Circuit Court for Harford County
Case Nos. 12-C-10-000272

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1262

September Term, 2019

GLENN LEGAULT

v.

MICHELLE LEGAULT

Berger,
Wells,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: June 5, 2020

Michelle Legault, appellee, ("Mother") petitioned the Circuit Court for Harford County to modify her former husband, appellant, Glenn Legault's ("Father"), visitation with their daughter, E.L.[1] In 2011, after both parents moved to modify custody, they agreed that Mother would have primary physical custody of E.L. and Father would have access to E.L. every other weekend and during some holidays. The parties also agreed that Father was to cooperate with Mother to get E.L. to any extra-curricular activities in which she was involved.

In 2018, Mother alleged that Father refused to get E.L. to her various scheduled activities and, therefore, moved to modify his visitation. The circuit court granted Mother's request and Father appealed. He raises two issues which we re-state for clarity:[2]

I. Did the court abuse its discretion in finding there was a material change in circumstances sufficient to modify the visitation order?

II. Did the court abused its discretion in allowing the court-appointed custody evaluator to testify at the modification hearing?

We answer both questions in the negative and affirm.

[1] The daughter is a minor and we will refer to her by her initials.

[2] In his brief, Father posed the following questions:

1. "Whether the court abused its discretion in finding there was change of circumstances affecting the material welfare of E.L. Legault?

2. Whether the court abused its discretion in admitting hearsay statements of the minor child through a custody evaluator who was not submitted or qualified as an expert witness, and hearsay statements of Defendant/Counter-Plaintiff?"

FACTUAL AND PROCEDURAL HISTORY

The 2009 Judgment of Absolute Divorce

E.L., born on January 7, 2004, is the biological child of Michelle (LeGault) Mutumbo, (hereafter, "Mother") and Glenn LeGault, (hereafter, "Father"). Mother and Father obtained an absolute divorce in Pennsylvania in 2009. At that time, the parties reached a stipulated custody agreement in which they agreed to share legal custody of E.L. Mother had residential custody and Father had visitation with E.L. on alternating weekends, from Friday evening to Sunday evening. Among other things, neither party was to be verbally abusive to the other, particularly in front of E.L. Also, Mother was to keep father informed of E.L.'s doctor visits, performance at school, and extra-curricular activities.

The 2011 Modification of Custody

In 2008, Mother left Pennsylvania with E.L., then aged four, and moved to the home of Isaya Mutombo in Bel Air, Maryland. At that time, Mr. Mutumbo was living with his two sons from a previous marriage. Mother married Mr. Mutombo in 2010. Father also remarried in 2010 and moved to Garnet Valley, Pennsylvania, 90 minutes from Bel Air.

In 2010, in separate petitions, Mother and Father requested that the Circuit Court for Harford County register the Pennsylvania judgment of divorce, including its custody provisions, and both parents moved to modify custody. In his petition, Father sought to stop Mother from moving further away from him. He also sought additional access during the summer. Father subsequently amended his petition and requested joint legal custody

of E.L., and access during the entire summer; alternate Thanksgivings; increased Christmas visitation, and visitation with E.L. on his birthday, her birthday, and school holidays.

Mother's petition sought full legal custody of E.L. Mother also tried to stop Father from attending E.L.'s extra-curricular activities. One reason for this request was Mother's claim that Father has a habit of making disparaging remarks about her and Mr. Mutombo during visitation exchanges. Mother maintained that whenever she and Mr. Mutumbo took E.L. to Father, he would often say inflammatory things about Mr. Mutumbo which Mother could clearly hear.

By way of an order of court dated January 10, 2011, Mother and Father reached an agreement on custody and visitation. Under the new arrangement, Mother and Father would share legal custody of E.L, but Mother would have "tiebreaker" authority. Mother retained primary residential custody of E.L. As for Father's visitation, during the school year, the agreement stated he would have

> partial physical custody of the minor child on alternate weekends from Friday at 6:30 p.m. until Sunday at 6:30 p.m. If there is no school in session after Father's period of partial physical custody, then Father will retain partial custody from 6:30 p.m. the day of school recess until 6:30 p.m. the night before school starts. This provision shall not apply to the weekends of Memorial Day and Labor Day (see paragraph 6 herein below for how these holidays will be shared).

Father's summertime visitation was as follows:

> During the summer months, Mother and Father shall alternate physical custody on a bi-weekly basis, beginning the Friday following the last day of the school year (according to the child's school district), and alternating bi-weekly thereafter until the last Friday before the start of the next school year. The parties shall exchange custody on Friday evenings at 6:30 p.m.

Of importance here, in terms of extracurricular activities, the parties agreed:

> Both parties shall keep the other informed of the child's school meetings and events, medical appointments, daycare arrangements, camps, extracurricular activities, and school functions. With respect to the child's extracurricular activities, the child may be transported to and from said activities by the parent with whom she is staying with that day, and the other parent will not appear at that activity. Both parents can attend games, dress rehearsals, performances, all school related events, and award ceremonies. The terms set forth in [the paragraph about communication and behavior between the parties] shall apply at all such events.

The 2017-2019 Modification of Custody Hearing

In a *pro se* pleading docketed September 13, 2017, Mother moved to modify Father's visitation. In her motion, she alleged that Father was not compliant with getting E.L., then 13 years old, to "sports, dance, and other extra-curricular activities." Mother alleged that Father "is very rigid when it comes to the custody agreement and will not compromise to accommodate her participation in extra-curricular activities." Mother desired to take E.L. to her activities on Father's weekends and drop her off with him once the activity concluded. In the summer, Mother wanted the biweekly visitation modified to "front load" Father's visitation to take place "from 7:00 p.m. on the last day of the school year for thirty days, returning [E.L.] to the mother's residence at 7:00 p.m. on the 30th day." Mother requested this arrangement "to accommodate [E.L.'s] August sports camps." In other words, because Father refused to take E.L. to her sports activities, Mother wanted to ensure E.L would attend sports camp and wanted her summer access to occur when the camp was in session.

Mother also requested modification of Father's telephone access. Finally, she sought to allow each parent's current spouse to transport E.L. to and from visitation.

Father denied all of Mother's claims. He asserted that there was no material change in circumstances. He maintained that E.L. had been involved in the same activities since 2011 when the parties agreed to modify visitation. Consequently, he claimed, there could not be a material change in circumstances. Father argued that even if he was unwilling (or unable) to get E.L. to her various activities, Mother still failed to show that any changes in E.L.'s schedule had negatively affected E.L.

The circuit court referred the parties to Moira Ricklefs, MA, CAC-AD[3] of the Howard County Office of Family Court Services, to serve as a custody evaluator. Ms. Ricklefs later issued a report that noted E.L. participated in softball, dance, band, and Girl Scouts. The evaluator's report confirmed Mother's reason for seeking the modification of custody: "[E.L.] is prevented from fully participating in various games, recitals, and activities that occur when she is scheduled to visit with her father."

Ms. Ricklefs reported that Father only appeared for one evaluation session and failed to schedule a second required meeting. During the meeting that did occur, the evaluator noted that E.L. was uncomfortable discussing her activities with Father. Ms. Ricklefs reported that Father claimed he had no knowledge of E.L.'s activities aside from

[3] Certified Associate Counselor-Alcohol and Drug. "A CAC-AD is the bachelor-level alcohol and drug counselor credential issued by the [Maryland Board of Health.]" Maryland Department of Health website: https://bit.ly/2xXywGs.

what Mother and E.L. told him. Significantly, the evaluator concluded that, "Father appears to continue to harbor a great deal of resentment and anger toward [Mother] even at this late stage."

The parties appeared for an evidentiary hearing before a magistrate. After the hearing, the magistrate found that Father's communication skills hindered him from amicably resolving disputes that arose with Mother regarding E.L. The magistrate found that this problem was particularly acute because the parents' inability to communicate did not allow E.L. to fully participate in activities which, in the magistrate's opinion, were vital to E.L.'s development. Echoing what Ms. Ricklefs had concluded, the magistrate found that,

> Father's continued anger and resentment toward [Mother] as a substantial impediment to the co-parenting process now required at [E.L.]'s stage in life. His active refusal to engage in meaningful discussions about [E.L.]'s status and activities is counter-productive to the situation and damaging to his relationship with his daughter. It takes an active commitment to remain angry for more than a decade.

Additionally, the magistrate concluded that Father had engaged in "emotional blackmail" when he told E.L. that she loved her activities more than she loved him by not "committing" to him on the weekends. The magistrate found Father's statement to be wholly "inappropriate."

Upon these findings, in what was clearly an attempt to alleviate tensions between the parents, on May 29, 2018, the magistrate issued her report and a "Temporary Consent Order," which resolved the pressing question of whether E.L. would be able to attend her middle school graduation, who would take her, and under what conditions. The order also

specified that on certain nights in June, E.L. would spend the night with Mother to ensure that E. L. would able to participate in a travel league softball tournament.

Based on this consent agreement, the magistrate did not recommend a change in the visitation schedule. The magistrate did make three affirmative recommendations though. *First*, Mother was to e-mail Father as soon as she learned of an activity that would occur during Father's visitation; *second*, Father was to respond within 24 hours, otherwise he would be deemed to have acquiesced in allowing E.L. to attend the event during Father's visitation; and, *third*, if after 24 hours Father had not responded, Mother could decide whether E.L. would participate in the event and immediately email Father notice of the decision.

Father timely filed exceptions to the magistrate's recommendations. The circuit court subsequently conducted three days of hearings over nearly eight months.[4] In her case-in-chief, Mother presented testimony from Ms. Ricklefs, her current husband, Mr. Mutombo, and testified herself. Mother's evidence fell along the lines that have been discussed. She asserted that Father's refusal to take E.L. to and from her various extra-curricular activities during his weekend visitation was adversely affecting E.L.

Ms. Ricklefs testified about her observations of what occurred during the sessions between Mother, Father, E.L., and each biological parent's current spouse. Ms. Ricklefs concluded that Mother and Father "need to be flexible with the schedule to accommodate [E.L.'s] commitments." Ms. Ricklefs strongly urged both parents to attend E.L.'s events,

[4] November 15, 2018, November 16, 2018, and July 10, 2019

regardless as to which parent had residential custody, so that E.L would feel supported. Ultimately, Ms. Ricklefs concluded that if Father was unwilling to take E.L. to her events during his visitation, then Mother's physical custody of E.L. should extend until the event concluded.

Father testified on his own behalf. He asserted that there has not been a material change in circumstances. Father testified that E.L. was fine and not being adversely affected by the custody and visitation arrangement. Further, in his estimation, he had always had a tense relationship with Mother. Nonetheless, he maintained that he had complied with the terms of the 2011 order, in that he had taken E.L. to all of her games. He stated that, in fact, he had no objection to her participating in any of her activities. Further, he denied saying anything disparaging about Mother or Mr. Mutumbo during visitation exchanges.

At the conclusion of the hearing, the court found a material change in circumstances existed, due largely to Father's intransigence:

> THE COURT: It is clear to the Court that a child is going to face stressful moments, as well as anxious moments, in her lifetime, similar to an adult. However, **when it is a parent who causes that stress because of his behavior in refusing to be flexible as required by court order and consider the child's needs, then the parent – and here that parent would be Father – has negatively impacted the welfare of his daughter.** Despite his testimony that he wants her balanced in both her family and activities, I find that in his testimony he could not provide, with the exception of one time, how allowing [E.L.] to participate in her activities during his custodial time negatively affects her or even her custodial time with him.

(emphasis supplied). The court then considered whether Mother's proposed modification of Father's access would be in E.L.'s best interest.

After finding Mother's proposal would be in E.L.'s best interest, the court issued an order structured around E.L.'s extra-curricular activities. Father's school-year visitation was as to be follows:

> During [E.L.]'s school year, Father shall have partial physical custody of [E.L] on alternate weekends from Friday at 7:00 p.m. until Sunday at 7:00 p.m. If there is no school in session after Father's period of partial physical custody, then Father will retain partial custody from 7:00 p.m. the day of school recess until 7:00 p.m. the night before school starts.

In the summer, the court re-established (despite Mother's objection) a shared custody arraignment of alternating two-week blocks:

> [Mother] and Father shall alternate physical custody on a bi-weekly basis, beginning the Friday following the last day of the school year (according to [E.L.]'s school district), and alternating bi-weekly thereafter until the last Friday before the start of the next school year. The parties shall exchange custody on Friday evenings at 7:00 p.m. . . .

To resolve the issue of who would transport E. L. to her activities, the court ordered Mother and Father to,

> keep the other informed of [E.L.]'s school meetings and events, medical appointments, daycare arrangements, camps, extracurricular activities, and school functions. With respect to [E.L.]'s extracurricular activities, [E.L.] may be transported to and from said activities by the parent with whom she is staying with that day. Both parties can attend all of [E.L.]'s extracurricular events, including, but not limited to, games, dress rehearsals, performances, all school related events and award ceremonies.
>
> [E.L.] shall attend all official school and recreational league extracurricular activities regardless of whether the activity takes place during [Mother's] or Father's custodial time, and the parent with whom [E.L.] is with, shall be responsible for transportation. Official extracurricular activities shall include, but no be limited to, a) softball team mandatory practices, scheduled games, and tournaments for which the softball team has duly qualified, b) official band activities, c) after school dances, d) organized and coached recreational sports, e) instructional dance, and f) girls scouting.

> It is understood that [E.L.] may miss an extracurricular activity for an important family occasion such as out-of-town vacations, graduations which confer a medal/rank/degree upon a close relative, weddings, funerals, etc.
>
> In the event that one of [E.L.]'s extracurricular activities conflicts with another extracurricular activity, then the parties shall consult with [E.L.] as to what activity [E.L.] would like to attend in a manner calculated to maker her comfortable.
>
> Should either party not be able to take [E.L.] to an extracurricular activity, and should the reason not be due to an important family occasion or an act of God, then that parent shall notify other parent at least 72 hours prior to the commencement of the activity and that parent shall return [E.L.] to the other parent in time for the other parent to take [E.L.] to the extracurricular activity without redress or make up of custodial time missed.

Additionally, both parties were to respond to each other's emails within 48 hours. Father filed this timely appeal.

Additional facts will be discussed, as necessary.

DISCUSSION

I. The Circuit Court Did Not Err in Modifying Father's Access

A. Mother's Evidence Sufficiently Proved a Material Change in Circumstances

Father argues that the court abused its discretion by erroneously finding that there was a material change in circumstances and, therefore, we must reverse. Father deploys one main argument: E.L is doing well under the current custody arrangement and because she is doing well, the court had no basis upon which to find that a material change in circumstances existed. Father invokes the holding in *Sartoh v Sartoh*, 31 Md. App. 58 (1976) for the proposition that "the custody [of] children should not be disturbed unless

there is some strong reason affecting the welfare of the child." Father bolsters his argument by noting that it "was not disputed" that E.L. was doing well academically receiving "top grades" and being named "an honors student." Further, Father avers that despite Mother's claim that he was unwillingness to get E. L. to her activities, the evidence adduced at the hearing showed that E.L., "did not have behavioral problems and did not need therapy or counselling." Consequently, in Father's view, Mother's and Ms. Ricklefs' testimony that E.L. supposedly suffered from anxiety was so vague as to be of no value.

Father argues that there was no controversy for the court to have resolved. In Father's estimation E.L. had not missed any of her extra-curricular activities from the date Mother filed her motion to modify, September 13, 2017, to the date of the exceptions hearing, July 10, 2019. In his brief, Father quotes Mother's testimony as: " He has taken [E.L.] to most of the stuff since the litigation started. So it hasn't been an issue since then." In short, Father argues nothing of significance has occurred since the court accepted the parties' 2011 consent custody agreement.

On the other hand, Mother argues that a material change occurred between 2011 and 2019. Mother points out that not only is E.L. older, (age 15), but the range of activities in which she participates has grown. Mother testified that in 2011, E.L. was a novice softball player. Now, according to Mother, E.L plays on two softball teams: a travel team and her high school team. E.L. is also a member of her high school's marching band, participates in dance, and is active in the Girl Scouts.

At the hearing, Ms. Ricklefs reported that E.L. would like to continue to participate in these activities, but Father has been unwilling to work with Mother to ensure that this happens. Citing *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977), Mother avers that because E.L. "has expressed a strong desire to participate in [these] activities," her preferences "should be given a significant amount of weight."

Mother contends that Father's refusal to transport E.L. to her scheduled events on his weekends and his unwillingness to communicate with Mother to resolve scheduling problems, is ongoing and, ultimately, damaging to E.L. In her brief, Mother recounts several incidents in which Father was unwilling to work with Mother to resolve scheduling difficulties and made inappropriate comments about Mr. Motumbo and his children. While Mother acknowledges the court found that Father's inability to cooperate with Mother was material because it had "negatively impacted" E.L., she argues that a material change does not have to be negative to be material. Citing *Domingues v. Johnson*, 323 Md. 486, 500 (1991), she argues that "[i]t is neither necessary nor desirable to wait until the child is actually harmed to make a change which the evidence shows is required."

We review a court's child custody determinations utilizing three interrelated standards of review. When we scrutinize factual findings, the clearly erroneous standard applies. *In re Yve S.*, 373 Md. 551, 586 (2003). If it appears that the trial court erred as to matters of law, further proceedings in that court will ordinarily be required unless the error is determined to be harmless. *Id*. Finally, if we determine that the trial court reached the

ultimate conclusion based 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 an abuse of discretion. *Id*.

The Family Law Article grants the circuit court continuing equitable jurisdiction over custody matters, Maryland Code, (1999, 2019 Repl. Vol.), Family Law Article § 1-201(b). The subsection says: "In exercising its jurisdiction over the custody, guardianship, visitation, or support of a child, an equity court may: . . . (4) from time to time, set aside or modify its decree or order concerning the child." We have consistently described a two-step process which a court must undertake when determining whether a modification of custody or visitation is warranted. "First, the circuit court must assess whether there has been a 'material' change in circumstance." *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012) (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)). Second and only, "if a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody." *Id.*

"A material change in circumstances is a change in circumstances that affects the welfare of the child." *Gillespie*, 206 Md. App. at 171 (citing *McMahon*, 162 Md. App. at 594). The materiality of the change in circumstances "'relates to a change that may affect the welfare of a child'" *Id*. (quoting *Wagner v. Wagner*, 109 Md. App. 1 (1996)). "'The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest

of the child for custody to be changed.'" *Gillespie*, 206 Md. App. at 171-172 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008).

Preliminarily, we may swiftly dispose of Father's contention that the court's finding of a material change was unwarranted based on his assertion that the parties had "worked everything out" by the July 2019 hearing. In his brief, Father notes that Mother testified that, "[Father] had taken [E.L.] to most of her stuff since the litigation started. So it hasn't been an issue since then." In other words, Father claims that Mother admitted that he had transported E.L. to her activities, so the problem had been resolved by the time of the hearing. So, according to Father, the court had no basis on which to modify his access to E.L.

A cursory examination of Mother's testimony reveals exactly the opposite of what Father contends. Mother clarified that the underlying issues had not been resolved, but, instead, were on-going and pervasive. In fact, the presiding judge commented during Mother's testimony that any characterization that the parties' difficulties had been "resolved" was unfounded. "If it was resolved the parties would have entered into some kind of agreement. So it's clearly not resolved."

Mother testified that although the conflicts between her and Father had continued unabated, the difference was that E.L., now in high school, was old enough to understand the level of anger Father exhibited toward Mother. When asked if E.L.'s anxieties were the same as in 2011, Mother said, "it's not the same anxiety. She was a child. She didn't understand what was going on. It was more – I wouldn't have even labeled it 'anxiety' as

scared. She was scared when she would see arguments and fights and that sort of thing." Earlier, Mother had said, "[E.L.] had anxiety from the experiences that she had seen happen, which was something that was **addressed** in that court order. **However, that was not fixed because there's still problems with the current court order** that are still leading her to have that anxiety." (emphasis supplied).

Indeed, we conclude that Mother presented sufficient evidence at the hearing from which the court could determine that a material change in circumstances had occurred since 2011. Mother established that the overarching material change was that Father was consistently unwilling to work with he to ensure that E.L. was able to participate in extra-curricular activities. The examples are plentiful. We cite only two to make the point.

Mother testified that in August 2017, Mother's stepson, Mr. Matumbo's son from a prior relationship, was graduating from the United States Coast Guard Academy. Mother testified that she emailed Father with a proposal to switch weekends with him to allow E.L. to attend the ceremony. Two weeks before the event, Father informed Mother that E.L. could not attend because of one of E.L.'s softball tournaments happened to be on the same weekend. Mother testified that the coach was willing to excuse E.L. from the tournament, but Father insisted that he was going to take E.L, even though E.L. made it clear she wanted to attend her brother's graduation. When rainy weather ultimately cancelled the tournament, Father was still unwilling to allow E.L. to attend the graduation. Ms. Ricklefs had to intervene and guide the parties toward a compromise.

Another incident involved E.L.'s eighth grade dance. According to Mother, E.L wanted to attend the dance, which fell on Father's weekend, June 1, 2017. She informed him of these facts on April 24th. Mother offered Father several options if he declined to take her to the dance, such as switching weekends, dropping E.L. off at the dance and Father could get her once the dance ended, or Mother offered to drive E.L. to Father's house after the dance. Father replied that he had sent Mother's request to his attorney and that "the attorneys would work it out." With the resolution to this seemingly trivial problem left in limbo for weeks, Mother testified that E.L. "was extremely anxious that she wasn't going to be able to attend the dance." Astonishingly, the court had to decide whether E.L. would attend the dance after it *held a hearing on the issue two days before the event*. Fortunately, the court helped facilitate a resolution that allowed E.L. to go to the dance.

All of the incidents, large and small, reflect that Father, for whatever reason, refused to engage with Mother in arriving at a workable solution that would benefit E.L. As the court observed when it delivered its ruling from the bench, the parties' 2011 agreement specifically required them to work together to accommodate each other's schedules for E.L.'s benefit.

> THE COURT: Up until the temporary custody consent order that was entered into recently in July of 2018, [Father] refused and would not take the child to her events. This, despite the original court order from 2011 . . . which provides specifically at paragraph 9(e), and I will quote: "If either party, or a child, has plans which conflict with a scheduled visit and wish to change such visitation, the parties should," and I highlight the language there, should, because it doesn't say may and it doesn't say should consider, "should make arrangement for an adjustment acceptable to the schedules of everyone involved." And "everyone involved" included the child. That section

> continues with: "Predetermined schedules are not written in stone and both parties should be flexible for the child's sake."

The court went on to find that Father's conduct had adversely affected E.L.

> THE COURT: In light of his past behaviors which include his failure to take the minor child to practices and games, his refusal to, in many instances gave any indication until the last minute whether or not the minor child will attend an event, the Court finds that his conduct has, in fact, negatively affected [E.L.]'s welfare and that changes in the current custody order must take place in order to avoid a repeat of the same behaviors that caused [E.L.] stress, anxiety, and guilt for wanting to participate in events that truly matter to this child.

We conclude that the evidence was sufficient for the court to find that Father's unwillingness to work with Mother to resolve frequently occurring logistical problems regarding E.L.'s scheduled events constituted a material change in circumstances. We stress that "materiality," in this context, need not necessarily be negative. So long as the changed circumstances affect the welfare of the child, the change may be material. *Gillespie*, 206 Md. App. at 171; *McMahon*, 162 Md. App. at 594. Here, the evidence demonstrated that Father's conduct had affected E.L.'s well-being.

B. The Court Properly Determined Whether Mother's Proposed Change in Father's Access was in E.L.'s Best Interest

Having found a material change in circumstances, the circuit court then considered the best interests of E.L. and modified Father's visitation schedule. When making a custody determination, a trial court is required to evaluate each case on an individual basis to determine what is in the best interests of the child. *Wagner*, 109 Md. App. at 39 (citing *Bienenfeld v. Bennett–White*, 91 Md. App. 488, 503 (1992)). Factors the trial court may use in this determination include:

> [A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.

Id. (internal citations omitted). These factors make clear that the best interest of the child is not a factor of its own. Rather, it is the objective that all other factors seek to reach. *Id*. The capacity of the parties to communicate and reach shared decisions regarding the children's welfare is of paramount importance. *Taylor v. Taylor*, 306 Md. 290, 303 (1986).

Here, in its oral ruling, the court considered whether Mother's proposed modification of Father's access was in E.L.'s best interest by discussing certain factors. Among the factors the court considered was the parties' character and reputation. On this score, the court found that both parents loved E.L., but Mother was willing to be flexible and accommodate E.L.'s schedule, while Father was not. The court found Father's stated reasons for not working with Mother to be disingenuous and his subsequent actions, petty. Further, the court found that Father revealed his true character by making unalloyed racist remarks about Mr. Mutombo and his sons, who are of African ancestry.

The court also considered "the desires of the parents," finding that Mother's request to modify access was sincere. The court concluded Father was sincere about wanting to accommodate E.L.'s schedule, but the court was nonetheless "concerned regarding his lack of flexibility going forward." The court determined that both parents would maintain family relations and provide materially for E.L.

As for E.L.'s preferences, the court found that as a fifteen-year-old high school student, E.L. had bonded well with both parents. Most importantly, the court found that E.L. wants to participate in extra-curricular activities and the court would "not allow anything to prevent that."

And as far as the parents' ability to communicate with each other, the court found that one "great concern" was Father's "refusal . . . to timely respond to Mother's emails." The court specifically found that this had caused "unnecessary stress to [E.L.]" The uncertainty that E.L. faced because of Father's refusal to communicate in a timely manner with Mother had "create[d] unnecessary stress and chaos in [E.L.]'s life and that has to stop."

To that end, the court modified Father's access by having his weekend visitation end at 7:00 p.m. More significantly, the court ordered that,

> [E.L.] should attend all official and recreational league extracurricular activities regardless of whether the activity takes place during Mother or Father's custodial time and the parent with whom [E.L.] is with shall be responsible for transportation. Official extra-curricular activities shall include but not be limited to (A) softball team mandatory practices, scheduled games, and tournaments for which the softball team has duly qualified; (B) official band activities; (C) after school dances, (D) organized and coached recreational sports; (E) instructional dance; and (F) Girl Scouts.

The court also addressed family activities that either parent may want E.L. to attend, such as weddings and funerals. If any event conflicted with another, the court ordered the parties to consult with E.L. to determine which event she wished to attend. The court also reinforced the notice provisions established and fine-tuned the protocol for pick-ups and drop-offs.

We hold that the circuit court did not abuse its discretion in modifying the custody arrangement in the manner that it did. After hearing evidence over three non-consecutive days and considering E.L.'s best interests, the court reasonably concluded that Father's refusal to take E.L. to the actives she enjoyed, mandated a change in his access schedule to ensure his compliance with this goal. We conclude that the circuit court's factual findings were not clearly erroneous, and the circuit court's ruling was founded upon sound legal principles. The circuit court's decision was not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Yve S*. 373 Md. 551, 583–84 (2003). Accordingly, we affirm the circuit court's modification of the custody arrangement.

II. The Court Did Not Abuse its Discretion in Allowing Ms. Ricklefs to Testify About Conversations She Had with E.L.

The court reappointed Moira Ricklefs to provide it with an updated custody assessment since the parties' previous modification request in 2010. To that end, Ms. Ricklefs interviewed E.L. alone, with both parents, and with each parent and his or her current spouse. Ms. Ricklefs provided the magistrate with an oral summary of her findings at a hearing on May 29, 2018 and she testified at the November 15, 2018 the modification hearing.

Father contends it was reversable error for the court to have received portions of Ms. Ricklefs' testimony at the November hearing because it contained hearsay statements from E.L. At the hearing, Ms. Ricklefs reported that E.L. said that she had missed some

of her weekend activities because her Father refused to take her. Father also objects to Ms. Ricklefs reporting that E.L. felt that "she ha[d] to pick between her activities and her father and when she picks her activities she stated her father has said to her, quote, 'You don't love me.'" Father claims Ms. Ricklefs was never offered as an expert witness and, therefore, in Father's opinion, the court should not have permitted Ms. Ricklefs to establish that E.L. was prone to anxiety due to her Father.

The circuit court is permitted to appoint an assessor to help guide it in making a decision regarding child custody or visitation. Rule 9-205.3. Specifically, the assessor provides the court with "a study and analysis of the needs and development of a child." Rule 9-205(b)(3). In addition, the court may ask the assessor for an evaluation on a particular area of concern. "Specific issue evaluation" means a targeted investigation into a specific issue raised by a party, the child's attorney, or the court affecting the safety, health, or welfare of the child. Rule 9-205.3(b)(7).

The custody evaluator's credentials must be vetted by the court. Subsection (d)(1) requires that a custody evaluator shall be:

> (A) a physician licensed in any State who is board-certified in psychiatry or has completed a psychiatry residency accredited by the Accreditation Council for Graduate Medical Education or a successor to that Council;
>
> (B) a Maryland licensed psychologist or a psychologist with an equivalent level of licensure in any other state;
>
> (C) a Maryland licensed clinical marriage and family therapist or a clinical marriage and family therapist with an equivalent level of licensure in any other state; or
>
> (D) a Maryland licensed certified social worker-clinical or a clinical social worker with an equivalent level of licensure in any other state;

> (E) (i) a Maryland licensed graduate or master social worker with at least two years of experience in (a) one or more of the areas listed in subsection (d)(2) of this Rule, (b) performing custody evaluations, or (c) any combination of subsections (a) and (b); or (ii) a graduate or master social worker with an equivalent level of licensure and experience in any other state; or
>
> (F) a Maryland licensed clinical professional counselor or a clinical professional counselor with an equivalent level of licensure in any other state.

Here, according to the "Order of Referral," dated February 2, 2018, Ms. Ricklefs works in the Harford County Office of Family Court Services and holds MA, CAC-AD. Nothing in the record would lead us to conclude that Ms. Ricklefs did not meet the qualifications to be a custody evaluator.

The Order of Referral makes clear that the purpose of the evaluation was to determine Mother's and Father's "ability to meet [E.l.'s] needs," "to evaluate each party's ability to make decisions which prioritize the needs of [E.L.], and to "evaluate [E.L.'s] adjustment to the current living arrangement," among other things. Both Mother, Father, and E.L. are listed as the persons to be evaluated. These provisions are consistent with requirements the Rule's subsection (f):

> (1) *Mandatory Elements.* Subject to any protective order of the court, a custody evaluation shall include:
>
> (A) a review of the relevant court records pertaining to the litigation;
>
> (B) an interview of each party;
>
> (C) an interview of the child, unless the custody evaluator determines and explains that by reason of age, disability, or lack of maturity, the child lacks capacity to be interviewed;
>
> (D) a review of any relevant educational, medical, and legal records pertaining to the child;
>
> (E) if feasible, observations of the child with each party, whenever possible in that party's household;

> (F) factual findings about the needs of the child and the capacity of each party to meet the child's needs; and
>
> (G) a custody and visitation recommendation based upon an analysis of the facts found or, if such a recommendation cannot be made, an explanation of why.

Father's complaint is that the court permitted Ms. Ricklefs to offer hearsay evidence of what E.L. said to her. Specifically, Father objects to two statements that Ms. Ricklefs made during her testimony. In the first instance, Ms. Ricklefs was testifying about her interview with E.L. when Father's trial counsel objected.

> [MS. RICKLEFS]: [E.L.] was seen individually. She described the schedule that is currently in place. So she was very aware of the schedule. She reported she misses every other softball game due to being with her father in Pennsylvania. She stated that her father did not take her to her recital as he, quote, "promised he would," end quote, because it was his weekend. He picked her up and then took her to his home and did not bring her back for the recital as she had thought was going to happen. [E.L.] went on to state that she wants to go to her activities and be with her friends and that it causes her stress to not –
>
> [FATHER'S COUNSEL]: I'm going to object to what E.L. said to the evaluator as hearsay.
>
> THE COURT: Overruled. Go ahead.

In the second instance, Ms. Ricklefs was testifying about a meeting that she had with E.L and Father.

> [MS. RICKLEFS]: . . .When the discussion was about the activities, the tension in the room seemed to increase as the explanations from father to daughter differed. Father stated that he didn't know that [E.L.] wanted to go to her ball games and the remainder of her activities, that they often gave her a choice and she chose to stay in Pennsylvania. [E.L.] responded that she chose to stay in Pennsylvania one time. Father stated now that he knows because of the court case that she wants to go, he has gotten her where she needs to be. Father also stated that he didn't know what the ball schedules

> were. [E.L.] responded that her mother emails all of the information as soon as she gets it so that father has the information.
>
> [FATHER'S COUNSEL]: Your Honor, may I note my continuing objection for the record?
>
> THE COURT: Okay, but I guess – I don't think I've ever experienced that when there's an evaluator, that the parties are ordered to go to, that there's going to be an interview with everyone, including the child, an objection (sic). So tell me what your basis is.
>
> [FATHER'S COUNSEL]: That this is hearsay because she's not a party here and the statements are being introduced for the truth of the matter asserted.

The court then heard from Mother's counsel, who argued that Ms. Ricklefs could testify about what E.L. told her because the court ordered her to evaluate E.L.'s relationship with her parents. Without further explanation, the court overruled the objection.

We review rulings on whether evidence is hearsay de novo. *Morales v. State*, 219 Md. App. 1, 11 (2014) (citing *Parker v. State*, 408 Md. 428, 436 (2009)). However, once establishing whether the evidence is hearsay or not, the decision to admit the evidence is reviewed for abuse of discretion. *Gillespie*, 206 Md. App at 166.

"[H]earsay" is "a statement, other than one made by the declarant while testifying at the trial …, offered in evidence to prove the truth of the matter asserted." Rule 8-501(c). "Except as otherwise provided by these rules, or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Rule 8-502. However, "the circuit court may, at its discretion, admit inadmissible evidence relied upon by an expert for the limited purpose of evaluating the validity or probative value of an expert's opinion." *Gillespie*, 206 Md. App. at 166 (citing *Brown v. Daniel Realty Co.*, 180 Md. App. 102, 118 (2008)). "It

is well established that experts may rely upon inadmissible evidence in formulating their opinions." *Gillespie*, 206 Md. App. at 166 (citing Rules 5-703 and 5-705). "Moreover, evidence 'that might not otherwise be admissible may, under Rule 5-703(b), be properly admitted if it is relied upon by an expert or is necessary to illuminate testimony.'" *Gillespie*, 206 Md. App. at 166 (quoting *Brown*, 180 Md. App. at 118).

Here, by virtue of the "Order of Referral," Ms. Ricklefs was the court's own expert witness. Father's claim that Ms. Ricklefs was not an expert, raised for the first time in this appeal, is unavailing. *First*, Father did not raise an objection to Ms. Ricklefs' credentials before the court at the modification hearing. His objection, therefore, is waived. Rule 8-131(a). "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Additionally, we note that Ms. Ricklefs provided the court with a custody evaluation in 2011. As far as we can tell from the record, Father did not object to Ms. Ricklefs' credentials at that time. Similarly, Father did not object to Ms. Ricklefs when she presented her report to the magistrate in April 2018. In any event, we conclude that any objection Father now raises as to Ms. Ricklefs' fitness to provide the court with a custody evaluation is waived.

Second, the court was not required to qualify Ms. Ricklefs as an expert because of her statutory role in the custody process. Under Rule 9-205.3(c)(1), the court "on its own initiative" "may order an assessment to aid the court in evaluating the health, safety, welfare, or best interests of a child in a contested custody or visitation case." Under Rule 9-205(m)(2), the assessor's presence is not required to admit the report into evidence. And

a Committee note states that even if the assessor's report is entered into evidence, this does not preclude the assessor from being called as a witness. *See generally Bijou v. Young-Battle*, 185 Md. App. 268, 288 (2009) (stating that although committee notes are not part of the Rules, "we read the Rules in light of the Committee notes.") (internal citation omitted).

Third, given that Ms. Ricklefs was the court's own expert witness, the scope of her testimony was within the court's discretion. Here, in the two instances Father cites, we conclude Ms. Ricklefs' testimony, although it contained hearsay, was necessary for the court to understand the basis for Ms. Ricklefs' recommendations. *Gillespie*, 206 Md. App. at 166.

Finally, Ms. Ricklefs' testimony underscored the effect that the situation with Father was having on E.L. Ms. Ricklefs, as a neutral evaluator, could have reported that E.L.'s view of what had transpired was not accurate. Since she did not, it would be fair to assume that Ms. Ricklefs felt that E.L. had accurately gauged Father's behavior. Based on this, in permitting Ms. Ricklefs' testimony, the court's decision was reasonable. *Wilson X. v. Dept. of Human Resources*, 403 Md. 667, 677 (2008) (An abuse of discretion occurs when the court's decision is one that "no reasonable person" would make.) We, therefore, affirm.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.