Circuit Court for Calvert County
Case No.: C-04-FM-19-000539

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 90

September Term, 2024

ELLEN PAULISICK WOLF

v.

CHRISTOPHER WOLF

Albright,
Kehoe, S.,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: January 27, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Ellen Paulisick Wolf ("Mother"), appellant, and Christopher Wolf ("Father"), appellee, were divorced in the Circuit Court for Calvert County. Their marital settlement agreement ("MSA") was incorporated, but not merged, in the divorce judgment. Five years later, Mother appeals from the grant of a motion entered in that court under section 9-105 of the Family Law Article ("FL") of the Maryland Code ruling that she unjustifiably denied Father access with the parties' two children under the terms of the MSA and awarding him twenty-one overnights as make-up time. She presents four questions,[1] which we combine and rephrase as two:

> I. Was Father's motion under FL § 9-105 barred by *res judicata* or collateral estoppel?

[1] The questions as posed by Mother are:

> I. Whether, where the Court previously denied a motion for make-up time based on unjustified denial of access finding the specific child access provision in question to be an insufficiently definite Order of Court and subject to competing interpretation, the Court committed reversible error in interpreting the provision and awarding make-up time in a subsequent hearing?
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> II. Whether the Court abused its discretion interpreting a provision of the parties' agreement to afford Appellee with unfettered and unlimited child access, rendering all of Appellant's time with the minor children subject to Appellee's approval or potential interference?
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> III. Whether the Court erred in effectively modifying a single child custody provision of the parties' agreement without finding a required material change of circumstances and without consideration of the impact of the Court's ruling upon the entirety of the parties' custodial arrangement, and with only superficial consideration of the best interests of the minor children?
>
> IV. Whether the Court abused its discretion in awarding Appellee twenty-one (21) make up days of child access where such relief was illogical under the Court's own ruling and Order nor required in the best interests of the minor children?

II. Did circuit court err or abuse its discretion by ruling that Mother unjustifiably denied Father access under a provision of the MSA and/or by the award of make-up time to Father?

For the following reasons, we hold that Father's motion was not barred by *res judicata* or collateral estoppel and that the circuit court did not err by ruling that Mother unjustifiably denied Father access under the terms of the parties' MSA, but that it did abuse its discretion by granting Father twenty-one days of make-up visitation. We thus reverse the award of make-up time and otherwise affirm the order.

BACKGROUND

Mother and Father, who are both practicing dentists, were married in July 2013. They have two children: F, now age nine, and R, now age seven. They executed the MSA on August 20, 2019. They were divorced on December 6, 2019, and the MSA was incorporated, but not merged, in that judgment.

Upon executing the MSA and by agreement, Mother relocated to Mount Pleasant, South Carolina and Father remained in Chesapeake Beach, Maryland. Though Father continues to maintain a residence and his dental practice in Maryland, he also purchased a second home near Mother's home in South Carolina at the end of 2020.

A. The MSA

Section 5 of the MSA sets out the child custody provisions. Mother and Father agreed to share joint legal custody of the children and for Mother to have primary physical custody of the children in South Carolina. Father's access with the children is spelled out in three sections: § 5.3.7, § 5.3.9, and § 5.3.10. We review them in reverse order.

Under § 5.3.10, Father has custodial access with the children for their entire summer vacation, beginning with their last day of school and ending the night before they return to school.

Section 5.3.9 sets out a detailed holiday schedule which, except for Mother's Day from 9 a.m. until 5 p.m., granted Father access with the children for every three-day holiday weekend and their entire Thanksgiving, Christmas, and spring/Easter breaks.

Section 5.3.7, entitled "Physical Custody," states that Mother will have primary physical custody of the children in South Carolina and that Father "shall have access with the minor children" as set out in three sub-sections. First, the children would remain in Father's custody in Maryland until August 31, 2019, eleven days after the execution of the MSA. Second, if the children have any four-day weekends based upon their school schedule, Father may have the children with him for the duration of the extended weekend in Maryland. Third, and of significance to this appeal, the parties agreed to the following:

> Any time that [Father] travels to the State of South Carolina, where [Mother] will be living with the minor children, and if [Father] provides [Mother] at least seven (7) days advance, written notice, [Father] shall be permitted to designate additional time with the minor children. [Father] shall be responsible for transporting the minor children to all previously scheduled, mutually agreed upon activities. [Father] shall arrange for himself and for the minor children, at his sole cost and expense, lodging during any such visit(s) as arranged herein.

We refer to this as the "seven-day provision."

Multiple provisions of the MSA reflect the parties' intent that the agreement be dynamic, flexible, and accommodate the children's changing needs. As pertinent here, a "Special Events" clause at § 5.3.13 required the parties to make a good faith effort to permit

the children to attend "special events with each parent" "[r]egardless of [the] custody and/or visitation schedule[.]" Similarly, a "Best Efforts" clause directs them to be flexible about scheduling for holiday and vacation visits. The parties also recognized that the terms of the MSA would be subject to change in the future and agreed that such changes be made by a written amendment. If the parties could not agree upon modifications, they would first mediate their differences. If mediation was unsuccessful, however, the parties could move to modify custody, visitation, or child support in the circuit court.

The MSA specified two changes of circumstance that would obligate the parties to renegotiate the custody and visitation provisions of the agreement: 1) if either party moved more than thirty miles from their current residence (which was designated as Father's home in Chesapeake Beach and Mother's home in Mount Pleasant, South Carolina), and 2) if either party relocated to "within a sixty (60) minute driving distance" of the other party's residence. In the latter scenario, the parties were required to renegotiate the custody and visitation terms "with the express intention of modifying the current custody and access schedule to achieve a shared physical custody schedule with each party having as close as possible to 50% of the overnights, but with each party having at least 35% of the overnights, with the minor children."

B. Mother's Modification Motion

Just over a year after the parties divorced, Mother moved to modify child custody, access, and child support in the circuit court.[2] As pertinent to the issue on appeal, Mother alleged that Father was abusing the seven-day provision in a manner that was disruptive to Mother's time with the children. Father filed a countermotion to modify custody and access. The court appointed a best interest attorney ("BIA") to represent the children's interests.

A merits hearing went forward over three days in December 2021 and one day in February 2022. By order entered March 30, 2022, the circuit court ruled that there had not been a material change of circumstances affecting the welfare of the children and denied the motion and countermotion to modify custody and visitation. Mother's motion to alter or amend that order was denied, and she did not note an appeal.

C. Father's First FL § 9-105 Motion and Petition for Contempt

Less than six months later, Father filed his first motion for make-up time due to an unjustified denial of access under FL § 9-105.[3] Father alleged that Mother denied him three

[2] Though Mother filed her motion in Calvert County, she simultaneously moved to stay the motion and transfer jurisdiction to a South Carolina court under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act. FL § 9.5-101 *et seq*. That motion was denied following a hearing and Mother does not raise any jurisdictional issues on appeal.

[3] That statute provides:

> In any custody or visitation proceeding, if the court determines that a party to a custody or visitation order has unjustifiably denied or interfered with visitation granted by a custody or visitation order, the court may, in addition

(continued…)

access days with the children under the seven-day provision in September 2022. He asked the court to grant him make-up time and to modify the MSA to "provide that [Father]'s designations take precedence over [Mother]'s" and, if Mother does not comply, Father is entitled to enforce the order with the assistance of law enforcement.[4] Father later filed a motion for contempt premised upon the same alleged violations.

Mother opposed both motions and asked the court to reappoint the BIA to represent the children's interests. Father opposed the reappointment motion, and the court denied it.

The court held a hearing on Father's motions on February 10, 2023. On February 23, 2023, the court issued an order finding that the "disagreement at the heart" of the outstanding motions concerned the interpretation of the MSA relative to the "designation of access with the minor children[.]" Specifically, Mother and Father "cross-designated weekends for access with the minor children based on each party's interpretation of

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> to any other remedy available to the court and in a manner consistent with the best interests of the child, take any or all of the following actions:
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> (1) order that the visitation be rescheduled;
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> (2) modify the custody or visitation order to require additional terms or conditions designed to ensure future compliance with the order; or
>
> (3) assess costs or counsel fees against the party who has unjustifiably denied or interfered with visitation rights.

FL § 9-105.

[4] The court initially denied Father's motion, but subsequently issued a show cause order to Mother in response to Father's motion to reconsider, which alleged additional instances of violations of the seven-day provision.

provisions in the [MSA.]" It found that Mother was not "willfully noncompliant with a sufficiently definite" custody order and denied Father's petition for contempt and his FL § 9-105 motion for make-up time.

Father noted an appeal from that order, but voluntarily dismissed it prior to briefing.

D. Mother's Petition for Contempt and Father's Second FL § 9-105 Motion

Meanwhile, in August 2023, while Father's appeal remained pending, Mother filed a petition for contempt asserting that Father was willfully violating the MSA by refusing to cooperate to choose a new therapist for the children, by interfering with Mother's planned special events with the children due to abuse of the seven-day provision, and by taking the children outside the country on a cruise without Mother's prior written consent.[5]

In November 2023, after dismissing his appeal, Father filed a second motion for make-up time under FL § 9-105. He alleged that he recently provided notice to Mother of the dates in winter and spring 2024 that he planned to designate for access under the seven-day provision. He designated four five-day periods (from Friday after school through school drop off on Wednesday morning): one at the end of January, one at the end of February, and two in March. He also designated a twelve-day period from the end of April to the middle of the second week in May, which included the weekend in May when he was getting married. This was in addition to Father's access under § 5.3.9 of the MSA for the Martin Luther King, Jr. holiday weekend in January, President's Day weekend in February, and the children's ten-day spring break. Mother responded that she already had

[5] The MSA requires each party to obtain written consent from the other party prior to traveling internationally with the children.

advised Father that she had plans with the children for most of those weekends but could let him know closer to the weekends if she could accommodate some overnights. She agreed to his request to have the children with him the weekend of his wedding, but not the remaining time around the wedding, though she later agreed to allow him additional time in advance of the wedding.

Father asked the court to award him make-up time for the missed overnights that Mother refused to accommodate and to "modify the terms of the parties' MSA to provide that [Father]'s designations take precedence over [Mother's.]" In a footnote, he clarified that he was "not seeking an absurd result with this request (i.e., that he could designate all but 2 overnights each year)" but asserted that he could claim "up to an equal number of overnights [as Mother has] each year (i.e., no more than 50/50 custody for either party)."

Mother opposed Father's motion and asserted as a defense that the motion was barred by *res judicata* because the February 2023 Order determined that the seven-day provision was not sufficiently definite to be enforced by the court. On the merits, she alleged that she always offered alternative dates to Father if his designations under the seven-day provision conflicted with her plans with the children, but that he continued to attempt to "claim and co-opt" her pre-designated time with the children.

On January 31, 2024, the court held a hearing on Mother's motion for contempt and Father's FL § 9-105 motion at which both Mother and Father appeared, represented by counsel, and testified. Mother testified that she gave Father notice of her "planned travel, family events, [and] special events with the children" as much as six months in advance, but that he would "book time" under the seven-day provision that conflicted with her dates.

She explained that since the parties executed the MSA, Father had begun spending increasing time in South Carolina at the house he owned there, located six miles from Mother's house. In her view, this change had upended the parties' agreement and caused significant disruption in the children's lives because their plans with Mother were subject to being superseded by Father under the seven-day provision.

In his testimony, Father acknowledged in his testimony that when Mother had requested to take the children on trips during their school holidays – which is Father's custodial time under the MSA – he had denied those requests. When Mother pre-designated time to take trips with the children during the academic year, however, Father took the position that that also was time he could claim under the seven-day provision if he planned to be in South Carolina at the same time. When he was asked if this meant he had an "unfettered seven-day right of access" that took priority over any plan Mother may have made in advance, he responded, "Yes, that's what we agreed upon and . . . that was the reason why she was allowed to relocate to South Carolina."

By reference to a chart his counsel prepared summarizing the days he requested under the seven-day provision from February 2023 through January 2024, Father testified that Mother agreed to 47% of the dates he requested and denied the remaining 53%. Father agreed that it would be unreasonable for him to use the seven-day provision to usurp all of Mother's time with the children and clarified that he would be amenable to capping his total overnight access at 182 nights.

E. The Circuit Court's Ruling

The circuit court announced its ruling from the bench during a remote proceeding on February 26, 2024. It denied Mother's petition for contempt, a ruling that is not challenged in this appeal. Turning to Father's motion under FL § 9-105, the court found that Mother's practice of blocking out time for trips or other events with the children in advance was in conflict with Father's rights under the seven-day provision. The court reasoned that there was "absolutely no language in the [MSA] that indicates [Mother] may provide to [Father] dates of her plans with the children which then alleviates [Father]'s ability to have access with the children on the dates provided by her." The court noted that the parties had agreed when they entered into the MSA that the seven-day provision was in their children's best interests. It found that it was in the best interest of the children "to spend time with both parents." The court emphasized that the MSA included language encouraging the parties to negotiate in good faith to ensure that the children could spend time with each parent for special events.

The court ruled:

> [T]he withholding of dates by [Mother] is not consistent with the MSA, nor is it in the best interest of the children. Therefore, the Court finds it's in the best interest of the children to grant [Father] 21 overnights as makeup days. The overnights shall not include Mother's Day weekend. He shall – [Father] shall provide at least seven days' notice in writing to [Mother] of the nights he elects.
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> Pursuant to the MSA, [Father] shall ensure [that the children] attend all previously scheduled activities that the parties mutually agree to. Further, [Father] shall provide at least seven days' written notice to [Mother] of any additional access time that he intends to have with the children in South Carolina beyond the holiday access schedule outlined in 5.3.9 of the [MSA] and the summer access/vacation days outlined in 5.3.10 of the [MSA].

The court permitted counsel to ask questions about the ruling. Mother's counsel asked the court how it could award Father make-up time if, under the court's reasoning, Father already had authority to "take any days he wants." The court agreed with counsel that, "technically," Father could "take as much time as he wants" under the seven-day provision. The court noted that Father testified that he never had exceeded 50% of the overnights in a year, however. The court added that the parties should be mindful of the special events clause and make a good faith effort to accommodate special events for each parent with the children.

Mother's counsel asked if, under the court's ruling, Mother could be prevented from ever scheduling a vacation with the children. The court responded that it understood why counsel asked that question but did not believe that was its ruling given the special events clause. In any event, that was "a bridge to cross on a different day[.]"

Likewise, the court declined to rule that Father taking more than 50% of overnights with the children would not be in the best interest of the children, emphasizing that that issue was not before it. The court reiterated that the evidence before it showed that Father had not taken more than 50% of the overnights in the past.

The court issued an order encompassing these rulings on February 28, 2024, and this timely appeal followed.

STANDARD OF REVIEW

We review child custody and visitation determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Supreme Court of Maryland has described these standards as follows:

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

Id. (cleaned up).

A trial court abuses its discretion if "'no reasonable person would take the view adopted by the trial court' or when the court acts 'without reference to any guiding rules or principles.'" *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (cleaned up) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). "This standard of review accounts for the trial court's unique 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Id*. at 625 (quoting *Petrini v. Petrini*, 336 Md. 453, 470 (1994)).

DISCUSSION

I.

Mother argues as a threshold matter that the circuit court erred in ruling upon Father's second FL § 9-105 motion under the doctrines of *res judicata* and/or collateral estoppel because the February 2024 Order represented a "complete and dramatic

turnaround" from the February 2023 Order denying Father's first FL § 9-105 motion and his related contempt petition.[6] She emphasizes that in the earlier order, the court found that the seven-day provision was not a "sufficiently definite" court order to warrant a finding that Mother willfully violated it.

Father responds that because the February 2023 Order did not construe the seven-day provision and because the court could not have made any findings about Mother's conduct in the nearly one-year period *after* the hearing on the prior motion, it did not preclude the court from considering that evidence and making new findings under FL § 9-105.

'"[A]s a general principle, one judge of a trial court ruling on a matter is not bound by the prior ruling in the same case by another judge of the court[.]"' *Gertz v. Anne Arundel Cnty.*, 339 Md. 261, 273 (1995) (quoting *State v. Frazier*, 298 Md. 422, 449 (1984)). The same would, of course, be true with respect to the same judge ruling on a matter it previously ruled upon in the same case, prior to the judgment becoming final. *See* Md. Rule 2-602(a)(3) (providing that an interlocutory order "is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties").

Because a custody order "always remains subject to revision," *Velasquez v. Fuentes*, 262 Md. App. 215, 237 (2024), it bears some attributes of an interlocutory order even after

[6] During argument at the motions hearing, Mother's counsel also referenced the "law of the case" doctrine. That doctrine does not apply here because there was no appellate review of the February 2023 Order. *See Tu v. State*, 336 Md. 406, 416 (1994) (explaining that "[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which must be followed by the trial court on remand" (cleaned up)).

the time to appeal from the order has expired. Nevertheless, because the best interest of the child is paramount in all custody determinations and stability in the child's life is recognized as a crucial factor in that analysis, we have explained that "[a] litigious or disappointed parent must not be permitted to relitigate questions of custody endlessly upon the same facts, hoping to find a chancellor sympathetic to his or her claim." *McCready v. McCready*, 323 Md. 476, 481 (1991). Thus, the "principle[] by which a material change in circumstances is required in order to modify a custody order . . . 'has its roots in principles of claim and issue preclusion.'" *Augustine v. Wolf*, __ Md. App. __, __, No. 2322, Sept. Term, 2023, slip op. at 13 (filed Nov. 22, 2024) (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)).

In this case, the two orders at issue were not final custody orders, as that term is used in our decisional law, because they did not determine the physical and legal custody of the children for the first time or modify that determination based upon a change in circumstances. Rather, the February 2023 Order and the February 2024 Order each arose from Father's attempt to enforce rights accorded to him by the final custody order, which was the judgment of divorce incorporating the MSA. The first order denied Father relief and the second order, raising similar arguments based upon new facts, granted it. We are satisfied that the trial court was permitted to revisit the same underlying issue without running afoul of the principles of claim preclusion applicable to final custody orders.

The doctrines of *res judicata* and collateral estoppel also did not apply to bar Father's second FL § 9-105 motion.

> [R]es judicata extends only to the facts and conditions as they existed at the time of the first judgment and does not bar the fresh litigation of an issue which is appropriately subject to periodic redetermination, as subsequent facts and changed conditions may alter the status of the thing being evaluated.

Scott v. Prince George's Cnty. Dep't of Soc. Servs., 76 Md. App. 357, 376 (1988) (cleaned up). The related, but distinct, doctrine of collateral estoppel bars the same parties from relitigating '"an issue of ultimate fact'" that has been '"determined by a valid and final judgment[.]'" *Colandrea v. Wilde Lake Cmty. Ass'n, Inc*., 361 Md. 371, 387 (2000) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

In the February 2023 Order, which denied Father's petition for contempt and his first FL § 9-105 motion, the court found that, because Mother and Father interpreted provisions of the MSA differently, Mother was not "willfully noncompliant with a sufficiently definite Order of this Court such that [Mother] should be found in constructive civil contempt[.]" Though the order also denied Father's request for make-up time under FL § 9-105, the court did not construe the seven-day provision, did not determine whether Mother or Father's interpretation was correct, and did not conclude that the seven-day provision, or the MSA as a whole, was ambiguous or unenforceable.

The February 2023 Order also did not decide any facts conclusively against Father. It did not determine that Mother was not violating the seven-day provision by blocking out dates in advance or denying Father access. It simply concluded that Father had not met his burden to show a willful violation of the order. Though the claims being litigated in the first and second FL § 9-105 motions are similar, this was a matter appropriately subject to redetermination based upon changing facts and circumstances.

II.

On the merits, Mother contends that the court erred by construing the seven-day provision in such an overbroad fashion that it essentially modified the MSA without making a finding of a material change in circumstances and without undertaking a weighing of the best interest factors. Relatedly, she argues that the court abused its discretion by granting Father twenty-one overnights with the children as "make up time" because, under the court's construction of the seven-day provision, he may claim any time he desires when he is in South Carolina with the sole exception of Mother's Day, and, consequently, the remedy is illogical.

Father responds that the circuit court did not modify the MSA, but rather "correctly interpreted and enforced" it. He asserts, citing *Hearn v. Hearn*, 177 Md. App. 525, 534 (2007), that a custody agreement is interpreted like any other contract and that the seven-day provision clearly and unambiguously permits Father to designate any time with the children when he is in South Carolina. The circuit court did not err by determining that Mother had unjustifiably denied Father access under that provision and did not abuse its discretion by awarding Father make-up time, even though he concedes that he does "not necessarily need the make-up time."

We begin with the premise that "[t]he parents of a minor child are generally free to enter into an agreement respecting the care, custody, education, and support of their child." *Ruppert v. Fish*, 84 Md. App. 665, 674 (1990). Nevertheless, courts "cannot be handcuffed in the exercise of [their] duty to act in the best interests of a child by any understanding between parents." *Stancill v. Stancill*, 286 Md. 530, 535 (1979) (citing *Glading v. Furman*,

282 Md. 200, 208 (1978)); *see generally* FL § 8-103(a) ("The court may modify any provision of a[n] . . . agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child."). "That does not mean, however, that the agreement between the parents is meaningless or that it may be casually disregarded as the court searches elsewhere for what is in the best interest of the child." *Ruppert*, 84 Md. App. at 674. Thus,

> [a]bsent some defect that would make the agreement invalid or unenforceable, it ordinarily should be given effect; the court should presume, in other words, at least in the absence of compelling evidence to the contrary, that the decision or resolution reached agreeably by the parents is in the best interest of their child.

Id. at 674-75.

The issues before the circuit court were 1) whether Mother had "unjustifiably denied or interfered with visitation granted by a custody or visitation order," and 2) if so, what remedy, if any, could be imposed in the best interest of the children. FL § 9-105. In granting Father's motion under FL § 9-105, the court construed the seven-day provision to permit Father to have custodial access with the children anytime he is present in South Carolina so long as he gave the required notice and did not infringe upon Mother's Day weekend.[7] The court urged the parties to be mindful of the hortatory clauses of the MSA in which they agreed to be flexible and to make good faith efforts to allow the children to attend special events with each parent. It also accepted Father's stipulation, made in his motion,

[7] The MSA does not grant Mother unfettered access to Mother's Day "weekend," specifying only that she can have the children in her care from 9 a.m. to 5 p.m. that day.

and repeated in his testimony, that he would not attempt to use the seven-day provision to claim more than 50% of the overnights in a year.[8]

We conclude that the court did not err by so ruling. We interpret the language of the MSA, which was incorporated in the divorce judgment, in similar fashion to interpretation of a contract. *Jones v. Hubbard*, 356 Md. 513, 533-34 (1999). That is, where the language is plain and unambiguous, we interpret that language according to what a reasonable person in the position of the parties would have thought it meant. *Id*. at 534. The plain language of the seven-day provision places two restrictions upon Father's designation of time while he is in South Carolina. First, he must provide written notice of his plans at least seven days in advance. Second, he must transport the children to any previously scheduled, mutually agreed upon activities during his access period. Because the provision appears within the "Physical Custody" section of the agreement and specifies that Father must bear the cost of lodging for himself and the children, it is apparent that the parties agreed that the access includes overnights.

Because no other provisions of the MSA permit Mother to designate time that Father may not infringe upon, we cannot say that the circuit court modified the MSA by construing the seven-day provision to allow Father's designations to supersede Mother's. Though, as

[8] We emphasize that the MSA does not reflect that it was the intent of the parties to share physical custody on a 50-50 basis. To the contrary, the MSA envisioned renegotiating the terms of the agreement to reach a 50-50 split (or closer to it) should the parties relocate to within sixty minutes driving distance from each other. Such a renegotiation would necessarily include the holiday and vacation terms of the MSA, however, which are enjoyed only by Father under the current agreement.

we explain below, due to changed circumstances, Mother may not have anticipated the impact of this clause, it is not our role to rewrite their agreement.[9]

The court found that Mother unjustifiably denied Father access under the seven-day provision because, when he provided notice to her of his designations in advance, she denied him access more than 50% of the time based upon her preexisting plans with the children. This was a fact question for the circuit court, and it did not clearly err by so ruling.

Turning to the remedy imposed, we hold that the circuit court abused its discretion by awarding Father twenty-one overnights as make-up time.[10] As mentioned, FL § 9-105 permits the court to "order that . . . visitation be rescheduled" as a remedy for the unjustifiable denial of access. The purpose of an award of make-up time under FL § 9-105 is not "to 'make whole' the party that is unjustifiably denied visitation[,]" and any award of make-up time must be consistent with the best interests of the children. *Alexander v. Alexander*, 252 Md. App. 1, 17-18 (2021).

Though the court found, generally, that it was in the best interests of the children to spend time with both their parents, it made no findings that the grant of three weeks of make-up overnight access to Father was in their best interests. Further, under the seven-day provision, Father may have overnight access with the children whenever he is in

[9] Mother's contention that the MSA is unconscionable because it infringes upon her fundamental rights as a parent was not raised below and is not before this Court. In any event, Mother did not demonstrate procedural and substantive unconscionability. *See, e.g., Lloyd v. Niceta*, 255 Md. App. 663, 685-86 (2022).

[10] The order does not specify whether the make-up time must be exercised in South Carolina or may be exercised elsewhere.

South Carolina so long as he provides Mother with seven days advance written notice. It follows that his future *regular* access under the seven-day provision would be indistinguishable from his "make-up" access.[11] *See B.O. v. S.O.*, 252 Md. App. 486, 502 (2021) ("An abuse of discretion results when the trial court's decision does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." (cleaned up)). Because the grant of make-up time could lead to confusion, particularly if the custody and access provisions are modified in the future, and because the court did not assess whether the remedy was in the best interests of the children, we reverse the grant of make-up time to Father.

In otherwise affirming the order, we do not intend to diminish Mother's legitimate concerns about the way the seven-day provision is being implemented. Father's increasing use of his South Carolina property as a second home, coupled with his requests for extended, overnight access under the seven-day provision have resulted in Father's overnight access time increasing, as Mother's time decreases. Mother correctly points out that her plans with the children are subject to being superseded by Father at his discretion. The parties expressly agreed to renegotiate the terms of the MSA to reach a 50-50 split (or closer to it) should the parties relocate to within sixty minutes driving distance from each other. Such a renegotiation would necessarily include the holiday and vacation terms of the MSA, however, which are enjoyed only by Father under the current agreement. Though Father maintains his home in Maryland, his frequent travel to South Carolina

[11] During oral argument in this Court, Father's counsel stated that Father had not used any of the twenty-one days of make-up time.

likely amounts to a material change of circumstances affecting the welfare of the children, as does the significant increase in his overnight access with the children.

The appropriate forum for a court to determine whether custody and visitation should be modified to further the best interests of the children is not, however, a FL § 9-105 hearing, as the circuit court recognized, but a modification hearing at which the issues can be fully fleshed out, preferably with the input of a BIA to advance the children's interests. *See, e.g.*, *Augustine*, __ Md. App. at __, slip op. at 12 ("To effectuate a child's unique interest in the outcome of a custody dispute, a BIA is frequently appointed to represent a child in contested custody proceedings, and in certain contexts, the failure to provide independent representation to a child in such proceedings can be reversible error.").

ORDER ENTERED BY THE CIRCUIT COURT FOR CALVERT COUNTY ON FEBRUARY 28, 2024 AFFIRMED, IN PART, AND REVERSED, IN PART. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY APPELLEE.