UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2422

September Term, 2015

MICHELLE R. WILDSTEIN

v.

ALAN DAVIS

Arthur,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: November 4, 2016

Appellant, Michelle R. Wildstein ("Mother"), appeals the Circuit Court for Montgomery County's grant of appellee Alan Davis's ("Father's") motion in limine to exclude certain evidence and strike the testimony of the court-appointed custody evaluator Jeanine Bensadon. Three questions are raised on appeal, as ordered for our review; the first is presented by Father in his responsive brief and the second and third by Mother:

> [Did Mother present an] Interlocutory Appeal [that] is Permissible Pursuant to § 12-303 of the Annotated Code of Maryland's Court & Judicial Proceedings Article . . . ?
>
> Did [Mother] violate Section 7-302 of the Criminal Law Article by copying a family computer (a) to which she had unlimited access during the marriage, (b) on which she had her own administrator profile and (c) in the absence of any notice that her authority had been restricted?
>
> Did the trial court abuse its discretion by granting, without any factual record, the appellee's motion *in limine* and striking the testimony of the court-appointed custody evaluator?

For the reasons that follow, we answer the first question in the affirmative and the second and third in the negative.

Factual and Procedural Background

Sometime in the summer of 2006, Father and Mother began a romantic relationship. At that time, Father was separated from his second wife and going through a divorce. In the beginning of 2007, they moved in together and were married on April 18, 2009. Their first child, J.D., was born shortly after in September 2010. Following J.D.'s birth, Father and Mother hired a full-time nanny. Mother was unhappy with the way that Father acted towards the new family and felt like Father "withdrew" and "the more [she]

asked him to do and be there for [her], the less he did." His long work hours appear to have exacerbated these issues.[1]

According to Mother, the marriage began to fail in May 2012 following an incident in which Father allegedly "tried to choke [her] while she was holding [J.D.] in [her] arms." Their second child, L.D., was born in July 2012. Following L.D.'s birth, the housekeeper took on some childcare responsibilities to help ease Mother's burden.

The marriage continued to deteriorate, and on December 13, 2013, reached a breaking point following an incident in which Mother and her father alleged that Father violated Maryland Code (1984, 2012 Repl. Vol.), § 4-501 of the Family Law Article ("FL § 4-501")[2] and Maryland Code (2002, 2012 Repl. Vol.), §3-201 of the Criminal Law Article ("CL § 3-201").[3] On that date, Mother filed for an interim protective order against Father and her father filed for an interim peace order. The charges resulted in Father being removed from the marital home.

[1] Father would often work from eight in the morning until eight, nine, or ten o'clock at night.

[2] Maryland Code (1984, 2012 Repl. Vol.), § 4-501 of the Family Law Article ("FL § 4-501") provides, in relevant part:

> (b)(1) "Abuse" means any of the following acts: (i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree; (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree; (v) false imprisonment; or (vi) stalking under § 3-802 of the Criminal Law Article.

[3] Maryland Code (2002, 2012 Repl. Vol.), §3-201 of the Criminal Law Article ("CL § 3-201") provides, in relevant part: "(b) 'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."

A hearing on Mother's protective order was held in Montgomery County District Court on December 17. The court ruled that there was not "sufficient evidence of prohibitive conduct towards [Mother] that warrants the entry of an order." A hearing on Mother's father's peace order was held in District Court on December 27, 2013, and again, the court ruled in favor of Father, finding that the alleged incident was "to some extent . . . a common[af]fray" and concluding that an order was not "necessary to curb future conduct."

Following the December 13, 2013 incident, Mother hired a bodyguard/private investigator named Devin Tullis[4] who "followed" Father and "tracked" his oldest daughter by placing a GPS tracking device on her car.[5] Mr. Tullis also referred Mother to "a computer technician" so that she could copy Father's MacBook Pro computer, which he had purchased before their marriage, but was kept in the home, and to which Mother had some access. Mother provided the technician with the computer in January of 2014, prior to when Father was permitted to return to the marital home, and she later "picked up the family computer and the drive that he created from [his] office in Sterling, Virginia." A January 15, 2014, message on the hard drive, which was deleted but later recovered by Father's computer expert, stated:

> Both user folders completly ripped from OSX Operating Drive
> This External HDD is formatted FAT. RjWmay be slow!

[4] The name of the bodyguard/private investigator appears in record as Tullos and Tullis; because the spelling Tullis appears more frequently, we use that spelling.

[5] Father had two children from his prior marriages, a daughter from the first marriage who was an adult at the time of the December 13, 2013, incident, and a daughter from the second marriage who was a pre-teen.

> For Web History, you need to search the Cookie PLIST file located:
> \ alan davis \ Library \ Cookies
> Other Folders are self explainitory
> Temp account "tadmin" was created to gain administrator rights and copy the files.
> Account has been deleted. Main account password was not touched.
> Michelle Account was not used and password changed to "password90" in case access
> is needed to laptop at later time without using singleuser mode. Both accounts on the
> MAC are administrator accounts.
> Thanks

Between January 25 and January 27 of 2014, Mother moved out of the marital residence; Father returned on January 28, 2014. On January 27, 2014, Mother filed a Complaint for Absolute Divorce, or in the Alternative Limited Divorce, Custody, and Other Appropriate Relief requesting sole legal custody and sole physical custody "*pendent lite* and permanently, with reasonable access to [Father]." Father responded on February 27, 2014, and filed a Counterclaim for Absolute Divorce, or in the Alternative Limited Divorce, and Other Relief. Mother responded on April 11, 2014, requesting that the counter-claim be dismissed.

On March 20, 2014, as part of the proceedings, the circuit court issued an Order for Custody/Visitation Evaluation, which provides in relevant part:

> ORDERED, that all parties involved in this case, participate in an investigative and evaluative process to assist the Court in resolving issues of custody and visitation; and it is further, . . .
>
> ORDERED, that the Evaluator shall have a right to terminate this referral if the Evaluator deems the referral inappropriate or if the parties fail to cooperate; termination shall be made by written notice of circumstances to the court and to the parties; and it is further,
>
> ORDERED, that the case is referred to the Family Division Evaluators to conduct an investigation of the parties, their child(ren), their

> histories and their living situations, in accordance with established guidelines, and to prepare a written report with evaluation and recommendations by the date scheduled for hearing on the merits of the case;

In addition, on May 8, 2014, the parties signed an agreement to begin working with Marcy Chell, a clinical social worker with the Capital Region Children's Center.[6] She first met with Father on April 12, 2014, and she spent about an hour and a half with Father, J.D., and L.D. on that date. On several subsequent visits she continued to observe "how he interacted with the children in the community." Ms. Chell first met with Mother on May 15, 2014, and they discussed the children's schedules. Ms. Chell observed Mother pick up the children from Father's home. During the transition, L.D., who was not wearing a diaper, wet herself and, according to Ms. Chell, Mother became "very angry, almost irate" and demanded to know why Father did not put a diaper on her. Ms. Chell attempted to "deescalate" the situation, and Mother eventually changed L.D. in the car and left with the children. After that incident, Ms. Chell suggested that "there should be somebody else doing the drop off and pick up," and from that point forward the nanny Lagaya Cuba handled the transitions.

Ms. Chell spoke with Mother on several other occasions,[7] and met with her counsel on June 5, 2014 about obtaining medical records of Father's adult daughter. The

[6] Capital Region Children's Center had originally been contacted by Father's prior attorney, and as a result, Ms. Chell had been working with Father to provide "supervision for [Father] and the children." Mother expressed some concern about Ms. Chell's neutrality due to these prior meetings with Father.

[7] Ms. Chell met with Mother in person on May 17 and June 8 of 2014, and spoke with her on the phone on May 27.

contact between Ms. Chell and Mother ended shortly thereafter because, in Mother's view, she failed to meet her obligation to obtain the requested medical records.

On June 18, 2014, a Consent Pendente Lite Custody order, signed by the court on June 11, was entered. The order temporarily resolved access issues and stated:

CONSENT PENDENTE LITE CUSTODY ORDER

Upon the Consent of the parties, as evidenced by their signatures below, it is hereby ORDERED:

1. The minor children of the parties, [J.D. and L.D.], will reside primarily with Plaintiff, [Mother], pendente lite and spend time with Defendant, [Father], as follows:

- Every Thursday from 5-7:30 p.m.
- Saturday, May 10, 2014, from 9 a.m. to 2 p.m.
- Saturday, May 17, from 9 a.m. to 4 p.m.
- Sunday, May 25, and alternating Sundays thereafter (i.e. June 8, June 22, July 6, and so on) from 9 a.m. to 6 p.m.
- Saturday, June 1, and alternating Saturdays thereafter (i.e. June 14, June 28, July 12, and so on) from 9 a.m. to 6 p.m.

2. The parties shall immediately begin working with Marcy Chell, LCSW to do the following: establish consistency across households regarding discipline, meals, night time routines, handling behavior issues, night time waking, etc.; establish ground rules for the pendente lite access schedule; monitoring the children's adjustment to the pendente lite schedule; and to assist the parties in resolving any other child-related issues that arise during the course of the pendente lite period.
3. The fact that the above schedule does not provide for [Father] to have overnight visits with the children is not due to his ability or fitness to have such visits but is due to other factors. If those factors disappear or are addressed to the parties' satisfaction, overnights visits may commence subject only to Marcy Chell's recommendation as to the actual schedule.
4. The parties will reconvene with Marcy Chell and Ann N. Sundt on June 23, 2014 for the purpose of receiving a neutral evaluation which shall include a recommendation as to a custody/access schedule, which recommendation shall not be binding on either party. If Marcy Chell is not available on June 23, the parties shall work together to schedule another date in June.

5. During the time that this order is in effect, neither party will subpoena or call as a witness in any proceeding either of [Father]'s other children.

In a September 15, 2014 letter, Ms. Chell issued her recommendation regarding Father's access to the children. The letter stated, in relevant part:

> This letter is being provided from The Capital Region Children's Center (herein CRCC) regarding the organization's involvement with [Father] and thereafter per the Consent Pendente Lite Custody Order, with [Mother]. Initial work with [Father] began in April 2014 to provide supervised visitation with his children, [J.D.], 4 years old and [L.D.], 2 years old. While further work with the family, per the current Consent Pendente Lite Custody Order in the divorce matter with his wife, [Mother] is to be on-going, it has halted due to no current communication with her. This writer had only a few opportunities to work with [Mother] (May 15, May 17 and June 8, 2014); however, those visits did result in being able to share with [Father] what she verbalized as the children's schedules, routines, and eating habits.
>
> In the six months that this writer has been involved in the direct work with [Father], he has been receptive to interventions; has adhered to the parenting strategies introduced by this writer for both the children; and has been consistently attentive and nurturing towards both his children during the observed visitation time. [Father] has also successfully incorporated time with his older daughters, [E.D.] and [S.D.], during the visits that this writer has observed. During the visits where both were present; they exhibited positive behaviors and interactions with [J.D.] and [L.D.]. The oldest, [E.D.], appropriately and effectively verbalized on a few occasions her awareness that at least some challenges in these divorce proceedings are due to "me". She described insightfully the reasons she believes this has occurred which is based on her own behaviors but also the behaviors exhibited by [Mother]. Their relationship reportedly remains strained.
>
> This writer recommends given the amount of supervised visitation provided with [Father], [J.D.] and [L.D.], that it is appropriate and beneficial for the children to have overnight visitation with [Father]. This should begin for one night on the weekend with both children going together to then increase to two nights on the weekend which will be based on their responses to the increased visitation. The children respond very well to their father; they are not in any duress with him; appear happy and

> comfortable consistently in their interactions with each other; and are also quite comfortable in their home.

Following that recommendation, on September 19, 2014, Father filed a Defendant's Motion to Modify and Expand Child Access Schedule in Consent Pendente Lite Order and requested a hearing. Father alleged that Mother had "unilaterally ignored the terms of the Consent Pendente Lite Custody Order" by failing to participate in good faith with Ms. Chell to establish consistency across households and by "refusing to cooperate in the most basic ways to make consistent access possible," among other things. He requested that "his access to the children be increased and include unsupervised overnight visits" and that Mother be "required to comply with the terms of the [June 18 order] including implementing the recommendations of Marcy Chell."

Father also filed an amended and supplemental counter complaint on the same date, which, among other things, included additional accusations of misconduct against Mother. Mother filed her opposition to that motion on October 6, 2014, asserting that certain "factors" in the pendente lite order, which were required to be satisfied before overnight visitations could commence, were not addressed. On November 7, the circuit court entered an order on Father's motion to expand access granting him access to the children on certain holidays:

> Upon consideration of [Father]'s Motion to Modify and Expand Child Access Schedule in Consent Pendente Lite Order (DE#98), [Mother]'s Opposition (DE#105), and the entire matter having been considered, it is this 27th day of October 2014, by the Circuit Court for Montgomery County, Maryland,

> **ORDERED,** [Father]'s Motion to Modify and Expand Child Access Schedule in Consent Pendente Lite Order (DE#98) be and the same is hereby GRANTED; and, it is further
>
> **ORDERED,** that the terms and provisions of the Consent Pendente Lite Order (DE#73) shall remain in full force and effect; and, it is further
>
> **ORDERED,** that in addition to the access with the minor children awarded to [Father] in the Consent Pendente Lite Order (DE#73), [Father] shall have additional access with the children as follows: i) Thanksgiving Day 2014, November 27, from 9 a.m. until 1 p.m., provided [Mother] has not made travel plans to be out of town with the minor children as of October 8, 2014; and ii) the seventh day of Hanukkah, Tuesday December 23, 2014, from 4:00 p.m. until 7:00 p.m., provided [Mother] has not made travel plans to be out of town with the minor children as of October 8, 2014.

On November 17, 2014, Father filed a Defendant's Motion to Alter or Amend Order Entered November 7, 2014, calling for additional holiday access and requesting "an expedited hearing on [his] request for an increase in pendente lite access to the minor children, to include overnight access and [his] request that [Mother] comply with the terms of the Consent Pendente Lite Custody Order entered on June 18, 2014 . . . ." Mother opposed the motion on December 4, 2014, asserting that "there is no more basis to grant the relief [Father] seeks now (overnight access) than there was when the Court ruled on his Original Motion to Modify." Father replied on December 12, 2014.

On January 15, 2015, Jeanine Bensadon, the court appointed custody evaluator, gave her oral report pursuant to the March 20, 2014, order, finding that there was "no compelling reason to change the current visitation schedule" and recommending that Mother "be granted sole legal custody with the caveat that she keep [Father] apprised of important matters related to the children via e-mail" and that "a gradual increase in overnights with [Father] occur on Saturdays, with the goal of becoming every other

weekend with an additional weekly dinner visit" provided Father satisfies certain conditions including undergoing "a psychological evaluation to better understand his difficulty managing relationships and to offer more information to the court given the highly adversarial nature of this case" and that "any recommendations raised by the evaluation should be followed." She also recommended that Father's oldest daughter "be prohibited from being alone with the children or in any caretaking role until substantive information may be gained in order to quell any concerns." On January 20, 2015, Father issued a subpoena for the file upon which Ms. Bensadon based her report.

On February 11, 2015, the court denied Father's motion to alter or amend the November 7, 2014, expanding access:

> Upon consideration of [Father]'s Motion to Alter or Amend Order entered November 7, 2014 (DE#l19), [Mother]'s Opposition (DE#125), [Father]'s Reply (DE#127), and the entire matter having been considered, it is this 22nd day of January 2015, by the Circuit Court for Montgomery County, Maryland,
>
> **ORDERED,** [Father]'s Motion to Alter or Amend Order entered November 7, 2014 (DE#119) be and the same is hereby DENIED.

On that date, Father's counsel also received a copy of Ms. Bensadon's file.

On February 27, 2015, Father filed a Defendant/Counter Plaintiff Alan Davis' Motion in Limine seeking "the preclusion of certain evidence at the trial in this matter commencing March 2, 2014." Specifically, Father sought to preclude Mother from "presenting any evidence, testimony, or documents at trial which refer to or relate to the words 'abuse' or assault'" and to preclude "all oral and documentary testimony and evidence obtained as a result of Plaintiff [Mother's] theft of numerous documents and

information from [Father's] personal password protected laptop computer" or any cellular device.

On March 2, 2015, the day that the custody merits trial was set to begin, Father filed a Motion to Postpone Custody Merits Trial asserting that "a postponement is necessary because [Father] and counsel have recently discovered that [Mother] has engaged in an ongoing theft of [Father's] communications with counsel and others through accessing [his] computer and computer data storage well after the date that [Mother] testified that she had an unnamed computer person to whom she gave [Father's] laptop computer prepare a 'mirror' copy of [Father's] laptop hardware."

In the motion, Father revealed that on February 26, 2015, he hired a cyber security firm to "determine the content of the [hard drive copy] and the last time that [Father's] laptop computer was accessed." The expert informed Father that "in order for [him] to determine the extent of the breaches, the destination of the stolen information, and the date and content of the deletions from the [hard drive copy], proprietary information from the manufacturer is required as well as substantial time to scan and go through the computer hard drive without altering the hard drive." Father requested the additional time because he had "to know and understand what has been taken from his laptop and what information [Mother] has obtained which she has not provided in discovery but which she has used in order to gain an illegal advantage in these proceedings as she is seeking to deny [him] all but minimal access to his children."

On that same date, Father also filed a Defendant/Counter Plaintiff Alan Davis' Motion to Preclude Testimony of Court Evaluator Jeanine Bensadon and to Strike Any Report and Testimony from Court Record and for Other Appropriate Relief seeking to preclude "the testimony of the Court Evaluator, Jeanine Bensadon (hereinafter 'Bensadon') at the trial" and to "strike any report and testimony of Bensadon from the court record." He asserted that "the entire testimony of the court evaluator is tainted and must be stricken in its entirety." As a result of Father's motions, the court heard arguments and postponed the originally scheduled merits trial to August 31, September 1, 2, and 3. The court "reopen[ed] discovery for the limited purpose of addressing any new issues that [were] raised by allegations today."

Following the postponement, Mother filed her Plaintiff's Opposition to Defendant's Motion in Limine on March 18, 2015, asserting that since "the trial has now been continued until late August 2015, the Motion in Limine is presently moot" and requested that it be denied, pointing out that Father can "file another motion in limine prior to the new trial date if any remaining evidentiary issues exist." Mother also filed a Plaintiff's Opposition to Defendant's Motion to Preclude Testimony of Court Evaluator and requested a hearing on the matter asserting that the resolution of the issue "will likely require extensive evidentiary hearings before this Court." In addition, Mother filed a Plaintiff's Response to Defendant's Motion to Postpone Custody Merits Trial stating that "while [Mother] did not oppose the continuance on the day of trial, the facts upon which the motion is based are very much in dispute and denied by [her]."

On May 28, 2015, Mother filed her own Plaintiff's Motion in Limine and to Strike or, in the alternative, to Compel and for Other Appropriate Relief requesting that the court grant her motion; strike Father's motions to postpone and preclude the testimony of Ms. Bensadon; "[i]ssue an order prohibiting, in limine, any future reference by [Father] at any trial or hearing in this matter to the allegations [regarding computer spyware] set forth in the Motion to Postpone and Motion to Preclude;" and order Father to provide Mother's counsel with the opinion of his expert witness, among other things.

On the same date, Mother also filed a Plaintiff's Motion for Appointment of Therapist for Minor Child alleging that Father "has ignored [Mother's] repeated efforts to address the need for therapy for [J.D.]" and that he "has failed and/or refused to respond to any of the emails sent to him regarding the matter." She requested that the court issue an order "authorizing her to engage [a therapist] for [J.D.] without the consent of [Father]." Father responded to the motion to appoint a therapist on June 16, 2015, requesting that the motion be "stricken" for failure to comply with the Maryland Rules or, in the alternative, denied due to a lack of "any factual or legal basis" upon which the court can grant the requested relief.

On June 19, 2015, Father filed an opposition/motion to strike Mother's May 28, 2015, motion in limine requesting that Mother's "Motion in Limine and to Strike, or in the Alternative, to Compel and for Other Appropriate Relief be STRICKEN, or in the alternative . . . DENIED" and that "the Court preclude all documents and

communications derived from the unlawful taking of information from [his] computer by [Mother]."

On August 20, 2015, Father filed a supplemental motion in limine re-alleging the counts in his earlier motions, in addition to new charges. On August 27, 2015, Father filed an In Limine Motion For Protective Order and to Quash to protect himself from "being required to produce certain documents set forth in . . . the Subpoena to [him] from [Mother] dated August 24, 2015." In the motion, he set forth the specific requests to which he objected including the request for documents relating to his children from previous marriages and his communications with third parties related to the proceedings.

On August 28, 2015, Mother filed a supplement to her May 28, 2015, motion in limine and to strike asserting that the "issue concerning allegations of some malfeasance on the part of [Mother] in copying a family computer is the 'reddest' of red herrings" and "[Father]'s effort to attempt to portray her actions as improper are nothing more than an effort to distract this Court from the facts relevant to the real issues pending in this case." On the morning of August 31, 2015, prior to the start of trial, Father filed a response requesting that Mother's August 28 motion be "stricken" because "it contains statements and allegations not permitted by the court's scheduling order, [and] contains information that is intended to mislead the court." He also requested that Mother be precluded from calling any expert witness at a hearing or trial in the matter, among other things.

The custody merits trial resumed on August 31, 2015, with the parties arguing the numerous pending motions starting with Father's motion in limine, which "sought

preclusion of any evidence, . . . including testimony of the court evaluator, which sort of is a part of [the] motion, due to [Mother's] misappropriation of [Father's] hard drive." In Father's view, even if Mother was given permission to use the computer to browse the internet at some point, "internet surfing does not give someone the right to then go into somebody's private documents, and copy them, and certainly not to disseminate them." In seeking to exclude the testimony of the court evaluator, Father's counsel asserted that there was "135 pages of documents that [Mother] provided to Jeanine Bensadon, the court evaluator in this case, that some of which – and I have them broken down for the Court – were text messages that [Mother] took a copy of from a phone without [Father's] permission."

Counsel for Mother responded that "as a result of [Father] being removed from the marital home, because of a domestic violence order, . . . [Mother] took a computer from the home, and had it copied," that the computer was one that "everybody used," and that she had the password "at least until some point well after the parties separated when [Father] apparently changed the password" and she "had her own administrator profile on the computer" that enabled her to "access every single document on that computer." According to counsel, all that Mother did in the fall of 2014 was make a copy of the copy that was made in January 2014.[8] According to Mother, "the factual issue, which is

[8] In the fall of 2014, while Mother "was working on the preparation of responses to discovery that had been served on her by [Father's] attorney," she "purchased two (2) separate Toshiba external hard drives with the intention of copying email correspondence from [her] personal computer to the hard drives," but her attempts were "unsuccessful." Consequently, she "again requested assistance from [Mr. Tullis] . . . who (continued…)

dispositive of this entire dispute is was that computer a family computer." And, in her view, the computer was a family computer that she "absolutely had the right to copy."

Both Mother and Father testified regarding the pending motions, but the court declined to hear testimony from Father's computer expert. Mother testified that she knew the password for the MacBook Pro, that an administrator profile was created for her, and that she used the computer for "checking my e-mails, surfing the internet, planning our wedding, looking at baby names, sometimes downloading photographs, looking at photographs." She also testified that the computer was readily accessible to her "on the top floor of the residence." Father testified in response that he never created an administrator profile for Mother, that her access was "purely a recreational [access]," that he was unwilling to share the information about his other two children contained on the computer, and that he changed his password in October or September of 2013, but he had not previously given her the password. In closing, Father's counsel asserted that "the manner in which [Mother] got into his computer [in January of 2014] is inconsistent with a person who possessed the ability to get in." Mother's counsel responded that she did not exceed her authority because this was a family computer and they both used the computer.

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referred [her] to another person with expertise in computers." She contacted that person to assist her in copying to the hard drives all of her emails that were responsive to Father's discovery requests. According to Mother, he came to her home, "examined the drives [she] had purchased, deleted the incomplete information that [she] had attempted to copy to the drives and successfully copied [her] responsive emails to the drives. He also assisted [her] in copying the [copy of the MacBook Pro] computer to the hard drives," which were turned over to Father as part of discovery.

After argument the court ruled:

> But [Father] changed the password, thereby denying [Mother] access and authority. The Court does not agree with counsel that once [Mother] had authority it could never be revoked. This was [Father's] personal property that he owned before the marriage and it does not suddenly become family property when he got married.
>
> Whether [Mother] had an independent administrative profile ended when she could no longer access the computer. [Mother] makes much of the argument that this was a family computer in her pleadings and also in her argument. . . . [T]here is a dispute in this case as to whether or not the computer is a family computer and just because [Mother] has testified to it and put it in her affidavit doesn't turn [Father's] computer into a family computer. By [Mother's] own testimony, the only documents that she saw on the computer were those that may have been opened on the computer when she was surfing the web.
>
> The Court finds that [Father] had a reasonable expectation of privacy, and he took steps to protect that privacy, which [Mother] breached. Some of the documents that were copied on the hard drive may have been discoverable, but some clearly were not. [Father] should have been given the opportunity to respond to discovery requests pertaining to the documents. The Court finds that the actions taken by [Mother] in copying the computer hard drive in January, 2014, were prohibited by criminal law Section 7-302(c)(1). Because at the time that she accessed and copied the hard drive, she did not have authority to do so. . . .
>
> As a matter of public policy, this Court cannot allow the admission of evidence that was obtained by the violation of a criminal statue. Therefore, [Mother] is preclude[ed] from using any of the information that solely came from the computer. If she requested the information in discovery and had a basis to request it, other than knowing about it from the copied hard drive, she may seek to introduce it. The Court understands this may have to be done [on] a[n] issue by issue or document by document basis.

Following the court's ruling, both Mother and Father made their opening statements. In Mother's opening, her counsel, in asking for sole legal and physical custody, asserted that there "isn't any ability of [Father and Mother], both pre December 2013 or post December 2013, to make joint decisions or cooperate or even really be in

the same room." Father's counsel discussed Father's desire to "regain his status as an involved parent" and "expand his [visitation] schedule."

Following opening statements, Mother called the court evaluator Jeanine Bensadon. Ms. Bensadon testified that during the course of her earlier interactions with the parties she "learned that there was a great deal of chaos with regards to their relationship with one another. . . . And there was a long history of discord regarding parenting styles during the relationship as well." She stated that Mother had concerns "regarding [Father's] parenting and just her ability to communicate with him in general, which was – she indicated that she felt that he had anger management issues, which often involved outbursts . . . ." In addition, there were concerns about Father's oldest child, pickups and drop-offs, and Father's attentiveness to the children's needs. She also noted Father's "concerns that he was being vilified by [Mother]", that Mother "was overprotective and highly anxious" and that Father "wanted Thursday through Monday overnight and joint legal custody, possibly sole legal custody." The proceedings that day ended in the middle of Ms. Bensadon's testimony.

The direct examination of Ms. Bensadon resumed the next morning. She discussed her home visit with Mother, which she described as "fairly uneventful. Pleasant. The children were warm and loving with their mother, affectionate physically" and there were "no concerns." She also testified that "during the course of the evaluation that [Mother] gave [her] a binder of all of her concerns and what she believes substantiated those concerns." Among the documents was information concerning Father's second wife,

which, according to Ms. Bensadon, included "the similarities between what [Mother] experienced with [Father] and what also [his second wife] experienced." Ms. Bensadon stated that she had read the binder before she spoke to Father's second wife. Father's counsel objected to Ms. Bensadon's testimony concerning any information related to the second wife, stating "there are approximately I believe a hundred pages in Ms. Bensadon's file concerning elements and documents from 2007. Some of them are attorney-client documents. Some of them are self-serving descriptive documents, all taken from [Father's] computer, and they are all part of Ms. Bensadon's file."

During her testimony, the court asked Ms. Bensadon to step outside in order to address issues related to the binder, which according to Father, contained information improperly taken from his laptop. Counsel for Mother asserted that "from what Ms. Bensadon indicated, she didn't rely on any information that came from [Mother]." Counsel for Father disagreed asserting that Ms. Bensadon stated "she had reviewed the materials" Throughout direct, the court questioned Ms. Bensadon about how she obtained certain information. Based on its examination, the court precluded Ms. Bensadon from testifying regarding certain information that the court felt was improperly obtained by Mother and turned over to Ms. Bensadon, including any information related to Father's oldest daughter. During the discussions, the court stated "it seems to me that you feel that what she's recommended is binding somehow on me, and it's not. It's just a recommendation."

After additional argument, the court decided to allow Ms. Bensadon to testify regarding her conversation with Father's second wife. She testified that Father's second wife indicated to her "there were issues in the marriage throughout, because the parties had differences of opinion regarding parenting style. [Father's second wife] described Father's parenting style as dictatorial and likened it to that of a 1950s parent where he did not want to participate in primary care duties, so that was an issue that they had, and that he was uninterested when [their daughter] was young in primary parenting."

Later, Ms. Bensadon provided her recommendation:

> Okay. So, in summary, [Mother] has organized her life around the needs of the children. This was something that happened since the births of the children. Collateral contacts speak to her involvement with the children, which I found to indicate a true interest and desire regarding being a primary caretaker.
>
> There's a great deal of animosity in this case and the parties continue to struggle with their relationship with one another. There's a history of difficulties in relationships – in previous marriages for [Father] and that's concerning, and also how those issues relate to the children, where anxiety and mental health issues seem to be a focus in the past with other children.
>
> An issue that came up was that oftentimes concerns are minimized by [Father], again, speaking to an ability to co-parent and an ability to share. There are concerns about – while there are concerns about anxiety with [Mother], she seems to be addressing those issues in therapy, and while there have been assertions made regarding [Father's] propensity towards anger, I haven't seen any real information about where that might be coming from other than what I learned during the evaluation.
>
> There also appears to be some difficulty regarding [J.D.], which came up during the evaluation, and, again, not really knowing specifically where it's coming from but wanting to find out more about that is something that I'm interested in.
>
> So, at this point, I'm recommending that there not be a drastic change in the current visitation arrangement until some things happen: one being that [J.D.] attend counseling, another one being [Father] receiving a psychological evaluation to figure out what's behind the history and if

> maybe there might be some insight gained there on why the history is what it has been.
>
> I'm recommending that [Mother] be granted primary – or sole legal custody as well, again, speaking to the difficulty between the parties in, you know, acknowledging the other's point of view, [Mother] appearing more in tune with the [cues] of the children – again, bringing up the situation with the arm, immediately noticing something was very wrong and taking the necessary steps to address that was one example.
>
> And then once these things happen, then my hope is that [Father] will have an every other weekend, one night weekly dinner schedule between him and the children.
>
> Okay. Oh, and I also recommend that [Mother] continue in counseling, again, as she does continue to be – does appear to be struggling currently with her anxiety and, you know, hyper-vigilance regarding [Father], a place to address those concerns.

The court refused to hear any recommendations regarding Father's oldest daughter because Ms. Bensadon stated that the basis for that recommendation included information "that [she] read" from the binder.

Following the recommendation, Father's counsel cross-examined Ms. Bensadon, who stated that she received information from Mother including a timeline, a "log of alleged injuries to the children," which did not contain Father's perspective, and information from Father's computer. She stated that Mother had told her that she had "made it a point to make sure [Father] was never alone with the children." According to Ms. Bensadon, Mother stated that she felt it was "important to her that [Ms. Bensadon] see that there was a history" of Father pushing and shoving his second wife prior to their divorce, and that Father's first divorce was a "volatile situation."[9] When asked by

[9] Although Ms. Bensadon interviewed Father's second wife, she did not speak to his first wife at any time. The information she received regarding the "volatility" of that relationship came from Mother.

Father's counsel, Ms. Bensadon stated that she inquired into Mother's allegations with Father, but he stated they were untrue. Ms. Bensadon did not notify Father that Mother had given her a binder of information to support certain allegations, but, as a result of that binder, she did ask Father for "follow-up information . . . so that he could give [her] his position on these issues raised by [Mother]."

Ms. Bensadon stated that "[a]ll of those emails and photos and these things that you're mentioning, they were things that I was made privy to, but it wasn't the primary focus for my recommendations." Ms. Bensadon also stated on cross her concerns about [Mother's] anxiety, which, in her view, "culminated into, you know, doing the GPS system, the bodyguards," and getting the children intensive swimming lessons because she was "extremely worried about [them] being with [Father]." Ms. Bensadon also stated that Mother told her that she "doesn't like to communicate with [Father] and does it rarely." In addition, she acknowledged that she recommended that Mother "be granted sole legal custody so that the major matters impacting the children are handled primarily by her" because she did not "think it was in the children's best interests to have these parents share decision making at this time, given the nature of this case."

Mother's counsel conducted a re-direct examination. On re-direct, Ms. Bensadon stated that she called Father's counsel's office "because [she] was getting so many – so much information from [Mother], [she] wanted to make sure, given the nature of this case, that [Father] was afforded the same [opportunity]." She also stated that she asked for additional information because she was "trying to get an understanding [of why he

wanted] the expanded schedule, given that [he] has a very demanding work schedule . . . ."

At the end of Ms. Bensadon's testimony, counsel for Father moved to strike her testimony, and the court responded that it would "talk about that later," before conducting its own examination of Ms. Bensadon. Among the questions asked by the court was whether Ms. Bensadon considered the possibility that Father wanted the expanded visitation schedule to align with his second daughter's visitation schedule, to which she replied that Father's second wife informed her that "the expanded schedule with [the second daughter] wasn't going very well." The court also asked whether the information that Ms. Bensadon obtained regarding Davis's first divorce was contained in the file of documents provided to her by Mother, to which Ms. Bensadon responded affirmatively. More specifically, she stated that the information contained in the binder and related to the first divorce affected her conclusion that the first divorce was "volatile" because "there were protective orders in that case . . . [she] just gathered that it was not an easy divorce – similar to the next two divorces."

The court then "[took] up [Father's] renewed motion." In the motion, counsel asserted that "based on Ms. Bensadon's testimony, . . . she in, in response to a number of questions, never answered that she could separate out what she'd read and what she knew and how she knew it from the conclusions that she drew, the assumptions that she made and where, and the burdens that she put on each party in, in terms of what those assumptions meant." Mother's counsel responded that the record "is devoid of anything

you can make a finding on and therefore a ruling" because Father has failed to indicate where the allegedly prohibited information came from and how Mother obtained the information and whether the information affected her recommendation.

After hearing the arguments the court stated:

> I'm leaning toward the defense motion because of the testimony of Ms. Bensadon, specifically when I asked her why she didn't speak to [Father's first wife], and she said, she was going to look at the phone number and then she said information about the initial divorce was in the binder, there were protective orders in the binder and other evid – information she gathered, it wasn't an easy divorce. Based on that, it seems like, only from what I heard from the parties and counsel yesterday, that that information was taken from the copied disc. It may be that you can show that it wasn't, but that's concerning to me because based on her recommendation, she is recommending that [Father] receive a psychological evaluation to figure out what's behind the history, and the history is based on what was in [the binder], and if those documents were from that copied hard drive, then I agree, it tainted her recommendation. To me, it's unusual that, I mean, I haven't heard anything concerning [Father] other than, you know, his wife's concerns that would preclude him from having overnight visits with his children, and for her to at this point want to gradually phase it in after [J.D.] attends counseling and after there's a psychological evaluation and then maybe he can have [them] every other weekend? To me, that's pretty strong, and it just seems like she got the stuff from [the binder] and the other thing, also, she kept trying to get more information from him as to why he wanted weekend visits. It just seems like, that's what a father should be doing, want to spend time with his children, and he had to prove to her why, and the basis for it, and she kept saying "Well, I've got all this information from the mother. She wanted to give him equal time." However, he didn't know about this binder full of documents that she had provided to him. So right now, I'm leaning towards striking it, but I will give you the opportunity to explain those documents and, if necessary, the expert may have to testify as to the source of [the documents].

The court then reserved its ruling on the motion.

Mother continued her case, calling her brothers Brian and David. Brian testified that Mother did most of the caretaking for the children and that she was a fit and proper parent. On cross examination he stated that he had conversations with her about her complaints that Father "was not being a father and she was not getting the partnership she wanted." David testified that she was "an excellent mother" and that "99.9 percent of the time it was [her] who was feeding them, making sure they were on schedule getting to bed, getting their teeth brushed and all that stuff." He only recalled seeing Father provide caretaking for the children on two instances.

On the third day of trial, the court took Father's witness Ariel De out of order to accommodate her schedule. Ms. De testified that when she observed Father with the children "everybody seemed relaxed and comfortable and happy" and that she believes him to be a fit and proper person to have custody of the children.

After the testimony of Ms. De, the Mother's counsel called Mother to testify. She testified that after L.D. was born in 2012 she "went back to work part-time, 50 percent schedule" of about twenty hours per week. She stated that following the birth of their first child she "pretty much did all the, took all the responsibilities." She also stated that Father "rarely, if ever" participated in the caretaking responsibilities, and that that negatively affected their relationship. She testified that when they moved to a new home in January 2012, he "just withdrew more."

She stated that in May of 2012, J.D. had foot and mouth disease and she wanted to bring him into their bed, so she went into his room and got him from the crib and Father

had taken J.D. from her and put him down on the bed and he fell off. After she scooped J.D. off the floor, Father "tried to choke [her] while [she] was holding [J.D.] in [her] arms." She testified that after that incident, their relationship was "strained."

She testified regarding her investigation of school placements for J.D. in 2015, after he completed the pre-K program at Washington Hebrew School. She stated that, when she emailed Father information about schools that she applied to on J.D.'s behalf, Father responded that he "wanted to be involved in the process," but, his involvement was limited to setting up an interview for early entrance at Somerset Elementary School in Montgomery County, and, to her knowledge, he did not tour or attend the other schools.

She stated that she makes "every effort to keep [Father] apprised of what's going on" with the children and she emails him regarding doctors appointments, health issues, and "what activities [she's] signing them up for." She stated that she is not able to contact Father through any means other than email because she's "afraid of him physically. He has bullied [her]. He's charged at [her] in the driveway in May [2014 during] a pickup. He had stolen the car seat out of [her] van on a drop off." She also recounted the content of a discussion with Ms. Chell about concerns she had about his oldest daughter "being in a supervisory role with the children." She again stated that she wanted "sole primary physical custody of the children, sole legal custody of the children, and [requested] that, [the court] essentially, follow the recommendations of Ms. Bensadon with regard to overnight visits."

Following a break, Mother's testimony was continued to accommodate Father's witness, Ms. Chell, who testified as an expert in "social work with an emphasis on evaluating child safety." She testified that she first became involved with this case when Father's former attorney called the Capital Region Children's Center "requesting assistance with a family to provide overall therapeutic supervision, visitation, to learn from that if there were any safety concerns on those visits." She stated that during her first visit with Father she observed "[v]ery positive interactions with the children. [She] found him to be attentive, nurturing, careful about their safety."

She testified about her role pursuant to the Consent Pendente Lite Custody Order and about Mother's understanding of her role, which was "to get [Father's oldest daughter's] records." She stated that during her initial interview with Mother, Mother informed her "this would be the third time that [Father] is litigating a divorce and that was very concerning to her," and that she had concerns Father's oldest daughter was "a drug addict at one point" and "mentally ill." She stated Mother stopped meeting with her after June 8, 2014. During her year and a half of visits with Father she had observed him prepare meals for the children and had "always seen them hugging, kissing." She also stated that she believed Father to be a "fit and proper" parent and that the children would be safe with him.

Ms. Chell also recounted a couple of conversations she had with Ms. Bensadon. During the first conversation in "late December [2014]/early January [2015]" she recalled Ms. Bensadon stating that she was leaning towards recommending "50/50 legal custody

and that primary physical custody would be with [Mother] as it is and that increasingly [Father] could reach overnight visitation every other weekend." But, approximately one to two weeks later, they had a second conversation in which Ms. Bensadon informed her that she "now had very overwhelming concerns about [Father] and that she believed he should have a psychological evaluation and she was changing her recommendation."

On cross examination Ms. Chell testified about her efforts to obtain Father's oldest daughter's records, including a discussion with Father, who refused to grant access to the records or healthcare providers. She also stated that Father's oldest daughter informed her that she "was in therapy and on medication," and that it was her understanding that Mother was the primary caretaker.

On September 3, the fourth day of trial, the court heard arguments on the renewed defense motion "to preclude or strike the court evaluator." In Father's view "the problem with Ms. Bendsadon's – the obvious problem is that she could not parse out, again, what she knew from people versus what she knew from documents." Mother responded, putting forth the same argument as before, that "there is yet a record that has been created for [the court] to rule." In her counsel's view, Mother needed "to be the one who's put on the witness stand," and Father's counsel should be required to create a record because there are "boxes, and boxes. And boxes of [Father's] legal files" laying around the marital home. The court again reserved on the motion stating "we still don't have the information we really need to determine whether or not Ms. Bensadon's testimony should

be stricken in whole or in part." Specifically, the court did not know how Mother got the information that was contained in the file given to Ms. Bensadon.

Following the discussion on the motion the parties agreed to take the final non-party witness, Mother's childhood friend Ali Kline, out of turn. On direct Ms. Kline testified that Mother was the "primary caregiver for the kids" and Father "was not engaged with his children; that was not his priority." On cross she stated she had not seen Father with the children in the past year and a half. After her testimony, the court suspended the proceedings and the parties agreed to "go to mediation before [a] retired circuit court judge to see if [they could] get th[e] case resolved." In addition, the access schedule was modified by agreement, and starting that weekend "from Saturday morning at 9:00 until Sunday at 5:00. And then starting alternate weekends after that, I think it's the 21st, . . . [t]hat [Father's access] will be 5:00 p.m. Friday to Sunday at 5:00 p.m., and continuing that way," and the pendente lite order otherwise remained in effect. In addition, the parties agreed that the issues about support and attorney's fees would be deferred.

On November 10, 2015, counsel for Mother produced over 2,000 documents and two flash drives to Father's counsel pursuant to a subpoena. In response to that production, Father filed a Defendant/Counter Plaintiff Alan Davis' Second Motion in Limine requesting that Mother "be precluded from presenting under any circumstance any and all evidence which refers or relates to the documents, photos or videos delivered to [counsel's] office on November 10, 2015" and that Mother be sanctioned for her

"eleventh hour delivery of documents." Counsel argued the motion on the morning trial resumed, and again requested that the documents be precluded. Mother responded that the documents were produced in response to a trial subpoena and they were not provided earlier to Father and his counsel because "[t]hey never asked for it." In addition, Mother stated that she did not intend to use any of the documents in question during her case. The court "reserve[d] with respect to the motion in limine based on what [Mother's] counsel has indicated, the documents were in response to the trial subpoena."

Counsel then resumed Mother's direct examination. She testified regarding the schedule of access that she wanted the court to order: "I would like the court to order that Father should have access on alternating weekends beginning on Friday[s] at 5:00 o'clock and ending on Sundays at 5:00 o'clock. That has been what we have done since the last day – since the trial was suspended back in September," and if "there is a weekend that [Father] has access and a holiday falls on a Monday, then that Monday holiday would sort of – the weekend would extend through that Monday and the access would end at 5:00 p.m. on Monday instead of Sunday." She stated that she wanted a "dinner or visitation every Wednesday evening" from 4:30 to 7:00 p.m. She requested that the parties alternate Thanksgiving each year, and that they split winter and spring break evenly with the first half and second half alternating each year, that each parent get to spend Mother's and Father's Day with the children from 9:00 to 5:00 p.m. if the children are scheduled to be with the other parent. Regarding summer break she requested that each parent have two "nonconsecutive weeklong vacation periods" with

the first choice of those periods alternating each year. She also requested that the parties alternate Jewish holidays, with each party getting half of the holiday per year but the order switching, with Jewish holidays taking "precedence over any other holiday period." With respect to legal custody she asked "that the Court award [her] sole legal custody."

On cross, when asked about Father's good characteristics Mother responded that he had "high earning potential to support his family." She testified regarding a recent phone call between the parties cancelling a tennis lesson that did not become contentious. She also raised concerns about injuries that the children sustained while with Father including, cuts, scrapes, bruises and a broken arm, which J.D. sustained when he fell of a set of monkey bars. She also indicated that she would agree to Father picking up "the children directly from school on his days that he has the children and also [dropping] them off at school on days that it coincides with his time," and that she would be "agreeable, obviously, to anything that the Court orders." But, she did indicate that she did not feel comfortable having Father come to her home because she had

> great concerns about [Father's] violent outbursts towards [her] in the presence of the children. And [she was] aware of the past history with his ex-wives and the behavior that he has exhibited there. And [she didn't] want [the] children to see it and [she didn't] want to be subjected to it.

Following cross, the court examined Mother and asked her "why do you want sole legal custody?" She responded that they "have a long history of not being able to communicate well. [Father] has bullied [her]. He only responds when its convenient for him. He, [she] knows him to be untruthful. [She] believe[s] he lies to [her]." When

prompted by the court, she was unable to give "an example of something that [she wasn't] able to do in terms of a decision that needed to be made because of his actions."

Following Mother's testimony, counsel for Father continued Father's case by calling Father to testify. On direct, he testified that regarding custody of his second daughter, he had "joint legal custody" and had "approximately forty percent of the time with her," from Thursday after school to Monday morning every other week. He stated that he participated in multiple activities with J.D. including Legos, learning how to ride a bike, scootering, swimming, and reading books, and participated in many of the same activities with L.D., who is "a little more adventurous." Regarding his involvement after J.D.'s birth, Father stated that "It was very difficult. [Mother] did not really want me to, she had her way of doing everything. And, anything that I did was usually criticized as being inadequate or flat-out wrong." He also stated that Mother had "a temper" and had thrown things at him during the time that they lived together.

He stated that he did not find out about the application to a new school that Mother had filled out on J.D.'s behalf until "[a]fter it was submitted," and that he submitted an application for Somerset Elementary to try and get a waiver for J.D. to begin kindergarten early, but at an interview Mother said she was "not in support of [her] son attending [that school]" and, as a result, refused to sign certain paper work. In an email to Mother, Father indicated that he "would like to be involved in the decision making process for the kids' education."

He requested sole legal custody and stated he was a fit and proper parent because he has "the ability to put the best interests of [the] children ahead of [his] own," and would "consult with" and "work with" Mother to raise the children. He discussed his concern that she would "alienate these children" from him, and stated his preferred access schedule, which included picking up the children from school on Friday and dropping them off Monday because "it doesn't involve any potential for conflict" during transfers. He also requested that the overnights overlap with his second daughter's visitation schedule. When he was unable to finish his testimony that afternoon, it was continued to the next scheduled meeting.

On November 13, 2015, Father resumed his case by calling non-party witness Elisa Chessler. She stated that she had observed Mother "very upset at with [Father], feeling he wasn't participating too much, or enough actually. And [Mother] would you know, give these examples and [Ms. Chessler] would say I just don't see it. And I think I see the participation and I think you're picking a lot." She also stated that she felt Father's second daughter, whom she got to know through her own daughter and found to be a "really well-spoken nice young woman," was an example of his parenting abilities. She stated that she had seen him read to J.D. and L.D. and prepare "[h]ealthy, round meals" for the children, and that she believed he was a fit and proper person to have custody. She also stated that she believed Mother was a "loving parent." On cross, she testified that she did not personally observe Father's absence in the evenings.

Following Ms. Chessler's testimony, counsel resumed Father's direct examination. He stated that he wanted the children "to know and appreciate that [he] can take them to school" and to interact with "the teachers, the institution, [and] the other parents." He also sought to expand the midweek access so that he would pick them up from school, and eventually to transition to overnights. He stated that he would like his winter break access to coincide with his second daughter's schedule, and for spring break to alternate on a yearly basis with one party getting access for the entire break on an alternating basis. He also requested overnight access on Father's Day, with overnight access to Mother on Mother's Day if it was his weekend. He suggested summer break be split 50/50, and he proposed a time change to access on the Jewish holidays, so access would end after sundown. He also proposed an additional clause in the order to deal with access on birthdays and other special events. He requested sole or joint legal custody because he believes he "bring[s] a more balanced rational approach to that decision-making." He stated he would handle co-parenting by "discuss[ing] things in advance about making decisions for the children with [Mother] . . . offer up solutions to help resolve issues or disputes." And he proposed a clause to make up scheduled visits that don't happen for a particular reason, among other things.

On cross, Father admitted that he had not discussed modifying his second daughter's access schedule to mirror the holiday access in Mother's proposed order. He also stated that he believed winter and spring break should take precedence over the Jewish holidays of Hanukkah and Passover, respectively. He stated that he intended to

hire his housekeeper full time after the court issued the custody schedule. On redirect, Father stated he would work with Mother if, in the final order, his time with J.D. and L.D. did not correspond with his time with his second daughter.

Following Father's testimony, Mother was recalled to the stand; she stated that she did not recall Father being home for dinner often, "maybe one out of every five nights," and she did not recall him giving the children a bath. She stated that she enrolled J.D. in a new school because "the educators at Washington Hebrew, [told her] that [it] was not in his best interest to repeat that year."

Following Mother's testimony, the court scheduled closing arguments for November 20, 2015. And, prior to the conclusion of the proceedings, Father's counsel requested that all of Ms. Bensadon's testimony be "stricken" and "the documents that she received from [Mother] returned to [them] and removed from her file," and that the transcript of her recommendations, "which are based on the documents," be removed from the file because in his counsel's view, the testimony and the documents were outstanding issues. The court indicated that it would give a written decision on Wednesday November 18, 2015.

On November 18, 2015, the court issued an Order on the outstanding motions to strike and preclude:

> ORDER
>
> Upon consideration of [Father's] Motion to Preclude Testimony of Court Evaluator Jeanine Bensadon and to Strike any Report and Testimony from Court Record and Other Appropriate Relief (DE 166), and [Mother's] Opposition, and after considering the testimony of Ms. Bensadon, and the Court finding that the testimony of Ms. Bensadon, her evaluation and

> recommendations were based in part on information that [Mother] improperly procured and provided to Ms. Bensadon, it is this is 18th day of November, 2015, by the Circuit Court for Montgomery County, Maryland:
>
> ORDERED, that [Father's] Motion to Preclude Testimony of Court Evaluator Jeanine Bensadon and to Strike any Report and Testimony from Court Record and Other Appropriate Relief is hereby GRANTED; and it is further
>
> ORDERED, that any testimony of Ms. Bensadon be and it is hereby stricken; and it is further
>
> ORDERED, that any information obtained from [Father's] computer, hard drive, computer accounts or cellular device provided to Ms. Bensadon be removed from her file and provided to [Father's] counsel by close of business on November 25, 2015.

On November 20, 2015, Mother and Father made their closing arguments, respectively; the court ruled, and applying the nine factors set forth in *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977), and supplemented by *Taylor v. Taylor*, 306 Md. 290 (1986), found it "not to be in the best interests of the minor children for either of the parties to have sole legal custody."

> Considering the factors as discussed and looking at each of the parents and their individual situations, based on the testimony of the witnesses and the Court's own observations of the parties, the Court finds that it is not to be in the best interests of the minor children for either of the parties to have sole legal custody. Although [Mother] has taken the lead in decisions, that alone does not entitle her to sole legal custody, especially when she has cut [Father] out of the decision making process. [Mother] testified that when she sends e-mails to [Father], she is seeking input, but most of the time, the e-mails are after a decision has been made, and [Mother] is merely informing [Father] of the decision. [Mother] discusses issues in advance with her 5 and 3-year-old children, but not with the children's father. The Court does not believe that if [Mother] is granted sole legal custody, she will discuss issues with [Father], which could lead to alienation. As [Mother's] counsel indicated, what happened the past can predict what happens in the future.
>
> Because the children will be primarily residing with [Mother], the Court does not find it to be in the best interest of the children to be in [Father's] sole legal custody. As indicated, [Father] is agreeable to joint

legal custody. The Court finds that the parties do have the ability to communicate and that nothing is prohibiting them from sharing in joint decisions except [Mother's] desire to be the sole decision maker. There is no reason why these two intelligent, caring parents cannot make decisions together for their children. If family is everything to [Mother], she will do what it takes to make sure that this works. [Father] has requested a parenting coordinator, which the Court believes would be helpful, but the Court can't appoint one unless [Mother] will agree.

Physical access. The access proposed by both parties envisioned every other weekend. It deviates from when it starts and ends. The Court finds that it's in the best interest of the children to spend more time with their father, and there has been no evidence that increasing the time has been harmful to the children. Marcy Chell testified as to her observations of [Father] and found that the interactions between him and the children were positive, and she describes him as nurturing, attentive, careful of the children's safety, and appears to have an understanding of their development. The Court will fashion an access schedule that incorporates the days that the parties have agreed upon and also a schedule that will foster more involvement by [Father] in the children's lives.

On December 11, 2015, the circuit court entered the Merits Custody Order, setting for the details for access:

MERITS CUSTODY ORDER

The above-captioned matter having come before the Court on the [Mother]'s and upon further consideration of the [Father]'s Counter-Complaint, with both parties seeking relief from this Court regarding the legal and physical custody of the minor children, and the Court having received testimony and evidence on August 31 through September 3, 2015, and November 12 and 13, 2015, and the Court having rendered its opinion on the record, it is thereupon this 1st day of December, 2015, by the Circuit Court for Montgomery County, Maryland

ORDERED, that Plaintiff [MOTHER] and Defendant [FATHER] are granted and shall share joint legal custody of the minor children, [J.D.] (age 5) and [L.D.] (age 3), and it is further

ORDERED, that Plaintiff [MOTHER] is granted primary physical custody of the minor children, and that the schedule of access for each parent shall be below; and it is further

ORDERED, that Defendant, [FATHER], shall have access to and spend time with the minor children in accordance with the following schedule, with all pick-ups and drop-offs taking place at the children's

school, camp or scheduled activity, and when there is no school, camp, or scheduled activity, the transitions of the minor children shall take place at the home of [Father]. [Mother] or her designee may not arrive at [Father's] home (including the driveway or any location visible by the children), for pick-ups [any] sooner than five minutes before the scheduled pick-up time. The access schedule shall be as follows:

Alternating Weekends: [Father] shall have the minor children on alternating weekends beginning at 3 :00 p.m. on Friday with [Father] picking the children up at school and continuing until Monday morning with [Father] taking the children to school. For the remainder of 2015, [Mother] shall have the minor children on the following weekends: December 4-7. For the remainder of 2015, [Father] shall have the minor children on the following weekends: November 20-23 and December 11-14. (The holiday/school vacation schedule is set forth in a separate paragraph). Beginning in 2016, [Father's] first weekend with the children will begin on January 15th and continue on alternating weekends thereafter.

Monday School Year Holidays: When the minor children are with [Father] on a weekend that includes a day off from school on the following Monday, then the weekend access shall conclude on Tuesday morning at the start of school.

Mid-week access: On each Wednesday, [Father] shall have the children beginning at 3:00 p.m. and continuing until 7:00 p.m. with [Father] picking the children up from school.

Thanksgiving: Except for 2015, in all odd-numbered years, [Father] shall have the minor children with him beginning at the end of the school day on Wednesday with [Father] picking the children up from school until Monday at the beginning of school. In all even-numbered years, [Mother] shall have the minor children beginning after school on Wednesday and continuing through Monday.

Winter Break (2015 only): [Father] shall have the minor children for the weekends of December 18-20, December 25-27 and January 1-3 (2016).

School Winter Break (2016 and thereafter): The parties shall equally divide and alternate annually the first half and second half of Winter Break from school for the minor children. The Winter Break commences at the end of the school day on the last day of school prior to the beginning and ends Monday on the first day of school following the break. [Mother] shall have the minor children with her during the first half of Winter Break in even years. [Father] shall have the minor children with him during the first half of Winter Break in odd years commencing 2017. [Mother] has the children with her in the second half of Winter Break in odd years and [Father] has the children with him first half of Winter Break in odd years. If the winter school break is an even number of days the

children's transition to the other parent will occur at 9:00 a.m. for the second half. If the winter school break is an odd number of days, the children's transition to the other parent will occur at 2:00 p.m. on the last day of the first half of the winter school vacation.

School Spring Break: The Spring Break commences at 9:00 a.m. on the day after the last day of school prior to the break beginning and ends at 6:00 p.m. on the day before the first day of school day following the break. [Mother] shall have the minor children with her during Spring Break in odd years. [Father] shall have the minor children with him during Spring Break even years.

Mother's Day and Father's Day: The minor children shall be with [Father] every Father's Day and with [Mother] every Mother's Day from 9:00 a.m. on Sunday until Monday morning following Mother's or Father's Day.

School Summer Vacation: "Summer" shall be defined as beginning at the end of the last day of school prior to the break beginning and ending on the first day of school following the break. Each party shall be entitled to have the children for two (2) non-consecutive week vacation periods which may be combined with the party's regular scheduled alternate weekend if that is the parent's choice. [Mother] shall have first preference of choosing summer vacation in even years; [Father] shall have first preference in odd years. The party with first preference shall notify the other party of the choice of vacation time by March 1st preceding the Summer. The party who does not have first preference shall inform the other parent of their preferred Summer vacation schedule by April 15th preceding the Summer. If the party who has first preference fails to timely designate his/her dates, then the other party shall then have the first preference and shall notify the other parent of her/his choice of dates by March 15th and the party who had first preference but failed to timely designate his/her dates shall inform the other parent of their preferred Summer vacation scheduled by April 15th preceding the Summer. Not less than fifteen (15) days prior to the scheduled vacation, the vacationing parent shall provide the other parent with an itinerary including dates and times and mode of travel, the location where the children will be, and a phone number at which the children may be reached during the vacation period.

During the weeks when neither party is exercising her/his summer vacation weeks, the weekly/weekend access set forth herein for [Father] shall remain in force and effect. If the children are in camp or another activity [Father] shall pick up the children from that activity, and shall deliver the children to the activity the following Monday. He will pick up the children at the activity for his midweek access.

Jewish Holidays:

a. **Rosh Hashanah.** Rosh Hashanah shall be defined as beginning at 3:00 p.m. on the eve of Rosh Hashanah and ending the following day at 8:00 p.m. The minor children shall spend Rosh Hashanah with [Mother] in odd years and [Father] in even years.

b. **Yom Kippur.** Yom Kippur shall be defined as beginning at 3:00 p.m. on the eve of Yom Kippur and ending at 8:00 p.m. on the following day. The minor children shall spend Yom Kippur with [Mother] in even years and [Father] in odd years.

c. The Rosh Hashanah and Yom Kippur schedule shall have precedence over the alternate weekend schedule.

d. **Passover.** Passover shall be defined as beginning at 3:00 p.m. on Passover Eve (the day of the first Seder) and ending at 9:00 a.m. on the morning following the second Seder. Passover shall be divided and alternated between the parties in each year as follows: The first half shall be defined as beginning at 3:00 p.m. on Passover Eve (the day of the first Seder) and ending at 9:00 a.m. (unless it is a school day, in which case it ends at the start of school). The second half shall be defined as beginning at 4:00 p.m. on the day of the second Seder (unless it is a school day, in which case it begins at the end of the school day) and continuing until the following day at 9:00 a.m. In even numbered years, the minor children shall spend the first half of Passover with [Father] and the second half of Passover with [Mother]. In odd numbered years, the schedule will reverse with [Mother] having the first half of Passover and [Father] having the second half of Passover. If Passover occurs during the school spring break, the parent who has the children for that year for the spring break shall have priority and the children during Passover.

e. **Chanukah.** Chanukah shall be defined as beginning at 3:00 p.m. on the first night of Chanukah and ending on the day after the second night of Chanukah at 8:00 p.m. Chanukah shall be divided and alternated between the parties in each year as follows: The first half shall be defined as beginning at 3:00 p.m. on the first night of Chanukah and ending at 4:00 on the following day. The second half shall be defined as beginning at 4:00 p.m. on the second night of Chanukah and ending on the following day at 4:00 p.m. In even numbered years, the minor children shall spend the first half of Chanukah with [Father] with [Mother] having the second half of Chanukah. In odd numbered years the schedule will reverse with [Mother] having the first half of Chanukah and [Father] having the second half of Chanukah. If the Chanukah holiday occurs during a party's access for the school Winter break, the parent who has the children for that Winter Break access shall have priority and the children during Chanukah.

Children's Birthdays: Each party shall be entitled to spend at least two (2) hours with both children on each child's birthday ([J.D.] - September 16; [L.D.] - July 31). Each party shall notify the other party of any birthday celebrations planned for each child, and shall be welcome to attend the celebration.

Special Events (including but not limited to weddings, funerals, life events, Bar or Bat Mitzvahs): Each party shall notify the other party at least thirty (30) days in advance, or as soon as possible if the event is not scheduled thirty (30) days ahead of time, of a Special Event (including but not limited to weddings, funerals, Bar or Bat Mitzvahs), and shall be entitled to take the children to Special Events; and it is further

ORDERED, that the holiday/school break/vacation access schedule set forth in this Order shall take priority over the regularly scheduled weekly access with the minor children; and it is further

ORDERED, that the parties may mutually agree in writing to alter the child access schedule outlined herein; and it is further

ORDERED, that each of the parties shall reasonably accommodate the occasional, timely request for a schedule change for personal or business reasons. Consent to such occasional changes may not be unreasonably withheld; and it is further

ORDERED, that both Parties shall consult with the other prior to making any decisions related to the minor children's health, education, welfare, and activities and shall refrain from scheduling any activities on the other party's time; and it is further

ORDERED, that each party shall, upon request of the other, provide the other with all medical, educational, and other records, notices or information which relate to any aspect of the welfare of the children and execute any authorizations whereby the full and complete contact information (including phone and email) for both parties is provided so that all information concerning the children shall be equally and directly available to both parties; if one parent received information from the school or an activity through the child or otherwise, he or she shall promptly notify the other parent, and it is further

ORDERED, that either party shall have the power and responsibility to set up emergency or unexpected medical appointments for the children if either child becomes sick, ill, or injured while in that party's care. Each party shall notify the other as soon as reasonably possible of any appointments and of the status of the children's health; and it is further

ORDERED, that each party shall be entitled to complete detailed information from any physician, dentist, consultant, or specialist attending to the children for any reason. Each party may directly contact any health care professional about the child's healthcare and obtain copies of the

children's records directly from that professional's office. Each party has the option to be present during the children's routine check-ups. Each party shall make a reasonable effort to keep the other informed with respect to the status of all health related matters regarding the children; and it is further

ORDERED, the parties shall share information regarding the minor children's school and extracurricular activities. Both parties are entitled to duplicate information from each school provider of extracurricular activities; and it is further

ORDERED, that the parties shall mutually discuss and agree upon all major issues involving the minor children's health, education, religion, and other matters of major significance concerning the children's life and welfare; and it is further

ORDERED, that neither party shall be denied the opportunity to participate in the school activities of the children including, but not limited to, parent-teacher conferences and meetings, lunch breaks, assemblies, special in-school programs, sports activities, back-to-school nights, and extracurricular activities. Each party shall be entitled to complete detailed information from any school, child care facility, daycare provider, babysitter, nanny, or other individual who furnishes or provides care for the children for any reason, and each party may directly contact any of the foregoing about the children. The parties shall timely exchange information regarding any daycare or educational programs for the children; and it is further

ORDERED, that each party shall use reasonable efforts to ensure that the minor children attend their mutually agreed upon activities including sports practices and games, social and extracurricular activities when the children are with her/him, and each party shall be entitled to attend any games or sports events when the minor children are scheduled to be with the other party; and it is further

ORDERED, that Kathleen A. Nardella, JD, LCSW-C, LICSW, 6203 Executive Boulevard, Rockville, MD 20852, (301) 775-5373, nardella@mdcustody.com, is hereby appointed as Parent Coordinator pursuant to the provisions of Md. Rule 9-205.2(f). Within ten (10) days of the date of this order the parties are to retain the services and equally divide the cost of Ms. Nardella, as a Parent Coordinator; and it is further

ORDERED, that consistent with the provisions of Md. Rule 9-205.2(g)2-7, the Parent Coordinator may, as appropriate, perform the following services:

1. Assist the parties in amicably resolving disputes about the interpretation of and compliance with the Order and in making any joint recommendations to the Court for any changes to the Order;

2. Educate the parties about making and implementing decisions that are in the best interest of the children;

3. Assist the parties in developing guidelines for appropriate communication between them;

4. Suggest resources to assist the parties;

5. Assist the parties in modifying patterns of behavior and in developing parenting strategies to manage and reduce opportunities for conflict in order to reduce the impact of any conflict upon their children;

6. In response to a subpoena issued at the request of a party or an attorney for a child of the parties, or upon action of the court pursuant to Rule 2-514 or 5-614, produce documents testify in the action as a fact witness;

7. If concerned that a party or child is in imminent physical or emotional danger, communicate with the Court or Court personnel to request an immediate hearing; and it is further

ORDERED, that the Parent Coordinator is authorized to decide post-judgment disputes by making minor, temporary modifications to child access provisions ordered by the Court if the parties have agreed in writing that the Parent Coordinator may do so: and it is further

ORDERED, all other claims pending between the parties shall be heard at the Divorce Merits Hearing presently set for February 29, 2016.

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A timely appeal was noted on January 8, 2016.

DISCUSSION

I. Did Mother present a Permissible Interlocutory Appeal

Contentions

Father contends that "[t]here can be no question that the Order entered on December 11, 2015, is not a final judgment as it does not adjudicate any of the parties' financial claims or claims incident to their divorce." Nor, in Father's view, does the appeal satisfy any of the exceptions permitting the appeal of a non-final judgment. Regarding CJP § 12-303, Father asserts that the appeal must be dismissed because the order "does not deprive [Mother] of the care and custody of her child."

Mother counters that "the custody order in this case is immediately appealable under both the applicable statute as well as the collateral order doctrine." She asserts that Father "urges a very narrow interpretation based on the suggestion that, because [she] was not completely deprived of care and custody, she may not immediately appeal." In her view, "it cannot be in the best interests of the minor children for an appeal of the final

custody order to be delayed until after the conclusion of the [support and property] phase of this case."

Analysis

A party may appeal a circuit court decision in the following circumstances: (1) the decision constitutes a final judgment within the meaning of Maryland Code (1973, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article ("CJP § 12-301"); (2) the decision has the status of a final judgment under the common-law collateral order doctrine; or (3) the decision is an interlocutory order immediately appealable under CJP § 12-303.

To be considered final, an order must be "an unqualified, final disposition of the matter in controversy." *Rohrbeck v. Rohrbeck,* 318 Md. 28, 41 (1989). But, under the Montgomery County Circuit Court's June 2009 Family Division Differentiated Case Management Plan and Procedures, cases involving "visitation, alimony, child support, earnings withholding, property, pension, costs and attorney fees, divorce" proceed, in order, through a three stage process. There is a preliminary stage, a custody stage, and a property stage. Because the December 11, 2015, merits order only relates to the custody issues, it does not represent "an unqualified, final disposition of the matter in controversy because other issues remain outstanding. *See* 318 Md. at 41.

Nor does the order qualify as a final judgment under the collateral order doctrine, which "treats as final and appealable a limited class of orders which do not terminate the litigation in the trial court." *Public Service Comm'n of Md. v. Patuxent Valley Conservation League*, 300 Md. 200, 206 (1984). "To fall within the collateral order

doctrine exception, an order must satisfy each of four requirements: conclusively determine the disputed question; resolve an important issue; be completely separate from the merits of the action; and be effectively unreviewable on appeal from a final judgment." *Jackson v. State*, 358 Md. 259, 267 (2000). At most, the merits order might satisfy two of these conditions. The Merits Custody Order resolves a disputed and important issue: child custody and access. It is not, however, completely separate from the merits of the action. And, although a delayed appeal of a custody and visitation order may not be in the best interests of the children involved, that does not mean that the order is "effectively unreviewable" at the termination of the entire case.

To be appealable, the Merits Custody Order must satisfy one of the exceptions contained in CJP § 12-303. The relevant exception is contained in CJP § 12-303(x) and states that an interlocutory order "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order" may be appealed.

The Court of Appeals has stated that "the word [deprive] must take its proper meaning from the context of its use." *Frase v. Barnhart*, 379 Md. 100, 118 (2003). And, while a minimal intrusion upon a particular interest, like legal or physical custody of one's children, is generally insufficient to constitute a deprivation, a total and complete dispossession is not required. *Id.* For example, orders eliminating unsupervised visitation, and "chang[ing] the terms of [a custodial parent's] visitation to her detriment, . . . [are] appealable as interlocutory orders under [CJP] Section 12–303(3)(x)." *In re Billy W.*, 387

Md. 405, 426 (2005). Similarly, conditions placed on a father's visitation that required him to "secure the services of an off-duty officer to supervise his visitation" sufficiently changed the terms of his care and custody to his detriment to permit an appeal of the order modifying visitation. *Id.* at 426; *see also Frase*, 379 Md. at 119 (determining that an order declining to strike conditions requiring a parent to apply for and obtain housing at a specified location and weekend visits with a sibling whom the parent did not maintain physical or legal custody "significantly infringe[d] on and thus acts as a substantial, albeit partial, deprivation of the parent's legal and physical custody.").

Particularly relevant to our analysis is "the extent to which [the] order changes the antecedent custody order." *In re Karl H.*, 394 Md. 402, 430 (2006). Here, on the record at the September 3, 2015, trial date, Mother and Father agreed to expand the visitation schedule contained in the June 18, 2014, Consent Pendente Lite Order to provide for overnights with Father from "5:00 p.m. Friday to Sunday at 5:00 p.m.," every other weekend. The Custody Merits Order, which the court entered on December 11, 2015, denied Mother sole legal custody and further expanded Father's overnight access to provide him with overnights on alternating weekends "beginning at 3:00 p.m. on Friday with [Father] picking the children up at school and continuing until Monday morning with [Father] taking the children to school." By granting Father additional time with the children, the order changed the terms of the physical custody arrangement in both the agreement on the record and the Consent Pendente Lite Order "to her detriment." *In re*

Billy W., 387 Md. at 426. We are persuaded that Mother's appeal of the Custody Merits Order is permitted under CJP § 12-303(x).

II. Did Mother violate Section 7-302 of the Criminal Law Article?

Standard of Review

The issue of whether Mother violated CL § 7-302 presents a mixed question of law and fact. "When reviewing mixed questions of law and fact, 'we will affirm the trial court's judgment when we cannot say that its evidentiary findings were clearly erroneous, and we find no error in [its] application of the law.'" *Fischbach v. Fischbach*, 187 Md. App. 61, 88 (2009) (alteration added) (quoting *Conrad v. Gamble*, 183 Md. App. 539, 551 (2008)).

We review the circuit court's interpretation of the relevant statute to determine "whether the lower court was 'legally correct'" in its application of the law. *Himelstein v. Arrow Cab*, 113 Md. App. 530, 536 (1997), *aff'd*, 348 Md. 558 (1998). We review this question of law under a de novo standard. *Friendly Fin. Corp. v. Orbit Chrysler Plymouth Dodge Truck, Inc.*, 378 Md. 337, 343 (2003); *see DPSCS v. Doe*, 439 Md. 201, 219 (2014) (quoting *Nesbit v. Gov't Emps. Ins. Co.,* 382 Md. 65, 72 (2004)) (stating that when an issue involves the interpretation and application of Maryland as well as federal statutory and case law, we "must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review.").

Statutory analysis treats "the language of the statute as the primary source of legislative intent." *MVA v. Lytle*, 374 Md. 37, 57 (2003). If the words of the statute,

"given their common and ordinary meaning," *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 74 (2015), are clear and unambiguous, we ordinarily "need not look beyond the statute's provisions and our analysis ends," *Barbre v. Pope*, 402 Md. 157, 173 (2007). "When there is some ambiguity in the meaning of statutory language or when the language conflicts with the larger statutory scheme, the statutory language must be construed in light of and governed by its context within the overall statutory scheme." *Friendly Fin. Corp.*, 378 Md. at 343–44. We may also look to "the legislative history or other sources extraneous to the statute . . ." to help shed light on legislative intent or confusion over interpretation. *Medex v. McCabe*, 372 Md. 28, 38 (2002).

Discussion

Contentions

Mother contends that "[t]he trial court erred in determining that [she] violated Section 7-302 of the Criminal Law Article." She asserts that it was undisputed that "during the prior seven (7) years, [she] had unrestricted access to the computer (including her own administrator account)," that she "was given the password no later than 2007," and that "there was no evidence that [Father] ever notified her that her access had been restricted." Mother cites *White v. White*, 781 A.2d 85 (N.J. Super. Ct. Chan. Div. 2001), in support of her argument. She asserts that copying the computer "could not reasonably be considered as 'exceeding its authorized use' as required by the statute since there were no limits on [her] use in the first instance and no notice that her right had been thereafter restricted."

Father contends that "the circuit court correctly determined that [Mother] violated C.L. § 7-302." To underscore that position, he points to his testimony "that he never created an administrator account on his laptop for [Mother]," that "he never gave [Mother] permission to use his laptop other than maybe to look something up on the web," that "she never had unrestricted access to it," and that he "had never given [her] the password to his laptop," and to the affidavit of his computer expert that "contradicted [Mother's] contention that it was a 'family computer.'" He asserts that the circuit court's ruling was based on "a factual determination that cannot be reversed or vacated absent a showing that it was clearly erroneous." In Father's view, *White v. White*, 781 A.2d 85 211, had "no bearing on this case because there was no dispute in that case that the computer was a 'family' computer."

Analysis

On August 31, 2015, the circuit court, after hearing arguments and testimony from Mother and Father, noted that "the actions taken by [Mother] in copying the computer hard drive in January, 2014, were prohibited by criminal law Section 7-302(c)(1)," which provides:

> (c)(1) A person may not intentionally, willfully, and without authorization:
> (i) access, attempt to access, cause to be accessed, or exceed the person's authorized access to all or part of a computer network, computer control language, computer, computer software, computer system, computer service, or computer database; or
> (ii) copy, attempt to copy, possess, or attempt to possess the contents of all or part of a computer database accessed in violation of item (i) of this paragraph.

CL § 7-302.

The statute, on its face, prohibits a person from "intentionally, willfully, and without authorization . . . exceed[ing] the person's authorized access to all or part of a . . . computer,"[10] or "intentionally, willfully, and without authorization . . . copy[ing] . . . all or part of a computer database."[11] The verb "exceed" recursively links with the words "authorized" and "access," to set forth the specific conduct prohibited by the statute, which is "exceed[ing] . . . authorized access."

In the absence of statutory definitions, these words are given their plain and ordinary meanings. *See Antonio*, 442 Md. at 74. Black's Law Dictionary defines intentional as "[d]one with the aim of carrying out the act;" willful as "[v]oluntary and intentional, but not necessarily malicious;" and authorization as "giv[ing] legal authority; to empower." *Authorize, Intentional, Willful*, Black's Law Dictionary (7th ed. 1999). Merriam-Webster's Collegiate Dictionary defines exceed as "to go beyond a limit." *Merriam-Webster's Collegiate Dictionary* 403 (10th ed. 1993). In addition, to defining

[10] CL § 7-302(a)(2) provides the following definition for the term "access" "(2) 'Access' means to instruct, communicate with, store data in, retrieve or intercept data from, or otherwise use the resources of a computer program, computer system, or computer network.

[11] CL § 7-302(a)(6) provides the following definition for a "computer database":
"Computer database" means a representation of information, knowledge, facts, concepts, or instructions that:
(i) is intended for use in a computer, computer system, or computer network; and
(ii) 1. is being prepared or has been prepared in a formalized manner; or
2. is being produced or has been produced by a computer, computer system, or computer network.

the prohibited conduct, the statute provides penalties for violators and establishes jurisdiction over the adjudication of violations.[12] Absent from the statute are any provisions permitting victims to maintain civil actions or to seek other remedies against an alleged violator in a civil action context.

In *Briggs v. State*, 348 Md. 470 (1998), the Court of Appeals discussed the statute's legislative origins.[13] The purpose of CL § 7-302 was "to deter individuals from breaking into computer systems." *Id.* at 482 (quoting Committee Report System, Summary of Committee Report, House Bill 121 (available at the Department of Legislative Reference, Bill File for House Bill 121 (1984))). The statute was silent, however, on the issue of "authorized users who exceed the scope of their authority." *Briggs*, 348 Md. at 480. As a result, the *Briggs* Court concluded that the statute was not intended to prohibit such conduct because "[i]f the Legislature intended the statute to cover [individuals] who exceeded the scope of their authority or who misused their authority, it could have done so explicitly." *Briggs*, 348 Md. at 480. In reaching that conclusion, the Court pointed to examples of federal and state legislation that specifically

[12] More specifically, CL § 7-302 provides:

(d)(1) A person who violates subsection (c)(1) of this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $1,000 or both.

* * * *

(f) A court of competent jurisdiction may try a person prosecuted under this section in any county in this State where:

(1) the defendant performed the act; or

(2) the accessed computer is located.

[13] The prior version of this statute was contained in the Md. Code (1957, 1987 Repl. Vol.) Art. 27, § 146.

prohibited such conduct. *See Briggs*, 348 Md. at 480 n.8 (citing *e.g.,* U.S.C. § 1030(a)(1), (a)(2), (a)(4) (1996); Ariz. Rev. Stat. Ann. § 13–2316(A) (Supp.1997)). The *Briggs* Court, recognizing the principle that policy determinations should be left to the legislature, declined to broaden the scope of the statute, opining that the statute "should be modified by the Legislature, not by [the] Court." *Briggs*, 348 Md. at 483; *see also Dorsey v. State*, 185 Md. App. 82, 122 (2009) ("[W]e shall not infer a remedy that the General Assembly did not authorize.").

In response to *Briggs*, the legislature enacted HB 925 in 1998, which added language to the statute forbidding a person to "exceed the person's authorized access." The purpose of HB 925 was to expand "the provision of law pertaining to computer access to prohibit a person from intentionally, willfully, and without authorization exceeding the person's authorized access to computer systems or services." Fiscal Note, HB 925, at 1 (1998). Although the amended provision expanded the scope of the statute, the General Assembly did not include provisions allowing victims to maintain civil suits or pursue other recourses against violators. *See* CL § 7-302. Notably, statutory remedies were available to victims of crimes involving computer use in excess of authorized access in other jurisdictions, and to victims of other forms of electronic misconduct within Maryland. *See, e.g.*, Maryland Wiretapping and Electronic Surveillance Act, CJP § 10-402;[14] Stored Wire and Electronic Communications and Transactional Records Act

[14] The following provisions are remedies available to individuals who were victims of violations of the Maryland Wiretap Act.

18 U.S.C. § 2511(a)(1) (1996);[15] and Computer Fraud and Abuse Act 18 U.S.C. 1030(g) (1996).[16] Because CL § 7-302 does not provide for civil remedies, we will not infer that the legislature intended application of this statute in a civil context.

As discussed above, it is well settled that this Court will not create a statutory remedy where one does not exist. *Briggs*, 348 Md. at 480, 483; *see King v. State*, 434 Md. 472, 493 (2013) ("[W]here the Legislature does not provide explicitly for a suppression remedy, courts generally should not read one into the statute."). Specifically, "the Court

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> (a) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, (continued…) or uses, or procures any other person to intercept, disclose, or use the communications, and be entitled to recover from any person:(1) Actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;(2) Punitive damages; and(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

CJP § 10-410.

> In general(a) Except as provided in subsection (b) of this section, whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle.

CJP § 10-405.

[15] The ECPA permits "such preliminary and other equitable or declaratory relief as may be appropriate," 18 U.S.C. § 2520(b)(1) (1996), and provides for civil damages, 18 U.S.C. § 2520(b)(2) (1996).

[16] The relevant portion of 18 U.S.C. § 1030(g) concerning fraud and related activity in connection with computers provides, in relevant part: "(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." 18 U.S.C.A. § 1030 (1996).

of Appeals has held that Maryland courts may not act to create an exclusionary rule where one does not exist." *Upshur v. State*, 208 Md. App. 383, 398 (2012) (citing *Thompson v. State*, 395 Md. 240, 259 (2006)).

Moreover, it is equally well settled that the "declaration of public policy is normally the function of the legislative branch." *Adler v. Am. Standard Corp.*, 291 Md. 31, 45 (1981). CL § 7-302 does not provide for the exclusion of evidence obtained in violation of the statute in a civil action. Therefore, we reject the circuit court's statement in its oral ruling that the evidence could not be admitted "[a]s a matter of public policy."

The District Court of Appeal of Florida, Fifth District reached a similar result applying a similar statute in *O'Brien v. O'Brien*, 899 So.2d 1133 (Fl. Dist. Ct. App. 2005). In *O'Brien*, a wife, "unbeknownst to [her] [h]usband, had installed a spyware program on [the husband's computer] that copied and stored electronic communications between the [h]usband and another woman." *Id.* at 1134. The spyware took snapshots of the computer screen, capturing all chat conversations, instant messages, e-mails, and websites visited. *Id.*

> When the Husband discovered the Wife's clandestine attempt to monitor and record his conversations with his Dominoes partner, the Husband uninstalled the . . . software and filed a Motion for Temporary Injunction, which was subsequently granted, to prevent the Wife from disclosing the communications. Thereafter, the Husband requested and received a permanent injunction to prevent the Wife's disclosure of the communications and to prevent her from engaging in this activity in the future. The latter motion also requested that the trial court preclude introduction of the communications into evidence in the divorce proceeding.

Id. Because, in its view, the electronic communications were obtained in violation of the relevant statute,[17] the trial court, "without considering the communications, entered a final judgment of dissolution of marriage." *Id.* The wife moved for a rehearing of the

[17] The relevant statute, which is a part of the Criminal Procedure and Corrections Title of the Florida Code provides, in part:

> (1) Except as otherwise specifically provided in this chapter, any person who:(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;(b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or2. Such device transmits communications by radio or interferes with the transmission of such communication;(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or(e) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication intercepted by means authorized by subparagraph (2)(a)2., paragraph (2)(b), paragraph (2)(c), s. 934.07, or s. 934.09 when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, has obtained or received the information in connection with a criminal investigation, and intends to improperly obstruct, impede, or interfere with a duly authorized criminal investigation;

Fla. Stat. § 934.03 (2015).

appellate court's affirmance of the trial court, arguing that the court had "either directly, or by implication, convicted [her] of a crime." *Id.* at 1138.

In denying a motion for rehearing of the original opinion, the appeals court addressed the implications of the trial court's finding that the communications were "illegally intercepted" and that the wife had committed a crime. *Id.* The court stated that the trial court's finding that the communications "were illegally intercepted by the [w]ife" was the basis upon which it "excluded the electronic communications that [she] attempted to introduce into evidence," but it was "a far cry from saying that [wife] has, in fact, committed a crime and should be convicted." *Id.* In affirming the trial court's decision, the appeals court explained that it was "simply [holding] that the trial court was within its broad grant of discretion in ruling that the communications should be inadmissible for that reason." *Id.*

In this case, it is not disputed that Mother intentionally and willfully accessed and copied the computer. The disputed issue is whether she was authorized to access the files on the computer and copy its contents. Mother testified that she was authorized because she knew the password, maintained an administrator profile, and used the computer for checking e-mails, surfing the internet, wedding-planning, looking at baby names, downloading photographs, and browsing photographs. Father contested those assertions. There was no other testimony, expert or otherwise. Therefore, the trial court's conclusion (presumably based on the preponderance of the evidence and not beyond a reasonable doubt) that any access terminated when the password was changed was essentially a

credibility finding, but it was necessarily "a far cry" from a finding of criminality. The question, therefore, is whether the exclusion of the evidence for that reason could still be within the circuit court's broad discretion in the admission of evidence.

III. Did the circuit court abuse its discretion by granting Father's motion in limine and striking the testimony of the court-appointed custody evaluator?

Standard of Review

The circuit court is afforded "broad discretion in the conduct of trials in such areas as the reception of evidence." *Void v. State,* 325 Md. 386, 393 (1992) (quoting *McCray v. State,* 305 Md. 126, 133 (1985)). Thus, "we extend the trial court great deference in determining the admissibility of evidence . . . ." *Hopkins v. State*, 352 Md. 146, 158 (1998). We "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). And, we review the trial court's rulings on the admissibility of evidence for abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2013).

Similarly, "[a]n evidentiary ruling on a motion in limine 'is left to the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of discretion.'" *Ayala v. Lee*, 215 Md. App. 457, 474–75 (2013) (quoting *Malik v. State*, 152 Md. App. 305, 324 (2003)); *and see Dehn v. Edgecombe*, 384 Md. 606, 628 (2005) ("When the trial court's evidentiary rulings result from its determination that the relevance of certain evidence is outweighed by its potential for prejudice, we review that determination for an abuse of discretion.").

Discussion
Contentions

Mother contends that the circuit court "erred in granting [Father's] motion in limine by failing to determine which, if any, documents provided to the custody evaluator were obtained from the subject computer." In her view, the court acknowledged that if she had "requested the information in discovery and had a basis to request it, other than knowing about it from the copied hard drive, she may seek to introduce it," and Father "never attempted to demonstrate which documents he alleged had been obtained from the subject computer and given to the custody evaluator." Mother also asserts that many of the documents reviewed by the custody evaluator "could not possibly have come from the computer."

In addition, Mother contends that the circuit court "erred in striking the testimony of the court-appointed custody evaluator which was both relevant and admissible." She asserts that the probative value of her testimony was "not substantially outweighed by the danger of unfair prejudice, confusion of the issue or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." In her view, the circuit court's decision to order "shared legal custody without considering the testimony of the court-appointed custody evaluator" was in error because "significant components of her case were presented through the evaluator's testimony," and therefore, she was "unfairly prejudiced."

Father, citing *Bryant v. State*, 163 Md. App. 451, 472 (2005), responded that "[t]he circuit court did not err in granting [his] motions in limine [and his] motion to preclude

and striking the testimony of the court-appointed custody evaluator" because "the decision to admit or exclude expert testimony 'seldom constitutes grounds for reversal' and certainly does not constitute grounds for reversal in this case." As he sees it, the court had "evidence of documents that had been obtained illegally by [Mother] and disseminated to Ms. Bensadon," and his testimony demonstrated that the computer contained "very sensitive documents" pertaining to his older daughters that could not have been obtained from any other source. He asserts that the custody evaluator's testimony was properly excluded because the obtained information negatively affected Ms. Bensadon's final recommendation. And, "even if the circuit court erred in striking the testimony of Ms. Bensadon, such error was harmless" because the information in the report was over one year old.

In her reply brief, Mother, citing *Santo v. Santo*, 448 Md. 620 (2016) for the propositions that the "capacity of the parent to communicate and to reach shared decisions affecting the child's welfare" is paramount and the best evidence of that ability is "past conduct or [a] 'track record' of the parties," argues that "by striking the testimony of the court evaluator, the trial court could not effectively consider all of the facts and circumstances of the case—especially the inability of the parties to effectively communicate."

Analysis

As noted above, the court had broad discretion to exclude the evidence. Decisions regarding the admission or exclusion of items of evidence are "committed to the

considerable and sound discretion of the trial court." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619–20 (2011) (quoting *Merzbacher v. State*, 346 Md. 391, 404 (1997)). The reason being that the trial court, whose "finger [is] on the pulse of the trial," *State v. Hawkins,* 326 Md. 270, 278 (1992), is best positioned to decide whether the prejudicial value of evidence outweighs any probative value. *Dehn*, 384 Md. at 629.

Relevant evidence, which is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Md. Rule 5-401, is generally admissible, Md. Rule 5-402. Relevant evidence, however, may be excluded under Maryland Rule 5-403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In its function as evidentiary gatekeeper, the court weighs "the probative value of proffered evidence and the party's need for that particular evidence (when compared to alternative means of proof) against [the considerations in Md. Rule 5-401]." Lynn McLain, *Md. Practice Series, Maryland Evidence State and Federal* 648 (3d ed. 2013). In other words, the court takes a holistic approach by comparing "evidentiary alternatives," rather than assessing probative value and prejudicial effect in a vacuum. *Carter v. State*, 374 Md. 693, 717 (2003) (quoting *Old Chief v. United States*, 519 U.S. 172, 184 (1997)); *see also Gabrill v. Schooley*, 95 Md. 260, 282-83 (1902) (concluding that the trial court erred by admitting a letter as a handwriting exemplar when it contained

the potentially inflammatory political opinions of defendant and other letters were equally available).

Here, the court, prior to its ruling, expressed its concern about Ms. Bensadon's recommendation being "tainted" by documents from the copied hard drive but cautiously withheld its ruling on the motion in limine until the end of trial in order to determine the actual source of the information provided to Ms. Bensadon. During that time, much of the information, including the recommendation itself, was provided through various other means. For example, Ms. Chell testified regarding Mother's concerns about Father's conduct towards his ex-wives and his allegedly violent nature. Ms. Chell also testified regarding concerns that Mother had expressed about Father's oldest daughter. In addition, the report and the other excluded documents contained material that related to medical treatment and other information regarding Father's oldest daughter, who did not live with him full time. In sum, there was a basis to exclude the testimony and recommendation of Ms. Bensadon in relation to taint and prejudice without relying on CL § 7-302, and even if exclusion was the result of error or an abuse of discretion based on that error, we view it as harmless in light of the evidence that was presented through other witnesses including Mother.

In the end, the dispute was mostly distilled to the award of joint legal custody.[18] Mother correctly points out that "the most important factor for a court to consider before

[18] By the time the court entered the merits custody order on December 11, 2015, the parties had agreed that Father would have overnight visits with the children on alternate weekends from 5:00 on Friday to 5:00 on Sunday.

awarding joint custody is the capacity of the parents to communicate and to reach shared decisions affecting a child's welfare." *Santo*, 448 Md. at 624. In its oral ruling on November 20, 2015, the court clearly considered the past conduct of the parties, stating "[Mother] discusses issues in advance with her 5 and 3-year-old children, but not with the children's father. The Court does not believe that if [Mother] is granted sole legal custody, she will discuss issues with [Father], which could lead to alienation. As [Mother's] counsel indicated, what happened the past can predict what happens in the future." The court also considered the parties' ability to successfully communicate regarding the cancellation of tennis lessons, and school placements.

The essential requirement in a joint custody determination is that a trial court "carefully set out the facts and conclusions that support the solution it ultimately reaches." *Id.* at 630. In its oral ruling, the court carefully applied the factors set forth in *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977), and supplemented by *Taylor v. Taylor*, 306 Md. 290 (1986), to the facts of this case. In sum, and even if we might have reached a different conclusion regarding the admission of Ms. Bensadon's testimony, we are not persuaded that the court abused its discretion in regard to the evidence and awarding Mother and Father joint legal custody in this case.

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