Circuit Court for Howard County
Case No.: 13-C-17-111078

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1473

September Term, 2019

JARED ROSS

v.

JENNIFER ROSS

Graeff,
Arthur,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: December 18, 2020

On December 20, 2019, Judge Richard Bernhardt, of the Circuit Court for Howard County, entered a judgment of absolute divorce between Jared Ross ("Husband"), Appellant, and Jennifer Ross ("Wife"), Appellee. Wife received sole legal and physical custody of their three children and Husband was granted regular visitation. Wife received a monetary award in the amount of $312,936, child support in the amount of $6,000 per month, and monthly rehabilitative alimony in the amount of $4,000 for eighteen months and then in the amount of $3,000 for eighteen months. Husband was ordered to pay $80,000 of Wife's attorneys' fees.

On appeal, Husband presents this Court with six questions for review, which we have renumbered:

> Question 1: Whether the judge erred by admitting a custody evaluation without a Frye-Reed hearing that used parental alienation, psychology tests, unsworn witnesses, and the evaluator's credibility findings to conclude that the father had committed spousal abuse, is dishonest, manipulative, malicious, and self-centered, and had alienated the children from their alcoholic mother?
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> Question 2: Whether the judge erred by deciding custody based on parental alienation, and alleged personality defects of the children's father previously rejected by the judge, that the judge reasoned would cause the children to have "distorted views of reality" if custody were awarded to the father?
>
> Question 3: Whether the judge erred by failing to order liberal visitations, including normal holidays and other events, to a fit non-custodial parent?
>
> Question 4: Whether the judge erred by refusing to hear directly from the children the reasons for their strong parental preferences for their father, including their mother's physical assaults even when sober, her isolation of them, their father's stable parenting, and to rebut her allegations that he had abused and stalked her, and breached the order that had suspended their access with him?

> Question 5: Whether the judge erred by basing his economic findings, the monetary award, and the legal fee award on the father's alleged personality defects, the children's custodial accounts, and marital assets that no longer existed?
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> Question 6: Whether the judge erred by not considering the $499,890.90 that the wife's family had contributed to her in its adjudication of the parties' economic circumstances? [1]

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[1] On November 5, 2020, Husband filed a Case in Bankruptcy, in the United States Bankruptcy Court for the District of Maryland. Husband's bankruptcy filing triggered an automatic stay of

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[,]

pursuant to 11 U.S.C. Section 362(a). There is, however, an exception to the automatic stay for divorce proceedings and issues related to divorce:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--
> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
> (2) under subsection (a)--
> (A) of the commencement or continuation of a civil action or proceeding--
> (i) for the establishment of paternity;
> (ii) for the establishment or modification of an order for domestic support obligations;
> (iii) concerning child custody or visitation;
> (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
> (v) regarding domestic violence[.]

11 U.S.C. Section 362(b).

We asked the parties to provide supplemental briefing on the extent to which the instant appeal is stayed as a result of Husband's bankruptcy filing. The parties agreed that Husband's questions 1 through 4 were not affected by the automatic stay. With respect

(continued . . .)

Wife, in response, poses seven questions for review, two of which, Questions 3 and 5, appear to be questions constituting her cross-appeal:

> 1. Whether the lower court appropriately admitted the Court-appointed Custody Evaluation by Dr. Paul Berman into evidence.
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> 2. Whether the lower court properly exercised its discretion and correctly declined to interview the Children or have them testify based upon evidence that doing so would be contrary to their best interests.
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> 3. Whether the lower court exhibited bias in favor of and encouragement for Father, in conjunction with a lack of consideration of the resounding credible evidence that Mother had been a victim of intimate partner violence.
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> 4. Whether the lower court properly found that it was in the best interest of the Children for Mother to have legal and physical custody and abused its discretion in awarding custody to Mother.
>
> 5. Whether the lower court erred in allowing awarding access to Father and permitting communication between Father and Children in the face of

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(. . . continued)
his questions 5 and 6, Husband averred that the automatic stay applied to those questions as they related to the monetary award. Husband, however, asserted that this Court could address questions 5 and 6 as they related to alimony, child support, and attorneys' fees. Wife, however, asserted that, by the plain language of 11 U.S.C. Section 362(a), Husband's bankruptcy filing did not trigger the automatic stay, because the proceedings were not an "action or proceeding against the debtor," as Husband had initiated the appeal.

We, relying on decision of the Court of Appeals in *Klass v. Klass*, 377 Md. 13 (2003), determined that the automatic stay did apply to Husband's questions 5 and 6, insofar as those questions challenged the Circuit Court's determinations with respect to marital property and the monetary award. As a result, we will stay the Circuit Court judgments related to marital property and the monetary award and address Husband's questions 5 and 6, as they relate to custody, visitation, child support, and alimony.

> overwhelming evidence that the same was contrary to the Children's best interest.[2]
>
> 6. Whether the lower court's calculation of the monetary award and support awards were proper and supported by the evidence?
>
> 7. Whether the lower court appropriately considered and weighed the $499,890.90 contributed to Mother by her parents for legal fees, treatment, and expenses?

We shall affirm the decision of the Circuit Court, for the following reasons.

BACKGROUND

Husband and Wife were married in November of 2003, and their three children were born in 2006, 2007, and 2010. Husband initiated proceedings for a limited divorce in April of 2017, and four months later, Wife also asked for a limited divorce. Wife, however, after the merits trial began, in October of 2018, amended her complaint to seek an absolute divorce, to which Husband responded in the same suit.

Wife sought sole legal and physical custody of the parties' three children. Husband sought joint legal custody of the children and asked to be granted sole physical

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[2] Husband presents two additional questions in his Reply Brief, which are restatements of Wife's questions 3 and 5, those being:

> Question 5: Whether the trial judge exhibited sufficient bias that he was required to *sua sponte* recuse himself before ruling on the merits?
>
> Question 6: Whether the judge erred by awarding visitation of the children with their preferred parent, especially in light of his appropriate parenting?

custody with tie-breaking authority. The Circuit Court, upon agreement of the parties, in April of 2018, appointed a Best Interest Attorney ("BIA") to represent the children.[3]

Two custody evaluators were appointed, pursuant to Rule 9-205.3.[4] The first, Dr. John Leftkowits, completed a custody evaluation report and testified during the trial, but Judge Bernhardt, then, appointed a second evaluator, Dr. Paul Berman, to complete another evaluation, after voicing some reservations about various of Dr. Leftkowits's recommendations.[5]

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[3] A trial court, when adjudicating custody as part of divorce proceedings, may appoint a Best Interest Attorney, to represent the interests of a child, pursuant to Section 1-202 of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), which provides:

> (a) *In general*. —In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may:
>
> (1) (i) appoint a lawyer who shall serve as a child advocate attorney to represent the minor child and who may not represent any party to the action; or
>
> (ii) appoint a lawyer who shall serve as a best interest attorney to represent the minor child and who may not represent any party to the action; and
>
> (2) impose counsel fees against one or more parties to the action.
>
> (b) *Standard of care*. —A lawyer appointed under this section shall exercise ordinary care and diligence in the representation of a minor child.

[4] Rule 9-205.3, which addresses Custody and Visitation-Related Assessments, entitles a trial judge to appoint "a [custody evaluator] to perform an assessment in an action . . . in which child custody or visitation is at issue." Rule 9-205.3(b)(4). A custody evaluation is "a study and analysis of the needs and development of a child who is the subject of [child custody] proceedings and of the abilities of the parties to care for the child and meet the child's needs." Rule 9-205.3(b)(3).

[5] The parties agreed, in April of 2018, that Dr. John Lefkowits should perform a custody evaluation and he was appointed in May of 2018, to do so. Dr. Lefkowits did

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After Dr. Berman completed his custody evaluation report, Husband, in July of 2019, filed a motion *in limine*, requesting that the Circuit Court hold an evidentiary hearing as to the admissibility of Dr. Berman's report and any testimony thereupon. Husband alleged that Dr. Berman based his evaluation and recommendations on the theory of "parental alienation syndrome,"[6] which, according to Husband, did not constitute a generally accepted psychological theory. Judge Bernhardt denied Husband's motion, though acknowledging his continuing objection, recognizing that Dr. Berman's report comported with the requirements of Rule 9-205.3(f),[7] but, more importantly, also

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testify regarding his findings and recommendations in October of that year, but his testimony and report are not in issue in this appeal.

[6] The term "parental alienation syndrome" was coined by child psychiatrist Richard Gardner, who opined that it is

> a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against the parent, a campaign that has no justification. The disorder results from the combination of indoctrinations by the alienating parent and the child's own contributions to the vilification of the alienated parent.

Richard A. Gardner, *Parental Alienation Syndrome (PAS): Sixteen Years Later*, 45 Academy Forum 10-12 (2001).

[7] According to Rule 9-205.3(f)(1), a custody evaluation must include the following:

> (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;

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stated that he was not going to accept evidence based upon "parental alienation syndrome." Dr. Berman did testify at trial and his report was admitted, although Judge Bernhardt did not eventually adopt the entirety of his recommendations.

The merits hearing began in October 2018 and continued, over many days, through October 2019. Judge Bernhardt, in March of 2019, entered a pendente lite custody order, which granted Wife sole legal and physical custody of the children and barred Husband from any contact with them. In September of 2019, Judge Bernhardt issued a Custody Order, which, again, granted Wife sole legal and physical custody, but also permitted Husband to attend the children's sporting events and school functions and granted Husband weekly visitation with the children every Friday evening and video access every Sunday evening.

Husband, following Judge Bernhardt's issuance of the custody order, filed a Motion to Reconsider and/or Modify Custody Order,[8] which was denied by the Circuit

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> (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.

[8] Husband filed a Motion to Reconsider and/or Modify Custody Order, pursuant to Rule 2-534, which provides:

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Court. Husband next, in October of 2019, filed a notice of appeal of the Custody Order with this Court.

Wife, in October of 2019, filed a Motion for Reconsideration and/or Clarification of Final Custody Order[9] with the Circuit Court, based on the premise that Husband had repeatedly violated the terms of the September Custody Order since it was entered. Judge Bernhardt, later that month, following the close of evidence, suspended the September Custody Order and rescinded all contact between Husband and the children. Husband, then, filed a second notice of appeal with this Court, challenging the rescission of his access to the children.

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> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

[9] Wife filed a Motion for Reconsideration and/or Clarification of Final Custody Order, pursuant to Rule 2-535(a), which provides:

> On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

On December 18, 2019, Judge Bernhardt presided over a hearing regarding Wife's Motion for Reconsideration and/or Clarification of Final Custody Order, after which he announced that he was amending the original custody order.

Two days later, Judge Bernhardt entered a Judgment of Absolute Divorce, in which Husband was ordered to pay Wife child support in the amount of $6,000 per month, rehabilitative alimony amounting to $4,000 per month for eighteen months, and then $3,000 per month for another eighteen months. Judge Bernhardt also ordered Husband to pay Wife a monetary award of $312,936 and $80,000 in attorneys' fees.

That same day, Judge Bernhardt issued an order amending the September Custody Order, according to the terms of which, Wife retained sole legal and physical custody of the children and Husband was granted visitation with the children every other weekend and for one week each summer. The parties moved separately for reconsideration of the Amended Order, both of which were denied. Both parties appealed from the Amended Custody Order, but Husband also appealed Judge Bernhardt's economic findings, which serves up the instant appeal.

HUSBAND'S APPEAL

Husband urges us to reverse the admission of Dr. Berman's custody evaluation report and his testimony, which were based, allegedly, on "parental alienation syndrome"

and/or "parental alienation." Husband asserts that under Rule 5-702,[10] as interpreted under the *Frye-Reed* standard, *Reed v. State*, 283 Md. 374 (1978) (adopting the "general acceptance" standard for admissibility of expert opinion testimony, as defined in *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923)), or under the *Daubert* standard, *Rochkind v. Stevenson*, 471 Md. 1 (2020) (adopting a factorial approach to determining the reliability of expert testimony, as defined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), Dr. Berman's report and testimony were inadmissible without an inquiry into their theoretical bases, because the bases were enmeshed in the parental alienation syndrome, which, according to Husband, constitutes "junk science."

The issue raised by Husband, whether Judge Bernhardt needed to entertain his gate-keeping role, in an *in limine* fashion, under the *Frye-Reed* or *Daubert* standards is not properly before us, however, because the Circuit Court, through Dr. Berman's testimony and/or report, was not being asked to admit expert testimony, the reliability of which was questionable, having been "rooted in a novel scientific principle or discovery" *See Rochkind v. Stevenson*, 471 Md. 1, 4 (2020); *see also, Blackwell v. Wyeth*, 408 Md. 575, 596 (2009).

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[10] Rule 5-702, which addresses testimony by expert witnesses, provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Rather, Judge Bernhardt was very clear, before Dr. Berman even testified, that he was unwilling to entertain parental alienation syndrome as a basis for evaluating custody:

> [I]f Dr. Berman says my reason, assuming he's allowed to testify that his determination was that the children have been alienated from their mother by the father's conduct, . . . a Court is required to make that finding, to either accept it or reject it.
>
> If there's not a sufficient evidentiary basis for it, it won't be accepted. If [Dr. Berman] says the only reason for the finding is because of the parental alienation syndrome, I won't accept it.

Judge Bernhardt then concluded that, "[i]f [Dr. Berman is] not basing [his opinion] on [parental alienation] syndrome, there's no legal basis for a *Frye-Reed* hearing." In fact, neither the body of the custody evaluation report nor Dr. Berman's testimony refers to parental alienation syndrome or parental alienation theory as their theoretical bases.

Husband, nonetheless, asserts that Dr. Berman's recommendations were based on a "reformulation" of parental alienation syndrome, because, according to Husband, Dr. Berman's recommendations were supported by a rationale, which "mimicked" parental alienation syndrome. Dr. Berman, again, though, refuted reliance on the syndrome or any such reformulation in his cross examination:

> Q. In this case you made a conclusion that the father was alienating the children, right?
>
> A. So it is - - that is not the way I would say it, no. And in addition, any - - my view of what I consider to be alienation which is a family problem is completely different and has no relationship to parent alienation syndrome which is agreed upon by the general community to be a problem concept. It makes no sense to people. It's not an accurate - - there is no such thing as parental alienation syndrome. And that is agreed.
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> ***

Q. In paragraph 21 - -

A. Yes.

Q. - - you said, results of the evaluation find that Mr. Ross' attitude and behavior regarding Ms. Ross has hurt the children, is harmful to the children, and has been the main source of the disruption in the children's relationship with their mother. Isn't that correct?

A. That's correct. That's what I said.

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Q. All right. And so doesn't that suffer - - that conclusion that you have made - - suffer from the same problem that is critiqued by this article that you attached that it's unfalsifiable because it is tautological?

A. No.

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Q. So in other words, isn't that the same as the radical recommendations that are referred to in this article that you attached where he says, in severe cases of [parental alienation syndrome] - - and this is from the Kelly and Johnston article on page 250, second paragraph, the last sentence, in severe cases of PAS Dr. Gardner recommends changing custody, placing the child with the hated parent, as well as other punitive measures that have resulted, for instance, in the child's detention in juvenile hall or inpatient psychiatric facility, and/or the jailing and fining of the offending parent. Isn't that similar to what is critiqued in this article?

A. I apologize. I'm not sure where you were reading from. But no, I do not believe so. I am not recommending consideration of jail[.]

Dr. Berman, also, then, was questioned by Judge Bernhardt regarding the distinction between his recommendations and any espoused under the parental alienation syndrome theory:

THE COURT: Well, what's the difference between removing - - what's the difference between what you're recommending and that characterization, though? Because you, in fact, recommended flipping custody.

THE WITNESS: Yes.

THE COURT: You, in fact, recommended excluding Mr. Ross.

THE WITNESS: Yes.

THE COURT: So where does your recommendation part ways with that article?

THE WITNESS: So most importantly this is - - they're talking about punitive, this is punitive. This is an attempt to in some way punish what they're seeing as the sole source of the problem. And I am not recommending punishment. I am recommending - - so there are similar recommendations. So I am recommending a change to mom. I am recommending if mom can't maintain for the health and safety of the kids that they go to boarding school. Absolutely. That's for their - - so the content, I guess, is similar, right?

THE COURT: Uh-huh.

THE WITNESS: The reasoning is completely different. And the causes are completely different. And, I don't anticipate that it's going to happen. But I have to recommend that something be able - - that somehow these kids have some option if they are so entrenched and cannot live with their mom. I don't know what other recommendation to make.

The difference is it has so much to do with their seeing in this article talking about parental alienation syndrome is dad is - - it's all dad's fault. And I - - that's not the way I see it. I see it as a combination of factors, primarily dad.

Judge Bernhardt acknowledged that Dr. Berman had not relied on a theory that "was not generally accepted": "Dr. Berman testified credibly that his recommendations and findings were case specific and not resulting from application of the parental alienation syndrome, a theory that Dr. Berman agreed was not generally accepted." As a result, Judge Bernhardt did not err in failing to hold an *in limine* hearing to test the reliability and validity of a theory of parental alienation or a reformulation thereof that was not on the table.

Husband then challenges the Circuit Court's grant of legal and physical custody to Wife, in our renumbered second question, in which he again espouses that Judge

Bernhardt relied on parental alienation and personality defects of the Husband he had expressly rejected. Husband is incorrect.

In reviewing a custody determination itself, we employ three interrelated standards of review. *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019). This Court recently explained:

> The appellate court will not set aside the trial court's factual findings unless those findings are clearly erroneous. To the extent that a custody decision involves a legal question, such as the interpretation of a statute, the appellate court must determine whether the trial court's conclusions are legally correct, and, if not, whether the error was harmless. The trial court's ultimate decision will not be disturbed unless the trial court abused its discretion.

Gizzo v. Gerstman, 245 Md. App. 168, 191-92 (2020) (citations omitted). "An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles." *Azizova*, 243 Md. at 373 (citing *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (internal quotation marks omitted).

In the instant case, Judge Bernhardt made extensive findings, which were supported by the evidence, only one of which Husband challenges for clear error, that being that Wife sought treatment for substance abuse only two times. That finding, however, even if eviscerated, because the testimony showed that Wife had sought treatment more than two times, does not undercut the legal conclusions reached. Judge

Bernhardt considered Wife's substance abuse issues in applying the *Sanders* factors[11] in making his original custody determinations, which Husband does not appeal. As a result, Judge Bernhardt did not abuse his discretion in his custody determination in the Amended Custody Order.

Husband then argues that Judge Bernhardt had no justification for not granting him "liberal visitations" with the children in the Amended Custody Order, because he is a "fit non-custodial parent."

The factors considered by a trial court in determining visitation are the same as those for custody determinations. *Boswell v. Boswell*, 352 Md. 204, 222-23 (1998) (reviewing factors relevant to custody and visitation decisions). The best interest of the child standard is "the objective to which all other factors speak[.]" *Id.* at 219. A trial court's grant of visitation is a decision that is "within the sound discretion of the trial court[.]" *Meyr v. Meyr*, 195 Md. App. 524, 550 (2010).

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[11] In *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977), this Court identified factors, to be considered by a trial court in making a determination regarding physical custody:

> 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 the parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender[.]

(citations omitted).

Judge Bernhardt, in explaining why he was amending the custody order, incorporated his earlier factual findings, about which Husband does not allege error and applied the *Sanders* factors appropriately. Husband, though, attempts to characterize the amount of visitation he was granted in the Amended Custody Order as a denial of his visitation privileges, relying on the decision of the Court of Appeals in *Boswell v. Boswell*, 352 Md. 204 (1998). In *Boswell*, the Court of Appeals affirmed this Court's reversal of a custody order that imposed a restriction, without supportive factual findings, on the non-custodial parent's visitation privileges. *Boswell*, 352 Md. at 240. *Boswell*, though, is inapposite, because Judge Bernhardt made factual findings supporting his visitation decision that, "[Husband] presents a developmental threat to [the children's] welfare." Judge Bernhardt found that Husband had undermined court-order reunification efforts and the children's participation in therapy sessions, as well as recounted Husband's efforts to interact with the children in violation of the terms of the previous custody orders. Judge Bernhardt did not err in the application of the law in his factual findings and thus, did not abuse his discretion by issuing the Amended Custody Order.

Husband also challenges Judge Bernhardt's decision that he did not need to hear from each of the children relative to custody. Husband argues that Judge Bernhardt "violated [the precepts of the competency of a witness to testify] when he refused to hear from the children - whose therapists testified met the elements of competency - concerning the facts behind their strong custody preferences." Husband avers that

prohibiting the children's testimony "was both an abuse of discretion, and serious legal error." We disagree.

Hearing directly from a child relative to custody is at the discretion of the trial judge. *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013). Entertaining preferences via the child is not mandated. *See Leary v. Leary*, 97 Md. App. 26, 48 (1993) ("[A] child's own wishes *may* be consulted and given weight if he is of sufficient age and capacity to form a rational judgment[.]" (emphasis added)).

In *Leary*, we specifically held that the trial court did not abuse its discretion when it entertained child preferences from a guardian ad litem, rather than from the children themselves; a Best Interest Attorney[12] ("BIA") stands in the shoes of a child's guardian

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[12] Maryland Rule 9-205.1 "applies to the appointment of an attorney for a child in actions involving child custody or child access." Rule 9-205.1(a). Sub-section (b) of the Rule which identifies factors that are relevant to a determination of whether to appoint an attorney for a child, provides:

> (b) **Factors.** In determining whether to appoint an attorney for a child, the court should consider the nature of the potential evidence to be presented, other available methods of obtaining information, including social service investigations and evaluations by mental health professionals, and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations, or concerns:
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> (1) request of one or both parties;
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> (2) high level of conflict;
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> (3) inappropriate adult influence or manipulation;
>
> (4) past or current child abuse or neglect;
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> (5) past or current mental health problems of the child or party;
>
> (6) special physical, educational, or mental health needs of the child that require investigation or advocacy;
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> (7) actual or threatened family violence;
>
> (8) alcohol or other substance abuse;

(continued . . .)

ad litem.[13]

In the present case, Judge Bernhardt heard from the children's BIA, who, in February of 2019, after explaining that the children's preference to reside with their father was already on the record, confirmed to Judge Bernhardt that the children had communicated that preference to her: "I will tell you that the children -- what they've told

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(. . . continued)

> (9) consideration of terminating or suspending parenting time or awarding custody or visitation to a non-parent;
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> (10) relocation that substantially reduces the child's time with a parent, sibling, or both; or
>
> (11) any other factor that the court considers relevant.

Responsibilities of a Best Interest Attorney are defined in the Maryland Rules: "A Child's Best Interest Attorney advances a position that the attorney believes is in the child's best interest. Even if the attorney advocates a position different from the child's wishes, the attorney should ensure that the child's position is made a part of the record." Maryland Rules, Appendix: *Guidelines for Practice for Court-Appointed Attorneys Representing Children in Cases Involving Child Custody and Child Access*, Section 2.2.

[13] In 2007, the Court of Appeals adopted Appendix 19-D to the Maryland Attorneys' Rules of Professional Conduct, which, *inter alia*, defines a "Child's Best Interest Attorney" as

> an attorney appointed by a court for the purpose of protecting a child's best interest, without being bound by the child's directives or objectives. This term replaces the term "guardian ad litem." The Child's Best Interest Attorney makes an independent assessment of what is in the child's best interest and advocates for that before the court, even if it requires the disclosure of confidential information. *The best interest attorney should ensure that the child's position is made a part of the record whether or not different from the position that the attorney advocates.*

Maryland Rules, Appendix: *Guidelines for Practice for Court-Appointed Attorneys Representing Children in Cases Involving Child Custody and Child Acces*s, Section 1.1 (emphasis added) ("Guidelines"). Section 2.2 of the Guidelines, which describes the responsibilities of a Best Interest Attorney, reiterates the requirement that a Best Interest Attorney "should ensure that the child's position is made a part of the record."

me is no different than what you've heard from folks on the witness stand." The BIA also, in August of 2019, communicated to Judge Bernhardt, the children's positions on testifying, explaining that she had spoken with each child individually and that each child had stated that they did not want to testify in their parents' divorce proceedings.

In fact, in the present case, gilding the lily, various experts also testified regarding the children's preferences. In August of 2019, Dr. Rebecca Snyder, the children's therapist, described Husband as the "favored parent" and testified that the children were unwilling to meet with their mother and that they did not want to spend time with her; Dr. Snyder specifically testified that the children had all expressed a desire to be with their father. Dr. George Carlson, a therapist who also worked with the children, testified that the children's attitudes toward their mother varied such that, in October of 2018, they did not want to see their mother, although, in February of 2019, the children had expressed an interest in spending time with both parents. As the BIA emphasized, the record in this case demonstrated that "the children's positions [were] repeatedly presented to th[e] Court."

Judge Bernhardt, in declining to interview the children also recognized that Dr. Snyder also had testified that the children could be harmed by testifying. Judge Bernhardt did not abuse his discretion by not interviewing the children.

Husband next argues in his brief before us, that Judge Bernhardt overestimated his annual income for the purposes of determining child support, alimony and attorneys' fees by asserting, without specification, that:

> The judge ruled that [Husband's] income during 2016, 2017, and 2018 averaged $387,421.00 per year based on statements of his commissions. But income for a self-employed person is "gross receipts minus ordinary and necessary expenses required to produce income." This was shown by the income tax returns. Based on these, Jared's income average $351,973.00."

(citation omitted).

As a preliminary matter, Husband's argument regarding self-employment would not apply to alimony, because Section 11-106 of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), which confers authority to a trial court to award alimony, does not distinguish income earned by an employee from income earned from self-employment.[14] Similarly, statutes governing shifting of attorneys' fees in

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[14] Section 11-106(b) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), defines factors, which a trial court must consider in awarding alimony, provides:

> (a) *Court to make determination.* — (1) The court shall determine the amount of and the period for an award of alimony.
>
> (2) The court may award alimony for a period beginning from the filing of the pleading that requests alimony.
>
> (3) At the conclusion of the period of the award of alimony, no further alimony shall accrue.
>
> (b) *Required considerations.* — In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:
>
> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;

(continued . . .)

proceedings related to child custody, visitation and support and alimony, do not differentiate between income from employment versus self-employment.[15]

(. . . continued)

(5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(6) the circumstances that contributed to the estrangement of the parties;

(7) the age of each party;

(8) the physical and mental condition of each party;

(9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;

(10) any agreement between the parties;

(11) the financial needs and financial resources of each party, including:

(i) all income and assets, including property that does not produce income;

(ii) any award made under §§ 8-205 and 8-208 of this article;

(iii) the nature and amount of the financial obligations of each party; and

(iv) the right of each party to receive retirement benefits; and

(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

(c) *Award for indefinite period.* — The court may award alimony for an indefinite period, if the court finds that:

(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or

(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

[15] Section 11-110 of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), which defines factors that a trial court must consider in determining whether to shift attorneys' fees in proceedings related to alimony, provides:

Before ordering the payment, the court shall consider:

(1) the financial resources and financial needs of both parties; and

(continued . . .)

With respect to child support, however, there is a differentiation between employment and self-employment in computing "actual income." Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), Section 12-201(b)(2) of the Family Law Article. "Actual income" refers to "income from any source," Section 12-201(b)(1) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), and includes:

> (i) salaries; (ii) wages; (iii) commissions; (iv) bonuses; (v) dividend income; (vi) pension income; (vii) interest income; (viii) trust income; (ix) annuity income; (x) Social Security benefits; (xi) workers' compensation benefits; (xii) unemployment insurance benefits; (xiii) disability insurance benefits; (xiv) for the obligor, any third party payment paid to or for a minor child as a result of the obligor's disability, retirement, or other compensable claim; (xv) alimony or maintenance received; and (xvi) expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business to the extent the reimbursements or payments reduce the parent's personal living expenses.

Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), Section 12-201(b)(3) of the Family Law Article. If a parent is self-employed, actual income is calculated as "gross receipts

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(. . . continued)

> (2) whether there was substantial justification for prosecuting or defending the proceeding.

Section 12-103(b) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), which defines factors that a trial court must consider in determining whether to shift attorneys' fees in proceedings related to child custody, visitation, and child support, provides:

> Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

minus ordinary and necessary expenses required to produce income." Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), Section 12-201(b)(2) of the Family Law Article.

If the parties' combined monthly income is less than $15,000, a trial judge, in calculating a parent's child support obligation, must rely on the child support guidelines contained in Section 12-204(e) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.).[16] *Reichert v. Hornbeck*, 210 Md. App. 282, 315 (2013). In "above guidelines" cases,[17] where the parties' combined monthly adjusted actual income is greater than $15,000, a trial court, pursuant to Section 12-201(c) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), "may use its discretion in setting the amount of child support."

"Income statements of the parents shall be verified with documentation of both current and past actual income." Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), Section 12-203(b)(1) of the Family Law Article. "[S]uitable documentation of actual income includes pay stubs, employer statements otherwise admissible under the rules of

[16] As of October 1, 2021, the child support guidelines in Section 12-204(e) of the Family Law Article, will apply to child support determinations in which the parties' combined monthly income is $30,000 or less. 2020 Md. Laws 1959, 1967-1986 (House Bill 946) (eff. Oct. 1, 2021); 2020 Md. Laws 1986, 1994-2014 (Senate Bill 847) (eff. Oct. 1, 2021).

[17] In cases where the parties combined monthly income exceeds $15,000, the child-support guidelines contained in Section 12-204(e) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), have not been applicable. *See, e.g.*, *Jackson v. Proctor*, 145 Md. App. 412 (2002). Such cases are commonly referred to as "above guidelines" cases. *Id.* at 89.

evidence, or receipts and expenses if self-employed, and copies of each parent's 3 most recent federal tax returns." Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), Section 12-203(b)(2)(ii) of the Family Law Article.

Husband, in the trial court and before us, submitted tax returns for 2016, 2017, and 2018, and proffered that he would earn less in 2019. Husband, though, did not identify, in any way, what he alleged were his "ordinary and necessary expenses" from 2016 through 2018 that he considered deductions from his gross receipts. Nowhere does Husband identify the types and amounts of ordinary and necessary expenses by year for the three years in issue that he used to account for the reduction of approximately $36,000 in average income that he avers. From our review of the record, it appears that Husband relied merely on his submission of his tax returns for 2016 through 2018, without any delineation. Husband assumes incorrectly, however, that he proved his "actual income" for child support purposes by merely referring Judge Bernhardt to the income tax returns for 2016 through 2018.

Even assuming that the "data dump" of the tax returns that Husband provided to the trial court and to us, contained expenses related to self-employment, there was no identification of the expenses Husband asserted were deductible from his income, as "ordinary and necessary expenses required to produce income," for child support purposes. The Family Law Article depends on parties identifying what they claim are the values of income, assets, and expenses, and articulates methods by which to verify those items. *See* Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.);

Reichert v. Hornbeck, 210 Md. App. 282 (2013). Neither Judge Bernhardt nor we can be expected to carry Husband's burden of proof regarding what he avers to have been his "ordinary and necessary expenses required to produce income." Judge Bernhardt did not abuse his discretion. [18]

Husband also argues that he offered unrebutted testimony that he would be earning "far less" income in the future. Judge Bernhardt, however, found, based on his consideration of income documentation from Husband's employer, that, as of September 17, 2019, Husband had already earned $292,399, with three months remaining in the year. As a result, we will not disturb Judge Bernhardt's credibility finding regarding Husband's 2019 income.

Husband next challenges Judge Bernhardt's decision to exclude from his estimate of Wife's income, for child support purposes, funds Wife received from her parents. A trial court may, but is not required to, treat gifts as income for child support purposes, pursuant to Section 12-201(b)(4) of the Family Law Article, Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), which provides: "Based on the circumstances of the case, the

[18] We also note that Husband failed to avail himself of the Circuit Court's "general and broad revisory power over the judgment[,]" by asking Judge Bernhardt to alter, amend, or revise his computation of child support based on self-employment income, pursuant to either Rule 2-534 or Rule 2-535(a). *See Wells v. Wells*, 168 Md. App. 382, 393-94 (2006). Although in December of 2019, Husband filed a 22-page "Motion to "Supplement, Reconsider, Modify, and/or Correct Judgment of Divorce, Including Incorporated Amended Custody Order," pursuant to Rule 2-535, he failed to ask for reconsideration of his child support obligation, based on his assertion that his actual income should have been reduced to reflect the fact that Husband was self-employed.

court may consider the following items as actual income: (1) severance pay; (ii) capital gains; (iii) gifts; or (iv) prizes." A trial judge is, therefore, not obligated to consider gifts from a parent's family as actual income for child support purposes. *Frankel v. Frankel*, 165 Md. App. 553, 588 (2005). The determination of whether a gift is income, for the purposes of child support, "is best left to the discretion of the trial court, whose decision should not be reversed unless the court acted arbitrarily or made a ruling that was clearly wrong." *Id.* at 588-89 (citing *Petrini v. Petrini*, 336 Md. 453, 462 (1994)) (footnote omitted).

In this case, Judge Bernhardt explained that he was not going to consider funds Wife received from her family as income, for child support purposes, just as he would not consider any funds received by Husband from his family, for the same purposes, because to do so would require imputation of these parental financial resources into the child support calculation. We do not find an abuse of discretion in this determination.

WIFE'S CROSS-APPEAL

Wife suggests, in the first question, that Judge Bernhardt acted with bias when he amended the original Custody Order to grant Husband greater unsupervised visitation with the children. According to Wife, Judge Bernhardt "took a dim view of intimate partner violence" and downplayed expert testimony and other evidence in the record, relating to how Husband treated Wife. Wife argues that Judge Bernhardt's "views clouded [his] ability to comprehend the danger that Father presents to the Children and to

make a custody and visitation determination in their best interest." Husband counters that "nothing [Wife] alleges raises to the level of objective bias[,]" especially considering the fact that Wife was awarded sole legal and physical custody of the children.

Judicial bias is reflected in court rulings related to visitation that are based on stereotypical beliefs or implicit personal beliefs that have no bases in the record in the case, as recognized by the Court of Appeals in *Boswell v. Boswell*, 352 Md. 204, 236-37 (1998):

> [B]efore a trial court restricts the non-custodial parent's visitation, it must make specific factual findings based on sound evidence in the record. If the trial court does not make these factual findings, instead basing its ruling on personal bias or stereotypical beliefs, then such findings may be clearly erroneous and the order may be reversed. In addition, if a trial court relies on abstract presumptions, rather than on sound principles of law, an abuse of discretion may be found.

As we recently recognized in *Azizova v. Suleymanov*, 243 Md. App. 340, 373 (2019), *cert. denied*, 467 Md. 693 (2020), judicial bias can manifest itself in a custody determination which is based on a trial judge's personal concerns regarding one party's conduct, rather than evidence of the effect on the child in the record. Additionally, "[a]n evaluation of a parent's past conduct is only relevant insofar as it is predictive of future behavior and its effect on the child. *Azizova*, 243 Md. App. at 357.

In the present case, Judge Bernhardt did find that Husband had been physically and emotionally abusive toward Wife, but did not find that Husband's abuse translated to a danger to the children, according to the evidence in the record. Judge Bernhardt, rather,

explicitly found that Husband had not presented a threat to the children's physical safety. Judge Bernhardt did not err, and we find no bases to support that any personal biases girded his decision.

Wife, in her appeal, also asks us to not only reverse the Amended Custody Order, but to also "issue a Custody Order, consistent with the recommendations of Dr. Lefkowits and Dr. Berman," without any citation to any authority for such an act. We cannot discern any authority to support Wife's request.

As a result, with respect to Husband's appeal and Wife's cross-appeal, we affirm Judge Bernhardt's order, dated December 20, 2019, as it relates to custody, visitation, child support, alimony and attorneys' fees, and his denial of their reconsideration and stay the remaining portions related to marital property and the monetary award.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED WITH RESPECT TO CUSTODY, VISITATION, CHILD SUPPORT, ALIMONY, AND ATTORNEYS' FEES AND STAYED WITH RESPECT TO MARITAL PROPERTY, THE MONETARY AWARD, AND THE PAYMENT OF COSTS, PENDING RELIEF FROM THE AUTOMATIC STAY IMPOSED BY 11 U.S.C. § 362(a).