Circuit Court for Howard County
Case No. C-13-FM-21-001026

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1477

September Term, 2022

TYLER ROACH

v.

SAMAH ABOUELNASR

Nazarian,
Tang,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: July 18, 2023

* 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).

** 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 appeal stems from a custody dispute between Tyler Roach ("Father"), appellant, and Samah Abouelnasr ("Mother"), appellee, that was brought in the Circuit Court for Howard County regarding the parties' two minor children, Y.R. and S.R. Following a merits hearing, the court awarded Mother sole legal custody of both children; sole physical custody of Y.R., with Father having access every Wednesday evening for a dinner visit at Mother's and Y.R.'s discretion; and primary physical custody of S.R., with Father having access every other week. On appeal, Father challenges the court's access ruling as to Y.R. and the custody determination as to S.R. For the reasons set forth below, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in 2001. Three children were born during the marriage, with the eldest child (son) becoming emancipated by reaching the age of majority prior to the start of the underlying proceeding. At the time of the hearing, the two remaining children (daughters), Y.R. and S.R. (collectively the "Minor Children"), were 16 and 8 years old, respectively.

Father worked for rideshare services, earning approximately $12,000 per year. Mother worked at a private school, from 8:00 a.m. to 5:00 p.m., earning approximately $34,000 per year.

In June 2021, the parties separated. Mother moved into a two-bedroom apartment where the emancipated son and Y.R. eventually resided. Father stayed in a three-bedroom condominium unit. The two residences were located about five minutes away from each other.

The parties subsequently filed their respective complaints for divorce. Each requested sole physical and legal custody of the Minor Children. In October 2021, the parties entered into a *pendente lite* custody order. Per that order, Father was granted primary custody of S.R., and Mother was granted primary custody of Y.R. Each party was granted access to the other child every other weekend, such that Father's weekend access with Y.R. occurred during Mother's weekend access with S.R.

The court appointed a custody evaluator to prepare a report with recommendations regarding custody. In May 2022, after an investigation, the evaluator completed a custody evaluation report. The report was made available to the parties prior to the merits hearing.

The court held a two-day merits hearing on August 30 and August 31, 2022. It heard testimony from Mother, Father, and Y.R. For reasons explained later, the evaluator, who was present, did not testify but her report and investigation notes were admitted into evidence. The evidence adduced at the hearing was as follows:[1]

Parenting

The parties agreed that they were unable to communicate effectively in reaching shared parenting decisions. Mother testified that Father implemented household rules that prohibited cellphones, "no t.v., no electronics," and restricted use of computers and laptops.

[1] We cannot include, in this opinion, a summary of all evidence and every account of conflicting testimony adduced at the two-day hearing, nor are we required to do so. Rather, we summarize the facts, pertinent to the discussion below, viewed in the light most favorable to Mother, the prevailing party in the underlying proceeding. *See Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) ("[A]ll evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below.").

The children were required to put their school-issued laptops in the trunk of Father's vehicle at the end of each school day, and they were not returned until the next morning. The children were granted limited access to the home computer to complete their homework but the time allotted was inadequate to complete assignments. When they would ask to retrieve their laptops from the trunk, Father "would say no." As a result, Mother would often drive the children to school an hour early the following day so that they could complete assignments.

Y.R. corroborated that "every day" "when we would come back from school, we'd put [the laptop] in the trunk, then in the morning we'd take it out." "[W]e had like an hour or something to do [homework] on the computer inside." "Sometimes it was [enough time], sometimes it wasn't, I'd have to go to school early to do my homework."

Mother thought the policy was too strict.[2] She tried to talk to Father "multiple times" to adjust the permissible times for computer use, but Father "would always scream it's my house and I do whatever I want." Mother testified that Father "doesn't discuss it with them. He just say[s] no and it's no for everything." Y.R. similarly testified, "Usually, [Father] would be annoyed, if he was in a bad mood he'[d] say no regardless of why [Y.R.] wanted to use" the laptop even if she needed it for school purposes. Sometimes, Father would be "okay" about the laptop use, but Y.R. generally did not know how he would react.

[2] Mother recalled an occasion when the emancipated son forgot to put his laptop in Father's trunk, and Father refused to return the laptop for the entire school year. Mother had to purchase another laptop for him so that he could do his schoolwork.

With respect to the children's social lives, Y.R. testified, "if I wanted to go out with a friend I don't know if [Father] would let me, he hasn't before." She also stated that Father disallowed her cell phone use after school. She usually would not call her friends when she was with Father, explaining that if she had to speak with someone, she "would probably go outside. Or do it when he wasn't there." By contrast, Y.R. and Mother would attend events and go to parks "like out with my friends, that kind of thing." With respect to S.R., Mother testified, "I think [S.R.] only gets in touch with her friends when she is with me."

Mother testified that Father "doesn't want them to make any mistakes. Like for him, it's better to take everything away then [sic] giving it to them for some time[.]" While she also did not want the children to make mistakes, Mother did not want to prevent them from living "a normal life."

Conflict in the Home

The parties and Y.R. testified to varying degrees of conflict in the home. Y.R. testified that "there was always conflict" between the parties, and they would "yell" at each other. The conflict made her feel "pretty uncomfortable." Father would throw "breakable" mugs and punch holes in the wall. Y.R. testified that "there would be some days where [Father] would be in a bad mood, I don't know why. And I mean in general even on the good days there would be some things that me and my siblings like, we'd be afraid to ask him, afraid to talk to him, to tell him, that kind of thing."

Mother recounted an occasion when Father was physically violent with her, and the emancipated son had to intervene. Y.R. corroborated that she and her brother witnessed Father trying to "hit" Mother, "and then [her] brother tried to stop him."

On another occasion in January 2020, not witnessed by the children, Father hit Mother and gave her a black eye. This prompted Mother to leave the home. She sent Father a text message indicating that she was leaving and would send him money for the children. Mother testified that she left "because of him, not because I don't want my kids." She "never" intended to leave the children, and she returned home the next day because she missed them.

When the parties finally separated in June 2021, the Minor Children stayed with Father. A few weeks later, Y.R. sent Mother a message stating that she wanted to live with Mother and would kill herself if she had to continue living with Father. Y.R. was not serious about committing suicide; she "just didn't want to be there anymore." Thereafter, Y.R. moved in with Mother, where she remained. Mother subsequently tried to facilitate visits between Y.R. and S.R., but Father "refused" to see Y.R. He told Mother, "[I]f you want to see [S.R.], then don't bring [Y.R.] with you or [the emancipated son]."

Father acknowledged that "everything was a conflict" but denied assaulting Mother or punching holes in the walls.

Relationships with the Minor Children and Custodial Preferences

Mother testified that her "hope was to have fifty/fifty" with the Minor Children. Father testified that, going forward, he wanted the custody arrangement "to remain as it

is," with S.R. being in Father's care and Y.R. being in Mother's care. Father stated that the non-custodial parent should have access "only once a month." As the hearing progressed, Father conceded that he did not want to fight over custody of Y.R. as she seemed "stable" and "happy" with the current arrangement.

Y.R. testified that she and Mother were "very close" and had "a good relationship." By contrast, Y.R. never felt that Father had an interest in her beyond "little controlling things." She described her relationship with Father as if she was "interacting with two different people." On some days, she and Father were "close," but on other days, "it was very uncomfortable, very distant relationship." When asked if she loved Father, Y.R. responded, "I guess."

According to Y.R., S.R. did not see Mother a lot but when she did, S.R. was "very happy." Y.R. did not testify about S.R.'s relationship with Father, but Father testified that, compared to Mother, he was "closer" to S.R., had been "more involved" with her, had always put her first, and "knows more" about her. Father testified about his daily routines with S.R. and his ability to adjust his ride-share/work schedule to accommodate her in the morning and after school.

Y.R. missed S.R. as she had only spent "maybe like four minutes together" since the separation. When they saw each other, S.R. was always very reluctant to leave Y.R., and she expressed a desire to be with Y.R. Y.R. also indicated that she would be happy to share a room with S.R. at Mother's residence; she and S.R. had "always" shared a room while their parents were living together.

ORAL OPINION AND ORDER

On September 8, 2022, the court issued a bench ruling, the relevant portions of which are set forth as follows:

As to the parties' ability to communicate, the court found that "the parties are incapable of communicating and reaching shared decisions" "due to [Father]'s conduct and behavior." Y.R. "corroborated that [Father] frequently yells at [Mother] and [the] children. [Father] simply refuses to compromise and has the attitude of it's his way or the highway."

As to the parties' willingness to share custody, the court acknowledged that Mother wanted to share custody of the Minor Children. Father wanted custody "to continue as is" but "as trial progressed," he "indicated that he wanted [Mother] to have *less* interaction with [S.R.]" and "was no longer seeking custody of [Y.R.]"

As to parental fitness, the court found Mother to be a fit parent. "She shows an interest in helping her children with their homework" and "ensured that the children have their necessities for school[.]" On the other hand, the court found Father's "fitness to be very questionable." Father "would become upset and punch holes in the wall, as well as throwing breakable items against the wall in fits of anger" and "yells and screams at the children." He "tells the children that they must put their laptops in the trunk of his vehicle at the school and only allow them to use the family computer to complete their homework." As a result, the "children would resort to going to school early the next day to complete the homework that they could not finish while they were in their father's custody." The court found that Father "also has very strict rules, and according to [Y.R.] [he] didn't really allow

them to have friends." The court concluded that "as a whole, [Father]'s actions are detrimental to his children's best interests."

As to the relationship established between the Minor Children and each parent, the court found that Mother "is close to all her children," both Minor Children and the emancipated son, who resided with Mother. "Overall," the court found that the "children have a better relationship" with Mother than with Father. As to Y.R., the court noted that she "is excited whenever she sees her mother and that she is close with her mother" but she was "hesitant in saying that she loves her father." As to S.R., "[t]here was insufficient evidence to determine the relationship between [S.R.] and her father."

As to the custodial preferences, the court found that "[t]here was insufficient evidence to determine [S.R.]'s preference, however [Y.R.] indicated an exceptionally strong preference to stay with her mother."

As to the potential disruption to the Minor Children's social and school life, the court concluded that an "award of custody to [Father] would be a grave disruption to the children's social and school lives." Father had "strict rules so that the children will not make mistakes" and "restricts the children's interactions with others, including their friends." On the other hand, "[a]n award of custody to [Mother] would not disrupt the children's social or school lives."

As to geographic proximity, demands of the parties' employment, and financial status of the parties, the court noted that the parties lived within a reasonable driving distance from one another and as such, "there will be ample opportunity for visitation." It

found that Mother was employed during the day, while the Minor Children were in school, and that she had a fixed schedule. By contrast, Father worked for a ride-share service(s) and did not have "a fixed schedule to ensure that he will be home when the children are." It also found that Mother earned more than Father and thus was "slightly better positioned to provide material opportunities positively affecting the future lives of the children."

As to the sincerity of the parties' custody requests and their desire for custody, the court found that Mother was "very sincere" in her requests for custody of the Minor Children. She "strongly desires that both minor children reside with her and is willing to give up her bed so that the [S.R.] would have her own bed." Father was "also sincere in his request for custody of [S.R.]" and wanted Mother to have less interaction with her. Father did not "appear to be sincere in his request for custody of [Y.R.], as was evident when he testified that he was no longer seeking custody of [her]." The court concluded that Father "basically washes his hands regarding the two oldest children" and "has a contemptuous attitude" toward them.

As to the potential of maintaining natural family relations, the court found that, due to Father's inappropriate behavior (yelling, throwing things against the wall, and punching holes in the wall), there was "not a good potential to maintain natural family relations." The court noted that Mother had expressed a desire to maintain the Minor Children's relationships with Father, but his conduct and actions made that "unlikely."

As to any prior voluntary abandonment or surrender, the court stated that there was no such evidence introduced at the hearing.

As additional considerations, the court reiterated that Father was "overly strict and inflexible." He did not "allow any input from [M]other or the children. There is never a discussion about the rules; things are simply what [F]ather says. For example: no cell phones allowed in the household." The court also found that Father "yells at the children, is angry a lot of the time," threw breakable items, punched holes in the walls, and struck Mother in "fits of anger." It further noted that Y.R. witnessed Father's assault on Mother.

In the Final Order for Absolute Divorce, Custody, Access, and Child Support ("Order"), the court ordered the following regarding custody of the Minor Children:

> **ORDERED,** that [Mother] shall have sole legal custody, but shall keep [Father] apprised of any educational and medical issues, and should seek his input and perspective before making a decision, and it is further,
>
> **ORDERED,** that [Mother] shall have sole physical custody of [Y.R.], with access to [Father] every Wednesday evening for a dinner visit, at [Mother]'s and [Y.R.]'s discretion; and it is further,
>
> **ORDERED,** that at [Mother]'s and [Y.R.]'s discretion, [Y.R.] shall also have liberal access to visit Father while [S.R.] is in Father's custody; and it is further,
>
> **ORDERED,** primary physical custody of [S.R.] is awarded to [Mother] on a week-on/week-off schedule, with access to [Father] on Monday afterschool to the following Monday drop-off at school. Transitions shall occur before or after school whenever possible; and it is further,
>
> **ORDERED,** that the visitation schedule shall commence on October 3, 2022, and shall continue until further order of the court or mutual agreement by the parties[.]

Additional facts will be supplied as needed below.

ISSUES PRESENTED

On appeal, Father presents five questions, which we have slightly rephrased and consolidated into four. The first issue relates to Father's access with Y.R.[3] The remaining issues relate to S.R.'s custody determination.

I. Did the court improperly delegate its authority by leaving Father's visitation with Y.R. to Mother's discretion?

II. In deciding S.R.'s custody, did the court err by denying Father's request to cross-examine the custody evaluator?

III. In deciding S.R.'s custody, did the court err by conducting a private interview with Y.R., who had not lived with S.R. in over a year—and then relying on that interview without letting Father reply?

IV. Did the court misconstrue the law and rely on erroneous findings when deciding S.R.'s custody?

For reasons to follow, we affirm the circuit court's judgment.

I.

Access Ruling

Father claims that the circuit court improperly delegated its authority by giving Mother and Y.R. the absolute discretion to decide his access with Y.R. He contends that the court "effectively ordered that Father must have no visitation with [Y.R.] unless Mother decides to offer it" and, as a result, placed an unreasonable restriction on his visitation with Y.R. Mother disagrees, explaining that the order did not delegate the authority to decide visitation itself; rather, the court established an access schedule and permissibly allowed some temporary variances at Mother's and Y.R.'s discretion.

[3] Father does not challenge Y.R.'s custody determination

Determinations concerning visitation are generally within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion. *In re Mark M.*, 365 Md. 687, 704 (2001). Whether a court has improperly delegated judicial authority to a non-judicial person, however, is an issue of law subject to *de novo* review. *Id*. at 704-05.

A trial court may not delegate to a non-judicial person complete discretion to determine the visitation rights of parents. *See Shapiro v. Shapiro*, 54 Md. App. 477, 484 (1983) ("Jurisdiction over custody and visitation . . . of children is vested in the equity courts. There is no authority for the delegation of any portion of such jurisdiction to someone outside the court.") (citation omitted); *see, e.g.*, *In re Mark M.*, 365 Md. at 710 (vacating order providing that visitation would not occur until recommended by appointed therapist); *In re Justin D.*, 357 Md. 431, 446-49 (2000) (vacating orders providing that visitation would be "under the direction" of the Department of Social Services; holding that the responsibility to determine the minimal level of access cannot be delegated.).

Based on the record, we do not interpret the Order as delegating the authority to decide whether Father's visitation with Y.R. would occur at all. The Order established the frequency, day, and period for Father's access with Y.R. (every Wednesday evening for dinner). It also ordered the "visitation schedule" to commence on a certain date (October 3, 2022) and "continue until further order of the court or mutual agreement of the parties[.]" While the Order stated that these visits would be "at Mother and [Y.R.'s] discretion," we

understand this to relate to the adjustments and/or details for those visits (*i.e.*, time, manner, and/or place).

The record supports this interpretation of the access ruling. First, there was no indication from the record that Mother wanted to eliminate Father's access with Y.R. Despite the problems in Y.R.'s and Father's relationship, Mother testified that she wanted Father to be in the children's lives, to have a relationship with them, and for Y.R. and Father to engage in reunification counseling.

Second, the court, in its oral opinion, did not suggest that Mother and Y.R. would decide whether visitation with Father would occur at all. Indeed, it expressly contemplated "ample opportunity for visitation" because the parties lived close to each other. In addition, the evaluator's report recommended, in part, that Father have visitation with Y.R. "every Wednesday evening for a dinner visit, depending on [Y.R.]'s extracurricular activity schedule and availability." The court appeared to adopt a variation of this recommendation, leaving the logistics of the visits, and any needed adjustments, to Mother's and Y.R.'s discretion.

Our Supreme Court[4] has said that, subject to the preclusion of complete delegation of authority to determine the right to visitation,

> there is a great deal of flexibility permitted in visitation orders. They run a gamut—a proper gamut. In the divorce, or post-divorce, setting, they may simply provide for "reasonable," but otherwise unspecified, visitation, or

[4] 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. *See* Md. Rule 1-101.1(a).

> they may set out a rather detailed schedule with respect to times, places, and conditions, or they may be somewhere between those poles, depending on the circumstances and the ability of the parties to agree to a mutually acceptable arrangement.

In re Justin D., 357 Md. at 447 (citation omitted). Here, the access ruling was somewhere between the "poles." The court's delegation of the specifics of the ordered visitation does not amount to the delegation of visitation itself and is not improper. We perceive no error or abuse of discretion on the part of the court in its access ruling.

II.

Cross-Examination of the Custody Evaluator

Father argues that the circuit court erred in admitting the custody evaluation report without permitting him to cross-examine the evaluator about it. Mother counters that Father had ample opportunity to challenge the report or to call the evaluator during his case-in-chief.

A. Proceeding Below

At the outset of the merits hearing, the court informed the parties that the matter was scheduled for two days, that the proceeding had to conclude on the second day, and that the parties needed to plan accordingly. Father thereafter began his case-in-chief, calling Mother as a witness. Mother's testimony consumed the entirety of the first day. Before recessing for the day, the court reminded the parties that the proceeding needed to conclude by the end of the next day. It noted that Father's counsel "took up quite a bit of time today" and Mother had not yet to put on her case. It asked Father's counsel to be mindful of that going forward, and counsel agreed.

The following day, Father testified as part of his case-in-chief. When that testimony concluded and Father rested his case, only approximately two hours remained before the expiration of the court's deadline for the conclusion of the proceeding. When Mother expressed concern that she would not have sufficient time to call her witnesses, including the evaluator, the court offered to continue the case to October to allow adequate time to finish the case. Not wanting to delay the custody decision, Mother stated that, while she had planned to call the evaluator as a witness, she would be willing to forego that testimony if the court would accept the evaluator's report into evidence.

Father objected to Mother's request, arguing that the report should not be accepted without giving him the opportunity to cross-examine the evaluator. The court reminded Father's counsel that he had been advised of the time constraints and yet had consumed an inordinate amount of time in presenting his case-in-chief. Father's counsel explained that he was not trying "to be difficult" and, in fact, had earlier attempted to streamline the presentation of the custody evaluation:

> [FATHER'S COUNSEL:] During our break, and this is not a case where I am objecting for no reason. I offered [Mother's] counsel a stipulation stating that if she was amendable to including the entire record including the record of the subpoenas, including the notes, including all the materials that [were] used, I offered to stipulate. So I wanted to make it very clear for the record that I am not objecting to be, to be difficult. I actually came and offered to admit it.
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> * * *
>
> [I]f given the opportunity to question the writer of that, to have her to compare her notes which are apparently what [Mother's] counsel doesn't want to come in, you will see that there are a lot of variances that again, the [c]ourt should be able to, to understand when, or to be able to hear when

> deciding what amount of weight is given to the report. That, that is the only thing that we are saying.
>
> We're not . . . saying that the report shouldn't come in. We're not saying that the [r]eport shouldn't be read, the report should be. We just want, just like any piece of evidence, if you're going to have the truth, you need to have the whole truth and nothing but the truth come in. Or nothing at all, either. We're saying that, that –
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> THE COURT: Well what is your position counsel?
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> [MOTHER'S COUNSEL:] You're Honor, actually, it makes it even easier now, because [Father's counsel] is saying that they are not opposing the admission of the evaluation.
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> THE COURT: As long as . . . he get[s] the opportunity to submit that record as well, correct?
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> [MOTHER'S COUNSEL]: Correct[.]

The court then asked Father's counsel, "[W]hy are we fighting? [Mother's counsel] agreed to allow that in, and you agreed, and then you agreed to allow the custody evaluation in, correct?" Father's counsel responded, "Well, I don't know."

The court indicated that it would admit the report without the evaluator's testimony. Father's counsel renewed his objection, insisting that the evaluator should testify about her methodology, explain inconsistencies in the report, and address the basis for her custody recommendation as to S.R. The court overruled the objection and decided to admit both the report and the related "package," which primarily consisted of the evaluator's handwritten notes of various interviews she conducted as part of the evaluation.

A. Analysis

Custody and visitation-related assessments are governed by Maryland Rule 9-205.3. Under that rule, when a custody evaluation has been ordered by a court, a custody evaluator, or "assessor," must be appointed, and that assessor must prepare a report detailing his or her findings and recommendations. Md. Rule 9-205.3(a)-(i). If a party wishes for the assessor to testify at a hearing or trial, that party "shall subpoena the assessor no less than ten days before the hearing or trial." Md. Rule 9-205.3(m)(1). 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." Md. Rule 9-205.3(m)(2). "If the assessor is present, a party may call the assessor for cross-examination." *Id.*

In *Draper v. Draper*, 39 Md. App. 73 (1978), we addressed the question of whether a court-appointed evaluator, who prepared a report with a recommendation that custody be awarded to the father, should be subject to cross-examination during trial. *Id.* at 75, 80. Counsel for the parties had read the report, although they had not been given copies of it. *Id*. at 80. The father offered the report in evidence without calling its author as a witness, apparently without objection. *Id*. In her case, the mother sought to call the evaluator for cross-examination, but the court ruled that the evaluator, when called, would be the mother's witness and could not be impeached. *Id*. We concluded that the court erred in refusing the mother's request. We explained that in a custody case, a court-appointed evaluator occupies the position of an officer of the court and as such, he or she may be

called as a witness, at the request of either party or *sua sponte* by the court. *Id*. at 81. When called, the evaluator may be subject to cross-examination by both parties when testifying to his or her report. *Id*.

In *Draper*, we did not consider situations where the court's failure to permit cross-examination of an evaluator might conceivably *not* be reversible error. *Id*. at n.3. But we noted that such situations could arise:

> [U]nder certain facts, courts have held that the right to cross-examine an [evaluator] had been waived by stipulation, failure to timely object to the denial of, or to timely exercise, the right, or the like, *or that the denial of the right was harmless error under the circumstances.*

Id. (citing to Right, In Child Custody Proceedings, To Cross-Examine Investigating Officer Whose Report Is Used By Court In Its Decision, 59 A.L.R. 3d 1337 (1974)) (emphasis added).

In *Denningham v. Denningham*, 49 Md. App. 328, 337 (1981), we concluded that an error was harmless and did not warrant reversal. There, the trial court prohibited the father from receiving a copy of the custody evaluation report. *Id*. at 331. Recognizing that these reports often contain double- or triple-level hearsay, which may or may not have a reasonable basis, *id*. at 335, we explained that, "[a]bsent consent or waiver, it is error for a court to admit and consider a custody investigation report without affording the parties an opportunity to read and challenge it." *Id*. at 336. Relying on *Draper*, we reasoned that "if it is error to deny the right to cross-examine the author of the report, it is even more blatant and grievous error to hide the report entirely from the parties and yet rely on it in making a decision." *Id*.

The analysis, however, did not end there. We concluded that the error was harmless because the reports "relied primarily on interviews with the parents and the two children" and "merely recited what the court already knew from its own interviews with the children and from the testimony presented by the parties." *Id*. at 338. The material contained in the reports "was basically cumulative and introduced nothing new of any significance that was, or could have been, relied upon by the court in determining custody." *Id*.; *cf. Van Schaik v. Van Schaik*, 90 Md. App. 725, 738 (1992) (holding that error was not harmless where trial court based findings *solely* on the report; record did not reflect that child was interviewed, nor was any other probative testimony presented).

In *Sumpter v. Sumpter*, our Supreme Court reiterated that "appellate courts of this State will not reverse a lower court judgment for harmless error: the complaining party must show *prejudice* as well as *error*." 436 Md. 74, 82 (2013) (citation omitted and emphasis in original). It explained:

> [P]rejudice occurs when an error affects the outcome of a case. The harmless error test does not have precise standards, but is instead based on the facts of each case. To determine whether prejudice occurred, courts look to the degree to which the conduct of the trial has violated basic concepts of fair play. Generally, the complaining party must show that prejudice was probable, not just possible.
>
> The test for what constitutes prejudice varies based on the context of the case—civil or criminal—and by the type of error alleged. For particularly acute errors, this Court will employ a presumption of prejudice.

Id. at 87-88 (cleaned up).

In *Sumpter*, the trial court did not allow the mother to obtain a copy of a 161-page custody report prepared by the evaluator. *Id*. at 80-81. As a result, she did not have a copy

of the report to use in preparation for, or during, the parties' two-day divorce hearing, in which custody was a contested issue. *Id*. After the court granted the father sole legal and physical custody of the children, the mother appealed, arguing that, without a copy of the report, she was unable to prepare for trial, retain an expert, and challenge the report as she would any other piece of evidence. *Id*. at 81. Recognizing that the report is "fertile ground for content that is biased, subjective, and contestable," the Court agreed that the denial of the mother's request for a copy of the report may have hampered her ability to retain an expert and prevented her from preparing a "vigorous rebuttal" to the report. *Id*. at 83-84.

After concluding that the trial court erred, the Court turned to whether the error caused any prejudice. Although the complaining party generally must show that prejudice was probable, the Court presumed prejudice because the error was particularly acute:

> Here, the trial court's error so hamstrung the defense that every aspect of the trial was affected. This error so infected the trial proceedings that it can only be characterized as egregious. Indeed, we cannot know how that infection might have contaminated the outcome of the case. Because determining prejudice is practically impossible, we will presume it in this case.

Id. at 88-89 (footnotes omitted).

In the instant matter, Father contends that the court's purported error in refusing to permit him to cross-examine the evaluator "influenced the outcome" of S.R.'s custody determination. The extent of his prejudice claim is as follows:

> You cannot tell where the material came from or if anyone tampered with it. You cannot tell what the judge read, how he understood it, or how it influenced his decision. The report itself is inflammatory. It would be hard for anyone to read it and keep an open mind to the possibility that Father might be a kind person and a good parent.

> Father has included in the Record Extract the notes he prepared to cross-examine the evaluator. E419-79 [citing to notes that he filed as an exhibit to a post-trial motion].[5] These notes show that the issues Father wanted to raise are not frivolous. These notes show that, unlike [in] *Sumpter v. Sumpter*, this Court does not need to "presume" prejudice to reverse here. [citation omitted]. Here, the prejudice was real.

Maryland Rule 8-504(a)(6) states that briefs "shall" include "[a]rgument in support of the party's position on each issue." Noncompliance with the rule where the brief does not include the party's argument, but merely refers to points contained elsewhere in a lower court motion, may result in the appellate court's election not to consider the merits of the argument. *See Monumental Life Ins. Co. v. U.S. Fid. & Guar. Co.*, 94 Md. App. 505, 543-44 (1993) (declining to consider the merits of arguments where appellant's brief merely adopted argument set forth in a lower court motion included in the record extract); *Rosenberg v. Rosenberg*, 64 Md. App. 487, 515 n.7 (1985) (declining to address argument where, rather than setting forth that argument in his brief, appellant merely attempted to incorporate by reference a discussion that appeared in a lower court memorandum). Here, Father essentially incorporates by reference the points made in approximately 60 pages of an exhibit to a post-trial motion filed below (E419-79). Accordingly, we need not consider the merits of Father's claim of prejudice.

[5] These notes consist of narratives and documents that purportedly show that the report was unreliable, premised on faulty methodology, and the product of the evaluator's bias toward Mother. For instance, Father claimed therein that the evaluator's method for compiling her report was "lazy" because she failed to speak to certain witnesses, did not resolve conflicting versions of events, and did not read the written statements he sent her. He also noted, *inter alia*, that the report devoted 3,000 words to telling Mother's side of the story, but only 2,300 words were devoted to his side, and included "untruthful allegations" about him.

Even if we assume *arguendo* that the court erred in not permitting Father to cross-examine the evaluator, Father has failed to demonstrate that the error probably affected the outcome of S.R.'s custody determination. In its oral opinion, the court primarily cited to testimonial evidence in determining S.R.'s custody. To the extent that the court relied on the report, its core content was basically cumulative of other evidence admitted at the hearing. Although the evaluator was not cross-examined on points itemized in Father's notes, Father testified to various factual points mentioned therein and that statements he made to the evaluator were incorrectly reflected in her report. In addition, the court admitted the evaluator's investigation notes. It could have appraised these notes, along with the mix of other evidence, and given the information in the report the appropriate weight it deserved. Based on this record, we conclude that any error by the court in denying Father's request to cross-examine the evaluator was harmless.

III.

Court's Interview of Y.R.

Father argues that the circuit court erred in interviewing Y.R. and in relying on that interview in making its custody determination as to S.R. His argument is threefold: (1) the court had no authority to interview Y.R. because "her custody was not in dispute"; (2) even if the court had the authority to interview Y.R., it had no authority to rely on that interview to decide S.R.'s custody or to learn "extra information" beyond Y.R.'s custodial preference; and (3) the court erred in not allowing him to "reply" after Y.R.'s interview.

A. Proceeding Below

At the outset of the merits hearing, Mother requested that Y.R. be permitted to testify. Father objected, arguing that Y.R. had already been interviewed by the evaluator, and the contents of that interview were reflected in the report and other documents used by the evaluator. Father, however, deferred to the court in interviewing Y.R. if it needed additional information:

> [W]e would object as far as the necessity of the children, however we will defer to the [c]ourt that after they hear the evaluator's testimony, *if the [c]ourt still believes that additional data points or information it [sic] needed, we would obviously defer*—I'm not sure if there's go[i]ng to be a need for them to come to testify as to what they've already put in the evaluator's report because that's—the reason why the court in its wisdom . . . uses the evaluators to minimize what's already a traumatic experience for minor children going through a divorce. . . . *Again, we would defer to the [c]ourt, however if the [c]ourt is so inclined to interview the children*, we would . . . request the opportunity to potentially submit sample questions.

(Emphasis added). The court deferred ruling on the motion.

On the second day of the hearing, the court informed Mother that she could call Y.R. as a witness. Father did not renew his earlier objection. The court cleared the courtroom and called Y.R. to the stand. After interviewing Y.R. *in camera*, the court called the parties back into the courtroom and played a recording of Y.R.'s interview in open court. At the conclusion of that recording, Father did not ask the court for an opportunity to respond to Y.R.'s interview.

B. Analysis

Father's claims are either waived or unpreserved. Although he initially objected to Mother's request for Y.R. to testify, he deferred to the court on the ruling if it needed

additional information. When the court ultimately permitted Y.R. to testify, Father did not renew his objection and thus waived it. *See Clark v. State*, 97 Md. App. 381, 394-95 (1993) (holding that even though the defense objected to certain testimony, failure to object again to subsequent elicitation of the same testimony waived objection for appeal); *Klauenberg v. State*, 355 Md. 528, 545 (1999) ("This also requires the party opposing the admission of evidence to object each time the evidence is offered by its proponent.").

In addition to his failure to object, Father never asked the court, during the hearing, to limit Y.R.'s testimony or to confine the court's reliance on that testimony to any matter. *See* Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *see also Bastian v. Laffin*, 54 Md. App. 703, 714 (1983) ("Objectionable testimony which is admitted without proper objection may be considered for whatever probative value it may have.").

Finally, Father never informed the court that he wanted to respond to Y.R.'s testimony.[6] The court did not have the opportunity to consider such a request, nor was it given the chance to develop the record on the issue. *See* Md. Rule 8-131(a).

Even if Father's claims were preserved and/or not waived, we conclude that none of them has merit. As to his first point, Father argues that the court did not have the authority to interview Y.R. because her custody was not in dispute. Although Father

[6] Father claims that he did not have a chance to inform the court that he wanted to respond to Y.R.'s testimony. Father, however, could have made the request when the court decided to allow Y.R. to testify or after it played the recording.

indicated that he no longer sought custody of Y.R., he clearly wanted some access to her, and the court was required to determine how much access was proper. An interview with Y.R. was appropriate to make that determination.

As to his second point, Father asserts that the court should not have used Y.R.'s interview to determine custody of S.R. He relies on *Boswell v. Boswell*, 118 Md. App. 1 (1997), for the purported proposition that the court cannot apply one child's preference to another. In *Boswell*, the court interviewed two children, and one indicated his preference not to stay overnight when visiting one parent. Later, the court found that both children expressed that view. We held that the finding was clearly erroneous because it was not supported by the evidence. *Id*. at 28-29. Here, the court did not find that both Minor Children preferred to spend less time with Father; the court expressly found "insufficient evidence to determine [S.R.]'s preference."

Father argues that Maryland law only authorizes a child's interview for the purpose of learning about the child's preference and not for general fact-finding. That claim is based on a distorted reading of *Karanikas v. Cartwright,* 209 Md. App. 571 (2013), in which we noted that, "[i]n disputed custody cases, the court has the discretion whether to speak to the child or children and, if so, the weight to be given the children's preferences as to the custodian." *Id.* at 590 (citations and quotations omitted). Father misinterprets that quote to mean that a court's interview of a child is limited to the matter of the child's custodial preference. We made that statement after it was argued that the trial court abused its discretion in *not* asking the child about his preference as to the custodian. *Id.* We held

that the trial court had not abused its discretion because, while the court did not ask about the child's preference, it did ask "a variety of questions related to the child's interests[.]" *Id.* at 595-96. In other words, a court's interview of the child is not limited to asking about a child's custodial preferences. *See id.* at 588 ("[T]he trial judge has discretion as to the length and content of a child interview.").

Finally, Father argues that the court erred in not allowing him to "reply" after it played Y.R.'s interview. For support, he cites to *Marshall v. Stefanides*, 17 Md. App. 364 (1973), but that case involved an interview that was not recorded, and its contents not revealed to the parties. *Id.* at 370-71. Conceding that this was not the case here, Father claims that the result was equally unjust and offended his right to due process. We are not persuaded. Father knew the time constraints that the court had placed on the parties, the court gave him ample time to present his case, and he failed to request the opportunity to reply to or rebut Y.R.'s testimony. *See McAllister v. McAllister*, 218 Md. App. 386, 406 (2014) (rejecting husband's due process claim and concluding that trial court did not abuse its discretion in not allowing him to present rebuttal case where he was given ample time to present his case and failed to make a timely request to set aside time for rebuttal purposes).

IV.

Application of Law and Findings of Fact

Father next argues that the circuit court "misapplied the law" and relied on "erroneous findings" in deciding S.R.'s custody. He makes five main points which we will discuss *seriatim*. We begin with the relevant law.

Decisions as to child custody are governed by the best interest of the child. *Gordon v. Gordon*, 174 Md. App. 583, 636 (2007). In *Taylor v. Taylor*, 306 Md. 290 (1986), we laid out the guiding factors to be considered in the best interest assessment.[7] When considering these factors, the trial court should "examine the totality of the situation in the alternative environments and avoid focusing on any single factor" to the exclusion of all others. *Best v. Best*, 93 Md. App. 644, 656 (1992). The best interest standard is "*the* dispositive factor on which to base custody awards." *Wagner v. Wagner*, 109 Md. App. 1, 38 (1996) (emphasis in original).

In addition, "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." Md.

[7] The factors include: (1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11) financial status of the parents; (12) impact on state or federal assistance; and (13) benefit to parents. 306 Md. at 304-11.

Code, Fam. Law ("FL") § 9-101(a) (1984, Repl. 2019). If abuse or neglect is found, the court must deny (or severely restrict) the offending party's custody or visitation rights "[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party[.]" FL § 9-101(b).

In reviewing custody determinations, we employ the following three interrelated standards of review:

> 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.

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (alterations in original) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). Where there is no clear error, we will uphold the court's findings unless there is an abuse of discretion, meaning that "no reasonable person would take the view adopted by the trial court," or the court acts "without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)) (cleaned up). "We will not reverse simply because we would not have made the same ruling." *Jose v. Jose*, 237 Md. App. 588, 599 (2018) (citation omitted).

A. Reasonable Grounds to Believe that S.R. Had Been Abused and Neglected

Father's first argument is that, because he alleged that Mother had abused and neglected S.R., the circuit court was statutorily required to engage in a two-step process

under FL § 9-101(a).[8] He argues that the court erred by "failing to do" the first step of determining whether there were reasonable grounds to believe that abuse or neglect had occurred. If the court discredited his allegations, he argues, it should have noted his allegations and suggested why it discredited him before proceeding to evaluate the *Taylor* factors.

As best as we can tell, Father points to incidents of purported neglect when Mother left the home in January 2020, *supra*, and again in June 2021 when the parties separated. At the hearing, Father testified that Mother's departure was part of a "pattern of behavior" that traumatized S.R., as evidenced by one of the child's drawings. In closing argument, however, Father addressed the evidence in the context of Mother's alleged abandonment of S.R. under the *Taylor* factors, not as neglect under the statute.

Father cites to other occasions when Mother was purportedly abusive. At the hearing, Father's counsel asked Father whether Mother had ever physically removed S.R. from Father's custody. Father testified that Mother visited the home when S.R. happened to be experiencing "a little bit of an allergic reaction" to a cat that she had adopted. Mother started yelling and "just said give me the girl." As Father held S.R., Mother "started jerking on [S.R.]'s arm" and "was physically jerking her arm to take her."

[8] "First, the court must consider whether there are reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding." *Baldwin v. Baynard*, 215 Md. App. 82, 106 (2013) (the preponderance of the evidence standard applies when the court determines whether reasonable grounds exist). "Second, the court must determine whether it has been demonstrated that there is no likelihood of further abuse or neglect by the party." *Id*.

When asked to provide an example of Mother's lack of empathy while parenting, Father testified that when S.R. was an infant, Mother gave her hot pepper and laughed.

When questioned about his views about Mother's parental fitness, Father testified that he had "serious concerns about and reasonable concerns about the girls in her care" because "the children are at risk of mental injury in her care, that she's unfit." He explained that Mother's "only involvement with the children is in the context of conflict." "[S]he would use the kids[']suffering as a tool to punish" Father and "leave them and use their suffering as a means to control" him. In sum, Father's testimony about these incidents and his closing argument were made within the scope of the *Taylor* factors.

In the proceeding below, Father did not make a request for the court to consider FL § 9-101; he made no reference to FL § 9-101 whatsoever. Even if there was enough to trigger the first step of the analysis under § 9-101(a), the record demonstrates that the court considered Father's testimony about these incidents. In its oral ruling, the court acknowledged twice that Father wanted Mother to have less interaction with S.R. It apparently considered, and rejected, Father's testimony regarding Mother's departure from the home, finding that there was no evidence of prior surrender or abandonment by Mother. It also recognized the conflict between the parties and fashioned an order requiring that they are not to "have any adverse contact between themselves and are not to fight in front of their children." In addressing the *Taylor* factors, the court implicitly concluded that there were no reasonable grounds to believe that S.R. had been abused or neglected by Mother. *See Gizzo v. Gerstman*, 245 Md. App. 168, 195-96 (2020) ("Generally, even where the trial

court must issue a statement explaining the reasons for its decision, the court need not articulate every step of the judicial thought process in order to show that it has conducted the appropriate analysis.") (citations omitted).

B. "Punishing" Father for Compromising

Father contends that the circuit court "punished" him for refusing to "fight" Mother for custody of Y.R. He claims that the rationale for the court's custody decision as to S.R. was premised on its finding that Father had a "contemptuous attitude" toward Y.R. Although the court may have considered Father's attitude toward Y.R. in deciding Y.R.'s custodial arrangements, the notion that it also served as the basis for granting Mother custody of S.R. is not supported by the record. Nor was there any indication that the court "punished" Father when it decided S.R.'s custody.

C. Applying Certain *Taylor* Factors to the "Wrong Children"

Father argues that the circuit court applied the following factors to the emancipated son and Y.R., and "then used that analysis" to decide S.R.'s custody:

Relationship with the parents: Father argues that the court "concluded that because [the emancipated son] lives with Mother instead of Father, he must have a better relationship with [S.R.]" "From there, the court concluded that '*overall*' the 'children,' plural, have a better relationship" with Mother, and it apparently decided S.R.'s custody based on that.

Custodial preferences: As mentioned, the court stated, "There was insufficient evidence to determine [S.R.]'s preference, however [Y.R.] indicated an exceptionally

strong preference to stay with her mother." Father claims that the use of the word, "however," implies that Y.R.'s preference was "so strong it should count for both."

Sincerity of the parents' requests: Father contends that the court "applied the factor to the wrong child. Why would [S.R.] have her life upended because Father was insincere in his request for [Y.R.]'s custody?"

Desire for custody: Father argues that the court misconstrued this factor "to mean that the court should measure which parent desires more custody of more children and then reward that parent."

We find no support in the record for any of Father's claims. As to relationship with the parents, there is no indication that the emancipated son's living arrangement with Mother was the primary basis for the court's finding that the children "overall" had a better relationship with Mother than with Father. As to custodial preferences, the word, "however," was used by the court to differentiate between the evidence adduced regarding S.R.'s and Y.R.'s preferences. As to sincerity of Father's request, although the court found that Father was insincere in his request for custody of Y.R., it did not apply that specific finding to S.R.; indeed, it expressly found that he was sincere in his request for custody of S.R. Finally, as to desire for custody, the court neither stated, nor insinuated, that it "rewarded" Mother for "seeking more custody" than Father. Accordingly, we reject Father's claim that the court applied certain *Taylor* factors to the "wrong children."

D. "Misconstruing" Certain *Taylor* Factors

Father next argues that the circuit court "misconstrued" certain *Taylor* factors in deciding S.R.'s custody in the following ways: (1) it misconstrued the "willingness to share custody" factor to mean that the court should punish the parent who is less willing to share custody; (2) it misconstrued the "parental fitness" factor;[9] (3) it should have construed the "potential disruption" factor to mean that the *pendente lite* custody arrangement for S.R. should be maintained to avoid disruption; (4) it misconstrued the "sincerity of the parents' request" factor twice: once by punishing him for lacking sincerity in his request for custody of Y.R., and again by misapplying that lack of sincerity to S.R.'s custody determination; (5) it misconstrued the "desires of the parents" factor to mean that the court should simply reward the parent who desires more custody; and (6) it misconstrued the "material opportunities" factor to mean that the parent who earns more should "win the child."

All of Father's assertions are without merit. The record, recounted *supra*, makes plain that the court considered the evidence adduced at trial fairly and reached reasonable findings and conclusions based on that evidence. It assessed those factors and reached a

[9] Father argues, "Even if the court's findings here were true, they would not correspond to the criteria for parental unfitness in *Burak v. Burak*, 455 Md. 564, 648 (2017)." In *Burak*, our Supreme Court listed non-exclusive factors relevant to a trial court's "inquiry into whether a parent is unfit sufficient to overcome the parental presumption in a third-party custody dispute." *Id*. There is no third-party dispute here. Rather, in "ordinary custody cases," the General Assembly "has carefully circumscribed the near-boundless discretion that courts have . . . to determine what is in the child's best interests." *In re Adoption/Guardianship of H.W.*, 460 Md. 201, 218 (2018).

custody determination based on S.R.'s best interest. Nothing in the record demonstrates that the court misconstrued the factors in the ways that Father asserts.

E. Court's Factual Findings

Father's final claim is that the circuit court made "erroneous findings" which created "a suspicion of partiality." He disputes "all the court's findings" "from beginning to end." He cites 15 "examples," explaining that the "word limit prevented him from listing them all in his brief." He presents these "examples" in a two-column table: one column for "Error" and the other for "Record." Each column includes citations to the record extract with interspersed notations (*i.e.*, "Error:" "E30.para.2 (questioning fitness)"; "Record:" "E177, E140:19").

As mentioned, Rule 8-504(a)(6) requires that briefs contain "[a]rgument in support of the party's position on each issue." "[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." *Klauenberg*, 355 Md. at 552. Father's objection to "all the court's findings" and mere citations in the record extract as "examples" are not adequately briefed. *See Konover Property Trust, Inc. v. WHE Assoc.*, 142 Md. App. 476, 494 (2002) (Appellate courts will not "rummage in a dark cellar" to find support for a party's appellate contentions.). Accordingly, we shall not directly address Father's challenges to the court's factual findings.

In any event, we have found no indication that the court's findings were clearly erroneous. To the extent that Father argues that other evidence contradicted the court's findings, our role is not to reweigh evidence or assess credibility. *Qun Lin v. Cruz*, 247

Md. App. 606, 629 (2020). Instead, "[i]f there is any basis in the record for reaching a given finding, we allow that finding to stand." *Long v. Long*, 129 Md. App. 554, 567 (2000). We are satisfied that the evidence supported the court's findings. *See Factual and Procedural Background*, *supra*.

Based on our review of the record and for the reasons stated, the court engaged in "precisely the type of analysis we have explained is appropriate when evaluating the best interests of a child in the context of a custody determination." *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 258 (2021). Accordingly, we reject Father's assertions that the court erred and/or abused its discretion in determining S.R.'s custody.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.