UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0721

September Term, 2015

JESSICA GILLIGAN

v.

SEAN GILLIGAN

Woodward,
Kehoe,
Leahy,

JJ.

Opinion by Woodward, J.

Filed: March 14, 2016

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

The instant appeal arises out of the Circuit Court for Anne Arundel County, where appellant, Jessica Gilligan ("Mother"), and appellee, Sean Gilligan ("Father"), have been engaged in a custody dispute. On April 24, 2015, after a two day trial, the court ruled in favor of Father and switched primary physical custody of the four-year-old child ("the Child") from Mother to Father. The court also ruled that the parties were to maintain joint legal custody, but that Father would have tiebreaking authority.

On appeal, Mother presents two issues for our review, which we have rephrased:[1]

> 1. Did the trial court err or abuse its discretion by failing to grant Mother's motion for a continuance to take testimony of the court-appointed custody evaluator and consider such evaluator's report?
>
> 2. Did the trial court commit prejudicial error in admitting videos of Mother's interrogation of the Child?

We answer both questions in the negative, and accordingly, affirm the judgment of the circuit court.

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[1] The issues, as presented in Mother's brief, are:

> 1. Whether the trial judge erred by failing to reserve his final opinion in the matter in order to hear the testimony of the court-appointed custody evaluator and consider the custody evaluation unit's report?
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> 2. Whether the Court erred in admitting video recordings that although relevant to the proceedings, were far more prejudicial than probative?

BACKGROUND

On May 13, 2013, Mother and Father were granted a Dual Judgment of Divorce in the Superior Court of New Jersey. Incorporated in the divorce judgment was a settlement agreement between the parties. The settlement agreement, among other things, granted Mother and Father "joint legal custody of the minor child of the marriage," and designated Mother as the "parent of primary residence" and Father as the "parent of alternate residence." The agreement also set forth the division of parenting time.[2]

Over the course of the next year, the relationship between the parties grew increasingly hostile, particularly with respect to issues related to the raising of the Child. On January 28, 2014, Father filed in the Circuit Court for Anne Arundel County a Complaint to Modify Custody, wherein he requested sole physical and legal custody of the Child. On March 28, 2014, Mother filed a Counter-Complaint for Modification of Custody, Visitation, and Child Support. In the counter-complaint, Mother sought sole legal and physical custody of the Child.

On May 13, 2014, prior to the custody modification trial, Mother filed a Motion for Emergency and *Ex Parte* Relief. Her motion alleged that Father was causing "significant emotional harm" to the Child by making allegations of sexual abuse against Mother, and that

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[2] That Order was subsequently registered with the State of Maryland on January 10, 2014.

she possessed a "discussion of these matters on video." Mother asked the court to suspend all visitation for the Father.

A hearing on Mother's emergency motion was held before a master on May 14, 2014. At that hearing, Mother reiterated her claim that Father was mentally abusing the Child by forcing the Child to make statements against Mother. At the conclusion of the hearing, the master recommended denial of Mother's emergency motion, finding that Mother "failed to produce any information that the minor children [sic] are at imminent risk of harm under the current custody arrangement. The [M]other is unable to show any psychological harm to the minor child as a result of spending time with [Father]." On the same day, the circuit court ratified the master's findings and issued an Order denying Mother's emergency motion.

On August 26, 2014, a pre-trial conference was held, at which time the trial court signed an Order for Custody Evaluation. The Order included the following "[r]eferring question[s]: Does child need psych [sic] evaluation or child sexual abuse specialist[?] –Do parents need psychological evaluation? (Determine w/in 30 days)." The Order also provided that "the evaluator shall have the discretion to expand the scope of the evaluation."

On December 24, 2014, the court-appointed custody evaluator, Terri Ann Harger, issued a report that recommended that neither the parents nor the Child needed a psychological evaluation at that time. Harger also stated that "[i]t does not appear necessary for the [ ] [C]hild to meet with a Sexual Abuse Specialist at this time." Harger, however, noted that her evaluation was incomplete at that time. On April 8, 2015, Harger submitted

an Addendum to Summary of 12/24/14 Modification Custody Evaluation. In the addendum, Harger reiterated her previous recommendations that neither the parties nor the Child needed a psychological evaluation, nor did the Child need to meet with a sexual abuse specialist. The addendum also contained several new recommendations, principal of which were that a "Privilege Attorney" should be appointed for the Child so that Harger could speak to the Child's therapist, and that "[t]he parties will continue to maintain Joint Legal Custody with [Mother] continuing to maintain primary care per the 05/13/13 Order from New Jersey."

A trial on the merits of Father's Complaint to Modify Custody was conducted from April 23-24, 2015. Seven witnesses testified at the trial, including Mother and Father. Harger did not testify at the trial. The testimony adduced over the course of the two day trial revealed hostility between the parties and disagreements over how to raise the Child.

On April 24, 2015, the trial court issued an oral ruling in favor of Father. In reaching such result, the court considered the evidence in light of the "list of factors in cases such as *Montgomery County Department of Social Services v. Sanders*[, 38 Md. App. 406, 420 (1977)] and *Taylor v. Taylor*[, 306 Md. 290, 303 (1986)]." For the most part, the factors did not tend to favor one party over the other. In particular, the court found neither parent to be unfit. The court acknowledged that both parents wanted to have the majority of the time with the Child, and the court gave little weight to the Child's preferences due to her young age. The court found that the Child "has a strong relationship with both parents." The court also

noted that there was no great disparity in the parties' finances, with Mother making a little over $100,000 a year, and Father earning around $76,000.

The trial court then addressed what it considered to be the key issue in the instant case: "character and reputation of the parties." The court found Mother to be of a "more complicated character" than the Father. The court observed that Mother suffers from an anxiety order, for which she takes medication. The court noted that Mother's extramarital relationship led to the end of the marriage. The court also recognized that the Child is known to suck her fingers when nervous, and that the habit tended to manifest itself only in pictures and videos with Mother. "[P]erhaps the largest concern" to the court regarding Mother's character was the videos that Mother took of the Child. The court opined that it was "[i]nappropriate to be taking full frontal nudity body shots of a three- or four-year old" where the only purpose seemed to be to use those videos against Father in their ongoing custody battle.

The circuit court concluded its oral ruling with the following:

> Putting all these things together, the Court does have very serious concerns about [Mother's] character as it relates to caring for this child. I have no doubt that she loves this child greatly. **But as her character is expressing itself as a mother, I think that what she has done is basically put her own ego and her own self-gratification above the need to co-parent and cooperate** so that the child is allowed to have two parents that she has full benefit of. She seems to have been working on building the case, on making a record of this, against [Father] before, as Counsel says, the ink was dry, within a month after the time that the divorce judgment was completed. And when she comes to Court with insufficient evidence

on the allegations of abuse, again, it is notable to the Court that she was asking for a complete termination of contact between [Father] and his daughter.

The photos here are notable in that there are so many closeup photos of this child with Mom right in the picture, like the mother and the child's interests are inseparable. They're in the frame so tight that it almost looks like one person. And it seems to me that's the way that [Mother] tried to co-parent, to say if you have alienated me, if my relationship with you is cut off, then my child's relationship with you should be cut off, and I'm, you know, regarding her as alienated also.

The Court recognizes there were some, you know, some episodes of good parenting. But putting it all together, **the Court does think that it would be in the best interests of [the Child] to make a change as to the custody and child access arrangements**, to give her more time with her dad and to permit him to do more of the decision making instead of the other way around because I don't think it has been working out very well from [the Child's] point of view to give her mother the priority and the control . . . .

*   *   *

Basically, what the Court thinks it's appropriate to do is to almost flip the custody arrangements to provide that primary care and time and residence of the child should be at her dad's house. Maryland is not a state that has maternal preference, nor is the rest of the country now. If we set that aside, I don't think, with the evidence here, that it would surprise anyone for the Court to make that decision.

I also think that joint legal custody may be continued, but there should be a tiebreaker capacity because of the difficulty the parties have had. If the parties are not able to reach a joint decision, we'll let [Father] have the final say. By their agreement, he already has the final say on educational matters. By common sense, if the child is spending more time at his house, and if he has a

> registered nurse at his elbow, I think he should be able to make good decisions for her on medical matters.

(Emphasis added).

On May 19, 2015, the trial court filed its Order to modify custody and support, awarding primary physical custody to Father, with the parties maintaining joint legal custody, but Father having tiebreaking authority. On June 17, 2015, Mother filed her timely Notice of Appeal. Additional facts will be set forth as necessary to the resolution of the issues raised in the instant appeal.

DISCUSSION

I. Motion to Continue

"The general rule of law is that the granting or denying of a continuance is in the sound discretion of the court and unless the judge acts arbitrarily or prejudicially in exercising that discretion, his action will not be interfered with on appeal." *Brooks v. Bast*, 242 Md. 350, 354 (1966).

Mother claims that the trial court abused its discretion by failing to grant her motion for a continuance so that the court could hear Harger's testimony and consider her report. Mother points out that the court initially reserved on the issue, but then never again addressed the continuance before giving its oral opinion at the conclusion of the trial. Mother claims that her counsel did not attempt to subpoena Harger, because she was on leave at the time of

the trial. Mother argues that it was prejudicial to not have Harger testify, because she would have provided a perspective from a neutral, court-appointed expert.

Father counters that the decision on whether to grant the continuance is left to the sound discretion of the trial judge. Father points out that the court said that it would reserve on the continuance and revisit it if there were "obvious gaps" at the end of the evidence, but that Mother's counsel never raised the issue again. Father also argues that Mother did not employ reasonable diligence to obtain the witness's presence, because she never issued a subpoena for Harger. Father concludes that justice did not require a continuance in this case, because the evidence produced at the trial was sufficient for the court to give a thoughtful and detailed analysis of all the relevant factors in its oral opinion.[3]

As previously stated, Harger issued a report in December of 2014 recommending that neither the parents nor the Child needed a psychological evaluation and that it was not necessary for the Child to meet with a Sexual Abuse Specialist at that time. In April of 2015, Harger submitted an addendum to her report reiterating the aforesaid recommendations and

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[3] Father also argues that Mother misunderstood the role of the custody evaluator in this case, which was only to determine whether the parents or child required mental health evaluations or a sexual abuse evaluation. Father contends that it "was never supposed to be an in depth custody evaluation (with detailed recommendations) in the first place." Father, however, overlooks the part of the Order for Custody Evaluation that granted the evaluator the "discretion to expand the scope of the evaluation." Harger did in fact expand the scope of the evaluation in the addendum to her report.

adding, among other things, a recommendation that the original agreement of the parties for joint legal custody with the Mother having primary care of the Child be maintained.

On April 23, 2015, at the beginning of the trial on the Father's Complaint to Modify Custody, the trial court asked the parties if they were going to stipulate to Harger's report or if Harger needed to testify. Mother's counsel asked that there be a stipulation to the report. Father's counsel referred to the report as "a joke" and "a disaster" and requested that Harger be available for cross-examination. Mother's counsel informed the court that he did not subpoena Harger for the trial because Harger was on leave. Mother's counsel then made an oral motion for a continuance so that Harger could testify.[4] Father's counsel objected to the continuance. The court stated: "I'm inclined to reserve on the continuance. We'll see what the evidence is and *if there are obvious gaps* that, you know, once the Court has heard the evidence Counsel can point to and say, at the conclusion of the evidence that we have available today." (Emphasis added).

Contrary to the trial court's invitation, Mother's counsel did not point out during trial any "obvious gaps" in the evidence that could be filled by Harger's testimony. Indeed, Mother's counsel never raised the issue of a continuance again. When a break was taken during the first day of the trial, the court asked:

[4] There was no written motion for a continuance filed by Mother in advance of the trial.

THE COURT:	Any other housekeeping concerns from Counsel until we have the lunch break?
[MOTHER'S COUNSEL]:	No, I'm fine.
[FATHER'S COUNSEL]:	No.

At the close of evidence on the second day of the trial, the court asked:

THE COURT:	Any other witness on [Mother's] side?
[MOTHER'S COUNSEL]:	No, Your Honor.
THE COURT:	Any rebuttal?
[FATHER'S COUNSEL]:	No.
THE COURT:	All right. Ready for closing?
[FATHER'S COUNSEL]:	Yes.
THE COURT:	You may proceed.

Mother's counsel gave no indication that he was not ready to proceed to closing, nor did he raise the issue of the continuance that had been reserved on at the outset of the trial. Given counsel's failure to raise the issue of the continuance at the close of the evidence, we conclude that Mother's motion for a continuance was effectively withdrawn.

Assuming, *arguendo*, that the motion for a continuance was not withdrawn, the trial court did not abuse its discretion by failing to grant the continuance. The Maryland Rules provide that "[o]n motion of any party or on its own initiative, the court may continue a trial

or other proceeding as justice may require." Md. Rule 2-508(a). With regards to a continuance for an absent witness, Rule 2-508(c) provides:

> **A motion for a continuance on the ground that a necessary witness is absent shall be supported by an affidavit. The affidavit shall state**: (1) the intention of the affiant to call the witness at the proceeding, **(2) the specific facts to which the witness is expected to testify, (3) the reasons why the matter cannot be determined with justice to the party without the evidence, (4) the facts that show that reasonable diligence has been employed to obtain the attendance of the witness, and (5) the facts that lead the affiant to conclude that the attendance or testimony of the witness can be obtained within a reasonable time.** The court may examine the affiant under oath as to any of the matters stated in the affidavit and as to the information or knowledge relied upon by the affiant in determining those facts to which the witness is expected to testify. If satisfied that a sufficient showing has been made, the court shall continue the proceeding unless the opposing party elects to stipulate that the absent witness would, if present, testify to the facts stated in the affidavit, in which event the court may deny the motion.

(Emphasis added).

Mother did not submit an affidavit to the trial court as required by Rule 2-508(c). Nor did Mother proffer to the court the information that must be included in such affidavit. First, Mother did not articulate the "specific facts" to which Harger was expected to testify, nor the reasons why the motion could not be determined with justice to the Mother without Harger's testimony and report. Mother never argued to the trial court the value of Harger's testimony, including her recommendation that the Child's primary residence remain with the Mother as a basis for the continuance. Mother's counsel stated only that Harger had suggested that

the parties engage the services of Dr. Gina Santoro as a counselor for the Child (which the parties did), and that a "privilege attorney" be appointed so that Dr. Santoro could testify.

Second, as correctly pointed out by Father, there was no showing that "reasonable diligence ha[d] been employed to obtain the attendance of the witness." Md. Rule 2-508(c). Mother did not subpoena, or even attempt to subpoena, Harger prior to the trial. Mother's only explanation for not subpoenaing Harger was that Harger was on leave. Finally, Mother failed to advise the court when Harger would be available to testify. Consequently, the court did not have any facts upon which to determine whether Harger's testimony could "be obtained within a reasonable time." Md. Rule 2-508(c).

In sum, Mother's failure to comply with the requirements of Rule 2-508(c), either strictly or substantially, provided no basis for the trial court to grant her oral motion for a continuance, much less for this Court to conclude that there was an abuse of discretion for not granting the motion. After two days of taking evidence, the trial court rendered a detailed oral opinion that considered all of the necessary factors set forth in *Sanders*, 38 Md. App. at 420. At no point during its opinion did the court suggest that it had insufficient evidence to render a reasoned judgment. There were no "obvious gaps" that the court alluded to when it reserved on the continuance motion at the beginning of the trial. Accordingly, we conclude that the circuit court did not abuse its discretion by failing to grant Mother's oral motion for a continuance.

II. Admission of Video Evidence

"We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard." *Bernadyn v. State*, 390 Md. 1, 7 (2005).

As previously indicated, Mother filed an emergency motion to suspend Father's visitation in May 2014. Her motion claimed that Father was causing the Child significant emotional harm by making false allegations of physical and sexual abuse against Mother. In the motion, Mother stated: "I have [the Child's] discussion of these matters on video." Those videos were then produced by Mother during the discovery process on Father's Complaint to Modify Custody.

At the trial on Father's Complaint to Modify Custody, Father offered the videos into evidence. Mother objected on the grounds of hearsay, relevance, and lack of consent. The trial court overruled the objection, admitted the videos, and allowed Father's counsel to play the videos for the court's review. In all, there were ten short videos taken by Mother that depicted her interrogating the Child, who was completely naked in most of the videos. The majority of Mother's questions in the videos concerned the Child's interactions with Father and his new wife, Katie. During its oral opinion, the court referenced the videos as reflecting very negatively on Mother's character.

On appeal, Mother admits that the videos were relevant to the proceedings, but claims that they were unfairly prejudicial. Mother argues that the proffers made by Father's counsel unfairly prejudiced Mother even before the court saw the videos. Mother asserts that "the

significant and voluminous characterizations of the videos prior to the in-camera review by the trial court" made it impossible for the court to not be unfairly prejudiced.

Father responds that Mother's argument on this issue is "nonsensical," because it was Mother who made the videos, referenced them in her emergency motion, and turned them over in discovery, but is now complaining that the court abused its discretion by admitting them into evidence. Father contends that the videos, and Mother's objection to them, "speaks volumes" about Mother's character.

1. Was Mother's issue preserved for appellate review?

At trial, when Father sought to introduce the videos into evidence, the following exchange occurred:

[FATHER'S COUNSEL]:	Your Honor, can I start playing videos, and ask her to identify these?
[MOTHER'S COUNSEL]:	I'm going to object to the admission of the videos, Your Honor.
THE COURT:	The purpose for which you're offering them is what?
[FATHER'S COUNSEL]:	Me?
THE COURT:	Yes.
[FATHER'S COUNSEL]:	Number one, because I think it's sick, and I think it goes to her character. I think it goes to her

	fitness. I think it goes to her lack of an understanding –
THE COURT:	So you're not trying to offer them for the truth of what's asserted by the child in the statements?
[FATHER'S COUNSEL]:	That's correct.
THE COURT:	And your objection was hearsay?
[MOTHER'S COUNSEL]:	My objection is hearsay and consent, Your Honor, that she's not old enough to grant consent to her tape recording of her voice, and therefore, it should not–or video, and therefore **it should not be allowed both on hearsay, relevance and consent–lack of consent**.

(Emphasis added).

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a).

"An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. *The grounds for the objection need not be stated unless the court, at the*

request of a party or on its own initiative, so directs." Md. Rule 2-517(a) (emphasis added). The Court of Appeals has held that it is

> long established Maryland practice that a contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence . . . the only exceptions to the principle that a general objection is sufficient are where a rule requires the ground to be stated, *where the trial court requests that the ground be stated*, and "where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence."

Boyd v. State, 399 Md. 457, 475-76 (2007) (emphasis added) (citations omitted).

In the instant case, the trial court asked Mother for the grounds upon which she was objecting. Mother's counsel responded that the objection was on the grounds of hearsay, relevance, and lack of consent. On appeal, Mother argues that the videos should have been excluded because they were unfairly prejudicial. Mother never raised this ground before the trial court, and therefore, it is not preserved.

2. If preserved, were the videos unfairly prejudicial?

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Mother concedes that the videos were relevant to the proceedings. What Mother does argue, however, is that the videos were unfairly prejudicial. "Although relevant, *evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice*, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403 (emphasis added).

During its oral ruling, the trial court addressed the second *Sanders* factor–"character and reputation of the parties." The court stated that "[c]haracter is ultimately, I think, what most of this case has been fought on." The court discussed several different issues regarding the character of the parties. Concerning the videos, the court stated:

> The other thing that is a concern to the Court, perhaps the largest concern, is these videos. The videos, I don't know if I would describe them as prisoner of war interrogation videos, **but they are inappropriate to be taking full frontal nudity body shots of a three- or four-year old, and potentially the only purpose that I can think of was we're going to share them with other people in Court.** While the Court is a private place, and we can and probably should seal the records of this case, it's just not appropriate to do that.

(Emphasis added).

The trial court's opinion clearly shows that the videos had a significant impact on its ruling, particularly with regards to Mother's character. But the mere fact that the videos reflected negatively on Mother's character does not mean that they were unfairly prejudicial. The videos went directly to Mother's character and thus informed the court's opinion on that factor. Therefore, the videos were of very high probative value, and Mother would need to show that the probative value was "substantially outweighed by the danger of unfair prejudice." We hold that she did not.

Mother's argument focuses specifically on the language used by Father's counsel to describe the videos. Prior to playing the videos for the trial court, Father's counsel said "I think it's sick, and I think it goes to her character." This language certainly cast a negative light on the videos, but there is no reason to believe that Father's counsel's characterization of the videos would have prejudiced the court when the court actually watched the videos and thus had the opportunity to decide for itself their meaning. In effect, Mother makes no argument that the evidence itself was unfairly prejudicial; she argues that opposing counsel's characterization of the videos was unfairly prejudicial. Mother cites no authority for such proposition, nor did we find any. The concept of "unfair prejudice" refers to whether the evidence itself is unfairly prejudicial, not counsel's characterization of the evidence.

Therefore, we conclude that the highly probative value of the videos was not substantially outweighed by the danger of unfair prejudice. *See* Md. Rule 5-403. Accordingly, the circuit court did not abuse its discretion by admitting the videos into evidence.

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