Circuit Court for Talbot County
Case No. C-20-FM-16-000069

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1678

September Term, 2016

MICHAEL PARKS. MULLIKIN

v.

CHRISTON MULLIKIN

Berger,
Leahy,
Alpert, Paul E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: February 5, 2018

Christon Mullikin ("Appellee" or "Christon") and Michael P. Mullikin ("Appellant" or "Michael") are the parents of two minor children, K.M. and A.M (collectively, "the children"). On September 4, 2016, after an incident between the children and Michael during their scheduled visitation, Christon petitioned for—and received—an interim protective order on behalf of the children against Michael in the District Court of Maryland for Talbot County, case number D-035-FM-16-000024 ("Interim 2016 Protective Order"). The case was transferred to the Circuit Court for Talbot County prior to the hearing on the final protective order ("2016 FPO"). The circuit court entered the 2016 FPO on September 19, 2016, mandating supervised visits on Wednesday nights at the Future for Families Visitation Center ("Visitation Center") and allowing the children to initiate phone calls with Michael a minimum of three nights per week. Michael appealed from that decision.

Before the appeal was submitted on brief to this Court, the parties agreed to—and the circuit court entered—a new visitation order providing Michael with supervised visitation at the Visitation Center with the children once per week and instructing that "the visitations shall not exceed two hours in duration[.]" On August 8, 2017, in response to a show cause order issued by this Court, Michael confirmed that the visitation issues in his appeal were now moot. The 2016 FPO expired on September 19, 2017.

As the child access issues are resolved and the 2016 FPO has expired, we consider only, based on what we can discern from Michael's questions presented,[1] whether the

[1] In his brief, filed *pro se*, Michael presented the following questions:

1. "Did statutory abuse occur to Appellant's children by Appellant during supervised visitation?"
2. "Was migraine headaches and weight loss actually caused by visitation

circuit court erred in entering the 2016 FPO. *See Piper v. Layman*, 125 Md. App. 745, 753 (1999) (reasoning that the subject of a protective order "has an interest in exoneration even if the period of the protective order has expired without incident.") For the reasons presented below, we hold that the circuit court did not err in granting the 2016 FPO against Michael.

BACKGROUND

Michael and Christon separated in early 2015 but remain legally married. Michael has not resided at the familial home since March 2015. Together, the parties have two minor children—K.M. and A.M. On September 19, 2016, when the circuit court granted the 2016 FPO, K.M. was 12 years old and A.M. was 10 years old.

A. 2015 Protective Order Proceedings

Unfortunately, the present case is not the parties' first interaction with the protective order process. On March 11, 2015, in case number 20-D-15-008439 ("2015 Protective Order"), Christon petitioned for a protective order for her and the children, alleging that Michael shoved, and then pinned, her against a wall and that A.M. saw everything and was ready to call 9-1-1. The circuit court granted a temporary protective order to Christon. Two days later, Michael filed for protective order in case number 20-D-15-008442

with Appellant?"
3. "Is moving a trial to Circuit Court on grounds of children's attorney presence and lack of child representation legal?"
4. "Is the motive for filing a protective order a means to usurp any pending mediation to modify visitation?"
5. "Did the Circuit Court judge err in allowing defense council [sic] to present mental health records?"

("Michael's 2015 Protective Order Filing"), contending that Christon assaulted him and K.M. on several occasions, and the court granted Michael a temporary protective order.

On March 17, 2015, after a hearing with the parties, the court granted an FPO ("2015 FPO") to Christon in the 2015 Protective Order and denied Michael's petition in Michael's 2015 Protective Order Filing. By a preponderance of the evidence, the court determined that Michael had placed Christon, K.M., and A.M. in fear of imminent serious bodily harm and false imprisonment after pinning Christon against a wall, choking her, and threatening to kill her. The 2015 FPO required Social Services to perform an investigation and retroactively permitted Michael to enter the family home to recover personal effects on March 12, 2015, five days before the order's issuance. Michael further received supervised visitation with K.M. and A.M. at the Visitation Center, but he could not contact Christon or the children.

Nearly two months later, on May 7, 2015, the circuit court filed an amended order to clarify the 2015 FPO's expiration date as March 17, 2016. On July 24, 2015, after hearing Michael's motion to enter the family residence, the circuit court again modified the 2015 FPO. The expiration date remained March 17, 2016; however, Michael could call K.M. and A.M. at least five times per week between 8:00 p.m. and 8:30 p.m. and a third party could enter the home to recover items on Michael's behalf.

B. Custody Case

The same day he petitioned for a protective order, March 13, 2015, Michael also filed a complaint for child custody. Christon filed a counter-complaint for custody on March 30, 2015. On September 3, 2015, the circuit court, adopting the family magistrate's

suggestion, granted the parties' proposed *pendente lite* consent custody order and visitation order. The *pendente lite* order granted Christon sole physical and—subject to certain provisions—sole legal custody of K.M. and A.M., and Michael received a minimum of one supervised visit per week at the Visitation Center. The visitation order specified the visitation schedule, granting Michael supervised visits at the Visitation Center with the children on Wednesdays and every other Sunday.

On March 2, 2016, pursuant to the family magistrate's recommendations, the circuit court approved the parties' proposed consent custody order, which maintained Christon's physical and legal custody of the children and offered Michael increased visitation and contact. The court granted Michael a minimum of one supervised visit per week at the Visitation Center and a minimum of three phone calls with the children per week; however, if a phone call distressed or harmed the children, Christon could end the call.

The custody order further granted Michael four supervised visits, each two hours long, for four consecutive Sundays after church in a public place, other than Mullikin Farm where his mother resides. If those visits were successful, the next four visits could occur at Mullikin Farm, albeit with the same other conditions. If that second set of visits went well, Michael could "have supervised visits with the children for four months in the presence of his mother to occur for four-hours on Sundays after church at the Mullikin Farm or a public place, but not on a boat on a waterway[.]" Events occurring at the conclusion of those visits at Mullikin Farm, supervised by Michael's mother, led to the

protective order proceedings at issue here.

C. 2016 Protective Order Proceedings

After picking up K.M. and A.M. from their visit on September 4, 2016, Christon petitioned for a protective order from child abuse on behalf of K.M. and A.M. against Michael in the District Court of Maryland for Talbot County. Christon alleged that, during the visit, Michael would not let K.M. and A.M. call her or 9-1-1 and threw their cell phone. She further stated that Michael had twice threatened "to sell [the] boat and take the kids far away." Finally, given that Michael previously threatened to take the children, walked out of visits, and needed extra security at the first visit to the Visitation Center, she asserted that K.M. and A.M. "are scared [for] their safety and don't want to talk or go around him[.]"

Based on that petition, the district court issued an interim protective order on September 4, 2016, operative through September 6, 2016. The court found reasonable grounds that Michael placed the children in fear of imminent serious bodily harm and false imprisonment and prohibited him from contacting the children or attempting to do so. The following week, on September 13, 2016, the district court granted a temporary protective order upon determining that reasonable grounds existed that Michael committed "Statutory abuse of a child Mental." That order likewise prohibited Michael from contacting or attempting to contact K.M. or A.M. Prior to the hearing on a final protective order, the district court extended the temporary order to September 19, 2016 and granted Christon's motion to transfer the case to the Circuit Court for Talbot County because the events on September 4 occurred at a visitation held pursuant to the circuit court's order in the Custody Case, *supra*.

Before the circuit court, Christon testified that she filed the petition because her children were crying when she picked them up at Mullikin Farm. She also discussed the combined impact of the visits on A.M. and K.M., iterating, "Over the past couple months it's gotten worse. The kids have come home crying. They have nightmares. [K.M.] lost ten pounds in two weeks." K.M. is prescribed medication for anxiety while A.M. has stress-induced migraines and sees a neurologist. She further described the children's demeanor as "physically exhausted" and "scared" and explained that as a result of the 2015 FPO, they are in art therapy, speak with a therapist, and see a preacher. Christon admitted that she parked at "the end of the lane" during the children's visitation because she thought Michael would take them away.

K.M.'s testimony developed what occurred during the visit on September 4. He recounted that he and A.M. wanted to call 9-1-1 because Michael asked them whether Christon was "sleeping with the judge or the lawyers[]" and because Michael and his mother argued about "random stuff" including "stuff about World War III[.]" K.M. noted that the arguing made him "sad". He then related that Michael threw their cellphone across the yard and that he and A.M. were prohibited from using a telephone in the house. This was not the only argument in front of the children, as Michael screamed at his mother about whether a tree branch had fallen. The children got the cellphone a few weeks prior—and were crying that day—because Michael said he was going to sell the boat and take the children far away "about three or four times." K.M. indicated that Michael said this "[t]hree weeks ago and the week after that and the week after that. And then a couple times at visitation at the Visitation Center."

The circuit court declared that A.M.'s testimony was not necessary, but defense counsel called A.M. as Michael wanted to "see if she lies like [K.M.]." A.M. likewise discussed the alleged incident on September 4 and corroborated K.M.'s account of the argument about the fallen tree. She further testified that she became concerned that day when Michael "started thinking that there were people around[]" and "that there were spies around, spying on us." These statements apparently occurred after the children's cellphone beeped and A.M. denied having a cellphone. Unlike her brother, A.M. said that no one was crying when Christon picked them up; however, she did reiterate that Michael told them a few weeks prior that he would sell the boat and take them away.

Defense counsel then called Michael's mother, Beverly Mullikin ("Beverly"), who provided a different version of events than K.M. and A.M. She found the children's cellphone and gave it to Michael who tossed it "two or three feet[,]" not across the yard. Beverly denied that she prevented the children from using a telephone in the house and did not recall fighting with her son about a tree branch. She further declared that at no point did the children tell her that they were scared nor were they upset when they left. Beverly also said Michael may have mentioned selling the boat, but he has not worked on the boat in two years. Michael never told her about spies on Mullikin Farm but had "expressed his concern that there are listening devices."

Michael's testimony generally coalesced with that of Beverly. He mentioned that he had not discussed selling the boat in six months nor had he ever threatened to sell it and take the children away. After Beverly found the children's cell phone, he tossed it to the side and when he asked why they denied having it, "[t]hey looked scared. They looked

like someone had threatened them[.]" Michael further declared that the children never said they wanted to call 9-1-1 nor were they stopped from calling. He admitted his belief that listening devices are likely on Mullikin Farm; however, Michael said K.M. and A.M. lied by telling him there were trespassers on the property "just like they got up here and lied today." Michael disputed Christon's testimony that he was schizophrenic, and the court sustained defense counsel's objection to the introduction of Michael's medical records.[2]

D. The Court's Ruling

On September 19, 2016, the circuit court entered the 2016 FPO, effective through September 19, 2017. The court found, by a preponderance of the evidence, that Michael committed "Statutory abuse of a child Mental" and caused emotional injury when he threatened to sell the boat and take K.M. and A.M. away from Christon. The court ordered that Michael have supervised visitation with the children every Wednesday from 6:00 p.m. to 8:00 p.m. and the children could initiate a minimum three phone calls per week with him, which Christon was to monitor and record.

The court supported its decision to grant the 2016 FPO by reciting its reasoning:

> **I find that by a preponderance of the evidence that there, on or before September the 4th at the grandmother's farm in the Cambridge area there was an incident**, the exact nature of it perhaps is not precisely clear but what I get from (inaudible) the children but some corroboration from the Respondent's witnesses is that there were conversations. **I believe the children were credible** . . . I did not get any impression that they were coached to say anything or not say anything in particular. But it's clear to me from everything I heard that the children are under a great deal of stress under this current arrangement. **I believe that there were discussions of, about some (inaudible) context of taking the children away. I believe**

[2] But when asked later if he knew whether he was receiving treatment for schizophrenia, Michael said, "[I]f you're going to call me a schizo, then I'm a schizo."

> **that these discussions have resulted in emotional harm to the children.** This is evidence not only by the, their behavior which mom, **I tend to believe the mother on this issue describes as their emotional upset and crying at the time she retrieved the kids on the September 4th visitation.**
>
> But I believe that the upshot of what the father has been telling the children on more than one occasion and repeated apparently on other occasion is that yes he intended to take them away. The children have been adversely affected apparently by this (inaudible) I think it's substantial. It's true we don't have an expert witness to talk about this but **I think a reasonable inference can be drawn by the Court that a child loses, a young, small child loses 10% of his, ten pounds is a good percentage of his body weight of a very slight child. And I choose to believe the mother's description of the children having nightmares, not being able to sleep without being in the presence of their mother, being afraid of their father.**
>
> * * *
>
> I would note that there is a history of a prior order between these persons in which the Respondent allegedly choked and threatened to kill the mother in the presence of the children. **For all these reasons I think it's in the best interests of the children I find by a preponderance of the evidence that they have been subjected to this mental and emotional harm by the father.**

(Emphasis added).

On October 18, 2016, in the circuit court, Michael moved to reinstate visitation, stating that he had not known that the 2016 FPO had allowed him to continue visitation and also moved for reconsideration of the 2016 FPO. The same day, Michael also noted his timely appeal of the circuit court's 2016 FPO.

E. Custody Proceedings after the 2016 FPO

While Michael's appeal in the underlying 2016 FPO case awaited review in this Court, however, the circuit court entered a visitation order in the Custody Case on April 4, 2017. Susan Land, the children's attorney, moved in the Custody Case to reinstate

Michael's visitation. Her motion noted that in late 2016, Michael "stopped appearing at [the Visitation Center] and visitations ceased" but that he had moved to reinstate the visits in the 2016 Protective Order Case. Ms. Land sought to have her motion heard with Michael's motion to reinstate visitation, which was pending in the 2016 Protective Order Case. Per the parties' agreement, the visitation order provides that Michael has supervised visitation at the Visitation Center with the children once per week and "the visitations shall not exceed two hours in duration[.]" Given this result, the court found that Michael's motion was moot.

A week later, on April 10, 2017, Michael moved to enforce the consent custody order. He claimed that Christon violated the custody order because during the preceding week, he only spoke with K.M. and A.M. once—whereas the order mandates a minimum three phone calls weekly. On June 20, 2017, the circuit court wholly adopted the family magistrate's recommendations, which found that Michael failed to prove that Christon violated the order.

In light of the April 4 visitation order, this Court issued an order on July 11, 2017, asking Michael to show cause why the visitation questions were not moot. On August 8, in his response, Michael confirmed that the visitation issues were moot.

DISCUSSION

Michael challenges the circuit court's grant of the 2016 FPO, contending that neither K.M. nor A.M. demonstrated "any signs or symptoms of distress" during their visits with him. He argues that the lack of medical evidence connecting the changes in the children's physical and mental health to their visits belies the court's determination of statutory abuse.

He also states that "Appellant never waived privilege and records were used solely to sway courts [sic] opinion[,]"—presumably in connection with the question he presents "Did the Circuit Court judge err in allowing defense council [sic] to present mental health records?"

Christon, however, contends that the circuit court made no error in finding statutory abuse. She argues that the circuit court acted within its purview as the factfinder and made reasonable inferences regarding the physical manifestations of the children's injuries and that those inferences should not be disturbed on appeal. Finally, she notes that the circuit court did not enter Michael's mental health records into evidence as the court found them unnecessary.

Maryland Rule 8-131(c) provides the standard of review. It states the following:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Md. Rule 8-131(c). "'When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous.' We leave the determination of credibility to the trial court, who has 'the opportunity to gauge and observe the witnesses' behavior and testimony during the trial.'" *Barton v. Hirshberg*, 137 Md. App. 1, 21 (2001) (internal citations omitted). Although we afford deference to the trial court's factual findings, "we must make our own independent appraisal by reviewing the law and applying it to the facts of the case." *Piper*, 125 Md. App. at 754.

Subtitle 5 of Title 4 of the Maryland Code (1984, 2012 Repl. Vol., 2016 Supp.),[3]

[3] Given that Christon petitioned for the protective order at issue here in September

Family Law Article ("FL"), governs domestic violence. The statute's purpose is "'to protect and aid victims of domestic abuse by providing an immediate and effective remedy. [It] provides for a wide variety and scope of available remedies designed to separate the parties and avoid future abuse.'" *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 134 (2001) (quoting *Coburn v. Coburn*, 342 Md. 244, 252 (1996) (alteration added) (internal quotation in *Coburn* omitted)). In pertinent part, FL § 4–506(c) states the following:

> (1) If the respondent appears before the court at a protective order hearing or has been served with an interim or temporary protective order, or the court otherwise has personal jurisdiction over the respondent, the judge:
>
> (i) may proceed with the final protective order hearing; and
>
> (ii) **if the judge finds by a preponderance of the evidence that the alleged abuse has occurred**, or if the respondent consents to the entry of a protective order, **the judge may grant a final protective order to protect any person eligible for relief from abuse.**

FL § 4–506(c) (Emphasis added).[4]

"Abuse" is defined in FL § 4–501(b)(1) and includes "an act that places a person eligible for relief in fear of imminent serious bodily harm[.]" FL § 4–501(b)(1)(ii). With regard to abuse of children, the statute expands on that definition of "abuse." FL § 4–501(b)(2) states, "If the person for whom relief is sought is a child, 'abuse' may also include abuse of a child, as defined in Title 5, Subtitle 7 of this article[.]" That subtitle focuses on child abuse and neglect, and FL § 5–701(b) defines "abuse" of a child as follows:

> (b) *Abuse.* – "Abuse" means:

2016, we apply the standards and definitions in effect at that time.

[4] Effective October 1, 2014, the standard of proof in FL § 4–506(c)(1)(ii) was lessened from clear and convincing evidence to a preponderance of the evidence. Act of April 14, 2014, ch. 111 and 112, 2014 Md. Laws. Several of the cases that we cite pre-date this change; however, the propositions for which we rely upon them still hold true.

> (1) **the physical or mental injury of a child by any parent** or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, **under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed**[.]

(Emphasis added). The same section defines "mental injury" as "the observable, identifiable, and substantial impairment of a child's mental or psychological ability to function." FL § 5-701(r).

After determining that the petitioner proved the alleged abuse by a preponderance of the evidence, the court "may issue a protective order tailored to fit particular needs that the petitioner has demonstrated are necessary to provide relief from abuse." *Piper*, 125 Md. App. at 754 (quotation omitted).

Here, the circuit court heard from various witnesses about the alleged abuse, and with minor differences, the witnesses established two versions of the visit on September 4, 2016. The children recounted similar versions of the visit and declared that Michael had said repeatedly he would "sell the boat and take them away." They also expressed how they felt "sad" and "concerned" during their visits with Michael. The court credited their testimony, finding both K.M. and A.M. to be mature for their ages and also credited Christon's testimony of her children's mental state leading up to, and on, September 4.

When Michael had the opportunity to present his version of events, he chose to call A.M. to the stand—despite the court saying her testimony was likely unnecessary—and announced that his purpose was to "see if she lies like [K.M.]". A.M.'s testimony largely corroborated K.M.'s statements. Although Beverly testified on Michael's behalf and

downplayed the version of events presented by Christon and the children, even Beverly admitted that Michael had tossed the children's cell phone, "expressed concern that there are listening devices" at Mullikin Farm, and that "none of this is brand new[.]" Beverly also testified that while Michael may have mentioned selling his boat, she did not believe it would give him enough money to leave with the children. Further, even in Michael's version of events, he conceded that the children "looked scared" and "threatened" when he confronted them about their cell phone. Finally, Michael's testimony provided the trial court an opportunity to assess his demeanor and behavior. Michael admitted that he thought Mullikin Farm was bugged with listening devices and refused to answer when asked whether he discussed selling the boat to take away the children. He also called his children liars in front of the trial judge on numerous occasions.

The court, acting within its purview, assessed the witnesses' credibility by "gaug[ing] and observ[ing] the witnesses' behavior and testimony during the trial." *See Ricker*, 114 Md. App. at 592. And within that prerogative, the court found Michael's and Beverly's testimony to be less credible than the testimony demonstrating that "the children are under a great deal of stress [from] discussions about . . . taking [them] away[,]" which "resulted in emotional harm to the children." The circuit court found "by a preponderance of the evidence that they have been subjected to this mental and emotional harm by the father."

Unless clearly erroneous, we accept the circuit court's factual conclusions that "there was an incident" and "there were discussions . . . of taking the children away." Given the wealth and depth of the testimony to support its factual determinations, and its

opportunity to observe the witnesses' courtroom behavior, the circuit court committed no error here. It detailed its assessment, based on the evidence and witnesses, regarding the impact of the abuse. The court credited Christon's testimony that the abuse affected the children psychologically, including that the children refused sleep alone at night and were scared of being with their father. Moreover, the court relied on Christon's description of the physical manifestations of this abuse, inferring that the abuse was "substantial" because K.M. lost a significant amount of weight for "a very slight child." The circuit court also considered the 2015 FPO, which the court granted after Michael "allegedly choked and threatened to kill [Christon] in the presence of the children." In short, the physical and psychological indicators and previous history of abuse, combined with its determinations of witness credibility, resulted in the court's legal determination that K.M. and A.M. suffered the requisite mental injury.

We conclude that the court had adequate evidence to support its grant of the 2016 FPO to Christon, K.M., and A.M. We therefore agree with the circuit court's determination to award the 2016 FPO, and we affirm its decision.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.