Circuit Court for Charles County
Case Nos. C-08-FM-21-000522 and
C-08-FM-21-000534

CHILD ACCESS

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1650

September Term, 2022

Y. B.

v.

T. B.

Leahy,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: December 1, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, (“Mother”),[1] and Appellee, (“Father”), are the unmarried parents of two minor children, J., born in 2020, and Z., born in 2021.[2] Here, Mother challenges the 2022 Order for Contempt and Custody Modification issued by the Circuit Court for Charles County, an Order that awarded Father shared physical custody of, and tie-breaking authority as to, J. where, previously, Father had had only visitation with, and joint legal custody of J. Mother also challenges the circuit court’s initial custody determination for Z. Finally, Mother appeals the circuit court’s finding that she was in contempt for denying Father court-ordered visitation with J. and Z. We will affirm in part, and vacate and remand in part.

Mother’s two questions for our review are:

1. Did the Circuit Court err in ruling that the parties have shared custody of the minor children on a 2-2-3 schedule[] with Appellee having tie-breaking authority?
2. Did the Circuit Court err in finding the Appellant in Contempt of Court when the Appellee’[s] visitation and access with the parties’ minor children were halted due to a Protective Order being in place against the Appellee?

[1] To protect the parties’ privacy, we refer to them by their initials in the caption and as “Father” and “Mother” in the body of this opinion. We intend no disrespect in doing so.

[2] To protect the minor children’s privacy, we refer to them by their middle initials. We intend no disrespect in doing so.

FACTUAL AND PROCEDURAL BACKGROUND

The crux of Mother's argument is that in reaching its custody and contempt decisions, the circuit court failed to consider and account for Father's abuse of Mother and their children and Mother's fear of Father. Specifically, Mother contends that the circuit court "brushed aside" Father's actions, actions that she argues led to a final domestic violence protective order being in place during the pendency of the case below. Mother adds that because it "was a matter of safety" that she denied Father visitation, she should not have been found in contempt for having done so. We start by summarizing the proceedings below.

The litigation that prompted this appeal was not Mother's and Father's first trip to court over the custody of their children. In 2021, when J. was about a year old, but before Z. was born, Father and Mother initiated custody-and-visitation litigation in the circuit court.[3] In July 2021, they reached a Parenting Plan Agreement ("Agreement") under which Mother was to have primary residential custody of J. and the parties were to share joint legal custody, among other provisions. In addition, Father was to have alternate weekends (Thursday through Sunday afternoon) with J., as well as a two-month "trial

[3] In Case No. C-08-FM-21-000522, Father filed a Complaint for Visitation (Child Access) asking that he have access to J. every Friday through Monday or Thursday through Sunday and offering to return J. to Mother on Sundays if Mother was off work on Monday. The next day, Mother filed a Complaint for Custody under a separate case number, Case No. C-08-FM-21-000534. She sought primary physical and sole legal custody of J., that Father have visitation with J., and that Father pay child support. On Mother's motion, these cases were then consolidated "for all purposes" under Case No. C-08-FM-21-000522.

period" during which Father would have additional time with J. during the weeks when Father "[did] not have weekend parenting time." For the first month, Father would have J. on Mondays and Tuesdays, from 5:00 p.m. to 9:00 p.m.; for the second month, Father would have J. Wednesday overnight. At the conclusion of the trial period, the parties agreed that they would "decide what is convenient for each party and in the best interest of [their] child." This Agreement was incorporated but not merged into an order in August, 2021, about a month before Z. was born.[4]

The parties operated under the Agreement for some time. Then, on April 4, 2022, after a hearing, the circuit court granted Mother a final domestic violence protective order against Father.[5] The basis for the domestic violence protective order was that Father had placed Mother in fear of serious imminent bodily harm.[6] Specifically, the circuit court found that Father had called Mother "multiple times being aggressive and ha[d]

[4] About two months later, in October 2021, the circuit court heard Mother's request for child support and ordered, among other things, Father to pay Mother $400 per month for the benefit of J. This amount was below the guidelines figure of $422 per month, based on the circuit court's finding that " . . . a downward deviation from the Maryland Child Support Guidelines is appropriate given the contributions of [Father], which serves the best interest of the minor child."

[5] A week before, on March 28, 2022, the circuit court had granted Mother a temporary protective order against Father, after finding "reasonable grounds to believe" that Father had placed Mother in fear of serious imminent bodily harm.

[6] This protective order was issued in Case No. C-08-FM-22-807900. Neither party noted an appeal from the October 2022 decision modifying the protective order to coincide with the family law case custody order. Nonetheless, because the parties mentioned the domestic violence case in their briefs and at oral argument, we take judicial notice of the orders and pleadings in that case.

threatened" Mother. However, the circuit court made no finding that Father had abused, neglected, or otherwise posed harm to the minor children. Although the circuit court had issued a temporary protective order a week before, that temporary order also contained no mention of finding of abuse or neglect by Father. Nor did the court order the Department of Social Services ("DSS") to investigate any potential abuse or neglect.

The final protective order did not prohibit Father from visiting with his children, either. Instead, the circuit court ordered that Father's visitation with J. continue, and that Father have "visitation" with Z. without setting a specific schedule. To facilitate this visitation, the circuit court allowed Father to contact Mother and permitted Father to enter Mother's residence (the location she requested) for the purpose of picking up and dropping off the children. The circuit court awarded custody of J. and Z. to Mother, adding that custody was "to remain as set forth" in the parties' existing family law case.[7]

Four days later, on April 8, 2022, Mother petitioned the circuit court to modify the existing custody order. Mother alleged that Father had made death threats towards her and was "not mentally capable of making positive decisions for the well-being of our

[7] The then-controlling custody order in the parties' family law case (Case No. C-08-FM-21-000522) did not address custody of Z., who had not been born at the time of the order.

children."[8] She sought sole custody of both children, that Father have no overnight visitation, and that his visitation be supervised only, among other things.

Father counter-claimed for custody of both J. and Z., alleging that Mother had limited Father's access to J., ignored Father's attempts to communicate with J., and was no longer able to provide adequate housing for the minor children, among other things. Like Mother, Father sought residential custody of the children, in addition to other relief.

Father also filed a petition for contempt against Mother, alleging that she had "not allowed" him the access he was due under the existing custody order and had refused his attempts to communicate with the "child(ren)," among other things. Father asked that Mother be found in contempt and that he be awarded make-up parental access time, among other remedies. Trial on the custody and contempt claims was scheduled for October 20, 2022.

On August 14, 2022, Mother stopped allowing Father to have visitation with J. and Z. Mother would later testify that her decision to do so followed an incident that day that left her afraid of Father for herself and the children. For the children, the consequence was that they had no contact with Father from August 14, 2022 until the October 20,

[8] In her petition for the protective order in Case No. C-08-FM-22-807900, Mother alleged, among other things: (1) that Father called her and her children "as early as 8:00 am … and the call back in less than a [*sic*] hour"; (2) that he sent "unpleasant texts" when Mother failed to answer the call; (3) that he also made unpleasant statements when Mother or her children answered the call; (4) on the day the petition was filed, Father called Mother over 19 times; and (5) that Father, in middle of a conversation, had texted Mother that "he was going to get his gun and his gun license."

2022 custody trial. The details of Mother's testimony about this incident are summarized below.

In September 2022, Father moved to modify the domestic violence protective order. He alleged that Mother was "refusing to allow [his] parental access with the children as dictated by the Protective Order. . . ." Father requested access with the children "to include Wednesday nights and every other weekend from Thursday until Sunday [afternoon]." Father also asked that this modification motion be scheduled on the same day as the parties' custody motions, a request that the circuit court granted.

On October 20, 2022, the custody case, Father's contempt petition, and his motion for modification of the domestic violence protective order came for trial before the same circuit court judge who had issued the protective order. Mother testified on her own behalf and called her mother (the children's maternal grandmother) as a witness. Father testified on his own behalf. The parties stipulated to what Father's mother (the children's paternal grandmother) would say: that Father's home is a loving and wonderful home, that he is a good dad, and that she would have nothing negative to say about Father. Both parties introduced exhibits that were admitted.

Mother testified that she owned a three-story townhouse, and had been living there for about a year, with J., Z., two older children (16 and 15 years old) from another relationship, and her own mother (the children's maternal grandmother). According to Mother, Father had lived at her place until J. was about a year old. Mother testified that while Father lived with her, he had never helped her with "any kind of care" of J., such as

late-night feedings or diaper changes. Mother nevertheless stated that she believed Father "does care for [their] children." When asked if she believed it to be in the best interest of J. and Z. to have a relationship with Father, Mother answered, "yes, they should have a relationship with their father."

As to Father's time with J., Mother did not deny that Father was seeing J. less often than their parenting plan envisioned. As for the Wednesday overnights available to Father during the "trial period," Mother testified that she and Father mutually decided to forgo those after the trial period because it put strain on both Mother's schedule as well as on the children's routine. Mother admitted that when Father asked for Wednesday overnights after the trial period, Mother declined Father's requests because the trial period was over.

When Z. was born, according to Mother, she informed Father, via text messages, that he and his family were welcome to visit Z. so long as the visitation would occur at her home. As to why she required Father to visit Z. at her home, Mother cited the COVID-19 pandemic ongoing at the time, as well as the fact that Z. was not included in the Parenting Plan Agreement. Mother denied having ignored Father's text messages regarding visitation during that time. Mother testified that Father had called many times a day to speak with the children, and that she allowed Father to talk to them "all the time." Mother also testified that except for a few occasions, Father did not pick up the children on Thursdays.

Although Mother testified about what she claimed was abuse by Father, the circuit court did not credit it entirely. Mother claimed that Father would text and call (multiple times) saying that if Mother "ha[d] any males around [his] children that . . . [he] would kill whoever [was] involved." Mother also testified that Father had threatened to break into her house, that he was not afraid to die or go to jail for the minor children. Though she testified that Father had made death threats to her, Mother also admitted to having texted Father that she was not afraid of him: "[a]in't nobody scared of you . . . ."

Mother did not deny that she stopped Father's visitation with the children on August 14, 2022. According to Mother, after Father dropped the minor children off at Mother's home, Father saw Mother leave her neighborhood with a friend, pulled next to the car in which Mother was riding, rolled down his window, and started yelling at Mother to pull over. When Mother did not do so, according to Mother, Father followed them, switching lanes to do so, and spit at them when they got to a red light. Mother felt threatened and called the police.[9]

Mother acknowledged that Father could not have been aware of whether the minor children were in the backseat. Nonetheless, Mother stated that she feared for her life and

[9] Mother applied for a criminal charge against Father after this incident and he was charged with violating the April 4, 2022 protective order. At the time of the October 2022 custody trial, that charge was still pending against Father. The circuit court was aware of the charge's status. On October 25, 2022, the criminal charge was placed on stet docket on condition that Father obey all laws, have no contact with Mother except through "Family Wizard," and obey all the terms of the current domestic violence protective order.

the children's lives because Father "still chose to follow" her car and to harass her. Thus, she "did not allow him to see the children until [she] was able to modify [their] pickups and drop-offs to where [she] felt safe or even my family felt safe to be around [Father]."

Mother's mother ("Maternal Grandmother") lived with Mother since Z. was born. According to Maternal Grandmother, Mother is a "very good," as well as "very patient," parent who takes the children to the park and "[does] things with them." She helps the children, both toddlers, to calm themselves when they "stumble and bumble." Mother disciplines the children with time outs and "popping hands" when, for example, they put their hands in the trashcan.

Maternal Grandmother had contact with Father when he returned the children at times that Mother was not home, or when Father was unable to reach Mother on the phone and tried Maternal Grandmother instead. According to Maternal Grandmother, the conversation was "all right until he decided [to call] her a name, which Maternal Grandmother didn't like, "fussed back at him and hung the phone up." Maternal Grandmother said there were no "confrontations or altercations" between Mother and Father other than Father's distaste for the light-up shoes Mother chose for the children to wear. Maternal Grandmother admitted that she did not know what happens at Father's house with the children.

Father testified that he lived in a four-story home with his mother and stepfather about 20-25 minutes from Mother. The home has multiple bedrooms and bathrooms. In the home, J. and Z. have a bedroom of their own that they share with each other. They

have beds, toys, clothes, and "everything they need." Father works delivering beverages for a distribution company and also drives part-time as a food-delivery driver. He confirmed that he and Mother had reached a parenting agreement regarding J. but soon started to disagree about it.

Father testified that he did not want to forgo his Wednesday overnight visitation with the children. According to Father, "after the [October 2021] trial,[10] [Mother] said she's not doing it, it's a waste of her time and she ain't got time to do it no more." Father admitted that he just agreed because all he wanted was to make sure he could see his sons, and if she did not want "to do Wednesdays, as long as [he] g[ot] them from Thursday like [he's] suppose[d] to be getting them[,] then that's fine."

Starting in March 2022, according to Father, Mother refused to give him the kids and then got a domestic violence protective order against him for "over-calling" her to try and talk to the children. According to Father, it was only after the visitation provisions in the domestic violence protective order that he was able to have Z. overnight at his home.[11]

Thereafter, according to Father, Mother took every opportunity to come between him and his court-ordered access to the children. According to Father, he missed out on

[10] This appears to be a reference to the October 2021 child support hearing.

[11] Father testified that he consented to the entry of the domestic violence protective order "because he wanted to see [his] boys." The protective order reflected that it was not entered by consent but rather after a finding of abuse against Mother.

important parts of their lives because Mother did not respond to his text messages requesting visits with his children. For example, Father testified that just about a month before the trial, he called, texted, and then had his mother call and text for Z.'s birthday, yet Mother never responded. "She would not let us see him. It's his birthday . . . I didn't get to see my youngest son for his birthday. Or talk to him."

Father's testimony also showed that Mother's actions were not just interfering with the relationship between him and the children, but also their relationship with his son, their half-brother. Father testified that his "oldest son is 16 going on 17, he's an [A]ll[-]American athlete. He plays baseball, basketball[,] and football[,] . . . so we're constantly on the go to sport[s] events with him when I have them." And when they have spent time together, they have developed a relationship that is not just "big brother, little brother" but one where the older brother is father-like to them.

It was not uncommon that Mother failed to answer Father's text messages about seeing the children. Father testified that "[Mother] never responds . . . . [S]ince . . . we've been going back and forth in the group text message[,][12] . . . I asked [ ] to meet at the Sheriff's Station and she [does not] respond. She don't [*sic*] say anything." And over the last two months, after they returned to the court, Father stated that he went to the

[12] Following the entry of the domestic violence protective order, Father included his attorney on his text messages to Mother ostensibly to document that he was communicating with Mother only to facilitate child visitation.

Sheriff's Office, where the exchange was supposed to occur, "[e]very Thursday [and] on Wednesdays" in hopes that Mother would let him see the children.

About two weeks before the October 2022 custody trial, and on the recommendation of his attorney, Father started seeing a therapist to address Mother's "accusations of anger management." Father was "starting to learn[ ]" and "getting into it." According to Father, he was working on ways to communicate without anger. Father had also downloaded "My Family Wizard app."[13]

At the conclusion of the trial, the circuit court took a recess, returned, and delivered its opinion orally from the bench. The circuit court found that Z.'s arrival was a material change of circumstances such that it was in J.'s best interest to review the custody arrangement. The circuit court then considered the evidence in light of 31 custody factors, some of which, the circuit court determined, did not apply here.[14]

> [G]o[ing] through the factors and then I'll put my ruling on the record. So, there are – I have a – I have a cheat sheet, 31 factors that I go through and fill out as I'm sitting here. And if the facts in here I add them in, sometimes they don't apply but I do like the parents to know that I'm considering all 31 of

[13] "OurFamilyWizard" is a mobile application designed to facilitate co-parenting communication. *See generally*, OURFAMILYWIZARD.COM, https://www.ourfamilywizard.com/ (last visited Nov. 27, 2023).

[14] Here, the circuit court appears to reference a chart available to Maryland Judges from Maryland's Judicial College. The chart summarizes the factors Maryland Judges may (and in some cases, must) consider in making child custody and visitation determinations, whether those factors emanate from statute, case law, or Maryland Rule. Mother does not contend that the "31 factors" are an inaccurate reflection of Maryland law. Instead, Mother's argument focuses on the consideration required by FL §§ 9-101 and 9-101.1.

> these. There may[ ]be seven that didn't apply. And the reason why I share that with you is because what the Court has to look at in determining where the children are to be un, is something that we don't take lightly.

In relevant part, the circuit court found both parents to be fit, healthy, and gainfully employed. As to mental health, the circuit court noted that Father was receiving mental health treatment and having "very positive … experience doing that." The circuit court did not credit Mother's assertion that Father did not "have the best character," citing the lack of independent testimony to support such a finding. Instead, based on its observation, the circuit court found both parents to be of good character and good reputation, as well as committed to the best interest of their children.

The circuit court also found that a few factors weighed against Mother. The court noted that while Father expressed his willingness to share custody with Mother, Mother "routinely and arbitrarily cancel[led] Father's visitation with the children." As to each parent's ability to maintain relationship with the other parent, siblings, relatives, and others, the circuit court also emphasized that Mother had denied Father's visitation with the minor children beginning August 2022, thereby potentially affecting Father's relationship with the minor children.

The circuit court also discussed in depth Mother's allegations about death threats from Father and the August 14, 2022 incident in light of the 31 factors, ultimately determining that Mother's testimony and her version of the events were not entirely credible. As to the former, the circuit court said:

> The extent to which either party has initiated frivolous or vexatious litigation. I mean it's questionable – there was a pro[tec]tive order where you – well, I'm sorry, I think it was in the motion for modification [Mother] filed where she says that she fears for her life and he's threatened my life. I don't find that credible really. But I do think that you don't have good feelings about him and it's justified by a lot of the text messages that he was sending you. And I hope that he's turned a corner[.]"

As to the August 14, 2022 incident, the circuit court found:

> Evidence of exposure to domestic violence, [Mother] testified that there was car chase and um,. I do believe that it happened and I do believe that [Father] was jealous. . . . Whether the children are in the car, I don't have any evidence that the children were present, um, and you were speculating as to what he may or may have not known. I just – I don't like the fact that that happened but I don't um, I don't' find that for this, that they've been exposed to domestic violence because they didn't see the text, they didn't have the benefit of the text and they were not in the car, I don't have any evidence that they were in the car at the time.

In discussing Mother's decision to deprive Father of visits for two months after August 14, 2022, the circuit court found that even if Mother was fearful of Father, *her* fear alone could not justify the denial of Father's visitation altogether, especially in violation of a court order. The circuit court said:

> [T]here could have been ways to ensure whatever fears you have, maybe have him over, maybe meet in a park, maybe let him have them, you know, during the day, something to kind of bridge the gap so it's not like, I've made this decision, this is what it's going to be. Because unless it's an order you really don't have the right to do that.

The circuit court then indicated that it would order that Mother and Father have joint legal custody with Father having tie-breaking authority. As to physical custody of J. and Z., the circuit court ordered, among other things, that Mother and Father have joint physical custody on a "2-2-3" schedule, with exchanges to occur at 6 pm on Sundays and Wednesdays. The circuit court also found Mother in contempt for having denied Father visitation. The circuit court modified the existing domestic violence protective order to reflect its custody decision.[15]

On October 26, 2022, the circuit court issued a comprehensive written Order for Contempt and Custody Modification that reflected its oral ruling. On physical exchanges of the minor children, the Order required: (1) that Mother and Father exchange the children at the Charles County Sheriff's Office on Leonardtown Road; (2) that during those exchanges, only the parents were to exit their vehicles; and (3) that communication during the exchanges be limited to a polite greeting, and, if necessary, important information relating to the minor children's immediate well-being. With regards to

[15] The modified protective order was entered on October 20, 2022. Two modifications were made to the April 4, 2022 protective order. First, where the original protective order read, "Custody shall remain as set forth in C[-]08-FM21-522," it was changed to "Custody shall remain as set forth in C[-]08-FM21-522 AND C[-]08-FM21-534." Second, where the April 4, 2022 protective order read, "[v]isitation with [J. and Z.] is granted to [Father]," the modified protective order added, "In primary consideration to the welfare of the minor child(ren)."

As with the April 4, 2022 protective order and other pleadings in that domestic violence case, Case No. C-08-FM-22-807900, we take judicial notice of the October 20, 2022 modified protective order. *See supra* note 6.

communications in all the other settings, the circuit court ordered that the parties communicate in writing using "My Family Wizard" mobile phone application only,[16] and that communication topics be limited to the minor children. On the issue of contempt, after repeating its contempt finding, the circuit court set a purge provision of 25 days of make-up time with J. for Father, to occur every other Sunday night until fully made up, plus overnight visitation for Christmas Eve in 2022 and 2023.[17] This timely appeal followed.

We include additional facts below as necessary.

DISCUSSION

1. Custody

a. Mother's Contentions

Mother challenges the circuit court's granting of shared physical custody and joint legal custody with tie-breaking authority over both J. and Z. to Father. First, Mother points to Section 9-101.1(b)(1) of the Family Law Article and argues that the circuit court's decision failed to account for the domestic violence protective order issued against Father, Mother's genuine fear of him and his boxing ability, his threats, and violations of the protective order. Second, argues Mother, the decision failed to account

[16] As with Father's testimony above, this appears to be a misnomer of OurFamilyWizard, a co-parenting mobile application. *See* OURFAMILYWIZARD.COM, *supra* note 13.

[17] As defined in the Order, this runs from 6:00 p.m. on Christmas Eve to 2:00 p.m. on Christmas Day.

for Father's instability, which manifested in his failing to exercise visitation on Thursdays, "removing" Wednesday visits, and not believing (initially) that he was the Father of Z. Third, Mother claims that the circuit court failed to follow the adage "Better safe than Sorry," particularly here where the minor children are too young to report " . . . whether they have been subjected to any form of abuse at the hands of [Father]."

b. Relevant Law

This Court reviews child custody determinations using three "interrelated standards[:]" (1) factual findings are considered under the "clearly erroneous" standard; (2) if we find the court erred as a matter of law, "further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless[;]" (3) if we view the trial court's ultimate conclusions to be based on "sound legal principles and based upon factual findings that are not clearly erroneous," the trial court's decisions should not be disturbed absent a finding of a clear abuse of discretion. *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 246 (2021) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). Ordinarily, trial court findings based on " . . . competent or material evidence in the record . . ." are not clearly erroneous. *J.A.B. v. J.E.D.B*., 250 Md. App. at 247 (omitting citation). Moreover, "[i]t is not our role, as an appellate court, to second-guess the trial judge's assessment of a witness's credibility." *Gizzo v. Gerstman*, 245 Md. App. 168, 203 (2020) (citing *Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 687 (2014)). Nor is it our role to " . . . make our own determination as to a child's best interest." *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007).

When determining custody of a child, the trial court has "discretion to consider a variety of factors." *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 757 (2017). Those factors include:[18] (1) the "fitness of the parents;" (2) the reputation and character of the parents; (3) the desires and prior agreements of the parents; (4) the potential of maintaining natural family relations; (5) the child's preferences (6) "material opportunities affecting the future life of the child;" (7) the child's age, health and sex; (8) where the parents live and the opportunity for visitation; (9) the length of the child's separation from the parents; (10) either parent's voluntary abandonment or surrender; (11) the parents' capacity to communicate and reach shared decisions affecting the child's welfare; (12) the parents' willingness to share custody; (13) the established relationship between the child and each parent; (14) potential disruption to the child's social and school life; (15) the demands of each parent's employment; (16) the age and number of the children; (17) the sincerity of each parent's request for custody; (18) the financial status of the parents; (19) the impact the custody decision may have on any parties' state or federal assistance; and (20) the benefit to the parents in maintaining the

[18] Because these factors were outlined in two landmark decisions, *Taylor v. Taylor*, 306 Md. 290 (1986), and *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1978), they are also called "*Taylor* factors," "*Taylor-Sanders* factors," or "*Sanders-Taylor* factors." *See, e.g.*, *J.A.B.*, 250 Md. App. at 255.

parental relationship with the child. *See Jose v. Jose*, 237 Md. App. 588, 599-600 (2018) (internal citations omitted).[19]

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[19] The circuit court may also consider the best interest factors that parents are encouraged to consider in developing parenting plans. These are:

> (1) Stability and the foreseeable health and welfare of the child;
> (2) Frequent, regular, and continuing contact with parties who can act in the child's best interest;
> (3) Whether and how parties who do not live together will share the rights and responsibilities of raising the child;
> (4) The child's relationship with each party, any siblings, other relatives, and individuals who are or may become important in the child's life;
> (5) The child's physical and emotional security and protection from conflict and violence;
> (6) The child's developmental needs, including physical safety, emotional security, positive self-image, interpersonal skills, and intellectual and cognitive growth;
> (7) The day-to-day needs of the child, including education, socialization, culture and religion, food, shelter, clothing, and mental and physical health;
> (8) How to:
>
> > (A) place the child's needs above the parties' needs;
> > (B) protect the child from the negative effects of any conflict between the parties; and
> > (C) maintain the child's relationship with the parties, siblings, other relatives, or other individuals who have or likely may have a significant relationship with the child;
>
> (9) Age of the child;
> (10) Any military deployment of a party and its effect, if any, on the parent-child relationship;
> (11) Any prior court orders or agreements; (12) Each party's role and tasks related to the child and how, if at all, those roles and tasks have changed;
> (13) The location of each party's home as it relates to their ability to coordinate parenting time, school, and activities;

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(14) The parties' relationship with each other, including:

> (A) how they communicate with each other;
> (B) whether they can co-parent without disrupting the child's social and school life; and
> (C) how the parties will resolve any disputes in the future without the need for court intervention;

(15) The child's preference, if age-appropriate; and
(16) Any other factor deemed appropriate by the parties.

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(9) Age of the child;
(10) Any military deployment of a party and its effect, if any, on the parent-child relationship;
(11) Any prior court orders or agreements;
(12) Each party's role and tasks related to the child and how, if at all, those roles and tasks have changed;
(13) The location of each party's home as it relates to their ability to coordinate parenting time, school, and activities;
(14) The parties' relationship with each other, including:

> (A) how they communicate with each other;
> (B) whether they can co-parent without disrupting the child's social and school life; and
> (C) how the parties will resolve any disputes in the future without the need for court intervention;

(15) The child's preference, if age-appropriate; and
(16) Any other factor deemed appropriate by the parties.

Md. Rule 9-204.1(c). Many of these factors overlap with the *Sanders-Taylor* factors.

When considering these "*Sanders-Taylor* factors," trial courts must examine the "'totality of the situation in the alternative environments' and avoid focusing on or weighing any single factor to the exclusion of all others." *Jose*, 237 Md. App. at 600 (quoting *Best v. Best*, 93 Md. App. 644, 656 (1992)). Nor do courts need to weigh *all* potential factors. *Santo v. Santo*, 448 Md. 620, 629-30 (2016). "The light that guides the trial court" in its determination of custody, however, is "'the best interest of the child standard,' which 'is always determinative in child custody disputes.'" *Id.* at 626 (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977)). With these principles in mind, we address Mother's contentions in turn.

c. Physical Custody

We turn first to Mother's contention that the circuit court's award of shared physical custody failed to account for the domestic violence protective order issued against Father, Mother's fear of him, and Father's violations of the order, all as required by Section 9-101.1(b)(1) of Maryland's Family Law Article. This subsection requires that ". . . [i]n a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against . . . the other parent of the party's child[,]" among others. Md. Code Ann., Fam. Law ("FL") § 9-101.1(b) (West). If the court finds such abuse occurred, "the court shall make arrangements for custody or visitation that best protect: (1) the child who is the subject of the proceeding; and (2) the victim of abuse." FL § 9-101.1(c). Section 9-101.1(b), however, "does not scrap the overall best interest of the child standard in favor of another single, alternate

standard." *Gizzo*, 245 Md. App. at 199 (internal quotations omitted). Instead, such evidence of abuse should be given due consideration in determining the best interest of the child. *Id.*

Here, in creating a shared physical custody arrangement for the parents, the circuit court considered Mother's evidence that Father abused her, the domestic violence protective order, and Mother's fear of Father as required by Section 9-101.1(b). That the circuit court did not expressly reference Section 9-101.1(b) "does not mean that the [c]ourt did not consider the provisions and purpose of that statute." *Gizzo*, 245 Md. App. at 197. As to the fear Mother claimed in seeking custody modification in April 2022, the circuit court did not credit it entirely.

> The extent to which either party has initiated frivolous or vexatious litigation. I mean it's questionable – there was a pro[tec]tive order where you – well, I'm sorry, I think it was in the motion for modification [Mother] filed where she says that she fears for her life and he's threatened my life. I don't find that credible really.

Having considered Mother's fear, the circuit court complied with Section 9-101.1(c) by adopting the arrangements for pick-ups and drop-offs that Mother requested. *See Gizzo*, 245 Md. App. at 198 (affirming the circuit court's award of custody where it considered "the evidence and factors to determine custody and visitation" and "made arrangements to minimize conflicts and dispute to provide the protection contemplated by [S]ection 9-101.1. . . ."). Asked whether there was anything she wanted other than to modify the parenting plan and enter a custody order, Mother said she would like pick-ups

and drop-offs to be at a police station because Father had yelled and argued with Mother's mother and Mother's children at pick-ups and drop-offs and "seem[ed] to make an altercation." Thus, the circuit court entered an Order that required physical exchanges of the children to occur at the Sheriff's Office, with no one else to exit the car, and with limited communication between the parents. The circuit court also left the protective order in place, with express intent to keep Mother safe from potential hostility or aggression from Father.

> So, everything in the protective order, this does not supersede the protective order. You are not – you're not to have contact with her, any abusive contact except – except for what's necessary to facilitate child visitation – custody and visitation.

Mother also suggests that the circuit court did not properly account for Father's abuse of the children, as required by Section 9-101 of the Family Law Article, but the court here had no "reasonable grounds to believe that" Father abused or neglected a child. FL § 9-101(a). Section 9-101's prohibition of custody or visitation applies only if the circuit court has such reasonable grounds. *Id*. Back in April 2022, the circuit court heard Mother's testimony, granted her a final protective order against Father, but made no finding that Father abused or neglected the minor children. The circuit court's temporary protective order, entered a week before the final protective order, likewise mentioned no "reasonable grounds to believe that" such abuse or neglect had existed. In granting Mother's requests for temporary and final protective orders, the circuit court did not order the DSS to investigate potential abuse of the children. *See* FL § 4-505(e)(1) (requiring the

court to order investigation by a local DSS upon finding of reasonable grounds to believe abuse of a child has occurred).

As to the August 14, 2022 incident (the one on which Mother apparently relies to claim that Father abused the children), the circuit court specifically found no evidence that the children were in the car at the time, and thus no "abuse."

> Evidence of exposure to domestic violence, [Mother] testified that there was car chase and um, I do believe that it happened and I do believe that [Father] was jealous . . . . Whether the children are in the car, I don't have any evidence that the children were present, um, and you were speculating as to what he may or may have not know. I just — I don't like the fact that that happened but I don't um, I don't find that for this, that they've been exposed to domestic violence because . . . they were not in the car. I don't have any evidence that they were in the car at the time.

Because there was no finding of child abuse by Father, the circuit court did not need to determine whether there was a likelihood of *further* child abuse by him or an appropriate supervised visitation arrangement to assure the safety of the children. *See* FL § 9-101(b); *see also Michael Gerald D. v. Roseann B.*, 220 Md. App. 669, 680 (2014) (noting that section 9-101(b) applies "where evidence of abuse or neglect exists") (cleaned up) (citations omitted).

Mother next contends that the circuit court "brushed aside" Father's actions towards her in weighing the evidence, but "[a] reviewing court may not decide on appeal how much weight should have given to each item of evidence." *Edsall v. Huffaker*, 159 Md. App. 337, 343 (2004). A trial judge "may believe or disbelieve, accredit or

disregard" any testimony adduced at the trial. *Id.*; *see also Petrini v. Petrini*, 336 Md. 453, 470 (1994) (emphasizing the importance of "the trial court's opportunity to observe the demeanor and the credibility of the parties and witnesses" in custody cases). Thus, so long as the circuit court had considered Mother's testimony and addressed it on the record, we do not disturb the court's decision to credit or discredit that testimony.

Although Mother argues the circuit court failed to consider or give proper weight to her evidence, this argument fails because the court's findings are supported by other evidence, including Father's testimony. *See Petrini*, 336 Md. at 471 (affirming the trial court's custody award "grounded on far more than an unsupported whim"). Thus, while Mother contends that the circuit court did not consider Father's having failed to exercise Wednesday or Thursday overnight visitation, Father testified that Mother denied him overnight visitation, and the circuit court found that Mother had done so. Likewise, while Mother contends that the circuit court did not consider Father's having believed that Z. was "not his," Father testified that he wanted to visit with Z. at his home after he was born, and the circuit court found that both parents had a loving relationship with both children and were sincere in wanting what was best for their children. And, while Mother contends that Father's employment was unstable, the documentary evidence showed, and the circuit court found, that Father was earning $24,602 per year,[20] and his having

[20] Father's 2021 income tax return (Form 1040), admitted into evidence as Plaintiff's Exhibit 2, supports this finding.

graduated from culinary school suggested, as the circuit court found, that he could earn more.

Having found that both parents were fit and healthy and able to meet the children's needs, but that Mother had deprived Father of visits and interfered with the children's relationship with Father, the circuit court was well within its discretion in awarding shared physical custody. This decision will not be disturbed.

d. Legal Custody

Our analysis does not end there, as Mother also contends that the circuit court's award of tie-breaking authority to Father failed to reckon the evidence of Father's prior abusive conducts, including the domestic violence protection order. We do not need to discuss the merits of Mother's contention because the record below does not provide us sufficient ground for appellate review. We explain.

Similar to physical custody, the award of legal custody is subject to *Sanders-Taylor* factors, in particular: (1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship between the child(ren) and each parent; (5) preference of the child; (6) parental disruption of child(ren)'s social and school life; (7) geographic proximity of parental Homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11) financial status of the parents; (12) impact on state or federal assistance; (13) benefit to Parents; and (14) other factors. *See, e.g.*, *Taylor*, 306 Md. at 304-11; *Jose*, 237 Md. App. at 602.

Among those, the capacity of the parents to communicate and to reach shared decisions "is clearly the most important factor." *Taylor*, 306 Md. at 304. Where the evidence indicates "a relationship marked by dispute, acrimony, and a failure of rational communication," joint legal custody is generally not appropriate. "Even in the absence of bitterness or inability to communicate, if the evidence discloses the parents do not share parenting values, and each insists on adhering to irreconcilable theories of child-rearing," joint legal custody is also inappropriate. *Id.* at 306. However, in "the unusual cases," where the trial court finds joint legal custody to be appropriate notwithstanding the lack of evidence showing the parents' willingness and ability to co-parent, the court must "articulate fully the reasons that support that conclusion." *Id.* at 307; *Santo*, 448 Md. at 630 (requiring courts to "carefully set out the facts and conclusions that support the solution it ultimately reaches" in determining legal custody).

Tie-breaking authority is one of "the multiple forms of joint custody that can be tailored into solutions for each unique family." *Shenck v. Shenck*, 159 Md. App. 548, 560 (2004) (quoting *Taylor*, 306 Md. at 304). A tie-breaking provision is "consonant with the core concept of joint custody," because such provision requires parents "to work together to decide issues affecting their children" and ensure each parent to have "a voice in the decision making process." *Santo*, 448 Md. at 633. Nonetheless, a tie-breaking authority may also "tilt[ ] power to the [parent] granted such authority." *Id.*; *cf. Downing v. Perry*, 123 A.3d 474, 484 n.11 (D.C. 2015) (noting that the father was abusing "his tie-breaking authority as a form of *de facto* sole legal custody). Just with any other form of joint legal

custody, the trial court must award a tie-breaking authority "under appropriate circumstances and with careful consideration *articulated on the record*." *Santo*, 448 Md. at 646 (finding that the court properly granted joint legal custody and tie-breaking authority) (emphasis added).

Based on the record below, we cannot determine whether the circuit court abused its discretion in awarding the tie-breaking authority to Father. The circuit court did not "carefully set out the facts and conclusions that support" its award of tie-breaking authority. *Santo*, 448 Md. at 630. While the circuit court mentioned the "most important factor," "the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare," *Taylor*, 306 Md. at 304, it was no more than a one-sentence comment: "I just know that the relationship is strained, that's obvious." Then, having acknowledged the parties' "strained" relationship, the court went on to state: "tie-breaker means that [Father] has to communicate . . . you both have to discuss and he has to consider very seriously what [Mother's] wishes are . . . . " How the circuit court went from finding a strained relationship to expecting good-faith communication is not "carefully set out." *Santo*, 448 Md. at 630. Nor, apparently, did the circuit court explain how such communication could occur where Father had been found, six months earlier, to have abused Mother through communication, *i.e.* by placing multiple, aggressive, and threatening phone calls and text messages to her and was subject to a domestic violence final protective order as a result. Nor did the circuit court explain why Father should have the tie-breaking authority, when it expected Father to defer to Mother's decision-making.

Because we conclude that the record is insufficient to determine whether the circuit court abused its discretion, the court's legal custody determination shall be vacated and remanded to consider the appropriate legal custody arrangements for the children. *See* Md. Rule 8-604(d)(1) (allowing the reviewing court to remind a case to a lower court if "the substantial merits of a case will not be determined by affirming, reversing, or modifying the judgment"). On remand, when considering legal custody, the circuit court should consider the fact that there was in place an order protecting Mother against domestic violence from Father. It is up to the circuit court to determine the weight to be attached to that evidence.

2. Contempt

With regard to the circuit court's contempt finding, Mother points to Section 9-105 of the Family Law Article and her asserted fear for her life. She contends that because she was granted custody of the children via the April 4, 2022 protective order, her interference with Father's visitation with J. was not unjustifiable. Accordingly, argues Mother, she should not have been held in contempt for having made this decision. Mother adds that she was not willfully disobeying a court order but simply attempting to protect her family by any means necessary. She concludes that Father should not have been awarded make up time with J. We disagree.

Again, Rule 8-131(c) governs our review of the circuit court's decision to hold Mother in contempt and award make-up time to Father. Thus, "we review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on

the evidence unless clearly erroneous, and [we] will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

This case implicates two distinct avenues for addressing one parent's denial of, or interference with, another parent's court-ordered visitation rights. One, a petition for constructive civil contempt, is " . . . generally remedial in nature[,]" *State v. Roll*, 267 Md. 714, 728 (1973), and addresses the willful or deliberate refusal to comply with a court order when one has the ability to do so. *Dodson v. Dodson*, 380 Md. 438, 452-53 (2004) (listing cases). A finding of constructive civil contempt must be coupled with a purge provision with which the contemnor has the ability to comply and thereby purge the finding of contempt. *Bryant v. Howard Cnty. Dep't of Soc. Servs. ex rel. Costley,* 387 Md. 30, 46 (2005).

The other avenue is Section 9-105 of Maryland's Family Law Article. Under this statute, the circuit court may remedy the unjustified denial of, or interference with, court-ordered visitation in a number of ways, including "that the visitation be rescheduled[.]" FL § 9-105. These remedies are in addition to " . . . any other remedy available to the court[,]" but must be imposed " . . . in a manner consistent with the best interests of the child." *Id.*

Although Mother contends that her denial of visitation was not unjustified under Section 9-105, the circuit court's award of make-up time to Father was not premised on Section 9-105. Instead, the circuit court found Mother in contempt, saying that Mother " . . . had an ability to and with a willful disregard for the order that was in place denied

visitation." The circuit court noted that Mother had deprived Father of visits with the children for "the last couple months," a deprivation that was " . . . against the court order to – to do so." The circuit court indicated Mother could "purge the contempt finding" by complying with its custody order, "especially" the provisions for make-up time for Father.

Mother's contention that she was attempting to protect her family by any means necessary is similarly unavailing. "It is not our task to re-weigh the credibility of witnesses, resolve conflicts in the evidence, or second-guess reasonable inferences drawn by the court, sitting as fact-finder." *Gertz v. Md. Dep't of Env't,* 199 Md. App. 413, 430 (2011). Indeed, the sole issue is whether the evidence, so viewed, is sufficient to support the court's finding of willfulness." *Id.* (citing *Royal Inv. Group,* 183 Md. App. at 430, 961 A.2d 665; *Espinosa v. State,* 198 Md. App. 354, 399 (2011)).

Here, there was ample evidence to support the circuit court's finding that Mother acted in willful disobedience of the existing visitation order. Mother admitted that she denied visitation to Father "since August 14th." She offered two reasons for doing so: 1) that she feared for her life and 2) that she feared for the lives of her children. Even if the circuit court had credited Mother's reasons (it did not), Mother's decision to violate the existing order based on her own reasons only goes to prove precisely what the circuit court found: that Mother acted voluntarily and intentionally, that is, willfully in disobeying the existing court order.

To the extent that Mother here challenges the specifics of the circuit court's make-up time purge provision, we see no clear error or abuse of discretion in that either. "'In order for a penalty for civil contempt to be coercive rather than punitive, it must provide for purging that permits the defendant to avoid the penalty by some specific conduct that is within the defendant's ability to perform.'" *Breona C. v. Rodney D.,* 253 Md. App. 67, 75 (2021) (quoting *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016)). Here, for make-up time, the purge provision was specific. It required Mother to allow Father to have 25 nights, every other Sunday night starting on October 30, 2022, following Father's parenting time block that started on October 25, 2022, until 25 nights were made up, plus consecutive Christmas Eve overnights in 2022 and 2023. And, given that the Sunday overnights were to be added on to time when the children were already with Father (his parenting time block), this part of the purge provision required no "performance" by Mother. As for the Christmas Eve portion of the purge provision, Mother identifies nothing in the record to suggest that she was unable to perform it.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY (1) AFFIRMED AS TO THE AWARD OF PHYSICAL CUSTODY AND FINDING OF CONTEMPT; AND

(2) VACATED AS TO THE AWARD OF LEGAL CUSTODY AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE SPLIT EVENLY.