

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1683

September Term, 2019

NIKIA NICKERSON

v.

MARK REGIS

Meredith,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 7, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Nikia Nickerson (“Mother”), appellant, and Mark Regis (“Father”), appellee, are the parents of a minor son, “M.,” born April 8, 2011. At the time that the Mother and Father divorced in 2015, they were awarded joint legal and physical custody of M. In 2018, Mother and Father filed the competing motions to modify custody that led to this appeal. After evidentiary hearings, the Circuit Court for Prince George’s County denied Mother’s petition and granted Father’s petition in part. But the court refused to consider evidence of Father’s past abuse, and did not make the findings required by Maryland Code (1984, 2019 Repl. Vol.), Family Law Article (“FL”), §§ 9-101 and 9-101.1. This was reversible error, and accordingly, we shall vacate the judgments entered with respect to the parties’ motions to modify custody, and we shall remand the case for further proceedings.

QUESTIONS PRESENTED

Mother presented the following questions for our review:

- A. Did the Prince George’s County Circuit Court violate Maryland Code, Family Law Section 9-101.1 in awarding joint physical and legal custody of M. to Appellee, where Appellee had been judicially found to have abused M’s mother (Ms. Nickerson) and where the trial court specifically found that Appellee has a temper that requires anger management, without making arrangements for custody or visitation that best protect M. and Ms. Nickerson?
- B. Did the Circuit Court err violate [sic] Maryland Code, Family Law Section 9-101 and 9-101.1 by excluding evidence of Appellee’s abuse of his other child and failing to make a determination that there is no likelihood of future abuse by Appellee?
- C. Did the Circuit Court abuse its discretion in finding that Ms. Nickerson’s conduct in reporting abuse to the police and otherwise

taking lawful actions to protect herself and her child should stop to avoid negative impacts on M.?

- D. Did the Circuit Court err in denying Ms. Nickerson's post-trial motion on the basis that there was no new development in law or facts that the Circuit Court had overlooked at trial?

Because we answer "yes" to questions A. and B., we need not reach the others.

FACTS AND PROCEDURAL HISTORY

The parties were married on December 20, 2010. M. was born on April 8, 2011. On June 25, 2015, the parties were divorced pursuant to a Judgment of Absolute Divorce filed in the Circuit Court for Prince George's County that, as pertinent to this appeal, awarded them joint legal and physical custody of M.

On April 18, 2018, Mother filed a motion for modification, alleging that Father "is emotionally/physically abusing minor child." Mother requested an emergency hearing, which she supported with an affidavit. In her affidavit, Mother averred:

1. I am fearful for my son's life along with mine. [Father] has recently made threats to us, by telling our son that he was going to harm us by stating he is going to do something violent to us. I am afraid along with our son. I had a restraining order on Mr. Regis that was issued [i]n January of 2017. It expired the end of January 2018. In that order, Mr. Regis was ordered to get a psychological evaluation along with domestic violence counselling which he never completed. In addition, Mr. Regis is no longer in the military due to his behavior.

My son has been consistently [] displaying concerning behavior. My ex-husband is emotionally and physically abusing our son. On 4/12/18 Mr. Regis came to pick up our son. When our son saw him, he began hiding under tables/behind boxes/behind his classroom teacher stating he was afraid to go with dad and refusing to go with him. The principal contacted me. When I was contacted, the security guard along with the secretary saw the behavior of [M.]. He expressed how afraid he was. He held me tightly and refused to look at dad and go with him.

After several attempts of convincing him they were able to get [M.] to go.

2. This is not the first time this has happened. This is the 1st time [M.] has displayed this behavior at school. [M.] has done this with me several times. He is terrified to go with [Father].

When [M.] came back on 4/13/18 he mentioned to me that [Father] threatened him stating that if he embarrassed him again like that he would abandon him and move to Florida. [M.] also told me that [Father] called him all kinds of names such as: a girl, a bitch, gay, and a faggot. [Father] also told [M.] that he was stupid and dumb. [Father] also has a woman sleeping in my son's bed.

My son is afraid to go to school. He tells me that he does not want to go to school because of [Father]. He is afraid of daddy. I am begging for your help. I don't want my son and I to be another statistic. I am begging for your help. PLEASE!! I am afraid that he is going to kill us.

I am asking the courts to please terminate access until an evaluation has been done on our son. I am also requesting that [Father] not come up to the school.

Also attached to Mother's motion for modification was a copy of the final protective order issued by the Circuit Court for Prince George's County on January 30, 2017. In that proceeding, the court found that there was a preponderance of evidence to believe that Father had placed Mother in fear of imminent bodily harm, noting that, "[o]n 12/22/2016 at 9:30 am and 7:00 pm [Father] smashed car windows, tire was slashed[,] threw rocks into dining room." Father was ordered to stay away from and not attempt to harass Mother, and to submit to a psychosocial evaluation. The Final Protective Order expired on January 30, 2018.

On July 11, 2018, Father filed his own motion to modify custody, and, on that same date, the parties agreed to a consent order making some revisions to their summer visitation schedule.

According to a final protective order issued by the Circuit Court for Prince George's County in a separate proceeding on August 23, 2018, Father also assaulted Mother on July 11, 2018, by hitting her in the face "as he attempted to remove the child from her," resulting in "small cuts inside [Mother's] mouth." In issuing that protective order, the court found that Father had committed abuse and ordered him to stay away from Mother for one year (until August 23, 2019).¹

Trial on the parents' competing motions for modification of custody took place on four dates over a six-month period between October 2018 and April 2019. On October 10, 2018, Mother testified about Father's history of abuse, including the July 11, 2018 incident. Mother testified that she took M. to the local police precinct for a visitation exchange with Father, and that Father had "yank[ed]" M. out of the car. Mother "stepped out of the car and grabbed my son's hand and that's when [Father] punched me in my face and hit me." The assault was witnessed by M., who, according to Mother, was "screaming" and "scared." As a result of the punch, Mother had cuts inside her mouth and was given an antibiotic. Mother went inside the precinct and reported the assault.

¹ Mother filed an Amended Petition to Modify Custody and Visitation on October 18, 2018, alleging that Father "has been physically and verbally abusive and hostile" to her, and that she was concerned that M. "has been verbally and physically abused" by Father. Mother requested sole legal and physical custody of M.

Father was arrested. Following a contested hearing on August 23, 2018, at which both parties and their counsel were present, the court found that there was a preponderance of evidence to believe that Father had assaulted Mother, causing her injury, during the July 11, 2018 incident.

At the hearings on the modification petitions, Father denied assaulting Mother, but conceded that M. had corroborated Mother's account—although Father believed Mother had “coerced” the child's corroboration. Father acknowledged that he had been arrested at the police station on the night of July 11, 2018, and charged with assault.²

² In addition to the evidence of Father's abuse summarized in this opinion (*i.e.*, the August 23, 2018 and the January 30, 2017 Final Protective Orders protecting Mother from Father), the record also contains: a copy of a Final Protective Order issued by the District Court for Prince George's County on February 11, 2014 covering the next one-year period and protecting Mother from abuse by Father, after the court found that Father had, on January 18, 2014, committed “assault in any degree” by “slapp[ing Mother] two times” and in October 2012, having “struck [Mother] with a belt several times”; a copy of a Final Protective Order issued by the District Court of Prince George's County on March 26, 2009 to Keisha Reives, Father's former wife, after Father was found to have committed an “assault in any degree” on her; a copy of an ex parte Restraining Order issued by the Superior Court in Milford, Connecticut on December 13, 2018 in which Myrtis Mason, the mother of Father's daughter, sought the court's protection because she and her daughter were “in fear . . . due to [Father's] aggressiveness”; a copy of a Temporary Peace Order issued by the District Court for Prince George's County on September 10, 2013, to Father's neighbor, as a result of Father's behavior, described in the neighbor's petition as “Threaten[ed] to put me in the hospital. Destroy me. Fuck me up. Called me a faggot. Wanted me to put dogs in the house so he could fight me like a man. Called me a punk. Parking vehicle illegally behind my car and . . . broken windshield. Flat tires.”; a copy of a preliminary protective order-family abuse issued by the Prince William County (Virginia) Juvenile and Domestic Relations Court on December 9, 2015 to Eugenia Rapp, Father's sister, to protect her and her 11-year-old son from Father's abuse. Additionally, the court was informed by Father's counsel that Father was facing child-abuse charges in the Circuit Court for Charles County with respect to his daughter.

Mother also proffered evidence that Father was facing allegations that he had abused his daughter (by another mother), but the trial court refused to consider such evidence as not being relevant to the custody of M.

Ultimately, by order entered June 10, 2019, the court denied Mother's motion for modification, and granted Father's motion in part. In the course of explaining at great length the reasoning behind the ruling, the judge indicated that he placed significant weight upon his own interview of M., as well as the recommendations of the custody evaluator. The judge explained (in his oral opinion delivered from the bench on June 7, 2019):

The custody evaluation was completed on April 19th, 2019. At that custody evaluation, [M.] [was] eight years of age and has been subject to court battles for four years, essentially half of his young life. A further hearing on April 30th, 2019 was conducted and during that hearing, the Court interviewed the minor child.

So as I just mentioned, the parties came before me on a merits hearing in this case on October 10th, 2018, November 5, 2018, December 10th, 2018, and on April 30th, 2019. The parties were present on all occasions and represented by counsel. Both parties testified and I heard from witnesses. **I had an opportunity to interview the minor child, [M.], and I have had an opportunity to review the recommendations from the Family Support Unit which was marked as an exhibit in this case and, as reflected in that report, the investigator recommended, among other things, week on/week off access schedule to reduce conflict and to ameliorate her concern that the conflict between the parties was hav[ing] a deleterious effect on the child and leading to anxiety with the child.**

And during the hearing, I had an opportunity to observe the parties, and listen to their sworn testimony, and evaluate their credibility and demeanor. I have considered all of the testimony and documentary evidence in this case. Both parties seek sole legal and physical custody.

* * *

In this case, the Court initially granted the parties joint legal and physical custody and later modified that order to, among other things, give the mother tie-breaking authority. The Court also ordered that the father shall have access on the alternate weeks from Wednesday to Friday on Week 1, no access on Week 2, from Thursday to Monday on Week 3, and no access on Week 4, and that was to alternate.

This arrangement clearly has not worked and has done little to tamp down the conflict between these parents. If anything, it would appear that this arrangement has amped up the conflict. With respect to the cause of this conflict, I don't find the mother's testimony to be entirely credible. On one occasion, she testified that she did not know the person who picked up [M.] from school only to learn later that that individual was the boy's godfather. Clearly, that added to conflict in this case.

Mother testified that [M.] was so upset on July 11th, 2018 that—and that is the reason why she could not exchange the child on the father's access date. And, in fact, I believe she testified that the child was screaming yet I did not hear anything from the child on this audio recording that I listened to. Needless to say, the events occurring on October—I'm sorry, on July 11th, 2018, the proverbial fire [sic], of gasoline on the fire.

The mother also testified that she received threatening text messages from the father, but I never saw them. What I saw were text messages, to be exact, that were rude, profane, uncalled for. To be sure, nothing to be proud of, but not threatening. What can't be disputed is that **there is a tremendous amount of conflict in this family and almost all of this conflict ends in one way, as having an adverse impact on the father's access to his child who was either deprived access to the child, arrested, or threatened with arrest.**

I find that all this conflict has had a substantial negative impact on the child in this case. The child's principal testified on one occasion that [M.] was crying and trembling under the table for 30 to 40 minutes, that this – this is about as compelling as evidence as it gets that this conflict is harming this child. The custody evaluation report – the custody evaluator's report also notes that – the negative impact the conflict is having in the child.

The mother has told the child, if the son is to be believed, that [M.] cannot live with both parents. [M.] apparently took that to mean that he had to choose between his parents because [M.] told the Court that he feels as if he is in the middle of this conflict, and the Court agrees with him. It is clear to the Court that the mother is not blameless in this situation and she is either unwittingly or wittingly feeding her son's anxiety and distress in this case.

While the Court would like to believe that this is not intentional in order to gain sole custody in this case, the plain fact is that time and time again, it is the father's whose – father's access that suffers adversely from these encounters.

Based on the evidence presented, the Court's conversation with the child, and based on the custody evaluation ordered in this case, **the Court finds that [M.] is being negatively affected by his parents['] behavior** and based on the Court's (indiscernible – 11:30:28) obligations to protect the child, **the Court needs to act, that as the Court finds that there has been a material change in circumstances since the last order, and that it's necessary for the Court to intervene because this child is being negatively impacted.**

(Emphasis added.)

With respect to Mother's evidence regarding Father's history of abusive behavior, the Court said:

Yes, the evidence shows that Mr. Regis has, in the past, exhibited an issue with his temper and the Court will require Mr. Regis to take parenting classes and family counseling as a condition for maintaining his custody in this case, but nothing in this record suggests the father has ever physically or mentally abused his child.

That's not what the son stated to the Court when – during the interview when he says he loves his dad, he loves to cook with his dad, watch TV, plays with his sister. He did mention that his father gets angry. I hesitate to believe that parents don't get angry from time-to-time, but he also testified the mother gets angry and that the father threatens to spank him, but the father – he told the Court that the father never does.

From this record, it appears that the mother has, you know, has not helped in reducing conflict in this case. Mother testified that the child is scared of the father and does not want to spend time with him, but that wasn't the Court's takeaway from my conversation with the child. That also was not the takeaway from the Family Support Services social worker who spoke with the child. That wasn't what the father stated when he testified under oath nor is that the testimony of the godfather who also testified under oath.

The court ordered the parties to share legal custody, with physical custody to be shared on a week-on, week-off basis. The court explained its basis for granting joint custody despite the history of conflict between the parents:

Looking at the Taylor factors and having determined that there is a material change in circumstances, the Court finds the following. With respect to ability to communicate, Court finds there's no ability of the parents in this case to communicate. Any good will that existed between these parents have [sic] long ago disappeared. I can't say who was to blame for all this. I mean, the weight of the evidence suggests that the father does have a temper.

Also, the evidence suggests that the mother is not blameless in this and engaged in a campaign to sabotage the father's relationship with his son. Whether the mother intends to sabotage that relationship is of no moment because the result is the same. What is clear is that this family has a high level of toxicity. Determining cause and effect is akin to who started the Hatfield and McCoy feud of lure [sic]. It is clear as mud.

The Court does find that [Mother] is not blameless in this conflict and that this conflict has negatively affected [M.] This Court is well-aware of the legal authority that states that a Court should not grant joint custody including the dicta stated in *Taylor v. Taylor*. Sadly, it does appear that that rancor and bitterness in this family is potentially a permanent feature in this relationship and there is no ability for the parties to communicate constructively and reach[] shared decisions regarding their child, but we'll see.

The other factor is acceptability of joint legal custody of the parents. The Court finds that the father, at some level, finds shared legal custody acceptable, but the mother does not. Fitness of the parents. Despite the

rancor that exists between the parties, I find that both parents are fit to care for their child. Relationship between the child and each parent. Court finds that the mother has an excellent relationship with her son. Son testified or told the Court that mother loves him and her behavior with him is appropriate other than giving him information about this case. But it appears that the relationship between the mother and the son is excellent.

The father and son relationship is a little bit somewhat – it's somewhat more nuanced, but I find that much of this is due to the conflict between the parents and that this child is forced to endure. The father is certainly a loving father. That's what the evidence suggests in this case, who wants to do things with his sons and the [sic] understands that based on my conversation with him.

* * *

[I]t's clear from my conversation with the child that the child loves both of his parents.

* * *

So based on the evidence and testimony presented[,] having observed the parties['] temperament and demeanor and after evaluating – reviewing the recommendations of the custody evaluation[,] and after careful consideration of the custody factors that I've just recited, the Court finds that it is consistent with the best interest of [M.] that the parents be awarded joint legal custody. Neither of these parents are perfect and neither of them have distinguished themselves.

I am aware of the inability of the parties to communicate. So, in that case – well, I should say that, you know, kids don't get to choose their parents and this Court is not prepared yet to grant one parent custody at the expense of the other. But given the high level of conflict that exists between the parents, the Court will grant tie-breaking authorities to the father on education and extracurricular activities if the parents, in good faith, cannot agree.

The Court will grant the mother tie-breaking authority on medical treatment if the parties, in good faith cannot agree. The Court will order that the parties shall consult one another on all major decisions involving [M.] I don't care how they do that, by text message or email, but they should consult each other on all major decisions involving the child

including, but not limited to, decisions regarding medical treatment, education, religious upbringing, and shall attempt to reach a joint decision on those issues.

Each party shall promptly provide to the other party any reports, records, or other documents pertaining to these decisions. The mother would add the Court's – I'm sorry. The mother will add the father's name to any medical, school, and daycare records so that father can have equal access to the same and vice versa.

With respect to extracurricular activities, the father is, in good faith, to consider the mother's schedule and the mother's wishes as to activities. If the child is enrolled in a team sport, the mother is to act in good faith and use her best efforts to support that activity. I cannot order the mother to take [M.] to team sports events or any extracurricular events for that matter and, given the high likelihood that the personal interaction between the two of you will lead to an altercation and the police being called, I'm not going to allow the father to transport the son to an activity when the child is with the mother. That's a real shame because the only person being harmed is [M.].

With respect to physical custody, after careful review of the factors laid out in *Montgomery County v. Sanders* and after consideration of all of the evidence, the Court will follow the recommendations from the Family Support Unit and order that the parents will have physical custody of [M.] on a week on/a week off basis. This schedule will commence on Tuesday, September 3rd, 2019

The court made no mention of FL §§ 9-101 and 9-101.1, but did make observations about Father's "temper" and the parties' turmoil:

With respect to the father, I'm ordering that his parenting class includes an anger management component so that he can learn additional techniques to deal with any anger issues. The Court shall order that the parents submit proof to the court that they have completed such counseling and classes by September 5, 2019 or explain to the court why they have not completed such training by September 5, 2019.

And the court urged both parents to "start agreeing" so that they could avoid incurring further legal expenses:

I suggest you start agreeing. I suggest you stop calling the police on each other. I suggest you stop doing things to have people call the police on you if that's what you're doing. **I'm not making any comments on it because I – on what occurred in the past. I wasn't there and it's not before me.** I suggest that you start acting in the best interest of this child. I'm not the only person to note that this child is being negatively affected by the both of you. The social worker who interviewed you – interviewed the child, has made that determination. He's eight years old. He can't – he didn't choose his parents in this case. I don't know what it is exactly that is – I don't want to hear it. I mean, I've heard four days of this. I don't want to – I don't know what it is, why it is that you can't seem to sit down next to each other and have a civilized conversation. I don't know who[']s] at fault. It's as clear as mud to me as to who[']s] the cause of all this, but unless you're just infinitely wealthy and want to continue to subject your child to court costs, I mean, if, you know, this is coming – this money comes from somewhere.

(Emphasis added.)

Mother's motion for new trial or to alter or amend was denied. This appeal followed.

STANDARD OF REVIEW

Mother's first two questions concern the interpretation of FL §§ 9-101 and 9-101.1. In a case raising a similar issue, we observed: "To the extent that a custody decision involves a legal question, such as the interpretation of a statute, the appellate court must determine whether the trial court's conclusions are legally correct, and, if not, whether the error was harmless." *Gizzo v. Gerstman*, 245 Md. App. 168, 191-92 (2020), citing *Burak v. Burak*, 455 Md. 564, 617 (2017).

DISCUSSION

FL § 9-101.1 provides:

- (a) In this section, “abuse” has the meaning stated in § 4-501 of this article.
- (b) **In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:**
 - (1) The other parent of the party’s child;
 - (2) **The party’s spouse; or**
 - (3) **Any child residing within the party’s household, including a child other than the child who is the subject of the custody or visitation proceeding.**
- (c) **If the court finds that a party has committed abuse** against the other parent of the party’s child, the party’s spouse, or any child residing with the party’s household, **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 the abuse.**

(Emphasis added.)

Section 9-101.1 adopted the definition of “abuse” set forth in FL § 4-501, which includes not only acts that cause serious bodily harm, but also acts that place a person in fear of imminent serious bodily harm, and “assault in any degree.” Because the court that issued the Final Protective Order regarding the July 11, 2018 assault specifically found that there was a preponderance of the evidence to believe that Father had committed an “assault” upon Mother on that date, the mandatory requirements of FL § 9-101.1(c) were applicable to this case. As we noted in *Gizzo*, 245 Md. App. at 193: “According to the Court of Appeals, the ‘legislative history of § 9-101.1 indicates recognition by the Legislature of a deep concern over the effect on a child of being in the maelstrom of *any*

domestic violence within the home, including the abuse of adults and other children, whether or not those victims are related to the child whose custody or visitation is at issue.” (Quoting *In re Adoption No. 12612 in Circuit Court for Montgomery Cty.*, 353 Md. 209, 236-37 (1999).) Because the court did not make any reference to this statute, and seemed to say that any abuse by Father that happened in the past, or with persons other than M., was of no concern—“it’s not before me”—we shall vacate the court’s order and remand for further proceedings.

Upon remand, the court shall also permit Mother to present evidence that Father has abused any other child in order for the court to consider whether it must make the mandatory findings required by FL § 9-101. That statute provides:

- (a) In any custody or visitation proceeding, **if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.**

- (b) **Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party,** except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

(Emphasis added.)

As we noted in *Gizzo*, 245 Md. App. at 193, “section 9-101 embodies a presumption ‘that a child’s best interest is not served by placing the child in the custody of someone with a history’ of child abuse or neglect.” (Quoting *In re Adoption No. 12612*, 353 Md. at 238.) *See also Santo v. Santo*, 448 Md. 620, 628 (2016) (“the best

evidence’ a court should look for is the ‘past conduct or [a] “track record” of the parties’”). Because FL § 9-101 applies if there are reasonable grounds to believe that “a child” has been abused or neglected (and not just the child who is before the court), evidence that Father has abused another child should not have been excluded on grounds of relevance.

Accordingly, we vacate the decision of the Circuit Court for Prince George’s County and remand this case to that court to hear such additional evidence of Father’s abusive conduct as may be relevant, and to make the findings required by FL §§ 9-101 and 9-101.1 before ruling on the parties’ respective motions to modify custody and visitation. Any evidence relevant to the best interest of M. should be considered.

**JUDGMENT OF THE CIRCUIT COURT FOR
PRINCE GEORGE’S COUNTY VACATED.
CASE REMANDED TO THAT COURT FOR
FURTHER PROCEEDINGS IN ACCORDANCE
WITH THIS OPINION. COSTS TO BE PAID BY
APPELLANT.**