Circuit Court for Baltimore County
Case No. C-03-FM-19-003033

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 519

September Term, 2021

LOREN PLUM

v.

KYLAH BACHMAN

Graeff,
Zic,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: March 9, 2022

The Circuit Court for Baltimore County granted appellee, Kylah Bachman, an absolute divorce from appellant, Loren Plum, incorporating but not merging a Marital Settlement Agreement the parties had executed during the divorce proceedings. The court awarded Ms. Bachman primary physical custody and sole legal custody of the parties' minor child. Mr. Plum appealed, raising the following issues for our review, which we have slightly modified for clarification purposes:

1. Whether the circuit court erred by enforcing the Marital Settlement Agreement.

2. Whether the circuit court abused its discretion by awarding appellee sole legal custody of the minor child.

3. Whether the circuit court abused its discretion by awarding appellee primary physical custody of the minor child rather than awarding the parties shared physical custody.

4. Whether the circuit court abused its discretion by upholding an agreement of the parties that appellant would submit to drug testing.

For the reasons to be discussed, we shall vacate the rulings on legal and physical custody and remand for the circuit court to reissue its rulings with an explanation for its decision. In all other respects, we affirm the judgment of the circuit court.

BACKGROUND

Ms. Bachman and Mr. Plum married in December 2015. Their child was born in July 2015. The family resided at 7719 Bagley Avenue in Parkville, Maryland, a home that Ms. Bachman had purchased prior to the marriage and which throughout the marriage remained titled in her name alone. The mortgage also remained in Ms. Bachman's name alone. In April 2019, Ms. Bachman left the home, with the child, due

to marital difficulties, which she claimed stemmed from Mr. Plum's "substance abuse problem."

On July 9, 2019, Ms. Bachman filed a Complaint for Limited Divorce, Custody, Child Support, and Other Relief. On October 17, 2019, the parties executed a Marital Settlement Agreement. On October 28, 2019, Ms. Bachman filed a Supplemental Complaint for Absolute Divorce and attached a copy of the Marital Settlement Agreement, which she requested be incorporated and made a part of, but not merged into, any judgment of divorce.

The Marital Settlement Agreement was signed by Ms. Bachman and Mr. Plum, who was then self-represented.[1] The Marital Settlement Agreement provided, among other things, that Ms. Bachman would have "primary care and custody" of the child, with Mr. Plum given certain visitation rights, and that the parents would have joint legal

[1] The Marital Settlement Agreement included the following statement, which Mr. Plum initialed:

> HUSBAND ACKNOWLEDGES THAT HE HAS BEEN ADVISED AND AFFORDED THE OPPORTUNITY TO OBTAIN INDEPENDENT COUNSEL OF HIS OWN SELECTION IN CONNECTION WITH THIS AGREEMENT, SO THAT HE MAY HAVE HIS OWN ATTORNEY ANSWER ANY QUESTIONS WHICH HE MAY HAVE. HUSBAND FURTHER ACKNOWLEDGES THAT WIFE'S ATTORNEY HAS NEITHER REPRESENTED HUSBAND NOR PROVIDED HIM WITH ANY LEGAL ADVICE IN CONNECTION WITH THE TERMS OR OPERATING EFFECT OF THIS AGREEMENT. FINALLY, HUSBAND ACKNOWLEDGES THAT HIS DECISION TO EXECUTE THIS AGREEMENT WITHOUT HIS OWN ATTORNEY IS MADE FREELY AND VOLUNTARILY.

custody, with Ms. Bachman given "tiebreaker" authority in the event the parents could not reach a mutual agreement on an issue. The agreement also provided that the parties released and discharged the other "absolutely and forever" from any right or claim for alimony and that they waived any right or claim to any portion of the other's retirement assets. The parties agreed that Mr. Plum would move out of the Bagley Avenue residence and Ms. Bachman and the child would move back in and that the home "shall be Wife's sole and separate property and Wife shall be responsible for all expenses associated with the Home." And they agreed that Ms. Bachman would be responsible for an American Express credit card debt of approximately $13,000 and Mr. Plum would be responsible for debt on another credit card totaling approximately $1,400. Additionally, the Marital Settlement Agreement provided that this agreement shall be incorporated, but not merged, in any judgment of divorce and its terms shall survive and continue in full force regardless of whether such a judgment is entered.

Nine months after Ms. Bachman filed her supplemental complaint for divorce, Mr. Plum, through counsel, filed an answer in which he admitted that he had entered into the Marital Settlement Agreement but denied that it had resolved all issues related to custody, marital property, child support, and alimony. He requested that Ms. Bachman's complaint for divorce be dismissed and the terms of the Marital Settlement Agreement be amended or, in the alternative, be declared invalid. Mr. Plum also filed a Counter Complaint for Absolute Divorce, Custody and Child Support, which the court later dismissed.

Then in September 2020, a Temporary Consent Order was entered which provided that Mr. Plum would return the child to Ms. Bachman, set out a visitation schedule for Mr. Plum, and provided that Mr. Plum would "submit to urinalysis testing at LabCorp by November 1, 2020, and that he shall cause the results of the test to be delivered to [Ms. Bachman] and her counsel . . . within 24 hours of receiving said results." The order further provided "that neither party shall speak negatively or speak disparagingly about the other party in the presence of the minor child." The Temporary Consent Order was signed by a judge as well as by Ms. Bachman, Mr. Plum, and their respective attorneys. At a hearing held on April 9, 2021, Ms. Bachman testified that the Temporary Consent Order arose after Mr. Plum refused to return the child following a visit until Ms. Bachman signed a document setting forth a visitation schedule. Ms. Bachman testified that when she signed the Temporary Consent Order, she was "stressed out of [her] mind" because Mr. Plum had taken their daughter and "nobody knew where [his new] apartment was" located and she "just wanted [her] daughter back." According to Ms. Bachman, within several weeks after signing the order, Mr. Plum stopped adhering to the visitation schedule.

On October 1, 2020, Ms. Bachman filed a motion requesting that Mr. Plum be ordered to take a hair follicle test. She alleged that Mr. Plum had admitted to her that "he has used, and still uses, methamphetamines." Mr. Plum filed an answer "den[ying] that he [was] under the influence of any drug substance."

On November 12, 2020, Ms. Bachman filed a Petition for Contempt in which she alleged that Mr. Plum had failed to abide by the Temporary Consent Order by failing to

forward the results of any urinalysis testing to her or her counsel and by failing to refrain from speaking disparagingly about her in the presence of the child. Ms. Bachman requested that the court find Mr. Plum in contempt and suspend visitation until he completes drug testing that confirms he "tests clean from drugs."

On March 9, 2021, following a hearing at which both parties were represented by counsel and testimony was taken as indicated on the hearing sheet, the court entered an order finding Mr. Plum in contempt for failing to abide by the Temporary Consent Order provisions directing him to submit to urinalysis testing and to refrain from speaking negatively or disparagingly about Ms. Bachman in the presence of the child.[2] Until Mr. Plum purged the contempt, or upon further court order, the court limited his visitation with the child to supervised visitation. The order provided that Mr. Plum could purge the contempt by (1) submitting to a "hair follicle test" and "provid[ing] a testing result showing an absence of all illegal drugs and absence of all drugs for which he does not have a prescription"; (2) attending and successfully completing anger management classes; and (3) following all terms of the Temporary Consent Order that were not superseded by this order.

On April 9, 2021, the court convened a hearing on Ms. Bachman's complaint for absolute divorce and several motions Mr. Plum had filed pro se. Because Mr. Plum had

[2] The hearing was held on February 26, 2021. There is no transcript of that hearing in the record before us.

recently discharged his attorney, he represented himself at the hearing.[3] Counsel for Ms. Bachman informed the court that her client was seeking a judgment of divorce that incorporates but does not merge the Marital Settlement Agreement, custody of the child, supervised visitation of Mr. Plum and the child, child support, and child support arrears. Mr. Plum, in turn, advised the court that he would like the complaint for divorce and "everything" dismissed. But if the divorce would be granted, he was seeking "50 percent custody, . . . 50 percent everything," including the house and "all of [the] marital property inside the house." He did not want to pay child support because if the parties shared custody, he saw no need for it. Mr. Plum also informed the court that he had "documentation" showing that the purge provision was satisfied.

The court responded that "custody is certainly an open issue" and it would not make a decision on that or child support before evidence was presented to the court. When asked by the court whether he had any issue with the Marital Settlement Agreement, Mr. Plum replied, "Yes, 100 percent." He asserted that it was "completely one-side" and claimed that he had "signed under distress and pretty much blackmail using our daughter." Counsel for Ms. Bachman informed the court that the validity of the Marital Settlement Agreement was ruled on in August 2020 by another judge when addressing, and dismissing, Mr. Plum's counter complaint for divorce in which he raised

[3] Mr. Plum, pro se, had filed various motions, including a motion to dismiss Ms. Bachman's complaint for divorce because he believed that it was "in the best interest" of the parties and their child for them to remain married, a complaint for custody, and a motion that all property belonging to him that was in the Bagley Avenue home be returned to him.

similar issues attacking the validity of the Marital Settlement Agreement.[4] The court informed Mr. Plum that its focus was on custody and child support going forward and that there was "nothing unusual about" the Marital Settlement Agreement and that it saw no filings in the record requesting that it be set aside. The court did, however, review on the record the terms of the Marital Settlement Agreement, other than those regarding custody and visitation. During his sworn testimony, Mr. Plum admitted that he had reviewed the provisions of the Marital Settlement Agreement before he signed it. He also testified that he was 32 years old and had completed high school and "some college."

Ms. Bachman testified on her own behalf. She related that she and Mr. Plum married in December 2015 in Baltimore County in a civil ceremony, that their daughter was born in July 2015, that she purchased the Bagley Avenue house prior to the marriage and it was titled in her name alone, and that her name alone was on the mortgage. Ms. Bachman testified that she moved out of the Bagley Avenue house in April 2019 and returned in October 2019 and during those months when Mr. Plum resided in the house alone, she paid the mortgage and the bills associated with the house without any financial help from him.

[4] The record before us does not include a transcript from any hearing on Mr. Plum's counter complaint for divorce or on any challenge he may have raised to the Marital Settlement Agreement. An order docketed on August 7, 2020 dismissing Mr. Plum's counter complaint did not specifically address or mention the Marital Settlement Agreement. But in any event, it is not this Court's task to search the record in support of a party's position. *Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008) ("[W]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." (second alteration in original) (quoting *von Lusch v. State*, 31 Md. App. 271, 282 (1976), *rev'd on other grounds*, 279 Md. 255 (1977))).

Ms. Bachman explained that she had left her home in April 2019 due to marital difficulties. She believed that Mr. Plum had "a substance abuse problem," which was having "a substantial impact on [their] relationship." She testified that he had "previously acknowledged" that he had a problem but claimed he had "quit," which Ms. Bachman "didn't necessarily believe." She related that "a lot of money would be spent" by Mr. Plum on items unknown to her and that Mr. Plum would be gone for hours without telling her where he was. She also testified that Mr. Plum's "demeanor was very different" and that "[h]e was very short a lot of times" and that he engaged in "a lot of irrational conversations that just went in circles and wouldn't make sense." At one point, Mr. Plum admitted to her that he was "abusing pills," specifically "Oxy's." Ms. Bachman related that she worried about leaving their child in Mr. Plum's care when she went to work and at times she "smell[ed] weed in the house" when she returned.

Ms. Bachman testified that she did not "coerce" or "guilt" Mr. Plum into signing the Marital Settlement Agreement or make him any sort of promises if he did so. In her view, they both "freely and voluntarily" entered into that agreement.

Since they separated, Ms. Bachman related that she primarily communicated with Mr. Plum via text or email, but she admitted that there were times when she blocked his phone number "because he was abusing it." She submitted into evidence screenshots of multiple text messages between them, illustrating long messages Mr. Plum at times sent to her. In at least one of the messages, Mr. Plum informed Ms. Bachman that he would tell their daughter that the divorce was Ms. Bachman's fault, stating "[i]f you['re] ready to explain to [our child] that mommy doesn't love daddy anymore th[e]n go for it because

if you don't I will." In others, he related his desire for them to reconcile, get a bigger house, and have more children. Ms. Bachman also submitted screenshots of text messages where she attempted to arrange visitation dates for Mr. Plum with their daughter, but she testified that frequently he would not follow through for various reasons or would put "stipulations" on the visit, like wanting her to be present so he could speak with her.[5]

When they did have face-to-face conversations during Mr. Plum's visits with the child, at times, he would get "upset" when Ms. Bachman "changed something in the house [or] . . . sa[id] something . . . and then usually it would go downhill." He would

[5] In response to Ms. Bachman's message arranging a visit for him with their daughter in which she stated "[y]ou can put her to bed, however it won't be sleeping over," Mr. Plum texted:

> I'm actually looking for hookers or random women right now to spend Christmas with, they just need to name their price since I can't get someone to voluntarily be with me. I'd rather be spending that money on you and our bills but since I'm so damn lonely this will have to do.
>
> I can't believe I'll be spending my 5 Year Wedding Anniversary with another woman. I really hope you[']r[e] happy without having to deal with me. I honestly do. I hope you have or find someone that is everything I'm not.
>
> I already have the hotel reservations downtown from 2 months ago. So I might as well use them since my wife doesn't want anything to do with me.

The next day, Mr. Plum sent Ms. Bachman the following text: "Good morning babe! Happy Anniversary! I can't believe it's been 5 years, well 8 years since we met, here's to 50 more! I love you. I'll drop off your gift later on today. I love you so much." Mr. Plum gave Ms. Bachman "$4,000 or $5,000 engagement and wedding rings." Mr. Plum testified at the hearing that, when they married, they had agreed not to "buy rings" because of other expenses, but that he had promised to do so in the future. At the hearing, Ms. Bachman agreed to return the rings to Mr. Plum.

then "kind of check out and just not interact" with their daughter. Ms. Bachman also explained that "a lot of times" in the child's presence he would make comments such as, "Your mom's divorcing me. She doesn't want me to live here anymore, ask her why."

Ms. Bachman related that Mr. Plum would "show up to the house if I wouldn't answer phone calls and just be ranting about what I've done, 'I'm leaving,' just screaming so the whole neighborhood can hear." In her view, "[i]t was just about his . . . [un]happiness about the situation, and how I've done it all to him." Ms. Bachman believed such incidents upset their daughter, as the child would ask her to "make him go home," ask him to "please stop," cover her ears, or hide. There were times when Mr. Plum called Ms. Bachman on the phone to "rant." If she did not answer her phone, he would continue to call until she did or show up at her house.

Ms. Bachman testified as to the difficulties she had with getting Mr. Plum to remove his property from the Bagley Avenue house, which she was preparing to sell. After multiple failed attempts to arrange a date for him to retrieve his possessions, Ms. Bachman began disposing of some of his items, such as pieces of furniture, by selling them online or donating them.

Ms. Bachman planned to sell the Bagley Avenue house and move in with her parents in York, Pennsylvania. There, the child would have her own bedroom. At the time of the hearing, Mr. Plum was residing with his mother in Parkville, Maryland. He testified that "right now, . . . there is no specific room for [the child]" at his mother's house. He worked fulltime as a technician for Honda, making approximately $60,000 annually.

During his testimony, Mr. Plum produced a certificate of completion indicating that, on January 4, 2021, he had completed a 16-hour drug and alcohol awareness class and a certificate of completion indicating that, on March 29, 2021, he had completed a 16-hour anger management class. Mr. Plum indicated that he had completed the courses online and that he had printed the certificates from the course website.

He also brought to court tests results from US Drug Test Centers dated April 8, 2021, which indicated that a 5 panel hair test showed negative results for amphetamines, cocaine, opiates, and phencyclidine and was positive for marijuana and carboxy THC. The hair sample had been collected by LabCorp on March 30, 2021. He also presented a copy of an email dated February 19, 2021 from Veriheal, providing that he had been preapproved for medical marijuana in Maryland.

Counsel for Ms. Bachman objected to the admission of Mr. Plum's documents, asserting it was the first time she had seen them, that they were not accompanied by any "certification of business records," and that they were "hearsay because they're unable to be authenticated by anyone." The court held ruling on the admissibility of the documents sub curia. Although the court indicated that it felt the documents were "probably accurate," the court believed counsel made a "well-placed objection that some type of verification that these things are accurate and true business record[s] would be

appropriate." Accordingly, the court left the record open for submission of "that type of information" before it ruled on their admission.[6]

At the close of the hearing, the court announced that it would grant the divorce. The court also announced that it found that the Marital Settlement Agreement was valid and would not be set aside. The court then turned to custody and found that "both parents are fit and proper parents." Assuming the court received the "verification of the things" in the contempt order related to the drug testing and anger management class, the court stated it would award Mr. Plum unsupervised visitation, but until the verification was submitted, the visitation would remain supervised.

The court announced that "there is no good situation for [the child] to be . . . with dad overnight at the moment" given that there was no bedroom in the house for her. Recognizing that Ms. Bachman planned to move to Pennsylvania and Mr. Plum hoped to move out of his mother's residence to a place of his own, the court stated that its "desire would be for dad to have [the child] every other weekend." Although the court's statements may have implied that it would grant Ms. Bachman physical custody of the child, the court did not announce a ruling on the record. And the court made no mention of legal custody.

On April 13, 2021, less than a week after the hearing, Mr. Plum, pro se, filed a motion to purge the contempt and attached documents supporting his claim that he had

[6] Mr. Plum expressed confusion as to what verification he needed to produce, stating that "all of that is legitimate that I found online and completed." The court responded that he needed to produce "[s]ome type of business record."

completed the anger management class and had submitted to drug testing. He attached to the motion a hair chain of custody form from LabCorp, which indicated that a hair follicle sample had been collected from him on March 30, 2021, and the same certificates of completion presented at the hearing for the 16-hour drug and alcohol awareness class he completed on January 4, 2021 and the 16-hour anger management class he completed on March 29, 2021. He also included a page which appeared to be printed from the website where the anger management and alcohol classes were taken that provided a general description of the courses offered.

Ms. Bachman filed a response, asserting that although Mr. Plum had "provided a copy of testing results at the divorce hearing, they are problematic as he was not tested for *all* drugs and the results he produced are problematic with regard to their authenticity." Accordingly, Ms. Bachman urged the court to deny Mr. Plum's motion to purge the contempt and further requested that the court order him to submit to a drug test, which includes "a 14 panel plus buprenorphine."

By order entered on the docket on May 14, 2021, the court denied Mr. Plum's motion to purge the contempt and ordered him to submit to a drug test that includes "a 14 panel plus buprenorphine," with the results provided directly to Ms. Bachman's counsel. The court also ordered Mr. Plum to "produce proof, with a custodian of records form, that

he has a prescription for any drugs he is currently taking that would appear on a 14 panel plus buprenorphine drug test."[7]

On May 14, 2021, the court also entered a Judgment of Absolute Divorce granting Ms. Bachman an absolute divorce from Mr. Plum and incorporating but not merging the Marital Settlement Agreement as it relates to the property of the parties. The court awarded physical and legal custody of the child to Ms. Bachman.[8] Mr. Plum was awarded "supervised visitation" with the child "until the Contempt Order in this matter is purged." The court further ordered that "[a]ll communication regarding [the child] shall be primarily via text or email" and that Mr. Plum shall pay Ms. Bachman $654 monthly in child support plus $3,924 for child support arrears. On June 24, 2021, the court issued an Order Correcting Errors in Judgment of Absolute Divorce in which it corrected the date of the child's birth and noted that the divorce was awarded on the grounds of a one-year separation. The order also set out a supervised visitation schedule pending Mr.

[7] US Drug Test Centers's website indicates that it offers various "hair drug testing" ranging from a 5 panel hair test, which tests for cocaine, marijuana, phencyclidine, amphetamines, and opiates, to a 14 panel hair test, which screens for the same substances as a 5 panel hair test plus "expanded" opiates, propoxyphene, methadone, benzodiazepines, barbiturates, meperidine, tramadol, oxycodone, and fentanyl. *Drug Test Panels*, US Drug Test Ctrs., usdrugtestcenters.com/drug-test-panels.html (last visited Feb. 18, 2022). Buprenorphine is a medication used to treat opioid use disorder. *See Buprenorphine*, Substance Abuse & Mental Health Servs. Admin, https://www.samhsa.gov/medication-assisted-treatment/medications-counseling-related-conditions/buprenorphine (last updated Jan. 24, 2022).

[8] The Judgment of Absolute Divorce did not include findings or an explanation for the court's award of physical custody and sole legal custody to Ms. Bachman.

Plum's purge of the contempt order and, once purged, an unsupervised visitation schedule.

DISCUSSION

I. MARITAL SETTLEMENT AGREEMENT

In reviewing the circuit court's decision in this case, we are guided by the following standard of review:

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

Md. Rule 8-131(c). We note that "[i]f any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 96 (2013) (quoting *Fischbach v. Fischbach*, 187 Md. App. 61, 88 (2009)), *aff'd*, 437 Md. 47 (2014). As to questions of law, "the trial court enjoys no deferential appellate review, and the appellate court must apply the law as it discerns it to be." *Shih Ping Li*, 210 Md. App. at 96 (quoting *Fischbach*, 187 Md. App. at 88).

Mr. Plum asserts that the court erred in enforcing the Marital Settlement Agreement. In essence, he maintains that, at the time he signed the agreement, Ms. Bachman "held all the cards, as she left, with the parties[']child, moved out of state, and did not allow [him] to see the child." Mr. Plum argues that "he felt he had no other

choice, but to sign it to be able to see his daughter and possibly to try and save the marriage."

Ms. Bachman responds, first, that Mr. Plum's "argument to set aside the marital settlement agreement was not properly before the trial court" because he had not filed a motion requesting that relief. We note, however, that Mr. Plum did dispute the validity of the agreement in his answer to the Supplemental Complaint for Absolute Divorce where he requested that "the terms of the Marital [Settlement] Agreement dated October 17, 2019, be amended or in the alternative declared invalid." Moreover, we see no evidence in the record before us that the circuit court had previously ruled on the validity of the Marital Settlement Agreement. And, most significantly, at the April 9, 2021 hearing, the court did, in fact, review on the record the terms of the agreement, considered Mr. Plum's request to invalidate it, and ultimately did "find that it's valid" and ruled that it would not "set it aside."

In any event, Ms. Bachman maintains that the court properly upheld the terms of the Marital Settlement Agreement, noting that the court "did not find the terms of the Agreement to be unconscionable, unfair, or inequitable at the time of signing the agreement."

We have no difficulty in concluding that the court did not err in refusing to set aside the Marital Settlement Agreement. Although Mr. Plum stated in his opening statement and closing argument that the agreement was "completely one-sided," that he had "signed [it] under distress," and that he signed it "under severe pressure while" unrepresented by counsel and, therefore, was not "a hundred percent sure of what [he]

was signing," comments or statements made in opening statements and closing arguments are not evidence. *See Keller v. Serio*, 437 Md. 277, 288 (2014). In his sworn testimony, Mr. Plum simply asserted that he believed that "everything needs to be divided evenly." In short, Mr. Plum did not put any evidence before the court in support of his claim that the Marital Settlement Agreement should be invalidated.

During his testimony, the court reviewed provisions of the Marital Settlement Agreement with Mr. Plum who admitted that he had reviewed the agreement before signing it, though he claimed he did not have a "full copy" of it until recently. He acknowledged that his primary complaint with the terms of the agreement was that it gave Ms. Bachman the Bagley Avenue house and expressed concern about retrieving his personal property from the premises.[9] Mr. Plum did not dispute that he had modified the provision in the agreement with respect to health insurance coverage for Ms. Bachman after the divorce, an alteration the parties had both initialed at the time of execution. He also admitted that he had understood the provision in the agreement that dealt with the Bagley Avenue house. Although he reiterated that he would like "everything to be split evenly," Mr. Plum did not testify under oath that he had entered the Marital Settlement Agreement under duress, involuntarily, or without understanding the terms of the agreement.

At the close of the hearing, the court discussed the Marital Settlement Agreement in its ruling. The court noted that separation agreements are "contracts" and the Marital

[9] He was also concerned about the custody provision, but the court was not binding itself to the Marital Settlement Agreement with respect to custody.

Settlement Agreement would not be set aside unless it was "inequitable or unjust." The court turned to the nature of the parties' relationship at the time the agreement was executed and found that there was no evidence that "one party was highly dependent upon the other party." Rather, the court found that "these two parties were operating independently, certainly at the time of the agreement they were operating independently and living independently of each other." The court further found that the Marital Settlement Agreement was not "unconscionable." The court noted that the "biggest issue" here was the Bagley Avenue residence, which the agreement provided would be Ms. Bachman's sole possession, but that provision needed to be viewed in context of the entire agreement. The court then noted that there was no evidence before it regarding "the value of the house, who put money into the house, what happened to the house or whatever else." The court, based on its own research, however, found that at the time the Marital Settlement Agreement was executed, the value of the Bagley Avenue house was "very similar" to the purchase price when Ms. Bachman acquired title to the property.[10] The court also found that the house was always in Ms. Bachman's name and, in addition, that under the Marital Settlement Agreement Ms. Bachman had taken responsibility for

[10] No objections were made to the court's research into the value of the Bagley Avenue home, which the court indicated was based on Zillow and the county's property tax records. We do not address this except to note that, pursuant to Rule 18-102.9(c), "[a] judge shall not investigate adjudicative facts in a matter independently, and shall consider only the evidence in the record and any facts that may properly be judicially noticed."

approximately $13,000 in credit card debt.[11] In short, the court found that the Marital Settlement Agreement "certainly wasn't an unconscionable deal at the time." Accordingly, the court found that the agreement was valid and refused to set it aside.

We are not persuaded that the court's findings were clearly erroneous. As such, we hold that the court did not err in refusing to invalidate or set aside the Marital Settlement Agreement.

II. CUSTODY OF THE MINOR CHILD

"We review a trial court's custody determination for abuse of discretion." *Santo v. Santo*, 448 Md. 620, 625 (2016). A court abuses its discretion "when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Gizzo v. Gerstman*, 245 Md. App. 168, 201 (2020). Appellate courts rarely find reversible error in a trial court's determination of custody. *Id*.

This deferential standard of review "accounts for the trial court's unique 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Id*. (quoting *Santo*, 448 Md. at 625). The circuit court "who '"sees the witnesses and the parties, [and] hears the testimony . . . is in a far better position than the appellate court, which has only a [transcript] before it, to weigh the evidence and

[11] The nature of the $13,000 credit card debt was not testified to, but in unsworn comments Mr. Plum made to the court at the hearing, he stated that the debt "was mutually accrued on that credit card" and that the parties "used that for" such things as "groceries."

determine what disposition will best promote the welfare of the [child].""" *Gizzo*, 245 Md. App. at 201 (alterations in original) (quoting *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000)). "The light that guides the trial court in its determination, and in our review, is 'the best interest of the child standard,' which 'is always determinative in child custody disputes.'" *Santo*, 448 Md. at 626 (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977)).

A. Legal Custody

We begin with the court's award of sole legal custody of the parties' child to Ms. Bachman. Mr. Plum maintains that the court abused its discretion in so ruling because Ms. Bachman had "never asked for sole legal custody." He also argues that the court erred in awarding her sole legal custody without stating any reasons for its decision. In response, Ms. Bachman speculates as to why the court awarded her sole legal custody and asserts that it was the court's role, not the party's, to determine legal custody in this case.

"Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "Joint legal custody means that both parents have an equal voice in making those decisions[] and neither parent's rights are superior to the other." *Id*. Joint legal custody requires that the parents have the capacity to effectively communicate with each other and, where there is "a failure of rational communication, there is nothing to be gained and much to be lost by conditioning the making of decisions

affecting the child's welfare upon the mutual agreement of the parties." *Id.* at 305.

Here, although it appears evident from the record before us that Ms. Bachman and Mr. Plum may have serious communication issues, it is not up to this Court to speculate as to why the circuit court granted sole legal custody to Ms. Bachman. And without knowing why the court awarded Ms. Bachman sole legal custody when her request was for joint legal custody, we cannot address Mr. Plum's contention that the court abused its discretion in its award. Accordingly, we are obliged to vacate the court's ruling on legal custody and remand the matter to the circuit court to reissue its decision on legal custody with an explanation for its ruling. *See* Md. Rule 2-522(a) ("In a contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision . . . .").

B. Physical Custody

We turn now to the court's award of physical custody to Ms. Bachman. The Court of Appeals has described physical custody as "the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor*, 306 Md. at 296. Where primary physical custody is awarded to one parent, frequently the other is awarded visitation rights. *See id.* at 297. In other instances, the court may award the parents joint or shared physical custody. *See id.* "Shared physical custody may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights." *Id.*

Mr. Plum contends that the court abused its discretion in not awarding the parties shared physical custody. He points to the court's finding that both parents are "fit parents." Without elaborating, he asserts that "the court did address some factors when discussing custody" but "it was nominal to say the least." He also cites Rule 2-522(a) and *Viamonte v. Viamonte*, 131 Md. App. 151 (2000), for the proposition that a court must provide a brief statement of the reasons for a decision rendered in a contested court trial.

Ms. Bachman responds that the court did not abuse its discretion in awarding her physical custody, "especially in light of the fact that it relied on facts that were not even in dispute and the same facts that are at the cornerstone of physical custody." Ms. Bachman points out that, at the merits hearing, Mr. Plum admitted that his current living arrangement did not include a bedroom for the child and that he testified that she is a "fit parent." She notes that, because of the lack of a bedroom for the child, the court found that it was not a "good situation for [the child] to be in with her dad overnight." Thus, Ms. Bachman maintains that, "[i]nasmuch as there was no question as to whether Appellee Mother was fit and that Appellant Father did not have any way to accommodate his request for shared physical custody or even overnight access," the court's custody "analysis rightfully ended there and it was unnecessary to go any further, obviating the need to detail the remainder of every single other factor." Finally, Ms. Bachman highlights that the court was aware that both the Marital Settlement Agreement and the Temporary Consent Order had given her primary physical custody and, moreover, she maintains that the court was able to "evaluat[e] both parties during the course of the

trial."

In *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1977), this Court set forth a nonexclusive list of factors that a trial court should consider in determining the best interests of a child in a custody dispute. *See id.* at 420-21. These factors include "fitness of the parents," "character and reputation of the parties," "desire of the natural parents and agreements between the parties," "potentiality of maintaining natural family relations," "preference of the child," "material opportunities affecting the future life of the child," "age, health[,] and sex of the child," "residences of parents and opportunity for visitation," "length of separation from the natural parents," and "prior voluntary abandonment or surrender." *Id*. at 420. We explained that none of these factors should be given weight to the exclusion of others but instead that the "court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor." *Id*. at 420-21. The Court of Appeals later expanded upon the list of factors for the trial court to consider in a custody case. *See Taylor*, 306 Md. at 303-11. Noting that each case has its own unique character and circumstances, the Court clarified that "[t]he best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Id*. at 303. The Court explained that no single factor "has talismanic qualities, and that no single list of criteria will satisfy the demands of every case." *Id*.

Here, the court's written order awarding physical custody to Ms. Bachman does not address *any* factors but simply states that its order is "[c]onsistent with statements by the Court in its oral findings at the trial of this matter." At the conclusion of the April 9

hearing, the court announced a finding that "both parents are fit and proper parents." The court spoke briefly of the lack of a bedroom in Mr. Plum's current residence for overnight accommodation of the child, which the court found concerning. The court also directed Mr. Plum to submit verification of testing results proving a lack of a substance abuse problem in accordance with the purge provision set by another judge on the contempt issue, yet the court stated that it believed that the documentation Mr. Plum brought to the hearing was "probably accurate" and it did not think it was "being snookered on this." Until the contempt was purged, however, the court announced that it would award Mr. Plum supervised visitation rights. Overnight and unsupervised visitation with the child was contingent on Mr. Plum both purging the contempt and securing a bedroom for the child's use.

No other factors relevant to the custody determination were mentioned by the court. Accordingly, this Court cannot determine whether the circuit court's findings in support of its decision to award Ms. Bachman primary physical custody were or were not erroneous because the only findings the court expressly made were that "both parents are fit and proper parents" and that Mr. Plum, at least at the present time, could not accommodate the child overnight.

In *Gizzo v. Gerstman*, 245 Md. App. 168 (2020), this Court stated that, "even where the trial court must issue a statement explaining the reasons for its decision, the court need not articulate every step of the judicial thought process in order to show that it has conducted the appropriate analysis." *Id*. at 195-96. But here the court failed to provide any explanation for its decision or demonstrate that it considered the factors

relevant to a custody determination, either at the hearing or in its order. Consequently, we vacate the physical custody award and remand so that the court can provide support for its decision. *See Maddox v. Stone*, 174 Md. App. 489, 502 (2007) ("Although the abuse of discretion standard for appellate review is highly deferential to the many discretionary decisions of trial courts, we nevertheless will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion.").

III. DRUG TESTING

Mr. Plum challenges the court's order limiting his visitation rights to supervised visitation until he has purged the contempt order by submitting drug testing results. He claims that "besides [his] failing to take the court ordered drug test, there is absolutely no evidence that the minor child was ever harmed while in [his] care, nor was there any evidence that [he] could have possibly harmed the minor child while in his care from drinking or otherwise." He also asserts that, "although it did not have the business authenticity to it, [he] did provide proof of a drug test result showing that he was negative, except for marijuana, [for] which he has a medical marijuana card." In short, he maintains that the drug testing provision is unwarranted and given "the lack of evidence regarding [him] having any current issue with drugs[,] the provision was[] an abuse of discretion." He requests that this Court "vacate the order regarding the drug testing obligation as either an abuse of discretion or at a minimum due to the fact that it has been satisfied."

Ms. Bachman responds that "[t]he court's order for drug testing prior to allowing overnight visits was reasonable" given that Mr. Plum agreed to drug testing, failed to submit to drug testing in accordance with the timeline set forth in the Temporary Consent Order, and after found in contempt of that order, he still failed to submit to drug testing. Ms. Bachman claims that the issue of Mr. Plum's drug use and his failing to follow through with proof to the contrary "has been at the forefront of this case since the beginning." Moreover, Ms. Bachman maintains that Mr. Plum "has consistently been awarded visitation with his daughter, [but] he simply fails to exercise it."

We are not persuaded that the court's visitation order was an abuse of its broad discretion. Ms. Bachman testified at the April 9, 2021 merits hearing that she separated from Mr. Plum in 2019 due to marital problems, which she attributed to a substance abuse problem on Mr. Plum's part. She described behavior that supported her belief that Mr. Plum was abusing substances, and she testified that he admitted at one point that he was "abusing pills," specifically "Oxy's." She also related that, while still living together, she worried about leaving the child in Mr. Plum's care while she worked and at times could "smell weed in the house" when she returned.

Significantly, in September 2020, the parties entered the Temporary Consent Order pursuant to which Mr. Plum, who was then represented by counsel, agreed to "submit to urinalysis testing at LabCorp by November 1, 2020" and provide the testing results to Ms. Bachman and her counsel within 24 hours of receiving them. There is no question that "[a] husband and wife may make a valid and enforceable . . . agreement that relates to . . . personal rights." Md. Code Ann., Fam. Law § 8-101(a). "[T]he validity of

such agreements has long been judicially recognized in Maryland." *Bruce v. Dyer*, 309 Md. 421, 438 (1987). And, as was done here, such an agreement may be submitted to a court for entry as a consent order or judgment. Md. Rule 2-612 ("The court may enter a judgment at any time by consent of the parties."). Accordingly, the Temporary Consent Order providing that Mr. Plum would submit to urinalysis testing was not merely an agreement between the parties, it was a final judgment of the court. *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 359 (2013) ("Although a settlement agreement is not a final judgment, a consent order is."); *Jones v. Hubbard*, 356 Md. 513, 528 (1999) ("[A] consent judgment is a judgment and an order of court. Its only distinction is that it is a judgment that a court enters at the request of the parties."). A consent order is, therefore, presumed valid and the burden is on the challenging party to establish otherwise. *See Jackson v. Jackson*, 14 Md. App. 263, 269 (1972).

When Mr. Plum failed to comply with the drug testing provision in the Temporary Consent Order, Ms. Bachman filed a petition for contempt. A hearing on the matter was held on February 26, 2021. Mr. Plum appeared at the hearing with counsel. The transcript of that hearing is not in the record before us, but in the March 9, 2021 Order Setting Contempt Purge Provision, the court found Mr. Plum in contempt for, among other things, failing to comply with the directive to submit to drug testing. The court set forth a purge provision, which required, in part, that Mr. Plum "submit to a hair follicle test" and "provide a testing result showing an absence of *all* illegal drugs and absence of all drugs for which he does not have a prescription." (Emphasis added). In addition, the court modified the Temporary Consent Order by providing that, until Mr. Plum purged

the contempt, "he shall only have *supervised* visitation with the minor child." (Emphasis added). It does not appear that Mr. Plum appealed that order.

At the April 9, 2021 hearing, Mr. Plum sought to submit the test results of a 5 panel hair follicle test, which indicated a negative result for some illegal substances. Notably, the test did not test for all illegal substances and, particularly relevant here, did not test for oxycodone. *See supra* note 7. Thus, we reject Mr. Plum's assertion on appeal that the test results he obtained should be deemed to satisfy his drug testing obligation. The March 9, 2021 order required him to submit to a hair follicle test showing an absence of *all* illegal substances, something the document he attempted to submit over Ms. Bachman's objection failed to do. Moreover, at the April 9, 2021 merits hearing, the court made it clear that it would not "countermand" the March 9, 2021 order, which had been issued by another judge of the court following a hearing.

With this background in mind, we see no abuse of the court's discretion in limiting Mr. Plum's access to his daughter to supervised visitation pending his satisfaction of the purge provision set forth in the March 9, 2021 order.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AWARDING APPELLEE SOLE LEGAL CUSTODY AND PHYSICAL CUSTODY VACATED; CASE REMANDED WITH INSTRUCTIONS TO REISSUE THOSE ORDERS WITH AN EXPLANATION FOR THE RULINGS; JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANT AND APPELLEE.