Circuit Court for Washington County
Case No. C-21-FM-20-001127

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 501

September Term, 2023

No. 125

September Term, 2024

ERIC HOUSTON

v.

MARY HOUSTON

Arthur,
Beachley,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: October 9, 2024

*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).

Eric Houston ("Father") and Mary Houston ("Mother") have one child, A.H. When the parties divorced in 2021, they entered into a consent order providing for shared custody. In May 2023, after a three-day hearing, the Circuit Court for Washington County issued an order reducing Father's custodial time with A.H. Father appealed from that order. Shortly thereafter, A.H.'s Best Interest Attorney filed a motion for a review hearing, resulting in the court issuing an order in February 2024 further curtailing Father's visitation with A.H. Father also noted an appeal from the second order.[1]

In his first appeal, Father presents a single question for our review:

1. Did the [circuit] court err, as a matter of law, in admitting evidence of illegally recorded videos in violation of Maryland's wiretapping laws?

In his second appeal, Father presents two questions, which we have rephrased:[2]

2. Did the court err in modifying custody without making an explicit finding that there was a material change in circumstances?

3. Did the court err in conditioning Father's in-person visitation on his therapist's timely submission of reports to the court?

We answer the first two questions in the negative. However, because we conclude that conditioning Father's in-person visitation on his therapist submitting a timely report was

[1] This Court consolidated the two appeals by an Order issued on March 26, 2024.

[2] Father presented the following questions in his brief:

1. Did the lower court err, as a matter of law, in modifying custody without making a finding of a material change in circumstances?

2. Did the lower court err, as a matter of law, in delegating a judicial function to a non-judicial actor?

not reasonably related to the best interests of the child, we shall vacate that provision in the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father were married in 2016 and have a single child together, A.H., born in August of 2016. A.H. has a history of serious medical problems, including cancer, that necessitate frequent medical appointments, hospitalization, and medication. The parties divorced in April 2021 and entered into a consent order providing for joint physical and legal custody of A.H. During the school year, A.H. primarily lived with Father, and visited with Mother nearly every weekend. During the summer, A.H. lived primarily with Mother and visited Father one full week and one weekend per month.

On April 8, 2022, Mother filed a motion for modification, seeking sole legal and primary physical custody of A.H. due to Father's alleged failure to allow Mother access to A.H.'s medical information and his failure to facilitate visitation between A.H. and Mother. The court held a three-day hearing on Mother's motion beginning on March 23, 2023.

At the March 2023 hearing, Mother introduced several videos which Father challenges in this appeal. The first video ("Video 1") is a recording of a virtual visit between Mother and A.H. on January 11, 2023. In the video, Mother's boyfriend is also present with her. When A.H. greets Mother and her boyfriend, Father is heard on the video using a homosexual slur to refer to the boyfriend. Father objected to the video being admitted because it was "recorded without [his] consent," and there was no indication that he knew the conversation was being recorded. Counsel for Mother and the Best Interest

Attorney ("BIA") both argued that Father was aware that Mother had security cameras in the main areas of her house and that the video was recorded while Mother was in her kitchen; therefore Father was "aware that it's not a private call." The court overruled the objection and admitted the video into evidence, comparing the situation to an inmate who is "aware . . . that all phone calls are recorded" and chooses to speak over the phone.

The second video ("Video 2") is also a recording of a virtual visit between Mother and A.H. on January 30, 2023. The following occurred at the beginning of the virtual visit:

[MOTHER]: Hi baby. . . . What's up?

[A.H.]: Nothing.

[MOTHER]: How's your day been?

. . .

[A.H.]: Good.

[MOTHER]: I'm glad. Miss you.

[A.H.]: Miss you too.

[MOTHER]: Um. What'd you do today?

[A.H.]: Nothing really. We really played (inaudible – few words.)

[FATHER]: (Inaudible – few words) say none of your business.

[A.H.]: None ya.

[MOTHER]: [A.H.], that's rude.

[A.H.]: None ya.

[MOTHER]: That's not nice.

Later during the same visit, while Mother was attempting to discuss an upcoming medical

appointment with her, A.H. "repeated no and uh-uh, in response to [Father] saying no, to [Mother.]" Father also objected to the admission of this video, saying his objection was "the same" as his objection to Video 1. The court overruled the objection and admitted Video 2 into evidence.

The third video ("Video 3") is a recording Mother made of one of A.H.'s doctor appointments. Father was physically present at the appointment with A.H., and, in accord with the custody order in effect at the time, initiated a video call with Mother so she could hear from and communicate with the doctors. The recording does not contain any audio. Father is seen walking over to the phone and disconnecting the video call with Mother while a doctor is treating A.H. Father objected to the admission of this recording because "[i]t was not taken with consent." The court noted that the video contained no audio, overruled Father's objection, and admitted Video 3 into evidence.

The final video ("Video 4") is Mother's recording of an interaction between her and Father in the hospital while A.H. was in surgery. Father testified that he did not give consent to being recorded and was not aware that he was being recorded during the interaction. Video 4 was not admitted into evidence. Instead, during the BIA's cross-examination of Father, Father viewed the video outside the presence of the court and then provided testimony about it. Father testified that the video was recorded around 11:45 p.m., shortly after Mother arrived at the hospital. When Mother told Father that she was only staying at the hospital for two hours, Father responded, "I don't give a f***." Father explained that he had arrived at the hospital at 5:45 a.m. that day, and, at the time of his

interaction with Mother, he was "extremely tired and a little upset that she decided to show up at midnight" rather than arriving "immediately after she got off work." Although Father objected to the admission of the recording, no objection was raised to his testimony about the events depicted in the video.

During Mother's cross-examination of Father, he acknowledged that, under the order in effect at the time, Mother was permitted to record her conversations with A.H. while the child was in Father's custody. Mother's counsel then asked Father: "And if you're jumping in the background of a video, she's going to catch you on camera. But she's -- she is recording that legally based upon your consent, correct?" Father responded affirmatively.

On May 8, 2023, the court issued an order modifying physical and legal custody. Pursuant to this order, A.H. was to live primarily with Mother during the school year, and Father would have visitation nearly every weekend. During the summer, Father would also have two consecutive weeks in July and one week in August for vacation time with A.H. The order provided that evening virtual visits with the non-custodial parent may be recorded. The order also contained a provision prohibiting the parties from making "any negative comment, or through their conduct, indicat[ing] anything negative about the other parent, the other parent's family, or any person connected with the other parent, to [A.H.] or to any other person." The order further specified:

> [E]ach party (now recognizing the significant negative impact on [A.H.], and the negative impact on [A.H.'s] medical care generated from the ongoing animosity, lack of trust, and attempts to assert control over the other parent's access, and attempts to negatively impact the other parent's relationship with

[A.H.]), shall do the following 100% of the time (some of the time or most of the time is not even close to being adequate):

A. Be respectful of the other parent directly and indirectly, within the hearing of the other parent, medical professionals, family, friends, and most of all [A.H.]

B. Never engage in name calling, cursing, raising of the voice, and do not have any physical contact with the other parent.

C. Make NO attempt to convince either the child or any other person that the other parent is wrong, making poor choices, is a bad person/parent or the like.

D. Do not have any discussion whatsoever about the other parent for any reason except with that parent's own attorney.

E. Do nothing, directly or indirectly, to negatively impact the other parent's (or their family or friends') relationship with [A.H.]

F. If frustrated, don't act out and don't speak out, pull back from the interaction long enough to make an intelligent choice about how to act, or engage on a topic. Ensure that interactions are driven by mature thought focused on [A.H.'s] best interests rather than that parent's emotion, frustration, anger and/or desire for revenge for the other parent's perceived wrongdoing.

G. Don't call hospital security, Child Protective Services, or the police unless there is an immediate risk of actual physical harm. Otherwise, the party should, during regular business hours, contact counsel for advice.

In the order, the court noted certain hypothetical situations which may constitute a material change in circumstances, including:

> [I]f there is evidence that [Father] continues to engage in conduct that is fueling further conflict, undermining [A.H.'s] well-being or undermining [A.H.'s] relationship with her Mother such as name calling, disrespectful conduct, or taking other actions to undermine [Mother's] parenting . . . , or if

> he has not engaged in counseling as Ordered,[3] and/or has not made reasonable progress in counseling on the issues identified, then the [c]ourt may consider whether it would serve [A.H.'s] best interests to adjust the summer vacation, holiday, and weekend access schedule to further limit [A.H.'s] time with [Father] and increase her time with [Mother].

Father noted a timely appeal from this order.

On June 30, 2023, while this appeal was pending, the BIA filed a motion for a review hearing, alleging that Father had made inappropriate comments to A.H. during phone calls, that Father had been creating difficulty with exchanging A.H. and her medication, and that A.H.'s medical care had been disrupted due to the parents' actions. The court held a four-day hearing on the BIA's motion, concluding on November 21, 2023.

The hearing on the BIA's motion primarily focused on two issues: Father's failure to continue mental health treatment, as required in the May 2023 order; and inappropriate conversations occurring during Father's virtual visits with A.H. At the hearing, Father admitted that he had not participated in mental health treatment since "late July or early August."

Mother introduced video evidence from Father's virtual visits with A.H. in which he routinely discusses matters related to the court case, criticizes Mother, and denies A.H.'s medical diagnoses. Father engaged in arguments with A.H. on these issues, despite her being seven years old at the time and the visits being recorded. In several videos, A.H. is riding in a car with Mother during the visit and Father refuses to speak to A.H. because

[3] A separate order issued the same day required both parents to separately participate in counseling and mental health treatment. The order provided a lengthy list of specific issues the court wanted each party to focus on in therapy.

Mother can overhear the conversation, despite A.H. pleading with him to not hang up.

On February 20, 2024, the court issued an "Amended Custody Order." The court found that the changes made in the order

> are in the best interests of the minor child . . . . Based upon [Father's] conduct from May 5, 2023, through the last day of the review hearing, the [c]ourt has found a continuing pattern of conduct which is mental abuse of [A.H.], however, so long as [Father] complies with the terms of this . . . Amended Custody Order and the terms of the May 5, 2023, Order for Counseling and Mental Health Treatment, then the [c]ourt finds that there is no further likelihood of abuse and neglect. . . . While the conduct and comments from [Father] are sufficiently problematic to justify much more limited contact than provided in this Amended Custody Order, the [c]ourt was conservative and still is providing significant in-person child access time, including overnights with [A.H.], mainly because [A.H.] is bonded to her father and this relationship is important to her[.]

The amended order further reduced Father's visitation to every other weekend during the school year and reduced his summer access to one week in July and every other weekend. The amended order provides the non-custodial parent video calls with A.H. on Tuesdays and Thursdays. The video calls are required to be recorded. The amended order also provides:

> IT IS FURTHER ORDERED that in order for [Father] to maintain the in-person visits with [A.H.], on or before April 15, 2024, [Father's] therapist shall provide to the BIA, the parties, and file with the [c]ourt . . . a report with the following information as to [Father's] therapy:
>
> 1. The date that therapy began, the date of each therapy session and whether in person or remote;
>
> 2. A confirmation that all material forwarded by the BIA has been received, reviewed and understood;
>
> 3. [T]he therapist's diagnosis of any mental health conditions;
>
> 4. [T]he therapist's summary of the issues currently be[ing] addressed in

treatment, and future issues to be addressed;

5. [T]he therapist's treatment plan and recommended frequency of treatment;

6. [T]he therapist's opinion regarding [Father's] understanding of the [c]ourt's concerns;

7. [T]he therapist's opinion regarding [Father's] cooperation with and engagement in the therapeutic process.

IT IS FURTHER ORDERED that if that report from [Father's] therapist has not been received by April 15, 2024, then starting April 15, 2024, [Father] shall have no in-person visits with [A.H.] (however, the recorded remote/video visits may continue) until the report has been forwarded to the [c]ourt and the parties/lawyers, and until the [c]ourt has acknowledged receipt and adequacy of the report, or if the court finds the report to be inadequate and has specified other needed information, then there shall continue to be no in-person visits until the inadequacy has been remedied by the therapist.

According to [Father], after stopping his prior therapy because he felt better, as of the last day of the review hearing, he was trying to start therapy as of November 2023, and therefore compliance with these provisions should not be difficult. The only reason compliance may be difficult is if [Father] has continued to ignore the requirement for court-ordered therapy . . . .

IT IS FURTHER ORDERED that in order for [Father] to maintain his in-person visits with [A.H.], [Father's] therapist shall update the initial report with current information on or before each July 1, October 1, January 1, and April 1 continuing into the future, until sufficient progress has been made such that the court deems that the progress reports are no longer necessary . . . .

IT IS FURTHER ORDERED that if a therapist report/update has not been received on by [sic] each date above, then in-person visits with [Father] shall be suspended until the report is received.

Father noted a timely appeal from the amended order. We discuss both of Father's appeals in this opinion.

DISCUSSION

I. VIDEO EVIDENCE WAS NOT ADMITTED IN VIOLATION OF THE WIRETAP ACT

Father argues that the court erred in admitting Videos 1-3, and erred in allowing opposing counsel to elicit testimony concerning Video 4. He argues that the videos of him were made without his consent or knowledge, and therefore are in violation of the Maryland Wiretap Act, which precludes such recordings from being admitted into evidence.[4] Mother responds that Father was aware that her calls with A.H. were being recorded and that, even if the court erred, Father was not prejudiced because he admitted to making inappropriate comments to A.H.

The Wiretap Act provides that "it is unlawful for any person to . . . [w]illfully intercept . . . any wire, oral, or electronic communication[,]" unless "all of the parties to the communication have given prior consent to the interception[.]" CJP § 10-402(a), (c)(3). An individual may consent to an interception either expressly or implicitly. *Agnew v. State*, 461 Md. 672, 683 (2018) (citing *State v. Maddox*, 69 Md. App. 296, 301 (1986)). The Wiretap Act further provides that, "no part of the contents of [any intercepted] communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this subtitle." CJP § 10-405(a).

[4] *See* Md. Code (1974, 2020 Repl. Vol., 2024 Supp.), §§ 10-401 to 10-414 of the Courts and Judicial Proceedings Article ("CJP").

As we discuss below, none of the recordings Father complains of were admitted in violation of the Wiretap Act.

a. Video 1 and Video 2

During Mother's cross examination of Father, he agreed that the custody order in place at the time was a consent order that allowed Mother to record her conversations with A.H. while A.H. was in Father's custody.

[MOTHER'S COUNSEL]:	And you consented to the noncustodial parent . . . recording um, video calls . . . which would mean that when [A.H.] is with you, [Mother] was allowed to record videos?
[FATHER]:	Yes.
	. . .
[MOTHER'S COUNSEL]:	. . . [Y]ou signed this agreement. You agreed to this statement. The parties -- only the noncust -- noncustodial parent may record the video with the minor child. You agreed to that statement.
[FATHER]:	I guess, I did.
[MOTHER'S COUNSEL]:	So, . . . when [A.H.] is with you, [Mother] is the noncustodial parent, correct?
[FATHER]:	Yes.
[MOTHER'S COUNSEL]:	And she's allowed to record her conversations with [A.H.] when [A.H.] was with you? Yes?
[FATHER]:	That's -- I guess that's correct.
[MOTHER'S COUNSEL]:	And if you're jumping in the background of a video, she's going to catch you on camera.

	But she's -- she is recording that legally based upon your consent, correct?
[FATHER]:	For that aspect of it. . . .

Thus, Father acknowledged that Mother was acting within the terms of the consent order when she recorded her visits with A.H., including those times when Father inserted himself into the conversation. Father therefore consented to the video recordings as contemplated by the Wiretap Act.

Furthermore, even if Father had not implicitly given his consent, the recordings were not made in violation of the Wiretap Act. In *Boston v. State*, 235 Md. App. 134 (2017), this Court considered whether a detention center "willfully" recorded a conversation in which an inmate called his girlfriend, and later added a third person (Boston) to the call. We concluded that, although the recording of the conversation between the inmate and the girlfriend was "an intentional, purposeful act, *i.e.*, was willful, its recording of Boston's portion of the telephone conversation was not." *Id.* at 150. The detention center's "intent to record [was] directed to" the initial parties to the conversation. *Id.* "Even in the absence of a policy prohibiting the later addition of a third participant to an inmate call, the Detention Center ordinarily would not be acting 'willfully' by continuing to record the call once it came to include the third participant." *Id.* "[W]ithout evidence of knowledge, power, and control on the part of the Detention Center, its recording of a conversation between an inmate and a person who was not the recipient of the inmate's call but was added to the call by the recipient is not willful. At most it would be inadvertent." *Id.* at 151.

Boston is instructive because, as an uninvited third-party to Mother's call with A.H., Father's interjected background remarks were not willfully recorded by Mother. As Father frequently pointed out concerning his own video calls with A.H., the calls are intended to be between A.H. and the non-custodial parent, without participation by the custodial parent. Father's interference in the conversations was therefore unexpected. Although Mother had the "knowledge, power, and control" to end the recording at any time, Father failed to show that Mother had the ability to prevent the recording of Father's short, unexpected comments.

b. Video 3

Video 3, as mentioned above, does not contain any audio. The Maryland Supreme Court has interpreted the Wiretap Act as applying only to audio recordings, not video recordings. *Deibler v. State*, 365 Md. 185, 199-200 (2001) (citing *Ricks v. State*, 312 Md. 11, 20-24 (1988), *disapproved on other grounds by Ragland v. State*, 385 Md. 706, 718-25, n.5 (2005)). Thus, the Wiretap Act did not apply to Video 3 and the court did not err in admitting it into evidence.[5]

c. Video 4

Video 4, in which Mother recorded her conversation with Father at the hospital while A.H. was in surgery, was not admitted into evidence. Father's counsel appeared to

[5] Furthermore, Father admits in his reply brief that Video 3 "was not referred to by the lower court in any meaningful way in its decision." He therefore appears to concede that, even if Video 3 were erroneously admitted into evidence, that error was not prejudicial to him.

object to admission of Video 4 into evidence on the ground that it violated the Wiretap Act, stating: "the question needs to be asked . . . did he know he was being recorded? Was his -- did he give consent? . . . Otherwise, I'm going to object." Father then testified that he did not know he was being recorded and did not give consent to being recorded. At that point, the BIA asked if she could play the video for Father outside of the courtroom in anticipation of further questioning about the video. Father's counsel raised no objections to the BIA's proposal, and did not object when Father was questioned about the contents of the video after he reviewed it. Thus, Father's argument on appeal that the court erred in allowing the BIA to elicit his testimony concerning Video 4 was not preserved for our review. *See Patriot Constr., LLC v. VK Elec. Servs., LLC*, 257 Md. App. 245, 268 (2023).

II. THE COURT IMPLICITLY FOUND A MATERIAL CHANGE IN CIRCUMSTANCES

Father argues that the court failed to find a material change in circumstances to support its Amended Custody Order. Father's single-paragraph argument on this issue is based on the court's failure to use the phrase "material change in circumstances."[6]

For a court to modify a prior custody order, it must make two findings: first, that there has been a material change in circumstances; and, second, that a modification is in the best interests of the child. *Jose v. Jose*, 237 Md. App. 588, 599 (2018). However, these two findings do not necessarily need to be made separately. *Wagner v. Wagner*, 109 Md.

[6] We note that we need not decide an issue raised in a brief where the party failed to adequately provide a supporting argument. *Boston Sci. Corp. v. Mirowski Fam. Ventures, LLC*, 227 Md. App. 177, 209 (2016) (citing *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003)). However, we will exercise our discretion in this case to consider Father's argument.

App. 1, 28-29 (1996). "[I]f a court concludes, on sufficient evidence, that an existing provision concerning custody or visitation is no longer in the best interest of the child and that the requested change is in the child's best interest, the materiality requirement will be satisfied." *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005).

> Certainly, the very factors that indicate that a material change in circumstances has occurred may also be extremely relevant at the second phase of the inquiry—that is, in reference to the best interest of the child. If not relevant to the best interest of the child, the changes would not be material in the first instance. Because of the frequency with which it occurs, this two-step process is sometimes considered concurrently, in one step, *i.e.*, the change in circumstances evidence also satisfies—or does not—the determination of what is in the best interest of the child. Even if it alone does not satisfy the best interest standard, it almost certainly will afford evidentiary support in the resolution of the second step. Thus, both steps may be, and often are, resolved simultaneously.

Wagner, 109 Md. App. at 28-29. The Maryland Supreme Court has noted that

> In the limited situation where it is clear that the party seeking modification of a custody order is offering nothing new, . . . the effort will fail on that ground alone. . . .
>
> In the more frequent case, however, there will be some evidence of changes which have occurred since the earlier determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

McCready v. McCready, 323 Md. 476, 482 (1991). In summary, where there has been some change in circumstances since the prior custody order, a court may resolve whether that change is "material" by finding that a modification to the custody arrangement is in the child's best interests.

Here, the court discussed Father's behavior subsequent to the May 2023 order, and indicated that his behavior necessitated a change in the custody order to preserve A.H.'s best interests. The court noted that Father showed a "lack of willingness to follow the [c]ourt's orders regarding no negative comments and regarding counseling[.]"[7] A determination of whether these changes were "material" depends on their effect on A.H.'s best interests. Under these circumstances, the issues of "material change in circumstances" and "best interest of the child" may be "resolved simultaneously." *See Wagner*, 109 Md. App. at 29. Furthermore, as this Court has stated in prior cases, the "mere incantation of the 'magic words' of a legal test, as an adherence to form over substance, . . . is neither required nor desired if actual consideration of the necessary legal considerations are apparent in the record." *In re D.M., J.M.*, 250 Md. App. 541, 563 (2021) (alteration in original) (quoting *In re Adoption/Guardianship of Darjal C.*, 191 Md. App. 505, 532 (2010)). "Trial judges are presumed to know the law and to apply it properly. Indeed, we presume judges know the law and apply it even in the absence of a verbal indication of having considered it." *In re X.R.*, 254 Md. App. 608, 629 (2022) (quoting *Marquis v. Marquis*, 175 Md. App. 734, 755 (2007)). Here, the trial judge explicitly demonstrated her familiarity with the material change in circumstances requirement in her prior orders in this case, stating in the May 2023 order that "the evidence has shown a substantial and significant change in circumstances such that the [c]ourt will address the legal custody and

[7] Indeed, Father admitted that he had stopped participating in therapy within three months of the May 2023 order requiring him to attend therapy.

physical custody and child access structure that is in the best interest of the minor child[.]" Thus, although the court's discussion in the February 2024 order does not explicitly use the phrase "material change in circumstances," it is clear from context that the court implicitly found that there had been a material change subsequent to issuing its previous order.[8] We discern no abuse of discretion in the court's determination and, indeed, Father's brief fails to articulate any abuse of discretion on this point.

III. THE COURT IMPROPERLY CONDITIONED FATHER'S VISITATION ON THIRD-PARTY ACTIONS

Finally, Father argues that the court's order improperly conditioned his in-person visitation with A.H. on his therapist submitting a report to the court. He contends that this is an improper delegation of the court's decision-making authority, and that it is inappropriate to condition his visitation on the actions of a third person. Although he acknowledges that the therapist's first report, due on April 15, 2024, was late, he objects to the continued suspension of his in-person visits with A.H. because the "lower court continues to sit on the report without acknowledging it or its adequacy."[9]

Mother responds that the court did not delegate a judicial function to Father's

[8] We further note that the court indicated in the May 2023 Order that, if Father acted to undermine Mother's parenting or failed to continue therapy, it might consider such actions to be a material change in circumstances.

[9] Our review of the docket entries indicates that the therapist timely submitted the July 1, 2024 report, but we see no indication that Father's in-person visits have been reinstated. The court's order implicitly presumes that it will promptly consider "adequacy of the report" yet the docket entries show no action by the court until it issued a Show Cause Order on September 30, 2024.

therapist because the therapist "is not making decisions[,]" but instead "is merely writing a report." Mother also notes that the therapist's report was late because Father did not provide the therapist a copy of the court order in a timely manner.

A trial court has "broad discretion" to impose a condition on a parent's visitation and custody rights, "so long as it is in the child's best interest and there is sufficient evidence in the record to support the condition[.]" *Cohen v. Cohen*, 162 Md. App. 599, 608 (2005); *see also Kennedy v. Kennedy*, 55 Md. App. 299, 310 (1983) ("We will affirm the imposition of such a condition so long as the record contains adequate proof that the condition or requirement is reasonably related to the advancement of a child's best interests."). We have upheld visitation conditions such as requiring the parent to abstain from consuming alcohol, *Cohen*, 162 Md. App. at 612, or to participate in family counseling, *Kennedy*, 55 Md. App. at 311. However, where the limitation is not related to the child's best interests, it has been stricken. *See, e.g., Boswell v. Boswell*, 352 Md. 204, 211, 240 (1998) (involving an order providing that the children have no visitation with parent in the presence of parent's same-sex partner or "anyone having homosexual tendencies or such persuasions"). "In all family law disputes involving children, the best interests of the child standard is always the starting—and ending—point." *Id.* at 236.

Additionally, "a court may not delegate to a non-judicial person decisions regarding child visitation and custody." *Van Schaik v. Van Schaik*, 200 Md. App. 126, 134 (2011). This limitation extends to orders which allow a non-judicial person "to curtail, or make more onerous, the visitation allowed in the court order." *In re Justin D.*, 357 Md. 431, 449

(2000). However, a court may delegate decisions regarding "matter[s] ancillary to custody and visitation[,]" *Van Schaik*, 200 Md. App. at 135 (emphasis omitted), and may allow a non-judicial person to increase visitation beyond a minimum (non-zero) level set by the court, *Justin D.*, 357 Md. at 450.

Although we agree with Mother that the therapist was not asked to make any decisions concerning visitation with Father, we conclude that the order is deficient under the applicable caselaw. In *Justin D.*, the Supreme Court reiterated that a complete suspension of all visitation privileges "should be ordered only in the exceptional case." 357 Md. at 446 (citing *Shapiro v. Shapiro*, 54 Md. App. 477 (1983)). The order here automatically suspends Father's in-person visitation if the therapist's report is not provided by specific deadlines, and "until the [c]ourt has acknowledged receipt and adequacy of the report[.]" After Father's in-person visitation is suspended for failure to timely provide the therapist's report, Father may not have in-person visitation until the court reviews the report and reinstates in-person visits. The court's order therefore makes Father's continued in-person visitation with A.H. fully dependent on his therapist. If the therapist fails to submit a report by a specified deadline, Father automatically loses in-person visitation. We perceive myriad reasons why the therapist may not timely provide the court-ordered report. For instance, if the therapist earnestly believed that in-person visits were inappropriate, the therapist could effectively suspend Father's in-person visitation by intentionally missing a deadline, resulting in an improper delegation of the court's jurisdiction over custody matters. *Cf.*, *In re Mark M.*, 365 Md. 687, 710 (2001) (holding that "[v]esting the therapist

. . . with complete discretion to deny or permit visitation . . . constitutes an improper delegation"). We recognize that there could be more innocuous reasons for failing to timely provide the report, such as simple administrative error or the unavailability of the therapist to provide the report due to professional or personal circumstances unrelated to the child. In short, we discern many circumstances where submission of the therapist's report by a specific date would be unrelated to A.H.'s best interests. Because the restriction on Father's in-person visitation with A.H. is based solely on the timeliness of the reports, over which Father may have little if any control, it is neither "reasonabl[e]" nor "related to the advancement of a child's best interests." *See Kennedy*, 55 Md. App. at 310.

Accordingly, we shall vacate the provision automatically suspending Father's in-person visitation based on the filing of his therapist's report, but otherwise affirm the circuit court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED IN PART AND REVERSED IN PART. THE PROVISION IN THE ORDER SUSPENDING VISITATION BASED ON THE TIMELINESS OF FILING THERAPIST'S REPORTS IS VACATED. JUDGMENT IS OTHERWISE AFFIRMED. COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND APPELLEE.