UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1403

September Term, 2014

KIMBERLY BALDWIN

v.

JOSHUA J. BALDWIN

Krauser, C.J.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 10, 2015

This case raises interesting questions about the role that prior incidents of domestic violence play in the analysis of post-divorce custody determinations. The order at issue here is a decision by the Circuit Court for Harford County to modify a no-longer-viable joint custody agreement and to award sole legal custody and primary physical custody to Joshua Baldwin ("Father"), despite the fact that Father pled guilty to (and served jail time for) assaulting his ex-wife, Kimberly Baldwin ("Mother"), was incarcerated for failing to obey a protective order, and admitted to a therapist that he punched one of their two sons in the mouth. The broader factual picture is complicated, though, and the parents agreed that they are not able to share custody, which left the court in the unenviable position of having to pick between them.

After a six-day trial, the circuit court awarded Father sole legal custody and primary physical custody while school is in session. Mother appeals, and argues primarily that the circuit court failed to give appropriate weight to the history of domestic violence Father committed against Mother and the sons in reaching its custody decision. But although it is not our role to second-guess the trial court's weighing and balancing of conflicting evidence in a contested record, we agree with Mother that the undisputed history of domestic violence by Father required the court make the findings required by § 9-101 and § 9-101.1 of the Family Law Article. We vacate the custody and visitation order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The parties were married on September 7, 2007. They have two minor children: Trent, Mother's son from a prior relationship whom Father adopted, and Jay, a product of the parties' marriage. At some point in 2011, Mother informed Father that she wanted to end their marriage. Father became infuriated and made a decision he would live to regret: on October 28, 2011, Father came home from work and, in a fit of rage, forcibly removed Mother from the marital home by picking her up and placing her outside, all in the presence of Jay, who was three years old at the time. As a result of his actions, Father was arrested and charged with second-degree assault. He ultimately pled guilty to that charge on October 4, 2012 and was placed on probation after serving a weekend in jail. In addition to the criminal charges, Mother successfully petitioned for a final protective order against Father, which prohibited him from contacting her except with regard to the children, and she was awarded temporary custody.

In April 2012, while the protective order was still in effect, Mother was kicked out of her parents' home, which left her and the sons without a home. To ensure her children would have a safe place to stay, Mother agreed to give Father physical custody of the children until she could find another place to live. Mother was eventually able to return to her parents' house in June 2012 and resume custody. While the children were in Mother's custody, Father periodically sent text messages to Mother to ascertain the children's whereabouts. At one point during the latter part of 2012, Mother texted Father to let him know that she and the children were at her parents' house. But Father believed that Mother

was lying, so he drove by Mother's parents' house to verify that she was really there and, in the process, violated the protective order. This conduct, combined with harassing text messages he sent Mother, led the court to find that Father had violated the protective order and to sentence him to ninety days' incarceration. He served seventy-five days and was released.

The parties eventually were divorced on February 15, 2013 pursuant to a Judgment of Divorce. Before the Judgment of Divorce was entered, the parties agreed to give Father final decision-making authority and primary physical custody of Trent, to give Mother final decision-making authority and primary physical custody of Jay, to share legal custody of the children, and to ensure each child spent adequate time with one another. The circuit court approved the parties' agreement and incorporated it into the Judgment of Divorce.

Among other things, the custody agreement provided that on Tuesday nights when Trent had a karate lesson, Mother would take Trent to karate and Father would have dinner with Jay, and the parents would switch roles when Trent had Thursday night karate lessons; during the weeks when Father had custody of Jay, however, Mother did not have a concurrent dinner visit with Jay. Mother suggested to Father that she be allowed to have dinner with Jay during Thursday karate, but the parties were unable to reach a compromise on this issue, which prompted Mother to file a motion to modify custody on July 1, 2013. In August 2013, before trial commenced on Mother's motion, the parties reached a temporary custody agreement, which was incorporated into a court order on September 4,

2013. But the agreement fell apart and, after extensive pre-trial litigation, they proceeded to trial in January 2014.

The trial evidence included testimony about Father's assault and protective order violation charges and the underlying circumstances, testimony about other ways in which Father sought to control and monitor Mother's activities, testimony about serious and intractable conflict among Father and Mother and the other's families and Mother's fiancé, testimony that Father had admitted hitting Trent in the mouth, and testimony that Trent told the custody evaluator that he did not like his father "beating him up." There was extensive testimony about both boys, and especially about Trent's mental and emotional difficulties, his treatments and progress, and the roles both parents had played in his care, particularly Father. Both parents testified, and shared examples proving, that they could not communicate effectively with the other for the purpose of sharing custody, and both parents asked for sole legal and primary physical custody. The trial lasted six days, after which the circuit court took the matter under advisement.

On July 10, 2014, the circuit court issued a memorandum opinion modifying the parties' custody arrangement. The court found, in light of the parties' inability to work together, that there had been a material change in circumstances that justified a modification of the parties' custody arrangement. The record backed this up:

> As to his controlling ways, [Father] has an inability to allow [Mother] to parent the children when they are in her custody. He repeatedly challenges [Mother's] parenting decisions and demands information from her regarding where she takes the children and who she is with when the children are in her

> custody. He is not flexible when [Mother] needs to change a pick-up or drop-off time, when she wants to change a dinner night with the boys, or when she wanted to make changes to the existing [custody order]. Furthermore, because he cannot deal with [Mother's] relationship with [her fiancé], he places, to some extent, unwarranted restrictions on [the fiancé's] involvement with the minor children. His controlling ways have contributed significantly to the toxic relationship he has with [Mother].
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> For her part, [Mother,] fed up with [Father's] controlling ways[,] has taken every possible opportunity to remove him from her life, even at the cost of her children's desire to have a relationship with their father. She has repeatedly threatened [Father] with criminal action whenever he has texted her and the tone of the text messages are quite negative or demanding; she has flaunted her relationship with her fiancé . . . to [Father], even though [her fiancé] is a source of contention for [Father]; and she fails to recognize the important role [Father], as the children's father, plays in their lives.

The circuit court also determined that it was in the best interests of the children to live together, and not to be split between the parents as they had been under the prior agreement:

> At one point, . . . because of some difficult times that Trent experienced, Jay's well-being was compromised because of Trent's outbursts towards Jay. Because Trent's behavior has significantly improved, Jay and Trent now get along well, with just the occasional sibling argument. The boys have a close relationship and enjoy being together whenever they are in custody of either parent at the same time.

The circuit court then undertook a comprehensive analysis of the children's best interests and made the following findings:

> (1) Mother and Father are both fit parents;

(2) Father is a very dedicated father who has been attentive to his children's individual needs, in particular Trent's significant mental health issues;

(3) Father is "extremely controlling" with Mother and his parents regarding the children and "has displayed flashes of anger towards" Mother in the past;

(4) Mother has a strained relationship with Trent, but the relationship has improved and Mother has expressed a willingness to engage in counseling;

(5) Mother has a strong relationship with Jay, who is a stable and happy child;

(6) Mother delegates a significant amount of her responsibilities to her children to her parents;

(7) Mother has very serious personal issues stemming from "sexual abuse she experienced during her early adolescence, . . . which she has not addressed with the help of a professional mental health provider;"

(8) Unlike Mother, Father has expressed a willingness to continue to share physical custody of the children;

(9) Father has been vocal about not wanting Mother's fiancé around the children, although there is no evidence that Mother's fiancé is unfit to care for the children;

(10) Mother wishes to drastically reduce Father's involvement with the children and "has reached a point where she simply does not want to make anything easy for [him] and believes that the less time the children have with [Father], the less she has to deal with him;"

(11) Trent and Jay would like to spend as much time with each parent as they can;

(12) Mother's ability to financially support the children in the event she no longer resides with her parents is unclear;

> (13) On multiple occasions, Mother and the children have been kicked out of Mother's parents' home;
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> (14) The children enjoy being together and have a close relationship.

Based on these findings, the circuit court concluded that "to avoid conflicts that will ultimately be to the detriment of the minor children, it is in the best interest of the children for one parent to have the legal decision making authority [and Father] has proven that he is the parent who should have sole legal decision making authority for the children." Despite Father's history of violent behavior, the circuit court determined that Father's vigilance in addressing Trent's mental health needs made him the appropriate parent to make legal decisions on behalf of the children:

> In considering all of the evidence presented and in weighing all of the factors discussed above, while each party has significant issues to work through in the way they handle the other parent, neither party is an unfit parent. In terms, however, of providing a safe and structured living environment, as well as making necessary decisions for the physical and mental wellbeing of the children, [Father], in spite of his lack of flexibility and controlling ways, has proven that he is the fit and proper parent to have legal custody of the minor children . . .
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> [Father] has appropriately dealt with Trent's mental health issues and with his academic issues. Trent has had many challenging times and while both parents have taken steps to help Trent, it is [Father] who has made the necessary decisions and has acted in the best interest of Trent. He has been vigilant in addressing Trent's mental health and he has been actively involved with Trent's school to make sure that Trent achieves academic success at Bakersfield. Despite the many challenges he has had to address with Trent, [Father] has also been

> actively involved with Jay and in helping Trent and Jay improve their relationship. While neither party has had to confront any significant issues with Jay, splitting up the decision making authority between the parents is simply not a working option. It is time for both children to resume living together, and to avoid conflicts that will ultimately be to the detriment of the minor children, it is in the best interest of the children for one parent to have the legal decision making authority. [Father] has proven he is the parent that should have sole legal decision making authority for the children.

The court required Father to involve Mother fully in all major decisions affecting the children and granted Mother's request that she be allowed to undergo counseling with Trent to improve their relationship.

The circuit court also awarded primary physical custody to Father during the school year:

> As to the physical custody of the minor children, [Father] has demonstrated that he is the fit and proper parent to have the primary physical custody of the minor children during the school year. He has a stable home, provides financial and emotional support to the children, and he is very hands-on in dealing with the children's needs. Because Trent has shown such positive improvements both academically and emotionally, removing him from Bakersfield Elementary would not be in his best interest. Jay is now going into the first grade and it would not be a disruption in his life to have him attend a new school next fall.

The arrangement flipped when school was not in session, with primary custody shifting to Mother during those months, and the court placed no restrictions on Mother's fiancé's involvement with the children. Given the parties' inability to communicate in a productive manner, the circuit court ordered them to communicate only by email and to use text

messaging only in exigent circumstances. And the court prohibited the parties from discussing any matters unrelated to the children or from making disparaging comments about the other's parenting style.

Mother noted a timely appeal.

II. DISCUSSION

Mother asserts that the circuit court erred in awarding Father sole legal custody and primary physical custody of the parties' minor children. She contends that the court failed, as § 9-101 and § 9-101.1 of the Family Law Article require, to determine the likelihood of future abusive behavior by Father and to give proper (she would say great) weight to that (she would say likely) possibility in awarding custody.[1] A motion to modify custody leads to a two-step analysis: (1) *first*, the court determines whether there has been a "material" change in circumstances since the entry of the final custody order; and (2) *second*, if a material change has occurred, it determines what custody arrangement would serve the best

[1] Mother presents the following questions for our review:

> 1. Did the Circuit Court err by failing to apply [Md. Code (1984, 2012 Repl. Vol.), § 9-101.1 of the Family Law Article ("FL")] when the Court granted [] sole legal custody and primary physical custody during the school year of the children to [Father]?
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> 2. Did the Circuit Court err by failing to give sufficient weight to the evidence of abuse offered by [Mother]?

interests of the children. *See McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). We review decisions to modify custody using three interrelated standards of review:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . 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.

In re Yve S., 373 Md. 551, 586 (2003) (citation omitted). We afford great deference to the custody determinations of a trial judge "because only [s]he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [s]he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id.*

A material change in circumstances is one that affects the welfare of the child. *McMahon*, 162 Md. App. at 594. In requesting modification of a child custody order, "[t]he burden is . . . 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." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008) (citations omitted). In this case, the circuit court found that a material change in circumstances had been established because the parties' inability to communicate and work

together made joint legal custody no longer viable and, in light of the children's repaired relationship, it was no longer in their best interest to live apart from one another. Not only was this point uncontested, the parents *agreed* that they could no longer communicate effectively or share custody, as they previously had agreed to do, and both sought sole legal custody and primary physical custody.

The circuit court then considered the best interests of the children in determining what custody arrangement to order. "The best interest standard is an amorphous notion, varying with each individual case . . . [t]he fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Montgomery Cnty. Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 419 (1978). This requires the court to consider and weigh a plethora of factors:

> The criteria for judicial determination includes, but is not limited to, 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.

Id. at 420 (internal citations omitted). "While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single

factor." *Id.* at 420-21. The circuit court's best interests analysis considered each of the *Montgomery Cnty.* factors, in order, and that normally would end the inquiry.

The documented (and, at least as to Mother, adjudicated) history of domestic violence in this family adds a couple of steps to the analysis. *First*, the history and testimony gave the court ample reason to believe that Father had physically abused the children in the past, which triggered an obligation to assess the likelihood of future abuse and, unless the court could rule it out, deny custody to Father:

> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
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> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

FL § 9-101; *see also Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 680 (2014) (quoting *In re Adoption No. 12612*, 353 Md. 209, 238 (1999)) ("FL § 9-101 governs the approach a trial court must take when child abuse or neglect has been raised in a custody or visitation proceeding" and "'requires the court, when faced with a history of child abuse or neglect by a party seeking custody or visitation, to give specific attention to the safety and well-being of the child in determining where the child's best interest lies.'"); *In re Mark M.*, 365 Md. 687, 706 (2001) (In cases "where evidence of abuse [or neglect] exists,

courts are required by [FL § 9–101] to deny custody or unsupervised visitation unless the court makes a specific finding that there is no likelihood of further child abuse or neglect." (emphasis omitted)).

Unlike his violent behavior toward Mother, Father had never been found formally to have abused the sons physically. But during trial, Dr. Pamela Baer, who was assigned by the circuit court to conduct a custody evaluation of the children, testified that Father had admitted to using corporal punishment on the children and, on one occasion, had hit Trent in the mouth as a form of discipline. This was enough to require the court to "specifically find[] that there [was] no likelihood of further child abuse or neglect by [Father]" before awarding him custody of the children. FL § 9-101(b). Although we do not question the court's finding that Father no longer engaged in corporal punishment, that finding by itself does not answer the statutory question of whether (or not) Father was likely to abuse the children in the future. And because the statute *precludes* the court from awarding custody to Father unless it could find no likelihood of future abuse or neglect, it would be inappropriate for us to attempt to divine such a finding from the court's opinion on our own.

Second, Father's adjudicated history of physically abusing Mother and violating a protective order required the court to consider that history in connection with these custody and visitation decisions and establish custody and visitation that protects her and the children:

> (b) In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:
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> (1) the other parent of the party's child;
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> (2) the party's spouse; or
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> (3) any child residing within the party's household, including a child other than the child who is the subject of the custody or visitation proceeding.
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> (c) If the court finds that a party has committed abuse against the other parent of the party's child, the party's spouse, or any child residing within the party's household, the court *shall* make arrangements for custody or visitation that best protect:
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> (1) the child who is the subject of the proceeding; and
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> (2) the victim of the abuse.

FL § 9-101(b) (emphasis added). According to Mother, while the circuit court acknowledged some of Father's abusive behavior towards her, it "did not consider *all* of the abuse that occurred during [the] relationship in making its custody determination." (Emphasis added). In particular, Mother asserts that the circuit court failed to consider: (1) Father's repeated violations of a November 2011 final protective order in which he sent Mother harassing emails and text messages; (2) Father's threats to Mother and her close friends; and (3) Father's stalking of Mother while the protective order was in effect.

We can see on the face of the circuit court's comprehensive and well-reasoned opinion that the court considered Father's history of abusive behavior seriously and carefully:

> Sometime in 2011, [Mother] made it known to [Father] that she no longer desired to be married to him. [Father] angered by [Mother's] decision to leave the marriage took steps that cost him dearly. In a fit of rage he forcefully removed [Mother] from the marital home by grabbing her by the arms and physically picking her up and placing her outside the home. The assault occurred in the presence of Jay who was three years old at the time. Consequently, [Mother] contacted the police who ended up arresting and charging [Father] with domestic violence assault. Thereafter, [Father] pled guilty and was placed on probation. In addition to the criminal charges, [Mother] sought and was granted a protective order, which prevented [Father] from, among other things, harassing her. Despite the protective order in place, [Father] believing that [Mother] was lying to him about her whereabouts with the children ended up violating the terms of the protective order by harassing [Mother] through phone text messages and driving by her home. Consequently, as a result of his criminal conduct toward [Mother], [Father] was sentenced to serve 90 days at the Harford County Detention Center (Detention Center).

The court went on to find that Father "is extremely controlling in his dealings with [Mother]" and "communicates at times inappropriately with [Mother] through text messages whenever he gets angry with [her]." We disagree with Mother, then, that the court failed to consider Father's abusive history and ongoing anger management and control issues—to the contrary, they stood front-and-center in the court's mind.

That said, a finding of abuse against the other parent or any child *required* the court to "make arrangements for custody or visitation that best protect" Mother and the sons. FL § 9-101.1(c). We cannot say that these custody and visitation arrangements fail this test—the court took great care to structure custody and visitation in a manner, and with ground rules, designed to minimize conflict and dispute, and it may be that maximizing separation

and controlling the parties' interactions represents the best form of protection against future abuse. But because the statute unambiguously requires that the ultimate custody arrangements reflect this protection priority, we think it better for us not to attempt to read that priority from between the lines of the court's order, especially since we already are vacating and remanding.

Accordingly, we vacate the circuit court's custody and visitation order and remand for the court to make the findings required by FL §§ 9-101 and 9-101.1. We express no views on the findings the court should make in either regard, or on whether the court should hold a hearing or take additional evidence or testimony.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.