Circuit Court for Montgomery County
Case No.: 168951FL

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

Consolidated Case Nos. 1008 and 1689

September Term, 2022

VERNON J. LEFTRIDGE, JR.

v.

NIAMBI HEYWARD

Reed,
Zic,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 3, 2023

* This is an unreported opinion. The 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).

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This case, before us for the second time, arises out of a custody dispute between Vernon J. Leftridge, Jr., Appellant, and Niambi Heyward, Appellee. The parties, who are not married, are the parents of a minor child who was born on April 14, 2015, and who was diagnosed with non-verbal autism. (Tr. 7/20/22 at 258-59). After a custody hearing on July 20, 2022, the Circuit Court for Montgomery County entered an order granting the parties joint legal custody. Appellee was granted primary physical custody and tiebreaker authority. Appellant was granted visitation on a schedule set forth by the court. Various post-judgment motions were filed and denied. Three notices of appeal were filed. Two appellate cases were opened, Nos. 1008 and 1689, September Term 2022, which by order of this Court have been consolidated. Appellant, who was represented by counsel in the circuit court, is proceeding on appeal in proper person. Appellee did not file a brief.

ISSUES PRESENTED

In his brief, Appellant presents 124 issues for our review, some of which are repetitive or difficult to discern. We have consolidated and rephrased those issues as follows:

> I. Whether the circuit court lacked jurisdiction because neither party lived in Montgomery County;
>
> II. Whether the decision to transfer the custody case to the Circuit Court for Montgomery County was based on fraud or mistake and should have been vacated;
>
> III. Whether the circuit court erred in failing to enter a default judgment based on Appellee's failure to file an answer to the amended complaint and comply with discovery orders;

IV. Whether the circuit court erred in awarding primary physical custody to Appellee;

V. Whether counsel for Appellant provided ineffective assistance of counsel;

VI. Whether the circuit court erred in failing to hold a hearing on Appellant's petition for contempt and in failing to hold Appellee in contempt;

VII. Whether the circuit court erred in denying Appellant's request for attorney's fees;

VIII. Whether the circuit court erred in failing to hold a hearing on Appellant's "Motion for Orders to Issue Against Defendant;"

IX. Whether Appellee fraudulently obtained services from Maryland Legal Aid; and,

X. Whether the trial judge was biased or engaged in the appearance of impropriety.

For the reasons set forth below, we shall remand the case to the circuit court for the limited purpose of ruling on a pending petition for attorney's fees. In all other respects, we shall affirm the judgment of the circuit court.

BACKGROUND

The procedural history of this case is complicated in part because both parties have, at times, proceeded in proper person. For clarity, we shall set forth the procedural history of the case in some detail.

On May 5, 2019, Appellant filed in the Circuit Court for Washington County a complaint against Appellee for sole physical and legal custody of their minor child, R. [1]

[1] At a scheduling conference on February 11, 2022, Appellee advised the court that the parties had a child support case pending in Connecticut. At the merits hearing, Appellee (continued)

Appellee failed to file a responsive pleading. On July 22, 2019, Appellant requested an order of default, which was granted on July 26, 2019. On February 18, 2020, Appellee filed an "answer" to the "Hearing Default" in which she denied Appellant's allegations. She also filed a counter-complaint seeking sole physical and legal custody of R. On the same date, the parties, each proceeding in proper person, appeared at a hearing before a family magistrate. The magistrate recognized that an order of default had been entered against Appellee and noted:

> The Defendant did not file an answer to the Complaint. The Defendant appeared and indicates that the minor child lives with her. Under Flynn v. May, the default order should be vacated and the Defendant permitted to file an answer to the Complaint. There is no agreement regarding custody. This hearing was scheduled to take testimony. As the case is contested, the hearing should be continued and rescheduled by the Assignment Office. There is also an issue of proper venue which will be reviewed by the Magistrate.

Thereafter, Appellee filed a motion to transfer venue from Washington County to Montgomery County, arguing, *inter alia*, that Montgomery County was the more appropriate venue because she and the child were residents of Montgomery County and had been since March 2016. Appellee was represented by counsel from Maryland Legal Aid, who entered her appearance for the limited purpose of filing the motion to transfer venue. Over Appellant's objections, the court granted Appellee's motion to transfer venue. Appellant appealed from that decision. In an unreported opinion, *Leftridge v.*

explained that she filed for child support in Montgomery County in 2018, but because she and Appellant were living in Connecticut at the time, the case went through courts in that state. According to Appellee, child support was originally ordered in 2019 and was modified in 2022. No issue of child support was involved in the instant case.

Heyward, No. 0251, Sept. Term 2020 (entered January 20, 2021), we affirmed the circuit court's decision to grant the motion to transfer the case to the Circuit Court for Montgomery County. The Supreme Court of Maryland, then known as the Court of Appeals, denied Appellant's petition for writ of certiorari. *Leftridge v. Hayward*, 474 Md. 230 (2021).

On May 8, 2020, the case was transferred to Montgomery County and Appellant's complaint for custody and Appellee's counter-complaint for custody were docketed in Montgomery County Circuit Court Case No. 168951FL. Several months later, on October 1, 2021, Appellant filed an answer to Appellee's counter-complaint. He also filed an amended complaint that sought the same relief requested in his initial complaint for custody. Appellant experienced difficulty serving his amended complaint for custody on Appellee. Eventually, the court granted Appellant's request for alternative service of his amended complaint and Appellee was served via regular mail. Appellee did not file an answer to Appellant's amended complaint.

On October 7, 2021, Appellant filed a motion to compel Appellee to respond to discovery requests. The court granted that motion, in part, and ordered Appellee to provide discovery responses within 15 days of the order. Again, on April 26, 2022, Appellant filed a motion to compel discovery which was granted. Appellee was ordered to provide full responses by June 16, 2022. There is no indication in the record that Appellee ever responded to Appellant's discovery requests.

On several occasions, Appellant requested that an order of default be entered due to Appellee's failure to answer the amended complaint for custody. On two occasions,

the court denied his request because there was no proof that Appellee had been served with the amended complaint. On December 1, 2021, the court denied Appellant's request on the ground that it was moot because a default had been entered previously on July 26, 2019. Appellant's final request for an order of default was filed on July 18, 2022, after Appellee had been served with the amended complaint, but just two days before the hearing on the merits. The court denied that motion as moot on August 2, 2022.

On January 5, 2022, Appellant filed a petition for contempt. He argued that he had been advised by a sheriff's deputy that Appellee did not reside at the address she provided to the court on December 17, 2021. Appellant requested a court order requiring Appellee to provide her true address. Appellee responded to the petition for contempt by providing her address which was on Roanoke Avenue in Takoma Park.

After a hearing, a pendente lite order was entered on April 26, 2022. The order provided for Appellant to have in-person access with R. every Saturday from noon to 3 p.m. at Appellee's residence or a location mutually agreed upon by the parties. Those visits were to continue until both parties agreed that R. was comfortable being with Appellant. At that point, Appellant would have unaccompanied access to the child on Saturdays from noon to 3 p.m. Appellant was also provided Zoom or Facetime meetings with R. every Tuesday and Thursday at 7 p.m.

Merits Hearing

A hearing on the merits was held on July 20, 2022. Appellant was represented by counsel and Appellee proceeded in proper person. Appellee testified that she lived in an apartment at an address on Roanoke Avenue in Takoma Park and that she had lived there

for "about two years," although she also testified that she thought she moved to that address in about August 2021. Prior to that time, she lived with her mother at an address on Garland Avenue in Takoma Park. In between those two places, she lived at another home owned by her mother on Sheridan Avenue in Lanham, Maryland. Her mother did not work and helped her with R.

Appellee and Appellant never lived together. They met when Appellee lived in Connecticut but had already stopped seeing each other when Appellee moved to Maryland to be near family in about January 2015, a few months before R. was born. According to Appellee, Appellant had promised to come to Maryland, and she had hoped he would live in her apartment, but that did not happen.

At the time of the merits hearing, R. was 7 years old. He could not speak and was unable to communicate at all. When Appellee first learned that R. had autism, she changed her work schedule to a split shift and worked from 6 to 9 a.m. and from 3 to 6 p.m. She did that so she could be with R. during the day and so that he could attend the Montgomery County Infant and Toddler Program which offered speech, sensory, and occupational therapy.

At the time of the hearing, Appellee was employed as a program director at a childcare center in Hyattsville. She claimed she worked from 7 or 7:30 a.m. to 5:30 p.m., but that she created her own hours. Later, she clarified that the childcare center is open from 7:30 a.m. to 5 p.m. She did not work on weekends.

R. attended Cannon Road Elementary School from 9 a.m. to 3 p.m. Appellee picked him up from school and took him to an after-school program known as Verbal

Beginnings that ran from 5 to 7 p.m. R. also participated in a "feeding" program. According to Appellee, Appellant lived with his sister and her eight children in Hagerstown, but she had never been to that residence.

Appellee testified that it was important for R. to have time with both of his parents and for both parents to be active in his life. Appellee had contact with Appellant's family. She visited Appellant's sister at Christmas and went to his mother's house in Virginia Beach at a time when Appellant's mother, stepfather, sister, and his sister's children were there, but Appellant was not.

Appellee requested sole physical and legal custody of R. She believed that she should choose R.'s school because she had been in R.'s life while Appellant had only seen him on two occasions and engaged with him for only 10 minutes. She stated that Appellant first saw R. in person on April 27, 2019, when he brought 20 members of his family to R.'s birthday party. The party was held at the Garland Avenue address in Takoma Park where Appellee was living at the time. According to Appellee, the party was attended by 70 to 80 people. Appellee had invited Appellant to come to Maryland in advance of the party to see R. on his own, but he did not do so. Although Appellee invited Appellant to R.'s birthday party every year, he did not attend prior to the party in 2019. Three or four weeks after the birthday party, Appellant met R. at a park near Appellee's house.

For three months from 2018 to 2019, R. attended East Silver Spring Elementary School, where he was in a special needs program. Thereafter, he attended Little Leaves Behavioral Services, a therapeutic center. Appellee sent a report from R.'s first day at

Little Leaves to Appellant and his mother. She did not, however, discuss R.'s enrollment generally with Appellant because he was not in R.'s life and did not engage with him. In April 2021, Appellee was making plans for R. to attend Rolling Terrace Elementary School, his "home" school in Takoma Park, when she received notice that the school did not have services to meet R.'s individualized education program ("IEP"). She was advised that Cannon Road Elementary School would be the best place for R because it had an autism program. Appellee acknowledged that she did not inform Appellant that R. changed schools in October 2021 when he enrolled in Cannon Road Elementary School. She did not list Appellant as a contact person when she registered R. at Cannon Road. Nor did she send R.'s educational information to Appellant because the "school does it." Appellee maintained that Appellant did not show interest in R.'s life until the child support case was filed in 2018 and that he told her if she did not drop the child support case, he would take custody of R.

Appellee requested the court establish a visitation schedule that would allow R. to begin forming a relationship with Appellant because, according to her, Appellant had only seen R. two times and engaged with him for 10 minutes. Appellee asked that the visits be observed, and that Appellant be required to take a parenting class offered at Verbal Beginnings, where R. was attending a summer program. She wanted Appellant to engage with R. physically in R.'s home, which was his "comfort zone."

Communication between the parties was problematic. Appellee stated that she had Appellant's email address but that calls to his cell phone went directly to his voice message. She did not stay on after the court-ordered, pendente lite Zoom visits between

Appellant and R. because after the visits R. was "frustrated and tired" and "ready for bed." She acknowledged that because R.'s after school program ends at 7 p.m. she was sometimes late in connecting for the Zoom visits, although she claimed that the most she was late was six minutes. She accommodated a request by Appellant to change the time for the Zoom meeting to 8 p.m. when he was unable to make the 7 p.m. time. Appellee also acknowledged that she had two telephone numbers, although she testified that she was no longer using one of them.

Appellee claimed that on two occasions Appellant refused to sign papers required for R. to attend the Verbal Beginnings summer program, causing R. to miss the first day. She acknowledged that Appellant eventually signed the required paperwork, and that R. was attending the program. Appellee did not wish to make joint decisions about R. and acknowledged that she had not involved Appellant in decisions about the child.

Appellant testified that beginning in 2019, he lived with his brother-in-law in Hagerstown. After about three years, he moved to a two-bedroom residence in Hagerstown. At the time of the hearing, he was in the process of buying a house in the Cannon Road Elementary School district and he anticipated moving "within two months." At his home, R. would have his own room. Appellant asked Appellee for a photograph of R.'s room at her house so that he could mirror it in his own house, but she did not respond to his email request. Appellant is disabled, but he stated that his disability did not prevent him from caring for R. Because he does not work, his day "is free" and, although he had not seen R.'s schedule, he believed he could follow it. Appellant had a vehicle and was able to drive.

At the time R. was born in 2015, Appellant was living in Massachusetts where he was attending school. Appellee let him know she was in labor, and he communicated with her by Facetime and other means. Appellant claimed that Appellee said she would get a hotel "up north" so that they could "bond together as a family," but she failed to follow through with that. They also discussed him moving in with Appellee, R., and Appellee's mother, but that did not happen. Between R.'s birth and 2018, Appellant communicated with Appellee by Facetime. Starting in 2018, he called her and sent texts and emails. Appellant acknowledged that he was invited to R.'s birthday parties. He stated that he saw R. at the child's birthday party in 2018. After that time, he met with R. in person "about six times." Appellant moved to Hagerstown in 2019.

Appellant stated that Appellee refused to tell him the name of the school R. attended. He discovered it in R.'s medical records which he obtained "through a national database" in the Spring of 2020. Appellant also testified that he obtained R.'s records from the National Archives in Washington, D.C. in 2021. When he contacted Cannon Road Elementary School, his name was not listed as a contact person in R.'s records. Since that time, he has had contact with R.'s teacher, principal, and his IEP team. He started receiving reports from the school in October 2021.

Appellant testified about issues related to in-person and virtual visits subsequent to the pendente lite order of April 26, 2022. Subsequent to the entry of the pendente lite order, Appellant did not have any in-person visits with R. At the time of the merits hearing, Appellant had missed 6 in-person visits with R. He missed those visits because he attended a funeral and because his father was hospitalized. He said he notified

Appellee in advance that he would miss those visits. He also attempted to reach R. via Zoom on those dates, but Appellee did not pick up. On June 25, July 2, July 9, and July 16, 2022, he went to Appellee's residence for Saturday visits with R., but Appellee did not answer the door. On June 25th, he called and attempted "Zoom timing" Appellee, but she did not pick up on either her former phone number or her new one. He stayed at her property, in view of the front door, for about two and a half hours.

With the exception of one time when his phone was not working, Appellant was available to participate in Zoom calls with R. on Tuesdays and Thursdays. Initially when he called, R. was at a playground and not at a quiet place. According to Appellant, on about 10 to 13 occasions, he called Appellee and she did not answer. When virtual visits were missed, he contacted Appellee by email. Appellant denied he was ever late for a Zoom meeting with R.

With regard to R.'s attendance at the Verbal Beginnings summer program, Appellant testified that he received the required forms electronically from the program director "like a day before the program started or the day of." He signed and returned the form within 24 hours. According to Appellant, Appellee did not ask him to sign any forms for the summer program prior to that time.

Appellant disagreed with Appellee's request that he and R. build a bond together before starting overnight visits. He requested that Appellee drop off R. at his home and allow him to spend time with him because R. had shown that he was able to adapt to new people without any hesitation or questions. Appellant stated that he should have overnight time with R. In addition, because he is free during the day, he could "supplicate

what [Appellee's] doing, in addition to providing those autism services for my son." Appellant requested access to R. Mondays through Thursdays and proposed "giving the mother the weekend, Friday, Saturday, and Sunday." He did not believe that R.'s schedule would be disrupted. He asked to pick up R. from school for his visits and to alternate weeks in the summer, on holidays, and school breaks. He testified that each parent should have the right of first refusal to be with R. if the other parent was unable to be with him. He also stated that his sister or his niece could babysit for R.

Appellant testified that he was familiar with R.'s care needs, that he had copies of R.'s IEP, and that he was able to help carry out the recommendations in the IEP. Appellant had "five years of professional work experience working with children, and adults, and teenagers who have autism" at the Caring Community of Connecticut, which he described as Connecticut's special needs agency. From 1995 to 2000, Appellant was a "community service special needs" representative and "worked out at the group homes with three clients administering meds, following in-service programs, nutrition." Based on the training he received at the job, Appellant felt equipped to work with R's special care needs.

We shall discuss additional facts as necessary in our discussion of the issues presented.

Court's Custody Decision

At the conclusion of the hearing, the trial judge addressed the required factors for a custody determination. The court found that there was "some level of miscommunication" between the parties, "a great deal of setting each other up going on here," that neither party

was completely candid with the court, and that neither party was completely credible. After a complete review of the required factors, the court ordered joint legal custody. The parties were ordered to communicate in good faith and make a sincere effort to reach a mutual and voluntary joint decision with regard to major decisions concerning R. Appellee was given tie-breaker authority. The parties were further ordered to communicate about R. in writing.

Appellant was granted in-person access to R. every Saturday from noon to three p.m. at Appellee's residence or another mutually agreed upon location. The court required demonstrable, substantial compliance for six months before visits would move to the next phase. If there was substantial compliance with the in-person visits for six consecutive months, Appellant would be permitted visits with R. every other weekend from Saturday at 9 a.m. to Sunday at 6 p.m. and on Wednesdays from 6:30 to 9:00 p.m.

In addition to in-person visits, Appellant was granted virtual visits with R. on Tuesday and Thursday evenings. The calls were to be initiated by Appellee from a designated phone number and R. was to be in a private setting with no one else around. The parties were ordered to give a reasonable window of time to make the calls and to email the other party if running late. A written order reflecting the court's custody determination was filed on August 8, 2022.

On July 27, 2022, Appellant filed a motion to amend the judgment or, in the alternative, for a new trial. The following day, he filed a motion for new trial based on fraud, mistake or irregularity and a motion to strike both the judgment and Appellee's evidence and testimony from the record. On August 11, 2022, Appellant filed a notice of appeal. Four days later, the circuit court denied his motion to amend the judgment,

motion for new trial, and motion to strike the judgment. On August 29, 2022, the court granted a motion to strike the appearance of Appellant's attorneys. He has proceeded in proper person from that time.

Appellant filed a second notice of appeal on September 8, 2022. On October 13, 2022, Appellant filed a motion to stay the circuit court case pending his appeal. That motion was denied on November 4, 2022, and a third notice of appeal from that ruling was filed on November 28, 2022. By order of this Court, the appeals were consolidated.

DISCUSSION

I. Jurisdiction & II. Vacation of Decision to Transfer Custody

Appellant contends that the circuit court lacked jurisdiction because neither party lived in Montgomery County. He argues that "material evidence" established that Appellee was not a resident of Montgomery County and that she lived in Lanham, in Prince George's County, Maryland. Specifically, Appellant asserts that Appellee "committed intentional fraud" upon the court when, at a hearing on December 17, 2021, she testified that she was living at a certain residence on Garland Avenue in Takoma Park. He claimed that an officer from the Montgomery County Sheriff's Office was unable to serve her at that address. Appellant also contends that the transfer of his custody case to Montgomery County should have been vacated because it was based on fraud or mistake with respect to Appellee's residence. Appellant's contentions are without merit.

Maryland Rule 8-131(a) provides that "[t]he issue of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court.

Section 1-201(b) of the Family Law Article ("FL") provides that an equity court has jurisdiction over "custody or guardianship of a child except for a child who is under the jurisdiction of any juvenile court and who previously has been adjudicated to be a child in need of assistance[,]" and "visitation of a child[.]" Jurisdiction of a court hearing for a child custody petition depends, in the first instance, on the domicile of the child. *Schwartz v. Schwartz,* 26 Md. App. 427 (1975) (citing *Renwick v. Renwick*, 24 Md. App. 277, 284 (1975)).

The facts show that the domicile of R. and his mother was Montgomery County. Appellee testified that she resided with R. on Roanoke Avenue in Takoma Park and that she had lived there either for "about two years" or since August 2021. Prior to that, she lived on Garland Avenue, also in Takoma Park. Appellee testified that in between those places, she resided in Lanham, but there was no evidence as to the dates she lived at that location. The affidavit of service for the complaint filed in the Circuit Court for Washington on June 18, 2019, indicates that the complaint was served on Appellee's mother who lived at the Garland Avenue residence with Appellee. On February 18, 2020, Appellee filed in the Circuit Court for Washington County an answer to the "Hearing Default" and listed her address as Garland Avenue. In her April 16, 2020 motion to transfer venue from the Circuit Court for Washington County to the Circuit Court for Montgomery County, Appellee, through counsel, stated that she and R. had resided in Montgomery County since March 2016. In addition, there was evidence that R. attended a public school in Montgomery County and that he had, in the past, attended the Montgomery County Infant and Toddler Program, and a preschool education program at East Silver Spring

Elementary School. Further, Appellant served his amended complaint on Appellee at the Roanoke Avenue address. Because there was ample evidence to support a conclusion that R.'s domicile was in Montgomery County, the Circuit Court for Montgomery County did not err in exercising jurisdiction over the custody case.

Appellant's contention that the order transferring the case from the Circuit Court for Washington County to the Circuit Court for Montgomery County should have been vacated is not properly before us. Appellant challenged the initial decision to transfer the case but, as we have already noted, that decision was upheld in the prior appeal and Maryland's Supreme Court denied his petition for writ of certiorari. Our decision in *Appellant v. Appellee*, No. 0251, Sept. Term 2020 (entered January 20, 2021), is now the law of the case. The doctrine of the law of the case precludes parties from relitigating issues that were raised and decided on appeal or could have been presented in the previous appeals of the same case. *Fidelity-Baltimore Nat. Bank & Tr. Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 372 (1958); *Holloway v. State*, 232 Md. App. 272, 282 (2017). Thus, "once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Scott v. State*, 379 Md. 170, 183 (2004) (footnote omitted). The Circuit Court for Washington County did not err in transferring the case and the record established that the Circuit Court for Montgomery County had jurisdiction and was a proper venue.

III.

Many of the issues raised by Appellant pertain to his contention that the circuit court erred in failing to enter a default judgment based on Appellee's failure to file an answer to

the amended complaint and failure to comply with discovery requests and orders. Specifically, he maintains that, as a consequence of her failure to file an answer and discovery responses, the court should have entered a default judgment and awarded him sole custody, and everything requested in his amended complaint. That argument is without merit.

Appellant filed several requests for an order of default. The first was filed while the case was pending in the Circuit Court for Washington County. That court entered an order of default on the initial complaint, prior to the time the case was transferred. Thereafter, in the Circuit Court for Montgomery County, Appellant filed an amended complaint. On several occasions, he filed a request for an order of default. On two occasions, his requests were denied because there was no proof that the amended complaint had been served on Appellee. On December 1, 2021, the court denied Appellant's request as moot, noting that the Circuit Court for Washington County had entered a default order on July 26, 2019.

Although the record reveals that Appellee failed to file an answer to the amended complaint, failed to appear for her deposition, and failed to provide responses to Appellant's discovery requests even after being ordered to do so, default judgments are not favored in child custody cases. In *Flynn v. May*, 157 Md. App. 389 (2004), we questioned whether a judgment by default was ever appropriate in a case of disputed child custody. *Id.* at 411. We noted that a "default judgment cannot substitute for a full evidentiary hearing when a court, in order to determine custody, must first determine the best interest of the child." *Id.* at 407. Quoting from *Taylor v. Taylor*, 306 Md. 290, 303 (1986), we emphasized that in any child custody case, the paramount concern is the best interest of the

child which is not considered as one of many factors, but as the objective to which virtually all other factors speak. *Id.* We also recognized that a custody determination will not "turn upon the procedural gamesmanship of the litigation" between the child's parents and that the rights of a father and mother sink into insignificance before the best interests of the child. *Id.* at 408-09. Relying in part on *Rolley v. Sanford*, 126 Md. App. 124 (1999), we recognized that a child has "an indefeasible right to have any custody determination concerning him made, after a full evidentiary hearing, in his best interest" and that the child "did not lose that right when his Mother failed to file a proper responsive pleading to the Father's complaint." *Id.* We concluded:

> As sorely tempted as we are to hold flatly that the default judgment procedure of Maryland Rule 2-613 is not applicable to child custody disputes, it is not necessary to go so far. We are content to hold that, at the hearing on August 1, 2003, the trial court, in the circumstances of this case, abused its discretion when it ordered a change in the primary physical custody of [the child] without permitting witnesses to testify or other evidence to be offered. We nevertheless note that it is impossible for us to conjure up a hypothetical in which a judgment by default might ever be properly entered in a case of disputed child custody. We are not hereby transforming our dicta into a holding. We are, however, unabashedly adding deliberate weight to the dicta. Our comments are not random, passing, or inadvertent.

In the underlying case, Appellant's amended complaint sought the same relief as his original complaint. In response to the original complaint, Appellee filed a counter claim for sole legal and physical custody. Appellant filed an answer to the counter-complaint. Appellant was clearly aware that Appellee opposed his request for custody of R. and that she sought sole physical and legal custody of the child. With respect to the discovery failures, Appellant has not directed our attention to any place in the record where he

requested a continuance to review the evidence offered by Appellee at the merits hearing or to subpoena witnesses in response to that evidence. In light of the nature and circumstances of the case at hand, it is absolutely clear that the circuit court did not abuse its discretion in failing to enter an order of default, in failing to sanction Appellee by barring her from testifying or submitting evidence, or in failing to grant sole physical and legal custody to Appellant solely because of Appellee's failure to file an answer and provide discovery responses.

IV.

Appellant next contends that the circuit court erred in awarding primary physical custody to Appellee. Although he raises myriad arguments in support of that contention, and his brief is, at times, difficult to discern, he clearly asserts that he had the more stable home; that he was a fit and proper parent; that Appellee frequently changed addresses and lied about her residences; that he could provide R. with his own bedroom; that his amended complaint was unopposed; that he had professional experience working with children who have autism; that the court gave "maternal preference" to Appellee; and, that the court ignored "clear material evidence" that Appellee lived in Prince George's County. Appellant also maintains that the court's custody order deprived him of "rightful access to his biological minor-child at his personal home" in violation of his constitutional rights as a "legal custodial parent" and that he was deprived of "his constitutional protected liberty interest" in the care and custody of R.

"The fundamental liberty interests of parents 'provide[ ] the constitutional context that looms over *any* judicial rumination on the question of custody or visitation.'" *Barrett*

v. Ayres, 186 Md. App. 1, 17, (2009) (quoting *Koshko v. Haining*, 398 Md. 404, 423 (2007)). "[T]he rights of parents to direct and govern the care, custody, and control of their children is a fundamental right protected by the Fourteenth Amendment of the United States Constitution." *Conover v. Conover*, 450 Md. 51, 60 (2016). At the same time, "[t]he primary goal of access determinations in Maryland is to serve the best interests of the child." *Id.* at 60. In custody disputes between parents, neither parent has a superior claim to the right to custody, and the issue is decided based on the best interests of the child. *McDermott v. Dougherty*, 385 Md. 320, 353 (2005); *Caldwell v. Sutton*, 256 Md. App. 230, 264-65 (2022). "[W]e review [a parent's] asserted denial of due process by an appraisal of the totality of the facts of the case." *In re Maria P.*, 393 Md. 661, 676 (2006). Due process "does not require procedures so comprehensive as to preclude any possibility of error." *Id.* at 674. Instead, "due process merely assures reasonable procedural protections, appropriate to the fair determination of the particular issues presented in a given case." *Id.* at 674-75.

When a matter is tried without a jury, like the custody proceeding in this case, we review the trial court's ruling on both the law and the evidence, but we will not set aside that court's judgment "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). "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Friedman v. Hannan*, 412 Md. 328, 335-36 (2010).

In reviewing custody determinations, we employ three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). Maryland's Supreme Court has explained those three levels of review as follows:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (alterations in original) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). Where there is no clear error, we will uphold the court's findings unless there is an abuse of discretion, meaning that "'no reasonable person would take the view adopted by the trial court,'" or the court acts "'without reference to any guiding rules or principles.'" *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). "We will not reverse simply because we would not have made the same ruling." *Jose v. Jose*, 237 Md. App. 588, 599 (2018).

In our review, we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *In re Yve S.*, 373 Md. at 584 (quoting *Davis v. Davis*, 280 Md. 119, 122-26 (1977)). We recognize that

> it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of discretion. Such broad discretion is vested in the [trial court] because only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he [or she] is in far better position than is an appellate court, which has only a cold record before it, to weigh the

> evidence and determine what disposition will best promote the welfare of the minor.

Id. at 585-86.

"Decisions as to child custody and visitation are governed by the best interests of the child." *Gordon v. Gordon*, 174 Md. App. 583, 636 (2007). In assessing the best interests of the child, consideration is given to guiding factors set forth in *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977), and *Taylor v. Taylor*, 306 Md. 290 (1986). "Although courts are not limited to a list of factors in applying the best interest standard in each individual case," *Azizova v. Suleymanov*, 243 Md. App. 340, 345 (2019), cases beginning with *Sanders* and *Taylor* have provided a checklist of more than twenty factors, many with significant overlap, that a court must consider when making custody determinations. Those factors include: (1) the fitness of the parents; (2) the character and reputation 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; (20) the benefit to the parents in maintaining the parental relationship with the child; and (21) any other consideration the court determines is relevant to the best interest of the child. *See Jose v. Jose*, 237 Md. App. 588, 599-600 (2018) (citing *Taylor*, 306 Md. at 304-11 and *Sanders*, 38 Md. App. at 420).

When considering the *Sanders-Taylor* factors, the trial court should "examine the totality of the situation in the alternative environments and avoid focusing on any single factor" to the exclusion of all others. *Best v. Best*, 93 Md. App. 644, 656 (1992). "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.'" *Santo*, 448 Md. at 626 (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977)). Stated otherwise, the best interest standard is "*the* dispositive factor on which to base custody awards." *Wagner v. Wagner*, 109 Md. App. 1, 38 (1996) (emphasis in original).

With these standards in mind, we turn to Appellant's contentions. We find no abuse of discretion or clear error in the circuit court's determination of custody in this case. The record makes clear that the trial court properly recognized, considered, and weighed the applicable required factors. In announcing its decision on the record, the court began by addressing the parties' ability to communicate. Specifically, the judge stated that the "first and most important factor to consider is the capacity of the parents to communicate and reach shared decisions affecting the child's welfare." The court determined that it did "not have any sense that the parents can communicate," that "both parents have not been credible to me on different issues," that "there is some level of miscommunication

between" the parents, and that there was "a great deal of setting each other up going on here, and I cannot determine who was telling the truth." The court recognized that there were problems with the parties' use of Zoom and those problems were compounded by the fact that Appellee had two phone numbers and had used two different Zoom links.

The court found that the parties had only one child, R., born on April 14, 2015. The court credited Appellee's testimony that the first time Appellant visited R. in person was at the child's birthday party in 2019. The court recognized the "relatively uncontested" fact that Appellant was absent during the early years of R.'s life and gave little weight to Appellant's testimony that, at the time, he lived in another state. The court rejected the idea that seeing the child via Zoom or Facetime was the same as seeing him in person and determined that there was not a great effort made to see the child physically. The court determined that Appellant moved to Hagerstown, Maryland in 2019 and found that his testimony about moving to a location closer to R. was vague.

The court credited Appellant's testimony that he obtained R.'s medical records from a national database and found it "completely unacceptable that he would have to resort to searching for his son's medical records." The court also recognized Appellant's testimony about his prior training and work experience with people who have autism but noted his failure to provide corroborating evidence. The court also took note of the fact that the evidence of the parties' communication consisted of post-litigation communications, and that it did not have evidence of how they communicated previously. The court reviewed evidence of the parties' communications and concluded that Appellee's explanations lacked credibility and she was not candid with the court and that Appellant's reasons for

failing to take advantage of the in-person visits offered in the pendente lite order also lacked credibility. The court also took "judicial notice of the fact that the record in this case is replete with questions about where [Appellee] lived." The court concluded that "[i]t may be that [the parties] can demonstrate an ability to communicate. But it hasn't happened now."

The court then reviewed the *Taylor-Sanders* factors. It found that both parties were fit parents. As to the willingness of the parties to share custody, the court noted that Appellee did not want shared custody. The court found Appellant's desire for 50/50 custody "a little bit surprising given that he hasn't seen the child in this long". With respect to the parents' relationship with R., the court recognized that Appellee had been R.'s primary caretaker and questioned how deep a relationship Appellant could have established "because he hasn't seen the child[,]" whether because Appellee prevented that contact or because it just did not happen.

The court found that to change R.'s living arrangement from his current situation to a 50/50 custody situation with Appellant would constitute a "big, big disruption" and "a huge transition" for R. The court did not weigh R.'s preference as no evidence was presented on that issue. As for the geographic proximity of the parents' homes, the court recognized that Appellant was living in Hagerstown, less than two hours away from R., and that he had plans to move even closer, so there was no impediment in his ability to see R. The court determined that both parents would be able to provide a comfortable and accessible home for R. and the judge credited Appellant's testimony that he would attempt

to prepare a room for R. in his home that was similar to the room he had at his mother's house in order to provide some continuity.

With respect to the demands of parental employment, the court weighed that factor in favor of Appellant because he did not work and would be at home to care for R., while Appellee was employed and relied on her mother for backup. The court found both parents sincere in their requests for custody of R. Lastly, the court determined that no negative evidence was presented with respect to either parties' financial status and there was no evidence about state or federal assistance.

The court's ultimate custody order provided Appellant with an opportunity to have in-person visits with R. and establish a relationship over a period of six consecutive months. That relationship-building would be continued in virtual visits on Tuesday and Thursday evenings. The court addressed the difficulties faced in virtual communications by requiring Appellee to initiate the virtual visits using a specified phone number and requiring R. to be in a private setting. The court also required all communications between the parties to be in writing. After "substantial compliance" with the visitation schedule for a period of six months, Appellant would have visits with R. every other weekend from Saturday at 9 a.m. to Sunday at 6 p.m. and dinner on Wednesdays from 6:30 p.m. to 9 p.m. The court specified that the custody order was established to respond to the "limited exposure personally between dad and son" and to provide "a transition period." The court recognized that, "in the future, a different access schedule would be more appropriate because there has been a material change in the relationship from today."

Competent evidence exists in the record to support the trial court's conclusions. We cannot say that "no reasonable person would take the view adopted by" the trial court, nor that the court's custody ruling is "removed from any center mark imagined by the reviewing court" or is "clearly against logic and facts presented in this record. *Santo*, 448 Md. at 625. Therefore, we affirm the circuit court's award of primary physical custody of R. to Appellee, visitation to Appellant according to the schedule set forth in the order, and the award of joint legal custody to both parties, with tiebreaker authority to Appellee.

On this record, we are not persuaded that Appellant was denied due process or that the circuit court otherwise abused its discretion by proceeding with the hearing despite his claims that he had not received discovery responses from Appellee. Appellant did not request a continuance or postponement of the hearing and did not lodge objections to Appellee's testimony or evidence on that basis. In fact, the record reflects that the majority of the exhibits offered by Appellee were admitted without any objection at all.

V. Ineffective Assistance of Counsel

Appellant was represented by counsel at the merits hearing on July 20, 2022. He asserts that his attorney provided ineffective assistance of counsel by, among other things, failing to object to Appellee's testimony and evidence on the ground that she had not answered the complaint and complied with discovery requests. Appellant's contention is without merit. Because this custody case is a civil action, there is no constitutional right to effective assistance of counsel that provides Appellant with a basis for relief. Parties are only entitled to counsel in criminal cases. *See* U.S. Const. amend VI; Md. Const. Decl. of Rts. art. 21; *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 432 (2003) ("Article 21 of the

Maryland Declaration of Rights applies solely to criminal prosecutions and provides that every criminal defendant is 'allowed counsel.'") A party to a civil suit, on the other hand, does not automatically have a Sixth Amendment constitutional right to counsel except in a proceeding that involves possible incarceration. *Abrishamian v. Wash. Med. Grp., P.C.*, 216 Md. App. 386, 407 (2014); *Zetty v. Piatt*, 365 Md. 141, 156-57 (2001). As this custody case is a civil proceeding in which Appellant's liberty was not in jeopardy, he is not entitled to assert a claim for ineffective assistance of counsel and, for that reason, we reject his contention.

VI. Waiver of Contempt

Appellant asserts that the circuit court erred in failing to hold a hearing on his petition for contempt filed on January 5, 2022, and in failing to hold Appellee in contempt. In his contempt petition, Appellant asserted that Appellee "made a false admission of fact to Court on 12/17/2021 that she lives at [XXX] Garland Avenue, Takoma Park, MD." He further asserted that "[o]n 12/17/2021, Deputy Syngol went to home & she does not live there and is, therefore, in contempt of the order." Appellant requested the court to order Appellee "to file under oath her actual true residence," "disclose the address where the minor-child is sleeping and living," and "to file a copy of her residential lease with the court." In her answer to the petition for contempt, Appellee gave her Roanoke Avenue address.

At the merits hearing, the court reviewed outstanding motions and the following occurred:

> THE COURT: Okay. And then there was a petition for contempt followed [sic] by the father January 5 of 2022. That was not before me, but do you still wish to proceed on that? Do you want me to leave that alone or do you want to withdraw that? It had to do with allegations that defendant made a false admission of fact, that she lived at [ ] Garland Avenue, ordering her to file a true address, and it references the Cannon Road Elementary School stuff. It's – that's entirely – that was filed pro se. It's pending. Do you wish to leave it?
>
> MR. APPELLANT: That can be mute [sic], Your Honor.
>
> THE COURT: What's that?
>
> [COUNSEL FOR APPELLANT]: He's saying that can be moot as well, or it can be –
>
> THE COURT: Do you want to withdraw it?
>
> [COUNSEL FOR APPELLANT]: Yes, Your Honor.
>
> MR. APPELLANT: Yes, Your Honor.
>
> THE COURT: Okay. This has to do with her address. So the petition for contempt that is filed at – that was filed pro se, January 5 of 2022. Okay. That is withdrawn by plaintiff. All right.

Because Appellant agreed to the withdrawal of his petition for contempt, he waived any issue with respect to it including whether a hearing should have been held. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *VEI Catonsville, LLC v. Einbinder Props., LLC*, 212 Md. App. 286, 293-94 (the right to appeal may be lost by acquiescence or waiver, that is a "'voluntary act of a party which is inconsistent with the assignment of errors on appeal[.]'").

VII. Attorney's Fees

Appellant next contends that the circuit court erred in denying his request for attorney's fees. On July 26, 2022, Appellant, through his counsel, filed a petition for attorney's fees in the amount of $3,306.55, pursuant to Md. Code Ann. § 12-103(a) of the Family Law Article ("FL"), which provides that the court "may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person: (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties . . . ." That request was based on Appellee's failure to provide responses to Appellant's interrogatories, request for production of documents, and request for admission of facts, and her failure to appear for a deposition. On June 6, 2022, the court ordered Appellee to provide the discovery responses and stated that if she failed to do so, Appellant "may seek additional sanctions, including an award of attorney's fees." Appellant asserted that Appellee failed to appear at the pendente lite hearing on March 31, 2022 and "failed to cooperate in any aspect of this litigation." Nevertheless, she appeared at the merits hearing with documents she wished to enter as exhibits which Appellant claimed should have been produced in discovery. This required the court to spend time reviewing the exhibits. Appellant argued that if Appellee had provided the documents in discovery, "the process of entering those exhibits as evidence would have been much quicker and taken up less Court time." Appellant claimed he had "incurred extensive Attorney's Fees in conjunction with this litigation, including the Defendant['s] refusal to respond to Discovery."

Shortly after that petition for attorney's fees was filed, counsel filed a motion to strike her appearance as Appellant's attorney. The court granted that motion and struck

the appearance of counsel on August 29, 2022. On September 7, 2022, Appellant, then proceeding in proper person, filed a duplicate copy of the petition for attorney's fees that was filed in July by his attorney. The motion even included a representation that the motion was filed on Appellant's behalf by and through his attorneys and the same certificate of service, signed by former counsel, that was attached to the prior motion. It is not clear from the record why Appellant refiled the petition.

In a written order entered on October 6, 2022, the court denied the September 7, 2022 petition for attorney's fees, stating:

> ORDERED, that Plaintiff's Petition for Attorney's Fees filed on September 7, 2022 is DENIED without prejudice to refile amended petition *pro se* or through counsel and with amended certificate of service. Plaintiff's motion is duplicative of the motion signed and filed through former counsel. Former counsel's appearance was stricken on August 29, 2022. See Order entered on 8/29/22.

The electronic docket also includes an entry on October 26, 2022, indicating that the petition for attorney's fees was dismissed without prejudice. No copy of that order is included in the electronic docket. Appellant has not directed our attention to any subsequent amended petition for attorney's fees and our review of the record did not reveal one. As Appellant was not represented by counsel at the time he filed the duplicate copy of the petition for attorney's fees, the court did not err in denying the motion without prejudice to refile and amended petition.

As the original petition for attorney's fees filed by Appellant's counsel is still pending in the circuit court and has not been ruled upon, we shall remand the case for the limited purpose of allowing the circuit court to determine whether Appellant is entitled to

the attorney's fees that were requested in that petition. *See Scott v. Scott*, 103 Md. App. 500, 524-25 (1995) ("The trial court never addressed Wife's request for fees and costs. Accordingly, we remand so the trial court may determine whether Wife is entitled to the attorney's fees she requested.").

VIII. Failure to Hold a Hearing

Appellant argues that the circuit court erred in failing to hold a hearing on his "Motion for Orders to Issue Against Defendant" filed on December 6, 2021. In that motion, Appellant requested the court to order, among other things, that Appellee reveal her address, notify the court as to where the Montgomery County Sheriff could make service of the amended complaint for custody, complete a parenting plan, provide a copy of R.'s social security card, and continue R.'s usual contact with Appellant by phone, email, and in writing. At the merits hearing, the court reviewed outstanding motions and the following occurred:

> THE COURT: Okay. And then there's a December 6th 2021 father's – plaintiff's motion for orders to issue against defendant.
>
> [COUNSEL FOR APPELLANT]: So that, that was prior to – I'm sorry, actually. That is moot as well.
>
> THE COURT: That is moot.

Because he acquiesced to the court's determination that the motion was moot, after volunteering the status of the motion, Appellant waived any issue with respect to the motion including whether a hearing should have been held. *VEI Catonsville, LLC v. Einbinder Props., LLC*, 212 Md. App. 286, 293-94 (the right to appeal may be lost by

acquiescence or waiver, that is a "'voluntary act of a party which is inconsistent with the assignment of errors on appeal[.]'").

IX. Fraudulent Procurement of Services

Appellant alleges that Appellee fraudulently obtained services from Maryland Legal Aid. The record shows that Appellee was represented by an attorney from Maryland Legal Aid for the sole purpose of filing the motion to transfer the custody case from Washington County Circuit Court to Montgomery County Circuit Court. Whether Appellee was entitled to receive services from Maryland Legal Aid is a matter between that organization and Appellee. Appellant does not have standing to raise that issue. Moreover, that issue was not addressed in the custody order that gave rise to this appeal. For that reason, the issue is not properly before us and we shall not address it. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

X. Bias or Impropriety

Appellant argues that the trial judge was biased or engaged in the appearance of impropriety toward him. This issue was not preserved for our consideration because Appellant never raised the issue in the circuit court or requested that the trial judge recuse herself. To preserve the issue, Appellant was required to file a timely motion with the trial judge that he sought to recuse. *Conwell Law LLC v. Tung*, 221 Md. App. 481, 516 (2015) (quoting *Miller v. Kirkpatrick*, 377 Md. 335, 358 (2003)). A timely motion for recusal is one that is filed "as soon as the basis for it becomes known and relevant" and not "one that represents the possible withholding of a recusal motion as a weapon to use only in the event

of some unfavorable ruling." *Id.* (internal quotations and citations omitted). For those reasons, "'a litigant who fails to make a motion to recuse before a presiding judge in circuit court . . . waiv[es] the objection on appeal.'" *Id.* (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 238, 255 n.6 (2008)). As these issues were not raised in and decided by the circuit court they are not properly before us. Md. Rule 8-131(a).

CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR THE LIMITED PURPOSE OF RULING ON THE PENDING PETITION FOR ATTORNEY'S FEES; IN ALL OTHER RESPECTS THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED; COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY APPELLEE.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1008s22cn.pdf