Circuit Court for Montgomery County
Case No. 150621FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1440

September Term, 2019

C.B.

v.

N.B.

Berger,
Friedman,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.
Dissenting Opinion by Berger, J.

Filed: July 10, 2020

The trial court set aside the parties' agreed-upon marital settlement agreement because it found that C.B. ("Mother"),[1] had made two "false" and "baseless" allegations of child sexual abuse. Finding no support for this conclusion, we reverse.

PROCEDURAL HISTORY

Mother filed for divorce from N.B. ("Father"), custody of the couple's child, A.B., and child support in January of 2018. The parties reached a voluntary marital settlement agreement concerning custody, access, and child support that was incorporated but not merged into a judgment of absolute divorce entered in July of 2018 by the Circuit Court for Montgomery County. Father began agitating to change the custody arrangement almost immediately.[2]

ALLEGATIONS OF CHILD SEXUAL ABUSE

The parties disagree about what happened next. According to Mother, on Sunday, October 14, 2018, A.B. complained that her "tutu" was hurting, that her "Dad touched her tutu," and that despite A.B.'s request that he stop, her father "kept touching it." Father denies the allegation and claims that Mother fabricated these claims. We are in no position

[1] To protect the identity of minors, this Court has replaced all proper names with initials. Additionally, we will use "Mother" and "Father" when referring to the parents of the minor child in this case.

[2] It is not necessary to identify the various other motions, oppositions, and cross-motions that the parties filed on their own behalf and through counsel. We note only that the trial court denied the parties' cross-motions for contempt and neither party has appealed from those decisions.

to evaluate the truth of the parties' conflicting statements. As a result, our recitation relies exclusively on the statements of neutral third parties.

On October 14, 2018, at 7:48 p.m., Mother brought 4-year-old A.B. to the emergency room at Children's National Medical Center ("Children's Hospital") in Washington, D.C. According to the visit summary, A.B. was referred to the Freddie Mac Child and Adolescent Protection Center (CAPC) within Children's Hospital. The physician on duty spoke with Mother and A.B. separately to compile a medical history and to understand A.B.'s complaint.[3] Those conversations resulted in the following report:

> **Comments**
> [A.B.] is a 4 year old girl referred for medical evaluation of suspected child abuse. She has a nonspecific anogenital exam characterized by redness/erythema of her labia majora and a disclosure of sexual abuse. The labial erythema is consistent with vulvovaginitis, which is not specific for sexual abuse and can result from a variety of unrelated causes. Nevertheless, her disclosure is quite concerning for sexual abuse. Sexual abuse … does not always result in physical injury.
>
> **Plan**:
> 1. sitz baths and application of petroleum jelly as a barrier
> 2. avoid bubble baths
> 3. colposcopic documentation obtained
> 4. discussed body safety

[3] We read the medical reports differently from our dissenting colleague. In our understanding, the physicians at Children's Hospital based their concerns on conversations with both Mother and A.B.

> 5. a copy of this report can be provided to CPS/law enforcement to aid in their investigation
>
> 6. testing for GC/Chlamydia (throat and urine) obtained. Will need repeat testing if any test returns positive.
>
> 7. Trauma-specific mental health care is recommended. Mrs. Gardella will follow up with you on this.

In accordance with D.C. law, the CAPC at Children's Hospital reported this suspected child sexual abuse to the Child and Family Services Agency of the District of Columbia (CFSA) and the D.C. Metropolitan Police (MPD). It is not clear (and the record does not reveal) what sort of investigations CFSA and MPD conducted but on December 5, 2018, CFSA found the allegations against Father were "unfounded," meaning the report was "not true."

On April 1, 2019, Mother took A.B. back to Children's Hospital. The physician's notes from this second visit provide:

> [Mother] states [A.B.] has been complaining of vaginal pain. States she was here for suspected ASA[4] in [O]ctober, and patient is still making statements that she is being touched sexually.
>
> [A.B.] was previously seen in October for alleged sexual abuse and [A.B.] disclosed that her father had touched her private parts. [CFSA] was called and [A.B.] saw CAPC. During the investigation they said that they couldn't prove it was the dad. [Father] agreed that something had happened but he does not know what happened and they wanted an out of court agreement. They agreed that it was likely the 8 y[ear] o[ld] girl that lives with him. The out of court agreement was

[4] The abbreviation, "ASA," is not defined but given the context, our review of the notes regarding A.B.'s October admission, and common sense, we understand this to mean something akin to "alleged sexual assault."

> that [Father] would have [A.B.] every other weekend and a few weekdays and keep her away from the other 8 y[ear] o[ld] girl in the home. They agreed [they would not bathe] … or … sleep together.
>
> [Mother] does not believe [that] it was [Father] who touched [A.B.]. [Mother] believes that something new happened and it was the 8 y[ear] o[ld] girl. She has been saying new things and has a new "sexual curiosity." Last time [A.B.] was with [Father] was 5 days ago. She does not have any signs of irritation around her vagina and has not complained of vaginal symptoms.
>
> [A.B.] usually lives at home with [Mother] and older sister (13y[ear] o[ld]). At [Father's] house it is [Father] and his fiancé and her daughter [who] is an 8 y[ear] o[ld] girl and 5 m[onth] o[ld] boy. They live in D.C. in an apartment building….

THE TRIAL JUDGE'S RULING

The trial judge made detailed findings of fact on the record:

> I am persuaded that [Mother] lacks not only good judgment but has some substantial flaws in her fitness and character … [b]ecause *I find that she knowingly and intentionally made two false reports of child sexual abuse to D.C. authorities.* I also find that she knowingly and intentionally [exchanged papers to be used in this and other litigation]. The point is, I find this parent is willing to do, and not in a good way … whatever it takes to get what she wants. … [L]ooking at the case in the totality and having had the benefit of listening to the testimony on the stand, it is clear to me and I find by more than a preponderance of the evidence that she was engaged in a war with [Father] and was ready, willing[,] and able to use her child as a weapon of war. To me that demonstrates aspects of lack of good character or lack of judgment and aspects of unfitness.

> There are other pieces which if standing alone would not by themselves necessarily in every case lean or fall one way or the other.
>
> [Court finds that Mother intentionally failed to make mortgage payments as a negotiating tactic with the bank and that] put the child's home in jeopardy.
>
> [Court finds that Mother rented out a room in her house without obtaining a rental license and that] to me suggests [that] she does what she wants to do regardless of what the law requires or what the rules of society require.
>
> * * *
>
> [Is Father's] character flawless? No, he's made a couple of bonehead decisions. But compared … to what [Mother] has done[,] his character by contrast is sterling.[5]
>
> * * *
>
> [M]aybe I'm in the minority but intentionally exposing a child to two sexual assault investigations in the course of one year that were *baseless* I find is harm to the child.
>
> * * *
>
> I find that [Mother] will continue to use the child as a weapon to get revenge on [Father]. [Father] very well may be deserving in a certain sense of regarding the breakup of the marriage. But neither parent is entitled to use the child as a

[5] The trial judge's comparison of Mother and Father's character and judgment is striking. It is in marked contrast to the findings of the custody evaluator who, evaluating the parties almost a year before the claims of sexual abuse, found that both Mother and Father have "deficits in their decision-making capacity," but recommended that Mother "be granted primary residential custody of [A.B.]." Although the admissibility of the custody evaluator's report is not challenged, we observe that it was properly prepared and admitted pursuant to Maryland Rule 9-205.3.

> weapon in that dispute and [Mother] has been unfortunately doing that.

(Emphasis added). The trial judge then modified the marital settlement agreement and awarded joint legal custody with tie-breaking authority to Father, primary residential custody to Father, and scheduled visitation to Mother.

ANALYSIS

In this appeal, Mother challenges the circuit court's decision to modify custody.[6] As a general matter, Maryland courts will respect and defer to parental agreements about the care, custody, education, and support of their child. *Ruppert v. Fish*, 84 Md. App. 665, 674-75 (1990). Nevertheless, in an appropriate case, trial courts have statutory authority to set aside the terms of these parental agreements. *Id*. at 674 (citing MD. CODE, FAMILY LAW ("FL") § 8-103). The trial court must use a two-step analysis in deciding whether a custody modification is appropriate. *First*, the court must find that there has been a "material change in circumstances" warranting a change in custody. *Green v. Green*, 188 Md. App. 661, 688 (2009). *Second*, if the court concludes that there has been a material change in circumstances, it turns to a consideration of what custody outcome is in the child's best interests. *Id*. The trial court determines the best interests of the child with the aid of a variety of factors. *See* Cynthia Callahan & Thomas C. Ries, FADER'S MARYLAND FAMILY LAW

[6] In her brief, Mother divides this argument into three parts: clearly erroneous factual findings; Mother's constitutionally-protected parental rights; and an abuse of discretion in modifying custody. We prefer to deal with this as a single issue.

§5-3(a) at 5-9 to 5-11 (6th ed. 2016) (consolidating factors from *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986) and *Montgomery Cty. Dep't Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977)).

"Our review of child custody determinations consists of three interrelated standards of review." *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019). *First*, this Court is deferential to the factual determinations made by the circuit court, which had the opportunity to observe the witnesses first-hand and make judgments about their credibility. *Van Schaik v. Van Schaik*, 200 Md. App. 126, 133 (2011) (quoting MD. RULE 8-131(c)). We only reverse fact-finding that is clearly erroneous. *Id*. *Secondly*, we are less deferential in reviewing the trial court's interpretation of laws, because we are equally well situated to make legal judgments. *State v. Robertson*, 463 Md. 342, 351 (2019). *Finally*, we review the ultimate decision to determine whether, in our view, the trial court abused the wide discretion that it is given to decide the best interests of the child. *Azizova*, 243 Md. App. at 372. We will only find such an abuse when we determine that no reasonable person would take the view adopted by the trial court. *Id*.

The trial court is commendably clear in identifying the basis for its decision. It found that Mother had made two "false" and "baseless" reports of child sexual abuse to the D.C. authorities.[7] Based on its finding that Mother made "false" or "baseless" reports, the trial

[7] In this opinion we will treat the terms "false" and "baseless" as synonyms, because that is how the trial court used the terms and generally how the terms are used. In fact, however, there is a slight difference. MERRIAM-WEBSTER DICTIONARY

court determined that Mother was willing to use her child as a "weapon of war" against Father. From that, the court found Mother lacking in good character and judgment and unfit. It was then a short step to finding that it was not in A.B.'s best interest for Mother to have custody.

We have no problem with the trial court's logic. A false report of child sexual abuse can be devastating to the person falsely accused and can reflect badly on the character and fitness of the person making the false accusation. *See Piper v. Layman*, 125 Md. App. 745, 753 (1999) (highlighting that "a person who has unfairly or inaccurately been labeled an abuser" often face the negative societal perception that is attached to such an accusation); *see also Devincentz v. State*, 460 Md. 518, 558-59 (2018) (holding that the history of arguments and bad attitudes between a child and the alleged abuser prior to the reported

https://www.merriam-webster.com/thesaurus/baseless [https://perma.cc/QT4N-CU43] (last visited June 26, 2020) (describing "baseless" and "false" not as synonyms but as related words). We understand "baseless" to mean, exactly as it says, without a base or basis. OXFORD ENGLISH DICTIONARY, https://www.oed.com (last visited June 26, 2020) (defining baseless as "[n]ot having an underlying basis or foundation"). Interestingly, our Merriam-Webster dictionary doesn't define "baseless." As we will demonstrate below, we will hold that there can be little doubt that there was a base or basis for Mother's allegations. The term "false" is a little more complicated as to know whether the allegations were false may require us to know at least a little about Mother's knowledge when she made them. MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/false [https://perma.cc/JJE7-HUF7] (last visited June 26, 2020) (defining false, among other definitions, as "intentionally untrue"). As we will describe in the pages that follow, we don't know what, if anything, happened to A.B., who did it, or what Mother knew and when. We don't know if Mother's allegations were correct in all regards. But, as we will explain, we find no information in the record to prove or from which to draw a reasonable inference that Mother's allegations were false when made.

incident of abuse was relevant insofar as it showed the child's bias or motivation to lie). In an appropriate case, we would agree that a known, false claim may be a material change in circumstances justifying the change in custody. In this case, however, the record does not support a finding that the allegations were, when made, known to be "false" or "baseless."[8]

A. THE TRIAL COURT'S UNSUPPORTED FACTS AND UNREASONABLE INFERENCES

The trial court is responsible for making factual determinations and "draw[ing] *reasonable* inferences from basic facts to ultimate facts." *State v. Smith*, 374 Md. 527, 535 (2003) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Only the reasonable inferences of the trial court are entitled to deference. *Jones v. State*, 343 Md. 448, 460 (1996). Here, the record reflects five unsupported factual findings or unreasonable inferences that led to the clearly erroneous conclusion that Mother made "false" or "baseless" allegations of child sexual abuse. *First*, the trial court ignored the uncontradicted medical records, which demonstrate that A.B. had objective physical findings consistent with child sexual abuse. *Second*, the trial court ignored Father's admission to physicians at Children's Hospital that A.B. had been the victim of some form of child sexual abuse. *Third*, we believe that the trial court drew an unreasonable and improper inference from Mother's decision to take A.B. to Children's Hospital rather than to another medical provider. *Fourth*, the trial court committed a factual error in attributing the reporting of

[8] Mother's brief and oral argument make much of the fact that because she was the child's custodial parent under the parties' agreement, she had no incentive to make a fraudulent report of child sexual abuse. We do not find this argument persuasive.

sexual abuse to Mother when, in fact, it was Children's Hospital that made the report, pursuant to governing law. And *fifth*, we hold that the trial judge drew unwarranted and unreasonable inferences—beyond even that claimed by their authors—to the "unfounded" findings by the Child and Family Services Agency of the District of Columbia.

1. The Objective Physical Evidence Provided by Neutral, Third-Parties Trained to Identify Child Sexual Abuse Belies the Conclusion that the Reports of Child Sexual Abuse were "False" or "Baseless."

In labelling the report of child sexual abuse "false" and "baseless," the trial court necessarily ignored the objective findings of the physicians at Children's Hospital. As we described above, when Mother brought A.B. to the Children's Hospital emergency room, she was transferred to the care of the physicians in the CAPC. The physician there reported that A.B. had a "redness/erythema of her labia majora" and made a "disclosure of sexual abuse." The physicians were careful to note that "labial erythema … is not specific for sexual abuse and can result from a variety of unrelated causes." The redness and erythema could have had another cause, or A.B. could have been sexual abused by someone other than Father. But, there was clearly a basis for concern. In the face of these objective findings by neutral, third-party physicians, who are experts in the diagnosis and treatment of child sexual abuse, we hold that the evidence does not support the trial court's conclusion that Mother's reports were "false" or "baseless."

2. The Trial Court Ignored the Potential Weight of Father's Admission that A.B. Was the Victim of Child Sexual Abuse While in His Custody.

The trial court disregarded Father's admission to the physicians at Children's Hospital that A.B. was sexually abused while in his custody:

> [A.B.] was previously seen in October for alleged sexual abuse and [A.B.] disclosed that her father had touched her private parts. [CFSA] was called and [A.B.] saw CAPC. During the investigation they said that they couldn't prove it was the dad. *[Father] agreed that something had happened but he does not know what happened and they wanted an out of court agreement. They agreed that it was likely the 8 y[ear] o[ld] girl that lives with him.* The out of court agreement was that [Father] would have [A.B.] every other weekend and a few weekdays and keep her away from the other 8 y[ear] o[ld] girl in the home. They agreed [they would not bathe] … or … sleep together.

(Emphasis added). Although not a model of clarity, the physician's note reveals that Father agreed to the fact that A.B. was the victim of some form of child sexual abuse, although he thought that A.B. was abused by another young girl living in his residence.[9] Although no party objected to the introduction of these documents or their content, we note that the physician's report of Father's statement is hearsay, but excluded from the hearsay rule by operation of Maryland Rule 5-803(a)(1). Father's admission, therefore, is inconsistent with

[9] In the note, Children's Hospital states that the parties intended to enter an out-of-court agreement. At trial, Mother offered an unsigned version of the agreement that appears to corroborate Children's Hospital's notes. The trial judge ruled it inadmissible and, because that ruling is not challenged in this appeal, we shall not consider it further. The decision not to admit the unsigned agreement, however, does nothing to undermine the importance of the medical record described above.

the trial judge's finding that Mother's reports of child sexual abuse were "false" or "baseless."

3. The Trial Court Drew an Unreasonable Inference From Mother's Decision to Take A.B. to Children's Hospital.

The trial judge made a finding of fact that Mother took A.B. to Children's Hospital rather than to her regular pediatrician or to another hospital in Maryland. That much is certainly true but unexceptional. From this factual finding, however, the trial judge drew unreasonable and unwarranted inferences about the truth (or rather the falsity) of Mother's allegations, specifically that Mother's choice to consult Children's Hospital demonstrated that "she's a very poor decision-maker." That inference is not reasonable or warranted:

- *First*, Children's Hospital is a very well-regarded, national-ranked pediatric hospital.[10]

- *Second*, Mother testified without contradiction that she first took A.B. to an "urgent care place" and that the doctors at the "urgent care place" recommended taking A.B. to Children's Hospital.

[10] This Court takes judicial notice, pursuant to Maryland Rule 5-201(b), that Children's Hospital is currently the #7 ranked pediatric hospital and has 10 nationally-ranked pediatric specialties according to U.S. News & World Report. *Best Children's Hospitals 2020-2021: Honor Roll and Overview*, U.S. NEWS & WORLD REPORT (June 16, 2020) available at https://health.usnews.com/health-news/best-childrens-hospitals/articles/best-childrens-hospitals-honor-roll-and-overview [https://perma.cc/E8VC-6CTQ]. Moreover, Children's Hospital is home to the Freddie Mac Child and Adolescent Protection Center (CAPC), a leading center for the diagnosis and treatment of victims of child abuse. *Child and Adolescent Protection Center*, CHILD. NAT'L HOSP., https://childrensnational.org/departments/child-and-adolescent-protection [https://perma.cc/NM5T-TZ9L] (last visited June 17, 2020). There are, as the trial judge noted, excellent hospitals in Maryland too.

- *Third*, Mother testified that she had taken A.B. to Children's Hospital several years before when she had hit her head and that Mother thought "they did a very good job."

- *Fourth*, Mother testified that she learned of her daughter's injury on a Sunday, which is verified by the admission notes from Children's Hospital that indicate that she arrived on Sunday at 7:48 p.m. It is hard for us to imagine the availability of a regular pediatrician at that time. As the trial judge pointed out, however, Mother never told A.B.'s regular pediatrician about the abuse.

- And *fifth*, when Mother took A.B. *back* to Children's Hospital in April of 2019, she had already been treated for the same issues at Children's Hospital in October of 2018. It would make little sense to begin again with a different doctor.

In sum, it was inappropriate for the trial court to question Mother's judgment in taking A.B. for treatment at Children's Hospital instead of to her normal pediatrician or to a hospital in Maryland.[11] More importantly, it is impossible to derive from the choice to take A.B. to Children's Hospital any inferences about the truth or falsity of Mother's allegations about child sexual abuse, or about Mother's parental judgment.

4. The Trial Court Erred in Finding that Mother—Not the Professionals at Children's Hospital—Made the Report to D.C. Authorities.

The trial court determined that Mother made a report of child sexual abuse "to D.C. authorities." The factual record, however, does not support this. Mother took A.B. to

[11] Mother couches this as an argument sounding in her constitutionally-protected rights as a parent to select her child's medical providers. In light of the doctrine of constitutional avoidance, however, we are content to address this as an unreasonable inference from the facts adduced.

Children's Hospital for treatment and the physicians at Children's Hospital, in turn, reported the allegations to the Child and Family Services Agency of the District of Columbia pursuant to that jurisdiction's mandatory reporting laws. D.C. Code, § 4-1321.02 (requiring mandatory reporting by, among others physicians, who "know[s] or has reasonable cause to suspect … mental[] or physical[] abuse[] or neglect [of] a child.").[12] The trial court's finding here is clearly erroneous, although we are not certain how meaningful this was in the court's thinking. The trial court might have meant that Mother indirectly caused a report to be filed or that Mother's actions resulted in a report being filed. In any event, however, this factual finding was clearly erroneous.

[12] The trial judge appeared to be unaware of the requirement of D.C. law, quoted above, that compels physicians to report only in circumstances in which the physician has reasonable cause to suspect abuse (and, therefore, has no obligation to report when the physician lacks such reasonable cause):

> So, do you … think a reasonable conclusion is that mother is priming the child to say certain things to the medical professionals knowing that the medical professionals, if they hear the right magic words, it's an immediate referral[?] You know it, I know it, and everybody knows it. It's not a secret.

Absent evidence that this physician, the physicians at Children's Hospital, or physicians generally do not follow the statutory directive, we think it is unreasonable for the trial court to infer or suggest that medical professionals exercise no independent judgment. This conclusion suggests that the trial court is operating solely on its claimed knowledge of how the system works and if there is an "open secret," we aren't in on it.

5. The Trial Judge Drew Unreasonable Inferences from the Reports of the Child and Family Services Agency of the District of Columbia (CFSA).

The trial court correctly found that the Child and Family Services Agency of the District of Columbia issued two reports—each of which concluded that Mother's allegations were "unfounded," which, pursuant to D.C. law, means the reports were "not true."[13] Neither of the CFSA reports, however, support the trial court's inference that Mother's reports were "false" or "baseless." We explain.

The December 5, 2018 Report outlines CFSA's investigation of sexual abuse by Father against A.B. CFSA's conclusion was that the "[a]llegations of [s]exual [a]buse were UNFOUNDED *against [Father]*." (emphasis added). That conclusion leaves open the possibility that A.B. was the victim of child sexual abuse perpetrated by someone other than Father, a fact which, as discussed above, Father admitted. That doesn't make Mother's report "false" or "baseless." It just makes it wrong in some of the particulars.[14]

[13] We also note that these reports are less impressive than they sound. Each report is a single page long, provides no details to support its conclusions, and does not describe the efforts put into reaching those conclusions. They are simply conclusions. Moreover, these reports are far less detailed than those we are accustomed to seeing in Maryland. *See, e.g., Montgomery Cty. Dep't Health & Human Servs. v. P.F.*, 137 Md. App. 243, 246-53 (2001) (describing the comprehensive reports prepared by a social worker and a police detective investigating allegations of the sexual abuse of a child).

[14] The difference, it seems to us, is vast. There is no doubt that Mother wanted to make maximal effect of the child sexual abuse charges against Father. If the charges were "false" and "baseless," that was, as the circuit court found, using her child as a "weapon of war." If the charges were simply wrong in the particulars—even important particulars, like the identity of A.B.'s abuser—Mother's litigation strategy must be viewed as an effort to protect her child from sexual abuse.

The May 3, 2019 CFSA report is even less supportive of the inference that the trial court drew from it. On its face, the report contained an allegation that A.B. was the victim of neglect or inadequate supervision. CFSA found that the allegations were "unfounded" and thus "not true," but then undermined that conclusion by explaining:

> There was no information obtained or observations made during the course of the investigation to determine that the child was improperly supervised by [Father] while in his care. In addition, there were no disclosures made or information obtained during the course of the investigation to suggest that the child was inappropriately or sexually touched by anyone. At this time, there is insufficient evidence to suggest that the

It is in this context that we view the text message exchanges between Mother and V.O. As best as we understand the relationships, V.O. and Mother are longtime friends who happened to be going through divorces at the same time. Both were also anxious to make much out of the child sexual abuse charges against Father: Mother hoped to use those charges to gain full legal custody of A.B.; V.O. hoped to leverage the charges against his ex-wife, E.L., who is a close friend of Father's new paramour, A.N., and has brought V.O. and E.L.'s child, L.O., to visit A.N. and Father. The conversations between V.O. and Mother are certainly inappropriate. But there is nothing in them that, to us, demonstrates that the allegations of child sexual abuse were "false" or "baseless." The worst part, sent by "1 Deuce" (likely, though not proven to be V.O.) is "But this [A.B.] situation is actually more important[. I] think [that] if you report to D[istrict of]C[olumbia]P[ublic]S[chools] that he abused [A.B. because] he had to withdraw her from [Alexander R. Shepherd Elementary School,] it's a slam dunk[.]" To which, Mother responded, "Hell yeah." Evidence that V.O. suggested reporting the alleged child sexual abuse to the D.C. Public School system (at a time when Mother was contesting Father's decision to enroll A.B. at D.C.P.S.), with all due respect to our esteemed dissenting colleague, is simply not proof that Mother's allegations were, when made, "false" or "baseless."

It is also in this context that we view Mother's sharing A.B. and Father's confidential information with V.O. (and, to the extent it is relevant here, V.O.'s giving this confidential information to his lawyer and causing it to be filed in his case). These were certainly errors of judgment. But they were, in our judgment, one-time errors, made in the throes of litigation and, at least in part, made to protect children from possible sexual abuse.

> child is in imminent danger nor are there safety concerns present at this time of closure.

This reads more like what, in Maryland, would be reported as "unsubstantiated." *See, e.g.*, *Montgomery Cty. Dep't Health & Human Servs. v. P.F.*, 137 Md. App. 243, 261 (2001) (citing COMAR 07.02.07.12A; 07.02.07.12C) (discussing statutorily defined dispositions of reports of child sexual abuse: "indicated," "ruled out," and "unsubstantiated."); *see generally* COMAR 07.02.07.02 (highlighting that child abuse is "indicated" "when there is credible evidence, which has not been satisfactorily refuted;" defining "ruled out" as a finding that "child abuse did not occur;" and defining "unsubstantiated" to mean that "there is insufficient evidence to support a finding of indicated or ruled out").[15] The CFSA reports simply don't support an inference that Mother made "false" or "baseless" allegations of child sexual abuse.

We hold, therefore, that the trial judge misconstrued facts and drew unreasonable inferences, which directly led to the clearly erroneous factual finding that Mother made two "false" or "baseless" reports of child sexual abuse. Put another way, to conclude that Mother made "false" and "baseless" allegations of child sexual abuse, the trial judge had

[15] Mother, for the first time in her reply brief, raises evidentiary challenges to the admissibility of these CFSA reports. These challenges were not raised before the trial court and are therefore waived. MD. RULE 8-131. Moreover, it is inappropriate to raise claims for the first time in a reply brief, which prevents the opposing party from responding. *Dolan v. Kemper Indep. Ins. Co.*, 237 Md. App. 610, 627 (2018) ("Ordinarily, we do not consider arguments that a party raises for the first time in a reply brief."); *Jones v. State*, 379 Md. 704, 713 (2004). We will not consider these evidentiary challenges further.

to: ignore the objective findings of neutral third-party physicians, trained in the detection of child abuse; ignore Father's admission that A.B. had been the victim of child sexual abuse while in his custody; draw an unreasonable inference from Mother's choice of healthcare providers; misunderstand who made the report to D.C. authorities; and draw unreasonable and unwarranted inferences from the reports made by the D.C. authorities. These errors all led to the clearly erroneous finding that Mother made "false" or "baseless" allegations of child sexual abuse. [16]

To be clear, we are not holding that A.B. was or was not sexually abused, let alone by whom. We are holding only that there is not enough in the record to definitively show

[16] In cases involving allegations of child sexual abuse, courts must be careful to avoid even an appearance of bias against the person who makes the allegation. The social science reflects that false claims of child sexual abuse are relatively rare, *see* Edwin J. Mikkelsen et al., *False Sexual-Abuse Allegations by Children and Adolescents: Contextual Factors and Clinical Subtypes*, 46 AM. J. PSYCHOTHERAPY 556, 568 (1992), but that there is a significant subset of child protective services investigators, police, lawyers, and, critically here, judges who think that false reports occur much more frequently than the data supports. Mark D. Everson et al., *Beliefs Among Professionals About Rates of False Allegations of Child Sexual Abuse*, 11 J. INTERPERSONAL VIOLENCE 541, 549-52 (1996). That is a bias and it can effect case outcomes. William O'Donohue et al., *The Frequency of False Allegations of Child Sexual Abuse: A Critical Review*, 27 J. CHILD SEXUAL ABUSE 459, 472-73 (2018); Mark D. Everson et al., *Beliefs Among Professionals About Rates of False Allegations of Child Sexual Abuse*, 11 J. INTERPERSONAL VIOLENCE 541, 541-42 (1996). Worse still, there are some advocates who believe that this bias causes some judges to even punish parents who make truthful allegations of child sexual abuse. Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 151 (1990); Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311, 313 (2016). We have resolved this case on other grounds but we caution trial judges against even the appearance of this bias in the resolution of custody cases.

that Mother's allegations of that abuse were "false" or "baseless." In the absence of the finding that Mother made "false" or "baseless" reports of child sexual abuse, we see in this record no "material change in circumstances," which is the necessary prerequisite for the court to modify child custody from the arrangement agreed upon by the parties. *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). On this basis, we are compelled to reverse.

B. OTHER FINDINGS

Assuming for the sake of argument that there was a "material change in circumstances" based on the allegations of child sexual abuse sufficient to allow the trial court to reconsider the parties' agreed-upon custody decision, we hold that the trial court's weighing of the factors was clearly erroneous as well. As reported above, the trial court based its weighing of the factors on three facts in its decision to modify custody: (1) Mother's "false" and "baseless" allegations of child sexual abuse; (2) Mother's failure to make a mortgage payment or payments; and (3) Mother's failure to obtain a rental license before renting out a room in her home. We have already dealt with the allegedly "false" and "baseless" allegations of child abuse. We turn next to the other factual findings. Neither of these findings, as the court appeared to recognize, support the emphasis that it purported to give to them. Rather, these appear to be make-weight arguments to bolster the trial court's conclusion that the reports of child sexual abuse were "false" and "baseless." We do not condone Mother's failure to make mortgage payments, but we are not persuaded that it reflects an intention to risk the child's home, let alone provides proof of bad character

or inability to make good decisions.[17] That is quite simply, an unreasonable inference. Similarly, we encourage all people who wish to rent out part of their homes in jurisdiction that require a renter's license to obtain such a license. But are not persuaded that failure to obtain such a license put the child's home at risk.[18] Again, this is an unreasonable inference. As a result, we give these additional findings no credence.

CONCLUSION

We hold that the trial court based its decision on incorrect facts and unreasonable inferences unsupported by the facts. As a result, we also hold that there was no material change in circumstances to warrant modifying the child custody, access, and support provisions of the marital agreement. We reverse the decision of the trial court and reinstate the agreed-upon marital settlement agreement.[19]

[17] In fact, there is a serious argument, which we need not decide, that the trial court should not have considered this issue, as the circuit court previously decided that Mother had *not* violated the terms of the marital settlement agreement by failing to make mortgage payments.

[18] Mother testified that she was unaware that she needed a renter's license before renting out her home. This fact, however, is still not dispositive to whether she can provide a safe home environment for her child.

[19] In this appeal, Father filed a motion to extend the time to file the Appellee's briefs, arguing that the delay in filing was due to Mother's failure to abide by the Maryland Rules governing appellate review. *See generally* MD. RULE 8-101 *et seq*. As a result, Father requested that we order Mother to pay the reasonable attorney's fees incurred in drafting his motion. We granted the motion in part but reserved judgment on the issue of apportionment of costs pending a decision on the merits of the appeal. We note now that, to the extent that Father seeks attorney's fees in addition to costs, his motion is denied.

JUDGMENT FOR THE CIRCUIT COURT OF MONTGOMERY COUNTY REVERSED. COSTS TO BE PAID BY N.B.

Circuit Court for Montgomery County
Case No. 150621FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1440

September Term, 2019

C.B.

v.

N.B.

Berger,
Friedman,
Kenney, James A. III,
(Senior Judge, Specially Assigned)

JJ.

Dissenting Opinion by Berger, J.

Filed: July 10, 2020

I, respectfully, dissent. The majority observes that the trial court was "commendably clear identifying the basis for its decision" and has "no problem with the trial court's logic." Nevertheless, the majority holds that the trial judge was clearly erroneous in his factual findings. In my view, the trial court's findings were supported by the evidence and not clearly erroneous. I, therefore, would affirm the decision below granting N.B.'s ("Father's") motion to modify custody.

The thrust of the majority opinion is that C.B.'s ("Mother's") allegations of abuse were not "false" or "baseless," and therefore, those allegations cannot serve as the basis for finding that Mother lacks appropriate judgment. Based upon my review of the record, I am not persuaded that the trial court's conclusion that Mother knowingly and intentionally reported false claims of sexual abuse by Father is clearly erroneous. My review of the record suggests that there is ample evidence to support the trial court's conclusion that a Mother's false reports of sexual abuse by Father constituted a material change in circumstances warranting a modification of custody.

First, the District of Columbia Child and Family Services Agency ("DC CFSA") investigated the allegations and ultimately determined that the allegations of sexual abuse were "unfounded." After receiving a report of suspected child abuse or neglect, the DC CFSA is charged with "conduct[ing] a thorough investigation of a report of suspected child abuse or neglect to protect the health and safety of the child or children." D.C. Code § 4-1301.04(a)(1). After completing the investigation, DC CFSA issues "[a] finding as to

whether the report of abuse or neglect is substantiated, inconclusive, or unfounded." D.C. Code § 4-1301.04(c)(3)(G). An "unfounded report" is a report of child abuse or neglect "which is made maliciously or in bad faith or in which has no basis in fact." D.C. Code § 4-1301.02(20A).[1] Not only did the DC CFSA find both reports to be "unfounded," but the agency further advised Father, with respect to the second allegation, that "[t]here was no information obtained or observations made during the course of the investigation to determine that [A.B.] was improperly supervised" by Father and that "there were no disclosures made or information obtained during the course of the investigation to suggest that [A.B.] was inappropriately or sexually touched by anyone." Simply put, the DC CFSA affirmatively determined that the allegations were not merely unproven; rather, the investigating agency found that the allegations were proved to be untrue.

In addition to the DC CFSA's findings, other evidence in the record supports the trial court's finding that Mother knowingly and intelligently made false reports of child sexual abuse. The trial court was presented with evidence that Mother's friend, V.O., Jr., used the sexual abuse allegations in his own custody dispute. Furthermore, text message conversations introduced into evidence through another witness, D.S., demonstrated that Mother and V.O. had conspired to use the sexual abuse allegations in their respective

[1] A "substantiated report" is a report "which is supported by credible evidence and is not against the weight of the evidence." D.C. Code § 4-1301.02(19A). An "inconclusive report" is a report "which cannot be proven to be either substantiated or unfounded." D.C. Code § 4-1301.02(13A).

custody cases. In a conversation on October 17, 2018, Mother told D.S. that she knew V.O. and his lawyer[2] would "use [her] case for their own best interest," "[l]ike if [Father] is a molester." In the same text message conversation, Mother told D.S. that she had not met with Mr. O.'s lawyer in person because "we would all go to jail for collusion if we all met." In a text conversation with D.S. on October 18, 2018, Mother discussed her plan with V.O. to "tie [Father] up in two courts." D.S. interpreted the reference to two courts to be Montgomery County and the District of Columbia and understood Mother as indicating that V.O. wanted her to file civil protection petitions in both jurisdictions. Mother told D.S. that she knew D.C. was going to "throw [the petition] out" and that it was a "waste of [her] time."

The majority identifies several clearly erroneous factual findings that led the trial judge to conclude that Mother made two "false" or "baseless" allegations of sexual abuse. The majority opinion holds that the trial court ignored the medical records, which demonstrate that A.B. had objective physical findings consistent with sexual child abuse. Notably, the record reflects that the trial judge expressly stated that "he would read the whole thing" when referring to the medical records introduced into evidence. Critically, the majority notes that the "objective findings" of the physicians at Children's Hospital do not support the trial judge's finding that the report of child sexual abuse was false or

[2] V.O., Jr.'s lawyer was his father, V.O., Sr.

baseless. The majority further notes that "there was clearly a basis for concern" when addressing whether A.B. had been sexually abused.

Critically, the findings by the physicians were based upon Mother's report and a physical examination that was nonspecific for child sexual abuse. Mother took A.B. to Children's Hospital and the note from the physician was based upon what Mother had reported. Indeed, Mother asserts that at the October 2018 visit to Children's National Hospital, medical staff found A.B.'s condition to be "quite concerning for sexual abuse." This quote is correct, but the context is critical to my analysis. The medical assessment concluded that A.B.'s physical exam was "not specific for sexual abuse" but noted that "her disclosure is quite concerning for sexual abuse." It was her disclosure specifically that caused concern, not the examination overall.

The majority further holds that the trial judge erred in finding an improper nature in Mother's decision to take A.B. to Children's Hospital. Clearly, the trial court had considerable concern about Mother's credibility for a host of reasons outlined by the trial judge in his opinion to modify custody, especially those related to her dealings with V.O. In my view, this may have colored his perception of Mother's decision to take A.B. to Children's Hospital. It certainly might not have been a conclusion that I would have made had I been the trial judge, but it was a judgment call for the trial court to make.

In the present case, the trial court was tasked with making factual findings and determining what custody arrangement would serve A.B.'s best interests. The trial court

considered Mother's choice of hospital, along with other evidence in the record, when determining whether it found Mother's testimony regarding the sexual abuse allegations to be credible.

The trial court was presented with evidence that Mother took A.B. to Children's National Hospital in Washington D.C. on October 14, 2018 for evaluation for suspected sexual abuse rather than to a different hospital closer to Mother's home. Mother testified that she was advised by staff at Children's National Hospital to follow up with A.B.'s primary care pediatrician. Mother acknowledged that she did not, in fact, follow up with A.B.'s pediatrician or even inform A.B.'s pediatrician of the alleged sexual abuse at any time.

The trial court commented that "[t]he race to Children's Hospital under the circumstances of this case I find was wholly unnecessary." The court further explained that it was "not saying that it wouldn't have been appropriate . . . to consult with medical experts," emphasizing that "of course, it is." The court, however, explained that it was considering this decision by Mother while "looking at the case in the totality and having had the benefit of listening to [Mother's] testimony on the stand." It was the totality of the circumstances that led the trial court to conclude that Mother was "engaged in a war with [Father]" and was "ready, willing and able to use her child as a weapon of war." This demonstrated to the trial court "aspects of lack of good character or lack of judgment and aspects of unfitness." This is a case in which the trial court expressly assessed the way in

which Mother had made decisions regarding her child in the context of its consideration of the *Taylor* and *Sanders* factors. Indeed, the *Taylor* and *Sanders* factors require a trial court to consider the decisions made by parents regarding their children in order to assess what custody arrangement would serve the best interests of a minor child.

The majority further holds that the trial court erred in finding that Mother -- not employees of Children's Hospital -- made the report of child sexual abuse to the D.C. authorities. Respectfully, I fail to appreciate the distinction that the majority attempts to draw. From my perspective, for the purpose of determining whether there is evidence to support the trial court's finding that Mother intentionally fabricated false claims of child sexual abuse, there is no practical difference between reporting an allegation of sexual abuse directly to the Department of Social Services or a law enforcement agency and reporting an allegation of sexual abuse to medical providers. Mother knew or should have known that medical providers would, in turn, report the allegations to authorities. Indeed, medical providers are required to report suspected instances of abuse or neglect to authorities. *See* Md. Code (1984, 2019 Repl. Vol.), § 5-704 of the Family Law Article (providing that health care providers are required to report suspected child abuse or neglect to the local Department of Social Services or law enforcement agency); D.C. Code § § 4-1321.02(a)(b) (providing that health care providers are required to report suspected child abuse or neglect to the Metropolitan Police Department of the District of Columbia or the Child and Family Services Agency). In this context, Mother's decision to report sexual

abuse allegations to medical providers instead of law enforcement authorities is a distinction without a difference.

Lastly, the majority addresses two other factors that weighed in the trial court's decision to modify custody: (1) Mother's failure to make mortgage payments for her residence, and (2) Mother's failure to obtain a rental license before renting out a room in her home. The trial court was certainly permitted to consider Mother's failure to make mortgage payments in its assessment of whether a change in custody would serve A.B.'s best interests. Mother testified that she had submitted a loan modification application to her mortgage company, but her ability to participate in the loan modification program was precluded by Father's failure to sign a quitclaim deed. Mother further testified that her need to pay for legal representation in connection with her divorce and custody dispute with Father hindered her ability to make mortgage payments.

Having heard and considered Mother's testimony, the trial court concluded that Mother's explanations for why she did not pay the mortgage were not credible. Pursuant to the parties' separation agreement, which was incorporated into the divorce order, Mother was responsible for all mortgage payments from the date of separation forward. The trial court "listen[ed] to [Mother's] explanations for why she didn't pay her mortgage" but explained that it "[did not] believe her." The court found that Mother "simply decided [she was] not going to pay" and instead "ma[d]e the bank come to [her]" in attempts to "get some skinnier deal." The trial court found that this "put [A.B.]'s home in jeopardy." The

court found that "the absence of the quitclaim deed did not . . . stop her from paying the mortgage." The trial court emphasized that Mother was "making plenty of money to pay her mortgage" but "just elected not to do it."

The trial court had a far better opportunity than this Court to weigh the credibility of Mother's testimony on this and other issues. Because the trial judge "sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [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." *Burak v. Burak*, 455 Md. 564, 617 (2017) (quoting *Yve S.*, *supra*, 373 Md. at 585-86). Furthermore, the trial court was permitted to consider its conclusions as to Mother's tendency for truthfulness in other contexts when evaluating whether to credit her testimony regarding the reasons she failed to make mortgage payments. The trial court considered Mother's testimony regarding the reasons she failed to make mortgage payments but, as fact-finder, was disinclined to credit it. This is a factual determination that was supported by evidence in the record and is, therefore, not clearly erroneous.

The final issue addressed by the majority concerns Mother's failure to obtain an appropriate license for the rental apartment in her basement. First, Mother does not dispute that she failed to obtain a rental license, nor does she dispute that such a license was required pursuant to the Montgomery County Code. *See* Montgomery County Code § 29-16 (setting forth requirements for licensing of rental properties). Instead, Mother takes

issue with the trial court's characterization of her failure to appropriately register her rental property as reflecting poorly on her judgment in general.

If sitting as fact-finder in this case, I may or may not have given Mother's failure to obtain a proper license for her basement rental apartment the same amount of weight as that afforded to it by the that the trial court. Nevertheless, I cannot say that the trial court's factual finding regarding Mother's unlicensed apartment was clearly erroneous. Nor, in my view, did the circuit court commit reversible error by considering this fact among many others when evaluating Mother's character and decision-making. Indeed, the trial court expressly explained that this factor was one of several "other pieces which if standing alone would not by themselves necessarily in every case lean or fall one way or the other." Furthermore, there were several other factors that the trial court explained that formed the basis for the court's conclusion that Mother had poor judgment, including Mother's decision to provide her friend with copies of her child's unredacted medical records for use in his own custody dispute. I, therefore, would hold that the trial court did not err when considering Mother's failure to obtain a rental license among other evidence when assessing Mother's credibility.

For several reasons, the trial court "f[oun]d that the best schedule for [A.B.] is primary residential custody to [Father]." Mother was awarded visitation with A.B. "every other weekend from Friday 3:15 until Sunday 6:00 p.m." and "two dinner visits per week from 3:15 pm until 7:00 p.m. Tuesdays and Thursdays." With respect to legal custody, the

court explained that it had "been on the fence between sole legal custody and joint legal custody with tiebreaking authority." The court explained that it had ultimately settled upon joint legal custody with tiebreaking authority because it wanted "to continue to incentivize [Mother[ ] to stay in the game and participate actively." The court further explained that this legal custody arrangement was "for the benefit of the child" so that A.B. would "know that both parents are actively interested in participating and having input into their well-being."

In sum, the trial court expressly considered all of the *Taylor* and *Sanders* factors and established its factual findings as to each. Although the court expressed concerns about both parents to some extent, the trial court explained in detail why it found Mother's shortcomings far more concerning than Father's. Different fact-finders may have weighed the factors differently. Nonetheless, the determination of which evidence to credit and how much weight to give to each factor is within the discretion of the fact-finder. My review of the record demonstrates that the circuit court's ruling was based upon sound legal principles and factual findings that were not clearly erroneous.

For all of these reasons, the circuit court's custody determination was not an abuse of discretion, and the judgment should be affirmed.