Circuit Court for Montgomery County
Case No. 159383FL

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1682

September Term, 2022

ANA PAOLA PEREIRA COTRIM

v.

MANFRED BOEHM

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

JJ.

Opinion by Getty, J.

Filed: November 14, 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).

This appeal originates from a modification of custody award for the parties' two minor children. After a custody hearing, the Circuit Court for Montgomery County granted Appellee Manfred Boehm ("Boehm") primary physical custody, sole legal custody for medical decisions, and joint legal custody for education and religious decisions with Boehm holding tie-breaking authority. Appellant Ana Paola Pereira Cotrim ("Cotrim") challenges the custody modification on several grounds.

The parties present us with the following questions,[1] which we have rephrased and renumbered as follows:

1. Did the trial court err or abuse its discretion in denying Cotrim's request for an *in camera* interview with the minor children?
2. Did the trial court err or abuse its discretion in granting Boehm primary physical custody and sole legal custody with regard to medical decisions?
3. Did the trial court abuse its discretion in declining to appoint a Best Interest Attorney?
4. Did the trial court fail to consider the effect of excluding witness testimony on the best interests of the children?
5. Did the trial court err or abuse its discretion by relying on the custody evaluation's portrayal of the parties or by awarding custody before Cotrim obtained a psychological evaluation?

For the reasons below, we affirm on all bases.

[1] Cotrim's questions are functionally the same, but she combines the first two questions and frames Question 5 (her Question 4) as follows: "The Circuit Court erred when it impermissibly considered [Cotrim's] failure to comply with an order requiring a psychological evaluation when reaching its custody determination." Boehm frames Question 5 as: "The trial court did not err or abuse its discretion by issuing a Custody Order prior to a mental evaluation of [Cotrim] being conducted." We address both of these questions together.

FACTS AND PROCEDURAL HISTORY

A. Parties' History and Divorce

The parties married in June 2006. They had two children in the course of their marriage: A.S., born in 2007, and A.E., born in 2009. Following a strained period of their marriage in late 2018, Cotrim filed a Complaint for Limited Divorce on February 8, 2019, in the Circuit Court for Montgomery County. Boehm then filed a Complaint for Absolute Divorce and Other Relief on February 15. The two cases were consolidated under Boehm's case, with Cotrim filing a Counter-Complaint for Absolute Divorce on April 18.

The circuit court conducted a hearing for uncontested divorce on October 16, 2020. The judge entered judgment of absolute divorce on November 9, 2020, which incorporated but did not merge the parties' marital settlement agreement dated August 21, 2020. The agreement outlined custody for A.S. and A.E., giving the parties joint legal and joint physical custody on a 2-2-5-5[2] basis. Pertinently, the agreement also provided that the children would spend alternating holiday breaks with each parent, staying with Boehm for their Thanksgiving break and with Cotrim for their winter break in even years and vice versa in odd years.

B. Post-Divorce Events

[2] A 2-2-5-5 custody arrangement provides that the children stay with one parent on Mondays and Tuesdays and with the other on Wednesdays and Thursdays. The parents then alternate weekends.

Tensions between the parties began to escalate after their divorce. A significant series of incidents occurred in fall and winter 2021. The year prior, being an even year, Boehm had the children for their Thanksgiving break, and Cotrim had them for their winter break. In September 2021, Cotrim asked Boehm if he would be willing to switch the breaks so that he would again have them for Thanksgiving and she would have them for winter break, despite it being an odd year. Boehm refused, and the parties exchanged a series of emails in which Cotrim signed several "PO2MBOEHM," which Boehm believed meant "protective order to Manfred Boehm." On December 15, 2021, just before the children's last day of school before winter break, Cotrim obtained a temporary protective order against Boehm prohibiting him from contacting the children. Cotrim failed to appear at the final protective order hearing on December 22, and the case was dismissed. The same day, Cotrim obtained a second temporary protective order. The final protective order hearing occurred on December 29 and was dismissed at the conclusion of Cotrim's testimony for failing to meet the burden of proof. By the time Boehm was permitted to contact the children, only about three days of their winter break remained.

Additionally, because Cotrim had alleged in her requests for protection orders that Boehm had physically and sexually abused the children, Montgomery County Child Protective Services ("CPS") conducted interviews with both parties and the children. Cotrim's primary basis for concern was that A.S., the parties' eldest daughter, purportedly told Cotrim that A.S. had slept in Boehm's bed, leading Cotrim to conclude that Boehm

either had or would sexually abuse A.S.[3] During CPS's investigation, the social worker interviewing the children used a technique that specifically screens for abuse, and neither child disclosed abuse or neglect. Instead, both children denied any inappropriate physical contact. CPS closed the case on January 6, 2022, without further action.

During the fall of 2021, A.S. started to report problems related to her mental health. Both parties stated that she was having difficulty sleeping, and Boehm arranged a telehealth appointment with A.S.'s pediatrician. Unbeknownst to Boehm, Cotrim received a notification of the appointment because both parties appeared on A.S.'s records, and Cotrim was present for the virtual visit. After the pediatrician opened the virtual meeting, Cotrim immediately told the doctor that Boehm was sexually abusing A.S. Upon hearing this statement, A.S. closed the meeting and did not complete the visit with the pediatrician.

Shortly after, A.S., on her own request, began seeing a therapist. Boehm alleged that Cotrim at one point withdrew her consent for A.S. to continue seeing the therapist on the basis that Boehm's own therapist had made the referral. Cotrim also told A.S.'s therapist that Boehm was sexually abusing A.S.

C. Motion to Modify Custody and Custody Hearing

Boehm filed a motion to modify custody on January 5, 2022, alleging material changes in circumstances justifying a change in custody. Specifically, Boehm pointed to

[3] As will be described further, Boehm denied that A.S. had slept in his bed since his and Cotrim's separation, and A.S. similarly told the custody evaluator that she had slept in Boehm's bed when she was younger and was frightened by something but had not done so since the separation.

Cotrim's history of filing protective orders, which he described as baseless, and her allegations that he was sexually abusing the children as grounds for modification. He also described Cotrim's behavior as erratic, evidenced by her continually sending emails and leaving voicemails containing allegations of abuse to Boehm's place of work and the protective orders filed against him during the 2021 winter break. Boehm also filed a motion for custody evaluation and a motion for mental examination of Cotrim on April 7, both of which the circuit court granted. The court ordered Cotrim to see a designated psychiatrist for a psychological evaluation within 30 days of the May 20 order. However, Cotrim failed to do so, later stating that she was unable to pay the $3,500 required for it (half of the $7,000 total, with Boehm paying the other $3,500). In July 2022, the court appointed a child privilege attorney and denied a motion from Cotrim requesting that Boehm be compelled to submit to drug testing. On August 11, 2022, Cotrim filed two motions, one requesting that a Best Interest Attorney ("BIA") be appointed for the children and one requesting that the court conduct an *in camera* interview with each child. The court denied both motions.

The court held a custody hearing on October 5, 2022. At the outset of the hearing, Boehm requested that one of Cotrim's witnesses, Dr. Roberta Rasetti, not be permitted to testify. Boehm asserted that Dr. Rasetti had not been identified as a potential witness during discovery and was mentioned for the first time in Cotrim's pretrial statement, which was filed the day before the hearing. Cotrim stated that she did not have information about Dr. Rasetti when Boehm initially asked for the identities of all potential witnesses. When

the court asked for a proffer as to why Dr. Rasetti should be allowed to testify, Cotrim argued that her mental state was at issue and that Dr. Rasetti would testify about a lack of erratic behavior. The court granted Boehm's motion to prevent Dr. Rasetti from testifying, concluding that the testimony was irrelevant because Cotrim only met with Dr. Rasetti once in 2019, before the alleged changed circumstances underlying the action to modify custody.

The first witness was the court-appointed custody evaluator, Rosalyn Hnasko. She testified about her custody evaluation, which included a determination that Boehm was a fit parent but that Cotrim was not due to untreated mental health concerns. Specifically, Hnasko pointed to incidents reported by A.S. in which Cotrim hid the children's belongings, accused them of "choos[ing] foods against her," spoke negatively about Boehm in front of the children, and discussed with A.S. that Boehm would abuse her. Conversely, Hnasko testified and documented in her report that the children were unsure of how Boehm felt about Cotrim because he rarely expressed his feelings about her in front of the children. Moreover, Hnasko stated that she found no evidence of abuse by Boehm. Hnasko's report stated that the children told her they wanted to spend equal time with each parent, but Hnasko noted concerns that A.S. and A.E. might be accustomed to Cotrim's behaviors and thus did not understand how the dynamic was harmful to them. She also noted that the children's behavior was more immature at Cotrim's residence than it was at Boehm's, which raised concerns because their temperament was different in each home.

As is relevant to this appeal, in his testimony, Boehm denied the abuse allegations and specifically stated that A.S. had not slept in his bed after the parties' separation. This assertion was supported by the custody evaluation in which A.S. also denied the allegation. A.S. also stated that Cotrim repeatedly asked her about whether she slept in the same bed with Boehm. A.S.'s therapist testified that she found no indication of abuse or of A.S. sharing a bed with Boehm. However, the therapist did express concerns that Cotrim would revoke her consent for A.S. to continue seeing a therapist.

Cotrim's testimony included additional explanations about why she believed A.S. was at risk of sexual abuse and why she thought Boehm could be grooming both children. She also explained why she had not completed the psychological evaluation required by the May 20 order, stating that she did not have the financial means to pay the $3,500 upfront cost. Cotrim testified that she was not opposed to having a mental evaluation performed and that she would undergo one if Boehm paid for it.

At the outset of the judge's oral opinion, issued from the bench on October 19, 2022, the judge stated that her factual findings were based upon a preponderance of the evidence standard and her decision-making was "viewed through the lens of the best interest of the children," with the findings "based specifically on what is in the best interest of the parties' two children." As to Cotrim's failure to obtain a mental evaluation, the court stated that the evaluation would have been an "extremely helpful tool" in assessing the custody issue and found that Cotrim did have enough money in her bank accounts to cover the cost, particularly given that the order was clear that the cost was subject to reapportionment.

The judge noted that Cotrim's behavior throughout the trial was disruptive, with Cotrim speaking out of turn and not responding to instructions to stay quiet, and the judge found that Cotrim lied throughout her testimony. The court accepted the custody evaluator's testimony and report as credible, including crediting the evaluation and testimony over Cotrim's testimony where they conflicted.

With regard to the abuse allegations, the court found that A.S. did not sleep in the same bed as Boehm and that, even if she did, there was no credible evidence to indicate that it would endanger A.S. The court also found that Cotrim had no basis for obtaining the temporary protective orders and only did so to have the children in her custody over winter break and punish Boehm for not agreeing to swap the breaks. Finally, the court found a sharp contrast between how Cotrim and Boehm communicated with one another, with Cotrim sending inappropriate and unresponsive emails to Boehm, while Boehm did not acknowledge anything outside the scope of the necessary communication.

As for the court's custody determination, the court found that Cotrim interfered with Boehm's relationship with the children and that modification of custody was in the best interest of the children. In assessing the requisite custody factors, the judge addressed each *Taylor*[4] and *Sanders*[5] factor in turn. Pertinently, the court found that: (1) the children were being harmed by Cotrim's behavior; (2) Boehm was willing to share custody provided that Cotrim sought help with her mental health and stopped making abuse allegations against

[4] *Taylor v. Taylor*, 306 Md. 290 (1986).
[5] *Montgomery Cty. Dept. of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1978).

him; (3) Boehm was capable of communicating with Cotrim and sharing in decisions related to the children, while Cotrim was unable to communicate effectively; (4) while both parties testified that they were financially stable, Cotrim had not worked since 2020 and was depleting alimony and child support for basic expenses; (5) the children's more immature behavior at Cotrim's home was not indicative of a parental preference; and (6) Boehm had not perpetuated any abuse against the children. After a consideration of each factor, the court granted Boehm primary physical custody, sole legal custody for medical decisions, and joint legal custody for education and religious decisions with Boehm holding tie-breaking authority. The court also required that Cotrim comply with the May 20 order regarding a mental health evaluation and ordered her to follow all of the psychiatrist's recommendations.

Cotrim moved for reconsideration, which the court denied. She then timely appealed.

STANDARD OF REVIEW

When reviewing child custody awards, an appellate court uses three different standards of review. *Davis v. Davis*, 280 Md. 119, 125 (1977). First, factual findings are reviewed under a clearly erroneous standard. *Id.* at 125–26. Second, "[i]f it appears that the [trial 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." *Id.* at 126. Finally, the trial court's ultimate conclusions are disturbed only for clear abuse of discretion. *Id.* Abuse of discretion arises when the consideration is "well removed from any center mark

imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994). The appellate court should not reverse simply because it would have made a different ruling. *Id.* Additionally, the reviewing court "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

DISCUSSION

A. In Camera *Interviews with the Children*

Cotrim argues that the circuit court abused its discretion by denying her motion for an *in camera* interview with the children. Cotrim highlights cases where minor children testified as witnesses to support her assertion that A.S. and A.E.—14- and 12-years-old, respectively, at the time of trial—should have been interviewed by the judge to assist in the determination of the children's preferences.[6]

Lemley v. Lemley recognized that a child's preference may be considered by the judge when making a custody determination but stated that "the court is not required to speak with the children." 102 Md. App. 266, 288 (1994) (citing *Levitt v. Levitt*, 79 Md. App. 394, 403 (1989)). As such, "[t]he trial judge has discretion to decide whether to conduct a child interview." *Karanikas v. Cartwright*, 209 Md. App. 571, 595 (2013). Although *Sanders* lists the child's preference as a potential factor when making custody determinations, an interview with the child "is not the only method by which the trial judge

[6] Cotrim combines her argument about the *in camera* interview with her argument that the court abused its discretion by ignoring the child's preferences. We address the child's preferences *infra* in our broader discussion of the custody award.

may discern the preference of the child." *Id.* We have also noted that custody disputes can be psychologically traumatizing, particularly for young children, and thus decisions about whether to interview the children should include considerations of whether such an interview could generate further trauma. *Marshall v. Stefanides*, 17 Md. App. 364, 369–70 (1973).

We find no abuse of discretion in the judge's denial of Cotrim's motion for an *in camera* interview. Our cases clearly state that a judge does not need to speak with children before making a custody determination. Additionally, the court had already ordered and received the custody evaluation when it considered Cotrim's motion for *in camera* interviews, and the judge could thus determine that the evaluation adequately represented the children's preferences without the need for an *in camera* interview. It was therefore well within the court's discretion to decide that additional interviews were not necessary or were otherwise against the best interests of the children.

B. Custody Award

Cotrim contends that the trial court wrongfully decided the custody issue based on its perception of the parties, not the *Sanders-Taylor* factors and the best interest of the children, and further argues that the perception was predetermined before evidence was presented. Cotrim states that the trial court "immediately discarded the *Taylor* factors based on an early and unsupported assignment of blame for any inability of the parties to communicate with each other." Additionally, Cotrim contends that the trial court abused its discretion by failing to consider the child's preferences. Boehm counters that Cotrim's

arguments consist of blanket assertions of prejudgment and abuse of discretion that have no support in the record. He argues that the trial court properly considered each factor listed in *Taylor* and *Sanders*, that Cotrim offers no basis for her contention that the judge predetermined the custody outcome or prejudged Cotrim, and that the judge properly considered all factors through the lens of the children's best interest, even when those factors addressed the character or fitness of the parties.

The overriding consideration in custody cases is the best interest of the child. *See Ross v. Hoffman*, 280 Md. 172, 174–75 (1977) ("[The] best interest standard is firmly entrenched in Maryland and is deemed to be of transcendent importance."); *Azizova v. Suleymanov*, 243 Md. App. 340, 347 (2019) ("Unequivocally, the test with respect to custody determinations begins and ends with what is in the best interest of the child." (citing *Boswell v. Boswell*, 352 Md. 204, 236 (1998)). To aid in the determination of the child's best interest, Maryland courts have created two lists of potential factors to consider before awarding custody.

Our decision in *Montgomery County Department of Social Services v. Sanders* produced a set of ten non-exclusive considerations for a court when awarding custody: (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between 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 the parents and opportunities for visitation; (9) length of separation from the natural parents; and (10) prior

voluntary abandonment or surrender. 38 Md. App. 406, 420 (1977). When considering these factors, a court should look to the totality of the situation and avoid focusing on any one factor. *Id.* at 420–21.

Taylor v. Taylor also established a list of considerations for awarding joint custody. 306 Md. 290 (1986). Those factors are: (1) capacity of the parents to communicate and 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; (13) benefit to parents; and (14) any other factor the court deems relevant. *Id.* at 304–11. The Supreme Court of Maryland specifically stated in *Taylor* that the factors set forth in that case did not eliminate the considerations enumerated by *Sanders* or any other factors trial courts typically consider. *Id.* at 303.

Finally, under Section 9-101 of the Family Law Article of the Maryland Code, a court must consider whether there are reasonable grounds to believe that a child has been abused or neglected by a party and, if so, determine whether such abuse or neglect would recur if that party were granted visitation or custody rights. Md. Code (1984, 2019 Repl. Vol.), Family Law § 9-101(a). If such reasonable grounds exist, the court must deny

custody or visitation rights unless it "specifically finds that there is no likelihood of further child abuse or neglect by the party." *Id.* § 9-101(b).

1. Capacity to Communicate

In support of her communication argument, Cotrim points to *Taylor*'s statement that "[t]he parents need not agree on every aspect of parenting, but their views should not be so widely divergent or so inflexibly maintained as to forecast the probability of continuing disagreement on important matters." *Taylor*, 306 Md. at 305–06. In relying on this language, Cotrim overlooks the trial court's conclusion that Cotrim lacked the capacity to communicate effectively and share in decisions regarding the children. The court specifically stated that when Boehm brought routine requests or issues to Cotrim's attention, she would respond with "unrelated allegations of sexual deviance, rehashed marital complaints, and called [Boehm] a pedophile, and threatened to file protective orders against [Boehm]." As such, the court's assessment of *Taylor*'s communication and decision-making factor was not based upon the parties' general disagreements but was instead based upon Cotrim's own inability to communicate and consider basic requests. The court's conclusions with regard to this factor are well supported by the custody evaluation, emails between the parties presented at trial, and both parties' testimony.

2. Parental Fitness

Cotrim's assertion that her fitness was questioned for unreasonable and arbitrary reasons is unsubstantiated. The court described several reasons why it thought Cotrim was an unfit parent, including her inappropriate and unresponsive emails to Boehm, her "total

lack of appreciation for the emotional harm she is doing to her daughters" in continuing to talk to them about the unfounded abuse allegations, and her intentional interference with the relationship between the children and Boehm. Both *Taylor* and *Sanders* include the fitness of the parents as a factor when making custody awards. The court was therefore justified in assessing evidence that indicated that Cotrim was unfit to parent and making an ultimate determination that she was not fit.

3. Children's Preferences

The preference of the child is a factor under both *Taylor* and *Sanders*; however, our Supreme Court has made clear that "the child's preference factor . . . is simply one factor to be considered, within the context of all other relevant factors." *Boswell v. Boswell*, 352 Md. 204, 222 (1998). Moreover, the Supreme Court has long held that "the desire of the child is not controlling upon the court," with varying degrees of weight given to the child's preference depending on their age and ability to "form a rational judgment." *Ross v. Pick*, 199 Md. 341, 353 (1952). "[T]here is no specific age of a child at which [the child's] wishes should be consulted and given weight by the court." *Id.* We have also noted that "the [trial] court has discretion . . . [in deciding] the weight to be given [to] the children's preference as to a custodian." *Leary v. Leary*, 97 Md. App. 26, 51 (1993) (citing *Casey v. Casey*, 210 Md. 464, 474 (1956)), *abrogated on other grounds by Fox v. Wills*, 390 Md. 620 (2006).

Cotrim is correct that whether a child's preferences will be given weight is not reliant on their age; however, she places too much weight on the children's ages. We do

not disagree that, at ages 12 and 14, A.E. and A.S. likely had the capacity to form rational judgment at the time of the custody hearing. The trial court, regardless of the children's ages, still retains discretion regarding how much weight to give to their preferences. The judge credited the custody evaluator's testimony and report, including her opinion that "the children are so used to [Cotrim's] strange and erratic, and abusive behavior . . . that they don't even understand how unhealthy and detrimental this dynamic is to them." Given the discretion afforded to the trial judge in making factual determinations, Md. Rule 8-131(c), and in deciding the weight given to the children's preferences, we do not conclude that the judge abused her discretion. The court was presented with evidence of the children's preferences within the custody evaluation. Although both children said they would like to spend equal time with each parent, the judge acted well within her discretion when she gave minimal weight to those preferences when viewed in conjunction with the other *Sanders-Taylor* factors. In addition, the evaluator's testimony that questioned whether the children understood the harm being done by Cotrim was an overriding factor in the decision by the judge.

4. Preconceptions

We see no support in the record for Cotrim's assertion that the judge had preconceived notions of the parties or judged Cotrim based upon her financial status. The court's consideration of its perception of the parties was justified, seeing as the character and reputation of the parties are a factor under *Sanders*. As such, the judge was permitted to assess her perception of the parties based upon the evidence presented and through the

lens of the best interest of the children. Although Cotrim is correct that the court emphasized the character and fitness of the parties, those considerations were relevant and applied to the best interest of the children standard.

Similarly, each parent's financial status is relevant under *Taylor*, so the judge was permitted to consider Cotrim's financial status in making her custody determination. There is nothing in the record that suggests the judge based her decision solely upon Cotrim's inability to pay for a psychological evaluation. To the extent it was mentioned, the judge indicated that such an evaluation would have been useful, but nothing indicates that Cotrim's failure to obtain the evaluation was determinative.

We find no error in the trial court's consideration of the *Sanders-Taylor* factors, nor do we give weight to Cotrim's argument that the judge discarded the factors based on pre-determined perceptions of the parties. The judge specifically stated that custody determinations are made under the best interest of the children standard based upon the factors set forth in *Taylor* and *Sanders*, and she considered each factor in turn. Although she did not differentiate between which factors fell under *Taylor* and which fell under *Sanders*, she noted that many of the factors overlap and stated she would "talk about them together."

C. Appointment of Best Interest Attorney

Cotrim next argues that the court erred in failing to appoint a BIA, pointing to the importance of children having a neutral advocate in the midst of contentious custody disputes in which their best interest may not align with their parents' wishes. She also

avers that the existence of past and current allegations of abuse heightened the need for a BIA and that a BIA was necessary so that the children would feel free to discuss their thoughts openly. Conversely, Boehm states that it was within the court's discretion to deny a BIA request, particularly given that: (1) the judge did not find evidence of actual abuse by Boehm; (2) there was insufficient time between the motion for a BIA and the date of the hearing for a BIA to take up the case; and (3) a BIA would be an additional litigation expense neither party could easily afford.

Section 1-202(a) of the Family Law Article, Maryland Code (1984, Repl. Vol. 2019), allows the trial court to appoint a BIA in child access and custody cases, stating that "the court *may* . . . appoint a lawyer who shall serve as a best interest attorney to represent the minor child." (Emphasis added.) Under Maryland Rule 9-205.1, the court "should consider the nature of the potential evidence to be presented, other available methods of obtaining information, . . . and available resources for payment" when considering a request for a BIA. Md. Rule 9-205.1(b). The Rule provides a set of eleven factors or concerns where "[a]ppointment may be most appropriate," including, as relevant here: the request of one or both parties; a high level of conflict; past or current child abuse or neglect; and past or current mental health problems of the child or party. *Id.* The Supreme Court held in *Garg v. Garg* that "the statute merely *authorizes* a court to appoint counsel in [contested custody cases]; it does not *mandate* such an appointment." 393 Md. 225, 238 (2006).

Cotrim is correct that the above factors were at play in this case: she requested a BIA, the parties were in deep conflict, Cotrim alleged that there was child abuse, and both

parents and A.S. had general mental health concerns. However, it was still within the court's discretion to not appoint a BIA. The judge found that the abuse allegations did not have merit, which eliminated the abuse factor as a concern. Additionally, the court properly relied on the custody evaluation, performed by a court-appointed neutral evaluator, as an alternative method of presenting and protecting the children's interests. Finally, the court was within its discretion to credit Boehm's argument that he could not shoulder the additional cost of a BIA.[7] For these reasons, the trial court did not abuse its discretion in denying Cotrim's motion for a BIA.

D. Witness Exclusion and Children's Best Interest

Cotrim next argues that the court improperly precluded Dr. Rasetti from testifying about the psychological evaluation conducted on Cotrim in 2019. Specifically, Cotrim asserts that the court failed to consider the impact of the exclusion on the best interest of the children and that Dr. Rasetti could have provided useful insight into Cotrim's mental health. Boehm claims that the trial judge correctly excluded Dr. Rasetti's testimony due

[7] Cotrim relies on the Appellate Court's decision in *Garg* to support her contention that a BIA should have been appointed in this case. Our decision in *Garg* that a BIA should have been appointed, however, was reversed by the Supreme Court. *Garg v. Garg*, 163 Md. App. 546 (2005), *rev'd*, 393 Md. 225 (2006). In her argument, Cotrim also mischaracterizes *Nagle v. Hooks*, 296 Md. 123 (1983). *Nagle* established that a court must appoint a *privilege* attorney to protect children's privileges when the parents may not have incentive to do so. *Id.* at 128. In fact, until recently, child's privilege attorneys were referred to as *Nagle v. Hooks* attorneys. *See Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access* § 1.3. The court did appoint a child's privilege attorney in this case, and while such appointment did not foreclose the possibility of a BIA, Cotrim's reliance on *Nagle* is inapposite.

to the procedural defect in notice about her testimony and the lack of relevance of the testimony.

The requirement that the best interest of the children remain paramount in custody cases extends to procedural issues and discovery violations. *Rolley v. Sanford*, 126 Md. App. 124, 131 (1999). In *A.A. v. Ab.D.*, we held that the "supreme obligation [to consider the best interest of the child] may restrain the court's broad authority to exclude evidence as a discovery sanction." 246 Md. App. 418, 444 (2020). As such, "procedural defects should not be corrected in a manner that adversely impacts the court's determination regarding the child's best interests." *Id.* at 446. Trial courts may not exclude evidence as a discovery sanction unless the court ascertains what evidence would be excluded and then decides that the evidence would not "assist the court in applying the *Sanders-Taylor* factors in its determination of the best interests of the child[ren]." *Id.* at 448–49. Any sanction imposed after such consideration is reviewed for abuse of discretion. *Id.* at 449.

We find that the trial judge was well within her discretion to exclude Dr. Rasetti as a witness. In compliance with *A.A.*, after Boehm moved to preclude Dr. Rasetti's testimony, the court requested a proffer on what the testimony would entail. Cotrim's counsel responded that Dr. Rasetti would testify as to Cotrim's mental state and her alleged erratic behavior. After hearing this proffer, the court explained that the testimony was irrelevant to the central issue of the case—whether there were material changes in circumstances necessitating a change in custody—because Dr. Rasetti evaluated Cotrim prior to the parties' divorce and before the alleged change in circumstances. Therefore,

anything that Dr. Rasetti testified about would not have aided the court in its assessment of the *Sanders-Taylor* factors. The judge satisfied her mandate under *A.A.* by ascertaining what the evidence would include and deciding that it would not help in her evaluation of the *Sanders-Taylor* factors.[8] We find no error in this determination or how it was reached.

E. Custody Evaluation and Lack of Psychological Evaluation

Finally, Cotrim argues that she was unduly prejudiced because the court did not have an accurate assessment of her mental health prior to making the custody determination. Moreover, she questions the validity of the custody evaluation and the court's reliance on it, particularly because such evaluations can contain hearsay statements and because the evaluator only interviewed collateral witnesses provided by Boehm. Cotrim also contends that the court impermissibly considered her failure to comply with the order for a mental evaluation in making the custody determination. Boehm notes that he and Cotrim had the same opportunities to provide information to the evaluator, yet Cotrim failed to identify potential collateral witnesses for the evaluator to speak to.

We first address the validity of the custody evaluation and the court's reliance on its conclusions. Maryland Rule 9-205.3(f) describes the mandatory elements of a custody evaluation, which include an interview with each party and "contact with any high neutrality/low affiliation collateral sources of information, *as determined by the assessor*."

[8] Further, it is clear that the trial judge knew that she needed to consider the best interests of the children before she could exclude Dr. Rasetti's testimony: the judge explicitly mentioned *A.A. v. Ab.D.* in allowing Cotrim's other late-identified witness to testify. After taking counsel's proffer about the other witness, the court decided that the testimony could be useful to the best interest determination.

Md. Rule 9-205.3(f)(1)(F) (emphasis added). A committee note within the Rule defines high neutrality/low affiliation as "impartial, objective collateral sources of information." The Rule further gives the evaluator discretion to include "contact with collateral sources of information that are not high neutrality/low affiliation" and a mental health evaluation in the report. Md. Rule 9-205(f)(2)(A), (D).

A court has discretion to "accept—or reject—*all*, *part*, or *none* of the testimony of any witness." *Omayaka v. Omayaka*, 417 Md. 643, 659 (2011). In *Barton v. Hirshberg*, we declined to disturb the trial court's custody award based upon the court's consideration of a custody evaluation alongside the other evidence and testimony presented. 137 Md. App. 1, 31 (2001). We have also held that a court-appointed evaluator is subject to cross-examination by either party. *Draper v. Draper*, 39 Md. App. 73, 81 (1978). Our decision in *Sanders* discussed the role of experts in custody hearings, noting that "[e]vidence offered by social workers, psychologists and psychiatrists may be necessary in custody cases" but that the court "is entitled to weigh that evidence along with contradictory testimony and its own observations." *Sanders*, 38 Md. App. at 423.

We find no merit in Cotrim's arguments that the custody evaluation was somehow lacking or biased against her. The court, as part of its discretion as fact-finder, was entitled to rely upon the custody evaluation report and the testimony of the custody evaluator at trial. Within that report, the evaluator had discretion to contact whichever collateral witnesses she felt could contribute reliably to the evaluation. As such, the evaluator contacted two collateral contacts that Boehm provided and their statements were

summarized in the final report, the inclusion of which was within the evaluator's discretion; however, the record indicates that Cotrim did not provide any collateral contacts for the evaluator to interview. It is therefore unwarranted for Cotrim to attack the neutrality of the evaluation based upon the evaluator only interviewing collateral contacts associated with Boehm. Cotrim also took the opportunity to cross-examine the evaluator about the report but did not question the evaluator's neutrality. As such, the trial court was within its discretion to credit the testimony of the custody evaluator and to rely upon the evaluation itself in making the custody determination, particularly because the judge noted that the evaluation was largely consistent with other evidence.[9]

We next consider Cotrim's allegation that the court improperly considered Cotrim's noncompliance with the court order to obtain a psychological evaluation. While noncompliance with a court order is not an enumerated factor in either *Sanders* or *Taylor*, neither case holds that its list of factors is exhaustive. *Sanders*, 38 Md. App at 420 ("The criteria for judicial determination includes, *but is not limited to*, [its list of factors]."

[9] Cotrim makes an additional allegation that the custody evaluator was biased against her due to what Boehm and his collateral contacts told the evaluator. Cotrim offers no factual support for this allegation of bias apart from an anecdote from her eventual mental evaluation when Cotrim "had to refute claims that she had been fired" from her former job. We fail to see how this is an example of bias, particularly on the part of the custody evaluator, who did not conduct the mental evaluation. Rather, it seems that Cotrim was instead given the opportunity to explain the allegations made against her. Moreover, to the extent the custody evaluator made conclusions about Cotrim based upon her interviews with Boehm and others, that was the precise role of the custody evaluator: to consider the circumstances of each parent and children to make a recommendation regarding custody. If Cotrim wanted an evaluation with reports from witnesses acquainted with her, she should have provided such contacts.

(emphasis added)); *Taylor*, 306 Md. at 311 ("The enumeration of factors appropriate for consideration in a joint custody case is not intended to be all-inclusive, and a trial judge should consider all other circumstances that reasonably relate to the issue.").

We find no error in the court's consideration of Cotrim's noncompliance with the court order for a mental evaluation. Under *Sanders* and *Taylor*, the court was entitled to consider factors it deemed relevant to the best interests of the children. The judge noted in her oral opinion that the mental evaluation would have been helpful in making the custody determination, particularly because changes in Cotrim's mental state were at the core of the petition to modify custody. The judge further explained that she found Cotrim's noncompliance with the order unreasonable and emblematic of the allegations against her, including issues with her rational decision-making and failure to consider the impacts her actions have on the children. Given Boehm's claim that Cotrim was consistently uncooperative in making decisions about the children, the judge was justified in looking at Cotrim's failure to comply with the court order as further evidence of her inability to abide by the provisions of the existing custody arrangement and any future arrangements.

Cotrim makes a passing argument that the court's consideration of Cotrim's noncompliance with the order for a mental evaluation was improper because the order itself was not supported by good cause. Maryland Rule 2-423 authorizes a court to order a mental evaluation for good cause shown when a party's mental condition is in controversy. The Supreme Court has concluded that a custody dispute does not inherently require an examination of the parents' mental health; however, once a mental health issue is raised, it

is within the trial court's discretion to assess it. *Cf. Laznovsky v. Laznovsky*, 357 Md. 586, 619–21 (2000) ("[A] person seeking an award of child custody that claims to be a fit parent, does not, without more, waive the confidential psychiatrist/psychologist-patient privilege on respect to [past treatment and diagnosis records]."). It is similarly within the court's discretion to determine whether a party's mental health is material to the case. *Roberts v. Roberts*, 198 Md. 299, 302–03 (1951).

Given that the basis of Boehm's custody modification petition was largely centered on alleged changes in Cotrim's behavior and mental state, it is hard to see how her mental state was *not* material to the case. Even if Cotrim had offered contrary evidence, the disagreements as to facts regarding Cotrim's mental health would need to be addressed by the court in some capacity. That the judge decided to examine disagreements about Cotrim's mental state by ordering an independent mental evaluation was well within her discretion.[10]

[10] Cotrim points to a 2018 unreported decision from this Court that addressed a very similar issue about an allegedly improper order for psychological evaluation in a custody case. Given the unreported nature of that case, which predates the change to Maryland Rule 1-104, it may not be cited for any precedential value or as persuasive authority. *See* Md. Rule 1-104 (allowing unreported opinions issued on or after July 1, 2023, to be cited as persuasive authority if "no reported authority adequately addresses an issue before the court"). Moreover, the case reaches the precise *opposite* outcome to what Cotrim is requesting of us. In that case, we determined that the order for a psychological evaluation was proper and that the court was entitled to consider the party's noncompliance with the order when making the custody determination.

CONCLUSION

The circuit court did not err or abuse its discretion as Cotrim challenges. At the hearing, the judge laid out each *Sanders-Taylor* factor and examined how the facts in the present case applied to that factor. There was adequate evidence presented regarding the children's preferences for custody such that it was well within the judge's discretion to deny an *in camera* interview with the children, particularly given the judge's discretion in weighing the children's preferences against the other *Sanders-Taylor* factors. The court similarly did not abuse its discretion in declining to appoint a BIA in a case with a neutral custody evaluation. The court determined that the testimony of Dr. Rasetti was not relevant to the allegations underlying the request to modify custody and properly precluded the witness. Finally, the court did not err when it considered Cotrim's failure to comply with a court order for a mental evaluation when making the final custody award. For the above reasons, we affirm the ruling of the circuit court.

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