Circuit Court for Montgomery County
Case No. 168818FL

UNREPORTED

IN THE APPELLATE COURT OF

OF MARYLAND*

No. 977

September Term, 2022

R. F. S.

v.

M. E.

Kehoe,
Leahy,
Zic,

JJ.

Opinion by Kehoe, J.

Filed: June 6, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal is from a judgment of the Circuit Court for Montgomery County, the Honorable Jill R. Cummins, presiding, that awarded R. F. S. ("S.") and M. E. ("E.") joint legal and shared physical custody of their two minor children, M. and D.[1] S. presents eleven issues, which we have consolidated and reworded:

> 1. Did the trial court abuse its discretion when it excluded the testimony of two of S.'s proposed expert witnesses?
>
> 2. Did the trial court err in admitting the custody evaluator's report even though the evaluator was not available to testify?
>
> 3. Did the trial court fulfill its duties imposed by Md. Code, Fam. Law §§ 9-101 and 9-101.1?
>
> 4. Did the trial court err in making its award of joint custody?[2]

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[1] We will refer to the children who are the subject of these proceedings as "M." and "D." These initials are chosen at random and neither child's first name nor surname begins with that letter.

[2] S. presents the issues as follows:

1. Did the lower court serve the best interest of the children when granting majority custody to a parent, as a fit parent, when it found the parent unjustifiably separated children from [S.], restricted children from accessing [S.], imposed supervision on [S.] and children, allowed children to witness domestic violence on [S.], used children as micro-aggressive weapons against [S.] to undermine [S.], leveraged children's respect for [E.] against [S.], sent implicit messages to the children that [E.] does not want them around [S.], empowered children to have equal or greater say than [their] parents, chose not to require children to spend time with [S.], chose not to comply with court access orders, and is unable to recognize the harm to [the] children for their not having a relationship with [S.]?
   a. Legal Propositions: Parental Fitness and Best Interest of the Child doctrines expressed in *Taylor v. Taylor* help determine if [E.] acted as a fit parent in [the] children's best interests.
   b. Questions of fact are based on lower court findings.

2. Do lower court's findings of [E.]'s conduct toward [the] children match the elements of child abuse as defined in Title 5, §5-701(b)(1)(i) and §5-701(r)? If so, is awarding unsupervised visitation or custody to [E.] in the best interest of the children?
    a. Legal Propositions: §5-701(b)(1)(i) and §5-701(r) guide legal inquiries to determine child abuse.
3. Questions of fact are based on lower court findings. Did [E.]'s conduct, according to court's findings, meet the elements of child neglect? If so, is it in the best interest of children to place children in custody or unsupervised visitation with such a parent?
    a. Legal Proposition: Title 5, Subtitle 7, §5-701(s) guides the legal inquiries to determine if child neglect is committed.
4. Questions of fact are based on lower court findings. Did court err in relying on the children's preferences for [E.] as a custody factor when court found the children's psyches were manipulated by [E.] for years?
    a. Legal Proposition: *Taylor v. Taylor* guides the legal inquiries to determine child preference.
    b. Questions of fact are based on lower court findings.
5. Did court have reasonable grounds to believe children were abused or neglected by a party to the proceeding?

    If yes, did court perform the mandatory determination whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party? If court performed the mandatory determination, did it do so correctly?

    a. Legal Proposition: MD Code, Family Law, § 9-101 guides the legal inquiry.
    b. Questions of fact are based on lower court findings.
6. Did court err, committing reversible error when it denied [S.] from presenting expert witness testimony because it determined a discovery deficiency, when the evidence proffered could have helped the court make custody decisions in the best interest of children?
    a. Legal Proposition: *A.A. v. Ab.D.* and *Kadish* guide the legal inquiries to determine if evidence should not be excluded as a discovery sanction in custody cases.
    b. Questions of fact are based on lower court findings.
7. Did the court incorrectly assess its custody factor findings in favor of [E.]?

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a. Legal Proposition: *Taylor v. Taylor and Montgomery Cty. Dep't of Soc. Servs. v. Sanders guide legal inquiries to help adjudicate custody factors.*
b. Questions of fact are based on lower court findings of the lower court, generally.

8. Did court commit reversible error, against the best interest of marshaling good information to the court, and therefore against the best interest of the children, when it relied on a custody evaluation nearly 14 months old to make a custody decision? Did the lower court commit reversible error, under *A.A. v. A.B.D*, when it denied [S.]'s expert witness, a social worker, the opportunity to impute the stale custody evaluation of a court social worker?
    a. Legal Proposition: *A.A. v. A.B.D*. and *Kadish* guide legal inquiries to determine if the lower court should allow the best information possible to make correct decisions affecting children's best interests.
    b. The questions of fact are based on the lower court findings and in the merits hearing transcript.
9. Did court err in determining [S.] worked outside the home and [E.] worked at home?
    a. Legal Proposition: the court erred as a matter of fact.
    b. The questions of fact are based on the lower court findings and in the merits hearing transcript.
10. Did court err in [expressing] concern[s] that if [S.] is awarded sole legal custody or tiebreaking authority, that may result in [E.] being excluded from decision-making, when testimony opposite to that effect was presented to the court?[2]
    a. Legal Proposition: the court erred as a matter of fact.
    b. The questions of fact are based on the lower court findings and in the merits hearing transcript.
11. Did court err in finding that [S.]'s sharing information about parent alienation with the children was an aggravating factor, when [S.]'s psychologist expert witness, had he been given the opportunity to testify, would have testified that this was a product of [S.] being a victim of domestic violence?
    a. Legal Proposition: the court erred when excluding expert testimony (*See A.A. B D.* and *Kadish*).
    b. The questions of fact are based on the lower court findings and in the merits hearing transcript.

We will affirm the trial court's well-reasoned resolution of this complex and challenging child custody case.

BACKGROUND

S. and E. were married in July 1998. During the marriage, the parties became parents of two minor children: M. and D. At all times relevant to the issues raised in this appeal, S. was writer for a labor organization, and E. owned a dog-walking business that operated out of E.'s residence. The trial court found that, prior to their separation, S. and E. often occupied different spheres of their children's lives—S. "handled the familial organization" and E. "spent more leisure time" with M. and D.

The evidence shows that the parties' relationship was a volatile one, marked by frequent verbal arguments and, on at least one occasion, a physical confrontation. The evidence indicated that the verbal altercations sometimes took place in the presence of their children, the physical altercation did not. The parties separated on March 28, 2020, which was when E. left the marital home with M. and D. and moved in with E.'s parents, who lived nearby. At the time of separation, M. was 11 years old and D. was 9. E. and the children were still residing with E.'s parents at the time of trial. The trial court categorized the parties' separation as "a high conflict divorce," one in which "the [marital relationship] ends and [the] war begins."

At trial, the court found that S.'s relationship with M. and D. had significantly deteriorated after the separation and that S.'s access to the children in the two years after E. took them out of the marital home could "best be described as minimal." Evidence at

trial also indicated that the children experienced an “attachment bonding reluctance” with S., though the underlying issues were complicated and differed between the children.

Prior to the party’s separation, M. began to exhibit symptoms of obsessive-compulsive disorder (OCD), which manifested as a fixation on cleanliness. At some point after the parties separated, S. became an object of M.’s obsessions, and M. became reluctant to spend time with S. M.’s reluctance to have a relationship with S. influenced D., who did not want to upset M. The court also found that S.’s behavior had at times alienated the children. The trial court additionally found that, after their separation, E. restricted S.’s access to the children and this contributed to the deterioration in S.’s relationship with them.

On April 20, 2020, E. filed a complaint for limited divorce, custody, child support, and other relief, and sought primary physical and sole legal custody, with tie-breaking authority if joint legal custody was awarded. S. initially filed a counterclaim seeking joint physical and legal custody, but by the end of trial S. had requested primary physical custody, with E. having supervised access, and sole legal custody or tie-breaking authority. The case came before the circuit court for trial on December 13–16, 2021, with an additional carry-over day on January 12, 2022.

The court issued its ruling from the bench on March 1, 2022, awarding the parties joint legal custody and shared physical custody, with S.’s physical custody to be implemented on a graduated basis. Additionally, the court ordered that both M. and D. were to participate in reunification therapy with S. and that S. and E. were to continue

their existing therapy treatments. Both parties filed cross-motions for reconsideration requesting minor modifications, which were granted in part and denied in part and are not at issue here. Additional facts will be presented in our analysis as necessary.

THE STANDARDS OF REVIEW

S.'s contentions implicate three modalities of appellate review. We review a trial court's legal reasoning *de novo*. We review factual findings for clear error. In that process, we must defer to the trial court's assessment of the probative value of evidence as well as the credibility of witnesses. Maryland Rule 8-131(c). As a result, we will uphold a trial court's factual findings "if there is competent or material evidence in the record to support the court's conclusion." *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)), *cert. denied*, 467 Md. 693 (2020).

Finally, as this Court recently observed, "there is no such thing as a simple custody case," and judges often "agonize more about reaching the right result" in child custody disputes than they do in "any other type of decision." *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (quoting *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 502-03 (1992)). For this reason, "trial courts are entrusted with 'great discretion in making decisions

concerning the best interest of the child.'" *Id.* (quoting *Petrini v. Petrini*, 336 Md. 453, 469 (1994)). As the Supreme Court of Maryland[3] has explained:

> [A]buse of discretion may arise when 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. Such an abuse may also occur when the court's ruling is clearly against the logic and effect of facts and inferences before the court or when the ruling is violative of fact and logic. Put simply, we will not reverse the trial court unless its decision is well removed from any center mark imagined by the reviewing court.
>
> The light that guides the trial court in its determination, and in our review, is the best interest of the child standard, which is always determinative in child custody disputes.

Santo v. Santo, 448 Md. 620, 625–26 (2016) (cleaned up).

ANALYSIS

1. and 2. The Excluded Expert Testimony and the Admission of the Custody Evaluator's Report

S.'s first two appellate contentions are factually and procedurally intertwined. We will address them together.

Craig Childress, Psy.D.

S. wished to call Dr. Craig Childress, a child psychologist, as an expert witness at trial. S. concedes that S. failed to designate Dr. Childress as an expert witness as required by the scheduling order entered in this action. S. asserts that this Court's holding and

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[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

analysis in *A.A. v. Ab.D.*, 246 Md. App. 418, 447 (2020), required the trial court to permit Dr. Childress to testify. Based on S.'s reading of *A.A.*, S. contends that the court had a "supreme obligation" to determine what is in a child's best interest and that duty "may restrain the court's broad authority to exclude evidence as a discovery sanction." (Cleaned up.) We do not agree. Before addressing the details of S.'s arguments, we will review the relevant law.

Sanctions for Scheduling Order Violations

The scheduling order in this case, issued pursuant to Md. Rule 2-504,[4] required S. to designate all proposed expert witnesses by no later than November 12, 2020. Pursuant to that order, and as required by Rule 2-504(b)(1)(B), S. was required to disclose "all information specified in Rule 2-402(g)(1)."[5] S. failed to designate Dr. Childress as an expert and failed to provide the information and written materials required by Rule 2-402(g)(1). While scheduling orders are not "unyieldingly rigid," *Naughton v. Bankier*,

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[4] Effective July 1, 2023, Rule 2-504 is amended to reflect (1) the change of the name of Maryland's highest court from the "Court of Appeals" to the "Supreme Court," and (2) the Adoption of Title 21 to the Maryland Rules pertaining to remote electronic participation. *See* Supreme Court of Maryland Order dated April 21, 2023. The pending changes to Rule 2-504 do not affect the outcome of this appeal.

[5] In relevant part, Rule 2-402(g)(1) requires a party to disclose

> the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions.

114 Md. App. 641, 653 (1997), trial courts may impose sanctions if a party fails to substantially comply with the order or, "*at the barest minimum*, [make] a good faith and earnest effort toward compliance" with the scheduling order's requirements. *Id.* (emphasis in original). In the present case, S. (or, to be more precise, S.'s counsel) failed to meet either of these thresholds. As to Dr. Childress, S. neither substantially complied with the scheduling order nor did S. make a good faith and earnest effort towards compliance. In assessing appropriate remedies for violations of scheduling orders, courts look to what are generally referred as the *Taliaferro* factors.[6] *Asmussen v. CSX Transportation, Inc.*, 247 Md. App. 529, 550 (2020).

We review trial courts' orders imposing sanctions for violations of scheduling orders for abuse of discretion, even when the rulings are outcome determinative. *Id.* at 549–52. This is the general rule. The landscape is different in custody cases, however.

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[6] A reference to the Supreme Court of Maryland's landmark decision in *Taliaferro v. State*, 295 Md. 376, 390 (1983). Writing for the Court, Judge Lawrence F. Rodowsky explained that a trial court's decision as to a sanction should include consideration of the following:

> whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Although *Taliaferro* was a criminal case, its teachings are equally applicable to civil cases. *See Asmussen,* 247 Md. App. at 550 n.6 (collecting cases).

Discovery and Scheduling Order Sanctions in Child Custody Cases

The scope of the court's discretion to address discovery violations is limited in a child custody case because in such cases "the very object of the suit is [the child] whose best interest transcends that of either formal litigant." *Flynn v. May*, 157 Md. App. 389, 391 (2004). For this reason, we have recognized that "a child's best interests are best attained when the court's decision is as well-informed as possible." *A.A. v. Ab.D.*, 246 Md. App. 418, 447 (2020), *cert. den.* 471 Md. 75. In *A.A.*, and after reviewing the development of the concept of "the best interest of the child" in custody cases, this Court explained:

> In sum, our decisional law has long recognized that a court commits legal error when it makes a decision that impacts a custody determination without first considering how that decision will affect the child's "indefeasible right" to have his or her best interest considered. *As a matter of first impression, we hold that it was error for the court to impose a discovery sanction that precluded the court from receiving evidence without first ascertaining whether the evidence was relevant* [*i.e. relevant to the Sanders-Taylor factors*[7]] in determining which custody arrangement was in the best interest of the children. We do not condone the behavior of discovery violators and do not intend that protecting minor children have the collateral effect of giving discovery offenders a pass.
>
> *   *   *
>
> [I]n a child custody case, the court's independent obligation to the child[ren] requires that, before ordering the exclusion of evidence as a sanction, the court *should take a proffer or otherwise ascertain what the evidence is that will be excluded*, and then assess whether that evidence could assist the court in applying the *Sanders-Taylor* factors in its

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[7] A reference to *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986). We will discuss these decisions later in this opinion.

> determination of the best interest of the child[ren]. *When the court completes this assessment, we review any discovery sanction it imposes thereafter for an abuse of discretion*.

246 Md. App. at 448–49 (emphasis added, brackets in original).

S. contends that *A.A.* stands for the proposition that a discovery violation is not a legally sufficient reason "to exclude information that could help the court protect the best interests of children." This contention is not persuasive. Our analysis and holding in *A.A.* does not expand the universe of evidence that is admissible in a child custody case. Nor does *A.A.* stand for the proposition that parties can violate discovery and scheduling order deadlines with impunity in custody cases. Instead, *A.A.* imposes a straightforward procedural requirement upon trial courts: Before a trial court can exclude testimony pertinent to the best interest of the child as a sanction for a discovery violation, the court must "receive a proffer or otherwise ascertain" the substance of the proposed testimony. And, if the trial court has informed itself of the substance of the proposed testimony before ruling on an objection to the admission of the testimony, we review the court's evidentiary ruling for abuse of discretion. *Id.* at 449. We now return to the case before us.

The question of Dr. Childress's testimony arose at three different stages at the trial. The issue first came to the trial court's attention by means of a motion *in limine* filed by E. shortly before trial. In that motion, among other things, E. asked the court to exclude the testimony and written reports of Dr. Childress because S. had failed to file an expert witness designation and failed to disclose a letter and a report from Dr. Childress until two weeks before the start of the scheduled three-day trial.

On the first day of the trial, the court heard from counsel regarding the *in limine* motion. The following colloquy took place between S.'s counsel and the court: (emphasis added):

> [The Court]: What's Dr. Childress's expertise?
>
> [S.'s Counsel]: Court involved family conflict, attachment pathology, personality disorders, parenting pathologies. Everything that this case is really about. . . . [H]e's a clinical child psychologist. So, he is an expert in child development and anxiety disorders.
>
> [The Court]: And -- but he's never spoken with the children, is that correct?
>
> [S.'s Counsel]: He doesn't -- he evaluated the reports, not the children.
>
> [The Court]: I understand. So, so -- right. So, he evaluated other people's opinions, not the children in this case.
>
> [S.'s Counsel]: That's correct.
>
> [The Court]: *So, tell me, tell me how that will help inform the Court as to what is in the best interest of these children when this expert has not spoken with these children?*
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> [S.'s Counsel]: It's immensely helpful to the Court because Dr. Childress observes reported facts in the reports that he can attest or connect the dots to scientific likely diagnoses. He doesn't diagnose because he admits that he cannot diagnose because he hasn't looked at the people, but the reports are sending out signals that the children have pathologies that these experts aren't bringing to the Court's attention, and he is doing that. And those pathologies are crucial to getting help for these kids. Furthermore, Dr. Childress is an expert in treatment of these pathologies. They're highly nuanced, highly subtle. And he can help the Court come up with solutions to protect and care for these children who are suffering, demonstrably the Court will see demonstrable suffering of the children still. They need help and he can help the Court help the kids.

The trial court reserved ruling on the motion.

On the second day of trial, the court intimated that it was inclined to hear from Dr. Childress but was informed by S.'s counsel for the first time that Dr. Childress was only available to testify by Zoom. The court told counsel that he had failed to file a motion requesting remote testimony and stated that it was "not prepared for an expert witness to testify via Zoom at this point in our trial."[8] However, the court asked counsel to discuss whether they could agree to the admission of Dr. Childress's reports in the absence of his testimony.

On the third day of trial, and in summary, E.'s counsel told the court that E. objected to the admission of Dr. Childress's reports unless he was available for cross-examination. The court ruled that it would not admit Dr. Childress's reports over E.'s objection and further indicated that it had been inclined to permit Dr. Childress to testify if he had been available to do so in person.

The custody trial was originally scheduled for three days and was extended. Towards the end of the fourth day, it became clear to the court that the evidentiary portion of the trial would not finish on that day and that an additional day of trial was necessary. On December 16, the court ruled that it would extend trial to a fifth day, which would take place on January 12, 2022. The court also instructed the parties that when the trial

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[8] Trial courts are vested with "broad discretion" in the conduct of trials, including the manner in which evidence is presented. *Hopkins v. State*, 352 Md. 146, 158 (1998). In the present case, the trial court did not abuse its discretion when it denied S.'s belated request to allow Dr. Childress to testify by Zoom.

resumed on January 12th, each party would be allotted no more than three hours to present evidence and to make their closing arguments. S. did not indicate that S. was going to call any additional witnesses.

However, on January 7, 2022, S. filed a motion asking the trial court to permit Dr. Childress to testify on January 12th. In S.'s motion, S. cited a December 27, 2021 order from the Administrative Judge for the Circuit Court of Montgomery County, that authorized trial courts to conduct proceedings remotely to the greatest extent possible, given renewed concerns regarding the ongoing Covid-19 pandemic.

At trial on January 12, S.'s counsel argued the following regarding the motion:

> If the Court recalls that the Court said that the Court was inclined to allow Dr. Childress to testify, but because the motion for a remote participation was not filed, you decided against it. Since then, Omicron has caused the courts to revert back to remote participation, and the courts are urged to do that as much as possible. So, I am renewing that possibility so that the Court can benefit from hearing from a specialized perspective on the problems in this case.

After hearing from E.'s counsel, the court denied S.'s motion for remote participation, stating that "it would be patently unfair at this point in time, and prejudicial to the plaintiff" to allow Dr. Childress's testimony.

S. asserts that the exclusion of Dr. Childress's testimony is inconsistent with our holding in *A.A.* As we have explained, before ruling on this issue, the trial court sought, and obtained, a proffer from S.'s counsel as to Dr. Childress's anticipated testimony.

From our perspective, what was significant about the proffer is that counsel informed the court that (1) Dr. Childress had not examined either child or either parent, (2) Dr.

Childress was not in a position to make a diagnosis as to either child or parent because he had not spoken to any family members, and (3) the substance of Dr. Childress's testimony would be to point out deficiencies in the methodologies employed by the witnesses who had interviewed the children and/or the parties. In light of this, the trial court's concerns about the probative value of Dr. Childress's testimony were reasonable.

In *Kadish v. Kadish*, this Court emphasized the importance of compliance with discovery obligations in order to "eliminate, as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation." 254 Md. App. 467, 500–01 (2022). Consistent with the holding of *A.A.,* the trial court obtained a proffer of Dr. Childress's testimony. The proffer revealed its limited probative value. A trial court abuses its discretion when its ruling is "clearly against the logic and effect of facts and inferences before the court or when the ruling is violative of fact and logic." *Santo*, 448 Md. at 626 (cleaned up). We hold that the trial court did not abuse its discretion when it declined to permit S. to call Dr. Childress as a witness.

The Exclusion of Testimony from Michele Sarris, LCSW-C and the Admission of the Written Report of the Court-Appointed Custody Evaluator

S. also contends that the trial court erred in excluding expert witness testimony from Michele Sarris, LCSW-C. Like Dr. Childress, Ms. Sarris was not identified as an expert as required by the scheduling order.

The issue of Ms. Sarris' testimony arose in an unusual procedural context. On the second day of trial, December 14, E.'s counsel informed the court that Karina Campbell,

LCSW-C, JD, the court-appointed custody evaluator, had left her position and was unable to testify regarding her written report. In light of these circumstances, E.'s counsel asked the court to admit the report despite Ms. Campbell's absence. S.'s counsel objected to the introduction of the report, and offered the court a *quid pro quo*, stating that he would not object to the introduction of the report if the court allowed S. to call Ms. Sarris as a rebuttal witness. The court ruled that it would not allow Ms. Sarris to testify, emphasizing that to do so would be "trial by ambush under those circumstances." The court also ruled that it would admit the custody evaluator's report into evidence.

S. contends that the exclusion of Ms. Sarris' testimony violates the principles of *A.A.* and additionally that the court erred in admitting the report in the absence of testimony from its author. We agree with neither of these assertions.

When S.'s counsel proposed that S. would not object to the introduction of the report if S. were allowed to call Ms. Sarris to offer rebuttal testimony, the court summarized its understanding of what the nature of Ms. Sarris' testimony would be, and asked counsel if that understanding was correct. S.'s counsel responded in the affirmative, satisfying the requirement that S. be allowed to make a proffer regarding the substance of Ms. Sarris's testimony. Further, and after the court's initial ruling that it would not allow Ms. Sarris to testify, the court allowed S.'s counsel to expand at length as to why the report should not be admitted into evidence. The trial court fulfilled its obligation imposed by our holding in *A.A.*

S. also asserts that the trial court abused its discretion when it admitted Ms. Campbell's report over S.'s objection. S. asserts that at trial, S.'s counsel:

> proffered [that] the report was old, that the custody evaluator failed to follow her own ethical guidelines under Maryland Law, failed to make appropriate recommendations, failed to follow-up on the family, failed to update the report in time for trial. This is a violation of the children's best interest since the stale and improperly fashioned custody report was used to make incorrect decisions affecting the children's welfare.

The court-appointed custody evaluator's report was admissible even if the evaluator was not present to testify. Md. Rule 9-205.3(m)(2).[9] Assuming for purposes of analysis that S.'s counsel accurately characterized the child custody evaluator's report, those concerns went to the probative weight of the report. We find no error on the court's part.

3. The Trial Court's Duties under Fam. Law §§ 9-101 and 9-101.1

S. contends that the trial court failed to comply with its obligations under § 9-101 and § 9-101.1 of the Maryland Family Law Article. S. asserts that the trial court had reasonable grounds to believe that E. had abused or neglected the children and that, in violation of the statute, the court failed to make a determination as to whether abuse or neglect was likely to occur if E. were granted custody or visitation rights. This argument is unconvincing.

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[9] Rule 9-205(m)(2) states:

> The court may admit an assessor's report into evidence without the presence of the assessor, subject to objections based other than on the presence or absence of the assessor. If the assessor is present, a party may call the assessor for cross-examination.

Fam. Law § 9-101 states:

> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

Section 9-101 does not define abuse. However, Fam. Law § 9-101.1 does. We have explained that "Fam. Law § 9-101 often 'needs to be considered together'" with Fam. Law § 9-101.1." *Gizzo v. Gerstman*, 245 Md. App. 168, 193 (2020) (quoting *In re Adoption No. 12612 in Circuit Court for Montgomery County*, 353 Md. 209, 238 (1999)). Looking to § 9-101.1's definition of abuse makes sense in this case.

Section 9-101.1(a) states that "abuse" for the purposes of that statute "has the meaning stated in § 4-501 of this article." For its part, Fam. Law § 4-501(b) states:

> (1) "Abuse" means ay of the following acts:
> (i) an act that causes serious bodily harm;
> (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
> (iii) assault in any degree;
> (iv) rape or sexual offense under § 3-303, § 3-304, § 3-307, or § 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
> (v) false imprisonment;
> (vi) stalking under § 3-802 of the Criminal Law Article; or
> (vii) revenge porn under § 3-809 of the Criminal Law Article.
>
> (2)(i) If the person for whom relief is sought is a child, "abuse" may also include abuse of a child, as defined in Title 5, Subtitle 7 of this article.
>
> * * *

Fam. Law 5-701 defines abuse as "the physical or *mental injury of a child* under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed" by those caring for the child, including the child's parent. (Emphasis added.) "Mental injury," which is the keystone of S.'s argument, is defined as "the observable, identifiable, and substantial impairment of a child's mental or psychological ability to function caused by an intentional act or series of acts, regardless of whether there was an intent to harm the child." Fam. Law § 5-701(r). This Court has explained that:

> Both physical and mental harm must be intentional and cannot be the product of an accident. . . . The scienter element of mental and physical injury can be met by showing a parent acted in reckless disregard for the child's welfare.

C. M. v. J. M., ___ Md. App. ___, No. 852, Sept. Term, 2022, 2023 WL 3614319 at *6 (filed May 24, 2023), (citing *McClanahan v. Washington County Dep't of Soc. Servs.*, 445 Md. 691, 705-06 (2015), and *Taylor v. Harford County Dep't of Soc. Servs.*, 384 Md. 213, 227 (2004)).

As we have noted, Fam. Law § 9-101 is triggered "if the court *has reasonable grounds to believe* that a child has been abused or neglected by a party to the proceeding" (emphasis added). In the context of Fam. Law § 9-101, the Supreme Court of Maryland has interpreted "reasonable grounds to believe" to mean proof by a preponderance of the evidence. *Volodarsky v. Tarachanskaya*, 397 Md. 291, 304 (2007). Making an initial determination for the purposes of Fam. Law § 9-101 requires the court to "sift through

the conflicting evidence, make credibility determinations, and determine the ultimate persuasiveness of the evidence bearing on the allegation of abuse." *Id.* at 307–08.

In the present case, the court did not make a finding as to whether it had reasonable grounds to believe that E. had abused or neglected the children. In asserting that the court did in fact have such reasonable grounds, S. directs our attention to several of the court's findings regarding E.'s parenting to support S.'s contention that the children were at risk of abuse by E. Without exception, none of the findings cited by S. provide any support for S.'s claim that the trial court found either that E. had abused the children or that the children were in danger of physical, mental, or emotional abuse by E.[10] As we understand S.'s argument, S. contends that by failing to adequately encourage and facilitate S.'s relationship with M. and D., E. inflicted mental and emotional abuse on their children.

Based on the record before it, we hold that the trial court did not commit clear error by failing to find that it had reasonable grounds to believe that E. abused or neglected the children. Ultimately, as the trial court found, "there are multiple factors impacting the [children's] relationship with [S.] attributable to both parents and beyond." Of particular note, M. suffers from an obsessive-compulsive disorder which has created difficulties in establishing a positive relationship with S. M.'s reluctance to spend time with S. also

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[10] Based on our reading of the transcript, the closest that the court came to making a finding that suggested that E. had abused the children was the court's comment that it was "deeply troubled by [E.]'s complacency and inability to recognize or acknowledge the harm to [the children] by having no relationship with [S.]." This does not reflect well on E. But when the court's findings are read as a whole, it is clear that the court did not believe that either parent had abused either child.

impacts D.'s interest in spending time with S. Based on this record, we cannot say that E.'s reluctance to further facilitate the bond between S. and the children constitutes abuse. E. may very well have capitalized on the children's hesitation to have a relationship with S. in order to gain more time with them following the separation. But inappropriate parenting is not inherently abusive parenting and we decline to equate the two concepts.

Further, the court heard extensively from Jessica Hasson, Ph.D., a clinical psychologist, who conducted a court-ordered mental health assessment of the children, and found her recommendations to be "objective, credible, and very persuasive." Dr. Hasson testified at trial that the children had not manifested symptoms consistent with suffering abuse from either of their parents.[11]

We hold that the trial court did not err when it failed to find that the children were at risk of abuse or neglect by E.

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[11] In its findings, the trial court recognized that in the years following the separation, E. had been "controlling and prefers simply not to deal with [S.], which is unacceptable and not in [the children's] best interests." In light of this reality, the trial court included provisions in its custody order to protect the children. Most fundamentally, the court awarded the parties joint legal and shared physical custody. The court also ordered reunification therapy between D. and S. to begin with 45 days, and for reunification therapy between M. and S. to begin as possible, based on the progress of M.'s ongoing therapy treatments. Further, the court order required that both S. and E. "continue their individual therapy treatment and follow all recommendations" and that the parties participate in a co-parenting seminar.

4. The Trial Court's Application the *Sanders/Taylor* factors

S. asserts that the trial court misapplied the *Sanders/Taylor* factors in making its custody award determination. We do not agree.

It has long been established that "the best interests of the child standard 'is firmly entrenched in Maryland and is deemed to be of transcendent importance.'" *A.A. v. Ab.D.*, 246 Md. App. 418, 447 (2020) (quoting *Ross v. Hoffman*, 280 Md. 172, 174–75 (1977). For decades, courts have applied the *Sanders/Taylor* factors to determine and protect the best interests of a child in a custody dispute. *See Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406, 419 (1977); *see also Taylor v. Taylor*, 306 Md. 290, 304–12 (1986).

Those cases lay out an analytical framework to determine what is in the best interest of the child and instruct courts to weigh the following factors: the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare, the willingness of parents to share custody, the fitness of the parents, the relationship established between the child and each parent, the preference of the child, potential disruptions to child's social and school life, the geographic proximity of the parental homes, the demands of parental employment, the age and the number of children, the sincerity of parents' request for custody, the financial status of the parents, possible impacts on state or federal assistance, benefit to parents, and any other factors that reasonably relate to the issue of custody. *See Taylor v. Taylor*, 306 Md. at 304–12.

In applying these factors, "the fact finder is called upon to evaluate the child's life changes in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Sanders*, 38 Md. App. at 419.

In this present case, the court considered and applied each of the relevant factors and, in a bench opinion that extended across thirty-seven pages of transcript, issued a detailed and carefully-reasoned decision as to what custody arrangement would be in M. and D.'s best interests. There is no reason for us to reiterate each step of the court's reasoning. The trial court is "entrusted with great discretion in making decisions concerning the best interest of the child[,] the trial court's decision governs, unless the factual findings made by the trial court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gizzo v. Gerstman*, 245 Md. App. at 168 (cleaned up). S. has not persuaded us that any of the trial court's factual findings were clearly erroneous[12] or that the court otherwise abused its discretion.

Because "[n]othing in [the trial court's] well-reasoned ruling can be described as anything remotely resembling an abuse of judicial discretion," *St. Cyr v. St. Cyr*, 228 Md.

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[12] S. asserts that the trial court "err[ed] when it determined that [S.] worked outside the home." This is not an accurate characterization of the court's relevant finding which was "[S.] works remotely from home several days a week, and has some flexibility in [S.'s] schedule." S. also faults the court for "fail[ing] to recognize the fact that [S.] was always home by the time the children arrived home from schoo1." The parties separated in March 2020 and the children resided with E. thereafter. The trial court entered its judgment two years later. The court's focus on the current status of the children was entirely appropriate.

App. 163, 201 (2016), we have no basis to interfere with the court's resolution of this extremely difficult custody dispute.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.