UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 961

September Term, 2016

NICOLE S. NEFF

v.

SAMUEL R. NEFF

Eyler, Deborah S.,
Graeff,
Harrell, Glenn T. Jr.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 28, 2017

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Nicole S. Neff ("Mother"), the appellant, appeals from a custody order and an amended custody order entered by the Circuit Court for Montgomery County during the pendency of her divorce case.[1] In the custody order, Mother and her now ex-husband, Samuel S. Neff ("Father"), the appellee, were awarded joint legal custody and shared physical custody of their three children, and Father was ordered to pay child support and to continue paying the mortgage on the family home, where Mother and the children lived.

Just over a month after the entry of the custody order, Father moved to modify custody and visitation and requested an expedited hearing, alleging that Mother had filed a statement of charges against him for violating a final Protective Order based upon his compliance with the custody order and that he had been arrested and jailed as a result. Mother moved to dismiss Father's motion for failure to state a claim and opposed it. Twenty days later, the court held an evidentiary hearing. It denied Mother's motion to dismiss and entered an amended custody order that, as pertinent, prohibited Mother from attending the children's school, camp, recreational, and other functions on days when they were in Father's custody under the access schedule.

Mother presents five questions, which we have reordered and rephrased:

> I. Was Mother deprived of procedural due process by the circuit court's scheduling of an expedited evidentiary hearing on Father's motion to modify custody and/or did the circuit court violate its Differentiated Case Management ("DCM") procedures by the scheduling of the case?

[1] The parties ultimately were divorced while this appeal was pending.

> II. Did the circuit court unconstitutionally restrict Mother's right to travel by amending the custody order to prohibit her from attending the children's events on Father's access days?
>
> III. Did the circuit court err or abuse its discretion in its calculation of child support?
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> IV. Did the circuit court err by not giving *res judicata* effect to the final Protective Order in place at the time of the custody order and by failing to comply with Md. Code (1984, 2012 Repl. Vol.), section 9-101.1 of the Family Law Article ("FL")?
>
> V. Did the circuit court clearly err or abuse its discretion by awarding Father shared physical custody in light of the evidence presented by Mother that he had been uninvolved in the children's lives?

For the following reasons, we answer these questions in the negative and shall affirm the orders of the circuit court.

FACTS AND PROCEEDINGS

Mother and Father were married on August 21, 1999. They have three sons: Benjamin ("Ben"), age 13; Jacob, age 10; and Andrew, age 9. During the marriage, the parties lived together with their children in a three-bedroom townhouse in Rockville.

All three children have been diagnosed with learning and developmental delays. At the time of the custody hearing, they all were being treated for an autism spectrum disorder ("ASD") and an adjustment disorder with anxiety. Jacob is diagnosed with attention deficit hyperactivity disorder ("ADHD") and Ben and Andrew also display symptoms of ADHD. Andrew is diagnosed with encopresis (fecal incontinence). All three children are prescribed Adderall, a stimulant used to treat ADHD.

For over a decade, Mother has worked at the Smithsonian Museum of Natural History ("the Museum") in its retail store. She earns $67,000 per year. Her schedule is somewhat variable, but she usually works Monday through Thursday, from 9 a.m. until 5:30 p.m., and Sundays from 10 a.m. until 6:30 p.m. Mother sometimes is required to work a late shift on Sundays, from noon until 8:30 p.m. She also is required to work very late several times a year when the museum store does inventory. Mother's commute takes approximately 60 to 75 minutes each way.

Father is a software engineer. When the custody hearing took place, he had just started a new job, earning $185,000 per year. He typically works 9 a.m. to 4 p.m. Monday through Thursday and works extra hours in the evening and on Friday.

The children attend St. Mary's School ("St. Mary's"), a private Catholic school in Rockville. Before being enrolled at St. Mary's, the boys attended the Smithsonian Early Enrichment Center ("SEEC"), a pre-school and kindergarten program located near the Museum. Ben also briefly attended a public school in Rockville.

In February 2012, Father leased a 700 square foot one-bedroom apartment in Rockville about a mile from the marital home. He moved out of the marital home in April 2012 and began living at the apartment. At that time, Ben was 8 and was in second grade at the local public school. Jacob, age 5, and Andrew, age 4, still were enrolled at SEEC. After Father moved out, he continued to come to the marital home daily, in the mornings and in the evenings. Mother drove Jacob and Andrew to school when she went

to work. Father drove Ben to school. He often spent the night at the marital home and the parties continued to have marital relations as well.

In August 2013, all three children began attending St. Mary's. Around the same time, Father and Mother ceased having marital relations. By informal arrangement, they agreed that Father would drive the children to school and, Monday through Thursday, would pick them up from aftercare, take them to his apartment or the marital home, and, if Mother was working late, feed them dinner and put them to bed at the marital home.

According to Father, he and Mother had a cordial relationship post-separation until May 2014, when Mother learned that he was "looking into dating." One time that month Mother came to Father's apartment to drop off the children, began questioning Father about his dating, becoming loud and belligerent, and refused to leave. Father called the police, but Mother left before they responded.

Four months later, on Sunday, September 7, 2014, a similar altercation took place. According to Father, on that occasion Mother came to his apartment to drop off the children, but arrived an hour earlier than usual. Instead of buzzing from the front door, Mother went around to the back of the building and began knocking on Father's bedroom window. Father, who had been sleeping, came to the back door to let them in. Mother "immediately started . . . yelling at [Father], and asking [him] about a [speed] dating event the night before, and . . . why was [he] dating." The children witnessed this. Father asked Mother to leave, but she refused. Father walked into his bedroom, closed the door, and locked it. Mother began banging on the bedroom door and yelling. Father

told Mother he was going to call the police, and he did so. When the police arrived, Father buzzed them in and emerged from the bedroom. The police spoke briefly to Mother and Father in the hallway of the apartment building. Mother agreed to leave. No charges were filed.

Mother's version of the September 7, 2014 incident differed dramatically. She claimed that she and Father were having a normal conversation when he suddenly became angry, "screaming [and] . . . yelling" at her, pushing her multiple times, and telling her to "get out of [his] f[]ing house." She went to urgent care later that day, after work, to seek treatment for pain in her neck, shoulder, and hip. She was given an anti-inflammatory and pain medication.

Four days later, on September 11, 2014, Father filed a complaint for absolute divorce in the Circuit Court for Montgomery County. He asked the court to award joint legal custody of the children and to order a "set visitation schedule which includes overnight visitation, summer access and holiday access."

On September 19, 2014, Mother filed a petition for a temporary Protective Order, also in the Circuit Court for Montgomery County, based on the September 7, 2014 incident. She alleged that she had been injured when Father pushed her with a "stiff arm" and that Father also had hit Ben in the face, causing a red mark. The filing of the petition prompted a referral to the Montgomery County Department of Social Services ("MCDSS") to investigate whether Father was abusing the children. The precise outcome of that investigation is not clear from the record, but it was either

unsubstantiated or ruled out. On September 26, 2014, the court held a final Protective Order hearing and, after testimony was taken, the parties consented to the entry of a final Protective Order ("2014 Protective Order") that was limited to Mother (not the children), without any findings. Under the 2014 Protective Order, the parties were to have no "adverse contact" for 12 months and Father was not to "abuse, threaten to abuse or harass" Mother. Father was not prohibited from having contact with Mother, however.

On October 27, 2014, Mother answered the divorce complaint and filed a counter-complaint for absolute divorce. She sought sole legal and physical custody of the children and an award of child support.

On December 5, 2014, the circuit court appointed Angela Layne, a licensed clinical social worker employed as a custody evaluator for the circuit court, to conduct a visitation evaluation.

On April 1, 2015, the parties appeared for a hearing and placed an agreement on the record pertaining to custody, visitation, and child support *pendente lite*. In general terms, the agreement called for Father to pick the children up from school or camp on Monday through Wednesday and take them to his apartment until Mother picked them up at 7:30 p.m. On Mondays, however, Mother would pick Jacob up from Father's apartment at 6:45 p.m., take him to Boy Scouts, and return between 8:30 p.m. and 9 p.m. to pick up the other children. On Thursday, Friday, and Saturday, the children would be with Mother; and on Sunday while Mother worked, she would drop the children off at Father's apartment one hour before she had to be at work and pick them up ten hours and

forty-five minutes later. During spring break, Father would have access to the children Monday through Thursday, from 6 p.m. until 7:30 p.m. During the summer, he also picked the children up Monday through Thursday, at a Smithsonian camp near the Museum. Depending on the day, Father would drop the children off later at Mother's work or take them to his apartment where Mother would pick them up. The children did not spend the night at his apartment. These arrangements and other agreements pertaining to therapy and expenses were incorporated into a pendente lite order ("the PL Order") that was entered on May 14, 2015.

Meanwhile, on April 9, 2015, the parties appeared for a status conference and for Ms. Layne to give an oral report on the results of her visitation evaluation. Ms. Layne had interviewed both parties and each child individually; observed the children in the care of each parent; reviewed the 2014 Protective Order; reviewed documents provided by the children's schools; spoken to the children's pediatrician; and asked Father to submit to a drug screen, which had come back negative for all substances. She also had spoken to a former teacher listed as a reference for Mother. She had been unsuccessful in reaching another person Mother had suggested or any of the people Father had suggested. She also had been unable to speak to Ben's group therapist.

Mother had told Ms. Layne that Father had physically and verbally abused her throughout most of the marriage, beginning when she was pregnant with Ben. He lacked patience with the children, often yelled at them, physically disciplined them, and on occasion had told her he hated them.

Father had told Ms. Layne that the parties' marriage began to deteriorate after Ben was born because he felt that Mother was not sharing in household responsibilities and she was disinterested in spending time with him without the children. He stayed in the marriage because of the children's special needs, but eventually the stress became too much and he left the marital home. He reported that the parties' relationship was cordial following the separation until he made clear that he intended to file for divorce.

Ms. Layne found the parties' homes to be appropriate, but noted that Father's one-bedroom apartment did not have accommodations for overnight visits with the children. Father had told Ms. Layne that he planned to let the children sleep in his bed or on a blow up mattress because this was similar to their sleeping arrangements at the marital home. Mother confirmed that the children typically slept with her in her bedroom at the marital home even though they had their own beds.[2] They slept in her bed, on a mattress on the floor, and on the couch.

Ms. Layne observed that the children were comfortable with both parents, although Ben was more withdrawn around Father. During both observations, Andrew, then age 7, told Ms. Layne, unprompted, that "mommy always lets me see my daddy, but my daddy doesn't let me see my mommy."

Ben, then age 11, and Andrew reported that they slept in Mother's room and would be unable to sleep "anywhere else or away from her." Jacob, then age 8, reported that he slept in the living room on the couch because he needed the television on in order

[2] Jacob had his own room, and Benjamin and Andrew shared a room.

to fall asleep. He said he would be willing to spend the night at Father's home if "he had to." All three said they loved playing video games and this was one reason they enjoyed spending time at Father's home. Mother recently had bought them a video game console as well, but had instructed them "not to tell [Father]."

Ms. Layne explained that it was "quite evident that [Mother] ha[d] exposed [the children] to information pertaining to the court, [Father's] alleged abuse towards her and them, and other things that the children should not be aware of." Ben reported one incident when Father had grabbed him by the neck and one incident when Father had yelled at Mother in his presence; however, all three children reported incidents of abuse by Father that predated their births and incidents when Father was "mean to them based on what [Mother] had told them." They also were aware that Father disapproved of their attending an Abused Persons therapy group Mother had enrolled them in.

Ms. Layne found that Mother made "several strong allegations about [Father], which were not substantiated during the . . . evaluation." Specifically, Mother alleged that Father abused drugs, but his drug screen was negative. She alleged that Father had physically abused her and the children, but did not produce any proof of injuries and acknowledged that she never had taken the children to the hospital or to their pediatrician for treatment of any injuries. The children had no independent recollections of any abuse directed at them by Father. Ms. Layne noted that Mother's allegation that she was fearful of Father was inconsistent with her practice of spending time at Father's apartment on Sundays when she dropped the children off, sometimes going jogging from there and

then returning to get ready for work. Finally, Mother had reported that Father was uninvolved in the children's lives, but Father had produced photographs showing him and the children engaged in many activities together over the years and the children's school and pediatrician confirmed that Father participated in their care, although less than Mother.

Ms. Layne was concerned about the children's sleeping arrangements at Mother's home, finding that Mother had failed to "establish appropriate boundaries" and that the children had formed "unhealthy attachments to her, to the point where they are unwilling, unable, and fearful to separate from her at night." Ms. Layne also expressed great concern that Mother was "sharing inappropriate adult-related information with the children pertaining to the court case and the reasons for the failed marriage." Specifically, Mother had told the children that Father was mean to her and them; that he was "the reason they are no longer in therapy"; and that he "said lies in court." Mother was "using the boys as confidants, as allies, and as her support system [and] need[ed] to realize that these are inappropriate roles for them to fulfill."

Ms. Layne recommended that Mother continue to have primary physical custody; that the parties share joint legal custody; that a parenting coordinator be appointed to assist them if they could not reach agreement; that Father continue to have access to the children Monday through Thursday, from after school until 8 p.m.; that he have overnight visits every other weekend, from Saturday at noon until Sunday evening; that he continue to have access on Sundays on the non-overnight weekends, while Mother was at work;

and that the parties reach an agreement on an appropriate therapist for the children (as they were supposed to do under their PL agreement) and ensure that the children receive individual therapy.

On May 8, 2015, Father amended his complaint for absolute divorce to seek joint legal custody, with him having tie-breaking authority, and sole physical custody of the children. He alleged that Mother's behavior had become "erratic and extremely concerning"; that she was "inundat[ing] the minor children with untrue information," including by telling them that Father had abused her and that Father had abused them when they were younger; that Mother was attempting to "alienate the children from [Father]"; and that she was "engross[ing] the children in the litigation between the parties."

On September 28, 2015, Mother filed a second petition for a temporary protective order in the circuit court, alleging that Father had stabbed Ben in the cheek with a fork. Following a hearing, the court declined to grant a final protective order in that case.[3]

On November 4, 2015, the court ordered Ms. Layne to perform a custody evaluation given that Father now was seeking primary physical custody of the children.

Mother filed a third petition for a temporary protective order on February 12, 2016. A hearing on that petition was held on February 24, 2016. Mother and Father both testified. As we shall discuss in more detail, *infra*, at the conclusion of the evidence, the

[3] Before filing this second petition, Mother had moved, unsuccessfully, to extend the 2014 Protective Order, which then expired.

court granted a final protective order ("2016 Protective Order"). The court ordered that, for a period of 12 months, Father was not to abuse, threaten to abuse, or harass Mother; that he was not to "contact . . . or attempt to contact [Mother] except to facilitate any child visitation"; that he was not to go to the marital home; and that he was not to enter the Museum, although he was permitted to go to a security checkpoint outside the Museum that the parties had been using for visitation exchanges. Father noted an appeal from the 2016 Protective Order to this Court but later dismissed it.

Over four days in April 2016, the court held a trial on the issues of custody, visitation, child support, and attorneys' fees. In his case, Father testified and called two witnesses: his brother and Ms. Layne.

Ms. Layne was accepted by the court as an expert in social work and custody evaluations. A transcript of her April 9, 2015 oral report on her visitation evaluation was admitted in evidence, and she testified about her more recent custody evaluation.[4] During the custody evaluation, she had again interviewed the parties, the children, and "collaterals" identified by the parties. By then, Father had moved into a 2-bedroom apartment about two miles from the marital home.

Ms. Layne testified that Ben had told her that "[M]other had told him to tell [Ms. Layne] everything that [Father] had done badly." Ms. Layne asked Ben what those

[4] Ms. Layne had given an oral report of her custody evaluation findings at a hearing on March 24, 2016, but a transcript of that report was not introduced into evidence.

things were and he replied that Father had "stabbed him in the neck with a fork[,] . . . [but] he couldn't remember if he got hurt[.]" Father also "hit Jacob when Jacob was a baby[,]" according to Ben, and had "slapped" Mother. Ben had not witnessed the latter incident, but Mother had told him about it. He also had heard Father yelling obscenities.

According to Ms. Layne, Jacob had told her that Mother took better care of the children and that Mother and Father could not be around each other because Father hit Mother. He told Ms. Layne that Mother had told him that. Jacob "believed that [Father] had spanked him and his brothers while they all lived together." Jacob did not remember and had not witnessed the "fork incident."

Andrew had told Ms. Layne that "he knows that [Father] has hit, has hurt [Mother], although he did not know he hurt her because he didn't see or hear it; he said that he just knows that it happened." Andrew also couldn't remember the fork incident and had not witnessed it. He had been "told about the incident," however. According to Andrew, Father "hurts people" and "lies." He said Mother had told him that Father lies.

Ms. Layne opined that the children had no independent knowledge of any abuse by Father.[5] Rather, they were conveying information about Father's alleged abuse of them and of Mother that Mother had told them.

Ms. Layne also testified about two MCDSS Child Protective Services ("CPS") investigations, one in 2013 for neglect, and one in 2014 for abuse. The 2013 CPS

[5] Ms. Layne noted that Ben had described one incident he may have witnessed when Father allegedly hit Jacob; she could not determine with any certainty that Ben had really witnessed such an incident, however.

investigation was initiated by a person in authority at Jacob and Andrew's school who was required by law to report suspected child abuse or neglect.[6] The person expressed concern that Jacob and Andrew both needed to be evaluated to determine whether they were on the autism spectrum and that Andrew had come to school with a cut on his abdomen and a burn on his ankle that was oozing. The school had contacted Mother about the cut on his abdomen, and she responded that it was caused when Andrew fell off a table. The person did not believe her. In addition, the person advised an MCDSS worker that Mother had sent Jacob to school on the same day he had had surgery, and Jacob had fallen asleep in school that day. The school called Mother to pick him up. The person also noted that Ben had accompanied Mother to the school for meetings and that he appeared to be "on drugs, extremely thin, and brown circles under his eyes with a flat affect." Finally, the person reported that when the school contacted Father to advise him that SEEC might not be the best fit for Jacob and Andrew's special needs, he grew very angry and began yelling. Ms. Layne did not testify about the results of that investigation, but it is clear that it did not result in an indicated finding.

The 2014 CPS investigation was initiated after Mother filed the September 19, 2014 petition that resulted in the entry of the 2014 Protective Order. During the course of that investigation, CPS workers interviewed the children. Ben told them that Father yelled more than Mother, but denied ever having been injured by either parent or being

[6] Andrew and Jacob attended SEEC in the early part of 2013 and began at St. Mary's in August 2013. The CPS investigation evidently was initiated by a reporter from SEEC.

fearful of either of them. He said that Mother was upset that Father was dating. Jacob said he was not fearful of either parent. Andrew said that Father sometimes yelled and cursed and that his parents fought because Father "wants another lady."

Ms. Layne opined that Mother had "exposed the children to information that was not appropriate," such as "[i]nformation about the court process, information about [Father], about the Protective Order, about any type of abuse th[at] may or may not have happened, information about [Father] sort of being a bad person." She found no evidence that Father had similarly shared inappropriate information with the children. She further opined that Father's new apartment was suitable for overnights; that he had a "great relationship" with the children; and that he set "boundaries and limits" and "correct[ed] any negative behavior, and, praised them when necessary." She characterized the relationship between Father and the children as "comfortable" and "natural."

Ms. Layne was of the view that the parties should share legal custody because of the children's health issues and because, in her opinion, if Mother were awarded sole legal custody, she would "cut [Father] out of the children's lives."

Father testified about his relationship with Mother; about Mother's allegations of abuse, which he denied; and about his involvement in the children's lives. He stated that he had no intention of changing the children's school placement, which he thought was appropriate for all of them. He would consider changing their pediatrician because the practice had become too busy, in his view.

Father discussed his and Mother's inability to agree on therapists for the children both before and after the PL hearing. Prior to the PL hearing, he had sent Mother a list of 19 in-network therapists in Rockville and had suggested that Ben could begin seeing one of them. Ben already was enrolled in group therapy, but his therapist thought he would benefit from individual therapy.

Following the PL hearing, Father had sent Mother three names of therapists all of whom were in-network and near the parties' homes. Over a month later, Mother responded with a list of therapists, some of whom were not in-network and had practices far away from the parties' homes. Mother claimed that the therapists Father had suggested were not experienced with autism spectrum disorders. Ultimately, when no agreement had been reached by June 2015, Father agreed to Mother's selection, Steven DellaVecchia, Psy.D., a clinical psychologist, who practices in Owings Mills, more than an hour from the parties' homes.

Father testified that he would consider taking Ben and Andrew off of Adderall, in consultation with their doctors. He explained that Ben did not take Adderall during the summer months and did not exhibit any problematic behaviors. Father believed that Andrew had been prescribed Adderall because Mother requested a prescription from the children's pediatrician, even though he did not meet the diagnostic criteria for ADHD.

Father acknowledged having told Ms. Layne that he believed that Mother hated him more than she loved the children and that he had testified at his deposition that Mother was "detached from reality" and "extremely paranoid."

In her case, Mother testified and called six witnesses: Dr. DellaVecchia; Steven Hirsh, M.D., the children's pediatrician; Rachel Pucko, a teacher at SEEC who had taught Ben; Jacob; Amy Martinez, the guidance counselor at St. Mary's; Meg Dunkin, the children's maternal great-grandmother; and Laurie Brooks, Mother's neighbor.

Dr. DellaVecchia testified that he started treating the children on July 3, 2015. He met with them every Friday from 4 p.m. to 6 p.m. Mother brought the children to the sessions. He began by checking in with Mother outside of the boys' presence and then he met with each child individually. He testified that all three boys were diagnosed with and being treated for an autism disorder and an adjustment disorder with anxiety. Jacob was being treated for ADHD, and Andrew was being treated for encopresis.

Dr. DellaVecchia did not recommend any changes in the children's medication protocol at that time because all three seemed to be doing well on Adderall. He also did not recommend that the boys change therapists because children with "social skills deficits" take more time to "build rapport." In particular, Ben had been "very closed off" at the start of the sessions, but had become more communicative over time.

Dr. DellaVecchia testified that Mother brought the children to all of their appointments, which were on Fridays when Mother did not work. He was unable to offer any opinion about Mother's fitness as a parent. He had spoken to Father by telephone three or four times over the course of therapy. He did not have any concerns about the children beginning overnights with Father.

Dr. Hirsch testified that he had been treating the children since 2008. During that time, he had had regular contact with Mother and "occasion[al]" contact with Father. He was asked about his decision to prescribe Adderall for Andrew in 2015. He explained that Mother had reported that Andrew was experiencing issues with inattention at school and that he had agreed that a "trial" of Adderall would be appropriate. After the trial period, Andrew's school performance improved and he had no adverse side effects, so he was kept on Adderall. Dr. Hirsch had seen no evidence that any of the children had been physically abused and they had not reported witnessing any abuse.

Mother's grandmother and her neighbor each testified that she was a devoted and involved parent. Mother's grandmother also testified that she had moved in with the parties briefly in 2012 and had observed Father slap Benjamin and yell at all three children.

In closing argument, Father's attorney advocated for a shared physical custody schedule that limited any contact the parties might have with each other. She suggested that the children be in Father's custody each week from Sunday morning, when Mother left for work, until Thursday morning, when Father would drop them off at school. She asked the court to award Father sole legal custody, however, because the evidence showed that Mother would "freeze him out" of important decisions if she were awarded legal custody.

Mother's counsel advocated for no change in the access schedule because the children were fearful of spending overnights with Father and because Father had no

history of involvement in their lives. She argued that if the court were inclined to award Father overnight visits, one overnight per week was appropriate because that was the recommendation of Ms. Layne. She asked the court to grant Mother sole legal custody as Mother had been making the decisions for the children during the marriage and post-separation and the evidence showed that her medical and educational decision-making had been appropriate to address their special needs.

The court directed the parties to return the following day for it to announce its findings and decision from the bench.

In its oral ruling, the court credited Dr. DellaVecchia's testimony about the children's diagnoses, the appropriateness of their treatment with Adderall, and that a change in therapists would not be in their best interests. The court then turned to the pertinent best interest factors set forth in *Taylor v. Taylor*, 306 Md. 290 (1986), making the following findings. With respect to the "fitness of the parties" and the "character and reputation of the parties" factors, the court found that each party was "fit to raise the children" "[i]n the most basic sense." Their high level of conflict and their mutual desire to exclude each other from decisions about the children was detrimental to the children's best interests, however. The court expressed particular concern about Mother's hostility to Father:

> I find [Mother]'s preoccupation, if you will, with [Father]'s defects . . . clouded her judgment with respect to the ability and willingness of [Father] to participate in the care and raising . . . of the minor children. She has accused him, I find, on a number of occasions of all manner of assaults and acts of violence. Respectfully, I disbelieve her testimony with respect to domestic violence. I understand and respect the finding of a colleague of

> mine that granted [the 2016 Protective Order]. Nonetheless, the record before me is such that I am persuaded that [Father] has not committed acts of domestic violence upon [Mother]. And while she may sincerely believe that he has and is likely to do so in the future, I disbelieve her in that regard and I discredit her assertions. I am not persuaded that he has abused her. This case, I find, has been unfortunately a negative and inappropriate example of the misuse of [the] domestic violence statute to, I find, gain leverage in a custody dispute. It has been used, I find, and abused over and over again. I take that finding into account with respect to what ultimately I'm going to do.

The court credited the testimony of Dr. DellaVecchia that there was no evidence that Father ever had abused the children,[7] and Ms. Layne's testimony that Mother had "repeatedly and inappropriately exposed the children to [Mother]'s views regarding [Father]." The court found that Mother was the "sole source of the children's negative information about [Father]" and that Mother had tried to "enmesh [them] with her and used [them] as her confidante[s]," in part, to "gain leverage" in the custody proceedings.

The court rejected Mother's testimony that the children were fearful of Father, and found that there was "no cogent evidence of record that [Father] has in any way, shape or form abused or neglected the children at any pertinent time." Further, the court found that if Mother were awarded sole legal custody, she would "freeze out . . . [Father] from the children's lives."

The court found that Mother had been the children's primary caretaker during the marriage, but that since the separation Father had taken on a more active role. He "came

[7] Dr. Hirsch also testified that there was no evidence that Father had abused any of the children.

to the [marital home] daily to take care of the children in the morning and . . . took care of the children after school while [Mother worked]."

The court credited Father's version of the September 7, 2014 incident, and his versions of several other incidents of alleged abuse by Father that both parties testified about. The court rejected Mother's testimony that Father had threatened to kill one of the minor children, had threatened to kill himself, and had described himself as a psychopath. The court found that although Mother is a good parent to the children, her "animus towards [Father] . . . overrides her judgment and common sense" and she is "unable to escape her . . . distorted views of the facts and circumstances."

Turning to the third *Taylor* factor, the court found that both parties had made sincere requests for sole legal custody and for the shared access schedule that they each wanted. The only prior agreement between the parties—which was set forth in the PL Order—was not a "formal or cogent plan" and merely was a placeholder pending the resolution on the merits. The court found, moreover, that Father was willing to share custody, but Mother was not.

With respect to the potentiality of maintaining natural family relations, the court found that both parents would maintain those relationships "under a carefully crafted detailed and exacting custody order."

The court was "not persuaded" that the preference of the children factor was "germane" in light of Dr. DellaVecchia's testimony that the children were "able and

ready" to have overnight visits with Father and in light of the court's finding that Mother was not credible in her testimony about the children's beliefs about Father.

The parties had "little or no capacity . . . to communicate and reach shared decisions," in the court's view.

The court found that the factors pertaining to the parties' homes, their jobs, and their financial status were largely in equipoise, although Mother's job was less flexible than Father's and he earned more money. The court also found that because there was no "cogent evidence" of abuse of Mother or the children, it was not required to make any additional findings under FL section 9-101.1.[8]

The court ordered that beginning Sunday, April 10, 2016, the children would be in Mother's care each week from Tuesday after school or camp until Sunday at 9:30 a.m., when Father would pick them up from Mother's home. The children would be in Father's care until Tuesday morning, when he would drop them off at school or camp. Commencing ten weeks later, on Sunday June 19, 2016, that schedule would be extended so the children would be in Father's care from Sunday morning until Wednesday morning each week. The court explained that this schedule would minimize the visitation exchanges, limiting the parties' contact to once per week, on Sunday mornings. During the summer, the schedule would remain unchanged except that each party would be

[8] FL section 9-101.1 requires a court to consider, "when deciding custody or visitation issues, evidence of abuse by a party against . . . the other parent of the party's child" and, if the court finds "that a party has committed abuse against the other parent of the party's child . . . [to] make arrangements for custody or visitation that best protect: (1) the child who is the subject of the proceeding; and (2) the victim of the abuse."

permitted one uninterrupted week with the children. Mother would select her week first, giving Father at least 15 calendar days' notice, and, within five days of his receipt of her notice, Father was to give Mother his notice.

The children would be with Father on Father's Day and his birthday and with Mother on Mother's Day and her birthday for a set access period. On the children's birthdays, they would be with Mother in even-numbered years and Father in odd-numbered years. Winter break would be split evenly between the parties, alternating as to which party had the first half and the second half each year. Access during spring break and Thanksgiving break would alternate year-to-year.

The court ordered that "[t]he children shall attend summer camp every day they are enrolled . . . [and] attend all regular scheduled school or other activities regardless of whose regularly scheduled access day it is." Both parties were permitted to attend the children's school and medical appointments regardless of who scheduled the appointment.

The court awarded the parties joint legal custody, but split the tie-breaking authority. Mother was given tie-breaking authority over physical and mental health decisions, and Father was given tie-breaking authority over educational and recreational decisions.

The parties were prohibited from having any "substantive parental discussions" in the presence of the children and from disparaging the other parent to the children. The court ordered the parties to use a program called "Our Family Wizard" ("OFW") for all

communications and not to delete, erase, or destroy any messages. They were prohibited from using any other methods of communication with each other.

The court found that the parties' combined incomes were "above the guidelines" and determined, based on each parties' needs and the best interests of the children, that Father would pay Mother $3,172 per month in child support. That amount was derived from an extrapolation from the child support guidelines, but not a "strict extrapolation." The court ordered Father to continue paying the mortgage on the marital home. It denied both parties' requests for attorneys' fees.

On April 12, 2016, the court entered a custody order incorporating these terms ("Custody Order"). That order clarified that the children would attend summer camp at the Smithsonian and that neither party could select a summer vacation week that conflicted with summer camp. The Custody Order also stated that it "supersede[d] all prior custody, visitation, or access orders [pursuant to Md. Code (1984, 2012 Repl. Vol., 2015 Supp.), FL] § 4-506(j)(3)."[9]

Within ten days, Mother filed a motion to alter or amend the Custody Order, arguing that the court had erred in its calculation of child support.[10] By order entered May 24, 2016, Mother's motion was denied.

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[9] As we shall discuss, FL section 4-506(j)(3) states that a "subsequent circuit court order pertaining to any of the provisions included in [a] final protective order shall supersede those provisions in the final protective order."

[10] Within thirty days of the entry of the Custody Order, Father also filed a motion to alter or amend with respect to the summer access notification provision. Following the (Continued…)

Two days later, on May 26, 2016, Father filed a motion to modify the Custody Order. He alleged that on April 24, 2016, Mother had filed in the District Court of Maryland sitting in Montgomery County an application for statement of charges alleging that he had violated the 2016 Protective Order. As a result, on Tuesday, May 17, 2016, he was arrested. He spent the night in jail and missed half a day of work. (The State's Attorney subsequently entered a *nolle prosequi* on the charge.) Father asked the court to set the matter in for an expedited hearing to consider his request for modification of the Custody Order.

As we shall discuss, *infra*, the court set the matter in for an expedited evidentiary hearing, which went forward on June 15, 2016. After taking testimony and receiving other evidence, the court granted, in part, Father's motion to modify custody. On June 21, 2016, it entered an "Amendment to Custody Order" ("Modified Custody Order"), which includes eight provisions. As relevant here, the second provision prohibited Mother from "attend[ing] any of the children's school, camp, recreational or other functions when the children are in [Father]'s custody."[11] On June 27, 2016, Mother filed

(…continued)
entry of the Modified Custody Order, which we shall discuss, his motion was denied as moot.

[11] The other seven provisions of the Modified Custody Order are: 1) Father could take the children to Florida for vacation the following week; 3) Father could pay child support via "direct bank-to-bank deposit"; 4) email and text messages could be used "only in the event of an actual emergency," and all other communications were to be made through OFW; 5) Mother was required to notify Father of her summer vacation plans within ten days of the entry of the Modified Custody Order; 6) Sunday custody (Continued…)

a motion to alter or amend the Modified Custody Order. The court entered an order denying that motion on July 21, 2016.

On June 20, 2016, Mother filed a notice of appeal from the Custody Order and on July 27, 2016, she noted an appeal from the Modified Custody Order. The appeals were consolidated in this Court.

DISCUSSION

I. & II.

Mother contends the circuit court erred by scheduling an expedited hearing on Father's motion to modify the Custody Order because Father did not comply with the rules governing emergency motions, his motion failed to state grounds justifying any relief, much less emergency relief, and the court violated the DCM procedures for scheduling cases. She maintains that the court "denied [her] any semblance of procedural due process" and that vacation of the Modified Custody Order is required.

Relatedly, Mother contends the court erred by modifying the Custody Order to prohibit her from attending the children's "school, camp, recreational, or other functions" on days when they are in Father's custody because that provision is an unconstitutional restriction on her "movement and right to travel." She argues that the court had no power to prohibit her from attending these events, many of which take place in public venues.

(…continued)
exchanges would occur at Father's residence at 9:30 a.m. each week; and 7) & 8) Mother and Father were required to engage in an "actual and meaningful consultation with [the other party]" before exercising their tie-breaking authority.

Father responds that Mother created an emergency situation by having him "arrested for properly exercising his rights and responsibilities" under the Custody Order and that the court did not err by taking "immediate" action to remedy the situation. Moreover, because Mother had notice and an opportunity to be heard at the June 15, 2016 modification hearing, she was not deprived of her due process rights. In addition, the court properly and reasonably exercised its discretion to limit Mother's right to attend the children's events on days that they were in his custody because the evidence showed that it was not in the children's best interests for their parents to be together around them.

a.

As mentioned, Father filed his motion to modify on May 26, 2016, nine days after he was arrested based upon a statement of charges filed by Mother. Mother made the following allegations in her application for statement of charges. First, on Sunday, April 10, 2016 (the first day of the new schedule, and the first day Father was to go to Mother's house to pick up the children), Father violated the "no contact" provision of the 2016 Protective Order by coming to her residence, blocking her driveway with his car, and asking her neighbor, Ms. Brooks, to give her a message. Second, Father paid child support by direct deposit into her bank account, rather than by check, as she had requested. Third, on Sunday, April 24, 2016, when she and Father both were attending Ben's school play, Father violated the no contact provision by approaching her

> within about 2 feet distance, took photos of [her] inside the school, and video recorded [her] and drove his car opposite direction of parking lot flow alongside [her] car to video record [her] on his phone as well as

> standing outside the car in front of [the] kids filming [her]. He made a gesture to [her] that he ha[d] used to insult [her] prior.

Finally, Father was insisting on scheduling joint appointments to meet with Ben's therapist and had sent "insulting messages to [her] and continues to send email and message [her] about [her] financial choices and other issues he should not be discussing since I have a no contact [order]."

In his motion, Father asserted that with respect to the April 10, 2016, and April 24, 2016 incidents alleged by Mother, he simply was complying with the Custody Order by picking up the children for the beginning of his access period and by taking Ben to his school play performance during his access period. He denied blocking Mother's driveway or otherwise violating the no contact provision of the 2016 Protective Order. With respect to the payment of child support, Father alleged that he was complying with the Custody Order by paying Mother directly. He asserted that under the terms of the Custody Order he was permitted to attend joint meetings with the children's medical providers. Finally, he alleged that the "insulting" email correspondence to which Mother had referred concerned her refusal to comply with the provision of the Custody Order requiring her to sign up for OFW and use it for all communications with him. He alleged that Mother's counsel claimed she could not use that program because she did not have a working computer at her home. OFW could be accessed from a phone or a tablet, however, but Mother refused to use those options. Father asserted that he was afraid to exercise his rights under the Custody Order because Mother might file charges against him again.

Father's lawyer filed his motion with the Clerk's Office and had a copy hand delivered, with a cover letter, to the judge who had presided over the custody trial (Judge Rubin). At the same time, she emailed the cover letter and motion to Mother's counsel.

The next day, Judge Rubin sent a memorandum to the circuit court assignment office directing it to set the matter in for a one-hour hearing on June 3, 2016, at 3:30 p.m. The memorandum stated that that date and time had been cleared with counsel.

On May 31, 2016, a hearing notice for that hearing was issued to the parties.

On June 2, 2016, a standard "Notice of Scheduling Hearing and Order of Court" notification was issued by the Clerk's Office, advising the parties that a scheduling hearing would be held on July 25, 2016.

On June 3, 2016, the parties appeared before Judge Ronald B. Rubin. The court asked to hear from Father's counsel about the basis for his motion to modify. Father's lawyer argued that Mother's action in filing the application for statement of charges based upon Father's compliance with the Custody Order was an attempt to thwart his access to the children.

Mother's attorney responded that Father's motion to modify was not yet ripe for consideration by the court and that the parties were bound by the standard DCM scheduling order that had since been received by the parties. She noted that she had not yet responded to Father's motion and there had been no time for discovery.

Judge Rubin ruled that Father's arrest and the "discord" between the parties relative to the custody exchanges was "profoundly and negatively" affecting the children

and there was an "urgent need for expedited treatment." He set the matter in for a 2-hour evidentiary hearing on June 15, 2016.

On June 8, 2016, Mother moved to postpone that hearing, to shorten the time for Father to respond to her motion, and to dismiss the motion for modification for failure to allege a material change of circumstances since the custody trial. The court granted the motion to shorten time. The administrative judge subsequently denied the motion to postpone by order entered on June 14, 2016, and that same day entered an order designating the case a "one family one judge" case and specially assigning it to Judge Rubin.[12]

The modification hearing went forward on June 15, 2016. Both parties were present and represented by counsel. In his case, Father testified. In her case, Mother testified and called one witness, Ms. Brooks. Father was recalled in rebuttal.

Father testified that he was arrested on May 17, 2016, at 8:30 p.m. at his apartment for violating the 2016 Protective Order. He spent that night in jail. He disputed that he had violated the 2016 Protective Order and recounted his version of the alleged incidents giving rise to Mother's application for statement of charges.

As pertinent to the issues on appeal, Father testified that on Sunday, April 24, 2016, St. Mary's was holding the final performance of a school play in which Ben was a cast member. The prior three performances had been on Thursday, April 21, Friday April

[12] Judge Rubin had advised the parties on the record at the conclusion of the custody trial that he would seek to have the case specially assigned to him.

22, and Saturday, April 23, 2016. Father had not attended those performances because the children were in Mother's custody during that time and he "would rather avoid her if [he could]." He did attend the final performance, however, because he wanted to see the play *and* because, under the terms of the Custody Order, he was required to transport Ben to any school function during his access period.

Father dropped Ben off a little after 1 p.m. He returned with Jacob and Andrew shortly before the play was scheduled to begin at 2:30 p.m. He entered the auditorium at the front and immediately saw Mother sitting in the chair closest to the entrance, in the front row. He did not speak to her, but Andrew and Jacob said hello. Father and the children found seats on the opposite end of the auditorium. During the performance, Andrew asked Father if he could sit closer to the front and Father agreed. Andrew went and sat with Mother.

The play ended around 4 p.m. Father asked Ben if he wanted to go home or stay for the cast party. Ben said he wanted to stay, and Father arranged to pick him up at 5:30 p.m. Father, Jacob, and Andrew drove back to Father's apartment. At 4:36 p.m., Mother sent Father a text message that read, "Ben doesnt know what time you are coming to get him from the cast party." Father immediately replied, "5:30." At 4:48 p.m., Mother sent Father another message that read, "Ben wants to leave now. ILL DROP HM OFF." Father replied immediately, "No. I'll come and get him. Do not come my apartment." A minute later, he added: "Do not take Ben from school." Ten minutes passed and then

Mother replied, "We already left" and, a minute later, "Ok. I guess i am heading back to school." Meanwhile, Father sent another message telling Mother to "Bring [Ben] back."

Father drove to the school with Jacob and Andrew, arriving at 5:10 p.m. Mother and Ben were not there. He parked on the surface lot outside the school, got out of his car, and waited by his driver's side door. Ten minutes later, Mother drove in with Ben and pulled up in front of the entrance to the school. Father video recorded her arrival using his phone. Ben got out of Mother's car and began walking across the parking lot toward Father's car. Father walked over to Ben, and they walked back to Father's car together. Father did not speak to Mother or walk near her car. He drove out of the parking lot, passing by Mother's car as he exited in the direction of his apartment. When he passed by her car, he was filming her again using his phone camera and she also was filming him from her car.

Father testified that, on advice of counsel, he had avoided all contact with Mother since his arrest. As a result, he had been unable to take Jacob to his Cub Scout parade on Memorial Day because Mother had advised that she also would be attending; he had stopped picking the children up from Mother's house on Sundays (she was instead dropping them off to him); and he had skipped a meeting with Dr. Shiffrin because Mother also was planning to attend.

Mother testified that on April 24, 2016, she arrived at St. Mary's for Ben's play before Father got there. She did not know whether he planned to attend. She had attended the prior three performances as well. She sat in the front row. She saw Father

enter with Jacob and Andrew, but did not speak to him. After the play was over, she went to the cast room to help Ben with his costume. She said that while she was doing that, Father came in with Jacob and Andrew, saw her, threw up his hands, and walked out. He did not speak to her or make any arrangements with Ben. Within half an hour, most of the other children and their parents were leaving and Father had not returned to get Ben. She contacted Father to determine when he was planning to return. She explained that if she had not stayed at the school, Ben might have been left all alone. She said she did not see Father's text messages telling her not to take Ben from the school until after she had already left with him.

When Mother drove Ben back to the school, she saw Father standing by his car videotaping her. Then, when Father was driving out of the parking lot with the children, Father drove against the flow of traffic in order to pass by her. He was taping her again and made a hand gesture "that he usually does after he gives somebody the finger." She was video recording him on her phone as he passed by. Still shots taken from her camera were introduced into evidence. They appear to show Father waving at Mother while holding up his phone to record her.

Father was recalled on rebuttal and a portion of the video he took on April 24, 2016, was played for the court.[13]

[13] Father played the video for the court on his phone; it was not introduced into evidence.

At the conclusion of the hearing, the court denied Mother's motion to dismiss and announced its findings from the bench. As a threshold matter, the court determined that the Custody Order "overrides, supersedes, and displaces any incon[sistent] provisions of the [2016 Protective Order]." The court credited Father's version of the events of April 24, 2016.[14] The court found that Mother attended Ben's play on that date in order to "manufacture a situation where she could allege a confrontation between her and [Father] . . . . to manufacture[] a confrontation." Mother had removed Ben from the school with the intention to "bait[]" Father and "get him mad," in the court's view. The court found that Father had not "threatened, harassed, abused, or assaulted [Mother]" on that date. The court held the matter *sub curia* to fashion a modified custody order.

The court issued the Modified Custody Order on June 21, 2016. As mentioned, the second provision prohibits Mother from attending the children's functions on Father's access days.

b.

Parents have a "protectable liberty interest in the care and custody of [their] children" and the "due process clause [of the Fourteenth Amendment to the federal constitution] is implicated" in proceedings affecting the custody of a child. *Wagner v. Wagner*, 109 Md. App. 1, 25 (1996) (citing *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 391 (4th Cir. 1990), and *Williams v. Rappeport*, 699 F. Supp. 501, 505 (D. Md.

[14] The court also disbelieved Mother's testimony about the other incidents giving rise to her statement of charges.

1988)). Due process is "a flexible concept that calls for such procedural protection as a particular situation may demand." *Id*. at 24. The fundamental components of procedural due process are prior notice and a meaningful opportunity to be heard. *See, e.g., Knapp v. Smethurst*, 139 Md. App. 676, 704 (2001).

In the case at bar, Mother was afforded adequate and meaningful due process. On the day Father filed his motion to modify, Mother was put on notice of it and that he was requesting an "expedited" hearing. Her counsel was emailed the motion, and Judge Rubin—who had presided over the custody trial the month before, was the judge with the most knowledge about the custody issues, and had issued the Custody Order—contacted both counsel and arranged for a preliminary hearing to take place on June 3, 2016. Mother appeared at the June 3 hearing with counsel and was given an opportunity to be heard. She was on notice of the June 15, 2016 hearing, which was scheduled during the June 3 hearing. She appeared at the June 15 hearing with counsel and was given the opportunity to be heard, to cross-examine Father, to call witnesses, to introduce evidence, and to present argument. She does not explain how this process was fundamentally unfair to her; she merely states, in conclusory fashion, that it deprived her of due process.

Mother's primary complaints concern the scheduling of the hearing on an emergency basis and what she contends were irregularities in the assignment of the case to Judge Rubin. We perceive no error in either aspect.

Mother filed a statement of charges against Father and had him arrested for actions he took in conforming with the Custody Order. Her doing so created an emergency

situation in that Father could not conduct himself in accordance with the Custody Order without risking that Mother would again bring charges against him. This was an untenable state of affairs that plainly required immediate action by the court to protect the children's best interests. Mother's counsel knew, from the contents of the motion, the court's contact with counsel the day that the motion was filed, and its scheduling of a preliminary hearing on June 3 (8 days after the motion was filed), that the court was treating the motion as an emergency. Mother had adequate time to file a written response before the evidentiary hearing that was scheduled for June 15, 2016, and she did so. In this equity matter, where the best interests of the children were at stake, an emergency situation existed of Mother's own making, and Mother's counsel was given immediate notice and had ample opportunity to be heard and prepare to be heard, the fact that Father's counsel did not file a motion to shorten time under Rule 1-204 is completely inconsequential.[15]

With respect to special assignment, Judge Rubin had made plain to the parties at the custody trial that he intended to seek to have the case assigned to him. Neither party took issue with that suggestion. After the case was specially assigned to Judge Rubin, by order entered on June 14, 2016, Mother did not move to recuse Judge Rubin or otherwise challenge the administrative judge's order. The special assignment of a contentious

[15] Mother also complains that Father did not comply with Rule 1-351. That rule pertains to *ex parte* communications, and there were none here.

custody case was appropriate for reasons we already have mentioned and did not deprive Mother of due process.

Finally, Mother complains that her due process rights were violated because she had no way to know precisely what relief Father was seeking in his motion to modify. Importantly, this type of proceeding—in equity involving children and an emergency set of circumstances—is one in which the court has great discretion to fashion relief. In his motion, Father asked the court to modify the Custody Order to protect him from Mother creating an opportunity to pursue him criminally for actions taken in compliance with the Custody Order and "[f]or such further relief as this court deems appropriate." Mother's counsel was on adequate notice before the June 15, 2016 hearing that any remedy the court might fashion would be non-formulaic and tailored. Mother's due process rights were not infringed.

c.

The circuit court has "broad and inherent power . . . to deal fully and completely with matters of child custody" so as to accomplish its "paramount purpose of securing the welfare and promoting the best interest of the child." *Taylor*, 306 Md. at 301–02. Mother contends the court exceeded its powers because the second provision of the Modified Custody Order deprived her of her constitutional right to travel and her freedom of movement. She emphasizes that many of the children's school and recreational functions are held in public parks and other public places and argues that she may not be restricted from those locations. We disagree.

The Supreme Court has held that the federal constitution encompasses a right to travel and that that right is personal and may not be infringed upon by state action or by private interference. *See Saenz v. Roe*, 526 U.S. 489 (1999). "The right to travel 'embraces at least three different components[:]' . . . . (1) the right of a citizen of one state to enter and leave another state; (2) the right of a citizen of one state 'to be treated as welcome visitor rather than an unfriendly alien when temporarily present' in the state; and (3) 'for those travelers who elect to become permanent residents, the right to be treated like other citizens of' the state." *Braun v. Headley*, 131 Md. App. 588, 600-01 (2000) (quoting *Saenz*, 526 U.S. at 500). In *Braun*, this Court considered the interplay between the right to travel and the "state's compelling interest in protecting the best interests of the child by application of the best interests standard." *Id.* at 602-03. We held that the standard established in *Domingues v. Johnson*, 323 Md. 486, 498–99 (1991), which held that "relocation of a child may constitute a change in circumstances sufficient to trigger a review of custody," was not unconstitutional in light of *Saenz*. *Braun*, 131 Md. App. at 592.

Mother's right to travel under the federal constitution plainly was not infringed by the Modified Custody Order. Mother was not seeking to relocate with the children and the Modified Custody Order placed no restrictions on her right to travel between states. Rather, it placed limits on when she could participate in activities with the children. The court made non-clearly erroneous factual findings that supported its determination that this limitation was necessary to protect the best interests of the children. Specifically, the

court found that Mother had attended Ben's play on April 24, 2016, knowing Father would also be in attendance; that she did so to manufacture a confrontation between the parties; that she removed Ben from the school without Father's permission or consent in order to "bait" him; and that, as a result, the parties were forced to have an unscheduled visitation exchange in the school parking lot. Mother then filed a statement of charges against Father based in part upon his allegedly harassing and threatening conduct during the visitation exchange. The court found, however, that Father had not harassed or threatened Mother at any time. In light of these findings, the court plainly did not abuse its broad discretion by amending the Custody Order to prevent Mother from attending the children's events during Father's access periods. Moreover, there is no merit in Mother's additional argument that the amendment was unfair to her because it did not also prohibit Father from attending the children's events during Mother's access periods. The record shows that Father chose not to attend events when Mother had the children in her custody because he sought to avoid contact and the resulting conflicts that often arose. More significantly, the record did not show that he generated conflicts to the detriment of the children, but Mother did.

Finally, Mother complains that the restriction in the Modified Custody Order is overly broad because it is "for ten years." (Apparently, ten years is based on Andrew being 8 years old when the Custody Order was entered). The Modified Custody Order does not say that it is not modifiable, however. If circumstances change so that Mother would not use her presence at these events to infringe on Father's access and generate

conflict detrimental to the children's best interests, the court may exercise discretion to remove the restriction. Fortunately for Mother, her behavior is within her own control.

III.

Mother contends the circuit court clearly erred or abused its discretion in its calculation of child support. She asserts that the court misapplied the shared custody guidelines and mistakenly failed to include the cost of summer camp in its calculations. Mother argues that in light of these errors, we should vacate the award of child support and remand for the court to recalculate child support.

Father responds that because this was an above guidelines case, the court had discretion to set the amount of child support and did not abuse that discretion. He notes that the court separately ordered him to pay the mortgage on the marital home, which is $2,400 per month. He maintains that by adding that amount to his child support obligation of $3,172 per month, the court effectively awarded child support in an amount significantly higher than the extrapolated guidelines amount and that the award should be affirmed.

FL section 12-204(d) states that when the "combined adjusted actual income exceeds the highest level specified in the [child support guidelines], the court may use its discretion in setting the amount of child support." The court found that the parties' combined adjusted actual income came to $20,999 per month. The highest level specified in the guidelines is $15,000 per month.

The court opined:

> I have elected to extrapolate guidelines with certain changes considering the *Voishan* factors. *Voishan v. Palma*, 327 Md. 318 [(1992)]. Here the parents' combined adjusted income exceeds the statutory amount. I have looked at the expenses of each party in their financial statements as amended by their testimony during trial. And in coming up with these considerations, I have balanced the best interests and needs of the children with the parents' financial ability to meet those needs. The parties' financial circumstances are very relevant. [Father] has the greater financial wherewithal. And I have considered the actual adjusted income of each party as I can ascertain it. And this has been put in place to continue with regularity the circumstances under which the children have grown accustomed to and to allow them a standard of living that corresponds with the economic positions with each parent. So while my method is not strict extrapolation, it is close.

Noting that it would attach "extrapolated guidelines to the order," the circuit court ordered Father to pay $3,172 per month, beginning May 1, 2016, and "in addition," that he pay "the mortgage on the family home."

The guidelines worksheet attached to the Custody Order shows that a strict extrapolation from the guidelines would have resulted in an adjusted basic child support obligation of $7,096 per month, with Father's share, based upon his income, being $5,208. The court calculated Father's net child support obligation, based upon a 50/50 split of custody, to be $1,670 per month. After accounting for $500 per month in after-care expenses that were paid by Mother, $100 in health insurance expenses that were paid by Father, and $1,583 in expenses paid by Mother for St. Mary's School, the court arrived at $3,172 per month for Father's total child support obligation.

The circuit court is afforded discretion to award child support, and a child support award ordinarily will not be reversed absent an abuse of that discretion. *See Walker v. Grow*, 170 Md. App. 255, 266 (2006). "Nonetheless, 'where the order involves an

interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review.'" *Reichert v. Hornbeck*, 210 Md. App. 282, 316 (2013) (quoting *Walker,* 170 Md. App. at 266, in turn quoting *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556 (2002)). When a court exercises its discretion in an above guidelines case,

> [s]everal factors . . . are relevant . . . . includ[ing] the parties' financial circumstances, the 'reasonable expenses of the child,' and the parties' 'station in life, their age and physical condition, and expenses in educating the child[ ].'" *Smith v. Freeman*, 149 Md. App. 1, 20, 814 A.2d 65 (2002) (quoting *Voishan*, 327 Md. at 329, 609 A.2d 319). "Nevertheless, in above [g]uidelines cases, calling for the exercise of discretion, the rational[e] of the [g]uidelines still applies." *Malin v. Mininberg*, 153 Md.App. 358, 410–11, 837 A.2d 178 (2003).

Reichert, 210 Md. App. at 316.

Mother takes issue with two aspects of the court's calculations. First, she argues that the court erred by calculating the parties' respective shares based upon a 50/50 split of custody. This is so because the guidelines worksheet specifies that those percentages must be determined based upon the number of overnights that each parent receives under the governing custody order. In this case, Father was given 2 overnights per week (Sunday and Monday) for the first 10 weeks following the entry of the Custody Order and 3 overnights per week (Sunday, Monday, Tuesday) thereafter. Thus, according to Mother, Father's percentage of overnights initially was 29% and, after 10 weeks, was 43%, and the court clearly erred by calculating child support based upon Father's having the children in his care for 50% of the overnights.

FL section 12-201(m) defines "Shared Physical Custody" to mean "that each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of the child support." Here, the court fashioned an access schedule that would result in Father's receiving more than 35% of overnights in a year and, thus, did not err by calculating child support based upon shared custody.

FL section 12-204(m) states that, "[i]n cases of shared physical custody, the adjusted basic child support obligation shall first be divided between the parents in proportion to their respective adjusted actual incomes" and then, "[e]ach parent's share of [that amount] shall . . . be *multiplied by the percentage of time the child or children spend with the other parent* to determine the theoretical basic child support obligation owed to the other parent." The access schedule under the Custody Order resulted in Father's having the children in his care one weekend day each week (Sunday) and two weekdays each week (Monday and Tuesday). Mother also had the children in her care one weekend day each week (Saturday) and two weekdays each week (Thursday and Friday). Wednesdays were shared, with Father having the children in the morning until drop off at school and Mother having the children in the evenings. While the child support guidelines worksheet suggests that shared custody percentages be based upon the number of overnights, we cannot say that the court abused its discretion in an above guidelines by calculating child support based upon shared custody on a 50/50 basis.

Mother also contends the court erred by failing to include the cost of the children's summer camp in its calculations. There was evidence that the cost for the Smithsonian summer camp, which is the camp the children had attended in 2015 and that they were scheduled to attend in 2016, was $10,000 annually, or $833 per month. Mother had been paying that tuition the last two years. The court did not include this amount as a "work-related childcare expense," however. The court explained that it had considered other expenses owed by Father, which included its order that Father pay $2,400 per month for the mortgage on the marital home, in determining not to make a strict extrapolation from the guidelines. We perceive no abuse of discretion by the court in not including the cost of summer camp in its worksheet calculations given that the amount of child support ordered, when the mortgage was included, far exceeded the extrapolated guidelines figure.

IV.

Mother contends the court erred by not giving *res judicata* effect to the 2016 Protective Order (and the 2014 Protective Order) in its resolution of the custody proceedings. She maintains that the court lacked authority to "ignore and/or override prior findings of abuse" and was required by FL section 9-101.1(b) to consider evidence of abuse by a party to a custody proceeding against the other parent. According to Mother, because the court failed to abide by this statutory mandate, reversal is required.

Father responds that the court had authority pursuant to FL section 4-506(j)(3)[16] to modify the custody and access provisions of the 2016 Protective Order and expressly stated that it had done so in its ruling. He maintains that the granting of the 2014 and 2016 Protective Orders did not require the court to find that abuse had occurred; rather, the court could weigh that evidence, along with other evidence, in determining for itself whether abuse had occurred.

As a threshold matter, Mother is incorrect that the doctrine of *res judicata* is implicated. *Res judicata*, or claim preclusion, applies in "a proceeding between parties involv[ing] the same cause of action as a previous proceeding between the same parties." *Colandrea v. Wilde Lake Comm. Ass'n, Inc.*, 361 Md. 371, 388 (2000). Under those circumstances, "the principle of res judicata applies and all matters actually litigated or that could have been litigated are conclusive in the subsequent proceeding." *Id.* In the case at bar, the two cases are a domestic violence protective order proceeding between the parties and a custody, visitation, and child support proceeding between the same parties. Plainly, these cases do not involve the same "cause of action" and, therefore, *res judicata* is inapplicable.

The related doctrine of collateral estoppel, or issue preclusion, might apply, however. That doctrine "precludes a party from re-litigating a factual issue that was essential to a valid and final judgment against the same party in a prior action." *Shader v.*

[16] As noted, *supra*, that section provides that a subsequent circuit court order pertaining to matters governed by a final protective order supersedes those provisions.

Hampton Improvement Ass'n, Inc., 217 Md. App. 581, 605 (2014), *aff'd*, 443 Md. 148 (2015). Thus, to the extent that Mother's allegations of abuse against Father were finally litigated in the 2016 Protective Order case or the 2014 Protective Order case, Father could have been collaterally estopped to relitigate those issues in the custody trial. We shall not reach this issue, however, because Mother has waived it.

During the period of the parties' separation, Mother filed three Protective Order petitions in the circuit court. The first petition was filed on September 19, 2014 (Case No. 122651FL) and resulted in the 2014 Protective Order. Father consented to the entry of the 2014 Protective Order, without any findings.[17] Mother filed her second petition on September 28, 2015 (Case No. 130902FL). The court declined to enter a final protective order in that case. Mother's third petition, filed on February 12, 2016 (Case No. 134079FL), resulted in the 2016 Protective Order.

The court held a hearing on February 19, 2016, in the 2016 Protective Order case.[18] At that hearing, Mother testified about nine incidents of abuse, harassment, or threats by Father spanning from December 13, 2013, to July 21, 2015.[19] Father testified,

[17] We glean this information from the testimony at the custody trial. Neither the 2014 Protective Order nor a transcript of the hearing is in the record.

[18] Father included the transcript of the final protective order hearing and the 2016 Protective Order in the appendix to his brief, and we shall take judicial notice of them for purposes of this appeal.

[19] The incidents testified to occurred on: December 13, 2013; May 11, 2014; September 7, 2014; October 28, 2014; January 14, 2015; April 10, 2015; an unspecified date in Spring 2015; July 7, 2015; and July 21, 2015. Mother alleged that Father

(Continued…)

disputing Mother's version of events. At the conclusion of the hearing, the court ruled that because the 2014 Protective Order was entered on September 26, 2014, the court only could consider the incidents from that date forward in assessing whether Mother was eligible for relief. It credited Mother's version of some of those incidents, Father's version of some of those incidents, and both parties' versions of one incident. It found that none of the incidents constituted "assault or acts that cause serious bodily harm." *See* FL § 4-501(b) (defining "Abuse" under the Domestic Violence subtitle). However, in light of a prior incident of abuse in December 2013 that the court found had occurred as Mother testified, the court found that Mother was put "in fear of imminent serious bodily harm" by the post-September 26, 2014 incidents. *See id.* On that basis, it granted the request for a final protective order. It ordered Father not to "abuse, threaten to abuse, and/or harass [Mother]"; not to "contact (in person, by telephone, in writing, or by any other means) or attempt to contact [Mother] except to facilitate any child visitation ordered"; not to enter Mother's residence; to stay away from the Museum and not enter it, except that he could enter the mall-side security checkpoint for the purpose of visitation exchanges; and that Father's access to the children remained as set forth in the PL Order.[20]

(…continued)
assaulted her in the first three incidents. She did not allege any physical contact in the latter six incidents, but alleged that he rushed at her, stalked her, or threatened her.

[20] Father noted an appeal from the 2016 Protective Order. On May 26, 2016, the same day he filed his motion to modify and while his appeal was pending, Father moved
(Continued…)

Collateral estoppel is an affirmative defense that ordinarily is waived if not raised in a party's answer. Md. Rule 2-323(g). Mother did not plead collateral estoppel (or *res judicata*) as affirmative defenses in her answer to Father's amended complaint for absolute divorce, filed on March 7, 2016, after the issuance of the 2014 Protective Order and the 2016 Protective Order.

Even if collateral estoppel did not amount to a "defense to a claim" in the procedural posture of a custody case, however, Mother's conduct at the custody trial was inconsistent with any assertion that the issue of domestic abuse was finally litigated and that Father was collaterally estopped to challenge the findings made in the 2016 Protective Order case, thus amounting to a waiver. *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right."). At the custody trial, Mother did not ask the court to take judicial notice of the proceedings in the 2014 or 2016 Protective Order cases nor did she seek to introduce the transcript of the final protective order hearings into evidence. She did not seek to introduce either protective order into evidence. During his testimony, Father testified in detail about the same incidents that were the subject of testimony at the February 19, 2016 Protective Order hearing. Mother's counsel did not object to that testimony or argue that those issues already had

(…continued)
to modify or rescind the 2016 Protective Order. The docket entries in the protective order case reflect that, by order entered on July 22, 2016, the court modified the 2016 Protective Order to be consistent with the Custody Order and the Modified Custody Order. Father dismissed his appeal three days later.

been finally litigated in her favor. Mother also testified about those same incidents, giving her version of each event.

In closing argument, Mother's counsel argued as follows:

> In terms of legal custody, Your Honor, you heard testimony – well, let's go back to the statutes. Family Law 9-101.1(b) and (c) talk about the Court must consider when deciding custody and visitation issues evidence of abuse against, by a party against the children or the spouse. *In this case, what we have is we have my client's testimony about the abuse.*

(Emphasis added.) The court interjected, "what if I disbelieve her?" adding, "I'm not bound by what some other judge found in some other case. What is the state of affairs if I say I'm not persuaded?" The court then pointed Mother's attorney to FL section 4-506(j)(3), permitting a circuit court to issue an order superseding provisions of a final protective order. Mother's counsel responded that "the Court is free to believe . . . what it wants, but it is still bound by the protective order that is in place." The court made clear that it disagreed and Mother's counsel moved on to other issues. As this exchange shows, Mother's counsel expressly argued that the evidence of abuse was Mother's testimony *at the custody trial*. While she argued that the court was "bound by the Protective Order," she did not identify the findings made in that case that she understood to be binding. Having chosen to relitigate the issue of abuse at the custody trial, Mother has waived her argument that the court was collaterally estopped to make its own independent findings on that issue.

V.

Mother contends the circuit court clearly erred or abused its discretion by awarding shared physical custody because the evidence overwhelmingly established that Father had not participated in the children's lives and had shown very little interest in them. This contention lacks merit.

"[T]his Court reviews child custody determinations utilizing three interrelated standards of review." *Reichert,* 210 Md. App. at 303–04.

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

In re Yve S., 373 Md. 551, 586 (2003) (quoting *Davis v. Davis*, 280 Md. 119, 125–26 (1977)). The governing standard in all decisions concerning custody and visitation disputes between fit, natural parents is the best interests of the child. *See, e.g., McDermott v. Dougherty*, 385 Md. 320, 354 (2005) (best interest of the child is the "central consideration"); *Taylor*, 306 Md. at 303 (standard is of "paramount concern" and "transcendent importance"). While a trial court must "look at each custody case on an individual basis to determine what will serve the welfare of the child [or children]," *Wagner,* 109 Md. App. at 39 (1996), the court may be guided by a nonexclusive list of factors relevant to the best interest inquiry:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 420 (1978) (citations omitted). "The best interest of the child is . . . not considered as one of many factors, but as the objective to which virtually all other factors speak." *Taylor*, 306 Md. at 303.

Mother challenges for clear error three findings made by the trial court. First, she argues the court clearly erred by finding that Mother denied Father overnight access. She points to Father's testimony that when he moved out of the marital home in April 2012, he did not request overnight visits. Father testified, however, that at that time he was renting a one-bedroom apartment and did not have space for the children to spend the night. He further testified that he spent every morning and every evening at the marital home with the children and, as such, overnight visits were not a priority. When Father filed his complaint for divorce on September 11, 2014, he requested overnight visitation. The court did not clearly err by finding that Mother's conduct, specifically her allegations that Father had abused the children, were an attempt to thwart his access to the children and to discourage him from seeking overnight visits.

Mother next contends the court clearly erred by finding that she "blocked and refused to allow [Father] [to] tak[e] the children to family visits in Pennsylvania." That

finding was based upon Father's testimony about a family reunion in Pennsylvania on a Sunday in 2015. Father testified that he had made plans to take the children to the reunion and had emailed Mother to tell her he needed the children to be dropped off by 9 a.m. that day. He did not tell her the reason, however. When Mother did not drop the children off on time, Father left for the family reunion without them. Father testified that he did not tell Mother his plans for the day because he believed that, if he did so, she would "not bring them that day." This was evidence supporting the court's findings.

Mother asserts the court clearly erred by finding that Mother misused the domestic violence statute to gain leverage in the custody case. She points to her "unrefuted" testimony that she was unaware that Father had filed for divorce when she filed her petition for protective order in the 2014 Protective Order Case. The court was free to disbelieve Mother's testimony on this point, however, and made plain that it found Mother to lack credibility.

Finally, Mother contends the court abused its discretion in its ultimate determination to award Father shared physical custody of the children. This contention lacks merit. The court made non-clearly erroneous factual findings under each of the pertinent best interest factors. Significantly, it found, based upon Ms. Layne's testimony, that Mother was disparaging Father to the children and sharing inappropriate information about the court proceedings with them. It found, moreover, based upon Dr. DellaVecchia's testimony, that the children were ready for and could adapt to overnight visitation with Father. The court rejected Mother's testimony and the testimony of her

grandmother that Father was disinterested in the children. The court's findings amply supported its decision, and it plainly did not abuse its broad discretion in awarding shared physical custody.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.