Circuit Court for Montgomery County
Case No.: C-15-FM-22-001350

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1841

September Term, 2023

MICHELLE L. PATAIL

v.

DANIEL J. WILLE

Berger,
Leahy,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: July 2, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

In this divorce and custody case, Michelle Patail ("Mother"), appeals an order granting legal and primary physical custody of their now 15-year-old child ("Child")[1] to appellee, Daniel Wille ("Father").[2] Following a three-day custody hearing, the Circuit Court for Montgomery County entered an order on August 21, 2023 (the "Custody Order"). The court determined that it would be in the best interest of Child to grant Father full legal and primary physical custody of Child, in addition to "exclusive Use and Possession of the family home" for "three years commencing October 1, 2023[.]"[3] Mother subsequently filed a motion to alter or amend the Custody Order which was denied. Mother noted this timely appeal.

For the reasons to follow, we shall affirm the judgment of the trial court.[4]

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[1] To preserve the anonymity of the child, throughout this Opinion we will identify the minor as "Child".

[2] To avoid confusion in this custody case involving cross-claims, we will use the terms "Mother" and "Father" to refer to Mother/Defendant/Cross-Complainant and Father/Plaintiff/Cross-Defendant, respectively.

[3] Prior to the final order, the *pendente lite* consent custody arrangement had provided for shared legal and physical custody of Child with Mother living in the family's residence.

[4] Father moves to dismiss this appeal on the ground that Mother "fail[ed] to consult and create a record extract, or agreed statement of the case," as required by Md. Rule 8-501(a)-(b). "Ordinarily, an appeal will not be dismissed for failure to file a record extract in compliance with this Rule." Md. Rule 8-501(m). "For an appellate court, the 'preferred alternative' is always 'to reach a decision on the merits of the case.' Consequently, this Court typically will not dismiss an appeal, even in the face of noncompliance with Rule 8-501, unless the appellee sustains prejudice." *McAllister v. McAllister*, 218 Md. App. 386, 399 (2014) (internal citation omitted). We decline to dismiss Mother's appeal because the electronically available record contains the relevant documents filed in the circuit court case, including transcripts and exhibits from the three-day custody hearing from which this appeal is taken.

ISSUES PRESENTED FOR REVIEW

Mother presents the following issues for our review, which we have condensed and rephrased as follows:[5]

I. Whether the court erred in its factual findings or abused its discretion when it awarded legal custody and primary physical custody to Father.

II. Whether the court erred in the admission of hearsay evidence without an applicable exception.

FACTUAL AND PROCEDURAL BACKGROUND

Father filed a complaint in March of 2022 seeking a divorce, custody of Child, use and possession of the family home, and child support. Mother counterclaimed, requesting primary physical custody of Child, sole legal custody or tie-breaking authority, use and possession of the home, as well as child support.

In May of 2022, the court ordered Mother and Father to participate in a custody evaluation which required information sharing and interviews of both Father and Mother. Father satisfied the Custody Evaluator's requests for information and an interview; however, Mother did not, despite having been provided with "approximately 15

[5] Condensed and rephrased from:

1. Unsubstantiated suppositions and conjecture about Appellant MP stated repeatedly as the basis for the Custody Order are clear error and an abuse of discretion. The Custody Order must be vacated.

2. The Custody Order must be vacated because it is based on unsubstantiated hearsay.

3. The Custody Order lacks basis in the Record and is against the weight of the evidence presented at trial. The Order is not in the Child's best interests.

appointment dates and times[.]" Due to Mother's lack of participation, at the Evaluator's recommendation, the court terminated its custody evaluation order as the information needed was incomplete. Subsequently, in July of 2022, a Child's Privilege Attorney was appointed. Later still, the same attorney's role was expanded to that of Best Interest Attorney ("BIA").[6]

In November of 2022, Mother and Father agreed to a *pendente lite* access order under which they shared physical custody of Child pending resolution of the divorce and custody petitions.

A. Custody Hearing

After bifurcating the custody and divorce proceedings, the court conducted a three-day custody hearing in August of 2023, at which Mother and Father were the only testifying witnesses. During the hearing, at the behest of Father, Mother, and the BIA, the Court admitted into evidence photos of Child, Child's medical records and communication with Child's doctors, text messages between Child and both parents, school records and communication with Child's teachers, focusing particularly on a 504 plan for Child.[7] Also

[6] The BIA is an attorney appointed by the court to represent this minor child's best interests in the parents' divorce action, where custody and child support were contested. *See* Md. Code, § 1-202 of the Family Law Article ("FL").

[7] Section 504 of the Rehabilitation Act of 1973 guarantees the rights of people with disabilities who are enrolled in federally funded programs, including public schools. "504 plans" ensure students with disabilities enrolled in such schools receive reasonable accommodations designed to meet their educational needs and promote their academic success. *See Section 504 Plans*, Maryland Dept. of Disabilities, *https://mdod.maryland.gov/education/Pages/Section-504-Plans.aspx* (last accessed Jun. 18, 2024).

admitted into evidence was a Child Protective Services ("CPS") Investigatory Report as well as additional exhibits. The CPS investigative report was prepared in February of 2022 and filed under seal. The report had resulted from Mother obtaining a protective order for herself and Child on February 11, 2022. That protective order was based on a dispute in which Mother reported that Father "took" Child. At the time she made the report, Mother had knowledge that, on the advice of Child's physician but against Mother's wishes, Father had transported Child to Children's Hospital in Washington, D.C. for emergency Guillain-Barre syndrome testing.

B. The Circuit Court's Opinion and Order

On August 21, 2023, the circuit court entered a Memorandum Opinion ("Opinion") and a separate Custody, Access and Use and Possession Order. In the 49-page Opinion, the court reviewed in detail the testimony of Father and Mother, as well as the documentary evidence admitted during the three-day hearing. In the Opinion, the court found that the parties were the parents of Child, who was 14 years old at the time, and had recently completed eighth grade at the Montgomery County Public Schools Virtual Academy. The court noted that Father had "moved out of the family home in March of 2022, and that [Mother] lives in the family home."[8] The court also stated that Child "presents with a mountain of serious issues[,]" which included "anxiety, tics, and movement disorders[,]"

[8] We note that the court mistakenly identified the parent who moved out of the home as "Defendant," *i.e.*, Mother. We find this to be an inadvertent and immaterial, as in the same sentence, the court correctly stated that Mother was living in the residence. Similarly, in awarding use and possession to Father, the court recognized its Order would require Mother to vacate the residence and make other living arrangements.

and explained that Child "is unable to walk without a cane or a wheelchair." The court noted that Child, who was assigned female at birth, now "prefers masculine pronouns" and per Father, identifies as a boy, although Mother continues to refer to child as "'[m]y daughter.'" The court acknowledged that while "[i]t is impossible to know" how much the parties' conduct contributed to Child's challenges, their ongoing disputes "certainly played some terrible role." The court further stated that due to Child's difficulties "one of the Court's goals is to remove [Child] from the middle of the war [between the parties] to the extent possible."

In summarizing the factual background of the case, the court took particular care in outlining the February 2022 CPS report. The court noted that because the CPS report "was filed under seal, [] a detailed summary of the report in this public opinion would be inappropriate[.]" The court then stated that it "found the report extremely helpful in understanding what this child has gone through" and summarized the relevant factual public information:

> According to the report, [Mother] blames [Father] for [Child]'s struggles. The Court finds it extremely odd that [Mother] denied saying all this in her Response to Request for Admissions (BIA Exhibit l3) when the CPS investigator cites her repeatedly and [Mother's] own testimony in Court was consistent with the CPS report. Why [Mother] would deny saying these things in BIA Exhibit 13 is very strange.
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> [Child] told the CPS investigator that [Mother] was mentally ill, and [Child] attributed all the fighting between [Mother] and [Father] to [Mother's] delusions. [Mother] attributes [Child]'s mental illness to [Child] being "brainwashed" by [Father].
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> The CPS investigator spoke with Dr. Cantor ([Child]'s pediatrician). Dr. Cantor described [Child] as "very unstable," with both somatic and mental health complaints that are intertwined. Dr. Cantor has been pressing

> this family to get mental health services for [Child] "for quite a while." About two weeks prior, Dr. Cantor recommended that [Child] be seen at the ER for symptoms indicative of Guill[ai]n-Barre Syndrome. [Mother] became quite combative and refused treatment. "Dr. Cantor stated that these behaviors with the mother are patterned as 'it took her a long time to come on board with psychiatric assistance' for the child." Dr. Cantor said that "[Mother] does not understand, and is not willing to understand, the severity of [Child]'s mental health needs . . . Mom's rejection leads to the intensification of [Child]'s symptoms."
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> Dr. Gold confirmed that Mother has made delusional or paranoid statements. She also said that [Mother] had refused [Child] an available spot with a local DBT program due to cost even though father offered to pay for the treatment.[9] The investigator criticized [Mother] for initially declining the first available DBT spot and for opposing group therapy as part of DBT. The investigator recommended a full custody evaluation, which was subsequently ordered but not completed. (See discussion above.)
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> In the interest of privacy, the Court will refrain from any further summary of the lengthy CPS Report.

After providing the factual background, the court specifically addressed the factors relevant to a determination of custody.[10] In addressing the fitness of the parents, the court stated:

> [Father] largely isolated himself from [Mother] while remaining in the family home[.] . . . [Child] lived in the middle of a 'war zone' for much of [Child]'s childhood. . . . The Court finds that [Father] stayed because he thought it was best for [Child].

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[9] DBT is an acronym for Dialectical Behavior Therapy a recognized form of therapy. Janet Feigenbaum, *Dialectical behavioral therapy: An increasing evidence base*, 16(1) J. Mental Health at 51-68 (2007).

[10] These factors, collectively termed the *Sanders-Taylor* factors, are discussed in more detail *infra*. In short, they are a non-exclusive list of factors which trial courts should consider when determining the best interests of a child pursuant to a custody determination. *See Montgomery Cnty. Dep't of Soc. Services v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986). While the court in this case made an on-the-record finding with regard to each of the *Sanders-Taylor* factors, we recount only the court's consideration of factors relevant to this appeal.

The Court finds [Father's] testimony credible. He cares very much for [Child], and seeks appropriate medical attention for the child, particularly when it comes to following the advice of professionals.

As for [Mother], the Court accepts only certain parts of her testimony as credible. She testified without contradiction that she was [Child]'s primary care giver for much of [Child]'s childhood. The Court accepts her testimony that she did much of the childcare for [Child.] . . . Both [Child] and [Father] are in her debt for all the work she performed when [Child] was very young, and she should be commended for it.

Nevertheless, the Court does not find her to be a fit parent at this time. [Mother] has repeatedly shown that she is more interested in blaming [Father] for [Child]'s struggles than in addressing them.

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As for credibility, the Court does not accept [Mother]'s descriptions of [Father]. Her complaints about how he was responsible for contaminating the family's food are bizarre. The Court does not accept her testimony about [Child] sitting shirtless in [Father]'s room. [Mother's] testimony about [Child]'s mental health struggles always focuses on why [Father] is to blame. The Court does not accept her testimony that [Father] acted improperly in taking [Child] on hikes, bike rides or kayaking. The Court understands that [Mother] "has concerns" about all these things. But these concerns are based on her own fears and not on reality.

Her failure to attend to [Child]'s school needs, including the need for a 504 plan is typical of her slowness to react to [Child]'s needs. [Mother] is worried about how things will appear on a college application instead of worrying about taking care of [Child] right now.

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This assessment is based largely on [Mother]'s own testimony. Her failure to obtain any mental health services for herself, despite the BIA asking for month after month, is worrisome. After all this time, she has done practically nothing to deal with her own mental health. The CPS report also supports the notion that [Mother]'s mental health is a major source of the tension in the family and therefore the struggles of [Child]. Her testimony is that she did not give the names of any [references] to the BIA because she did not want to lose friends. The Court finds her failure to cooperate with the BIA (both

> in failing to get mental health services for herself and in failing to provide [references]) quite troubling.
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> . . . [Mother] would have this Court believe that [Child] and [Child]'s wellbeing is the most important thing in [Mother]'s world, but [Mother] could not even find time to meet with the Custody Evaluator. . . . Her actions speak louder than her words, and her actions (in failing to cooperate with the 504 process, in failing to cooperate with the BIA, and in failing to cooperate with the Custody Evaluator) have convinced this Court that [Mother] does not appreciate the seriousness of [Child]'s condition or the seriousness of this case.
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> Moreover, the Court finds that [Mother] is unable to deal with the complexity of [Child]'s mental health struggles. . . . This is the child custody equivalent of a 5 alarm fire, and yet [Mother] cannot find time to go to the 504 meeting! [Mother] refused to let [Child] participate in DBT group therapy because she did not want [Child] associating with "bad kids." [Mother] is content to simply blame [Father] for the problems and not aggressively address them.

Discussing another factor, the character and reputation of the parties, the court found that:

> There is **NO** reliable evidence that [Father] ever abused [Child] or abused [Mother]. The Court does not believe or accept [Mother]'s explanations or accusations as true. [Mother] has convinced herself that she is a victim, . . . but her lack of credibility dooms these claims.

The court subsequently addressed the factor of the relationship established between the child and each parent:

> The evidence is that both parents love and care for [Child]. The Court finds that [Child] knows that each parent loves [Child]. . . .
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> The problem is that [Child] does not trust [Mother]. (See BIA Exhibit 1.) This lack of trust is justified, given [Mother's] actions. For example, [Mother] has falsely accused [Father] of domestic violence on two occasions. When [Father] sought emergency psychiatric help for [Child], [Mother] accused him of kidnapping. When [Child] is in need, [Mother's] response is to minimize the problem and blame [Father]. The text messages from [Child] (See Plaintiff's Exhibits 7, 8, and 9), reflect the fact that [Child] does not trust [Mother] to help [Child] in times of need. The relationship between

> [Mother] and [Child] has deteriorated to the point that [Mother] should not be in charge of [Child]'s health care.
>
> The relationship between [Child] and [Father] is not perfect but is manageable. [Father] does seek out professional help in a timely manner for [Child].

Turning to another factor, the potential disruption of the child's social and school life, the court noted:

> As for [Child]'s school life, this is a major issue in the case. [Child] is currently enrolled in the MCPS virtual academy. [Mother] wants [Child] to remain in virtual school for at least one semester and then evaluate whether [Child] is ready for in-person school at Walter Johnson High School. . . . [Child] wants to attend Walter Johnson in person. [Father] has met with the various school authorities to arrange for [Child] to attend Walter Johnson right away. The school officials have indicated that they can accommodate [Child] at Walter Johnson.
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> The Court has confidence in [Father] to make these decisions. If the professionals (both the doctors and the school) believe that it is time for [Child] to return to in person school, then he will follow their recommendation. . . . The Court has no such confidence in [Mother]. She has not presented any support for her decision to keep [Child] in virtual school. . . . No educator or doctor has said that [Child] should not be in school.

The court found that the evidence demonstrated that the "two parents cannot communicate well enough to make shared decisions[,]" and determined that "the current 50/50 arrangement is not in [Child]'s interest." Additionally, the court concluded by acknowledging that, although Mother was "doing the best she can" and that it "observed a great deal of love and concern for [Child][,]" Mother's inability to timely respond to genuine concerns was impeding Child's ability to receive necessary care and support. Based on the factual findings above and consideration of the other *Sanders-Taylor* factors, the court granted Father sole legal custody and primary physical custody of Child, as well

as use and possession of the family home. Additional facts will be included as they become relevant to the issues.

I. THE CIRCUIT COURT DID NOT ERR IN ITS FACTUAL FINDINGS OR ABUSE ITS DISCRETION IN AWARDING CUSTODY TO FATHER.

Invoking her "constitutionally protected liberty interest in the care and custody of her Child[,]" Mother contends there is "substantially uncontroverted evidence of [Father's] abuse, violence, and detrimental impact on the Child" and that the custody decision is otherwise predicated "on erroneous findings and conjecture concerning [Mother] that are not substantiated in the Record." According to Mother, "[t]he Order and its directives were intended to punish [Mother] for independently seeking medical and educational assistance for her Child." We address Mother's contentions regarding the court's factual findings, legal rulings, and ultimate custody decision in turn.

A. Standard of Review

In child custody matters, the court's responsibility is to protect the best interests of the child. *See In re Yve S.*, 373 Md. 551, 569–70 (2003); *Boswell v. Boswell*, 352 Md. 204, 219 (1998). Maryland "recognize[s] that in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent." *Id*. at 220. Although both parents have a fundamental constitutional "liberty interest in raising his or her children as he or she sees fit, without undue interference by the State[,]" such rights are "not absolute" and "may be restricted or even denied" when the child's best interest is at stake, such as when the child's health or wellbeing is effected, or when divorcing parents "are exercising those rights to opposing

ends[.]" *See Yve S.*, 373 Md. at 565–70.

In determining a child's best interests, Maryland appellate courts have set forth a list of non-exhaustive factors "that a court must consider when making custody determinations[.]" *Azizova v. Suleymanov*, 243 Md. App. 340, 345 (2019) (citing *Montgomery Cnty. Dep't of Soc. Services v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986). None of the *Sanders-Taylor* factors are dispositive, and in determining custody, "the trial court should examine 'the totality of the situation in the alternative environments' and avoid focusing on or weighing any single factor to the exclusion of all others." *Jose v. Jose*, 237 Md. App. 588, 600 (2018) (quoting *Best v. Best*, 93 Md. App. 644, 656 (1992)).

On appeal, this Court reviews a child custody decision under "three interrelated standards[.]" *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 246 (2021). First, '"[w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies."' *Id*. (quoting *In re Yve S.*, 373 Md. at 586). Next, "if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Id*. (citation omitted). Finally, the circuit court's "ultimate conclusion" regarding custody, when predicated on "factual findings that are not clearly erroneous" and "sound legal principles[,]" will be affirmed unless "there has been a clear abuse of discretion." *Id*. (citation omitted).

Trial courts are entrusted with "great discretion in making decisions concerning the best interest of the child." *Petrini v. Petrini*, 336 Md. 453, 469 (1994). "We will only disturb a decision made within the discretion of the trial court 'where it is apparent that

some serious error or abuse of discretion or autocratic action has occurred.'" *J.A.B.*, 250 Md. App. at 247 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). As this Court has emphasized, child custody cases are inherently difficult and complex, and due to a trial court's superior ability to view the witnesses and make credibility determinations, "we will set aside a [custody] judgment only on a clear showing that the [trial court] abused [its] discretion." *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000). Appellate courts "rarely, if ever, actually find a reversible abuse of discretion on this issue." *McCarty v. McCarty*, 147 Md. App. 268, 273 (2002).

B. The Record Does Not Support Mother's Challenges to the Circuit Court's Factual Findings.

Mother contends that the circuit court committed clear factual error in resolving several disputed facts. We are mindful that "[t]he clearly-erroneous standard is a deferential one, giving great weight to the trial court's findings[,]" because the trial judge has the opportunity to observe the testifying witnesses when making credibility findings and resolving conflicts in the evidence. *See Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (internal quotation marks and citation omitted). Factual findings "are not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Azizova*, 243 Md. App. at 372. (internal quotation marks and citation omitted). Addressing the specific findings challenged by Mother, we conclude the court did not err.

1. Mother's participation in 504 planning for high school

According to Mother, the court erred in finding that she "could not find time to go to the 504 meeting" concerning plans for Child's in-person attendance at Walter Johnson

High School. To the contrary, Mother asserts, she "spent a lot of time on the Child's 504 plan[,]" as "substantiated in both parties' testimony." Specifically, she points out that she attended the February 2022 meeting with school officials to start 504 accommodations, and "attended several 504 meetings[,]" as well as "had conversations" with Child's school counselor over the course of the subsequent year and a half. In Mother's view, any meetings she missed "were for minor amendments to 504 accommodations." Mother contends that her "involvement was essentially discounted" by the court due to the erroneous supposition that she "could not find time for the Child's 504 Plan."

The record does not support Mother's characterizations of the court's factual findings as prejudicially erroneous, speculative, or punitive. To the contrary, the court thoroughly summarized the pertinent testimony and documents, explaining that Father testified that Mother did not attend multiple 504 meetings, and was hesitant to seek formal accommodations because "it might look bad on college applications in the future." By contrast, the record indicated, and the court concluded, that Father consistently undertook 504 planning steps to facilitate Child's return to a classroom setting.

Father testified that he received a copy of the initial 504 determination, which was implemented as soon as Father went to Child's middle school and signed the document. He also attended all the ensuing 504 planning meetings. The next school year, while Child went to Montgomery Virtual Academy, Father continued his efforts to secure accommodations which would allow Child to attend classes in-person when beginning high school in August of 2023.

The court also reviewed testimony provided by Mother during Father's case-in-

chief. With respect to the 504 planning, the court recounted that email and text messages had alerted Mother that Child wished to attend in-person school, but Mother took no immediate action, and instead "tr[ied] to assess whether [Child was] being realistic" in Child's desire to attend in-person school and noted her "concerns" about the possibility of Child attending an in-person school. In her own testimony, Mother agreed that she was "unable to make it to the [504 Plan] meeting because of a scheduling conflict[,]" but otherwise took the process "very seriously" and denied avoiding the issue.

The court also summarized Mother's testimony during cross-examination by the BIA regarding her email dated May 1, 2023 (BIA Exhibit 17), in which Mother admitted that, while Father and Child's counselors were planning for Child to attend in-person school at Walter Johnson starting in August 2023, Mother arranged for Child to be "enrolled in the virtual academy as of May 1, 2023."

In evaluating the "[p]otential disruption of the child's social and school life" from a change in custody and residence, the court found that "[Child's] school life . . . is a major issue in the case." The court concluded that Child should remain in the family home with Father based in part on Father's successful 504 planning with school officials and doctors for Child to attend Walter Johnson in-person. Mother's preference to delay that plan until the second semester based on her "concerns" undermined the court's "confidence" in Mother to make "appropriate adjustments" if "problems develop" while Child is attending Walter Johnson, as "both the doctors and the school" recommend.

When viewing the court's findings regarding the 504 planning in context, we conclude the court did not predicate its custody decision on Mother's admitted failure to

attend all the 504 planning meetings. Nor did it "punish" Mother for missing the more recent 504 meetings when plans were being made for Child to start at Walter Johnson High School. Instead, the court cited Mother's admitted absences from 504 meetings and her reluctance for Child to begin high school in person, in accordance with the wishes of Child and Child's health care team, as reason for the court's lack of "confidence" in Mother to respond in a timely and appropriate manner to future 504 planning.

The evidentiary record amply supports the court's factual findings regarding Mother's reluctant and intermittent participation in 504 planning. In turn, those findings support the court's broader conclusion that Mother's "actions (in failing to cooperate with the 504 process, in failing to cooperate with the BIA, and in failing to cooperate with the Custody Evaluator)" collectively indicate that she "does not appreciate the seriousness of Child's condition or the seriousness of this case." Accordingly, the court did not err in concluding that Mother's failure to cooperate in 504 planning supports the premise that Child's best interests would be furthered in Father's custody.

2. The court-ordered custody evaluation

In assessing the fitness of both parents, the court found the Custody Evaluator's memorandum to be "[o]ne of the most important items of evidence[,]" explaining that Mother "could not even find time to meet with the Custody Evaluator[,]" which was indicative of being unable to sufficiently prioritize Child's best interests.

Mother challenges "the unsubstantiated supposition that [she] 'refused to cooperate' with" and "'could not find time' to meet with the Custody evaluator[.]" She maintains the court's finding is erroneous, citing her own testimony that she "did not decline" to provide

any information the custody evaluator asked for and that she "provided the Custody Evaluator with several dates for a meeting[,]" but the Custody Evaluator "was not available" on the dates Mother suggested. While tacitly conceding that she did not schedule a meeting with the court-appointed Custody Evaluator, Mother blames that failure on her busy schedule of work and parenting, and on the evaluator's unavailability. In Mother's view, the circuit court penalized her for being unavailable due to her responsibilities as the primary parent and argues that she was forced to choose between meeting the court's scheduling requirements and adequately caring for Child.

Mother mischaracterizes or misreads the court's findings. The court correctly found that Father "met with the Court's Custody Evaluator and did not decline to give the Evaluator any information that was requested." By contrast, the court also cited a "Custody Evaluation Memorandum" dated October of 2022 and determined that Mother "has not participated in the evaluation" even though "[s]he was provided with approximately 15 appointment dates and times, none of which reportedly worked for her schedule." Due to Mother's lack of participation, the evaluator filed a memorandum requesting that the custody evaluation be terminated. After Mother was "given a chance to respond[,]" the court granted the request. The court then cited Mother's failure to cooperate with the evaluator, consistent with her failures to assist educational and mental health providers, as support for its finding that Mother "does not appreciate the seriousness of [Child]'s condition or the seriousness of this case."

The record supports this finding. More than five months after Mother was ordered to participate in the custody evaluation, she still had not scheduled a meeting with the

Custody Evaluator. Nor did she take steps to make Child available to meet with the evaluator. Mother testified that she "was being cautious" about the court evaluation. The court did not err in finding that Mother's "explanations" for failing to cooperate with the court evaluation "make no sense," particularly when viewed in light of Child's "struggles" having reached "the child custody equivalent of a 5 alarm fire" by this time, where Child's movement difficulties were compounded by Child's history of mental illness and self-harm. This record supports the court's consideration of Mother's failure to timely meet with the Custody Evaluator as another factor evidencing Mother's inability to timely understand and address Child's urgent and complex needs.

3. Child's dialectical behavioral therapy

Mother next contends that the Custody Order is based on erroneous findings that she "refused to let the Child participate in DBT" and caused a delay "in the Child starting DBT[.]" Mother again misstates and misunderstands the record and the court's factual findings.

The court expressly recognized Mother's testimony that she "did not refuse DBT therapy" but that, "after extensive research[,]" she did not want Child in a group session that she believed would expose Child to "the worst kids in the county." Rather, Mother "wanted [Child] to consider other alternatives" and "did not see any improvement in [Child]" resulting from the therapy. Mother's testimony is consistent with this statement expressing her "concerns" based on her own "research."

Regarding the recommendations by Child's mental health providers that Child begin dialectical behavior therapy, the court recounted that Father testified that after Child had

self-harming incidents, Child's treating therapist advised "both parents that [Child] needed a higher level of care" than Child's treating doctors could provide, and recommended DBT, which was started in March of 2022. The court noted that the CPS investigator who spoke with Child's pediatrician and therapist "criticized [Mother] for initially declining the first available DBT spot and for opposing group therapy as part of DBT." In addition, the court, in its "final observations" acknowledging Mother's "great deal of love and concern for [Child,]" explained that Mother's pervasive fears have "paralyzed [her] from acting. She calls it having 'concerns.'" The court found that Mother's many concerns were "genuine, but they are overstated, and they are causing [Mother] to ignore the obvious concerns right in front of her." Identifying situations in which Mother "was 'assessing' . . . because she was being careful[,]" the court pointed out that "[w]hile she 'assesses' whether a particular DBT therapist is best, [Child] goes without treatment."

The court did not mischaracterize Mother's actions or stated position on DBT, but instead recognized that Mother's "concerns" caused delay in beginning therapy and that her opposition to group DBT resulted in discontinuation of that therapy mode. In this context, the court did not err in considering such evidence or inferring from it that Mother's reluctance toward DBT was obstructive and contrary to Child's best interests.

4. Mother's ability to address Child's mental health challenges

Mother characterizes the court's conclusion that she "could not deal with the Child's mental health issues" as "conjecture" that "is against the weight of the uncontroverted evidence" and one that effectively penalizes her for "requesting additional information about their Child's health or education[.]" We again disagree. The challenged finding

reflects the sum of the court's credibility determinations, resolution of evidentiary conflicts, weighing of the evidence, and drawing of inferences. The court made its own observations of both parents, based on their testimony over three days. Those assessments aligned with information in reports from the BIA and CPS, and collectively persuaded the court to find that Child's health needs were urgent, serious, and insufficiently addressed by Mother.

The court did not err or abuse its discretion in relying on such evidence in determining that Father should have sole legal and primary physical custody. Over the course of the two years preceding the hearing in August of 2023, Mother had at times denied, questioned, or downplayed Child's mental health challenges, and delayed or failed in obtaining the help recommended by Child's health care providers. By contrast, Father acknowledged Child's serious condition, then made timely arrangements to obtain the recommended help, which including DBT, gender affirming, and other therapies, as well as 504 accommodations enabling Child to return to the classroom. We find no error in those underlying factual findings and no abuse of discretion in the ultimate custody decision predicated on them.

5. Other challenged findings

In her brief, Mother also challenges a litany of other factual findings made by the court as "conjecture and supposition" that tainted the circuit court's conclusions and orders. Specifically, these include findings that Mother blamed Father for Child's mental health challenges, that Mother did not sign a therapist release form, that Father and Mother's co-habitation was fraught, and that Mother did not follow the BIA's non-legally required

requests. Upon our review of the record, these factual findings have sufficient evidentiary support.

With regard to the conclusion that Mother blamed Father for Child's mental health struggles, the court found it significant that when Mother was asked whether Child's mental health struggles are Father's fault, she "initially said yes, but then said, 'not all.'" Later, Mother testified that she "believe[s] that a lot of the behavior and abuse" allegedly committed by Father "contributed to [Child]'s anxiety," whereas her role was limited in contributing to "the tension in the household." Here, Mother challenges an inference drawn by the court, which was based in significant part on Mother's own testimony. This Court does not revisit such inferences because it is the trial court's responsibility to make the credibility determinations and factual findings underlying them. *See Gizzo*, 245 Md. App. at 200–01.

Similarly, the record does not show that the court erred in concluding that Mother did not sign a release form for Child's therapy. To the contrary, Mother testified that she could not recall whether she signed releases for the school counselor to talk with Child's mental health providers. Mother also testified that she did not sign a release for a licensed clinical social worker referred by the BIA because her "preference was to find . . . a licensed psychologist."

As to Mother's claim that the court erroneously concluded that she asked Father to leave the family home, Mother misreads the record. The court accurately recounted Father's testimony that "[i]n June of 2009, his marriage to [Mother] began to deteriorate when she accused him of stealing diamonds and of adultery." Although Father testified that

he consulted an attorney, stayed in the house, and moved into another bedroom, he also felt that this change "seemed to help the situation" and that Mother "was fine" most of the time, except for her occasionally puzzling "accusations" that he was "a drug dealer, a white supremacist, and" was "poisoning her food."

Nor do we agree with Mother's contention that the court "faulted [her] repeatedly for not following the BIA's directives[.]" In so asserting, Mother mischaracterizes the BIA's recommendations and requests as "directives" and the court's conclusions about Mother's refusals as "faulting" her for failing to comply. Rather, the court appropriately recognized that Mother denied the BIA's repeated requests to seek support for her own mental health, which is an appropriate consideration for the court when evaluating Mother's fitness to act in the best interests of Child.[11] At no point did the court state or imply that the BIA's suggestion was a legal requirement Mother was obligated to follow.

Due to the presence of competent evidence in the record supporting the court's determination of contested factual findings, we discern no errors as to the court's resolution of the factual questions of this case. *See Wagner v. Wagner*, 109 Md. App. 1, 39–40 (1996).

C. The Circuit Court Did Not Abuse Its Discretion in Granting Father Sole Legal and Primary Physical Custody.

In challenging the ultimate custody decision, Mother contends that the Order "is not in the Child's best interests," "lacks basis in the Record[,]" and is "against the weight of

[11] Indeed, during the hearing, Mother testified that she had not sought out mental health support services and had yet to contact any of the references whom she had "researched . . . on the internet," claiming that she was "having a hard time finding somebody." She also admitted that was "the same answer" she had given the BIA eight to nine months earlier.

the evidence presented at trial." In her view, the court abused its discretion because Father's "own words and actions demonstrate that [Mother] should have remained primary physical custodian and retained legal custody." She again asserts that the Custody Order "is directed at punishing [her] instead of determining the Child's best interests."

We are not persuaded that the circuit court abused its discretion in concluding that it is in Child's best interests for Father to have sole legal and primary physical custody, along with use and possession of the family residence and Child's beloved cat. As we explained when addressing Mother's challenges to factual findings, the record supports the court's diligent application of the *Sanders-Taylor* custody factors and includes ample support for the court's determination that sole custody of Child to Father would advance Child's best interests. *See Jose*, 237 Md. App. at 600 ("The best interest standard is *the* dispositive factor on which to base custody awards." (internal quotation marks and citation omitted)). The record includes evidence sufficient for the court to conclude that Mother's fitness to parent Child had been materially diminished by her unjustified blaming of Father for Child's serious health challenges, her difficulties in decision-making impacting Child's therapy and education, and the unaddressed concerns about Mother's own mental health. The court evaluated the testimony of Mother and Father, as well as records such as emails, text messages, audio and video recordings from police encounters, and reports from CPS and the BIA. Collectively, this evidence supports the court's credibility determinations and factual findings that on critical occasions and in multiple forums, Mother failed to take parenting actions that the court, Child's medical and educational providers, and the BIA identified as reasonable, necessary, and at times urgent to address Child's needs. Among

the most critical were Mother's failure to comply with a court-ordered custody evaluation, lack of participation in 504 planning to assist Child in securing educational accommodations, and denial of or delayed consent to a range of medical or mental health care assessments and therapies.

Moreover, the court determined that Mother's testimony was not credible and rejected her allegations that the recreational activities Father did with Child, including hiking and kayaking, were unsafe; that Father absconded with Child when he followed medical advice by taking Child for Guillain-Barre testing at Children's Hospital; that Father was physically abusive; and that Father was present while Child was in his room, not wearing a shirt. This Court defers to the circuit court's resolution of conflicting evidence and credibility questions. *Spencer v. State*, 450 Md. 530, 549 (2016) ("We give due regard to the fact finder's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." (internal quotation marks, brackets, and citation omitted)).

Ultimately, the record supports the circuit court's finding that Mother's continued resistance—to therapies, educational planning, and other measures recommended by Child's health care providers—prevented Mother from appreciating and addressing Child's urgent needs. The evidence further supports the court's finding that at critical times when Child was in crisis, Mother's concerns and fears resulted in a failure to timely respond to efforts by Father and others to help Child obtain legal, medical, and educational resources.

Likewise, the evidence supports the circuit court's assessment that Mother's focus on what she viewed as wrongdoing by Father interfered with her ability to parent and

Father's relationship with and access to Child. Those are valid considerations in the court's evaluation of what custody arrangements are in Child's best interests. *See Kadish v. Kadish*, 254 Md. App. 464, 505–06 (2022) (affirming order granting father sole legal and primary physical custody, based on mother's failure to comply with court orders regarding custody exchanges and making multiple unsupported reports of abuse, which harmed child and interfered with father's custody); *Wagner*, 109 Md. App. at 33 (affirming order granting father sole legal and primary physical custody in part due to mother "attempt[ing] to discontinue [the father's] visitation[,]" in a manner that "vitiated" "the presumption of continuity and stability in favor of the original custodial parent").

For the reasons articulated above, the court did not err in its factual determinations, nor did it abuse its discretion in concluding that the custody order was in Child's best interests.

II. THE CIRCUIT COURT DID NOT ERRONEOUSLY ADMIT HEARSAY EVIDENCE.

A. Contentions

Mother contends that the Custody Order must be vacated because it is based on "inadmissible" and "unsubstantiated" hearsay. (emphasis omitted). In particular, Mother cites to portions of the Custody Order that summarize the CPS report, acknowledge the BIA's report of Child's "observations" and preference for conditional "supervised contact with" Mother, and identifies the "text messages from [Child]" in Plaintiff's Exhibits 7-9

as "reflect[ing] the fact that [Child] does not trust [Mother] to help [Child] in times of need[,]" as an improper basis for the Order. [12]

B. Standard of Review

Although trial courts generally have broad discretion over admission of evidence, "whether particular evidence is hearsay or whether it is admissible under a hearsay exception" is a legal question to which appellate courts do not defer. *See Gordon v. State*, 431 Md. 527, 538 (2013). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by these [Maryland R]ules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802; *Bernadyn v. State*, 390 Md. 1, 8 (2005). "Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Id.* at 7–8.

C. Analysis

Here, the court did not err in admitting the CPS report under the hearsay exception for public reports. Maryland Rule 5-803(b) provides that "a memorandum, report, record, statement, or data compilation made by a public agency setting forth . . . matters observed

[12] Mother also asserts that the court relied on impermissible hearsay in its Opinion and Order when on page 44 of the Opinion the court allegedly makes "[v]ague references to unnamed doctors and other professionals[.]" While the court does reference unnamed professionals on the identified page, it is for the purpose of articulating the court's conclusion as to a *Sanders-Taylor* factor, specifically that Father will rely on professionals to guide his decisions. The court did not state that a specific unnamed professional provided a statement or belief that the court relied on for the basis of its opinion. Thus, it is a forward-looking generalization, not an evidentiary basis for the Order requiring review.

pursuant to a duty imposed by law, as to which matters there was a duty to report" is admissible. *See* Md. Rule 5-803(b)(8)(A). Per the Supreme Court of Maryland:

> When such a duty clearly exists, the general doctrine [], that a witness should have personal knowledge, need not stand in the way, for . . . it has its conceded limitations; and where the officer is vested with a duty to ascertain for himself by proper investigation, this duty should be sufficient to override the general principle. It is true that due caution should be observed before reaching the conclusion that the law has in fact in a given case intended to invest the officer with such an unusual duty. But when it clearly appears that a duty has been prescribed to investigate and to record or certify facts ascertained other than by personal observation, then it follows that, in accordance with the general principle of the present exception, the statement thus made becomes admissible.

Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581 605–06 (1985) (citation omitted).

In this civil action, the CPS report was properly admitted because it was prepared by a public agency (*i.e.*, Montgomery County Department of Social Services) regarding "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report" (*i.e.*, a mandatory Child Protective Services investigation and report triggered by Mother's request for a protective order covering the Child).[13] Md. Rule 5-803(b)(8)(A). Thus, the summaries of interviews with Mother, Father, and Child, as well as Child's

[13] On February 11, 2022, as a result of Father taking Child to the Children's Hospital Emergency Room for specialized testing per Child's physician, over Mother's objection, Mother obtained an *ex parte* temporary protective order for her and Child. By law, this triggered a referral to Child Protective Services to investigate, as mandated by FL § 4-505(e) ("Whenever a judge finds reasonable grounds to believe that abuse of a child . . . has occurred, the court shall forward to the local department a copy of the petition and temporary protective order" and "the local department shall . . . investigate the alleged abuse as provided in . . . Title 5, Subtitle 7 of this article" and "send to the court a copy of the report of the investigation" before the final protective order hearing.). After Father agreed to leave the home, Mother dismissed the action before the final protective order hearing.

medical providers and other witnesses, including their out-of-court statements, could be considered by the court because they were part of a report prepared by CPS "pursuant to a duty imposed by law[.]" *See, e.g. In re H.R.*, 238 Md. App. 374, 405–07 (2018) (finding that Court Reports prepared for a child access hearing which "largely comprise[d] factual recitations about routine matters, such as the children's academic progress, their medical appointments, the dates and times of contacts between the Department and parents, and referrals made for the parents and the children" were "presumptively admissible under Rule 5-803(b)(8)(A)").

To be sure, much of the evidence from that report was cumulative of other admissible evidence presented to the court. Specifically, Father and Mother both testified extensively about the events surrounding the protective order proceedings, as well as other family dynamics covered by the CPS report, including their communications with each other and Child, in addition to communications about Child's mental and physical health and educational history and plans. For example, the court, in evaluating one of the custody factors, expressly stated that its "assessment is based largely on [Mother]'s own testimony," in which she acknowledged that, despite the BIA and CPS reports stating that her "mental health is a major source of the tension in the family[,]" Mother still had not "obtain[ed] any mental health services for herself[.]"

With respect to Child's text messages and the parties' testimony about their communications from Child, the court did not admit those out-of-court statements for their truth, but to establish Child's perception of Child's relationships with Mother and Father. *See generally Battle v. State*, 252 Md. App. 280, 312 (2021) (recognizing that one of "[t]he

threshold questions when a hearsay objection is raised [is] . . . whether [the evidence] is offered for the truth of the matter asserted" (internal quotation marks and citation omitted)).

Specifically, the court cited these text messages, in which Child was seeking help from Father while in Mother's custody, not as evidence that what Child said was true, but as evidence that Child reached out to Father because Child did not trust Mother to help when help was needed. To the limited extent Mother objected on hearsay grounds, the court did not err in admitting the text messages as non hearsay evidence of Child's relationships with Mother and Father, then allowing Mother to testify about those texts, including those relating to an incident when Child was lying on the floor and unable to get up. *See Ashford v. State*, 147 Md. App. 1, 75 (2002) ("[W]hen a statement is offered for some purpose other than to prove the truth of the matter asserted therein, it is not hearsay.")

Thus, we conclude that the court did not erroneously admit hearsay evidence by admitting the CPS report and the test messages between Child and both parents.

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