App. ___, No. 0998, Sept. Term, 2020, 2021 WL 2102717 (filed May 25, 2021), Judge Arthur explained that:

> In general, a party may appeal only from "a final judgment entered in a civil or criminal case by a circuit court." Maryland Code (1974, 2020 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article.
>
> To qualify as a final judgment, an order "must be so final as either to determine and conclude the rights involved or to deny the appellant the

> means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding. In other words, the order must be a complete adjudication of the matter in controversy, except as to collateral matters, meaning that there is nothing more to be done to effectuate the court's disposition. . . .
>
> The Court of Appeals has identified three exceptions to section 12-301's finality requirement: (1) appeals from interlocutory orders specifically allowed by statute; (2) immediate appeals permitted under Maryland Rule 2-602(b); (3) and appeals from interlocutory rulings allowed under the collateral order doctrine.

Id. at *5–7 (cleaned up).

Mr. U. does not assert that the circuit court's order denying his motion for *ex parte* emergency relief was: (1) a final judgment, (2) appealable under the collateral order doctrine, or (3) certified for immediate appeal pursuant to Rule 2-602(b). This brings us to the topic of interlocutory appeals permitted by statute and, specifically, to Courts & Jud. Proc. § 12-303(3)(x), which permits an interlocutory appeal from an order "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order[.]"

In *D.M*., the Court explained that subsection (3)(x) permits appeals of an order that "operates to deprive a parent of the care and custody of their children or changes the terms of a parent's care and custody of their children [in a way that is detrimental to the parent's interests]." 2021 WL 2102717 at *5 (cleaned up).

Returning to the case before us, the February 22, 2021 order denying Mr. U.'s emergency *ex parte* petition did not *change* any provision of the court's prior custody and visitation order. Instead, it deferred action on his petition until "the normal course" had

taken place, that is, until Ms. P. and Mr. P. were given an opportunity to respond to the petition and the court could hold an evidentiary hearing. Because the court's order was not an appealable collateral order, certified for immediate appeal under Rule 2-602(b), or immediately appealable under Courts & Jud. Proc. § 12-303(3)(x), we have no choice but to dismiss the appeal.[3] *See Gruber v. Gruber*, 369 Md. 540, 546 (2002) ("Where appellate jurisdiction is lacking, the appellate court will dismiss the appeal on its own motion.").

C. Re-Opening the Record

On June 14, 2021, Mr. U. filed a motion asking this Court to "reopen" the record of this case to receive additional evidence of what he terms "'smoking gun' documents" that he asserts undermines Ms. P.'s credibility and shows that K. is in danger of physical injury at the hands of Mr. P. We deny the motion. There is no mechanism for an appellate court to "reopen" a trial record to receive additional evidence that was not presented to the trial court in the first instance. The circuit court is the appropriate forum to make the initial decision as to whether the material proffered by Mr. U. is admissible evidence.

[3] During oral argument, Mr. U.'s counsel raised two cases in support of his contention that that the interlocutory order is appealable: *Frase v. Barnhart*, 379 Md. 100, 110 (2003), and *Miller v. Bosley*, 113 Md. App. 381, 386 (1997). Both cases involved appeals from non-final orders that changed custody *pendente lite*. These are permitted by Courts & Jud. Proc. § 12-303(3)(x). In the present case, the circuit court did not change the terms of custody or visitation in any fashion.

D. Further Proceedings

We fully appreciate Mr. U.'s concerns for the safety of K. Our concerns extend as well to Ms. P. and the other members of her household. But the decision as to what is best for K., his half-siblings, Ms. A., and Ms. P. must be based on evidence as opposed to allegations. In Maryland, it is the circuit court that has the primary responsibility for this difficult task, subject to review by appellate courts. Fam. Law § 9-101.1 provides the circuit court with ongoing authority to "make arrangements . . . that best protect" the children who are the subject of the proceeding as well as any other victim(s) of abuse. When the circuit court addresses the merits of Mr. U.'s pending custody petition, it should undertake another § 9-101.1 analysis in light of the existing record and any new evidence admitted in hearing(s) that occurred after December 16, 2020, which was the date of the hearing that resulted in the court's judgment that has been affirmed by this opinion.

Appeal No. 1198, 2020 Term:

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

Appeal No. 1457, 2020 Term:

APPEAL DISMISSED. APPELLANT TO PAY COSTS.