Circuit Court for Howard County
Case No. 13-C-13-097021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1760

September Term, 2017

K.M.

v.

C.D.

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Meredith, J.

Filed: January 17, 2019

*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.

Although the parties to this appeal never married, they are the biological parents of two children: a son ("Son") born in February 2009, and a daughter ("Daughter") born 22 months later in December 2010.[1] In November 2013, K.M. ("Father"), appellant, filed a complaint in the Circuit Court for Howard County, seeking custody. C.D. ("Mother"), appellee, responded with a counterclaim for custody. As a result of a contested *pendente lite* hearing conducted by a magistrate (then referred to as a "master"), the magistrate recommended that the parties be granted shared physical custody and that Father have sole legal custody. The court filed a *pendente lite* order on April 3, 2014.

Before the court made a final determination, Father and Mother entered into a "Parenting Plan" on July 7, 2014, and that agreement was "incorporated, but not merged" into a "consent order" entered by the circuit court on July 11, 2014. That consent order provided, *inter alia*, that "Father and Mother shall have joint legal custody with tie-breaking authority to belong to Father," and "Father shall have primary physical custody of the minor children during the school year." The consent order provided Mother liberal opportunities for her to have physical custody of the children.

On May 3, 2016, Father filed a motion to modify custody and to establish child support. Mother responded by filing a counter complaint for modification of custody and for the establishment of child support. Evidentiary hearings on the competing custody claims spread over four days, conducted on March 13, June 8, June 9, and July 10, 2017.

[1] Due to the sensitive nature of some of the information discussed in this opinion, we shall refer to the parties by their initials.

On September 15, 2017, the circuit court announced oral findings of fact and conclusions of law; a written order for modification, modifying the physical custody and legal custody of the children, was signed the same day, and docketed on September 18, 2017 ("the September 2017 order").

Father noted this timely appeal.

QUESTIONS PRESENTED

Father presents the following questions for our review, which we have condensed as follows:[2]

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[2] As worded by Father, the questions presented were as follows:

1. Was the Circuit Court clearly erroneous when it found that the Mother had proven a material change in circumstances affecting the welfare of the minor children to justify consideration of a change in custody?

2. Did the Circuit Court err when it failed to include as part of its two-part assessment for modification of custody the benefit of continuing the existing custodial arrangement because without such consideration the children's best interests were viewed out of context and without the benefit of previously adjudicated facts affecting the best interests of the children?

3. Did the Circuit Court err when it failed to take judicial notice of adjudicated facts found by the Master since those facts served as the predicate for provisions in the existing custody order requiring the Mother to abstain from alcohol and to continue mental health counseling?

4. Did the Circuit Court err when it allowed the Mother to introduce as substantive evidence, over the hearsay objection of the Father, a report prepared for trial by the Mother's expert witness?

continued…

1. Did the trial court err when it found that there had been a material change in circumstances since the entry of the custody order on July 11, 2014?

2. Did the trial court err by not accounting for the benefit of continuing the existing custodial arrangement when assessing whether, and how, to modify custody?

3. Did the trial court err when it failed to take judicial notice of the findings of fact made by a master in February 2014?

4. Did the trial court err when it allowed Mother to introduce a report prepared for trial by her expert witness?

5. Did the trial court abuse its discretion when it excluded from evidence records from Child Protective Services and the children's school as a sanction for Father's failure to timely produce the documents during discovery?

6. Did the trial court abuse its discretion when it modified the provisions of the custody order entered July 11, 2014?

For the reasons explained herein, we shall affirm the judgments of the Circuit Court for Howard County

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continued…

5. Did the Circuit Court abuse its discretion when it excluded from evidence business records from Child Protective Services and the children's school based on the Father's failure to timely produce those documents when the order compelling production was not mailed to the Father or docketed by the Clerk until after the time for compliance expired and such documents were germane to the allegations and a determination of the best interests of the children?

6. Did the Circuit Court abuse its discretion when it modified legal and physical custody and eliminated an enforcement mechanism relating to the Mother's obligation to continue with alcohol and mental health counseling?

FACTS AND PROCEDURAL BACKGROUND

On July 7, 2014, Father and Mother agreed to a parenting plan which was incorporated, but not merged, into a consent order dated July 8, 2014 (docketed July 11, 2014). The agreed plan granted joint legal custody with tie-breaking authority to Father, and gave him primary physical custody during the school year. The parenting plan provided Mother liberal access to the children. For example, Paragraph 6 stated that Mother would have the children on alternating weekends during the school year, and overnight on alternating Thursdays preceding the Father's weekends. Paragraph 8 provided for equal division of summer vacation time. Paragraph 4 further stated, *inter alia*: "Mother shall be entitled (but she is not required) to pick [Son and Daughter] up from [the daycare provider's] house and keep them until 8:00 p.m. on Mondays, Tuesdays, and Wednesdays so long as" Mother gave Father advance notice, and the visitation did not interfere with the children's homework and extra-curricular activities.

Paragraph 9 of the parenting plan read as follows:

> 9. Mother shall continue to show that she is alcohol and drug free and shall continue getting regular and frequent counseling as necessary. Mother shall submit to a drug and/or alcohol test within 12 hours of being requested by Father, and said results shall be provided to Father. If Mother fails to test when requested, or cannot provide a clean test, then all future visits with Mother shall stop until Mother is able to provide Father with proof of attendance at counseling and two clean urine tests.

The parenting agreement included the parties' representations that both Mother and Father had been "represented by counsel while negotiating and entering into this

Parenting Plan," and that "[Mother and Father] have each had an opportunity to discuss [the plan] fully with our own attorneys."

On April 6, 2016, Father exercised his right under Paragraph 9 (quoted above) to request that Mother provide a clean drug and alcohol test before again taking physical custody of the children. Mother did not provide the requested test results, and Father withheld access to the children.

On May 3, 2016, Father filed a motion to modify custody and to establish child support. In the motion (later amended), Father requested sole legal custody and new restrictions on Mother's access to the children.

On August 29, 2016, Mother filed a cross complaint to modify custody and to establish child support. She alleged that she had begun treatment for depression and anxiety, refrained from alcohol use, lived in a stable home suitable for overnights with children, and had been gainfully employed for over a year. She requested sole legal custody and sole physical custody.

The Circuit Court for Howard County conducted evidentiary hearings on four days: March 13, June 8, June 9, and July 10, 2017. On September 15, 2017, the circuit court announced its findings and disposition from the bench. The court reviewed the evidence in detail, and stated that it found that there had been material changes in circumstances that warranted a modification of the custody terms set forth in the parenting plan that had been incorporated into the consent order in July 2014.

The court modified legal custody from joint with Father having complete tie-breaking authority, to joint with each of the parents having limited tie-breaking authority: Father received tie-breaking authority for educational and religious decisions; Mother received tie-breaking authority for medical decisions and extracurricular activities. The court modified the award of physical custody to a more explicitly defined equal division, including a detailed schedule for alternating holidays.

The court also modified Paragraph 9 of the parenting plan dated July 7, 2014, to disallow Father from unilaterally blocking Mother's access to the children if she failed to provide clean drug or alcohol test results whenever requested by Father.

The court explained its rationale for the modifications as follows:

> . . . [T]he Court does, in fact, find that there are material change[s] in circumstances to warrant modification and the Court is going to find that it is in the children's best interests to modify custody. The Court is considering the factors in *Montgomery County versus Sanders* and *Taylor versus Taylor*. First of all, as it relates to fitness of the parents the Court does find that both [Father] and [Mother] are fit parents. . . . That desire of the natural parents and any agreement between the parties, they each have a natural desire and there is an agreement for joint legal custody with what I would call liberal access because it's every Thursday and every other weekend and seeing the children after school, that's pretty much daily contact. The potentiality of maintaining natural family relations, there would be but they already have joint custody. The preference of the child, the Court doesn't have that information or testimony but also due to their ages, the Court is going to find that the children want to be with both of their parents. They have that. The main issue is that [Father] invoked that no-contact clause until he was presented with proof of counseling as well as clean urinalysis.
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> * * *
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> . . . Health of the child, they both appear to be healthy . . . . The residence of the parents. They both live in Howard County, not that far

from one another. The length of separation from the natural parents. There really hasn't been any separation other than the limited restricted access [imposed by Father] during mainly the summer of 2016. And whether or not there were any prior abandonment or surrender, there hasn't been any voluntary prior abandonment or surrender.

Now, in the legal custody, the factors are very similar except one difference is the demands of the parental employment. Both are employed. We know [Father] has a legal practice and if he's in trial, it may be very demanding. . . . [Mother] is employed, thirty hours a week at Bob Evans and I believe that's during the mornings so she has her afternoons free.

The financial status of the parents. [Father] is having some financial problems. He's been with his business. He's been depleting his retirement assets in order to pay some expenses. I think his testimony was he had a couple of cases where he was expecting a big payout that never came through. That [Mother] is living in a transitional shelter. Her funds are, in fact, limited. That the impact on state or federal assistance while the children are receiving state/federal assistance by receiving medical benefits and [Mother] is receiving daycare vouchers as well as food stamps.

The benefit to parents. Both parents well [sic], in fact, benefit. And any other factor this Court deems to be important. The concern that this Court has is that [Father] has invoked the clause [in Paragraph 9] to where he can end and stop all access and visitation if [Mother] does, in fact, fail to provide the proof of counseling as well as the alcohol testing. It is clear from the testimony that she is in counseling and her own credit or her own admission, excuse me, she has not provided clean urine. The Court is also concerned that [Father] wants to use [the daycare provider] for daycare provider. It is also clear that there is a major problem and conflict between [the daycare provider] and [Mother] to where the police had been threatened to be called. So, it's not in the children's best interests for [Mother] and [the daycare provider] to be around one another. Children always have problems – excuse me, not always, routinely have problems with transitions and winding down during the exchanges. To require [Mother] to pick up the children from [the daycare provider's] house is setting the situation up for failure.

The Court also notes, based on their [2014] agreement, that [Mother] has these children virtually every day. The Court is also considering the factors that have been specified or stated in *Santo versus Santo* whether you can still award joint custody when the parties cannot communicate. Now,

> these parties already have joint legal custody, however[,] [Father] has tie-breaking authority.
>
> So, **this is what the Court is going to do as it feels is in the children's best interests** by this party's behavior and the way they have been conducting themselves. The Court is going to order that **[Father] and [Mother] shall have joint legal custody of their minor children.** That **[Father] shall have tie-breaking authority over educational decisions and religious decisions**. That **[Mother] will have tie-breaking authority over medical decisions, as well as extra-curricular activities**. That **the Court feels, based on the change of the situation in housing situation, that a modification of the physical custody is in the children's best interests**. And the Court is going to order that . . . [Mother] shall have the children every Monday and Tuesday until Wednesday morning and alternating weekends from Friday until Monday morning. [Father] shall have the children every Wednesday and Thursday and alternating weekends from Friday until Monday. **It's what we call a two-two-five schedule. That's a straight fifty/fifty schedule**.
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> [After discussing a schedule for alternating holidays, the court further stated:]
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> . . . I'm removing the provision **[in Paragraph 9]** that says if mother fails to test when requested, that all future visits shall stop. **I'm going to change that to[:] if she fails to submit and provide proof that that may be grounds for modification of the provision**.

(Emphasis added.)

The court's order for modification was entered on the docket on September 18, 2017. Father filed a timely appeal to this Court.

STANDARD OF REVIEW

"For cases involving the custody of children generally, our precedents establish a three part review of the decisions of the lower courts, addressing the findings of fact, conclusions at law, and the determination of the court as a whole." *In re Yve S.*, 373 Md. 551, 584 (2003).

> In sum, we point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] [i]f it appears that the chancellor 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 chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 584–86 (2003) (emphasis omitted) (citations omitted).

DISCUSSION

1. Material Change in Circumstances

Father contends that the trial court made a clearly erroneous ruling in finding that the changes in Mother's circumstances affected the welfare of the minor children and justified changes in custody. But, in our view, there was adequate evidence to support the court's finding of material changes.

"To justify a change in custody, a change in conditions must have occurred which affects the welfare of the child and not of the parents." *Shunk v. Walker*, 87 Md. App 389, 397 (1991). Courts make a "totality of the situation" assessment when determining the best interest of the child, and take into account the following factors: (1) fitness of the parents, (2) character and reputation of the parties, (3) desire of the natural parents and any agreements between the parties, (4) potentiality of maintaining natural family relations, (5) preference of the child, (6) material opportunities affecting the future life of the child, (7) age, health and sex of the child, (8) residences of parents and opportunity for visitation, (9) length of separation from the natural parents, and (10) prior voluntary

abandonment or surrender. *Montgomery Cty. Dept of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420-21 (1977). As this Court stated in *Sanders*: "While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others." *Id*. at 420.

In the case at hand, Father asserts that the trial court's findings were clearly erroneous because the material changes that occurred since July 2014 affected only the Mother, *not* the children. In his brief, Father states:

> The **Mother's evidence supported a finding that she had improved her own station in life**, i.e., that **she was more stable** than she was in 2014 because **she held a job for two years, she had a place to live that accommodated the children, and she was drinking less[,] which enabled her to become a functioning adult**. These facts are not clearly erroneous insofar as the *effect on the Mother's life*, but they are clearly erroneous to the extent that they purport to contribute, let alone equate to, a material change in circumstances *affecting the welfare of the minor children*.

(Bold emphasis added.)

Father argues that the above-mentioned changes in Mother's life and living conditions have no impact on the children, and, therefore, it is in the children's best interest to continue with the July 2014 custody arrangement unmodified. We do not agree with Father's premise that the changes that he concedes were supported by evidence in the record provided no rational basis for the court's finding that there had been a material change in circumstances that warranted a change from the custody arrangement that had been put in place in July 2014 when the Mother was not functioning as well and did not have stable housing for the children.

Although Father directs us to evidence in the record that could support a conclusion -- *if* we were not obligated to view the evidence in the light most favorable to the prevailing party -- that Mother's ability to be a fit parent had not improved significantly since July 2014, Father also concedes in his brief that there had been positive changes in Mother's circumstances and parental effectiveness. He states:

> The Father hereby acknowledges that the Mother improved since 2016 and he admits here that the Mother appears to be on a better path than at any time since the children were born. However, the Mother's self-improvement increases the quality of life for the children *while they are with her and so long as she remains functional*. Such evidence does not satisfy the Mother's heavy burden to prove that there was a material change *relating to the welfare of the children* as distinguished from the Mother's personal welfare.
>
> * * *
>
> The Mother's evidence simply established that the children's custodial times with the Mother are now more likely to be enjoyable and safe; and less likely to be negatively impacted by the Mother's personal struggles (so long as she continued to control her drinking).
>
> * * *
>
> The Father concedes that the Mother did well once her attorney got the Mother resources and the Father hopes it continues, but the original custodial arrangement was constructed for flexibility when the Mother's problems became an impediment to her parenting. . . . The Mother is, when she is not stressed and drinking, a good human being and a better and better parent, especially now as the children become less dependent due to their age.

(Emphasis in original.)

Under the clearly erroneous standard, our "task is limited to deciding whether the circuit court's factual findings were supported by 'substantial evidence' in the record.

And, to that end, we view all the evidence 'in a light most favorable to the prevailing party.'" *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 456 (2004) (citations omitted). The trial court properly took into consideration the *Sanders* factors, and found that, as a result of material positive changes in Mother's circumstances --- including, specifically, her "housing situation" --- modification of the July 2014 custody order "is in the children's best interests." Considering all of the evidence in the light most favorable to the prevailing party – here, the Mother -- the trial court's findings were not clearly erroneous.

2. Benefit of Continuing the Existing Custodial Arrangement

Father alleges that the trial court's failure to give adequate weight to "the benefit of continuing the existing custodial arrangement" was an error of law, and that its factual findings were clearly erroneous.

First, Father alleges that the circuit court "failed to give any weight to the existing custodial arrangement." We disagree. The court stated that it was considering the best interest of the child factors which take into account "the question of stability" and continuing the existing custodial arrangement. *McCready v. McCready*, 323 Md. 476, 481 (1991). At the end of the four days of hearings, the court reviewed the testimony in detail and demonstrated a well-informed understanding of the current custodial arrangement. The court concluded, based on its analysis of the best interests of the children, that modification of the existing custodial arrangement was appropriate. In our view, the court did not commit an error of law.

Next, Father alleges that the court's findings of facts were clearly erroneous because the court did not take into account the findings of fact that had been made by the magistrate who conducted a *pendente lite* hearing in February 2014. This argument overlaps the argument addressed in the next section, but the bottom line is that the findings of fact that had been made by a magistrate in early 2014 were not incorporated into the parenting plan and consent order that established a custody arrangement in July 2014. As Father concedes in his brief: "The evidence did show that, by the time of trial, the Mother was doing well." Under the circumstances, we perceive no error in the court's decision to focus on the July 2014 consent order and what had changed since the entry of that operative order, rather than revisit what had happened prior to a hearing at an earlier point in the litigation.

3. Judicial Notice of the Master's Findings of Facts

Father asserts that the court erred in declining to take judicial notice of the written findings of fact made by the magistrate who conducted a *pendente lite* hearing. Father hypothesizes that, when the July 2014 consent order was signed, the court "presumably considered" the magistrate's findings. But there is no express reference in either the July 2014 consent order or the parenting plan to the magistrate's findings. And the agreed parenting plan *does* expressly state:

> This document contains all of the terms of the parties['] agreement. There are no outside agreements.

In Father's brief, he asserts that the magistrate's February 2014 findings qualify for "the Doctrine of Res Judicata and its component part, claim preclusion." At the trial

regarding the modification requests, Father made the following argument in support of the request for judicial notice:

> THE COURT: --- next Mr. [M.].
>
> MR. [M.]: - yes I would ask you to take judicial notice of the findings of fact of the master in this case that was adopted by the court and made into a *Pendente Lite* order in 2014.
>
> THE COURT: Well what I have before me is as I said the file is down into --- in Annapolis, I have the parenting plan that I believe I was the actual judge that signed off on it just let me check, if I recall, no I wasn't sorry was it a consent order, the docket parenting plan July 7th, 2014, where's the consent order, as I said consent order July 11th of 2014 the findings of fact are down in Annapolis but you're asking me to take judicial notice of what sir?[3]
>
> MR. [M.]: Those findings of fact.
>
> THE COURT: Okay. Ms. [Counsel for Mother]?
>
> [COUNSEL FOR MOTHER]: Your Honor subsequent to the entry of that PL order[,] a consent order [was entered,] so I would ask the court that anything that that the court determined prior to that is irrelevant[;] the most recent court [order] is what stands and is relevant today.
>
> THE COURT: And when was the PL hearing?
>
> MR. [M.]: I believe it was February 2014.
>
> THE COURT: And if you all entered into this agreement July [2014] and then you can ask this court not to conserve anything before that[,] why would that be relevant sir, for this court to take notice of?
>
> MR. [M.]: Well as I said I --- when I made that statement to you it was in the context of a different argument so I contend that what happened prior to parenting agreement of July 2014 is relevant.

[3]The judge who heard the modification requests in 2017 was indeed the same judge who signed the consent order in July 2014.

THE COURT: If the standard that the court has to use is what are the material changes and circumstances since custody was last addressed by this court, it was addressed by this court obviously so why of 2011 [sic], how would anything prior to that and as I said a couple times earlier a modification must be in the children's best interest how would what occurred February of 20[11] be relevant, I mean [20]14 be relevant?

MR. [M.]: Because otherwise the doctrine of res judicata doesn't have any bearing in family law cases, I recognize however that the case law speaks in terms of there has to be --- that the court should recognize its ability where the children are is a big factor in modification hearings, so I've thought to myself based on my research that[,] while I don't see that it's directly linked[,] here's how I interpret it, that if the court --- because the doctrine of res judicata applies based on cases that I cited to previous arguments --- let me flip it around this way[;] I contend the court is operating from the premise that the children stay where they are because of the stability factor and then weighs against that (inaudible), that is in [e]ffect a substitute for applying with strict application the doctrine of res judicata, the Court of Special Appeals and the Court of Appeals haven't linked together but on the first day when I was arguing about some matter and where we were I was pointing out that recent case law and in fact it's in my motion to dismiss for failure to state a claim. I point out that the Court of Special Appeals has said that res judicata is applicable to family law cases, but then as you pointed out to me there's this whole other body of law that says once you find a material change in circumstances, if you do, then you can start again, but I don't think that they mean again clear slate, I think they mean keeping in mind the stability of the children, otherwise if you just flat out started straight then the case law that says res judicata applies to family law matters would have no bearing, it would --- they're in contradiction then.

THE COURT: Ms. [Counsel for Mother,] did you wanna response to that?

[COUNSEL FOR MOTHER]: I wanna try, I don't know, Your Honor we're here to modify a court order that in July of 2014, I think July 7th of 2014, I don't recall [t]he specific date, nothing ---

THE COURT: It was signed the 8th and it was entered the 11th[;] so the official date is the 11th.

[COUNSEL FOR MOTHER]: --- okay, so 3 years ago tomorrow, we're here to modify it that specific court order[. A]nything prior to that is not

> relevant, they entered into a consent agreement whatever issues they had prior to that they both felt the need to enter into that agreement and all of the other issues are set aside at this point so we are only moving forward from the last court order and has there been a material change in circumstances to warrant a modification of the July 11, 2014 order.
>
> THE COURT: Alright thank you[.] I'm going to deny the request to take judicial notice of the magistrate[']s find[ing]s from February 201[4. N]ext request?

As we view the trial proceedings, the court did not deny preclusive effect to any findings that were entitled to preclusive effect. It appears to us that the magistrate's findings, made in February 2014, were never incorporated into the July 2014 judgment that was the focus of the modification requests. But, even if they had been, we would find no error in the trial court's apparent conclusion that findings regarding facts that occurred prior to February 2014 were not particularly helpful to resolution of the question before the court with respect to the requests to modify a custody order entered in July 2014. And, despite Father's conclusory argument that the doctrine of *res judicata* applies to family law cases, Father has not persuaded us that any finding of fact the magistrate made in February 2014 would have altered any ruling the court made in September 2017.

4. Mother's Hearsay Evidence

Father contends that the court erred in admitting a letter/report from Mother's counselor; Father asserts that the report was inadmissible hearsay. The trial court ruled that it would admit the report as rebuttal evidence that fit within the business record exception to the rule against hearsay. Regardless of whether the report was some sort of rebuttal evidence, we agree with Father's contention that the document was inadmissible

hearsay and should not have been admitted. But it appeared to play no role in the court's judgment, and we conclude the court's error in admitting this piece of evidence was harmless.

In the case at hand, Father asserted that Mother was not receiving counseling for abuse of alcohol. But Mother then testified that she was seeing a psychologist:

> Q. [BY COUNSEL FOR MOTHER] . . . [S]ince we brought up the issue of the question of whether you are attending any mental health counseling, have you been seeing any psychologist or psychiatrist?
>
> A. [BY MOTHER] Yes.
>
> Q. Okay who are you seeing?
>
> A. Dr. B[].
>
> * * *
>
> Q. Do you know approximately when you began seeing him?
>
> A. In the fall.
>
> Q. Of 2016?
>
> A. Yes, sorry.
>
> * * *
>
> Q. Did you authorize – is this also the individual that was listed as the expert witness in this case?
>
> MR. [M.]: I will stipulate there.
>
> Q. Did you authorize Dr. B[] to have correspondence with Mr. [M.]?
>
> A. Yes.
>
> Q. As is related to the designation in this case?

A. Yes.

Q. And in this email dated June 21[,] 2017 did you authorize my office to expressly indicate to Mr. [M.] that he had authorization to speak to Dr. B[]?

A. Yes.

[BY MOTHER'S COUNSEL]: I'd like to have exhibit 36 [the email dated June 21, 2017] admitted.

THE COURT: Any objection?

MR. [M.]: No.

THE COURT: It's admitted.

In addition to introducing that testimony and exhibit, Mother offered to introduce a letter/report prepared by Mother's counselor, dated July 8, 2017, which included the following statements: (1) Mother started seeing Dr. B[] on October 11, 2016; (2) Dr. B[] did not see any evidence of Mother being a danger to her children; (3) Dr. B[] was authorized by Mother to speak with Father; and (4) Father never contacted Dr. B[]. Father objected to the report being admitted into evidence on several grounds. Although Father's principal objection was that he had not received the document during discovery, he also asserted that the document contained hearsay.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-801. In *Bernadyn v. State*, 390 Md. 1, 8 (2005), the Court of Appeals stated: "Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by

applicable constitutional provisions or statutes.' Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility."

One exception to the rule against hearsay is for "Records of Regularly Conducted Business Activity." Maryland Rule 5-803(b)(6). This exception allows admission of a report if it was created in the regular course of business, by a person with knowledge of the event at or near the time of the event, and it must be the regular practice of the business to make and keep such reports. Rule 5-803(b)(6). The business record exception "is based on the premise that because the records are reliable enough for the running of a business . . . they are reliable enough to be admissible at trial." *Hall v. Univ. of Maryland Med. Sys. Corp.*, 398 Md. 67, 89 (2007). The exception "does not embrace self-serving records, made in anticipation of litigation which lack circumstantial guarantees of trustworthiness." *Id.*

Dr. B[]'s report does not qualify for admission pursuant to the business records exception. The report is signed and dated July 8, 2017, and was introduced at the hearing on July 10, 2017. The report also includes the factual assertions that "Mr. [M.] has never contacted my office," and that Dr. B[] is "pleased" with Mother's "progress in treatment." Although the report was signed by the doctor and apparently based on his first-hand knowledge, there was no foundation testimony to establish that it was made in the regular course of business, or that it is in the regular course of business for the doctor to make such reports. *See* Rule 5-803(b)(6)(C) and (D).

At the hearing, the court admitted the report as a self-authenticated document because it had "the business record certification" as required under Rule 5-902(b). Maryland Rule 5-902(b)(1) requires the proponent to give the opponent ten days' notice of intention to introduce the document "prior to the commencement of the proceeding in which the record will be offered into evidence." *Id.* It was undisputed at the hearing that Father did not receive the report until the day it was introduced. Therefore, under Rule 5-902, Dr. B[]'s report could not be self-authenticated because Father did not receive notice of Mother's intent to use the report ten days prior to the hearing.

Nevertheless, there is no indication in the court's opinion that the court placed any reliance on Dr. B[]'s report in making the court's analysis. The report was largely duplicative of Mother's testimony, which was admitted without objection. Consequently, we conclude that the error in admitting the report was harmless. "It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error. Prejudice will be found if a showing is made that the error was likely to have affected the verdict below." *Crane v. Dunn*, 382 Md. 83, 91 (2004) (citations omitted). The court did not indicate that it was relying on this document, and there was testimony by Mother regarding the key statements made in the document. We are not persuaded that Father was prejudiced by the erroneous admission of this document.

5. Excluded CPS and School Reports

Father alleges that the court abused its discretion when it sustained Mother's objections to business records from Child Protective Services and the children's school. The trial court excluded the records as a discovery sanction. We perceive no abuse of discretion in doing so.

The timeline regarding the discovery period and the sanctions imposed for untimely disclosure of the proffered documents is as follows:

- On August 31, 2016, Mother served discovery on Father, including interrogatories and a request for production of documents.

- On October 24, 2016, Mother sent Father a letter requesting responses to the discovery requests by October 28, 2016.

- On November 16, 2016, Mother filed a motion to compel and for sanctions which was denied.

- On November 28, 2016, Father filed a motion to enlarge the discovery period, which was granted, and the discovery period was extended to January 31, 2017.

- On December 21, 2016, Mother filed a second motion to compel and for sanctions.

- On January 24, 2017, Mother filed a third motion to compel and for sanctions.

- On January 31, 2017, pursuant to the court's scheduling order, discovery closed.

- On February 17, 2017, the court scheduled a hearing on Mother's third motion to compel.

- On February 24, 2017, Father filed a notice of intent to use "Self-Authenticating Business Records," the CPS reports and reports from school.

- On March 3, 2017, a hearing on the discovery motions was held, and Father did not appear, or give the court notice that he was unavailable. The court entered a sanction that compelled Father to provide discovery by March 7, and precluded Father from introducing any documents at trial that he had not provided in discovery by that date.

- On March 13, 2017, the court held the first day of evidentiary hearings on the modification requests. Father made an oral motion for the court to revisit the sanctions imposed on March 3, 2017. The court declined to revisit the sanctions.

- On March 20, 2017, Father filed a motion to vacate the March 3, 2017, order imposing sanctions, which was denied.

Maryland Rule 2-433 states the following about a trial court's ability to sanction parties for discovery violations:

> (a) **For certain failures of discovery.** Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following: . . .
>
> > (2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence . . . .

"Our review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery." *Sindler v. Litman*, 166 Md. App. 90, 123 (2005). "[I]n order to reverse a trial court's decision, it must be 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" *Valentine-Bowers v. Retina Group of Washington, P.C.*, 217

Md. App. 366, 378 (2014) (citations omitted). Although there appears to be some discrepancy about the reason Father failed to appear for the hearing on March 3, 2017, and when Father became aware of the ruling made at that hearing, there appears to be no dispute that Father did not timely provide discovery of the documents before the close of discovery. The trial court had the authority to enter sanctions against Father based on his discovery violations, and, based on the record, we do not find that the court abused its discretion in disallowing introduction of the CPS reports and school records.

6. Modifying legal and physical Custody, and Eliminating Paragraph 9.

Father alleges that the court abused its discretion when it modified physical custody, legal custody, and Paragraph 9 of the parenting plan.

"Where modification of a custody award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child." *Sanders*, 38 Md. App. at 419. "This Court may not set aside the factual findings of the chancellor unless they are clearly erroneous." *Id.* **"[W]hen the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, <u>the chancellor's decision should be disturbed only if there has been a clear abuse of discretion</u>."** *In re Yve S.*, 373 Md. at 584–86 (underlining added) (citations omitted).

In the case at hand, the court explained the factors it took into account relative to physical custody:

> [(1)] . . . the Court does find that both [Father] and [Mother] are fit parents. They may deal with their children differently but both of them are fit and proper people. [(2)] That the character and reputation of each parent, I don't have anything negative about the character or reputation of each parent other than [Father]'s comments that [Mother] abuses alcohol. . . . [(3)] That desire of the natural parents and any agreement between the parties, they each have a natural desire and there is an agreement for joint legal custody with what I would call liberal access . . . . [(4)] The potentiality of maintaining natural family relations, there would be but they already have joint custody. [(5)] The preference of the child, the Court doesn't have that information or testimony but also due to their ages, the court is going to find that the children want to be with both of their parents . . . .
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> * * *
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> . . . [(6)] Health of the child, they both appear to be healthy . . . . [(7)] They both live in Howard County, not that far from one another. [(8)] The length of separation from the natural parents. There really hasn't been any separation other than the limited restricted access during mainly the summer of 2016. [(9)] And whether or not there were any prior abandonment or surrender, there hasn't been any voluntary prior abandonment or surrender.

These findings of fact were not clearly erroneous. The court clearly based its decision on sound legal standards under *Sanders*, supra, and *Taylor v. Taylor*, 306 Md. 290 (1986). We perceive no clear abuse of the court's discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.