Circuit Court for Harford County
Case No. 12-C-12-000891

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1556

September Term, 2019

JENNIFER MCANANY

v.

ERIK S. MCKENZIE

Leahy,
Shaw Geter,
Wells

JJ.

Opinion by Leahy, J.

Filed: June 15, 2020

Erik McKenzie sued Jennifer McAnany in 2012 for joint legal and physical custody of their child who was not yet one year old at the time. Beginning on September 10, 2012 and extending through September 23, 2019, more than ten orders, consent orders, and temporary consent orders were entered in the underlying case. The parties continuously adjusted the visitation schedule, and a final determination in the case was delayed, so that Mr. McKenzie could earn unsupervised visitation with the child. Before the court would grant unsupervised visitation, Mr. McKenzie was ordered to abstain from alcohol and tobacco use, verify his compliance through hair follicle testing, and seek treatment from a counselor who specialized in both substance abuse and mental health.

Following a hearing, the Circuit Court for Harford County issued a final custody order on July 15, 2019, in which the court granted Mr. McKenzie's request for overnight visitation with the child, denied Ms. McAnany's previously-filed petitions for contempt, and denied her request for attorneys' and private investigator fees. Ms. McAnany filed a timely appeal and contends, among other things, that, despite Mr. McKenzie's more recent compliance with the court's orders, his failure to comply for several years required her to file two petitions for contempt and rack up counsel fees. Accordingly, she presents three questions for our review which we have rephrased and reordered:[1]

[1] Ms. McAnany's questions presented were stated as follows:

> "I. Did the trial court err or abuse its discretion when it refused to enter an award for counsel fees and private investigator fees incurred by Appellant in her pursuit of contempt petitions against Appellee for his noncompliance with two prior custody Orders, because it focused only on his more recent compliance with the latest Order, when, 'but for' her ongoing expenditures, Appellee would not have been compelled in the first instance to resolve his

I. Did the circuit court abuse its discretion in failing to find Mr. McKenzie in contempt of court?

II. Did the circuit court abuse its discretion when it denied Ms. McAnany's request for attorneys' fees and private investigator fees?

III. Did the circuit court abuse its discretion in fashioning the holiday visitation schedule?

The right to appeal from a ruling on a petition for civil contempt is found in the Maryland Code, Courts and Judicial Proceedings Article, section 12-304. That statute does not grant a right to appeal from a trial court's denial of a petition for constructive civil contempt; therefore, we do not have jurisdiction to review the circuit court's failure to find Mr. McKenzie in contempt. *See Pack Shack, Inc. v. Howard Cty.*, 371 Md. 243, 246 (2002). For the reasons set forth below, we shall reverse the circuit court's denial of attorneys' fees and private investigator fees and affirm the circuit court's decision regarding the holiday visitation schedule.

---

own self-limiting personal issues that had warranted supervised visitation of the parties' minor child?

II. By failing to address Appellee's prior noncompliance with previous custody Orders, and by focusing solely on his compliance with a recent custody Order, did the trial court err or abuse discretion when it denied any and all relief sought by Appellant's contempt petitions?

III. Did the trial court err or abuse its discretion in unilaterally fashioning its own complicated 'holiday schedule' that was not only contrary to a much simpler version proposed by the parties, but also imposed a six (6) hour window during the middle of major holidays thereby resulting in less meaningful holiday time between the minor child and a given parent?"

BACKGROUND

The following factual history is derived from the documents filed in the case including Ms. McAnany's contempt petitions, her "Complaint to Modify Custody and Visitation" (filed April 14, 2015), and the testimony presented at the April 8, 2019 hearing. Much of the testimony has been omitted because it is not directly relevant to the issues on appeal.

Mr. McKenzie filed his original complaint for custody on April 2, 2012. Following a series of hearings, the court entered an order, on April 11, 2014, awarding joint legal custody to Mr. McKenzie and Ms. McAnany with primary physical custody to Ms. McAnany. The order allowed certain times for Mr. McKenzie to have unsupervised visitation with the child. It required that both Mr. McKenzie and Ms. McAnany abstain from the use of alcohol and tobacco products (the latter restriction was imposed presumably because the record indicates the child was especially sensitive to smoke). Mr. McKenzie, however, was specifically directed to attend regular meetings of Alcoholics Anonymous ("AA"), maintain a home group and a sponsor, and attend therapy sessions with a therapist who had expertise in both mental health and substance abuse. The court further ordered that Mr. McKenzie provide Ms. McAnany with the contact information for both his AA sponsor and his therapist. Additionally, by signing the order, Mr. McKenzie waived confidentiality requirements to allow Ms. McAnany to verify his continued compliance with these requirements. The parties retained the ability to modify the custody agreement and the court reserved ruling on the holiday schedule for a later time after the parties submitted proposals to the court on the issue.

Ms. McAnany retained the services of a private investigator to follow Mr. McKenzie. She provided Mr. McKenzie's counsel with a copy of the results of the investigation which showed that Mr. McKenzie was continuing to use alcohol and tobacco products. On September 23, 2014, the parties entered into a temporary consent order that suspended the court's previous order and allowed Mr. McKenzie to have only supervised visitation with the child. On December 2, 2014, Ms. McAnany filed a contempt petition in which she requested that the court issue a show cause order and find Mr. McKenzie in constructive civil contempt for failure to comply with the April 11 order. The petition included a request for an award of private investigator and attorneys' fees.

On April 14, 2015, Ms. McAnany filed a "Complaint" (which was treated as a motion) "to Modify Custody and Visitation" in the custody case. In the motion, Ms. McAnany requested that she be granted sole legal custody of the child—a modification of the then joint custody arrangement. Ms. McAnany set out the history of the case and then alleged that she believed that Mr. McKenzie would not abstain from alcohol and tobacco without court intervention. Further, she claimed that Mr. McKenzie was not "a fit and proper person to have custody" and requested that he be required to submit to random alcohol monitoring. She asked that the court limit Mr. McKenzie's access to supervised visitation only until he complied with the provisions of the April 11, 2014 Order. Ms. McAnany also requested that she be awarded "reasonable attorney[s'] fees incurred in the pursuit of this matter[.]"

Although the parties were scheduled to go to trial on the unresolved custody issues on February 24, 2016, they were able to enter into a custody agreement before that date.

On July 18, 2016,[2] the circuit court entered another consent order placing the parties' agreement on the record. Under the consent order, Ms. McAnany had sole legal and primary physical custody of the child and Mr. McKenzie had supervised visitation to continue for one year, during which time he would submit to hair follicle tests and tests to detect tobacco use every sixty days. If, after a year, none of the tests yielded a positive result, Mr. McKenzie would be allowed to have unsupervised visitation.

The order also stated:

> **ORDERED**, that the issues of contempt, attorney[s'] fees and the fees for the Private Investigator raised by the Defendant in prior pleadings are reserved and shall not be considered by the Court if the hair follicle testing results are all negative. If a positive result is shown, the Defendant may pursue the contempt and fees[.] If no positive result is shown, the Petition for Contempt shall be dismissed at the conclusion of the one hundred and twenty day period of unsupervised visitation; . . .

In addition, the order continued the force and effect of the April 11, 2014 Order.

Six months after the court entered the consent order, on January 17, 2017, Ms. McAnany filed a second petition for contempt. She alleged in her petition that Mr. McKenzie had not submitted to any hair follicle testing in compliance with the court's July 18, 2016 Order. She also alleged that Mr. McKenzie had not maintained his enrollment in mental health treatment. In terms of relief, Ms. McAnany requested, among other things, that the court order Mr. McKenzie to comply with the requirements of the April 11, 2014

[2] The order was signed on July 8 and entered on July 18. Although the record contains some references to the "July 8th Order", we shall refer to the date on which the order was entered on the docket.

and July 18, 2016 orders. She also asked that the court consider the issue of outstanding costs and fees.

Following a hearing that was held on June 30, 2017, the circuit court entered another consent order on August 31, 2017 that continued the force and effect of the previous orders, including the conditions contained therein.[3] A few months later, on November 15, the parties entered into another consent order. In it, they agreed that, as of July 26, 2017, Mr. McKenzie was in full compliance with all the terms and conditions necessary for him to begin the one-year period of supervised visitation required under both the July 18, 2016 Order and the August 31, 2017 Order. The court again reserved on a final determination on the issue of private investigator and attorneys' fees, however, it included a provision pursuant to which Mr. McKenzie would start paying $100 per month toward those fees contingent on an equal reduction in child support (which did not happen). The November Order stated "[s]hould the court determine that [Mr. McKenzie] is accountable for these or any other fees incurred by [Ms. McAnany, Mr. McKenzie] shall receive credit for all payments made . . . ." The court set June 1, 2018 as the date on which the parties were to

[3] Ms. McAnany asserts in her brief that the August 31, 2017 Order imposed

> certain new terms and conditions: (a) that [Mr. McKenzie] engage in regular treatment with a therapist who has expertise in both mental health and substance abuse, and that he consistently attend treatment as recommended by the therapist []; (b) that [Mr. McKenzie] provide the contact information of both his therapist and his AA sponsor []; and, (c) that he execute waivers of confidentiality allowing Ms. McAnany to verify his continued [compliance] . . .

These conditions, however, were contained in the court's April 11, 2014 Order as well.

return to court to agree on a schedule for unsupervised visitation, to begin July 27, 2018, provided that Mr. McKenzie was in full compliance with the terms and conditions of the August 31, 2017 Order as well as the prior orders.

The parties ended up attending two hearings during June and July of 2018, which resulted in the court imposing a three-phase visitation schedule for Mr. McKenzie. On August 6, 2018, the circuit court entered an order setting out a schedule and clarifying the terms for Mr. McKenzie's unsupervised visitation.[4] The court stated that Ms. McAnany's request for attorneys' fees and private investigator fees "shall continue to be reserved with regard to a final determination in accordance with the prior Orders in this case[.]" The court also noted that, unless specifically amended by the instant order, Mr. McKenzie's "requirements of sobriety, substance and alcohol abuse treatment and counseling and drug testing" contained in the previous orders would remain in effect. The August 6, 2018 Order provided that the parties would appear for a review hearing in November 2018, however the parties did not return to court until December 3, 2018. At the December hearing, the parties reached a partial agreement regarding a holiday visitation schedule.

To memorialize the agreement reached at the December hearing the circuit court entered a consent order, on December 28, 2018, prescribing a schedule for holiday visitation with the child. Under the order, the parents would split time with their child on Christmas Day and New Year's Day.

[4] The court's oral ruling at the July 6 hearing provided that Phase 1 of the visitation schedule would begin on July 26, 2018—clearly a typographical error since the order memorializing the ruling and setting forth the requirements was dated August 2, 2018 and docketed August 6, 2018.

April 8, 2019 Hearing

After the December review hearing on the court's August 6, 2018 Order, the parties received another hearing date and ultimately appeared for a custody proceeding, on April 8, 2019, in the Circuit Court for Harford County. The issues pending before the court were Mr. McKenzie's request for a modification of the current custody arrangement to include overnight visitation, the holiday visitation schedule, as well as the contempt petitions and the various requests for attorneys' fees that were carried forward by the court's previous orders.

Mr. McKenzie called George Miller, his friend and AA sponsor, as a witness. The thrust of Mr. Miller's testimony was that Mr. McKenzie is an exemplary AA member and, from what he had seen, a dedicated father. Mr. McKenzie also called his girlfriend, Francis E. Meadows, to testify. She was employed as an elementary school teacher in Baltimore County and had been dating Mr. McKenzie for a year and a half. She testified that she had met the parties' child on numerous occasions and had observed Mr. McKenzie interacting with the child. She described their relationship as loving and noted that the child was always happy to see his father.

Mr. McKenzie's Testimony

Mr. McKenzie opened his testimony by telling the court what sorts of activities he and the child liked to do together. He said that he tried his best to keep up with what the child was doing in school and what happened at medical appointments. Mr. McKenzie spoke to his alcoholism, expounding that he joined a book study group and that he was able to stay clean by avoiding people who drink, attending AA meetings regularly, and staying

involved in the community. The last time that he had a drink was December 13, 2015, and he celebrated three-years sober in December 2018.

Mr. McKenzie asserted that he had been in full compliance with the court's order requiring follicle testing since the order was issued. However, he explained that he experienced some difficulty having the testing administered at one point but that those issues were resolved. Despite the difficulty, Mr. McKenzie averred that he never missed a test. He was tested every 60 days for three years, and every test was negative for alcohol, tobacco, or illegal substances. Each test cost $327 and his last follicle test was in December 2018.

The reason he agreed to the stipulation that July 26, 2017 was the first date that he was fully compliant with the court orders, Mr. McKenzie explained, was because, initially, he was seeing a counselor who was not an alcohol or substance abuse counselor. So, he had to locate a new counselor before he could fully comply. Mr. McKenzie did not attend counseling in the two-month interim, but he still abstained from alcohol and tobacco use. He eventually found a therapist who had credentials that complied with the court's order, and he had been seeing her once every three weeks.

Mr. McKenzie related that he was not satisfied with the current custody schedule. He had a great relationship with the child and thought he was ready for overnight visitation, but Ms. McAnany refused to entertain the idea. He suggested a custody schedule whereby he would have the child every other weekend from Friday night after work until six o'clock on Sunday. He also said that he would like to have the child on Wednesday nights and, during the weeks that he does not have the child on the weekend, on Tuesday and Thursday

nights. Mr. McKenzie testified that Ms. McAnany is fairly flexible in regard to the pick-up and drop off arrangements and noted that they only live about nine miles, or fifteen minutes, apart.

Finally, Mr. McKenzie also expressed dissatisfaction with the holiday schedule. He testified that he could not get any meaningful holiday time with the child unless it was court ordered. He requested that the court fashion a written schedule so that he would not have to negotiate with Ms. McAnany anymore. Mr. McKenzie also asked for one-week vacation with the child in the summertime.

On cross-examination, Ms. McAnany's counsel asked about Mr. McKenzie's past alcohol use and the date of his first hair follicle test. He admitted to drinking between 2014 and 2015 and said that his first test would have been in January or February of 2016. The court also heard testimony regarding Mr. McKenzie's employment, salary, work schedule, and child support obligations.

Ms. McAnany's Testimony

After Mr. McKenzie rested his case, Ms. McAnany took the stand as the sole witness in her case. She testified that she did not think it was in the child's best interests for the court to grant Mr. McKenzie's request for an extra weeknight visit. She told the court that the child is used to structure and that it would be too disruptive to the child's schedule. When prompted about her concerns regarding overnight visitation, Ms. McAnany explained that she was concerned about Mr. McKenzie's mental health.

Ms. McAnany also admitted that the child loves Mr. McKenzie and that the unsupervised visitations were going well so far. Ms. McAnany explained to the court that

the parties had shared every major holiday with the child in the past and that she was asking the court to clarify a schedule with regard to holidays. Furthermore, she did not agree that the child was ready to have a week-long vacation with Mr. McKenzie. Ms. McAnany also stated concerns about the child's ability to quickly adjust to a changed custody arrangement.

Next, Ms. McAnany explained that she needed to hire a private investigator in 2014 in order to determine if Mr. McKenzie was obeying the court's order to stop drinking and smoking. When the private investigator discovered that Mr. McKenzie was violating the court's order, Ms. McAnany filed a petition for contempt. It was Ms. McAnany's position that she was entitled to reasonable attorneys' fees and private investigator fees.

Ms. McAnany explained that, after the court issued the July 18, 2016 Order, she had to file another petition for contempt in 2017 when it became clear to her that Mr. McKenzie was violating that order as well. Though she reiterated concerns about Mr. McKenzie's mental health status multiple times, she agreed that the child's transportation arrangements were acceptable and that the parties had the ability to effectively communicate to make changes. In regard to her employment and financial circumstances, Ms. McAnany related that she filed for bankruptcy in 2016.

Closing Arguments

After Ms. McAnany's testimony, the court instructed the parties to address the holiday schedule as well as the other issues in closing. Mr. McKenzie's counsel emphasized the number of requirements that Mr. McKenzie had to meet to be allowed to see the child, as well as the expense and inconvenience of meeting them. In terms of the

holiday schedule, Mr. McKenzie's counsel proposed that the parents alternate major holidays from year to year.

Ms. McAnany's counsel suggested that the parties split the day on major holidays so that both would have access to the child, as they had traditionally done. Addressing the contempt petitions, counsel argued that without Ms. McAnany filing the petitions, Mr. McKenzie would never have complied with the court orders. She also emphasized the ways in which Ms. McAnany had worked to facilitate a relationship between Mr. McKenzie and the child.

Circuit Court's Ruling

The judge launched her ruling from the bench by stating her factual findings. She found that the child was seven years old at the time of the hearing and a student in the first grade, and that the child seemed relatively well-adjusted. The judge noted that Mr. McKenzie had "a lot of hurdles . . . to jump over and a lot of things to overcome before the [c]ourt would allow him to have access to his child." She found that Mr. McKenzie took extraordinary measures to get his alcoholism under control and had fulfilled every requirement that the court placed on him. The judge sympathized with Ms. McAnany's safety concerns regarding overnight visits with Mr. McKenzie. Based on Mr. McKenzie's progress, however, she decided that it was appropriate to award overnight visitation.

The judge found also that Mr. McKenzie had created a suitable home environment for the child and that it was in the child's best interests to have more time with Mr. McKenzie. She then ordered a visitation schedule whereby Mr. McKenzie would have the child every other weekend from Friday night at 5:15 p.m. until Sunday at 6:00 p.m. The

judge also ordered that the child be allowed to call Ms. McAnany once per day while with Mr. McKenzie. She continued the schedule of Wednesday night dinners and added a Thursday night visit for Mr. McKenzie for the weeks during which he does not have the child on the weekends.

As for the holiday schedule, the judge ordered that the parties split New Year's Day and Christmas Day. Mr. McKenzie would have the child from noon until 6:00 p.m. each day. Furthermore, the judge explained,

> [S]tarting New Year's, that's January. If New Year's is on a weekend, then if it's the father's weekend he should have [the child]. If it's not his weekend, then he should have [the child] New Year's Eve, noon to six, if it's a Friday.
>
> If Easter is on a Sunday, if it's the [f]ather's [d]ay already, then he will have [the child]. If it's not the [f]ather's [d]ay, then you can have [the child] noon to six on Easter.
>
> Memorial Day is always a Monday. So if it happens to fall on the father's weekend, I'm gonna order that he be allowed to keep [the child] one extra day, Memorial Day until four o'clock in the afternoon.
>
> Fourth of July is a hit or miss day, so we are gonna order that that be split and that the father have access to [the child] from noon to six on the Fourth of July.
>
> Labor Day is always a Monday. So again, I'm going to order that [the] father be given access to [the child] one extra day, and he will be able to keep [the child] until Labor Day at four o'clock should that be his weekend. And if that is not his weekend then they will split the Labor Day, similarly to how Christmas is noon to six.
>
> Halloween, whoever has [the child] on Halloween gets to take [the child] trick or treating.
>
> Now, Thanksgiving is a little different. So, if Thanksgiving weekend -- and I think you know what I mean by weekend, the Friday, Saturday, Sunday after Thanksgiving, if that's on the [f]ather's [d]ay, I'm gonna give him an extra day. I'm gonna give him Friday morning until Sunday if his weekend is the weekend immediately after Thanksgiving. If it is not, then they will split the day. Noon to six for dad. And then Christmas Day the same thing. Again, if Christmas is on -- it will be split noon to six for the father, and if Christmas Day falls on a weekend, then the father will get Christmas Eve --

The judge admitted that the holiday schedule was complicated and explained that her hope was that as the child grew older the parties would communicate and come up with their own schedule. She found that it was too early for Mr. McKenzie to take the child on a week-long vacation away from Ms. McAnany but reserved the issue for another time. The court, therefore, continued the existing arrangement of sole legal and primary physical custody with Ms. McAnany, but awarded increased visitation rights to Mr. McKenzie.

Regarding the issue of contempt, the judge found that Mr. McKenzie did not willfully violate the order when he missed therapy for 60 days. The judge relied on the following language from the July 18, 2016 Order, which she quoted, in denying the contempt:

> The issues of contempt, attorneys' fees, and the fees for the private investigator raised by the defendant in the prior pleadings are reserved and shall not be considered by the Court if the hair follicle testing results are all negative. If a positive result is shown, the defendant may pursue the contempt [and] fees. If no positive result is shown, the petition for contempt shall be dismissed at the conclusion of the 120-day period of unsupervised visitation.

The judge pointed out that both parties had consented to this language. Based on the language of the July 2016 Order and the fact that every single hair follicle test came back clean, the judge denied Ms. McAnany's contempt petition and the request for attorneys' and private investigator fees. Subsequently, when counsel asked the court "just to confirm, my client wanted to be clear if there was any award of fees . . . I know that you had denied the –," the court interrupted and stated "No, I'm not gonna make an award of her attorneys' fees."

A final, written order that was amended to reflect the circuit court's oral ruling was entered on September 23, 2019.

DISCUSSION

I.

Contempt

Ms. McAnany contends that the circuit court erred in denying any and all relief sought by her contempt petitions.[5]

Appellate jurisdiction in Maryland is wholly dependent on a statutory or constitutional grant of authority.[6] *E.g.*, *Prince George's Cty. v. Beretta U.S.A. Corp.*, 358 Md. 166, 173 (2000). As the Court noted in *Pack Shack, Inc. v. Howard County*, "we begin our inquiry with [the] appeals statutes for, if there is a right to appeal in this case, it must be grounded there." 371 Md. 243, 246 (2002). Appeal rights are found in the Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), §§ 12-101 *et. seq.* Appeals from contempt proceedings are governed by CJP § 12-304,[7] which provides, in pertinent part:

[5] In the contempt petitions, Ms. McAnany requested, *inter alia*, that the court order Mr. McKenzie's compliance with the April 11, 2014 Order and, subsequently, the July 18, 2016 Order. Though the circuit court declined to find Mr. McKenzie in contempt of court, we note that the court had reserved on the issue of contempt and continued to police Mr. McKenzie's compliance through subsequent orders.

[6] Appeals may also be constitutionally authorized in some cases. *State v. Green*, 367 Md. 61, 76 (2001) ("[E]xcept as may be constitutionally authorized, the right of appeal is entirely dependent upon statutes.").

[7] CJP § 12-301 provides that, "[e]xcept as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit

> (a) Any person may appeal from any order or judgment passed to preserve the power or vindicate the dignity of the court and adjudging him in contempt of court, including an interlocutory order, remedial in nature, adjudging any person in contempt, whether or not a party to the action.

CJP § 12-304(a). This language establishes two prerequisites

> before an appeal may be successfully maintained in a contempt case. Firstly, there must be an 'order or judgment passed to preserve the power or vindicate the dignity of the court' and, secondly, the appeal must be prosecuted by the person adjudged to be in contempt.

Becker v. Becker, 29 Md. App. 339, 344-45 (1975).

Accordingly, in Maryland, "a party that files a petition for constructive civil contempt does not have a right to appeal the trial court's denial of that petition." *Pack Shack, Inc.*, 371 Md. at 246. "[O]nly those adjudged in contempt have the right to appellate review. The right of appeal in contempt cases is not available to the party who unsuccessfully sought to have another's conduct adjudged to be contemptuous." *Becker*, 29 Md. App. at 345.

The Court of Appeals, at one time, recognized a limited exception to this rule, noting that, in limited circumstances, "refusing to impose the order for civil contempt is so much a part of or so closely intertwined with a judgment or decree which is appealable as to be reviewable on appeal as part of or in connection with the main judgment." *Id.* (quoting *Tyler v. Baltimore Cty.*, 256 Md. 64, 71 (1969)). The Court has since, however, questioned the continued legitimacy of this exception, recognized primarily in dicta in *Tyler v. Baltimore County*. *Pack Shack, Inc.*, 371 Md. at 260 ("In any event, the continued vitality

court[,]" and CJP § 12-302(b) directs that appeals in contempt cases are governed by CJP § 12-304.

of this exception, which was a very narrow one to begin with, is highly doubtful."). The Court cautioned that the

> exception very likely would not apply when the appeal is filed by a person who was not held in contempt, however closely related and intertwined it is with other orders or judgments also pending appeal. *Tyler* simply does not support affording the losing party to a contempt action the right of appeal.

Id. Based on the foregoing, we perceive no jurisdictional basis upon which we can consider Ms. McAnany's challenge to the circuit court's failure to find Mr. McKenzie in contempt.

II.

Attorneys' Fees

Ms. McAnany contends that, despite the language of the July 18, 2016 Order, the circuit court erred in failing to award her attorneys' fees and private investigator fees. She argues that because she incurred these expenses as a result of Mr. McKenzie's conduct, she is entitled to compensation. Ms. McAnany also asserts that the July 2016 Order was rendered moot by subsequent consent orders.

Mr. McKenzie responds that the July 2016 Order was a valid and enforceable contract between himself and Ms. McAnany, and that it expressly conditioned attorneys' fees on the results of his hair follicle tests. As there is no evidence of a positive hair follicle test, he argues, the court properly denied the request for fees.

Fees in custody disputes are awarded under Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL"), § 12-103. The statute provides that a court "may" award "costs and counsel fees that are just and proper[.]" FL § 12-103(a). In awarding costs and counsel fees, the circuit court "shall" consider the parties' relative financial circumstances, their

needs, and whether there was a substantial justification for bringing, maintaining, or defending the action. FL § 12-103(b). "Decisions regarding the award of attorney[s'] fees rest solely within the sound discretion of the trial court." *McCleary v. McCleary*, 150 Md. App. 448, 466 (2002). "Though a deferential standard, abuse of discretion may arise when no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (citation and internal quotation marks omitted).

Moreover,

> [a] plain reading of this statute shows that the court is required to consider the three factors under FL § 12–103(b) "[b]efore [it] ***award[s]*** costs and counsel fees," not before denying a party's request for costs and fees. . . . Nonetheless, this Court has previously remanded a case "for the trial court to consider the factors in FL § 12–103 and articulate its basis for denying counsel fees" where the parties had "disparate incomes."

Leineweber v. Leineweber, 220 Md. App. 50, 65 (2014) (internal citations omitted).

In the case before us, the parties entered into multiple consent orders that contained provisions that addressed certain costs and attorneys' fees. "Consent judgments or decrees are essentially agreements entered into by the parties which must be endorsed by the court. They have attributes of both contracts and judicial decrees." *Chernick v. Chernick*, 327 Md. 470, 478 (1992). A consent order, therefore, operates as a valid contract between parties and is judicially enforceable. *Kirby v. Kirby*, 129 Md. App. 212, 215 (1999). "Where the language of the consent decree is clear and unambiguous, all terms in the decree 'are to be given their plain meaning in construing the order.'" *Id.* at 216 (citation omitted).

Ms. McAnany cites to a number of cases in which courts have awarded attorneys' fees and private investigator fees in family law disputes. Any contractual agreement regarding the assessment of attorneys' fees, however, is conspicuously absent from each of these cases. *See Maness v. Sawyer*, 180 Md. App. 295 (2008); *see also McCleary v. McCleary*, 150 Md. App. 448 (2002); *see also Wassif v. Wassif*, 77 Md. App. 750 (1989). The parties do not cite, and we have not found, any Maryland case that addresses the precise issue at hand. There are a few, however, that deal with the enforceability of consent orders generally.

In *Kirby v. Kirby*, this Court considered whether "the Circuit Court for Prince George's County erred in enforcing a consent order and ordering [] appellant, to pay one-half of the college tuition of two adult children[.]" 129 Md. App. 212, 214 (1999). After divorcing, the parties entered into an agreement regarding custody and visitation matters, which was signed by both parties and executed by the circuit court. *Id.* at 214. The consent order provided that the appellant would pay one-half of his children's college tuition and expenses. *Id.* The appellant paid the required expenses for about two years but later stopped. *Id.* at 214-15. He argued that it was beyond the authority of the court to enforce a consent order requiring him to pay for his adult children's tuition. *Id.* at 215. This Court held that, while the court could not, of its own accord, require the appellant to provide financial support to his adult children, it could certainly enforce his own contractual agreement to do so. *Id.* In doing so, we explained that "[i]f parties stipulate to terms embodied in a proposed consent order, the fact that a court must approve and sign the order does not affect the parties' ability to reach a valid agreement." *Id.* at 216 (citation omitted).

Returning to the case before us, we do not regard the language of the July 18, 2016 Order concerning attorneys' fees to be clear and unambiguous. The language of the order only reserves the issues of contempt, attorneys' fees and private investigator fees that were raised "in prior pleadings[.]" The language of the order is not prospective and does not mandate that Ms. McAnany cannot pursue legal fees accrued after the filing of her initial contempt petition. *Cf. Ahmad v. Eastpines Terrace Apartments, Inc.*, 200 Md. App. 362, 374 (2011) (holding that a party cannot agree to waive the statute of limitations perpetually without specific language to that effect). The trial judge did not engage in any discussion about how or why the language of the order could prospectively bind the parties via an agreement that addressed *prior* costs and fees.

There is nothing in the July 2016 Order, or the circumstances surrounding that order, to suggest that Ms. McAnany and her counsel intended to condition the award of any and all future attorneys' fees on Mr. McKenzie's hair follicle test results during the year in question. Indeed, the July 2016 Order cannot be read to prospectively waive all attorneys' fees with regard to the second contempt petition that was not filed until 2017.

In reviewing the record as a whole, and not just the language of the July 2016 Order, it is clear that the judge who signed the November 15, 2017 Order (who was not the trial judge) anticipated that fees may ultimately be assessed:

> ORDERED that [Ms. McAnany's] request for private investigation and attorney's fees shall continue to be reserved with regard to a final determination in accordance with the prior Orders in this case but shall be addressed in the interim such that, [Mr. McKenzie] shall begin to reimburse [Ms. McAnany] for her costs incurred for Private Investigation fees and/or attorney fees at a minimum of One Hundred Dollars ($100.00) per month . . . contingent upon [Mr. McKenzie]'s child support obligation being reduced

> at least One Hundred Dollars ($100.00) per month[.] . . . Should the Court determine that [Mr. McKenzie] **is accountable for these or any other fees incurred by [Ms. McAnany,]** [Mr. McKenzie] shall receive credit for all payments made to [Ms. McAnany] pursuant to this paragraph. Should the Court determine that [Mr. McKenzie] does not owe any fees to [Ms. McAnany], [Mr. McKenzie] shall get a credit for any payment made under this paragraph toward his child support obligation[.]

(Emphasis added). At this point, Mr. McKenzie had been in full compliance with the court's orders for almost four months, yet the court was contemplating that fees may still be incurred and might be awarded. We note that Ms. McAnany's second contempt petition was filed based on Mr. McKenzie's failure to comply with the very order that contains this attorneys' fees provision. Moreover, Ms. McAnany filed a separate motion to modify custody that included a separate request for attorneys' fees.

In sum, we conclude that the record before us does not support a finding that by signing the July 18, 2016 Order, Ms. McAnany waived all future attorneys' fees that she might incur in the underlying custody case. We hold, therefore, that the trial judge abused her discretion when she summarily denied all attorneys' fees in the instant case based on the July 2016 Order without reference to the subsequent orders or to any guiding rules or principles. *See Santo*, 448 Md. at 626. Whether or not the court finds that Ms. McAnany had a substantial justification for filing the second contempt petition or for incurring any other attorneys' fees are issues within the court's discretion and should be addressed by the court on remand. Accordingly, we must remand the case so that the court can consider the proper scope of the fee provisions in the consent orders and then apply the FL § 12-103 factors to determine whether costs or fees should be awarded beyond those fees that are covered under the July 2016 Order.

III.

Holiday Visitation Schedule

Lastly, Ms. McAnany contends that the circuit abused its discretion both in fashioning a visitation schedule that required the child to be transferred back and forth on major holidays and in not seeking enough input from the parties on the matter. She further asserts that the schedule does not serve the best interests of the child. Mr. McKenzie responds that the circuit court granted the visitation schedule that Ms. McAnany's counsel requested in her closing argument and thus did not abuse its discretion.

"Decisions as to child custody and visitation are governed by the best interests of the child." *Gordon v. Gordon*, 174 Md. App. 583, 636 (2007). Such decisions "generally are within the sound discretion of the trial court [ ] and are not to be disturbed unless there has been a clear abuse of discretion." *Meyr v. Meyr*, 195 Md. App. 524, 550 (2010) (citation omitted).

The Court of Appeals has very specifically described the boundaries of that discretion:

> [T]here is a great deal of flexibility permitted in visitation orders. They run a gamut—a proper gamut. In the divorce, or post-divorce, setting, they may simply provide for "reasonable," but otherwise unspecified, visitation, or they may set out a rather detailed schedule with respect to times, places, and conditions, or they may be somewhere between those poles, depending on the circumstances and the ability of the parties to agree to a mutually acceptable arrangement.

In re Justin D., 357 Md. 431, 447 (2000). We are aware that this case does not arise in the divorce, or post-divorce, setting because the parties were never married. We conclude, however, that this standard is still instructive in the instant case, as the court found that Mr.

McKenzie does not pose a danger to the child in any way. There are, however, "no 'bright-line rules' in custody matters." *Gordon*, 174 Md. App. at 637. "In applying the best interests of the child standard to a custody award or grant of visitation, a court is to consider the [enumerated] factors [] and then make findings of fact in the record stating the particular reasons for its decision." *Boswell v. Boswell*, 352 Md. 204, 223 (1998). The best interests factors include, but are not limited to:

> [T]he fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child. It stands to reason that the fitness of a person to have custody is of vital importance. The paramount consideration, however, is the general overall well-being of the child.

Id. at 222 (quoting *Hild v. Hild*, 221 Md. 349, 357 (1960)).

On issues of custody and visitation, "the trial court's decision governs, unless the factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion." *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019), *reconsideration denied* (Dec. 31, 2019), *cert. denied*, 467 Md. 693 (2020). Additionally, "if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

The circuit court judge, in this case, specifically requested that the parties address a proposed holiday visitation schedule in their closing arguments delivered on April 8, 2019.

Mr. McKenzie's counsel proposed that the parents alternate major holidays from year to year. Ms. McAnany's counsel suggested that the parties split the day on major holidays so that both would have access to the child, as they had traditionally done. The judge noted, in setting the schedule from the bench, that she hoped the parties would find a way to agree on a holiday schedule in the future and not require the input of the court. Ms. McAnany now argues that the circuit court abused its discretion in fashioning a holiday schedule pursuant to which the parents split time with the child on major holidays, and that the court did not take enough input from the parties on the matter.

Admittedly, the holiday schedule appears complicated. Our role in reviewing it, however, is not to questions its complexity. The record shows that the judge made findings of fact on the record regarding the child's age, development, and need to spend time with his father as he matures. The judge also went into a very detailed explanation of Mr. McKenzie's fitness as a parent and the requirements that he met in order to have unsupervised visitation with the child. She found that Ms. McAnany was appropriately concerned about the child's welfare, but that her concerns were not entirely founded. The judge found that the evidence showed Mr. McKenzie was an overall positive influence in the child's life and had made him welcome in his home. All of this evidences that the court considered the best interests factors as well as the situation as a whole. Ultimately, the judge noted that it was in the child's "best interest to develop a relationship with his father."

All of the court's findings of facts with regard to the child as well as the parents were supported by facts in the record, introduced either through testimony or exhibits. The record also shows that the court considered appropriate factors and applied the best

interests standard in its decision making. Accordingly, we perceive no abuse of discretion in the court's ruling on the holiday schedule, however complicated it may be.

Conclusion

We have no jurisdiction to consider the circuit court's denial of the contempt petitions. We affirm the court's visitation schedule, and remand solely on the issue of attorneys' fees so that the circuit court can consider the proper scope of the fee provisions in the consent orders and then apply the FL § 12-103 factors to determine whether attorneys' fees should be awarded beyond those fees that are covered under the July 18, 2016 Order.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEE.