Circuit Court for Baltimore County
Case No. C-03-FM-22-000138

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1484

September Term, 2023

---

KRYSTAL LUCADO

v.

PETER OETKER

---

Nazarian,
Leahy,
Harrell, Glenn T.
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Leahy, J.

---

Filed: June 28, 2024

Krystal Lucado ("Mother") appeals from a Judgment of Absolute Divorce from the Circuit Court for Baltimore County, which awarded Peter Oetker ("Father") sole legal and primary physical custody of the parties' minor children, I.R. and A.X. Mother filed a complaint for absolute divorce in the Circuit Court for Baltimore County on January 12, 2022, and Father filed a counter-complaint for absolute divorce a month later. At the time, Mother had primary physical custody of the children and the parties shared joint legal custody.

A three-day merits hearing was originally scheduled to commence on February 13, 2023, but was ultimately rescheduled to September 19-21, 2023. Just a week before the trial was set to begin, Mother filed a motion requesting that I.R. and A.X., and her two older sons by a prior marriage, appear remotely to testify as witnesses. She cited financial constraints, stating that she could not "afford to fly the children to [Maryland]." The motions court denied this motion without explanation.

During the week prior to trial, Father filed an amended counter-complaint in which he requested sole legal and primary physical custody of the children. He claimed that Mother "makes scheduling visitation with the Minor Children incredibly difficult"—frequently inventing excuses to cancel visitations and making it challenging for Father to make travel arrangements. Father also claimed that the children's education and well-being was being negatively impacted by Mother's relocations from state to state, and twice within the State of California, over the last two years.

On the evening of September 18, 2023, Mother filed the motion for continuance that

is the subject of this appeal. As grounds, Mother explained that she had been experiencing a Lupus flare, and that she woke that morning with "severe symptoms of joint pain, headache, fever, exhaustion, and chest pains." Her children had tested positive for COVID the night before, and later that afternoon, Mother also tested positive for COVID. The trial court received the motion at the outset of the hearing on September 19, and after hearing argument from Father's counsel, denied the motion for continuance.

Following a one-day trial, the circuit court granted Father a judgment of absolute divorce, ordered the division of the parties' personal property and assets, and awarded Father sole legal and physical custody of the minor children with Mother having visitation. The court ordered the children to relocate to Father's home in Maryland by no later than October 12, 2023.[1] Mother timely appealed and presents the following questions for our consideration, which we have rephrased as follows:[2]

[1] On Mother's emergency motion filed on October 15, 2023, this Court entered an order staying the provisions of the Judgment of Absolute Divorce awarding Father primary legal and physical custody of the children and requiring the children to move from California to Maryland until the resolution of Mother's appeal.

[2] Mother's questions presented are:

1. "Did the trial court violate Appellant's Due Process rights in denying Appellant a continuance of the September 19, 2023 merits trial, when the court was aware she and the children had tested positive for C[OVID]?"

2. "Did the trial court err or abuse its discretion, or did it act in an arbitrary manner when it denied Appellant a continuance of the September 19, 2023 trial?"

(Continued)

1. Did the trial court violate Mother's procedural due process rights in denying her motion for continuance?

2. Did the trial court err or abuse its discretion in denying Mother's motion for continuance?

Mother's last-minute motion for continuance was not her first and would normally be within the court's discretion to deny. However, the court's decision to deny the motion was premised on several factual errors, and while those errors were understandable under the circumstances in this case, because significant custody issues are at stake, we must vacate the circuit court's judgment and remand the case for a new trial. We do not need to reach Mother's procedural due process argument.

## BACKGROUND

### Procedural History

The parties were married on March 30, 2007, in a civil ceremony in Baltimore County. I.R. and A.X. were 15 and 13 years old respectively at the time of the merits hearing. Both Mother and Father also have adult children from previous marriages.

Soon after their marriage, the parties jointly purchased their marital residence in Monkton, Maryland. In August 2019, Mother purchased a second home in Havre de Grace, Maryland, "against [Father's] wishes[,]" as he thought they had agreed to "severely downsize." A "week or two later," Mother sent Father a separation agreement. Mother

3. "Did the trial court err, abuse its discretion, or act in an arbitrary manner when it denied Appellant a continuance of the September 19, 2023 trial, knowing that she was ill with C[OVID]?"

and the children lived at the Havre de Grace house, while Father stayed at the Monkton house but visited "most weekends." This living arrangement continued for the next couple of years until September 2021, when the parties informed their children of their decision to divorce. By the end of September 2021, the parties no longer cohabitated.

On October 29, 2021, the parties signed a parenting agreement stating that it was in the best interests of the minor children for Mother to retain physical custody, with joint legal custody shared by both parents. This parenting agreement also stipulated that the children were "free to choose when they want[ed] to visit each parent" and "where they want[ed] to spend a holiday with practical and reasonable notice."

Father initiated proceedings for absolute divorce in the Circuit Court for Harford County on December 20, 2021. A month later, Mother filed a separate complaint for absolute divorce in Baltimore County, which became the operative complaint after Father dismissed the Harford County action. In her complaint, Mother alleged that she "[w]as the primary parent for all of the fourteen years in raising the minor children and her twin sons from a prior marriage, while [Father] was largely an absentee parent." She also claimed that Father began an extra-marital relationship beginning in August 2021. As grounds for divorce, Mother asserted Adultery (Count One) and Constructive Desertion (Count Two). Mother sought sole physical custody, joint legal custody, child support, permanent alimony until the businesses of Gateway Executive Suites and Gateway Executive Suites 1 were sold, equitable shares of the marital property and financial assets, and attorneys' fees.

Father filed his answer on February 11, 2022, followed by a counter-complaint for absolute divorce filed three days later. In Father's answer to the complaint, he alleged that Mother "liquidated the funds in the retirement account" that he had funded for her by putting her on the payroll of his company, and then she "unilaterally decided" to purchase a new home in Havre de Grace against his wishes. He claimed that upon moving into the new house, Mother presented him with a separation agreement that Father stated was "signed [by the parties] around the beginning of October 1, 2019, and [Mother] backdated to 2018."

Thereafter, the parties met several times to try to reach an agreement on the terms of a divorce, and Father "prepared different draft versions of documents for these settlement discussion[s]"; however, according to Father, no agreement for a settlement regarding the terms of the divorce was reached. Father claimed that the Maryland Parenting Form submitted by Mother did not "correspond to any of the forms that [Father] developed during settlement discussions," and requested that it be stricken.

Father emphasized that he had been "an active father in the lives of the minor children and stepchildren up to the separation in September/October 2019 when [Mother] unilaterally moved 50 minutes away and created circumstances that forced [Father] to work long hours on weeknights and weekends." Father requested the court deny Mother's request for relief except for ordering child support after utilizing the Guidelines.

In his counter-complaint for absolute divorce, Father requested joint physical custody and joint legal custody of his minor children. He also asked the court to facilitate

"mediation to develop a parenting and custody plan based on the expected future geographic locations of [Father] and [Mother]."

The court's scheduling order, issued on April 4, 2022, set a settlement conference for September 28, 2022. On September 27 at 10:18 p.m., Mother filed a request to appear remotely at the settlement conference because she and the minor children were residing in California at the time. The settlement conference occurred on September 28, with Mother's counsel and Father present. According to Father's counsel, Mother failed to appear for the settlement conference, and the magistrate "very graciously" attempted to call Mother to hold the hearing remotely. However, Mother "never picked up the phone." The magistrate indicated during the settlement conference that Mother's motion to appear remotely "didn't even actually get ruled on." The magistrate stated that she "would have granted it[,]" but Mother was "not answering right now."[3] A partial settlement was reached, and the trial was set for February 13, 2023, to resolve the remaining issues of "custody/access, child support, [and] marital property." On October 17, 2022, Mother's counsel withdrew his appearance, and Mother filed *pro se* thereafter.

On January 31, 2023, Mother notified Father via email that their son had tested positive for COVID. Then, on February 6, 2023, a week before the scheduled trial, Mother filed a motion for remote proceeding or to appear remotely, stating:

[3] Another settlement conference was scheduled for December 21, 2022. Father filed a request for a remote proceeding on December 6 because he would be in Europe visiting his mother. Father's motion was granted; however, the settlement conference was ultimately canceled.

> My 12 year old son tested positive for C[OVID] on 1/31/23 and 2/1/23. The State of California requires that he isolate for 5 days and on the 6th day, test again before returning to school. My 14 year old daughter will also be tested tomorrow. I cannot fly on February 12th, given contact with positive COVID patient.

Father opposed the motion, arguing that Mother "failed to appear in proper person for the Settlement Conference" and contended that she "never intended to appear in person for this trial." On February 10**,** the parties were informed that the trial was on "standby" due to the lack of available judges. The court reset the trial to September 19, 2023.

On September 11, 2023, Mother filed a motion for remote proceeding or to appear remotely. She requested that her witnesses—her twin adult sons and the minor children—appear remotely because: "Mother cannot afford to fly the children to MD. The twin sons work in the state of MA. The minor children are in school in the state of CA." The trial court denied the motion.

Four days before the trial, Father filed a supplemental counter-complaint for absolute divorce. He stated that Mother made "scheduling visitation with the Minor Children incredibly difficult." He recounted that Mother would "invent[] excuses to cancel visitations, telling [Father] that his proposed dates do not work because the Minor Children have plans, only for [Father] to later find out, that there was never anything planned or scheduled." He explained that Mother "constantly changes her mind" regarding visitation plans, "making it incredibly difficult for [Father]" to access and visit his children. Father argued that it was not in the best interest of the children "to be away from Maryland and away from him for extended periods of time." Father claimed that Mother makes "life-

changing decisions" without discussing matters with him, and Mother's behavior "has provided instability and uncertainty for the minor children." Father stated that he believed "it is in the best interest of the minor children to be in his sole legal and primary physical custody."

**Motion for Continuance**

At approximately 6:00 p.m. on September 18, the evening before the trial, Mother filed a motion for continuance and stated that she was experiencing a Lupus flare that prevented her from traveling and that she and the children had tested positive for COVID. Mother attached her flight information, which showed a plane ticket that was purchased on September 11, 2023 (the same day that she filed the motion to appear remotely) and showed a flight leaving from San Francisco and arriving in Baltimore at 6:35 a.m. EST on September 19, 2023.

The court reviewed the motion at the outset of trial proceedings on September 19. Opposing counsel recounted Mother's previous failures to appear. Father's counsel relayed to the trial court judge that Mother "went to law school" and that she was "an attorney" and was "very familiar with the law, family law."[4] Father's counsel mistakenly told the court that Mother booked a flight that was to arrive at around 9 a.m. on the day of the trial (perhaps mistaking Pacific Standard Time with Eastern Standard Time, as Mother's flight was actually scheduled to arrive at 6:35 a.m. EST).

[4] We observe that Mother is not an attorney and at the time of the trial was nearly finished with her Master of Law degree.

The court and Father's counsel then engaged in a conversation about the picture of the COVID tests, which was attached to Mother's motion for continuance.

> THE COURT: The COVID test.
>
> [FATHER'S COUNSEL]: Pardon me?
>
> THE COURT: There's also COVID allegations. I don't know if you saw that.
>
> [FATHER'S COUNSEL]: All the time. Sometimes there's COVID.
>
> THE COURT: Yes.
>
> [FATHER'S COUNSEL]: If you look at the old one, the kids have COVID – the kids have had COVID every single time we have had something scheduled here.
>
> THE COURT: Well, and **I only saw one out of three positive tests** in the attachments. So I was a bit confused.
>
> [FATHER'S COUNSEL]: Well, she said the same thing in February too on the postponement request.
>
> THE COURT: Okay.

(Emphasis added). The Court determined to proceed with trial, explaining, in part:

> THE COURT: Okay. Okay. Well, I am and have through central denied her request to postpone today. I was covering for Judge Epstein last week when the Motion for Remote was denied consistent with Judge Epstein's policy on such things as we are living in 2023 versus 2020 or 2021.
> Our benches, we are not looking to do these hybrid hearings. **It's fine if it's a witness or two, but not a party.**
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: So I did not deny her remote request, which was based upon, if I am recalling correctly, really finances and convenience. Not illness or any kind of medical condition.

> [DEFENSE COUNSEL]: Right.
>
> THE COURT: So I was surprised to see the medical issues that were raised in yesterday's –
>
> [DEFENSE COUNSEL]: Three days later.
>
> THE COURT: Yeah, I guess it was yesterday's motion. I was out of the office yesterday. But I am back today. So anyway, I have denied the Motion for Continuance.

(Emphasis added). At the conclusion of the trial, the Court again reviewed Mother's previous failures to appear and observed, "[a]ll this [is] to say I think the file is quite clear that, you know, [Mother], after filing her complaint has chosen not to appear and proceed on many of her requests[.]" The court continued:

> THE COURT. This case was set -- and it was set for today, the 19th, to begin.
>
> Eight days ago, M[other] filed **a request for a remote procedure asking that she** and the children be allowed to proceed remotely. I denied that consistent -- either I did or Judge Epstein did. But, either way, it's consistent with the Court's policy since we have moved back to phase 5.
>
> And then today, there was a motion for continuance -- yesterday, a motion for continuance filed alleging a lupus flare that started 3 months ago and a positive COVID test for herself and the children.
>
> But, again, I did not -- **I saw one positive test on the attachment**.[5] Again, that was used as a reason for continuance back in February.

[5] Mother had attached to her motion a photograph of three unidentified and undated COVID tests. On the photograph, only one test showed a line next to the "T" (test) and a line next to the "C" (control). The other two tests showed a line next to the "T" but no line next to the "C." The court interpreted this photograph as depicting only one positive COVID result. However, the instructions depicted on the photograph for interpreting the results of *these* COVID tests stated:

> The test is **POSITIVE** if:

(Continued)

> So, at any rate, here we sit. I don't like deciding these matters based only on one side of the story. But sometimes I am left with no choice when one party chooses to not have any significant engagement with the proceedings. And so that's where we are at this point.

(Emphasis added).

**The Trial**

Defense counsel called three of Father's friends who testified to Father's good character, and Father testified on his own behalf. According to Father, in January 2022, Mother and the minor children left Maryland and moved to Massachusetts, where her adult children from a previous marriage reside. Although Father was "generally opposed that the children would leave the state," he "did not fight it because [he] did not want to create drama or a situation that would harm the kids." Mother and the children remained in Massachusetts until approximately the "middle of May of 2022." During their time in Massachusetts, the children were allegedly "home schooled in the Calvert program. Father noted that this "really wasn't the Calvert program" like the Calvert brick and mortar his older children had attended but "was more of a webinar thing where the parent has to be

---

- there is a reddish-purple line next to the "t" and NO reddish-purple line next to the "C"
- there is a reddish-purple line next to the "T" and a reddish-purple line next to the "C", even if the "C" line is faint
- there is a reddish-purple line next to the "T" and a reddish-purple line next to the "C"

Mother filed a note from an urgent care doctor at 12:03 a.m. on September 20, 2023 (a day after trial). The note stated that Mother, I.R., and A.X. "all have test[ed] positive for COVID and will need to quarantine through 09/22/23 and cannot travel."

the teacher." The program involved "some online type of tests[,]" with the parent responsible for "check[ing] the homework and . . . coach[ing] the kids[.]" According to Father, Mother did not share school records, but once he received them under a *subpoena*, he discovered that the children "really didn't do all that great."

Father expressed that he had "a number of concerns" regarding the children's schools in California. Father also expressed general concern about the children's diet and overall welfare under Mother's primary physical custody, noting that they "seem to be fending for themselves." If he were to receive physical custody of the children, Father asserted, they would attend Havre de Grace High School and Havre de Grace Middle School. Both schools are housed within the same building, and the children had previously attended the Havre de Grace school system. Father highlighted the schools' rankings, which showed that both of the Havre de Grace schools were top rated. He believed that these schools would provide academic advantages for the children, and particularly highlighted the magnet program tailored for students "with special interest in science."

The current visitation arrangement was characterized by Father as "[c]haos." Father proposed a visitation schedule with alternate vacation periods and with Mother having the majority of the summer with the children. In the event that Mother lived closer to Father, he suggested a more evenly-split-visitation time for the shorter holidays, such as Memorial Day and Labor Day weekend, as well as visitation "every other weekend[.]"

As previously noted, at the conclusion of the trial, the court discussed the relevant procedural history to explain why the trial court proceeded despite Mother's absence. The

court then determined, reluctantly, to dismiss Mother's complaint for absolute divorce and to grant Father's supplemental counter-complaint based upon a separation from Mother of more than 12 months.

After the judge weighed the factors under *Montgomery County v. Sanders*, 38 Md. App. 406 (1978) and *Taylor v. Taylor*, 306 Md. 190 (1986), she found that it was "in the children's best interest to be in their father's primary physical custody" as Father could "provide the structure and stability that his children need"[6] with an access schedule for Mother as outlined in Father's proposal. The judge recognized Father as "a very involved father who cares about his children . . . [who] has had to really make some heroic efforts to get access to them since the separation." Additionally, the judge awarded Father sole legal custody, and ordered the children to relocate to Maryland by no later than October 12, 2023, noting that "since separation" there was a pattern to "exclude[]" Father in the decision making.

Regarding alimony and property claims, the court ruled that "[h]ousehold furnishings are to remain in the possession of the party who currently has it" and that "each party is to maintain all bank accounts and assets by title." Despite Father not making any claims for alimony and Mother "not here to support her claim for it[,]" the court noted that

[6] While the court acknowledged that there was not an opportunity to hear from the children and could not consider the children's preferences, the court ultimately determined that it would be in the children's best interests for Father to have primary physical and legal custody. We refrain from addressing the court's reasoning in applying the *Sanders* and *Taylor* factors, as the question of custody is not before this court.

both parties "either make or are capable of making comparable incomes every year." In terms of child support, Father was ordered to pay Mother child support from February 2022 until September 2023 within two weeks of the order, with Mother obligated to pay child support to Father once the children were in his custody.

**Post-Trial Motions**

The trial court entered its judgment of absolute divorce on September 26, 2023, and Mother noted her timely appeal on October 4, 2023. Mother then filed an emergency amended motion to stay proceedings[7] to prevent enforcement of the custody provision in the judgment of absolute divorce pending appeal. Mother explained that she had been scheduled to appear for trial from September 19–21 in Maryland, and had purchased a plane ticket with arrival planned for "6 a.m. EST the morning of September 19, which would give her plenty of time to arrive for a 9 a.m. EST hearing[.]" However, on the morning of September 18, 2023, she and both children "awoke ill and tested positive for C[OVID.]" Given her ongoing treatment for a Systemic Lupus Flare, Mother "immediately contacted her Rheumatologist" who advised her not to travel. Mother stated that she called judicial chambers and "left a message regarding the motion for continuance[.]"

[7] Before the court entered its judgment, Mother had filed a motion to stay the proceedings pending an appeal from the trial court's denial of her motion for continuance. Mother had initially appealed from the denial of her motion for continuance on September 22, 2023, but the appeal was deficient under Md. Rule 20-201(e). Mother corrected the deficiencies in her notice of appeal and resubmitted it on October 4, 2023.

On the morning of September 19, Mother received an email instructing her to file a Notice of Restricted Information alongside the doctor's note for it to be accepted for filing. At 8:46 a.m. the morning of trial, Mother filed a note from her rheumatologist, which stated that Mother was unable to travel due to her Lupus flare. Later that morning, Mother was informed that the motion for continuance was denied. She had scheduled a doctor's appointment for herself and the children, but the earliest available appointment was at 7 p.m. PST that night. The doctor confirmed that Mother and the children had tested positive for COVID and provided a note advising them to quarantine, which Mother filed and submitted to the court, which, at that time, was after the trial had ended.

In her emergency amended motion to stay the custody provisions, Mother argued that the Judgment of Absolute Divorce caused Mother "irreparable injury" because the Judgment required Mother to "force the children to do something they do not want to do[,]" as the children have "refused to go because they do not want to live with Father and do not feel safe with Father." Furthermore, Mother argued that the Judgment would disrupt the children's lives when they are "well cared for and progressing in [] academics," and that "the custody provision was entered without considering the expressed wishes of the children and [hearing] from both parents[.]" Mother included signed affidavits from her two minor children, A.X. and I.R.[8] The affidavits each stated, among other things, that

[8] Father filed a motion to strike the affidavits of the minor children pursuant to Maryland Rule 2-322, specifically: "On motion made by a party before responding to a pleading or, if no responsive pleading is required by these rules, on motion made by a party within 15 days after the service of the pleading or on the court's own initiative at any time, (Continued)

"My Father can be emotionally and physically abusive" followed by examples organized in bullet-outline form below.[9] Another affidavit written by Mother's Mother stated that I.R. "complains about [Father's] friends touching her inappropriately and [Father] forcing her to be in their presence."[10]

Subsequently, we granted the motion to stay the physical custody provisions of the Judgment of Absolute Divorce pending the outcome of Mother's appeal.

## DISCUSSION

## I.

## DENYING THE MOTION FOR CONTINUANCE

### A. Parties' Contentions

Mother asserts that "when illness prevents a party from attending trial, particularly where child custody is at issue," the trial court abuses its discretion by denying a motion

---

the court may order any insufficient defense or any *improper, immaterial, impertinent, or scandalous matter stricken from any pleading* or may order any pleading that is late or otherwise not in compliance with these rules stricken in its entirety." (emphasis added). Father argued that neither child is over the age of eighteen, and "[i]t is improper for [Mother] to submit an affidavit of the Minor Children." The trial court judge granted the motion and struck the affidavits written by the minor children.

[9] In order to protect the privacy interests of the children, we do not quote further from the affidavits. We observe, however, that the words and phrases used in the affidavits, such as, "Father had made a homophobic joke," are not typically the words used by 13-year-olds.

[10] We observe just as in *Wagner v. Wagner*, 109 Md. App. 26 (1996), where Ms. Wagner had never alleged Mr. Wagner abused the children until *after* she sought a change in custody, here the affidavits in Mother's emergency amended motion to stay the custody provisions raise allegations of abuse for the first time.

for continuance. She contends that the court "had an obligation to hear from the mother of the minor children before deciding custody, and before deciding her claims of monetary award, child support and alimony." By declining to grant Mother's motion for continuance, the trial court, in her view, "abused its discretion and [acted] arbitrarily[.]" Mother references *Hart v. Miller*, 65 Md. App. 620, 627 (1986), in which a plaintiff's case was dismissed by the trial court due to failure to timely file answers to interrogatories, and we reversed for the reason that the court failed to consider alternative remedies. Mother argues that, similar to *Hart*, the trial court failed "to consider any alternatives to denying the continuance[,]" and that this failure to exercise its discretion, "in and of itself," is "an abuse of discretion."

Mother contends that her case is akin to *Wells v. Wells*, 168 Md. App. 382 (2006). In *Wells,* where the trial court entered a default judgment against the absent mother that granted the father custody of their minor child, we determined that the court "abused its discretion in denying the motion to vacate with respect to the issues of equitable distribution and alimony." *Wells*, 168 Md. App. at 398. We noted that there was no evidence that granting the motion would prejudice the father—a point, Mother contends, parallels the current case. She emphasizes that "at no point" was there argument that granting a continuance would prejudice Father, whereas denying it severely prejudiced Mother's "claims for custody, visitation, child support, alimony, marital property, and other relief sought[.]"

Mother points out that the trial court seemed influenced by opposing counsel's "factually inaccurate" assertion that "'[e]very single appearance we have she filed like the day before.'" According to Mother, her request for a continuance, not remote appearance, was denied seemingly "based on policy" rather than merit. Mother emphasizes that her motion was for the minor children to appear remotely, not for herself, and that she had provided evidence such as her flight information and emails to opposing counsel. She argues that the trial court's mistaken belief that she filed a motion to appear remotely for herself, instead of for her witnesses, constitutes an "erroneous finding [that] alone may require vacating the Judgment of Absolute Divorce."

Mother further argues that the trial court abused its discretion when it denied Mother's continuance due to her illness with COVID. Mother contends that in this regard, her case is similar to *In Re McNeil*, 21 Md. App. 484 (1974), a case in which the trial court denied the mother's motion for continuance because one of her children was ill. On appeal, our predecessors determined that refusing to grant a continuance in that case was "so arbitrary as to constitute a denial of due process." *In Re McNeil*, 21 Md. App. at 499) (emphasis removed). Similarly, here Mother contends that the trial court erred in denying the motion for continuance because it failed to recognize "that illness cannot be anticipated, nor that it is an absolute reason not to come to court." She explains that, as a *pro se* litigant, she encountered difficulty in properly filing the doctors' notes and the COVID diagnoses of all three individuals due to the requirement of filing restricted information.

Father contends that the trial court acted well within its discretion to deny Mother's motion for continuance. He argues that Mother's question "assume[s] that the Court knew for certain that [Mother] and the Minor Children definitely had COVID." Father highlights that Mother's "alleged proof" included a letter about a Lupus flare and a photo that "showed only one positive COVID test[,]" "offered no identifying information[,]" and was filed on "September 19, 2023 at 8:46 a.m., fourteen minutes before trial was set to begin." Furthermore, he points out that the doctor's letter that "purport[ed] that [Mother] and the Minor Children had been diagnosed with COVID" was "unsigned" and only became available to the Court after the trial.

Father outlines the procedural history leading up to the trial and argues that Mother established "a pattern throughout the entirety of these proceedings of . . . avoiding trial." He highlights instances when Mother attempted to delay or avoid trial, such as filing a request to appear remotely at 10:18 p.m. the night before the pre-trial settlement conference, and Mother's subsequent motion for remote proceeding or to appear remotely because the parties' youngest child had tested positive for COVID, filed just before the initial merits trial date.

Father argues that the situation in this case differs from cases referenced by Mother, such as *Wells v. Wells*, 168 Md. App. 382 (2006) and *Flynn v. May*, 157 Md. App. 389 (2004), as "there was no Order of Default in this matter." He notes that Mother "has continued to file pleadings" since the Judgment of Absolute Divorce. Father suggests that

Mother is "dissatisfied with the result" of the trial, and now, after "having failed to meaningfully participate[,]" wishes to "challenge the outcome of this matter."

**B. Legal Framework**

Motions for continuances or postponements are governed by Maryland Rule 2-508, which states, in pertinent part: "On motion of any party or on its own initiative, the court may continue or postpone a trial or other proceeding as justice may require." Md. Rule 2-508(a). Although the Supreme Court of Maryland has "not specified what the phrase 'as justice may require' means," it has emphasized that the "the decision to grant a continuance lies within the sound discretion of the trial judge." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). Generally, an appellate court will not "disturb[] the decision to deny a motion for continuance" unless there has been an abuse of discretion. *Id*. (citations omitted). An abuse of discretion occurs when the discretion exercised is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (citation omitted) (internal quotations omitted).

Maryland Rule 8-131(c) provides the standard of review for actions tried without a jury:

> When an action has been tried without a jury, an appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Md. Rule 8-131(c). In *Davis v. Davis*, 280 Md. 119, 122-26 (1977), the Supreme Court of Maryland further clarified application of the "clearly erroneous" standard in child custody

cases, instructing that appellate courts must give broad deference to the trial court because the trial judge "sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [the judge] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id*. The Court noted, however, that "when it appears on review that the [trial judge] failed to take sufficient evidence into account, we may remand the case without affirmance or reversal for a redetermination, after further proceedings, as to what is in the best interests of the children." *Id.* at 126, n. 4 (citations omitted).

It is long held by our appellate courts that when the custody of children is the question, "the best interest[s] of the children is the paramount fact." *A.A. v. Ab. D.*, 246 Md. App. 418, 441 (2020) (quoting *Kartman v. Kartman*, 163 Md. 19, 22 (1932). Indeed, the best interests of the children "is the central consideration." *Id.* (quoting *McDermott v. Dougherty*, 385 Md. 320, 354 (2005)) (citation omitted).

Turning to those decisions that address a trial court's decision to deny a parent's motion for a continuance in child custody case, we begin with *In re McNeil*, 21 Md. App. 484 (1974). In that case, this Court examined whether the trial court abused its discretion by denying the mother's request for continuance and proceeding with an exceptions hearing in her absence. *Id.* at 496. The mother had initially petitioned for her minor children to be committed to the Department of Social Services ("DSS") due to her inability at the time to care for them. *Id.* at 486. Approximately six months later, her circumstances

had changed, and she filed a petition for review of the commitment. *Id.* Following a hearing, the magistrate recommended revoking the commitment and placing the children, then living in foster care, back with the biological mother. *Id.* DSS took exception to the magistrate's report, and the merits hearing was scheduled in the circuit court. *Id.*

On the day of the merits hearing, the mother's counsel communicated that the mother was unable to attend the hearing because her child was sick. *Id.* at 486-87. The court proceeded with the trial on the merits in her absence and denied mother's counsel's repeated requests for a continuance, ultimately dismissing her petition for review of commitment. *Id.* at 487, 493.

On appeal, this Court determined that the mother "was entitled to a reasonable opportunity to be present and assert her view as to why her children should be returned to her care." *Id.* at 500. The Court instructed:

> We can think of no right more fundamental to any parent than to be given a reasonable opportunity to be present at any judicial proceeding where the issue is whether or not the parent should be permitted to have custody of its child. We believe that there was grave and serious error on the part of the trial judge in compelling the hearing to proceed in the absence of the Appellant, and we find that it was arbitrary and unreasonable for him to refuse to grant a continuance so that she might be present.

*Id.* at 496-97. Of particular concern was that the court did not "mak[e] a realistic inquiry into the circumstances of [mother's] absence, or ascertain[] whether she had been guilty of a pattern of unconcern." *Id.* at 498. Moreover, the record did not reflect that the trial court judge considered "whether the mother's testimony would be competent or material." *Id.* The Court found relevant mother's counsel's "uncontradicted statement" that Mother was

unable to appear due to the illness of her child, as well as Ms. McNeil's extensive involvement in the proceedings leading up to the hearing. *Id.*

In *Touzeau v. Deffinbaugh*, 394 Md. 654 (2006), the Supreme Court of Maryland held that the trial court did not abuse its discretion in denying the motion for continuance. The case involved a contentious child custody and access dispute between a divorced couple and their minor child. *Id.* at 656-58. The parties shared legal custody of the child, and Ms. Touzeau had primary physical custody while Mr. Deffinbaugh had liberal visitation rights. *Id.* at 656. The dispute escalated when Ms. Touzeau informed Mr. Deffinbaugh that she would be moving from Silver Spring to Churchton, Maryland, and would be taking their daughter with her. *Id.* at 658. Mr. Deffinbaugh filed an emergency motion for modification of custody and attorneys' fees in the Circuit Court for Montgomery County and requested "injunctive relief prohibiting Ms. Touzeau from relocating [the child] to Churchton, temporary primary physical custody of [the child] until a court evaluation and a hearing on his petition could be conducted, and permanent primary physical custody of [the child]" *Id.* at 658. Ms. Touzeau, as a *pro se* defendant, filed a petition for an emergency order and counter-petition to modify custody. She also requested that the visitation schedule be altered, no long requiring the child to visit her father during the school week "because of the length of the commute." *Id.* at 658-59.

The parties met on September 30, 2004, for a scheduling conference, and the judge ordered a custody evaluation, with the results announced at the January 21, 2005 settlement conference and a custody modification hearing scheduled for February 8, 2005. *Id.* at 659.

On January 28, 2005, Ms. Touzeau filed a motion for continuance of the February 8 custody modification hearing, citing that, in light of the "unfounded recommendations" in the custody evaluator's report, she was attempting to obtain *pro bono* counsel. *Id.* at 659. This motion was denied. *Id.* During the custody modification hearing, Ms. Touzeau again raised her motion for continuance stating that she was *pro se* and was seeking counsel due to the recommendations of the Court evaluator's report. *Id.* at 659. She explained that she had taken steps to obtain legal counsel and was able to find an attorney who was able to represent her, but he was unavailable that day. *Id.* at 660. Mr. Deffinbaugh opposed the motion due to the "urgency of the matter and argued that Ms. Touzeau had ample time to obtain counsel[.]" *Id.* at 661.

The Court agreed with Mr. Deffinbaugh and stated:

> THE COURT: It seems to me that Ms. Touzeau had plenty of time as this case was pending to seek and be able to find someone perhaps to represent her in this. It's a crisis that I think unfortunately has been generated by Ms. Touzeau waiting until the very last to seek counsel.
>
> So the Court's ruling on the renewed oral motion to continue is denied.

*Id.* at 662.

The trial judge read a portion of the custody evaluator's report, which stated: "Mrs. Touzeau does not seem to understand that [the child] needs her father to be involved in her life on his own terms, not just when she finds it convenient or acceptable. The parties appropriately have joint custody, yet she had numerous times made decisions unilaterally which are debatable as to whether they were in [the child's] best interest. She has little insight into how she is contributing to the problems and she seems to have difficulty

accepting that she cannot control what goes on when [the child] is with her father." *Id.* at 663. Having considered the custody evaluator's report and observed "a pattern of behavior" of removing the child's father from her life and "totally disregarding any input by Mr. Deffinbaugh[,]" the court awarded Mr. Deffinbaugh physical and legal custody of the child and granted Ms. Touzeau liberal visitation. *Id.* at 664.

On appeal, Ms. Touzeau contended that "justice required" the trial court to grant her motion for continuance to enable her to obtain counsel. *Id.* at 666. We affirmed the trial court's decision, noting that Ms. Touzeau had "four months to prepare for the custody modification hearing, [and] Ms. Touzeau had waited until the last moment to file a motion for a postponement." *Id.* at 664-65. Moreover, the parties "had been informed at the September scheduling conference that the results would be available to them in January." *Id.* at 665. The Supreme Court of Maryland agreed and delineated factors in which it would be an abuse of discretion for a trial judge to deny a motion for continuance.

> We have found that it would be an abuse of discretion for the trial judge to deny a continuance when the continuance was mandated by law, *see Mead v. Tydings*, 133 Md. 608, 612 (1919), or when counsel was taken by surprise by an unforeseen event at trial, when he had acted diligently to prepare for trial, *Plank v. Summers*, 205 Md. 598, 604-05 (1954), or, in the face of an unforeseen event, counsel had acted with diligence to mitigate the effects of the surprise, *Thanos v. Mithell*, 220 Md. 389, 392-93 (1959).

*Touzeau*, 394 Md. at 669-70. The Supreme Court noted the expedited circumstances and the "consequence of the immediate impact that [the child's] relocation had on her relationship with Mr. Deffinbaugh." *Id.* at 675. Furthermore, the court noted that the continuance requested was "not merely for one day, but for a protracted period of time[.]"

Unlike in other instances that the court had found exceptional circumstances, the case "lack[ed] the elements of surprise and due diligence." *Id.* The court determined that "Ms. Touzeau had failed to demonstrate that she experienced an unforeseen circumstance in the contested custody proceedings that she reasonably could not have anticipated and that she acted with due diligence to mitigate the consequences of not being represented by counsel at the hearing to modify custody." *Id.* at 678. Thus, the Supreme Court of Maryland affirmed the judgment of the Appellate Court and held that the trial judge did not abuse his discretion in denying the motion for continuance. *Id.*

Although not a child custody case, in *Reaser v. Reaser*, 62 Md. App. 643, 645 (1985), we again recognized the "exceptional instance" in which there was an abuse of discretion when the trial court denied a motion for continuance in a divorce proceeding. In *Reaser,* the wife, previously represented by counsel, requested a continuance of the merits hearing because her attorney had withdrawn from her case, she had not been able to retain a new attorney "financially or physically," and she "did not know until" six days prior that the case was to be heard that day. *Id.* at 645, 649. The trial court denied the wife's request for continuance and proceeded with the hearing. *Id.* at 649-50. Ultimately, the trial court granted the husband's divorce request and dismissed the wife's countercomplaint and contempt petition.[11] *Id.* at 647.

[11] The court also dismissed appellee's petition for reduction of alimony, distributed certain monies from an IRA account to appellee, and ordered appellee to pay appellant alimony. *Reaser*, 62 Md. App. at 647.

On appeal, we analyzed the circumstances under factors set out in *In Re McNeil*, *supra*, that "militat[e] in favor of a continuance[,]" and determined:

> No reason was given for the denial of the continuance. We know that Judge Thieme in September expressed concern that the case had not proceeded to trial on the merits. We might speculate that the age of the case played a role in the court's decision. If this were so, it would not provide sufficient justification for the denial of the continuance particularly when no prejudice to the other side was shown and no objection voiced. There does not appear to have been any emergency situations necessitating that the case proceed immediately. No inquiry was made of appellant as to how long it would take her to get counsel.

*Id.* at 650.

We concluded that denying the wife's request for a continuance was an abuse of discretion and thus remanded the case for a new trial. *Id.* at 650.

**D. Analysis**

Applying the foregoing rules and precepts to the case before us, we hold that the trial court abused its discretion in denying Mother's motion for a continuance because it appears from the record that the courts' determination was based on several factual errors that, although understandable in light of Mother's history of last-minute filings, have greater significance in this case given the child custody issues at stake.

Mother, as a *pro se* litigant, filed her motion for continuance the night before trial was to begin and included documentation from her rheumatologist, advising against her traveling due to health reasons, as well as a picture of three positive COVID tests. Just prior to denying Mother's motion on the day of the hearing, the Court observed, "Well, and I only saw one out of three positive tests in the attachments." Although Father argued,

and the trial court concurred, that the COVID test picture provided in Mother's motion for continuance depicted only *one* positive test, as we explained previously, the instructions for the InteliSwab COVID-19 test indicated that all *three* COVID tests were positive. Each test in the picture depicted a reddish-purple line next to the "T," which, according to the instructions on interpreting the results, indicates a positive COVID test. Father has not demonstrated or averred to the contrary on appeal. Although it is true that none of the tests as depicted in the photograph were identified as belonging to Mother or anyone in particular, the diagnoses of Mother and the children were confirmed by a doctor at an urgent care facility in California, and Mother filed the documentation with the court at 12:03 a.m., a day after the hearing. The court's error in accepting Father's counsel's interpretation of events instead of making further inquiry into the nature of Mother's and the children's illnesses may have been anodyne, especially in light of Mother previous attempt to postpone due to COVID illness, except that it was not the only factual inaccuracy in the court's determination.

The record shows that the trial court judge was also mistaken in believing that Mother requested a remote hearing for *herself* when she had filed the Motion for Remote Proceeding or to Appear Remotely a week before trial. However, Mother had only requested the parties' minor children and her witnesses, her two adult sons, appear remotely, and she had purchased a plane ticket for herself, set to arrive at BWI at 6:35 a.m. the morning of trial – not 9 a.m., as Father's counsel contended. In denying the motion to continue, the court, referring to Mother's motion to appear remotely, stated, "It's fine if

it's a witness or two, but not a party." Consequently, it is clear from the record that the trial court believed that Mother tried to avoid appearing for trial by filing a motion to appear remotely, and then, when that was denied, submitted a request for continuance with a photograph showing only two, rather than three, positive COVID tests.

Although the trial court was appropriately concerned that the custody proceedings come to some resolution in the best interests of the children, the record does not indicate that there was an emergency that required the merits hearing to proceed in absentia, and certainly, as the court recognized, mother's testimony would have been material to the court's custody determination.[12] *See In Re McNeil*, 21 Md. App. at 496 (1974) (determining that the mother's testimony "could have been very important" and "have been of probative value" in determining the custody of the child); *see also Reaser*, 62 Md. App. at 650 (concluding that "[t]here does not appear to have been an emergency necessitating that the case proceed immediately."). Additionally, the record did not reflect that Father would suffer prejudice or harm from granting the continuance. Conversely, Mother's

[12] There are numerous factors to consider in a custody determination, such as, but not limited to:

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

*J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 253 (2021) (quoting *Montgomery Cnty. Dept. of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977) (citations omitted).

absence rendered her unable to represent herself in the proceedings and proved to be prejudicial to her request for full legal and physical custody of the children. *See In Re McNeil*, 21 Md. App. at 497 ("We can think of no right more fundamental to any parent than to be given a reasonable opportunity to be present at any judicial proceeding where the issue is whether or not the parent should be permitted to have custody of its child.").

Although Maryland Rule 2-508 "provides wide latitude" for the trial court to act within its discretion in determining whether to grant a continuance, *Shpak v. Schertle*, 97 Md. App. 207, 225 (1993), we must conclude the trial court's determination in this case was clearly erroneous given the factual mistakes that factored into the trial judge's ruling. Given our holding, we must vacate the judgment of the circuit court and remand the case for a new trial on the merits.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED; CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.**