Circuit Court for Prince George's County
Case No. CAD13-12909

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1201

September Term, 2020

M.Y.

v.

L.G.

Berger,
Wells,
Ripken,

JJ.

Opinion by Berger, J.

Filed: October 7, 2021

This case involves a custody dispute originating in the Circuit Court for Prince George's County. M.Y. ("Mother") filed a complaint for limited divorce against L.G. ("Father") on April 30, 2013.[1] On October 15, 2013, the trial court entered a judgment of limited divorce. The trial court awarded Mother and Father joint legal custody and shared physical custody of the parties' minor children, L. and S.[2] In May of 2019, Mother filed a motion for modification of the custody schedule. Father also filed a motion for modification in July of 2019. On December 2, 2019, the trial court held a hearing on the competing motions. That same day, the trial court issued an Order denying Mother's motion and granting Father's motion. The trial court ordered that the parties would continue sharing legal custody, but that Father would have sole physical custody of S., with Mother having one-hour supervised visitation every other Monday.[3] Mother filed a notice of appeal on December 23, 2019.

[1] We shall refer to the parties by only their initials in order to protect their and their children's privacy.

[2] We shall refer to the children by only their first initial to protect their privacy. As of the time relevant to these proceedings, L. was in the age of majority and the parties no longer shared custody of him.

[3] "Physical custody . . . means 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 v. Taylor*, 306 Md. 290, 296 (1986). "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." *Id.* "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 physical custody is in reality 'shared' or 'divided' custody. Shared physical custody may, but need not, be on a 50/50 basis." *Id.* at 296–97.

On June 25, 2020, Mother filed a motion for modification of the December 2, 2019 Order and a motion for contempt. Father filed a motion for modification and a motion to obtain S.'s passport from Mother on September 30, 2020. On October 23, 2020, Mother filed a motion to recuse Judge Robin Gill Bright. Judge Bright denied Mother's motion for recusal on November 6, 2020. The trial court held a hearing on January 7, 2021 regarding both parties' motions. On January 20, 2021, the trial court issued an Order denying Mother's motion for contempt, Mother's motion for modification, and Father's motion for modification. The trial court also ordered that Father's motion to obtain S.'s passport would be held in abeyance. Mother filed a notice of appeal on February 17, 2021. The original notice of appeal, filed after the December 2, 2019 hearing, was not received by the Court of Special Appeals until December 16, 2020. Mother's two appeals were consolidated.

Mother presents four questions for our review,[4] which we have rephrased for clarity as follows:

"The parent not granted legal custody will, under ordinary circumstances, retain authority to make necessary day-to-day decisions concerning the child's welfare during the time the child is in that parent's physical custody. Thus, a parent exercising physical custody over a child . . . necessarily possesses the authority to control and discipline the child during the period of physical custody." *Id.* at 296 n.4.

[4] Mother's original questions presented are as follows:

> I. Whether the judge's findings of fact and conclusions when it modified the parties' shared custody of their daughter to award the father sole custody, and restrict the mother to supervised visits for one hour every two

I. Whether the trial court abused its discretion in its analysis of the best interests of the minor child and ultimately deciding to restrict Mother's visitation rights.

II. Whether the trial court committed reversible error when it conducted an *in camera* interview of the minor child and did not record the interview or disclose its contents to the parties.

III. Whether the trial court abused its discretion in declining to recuse the trial judge from further proceedings.

IV. Whether Mother had a right to appointed counsel in a civil case due to her indigent status.

For the reasons explained herein, we shall affirm the judgment of the trial court.

FACTS AND PROCEEEDINGS

Mother and Father married on October 21, 1999 in a civil ceremony in Arlington, Virginia and also on March 11, 2000 in a religious ceremony in Venezuela. The parties lived together as husband and wife following the marriage. The parties had two children as a result of the marriage: L. and S, who were ages 18 and 11 respectively, at the time of

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weeks, were clearly erroneous, a misapplication of law, or an abuse of discretion?

II. Whether the judge erred when she conducted *in camera*, unrecorded interviews of the parties' daughter, failed to document the child's statements, and used them to deny [Mother's] access to the child?

III. Whether the lower court's refusal to recuse the trial judge denied [Mother] her due process rights to a fair and impartial adjudication?

IV. Whether [Mother] had a right to appointed counsel because of her indigency and related circumstances?

the original modification hearing on December 2, 2019. On October 13, 2013, the trial court issued a judgment of limited divorce. In the judgment, the trial court incorporated a Voluntary Separation and Property Settlement Agreement ("Separation Agreement") signed by both parties, dated March 26, 2013. The trial court awarded Mother and Father joint legal custody and shared physical custody of both minor children. The shared physical custody access schedule was outlined in the Separation Agreement. The trial court also ordered that Father pay to Mother monthly child support in the amount of $768.00. Pursuant to the Separation Agreement, the minor children were to spend each Wednesday overnight with Father from 6:00 p.m. until 6:00 p.m. on Thursday. Further, the minor children would spend alternate weekends with Father from 6:00 p.m. on Friday until Monday morning at 10:00 a.m. The minor children were to spend the remaining time with Mother.[5]

A judgment of absolute divorce was entered on April 12, 2015. In July of 2015, Father filed a motion to incorporate an Addendum to the Separation Agreement ("Addendum Agreement"). After a hearing, the trial court granted Father's motion and incorporated the Addendum Agreement into the judgment of limited divorce, therefore modifying the custody access schedule accordingly. Pursuant to the Addendum Agreement, the parties retained shared physical custody of the minor children. The Addendum Agreement provided that Father would have physical custody every Tuesday

[5] The Separation Agreement also set forth various changes in the access schedule to account for holidays, vacations, "fishing time," and other special occasions.

after school overnight through Thursday morning drop-off to school and every other weekend from Friday after school through Monday morning drop-off to school. Further, the Addendum Agreement stipulated that the non-custodial party may contact the minor children when they are with the other parent no more than one time per day for an uninterrupted period of thirty minutes. The Addendum Agreement also outlined that any travel with the minor children must be accompanied by written permission from the other parent. As to the children's passports, the Addendum Agreement specified that Mother shall retain the United States passport for S. and Father shall retain the United States passport for L.

On May 31, 2019, Mother filed a motion for modification of the custody Order. In her motion, Mother requested that the trial court grant her "primary physical custody and sole legal custody" of the parties' minor daughter, S.[6] Father filed an opposition to Mother's motion on July 19, 2019. That same day, Father also filed a motion for modification.[7] In his motion, Father argued that Mother had reported concerns regarding Father's care of S. to the Maryland Department of Social Services ("DSS") and had violated the Addendum Agreement multiple times.

Throughout the summer of 2019, Mother made several allegations against Father. As a result, DSS and a social worker conducted investigations to assess any relevant safety

[6] Mother filed additional, supplemental motions for modification on September 13, 2019 and October 9, 2019.

[7] Father filed an additional, supplemental motion for modification on October 23, 2019.

concerns related to S. The social worker conducted a home study and a meeting with Mother. The social worker also visited Father's residence, however, Father received advice from his counsel and elected not to speak with the social worker.[8] Notwithstanding his decision, Father allowed the social worker to speak with S. When observing Father's residence during her home visit, the social worker found that the home was clean and tidy. The social worker also found that the minor child was well kept and neat. After concluding her conversation with the minor child, the social worker determined that S. was well taken care of and that there were no safety concerns at issue in Father's home. At the conclusion of the home study, DSS found that all of Mother's allegations were unsubstantiated.

On September 5, 2019, the parties appeared before a Family Magistrate. Mother filed a response to Father's motion for modification on September 13, 2019. On September 19, 2019, the Family Magistrate proposed that a custody and mental health evaluation be completed for all parties and that the case be continued to December 2, 2019.

On October 18, 2019, S. attended school and told the school counselor that she was suicidal. DSS was contacted again. Tamira Robinson ("Robinson"), a social worker, met with S. on that day. During the meeting, Robinson gained information from S. which provided that S. had panic attacks and thoughts of killing herself when spending time with Mother. Robinson also found that S. had reported to the school guidance counselor that she wanted to harm herself. Further, Robinson reported that S. did not feel safe with

[8] The social worker made clear that Father's decision to speak to DSS was a voluntary one that he was entitled to make and that he faced no consequences or adverse opinions as a result of that decision.

Mother and did not want to return home with her. Finally, Robinson found that S. would try to harm or kill herself if forced to return to Mother.

Based on this information, a DSS Safety Plan ("Safety Plan") was put into effect on October 18, 2019. The Safety Plan outlined a custody and visitation schedule for S., wherein she would be placed with Father full-time, "temporarily until Mother . . . has demonstrated that she is allowed to be left alone with her daughter." Further, the Safety Plan required Mother to undergo a mental health assessment and, if the assessment indicated that treatment is required, Mother must complete all treatment prior to S. being left alone with Mother. The Safety Plan allowed for Mother to have two hours of supervised visits two days a week. Accordingly, Mother was granted supervised access to S. every Monday and Tuesday for one hour each day.

The parties appeared before the trial court on December 2, 2019. Both parties appeared *pro se*. During the hearing, the trial court heard testimony from Lois Smith ("Smith"), a family casework specialist with the Anne Arundel County Department of Social Services; Mother; and Father.[9] Smith testified as to the process of how the case was assigned to her and the steps she took to investigate. Smith testified that Mother's concerns

[9] Mother also proposed three additional witnesses: Melissa Cochran, a counselor at S.'s school; Ms. Barton, S.'s second-grade teacher; and Maria Lopez, S.'s babysitter from years prior. The trial judge refused to allow testimony from any of these three proposed witnesses. The trial judge did not allow Ms. Cochran to testify because, as an employee of Anne Arundel County Public Schools, Mother was required to put the school system's attorney on proper notice, and she had not done so. Further, the second-grade teacher and former babysitter were not allowed to testify because any information they would provide were not relevant as the modification was from the most recent order, which was entered in 2018.

regarding S. being exposed to pornography were solely based on prior interactions between Mother and Father during their marriage. To be sure, Mother was concerned that S. would be inadvertently exposed to pornography by Father.

Following Smith's testimony, the trial court conducted an *in camera* interview with S. The trial judge conducted this interview in her chambers and off the record. Upon her return to the courtroom, the trial judge explained that she had an opportunity to speak with S. Further, the trial judge explained that "[t]his is standard in family cases" and that "[t]here are ways in which [it] can be done." The trial judge also explained that she chose to have no one in chambers besides herself, the minor child, and the trial judge's legal assistant. Specifically, the trial judge declined to have a court reported in chambers during the interview. The trial judge explained:

> [a]nd the reason why I'm hesitant to have either the parents or the [ ] court reporter [present] is because the whole point is to have a frank discussion without any minor child or children feeling that they have to say one particular thing or agree with one particular parent or be persuaded in any way.
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> In addition with having a court reporter present, again knowing that what is said is being recorded, is sometimes very difficult, as well, to get that full, frank, relaxed conversation.

The trial judge stated that while she would not recount the conversation word for word, she would "summarize pretty much what took place." She explained that she did not speak with S. about her conversations with her therapist so as to not risk breaking

confidentiality. The trial judge summarized that S. "loves both of her parents," but that S.'s visitation with Mother had not always been successful.

Next, the trial court permitted testimony from both Mother and Father. Mother testified that she planned to move to Texas to open a business and that she was in contact with a broker to do so. Upon further questioning, however, Mother testified that the numbers she provided were all estimations and that she was unsure as to the type of business she would open and how much she would be earning to support S. should she be allowed to move to Texas with Mother. Mother also testified that she planned on using child support from Father to support S. and herself while living in Texas. Further, Mother testified that when she moves to Texas, she will be living in a single room in her brother's home.

Subsequently, the trial court heard testimony from Father. Father testified that he monitors his daughter's activity on technology and that he makes sure she is following the rules. Father also testified that he encourages S. to read and frequently takes her to the library to check out books. After hearing testimony from both parties, the trial court issued its ruling.

The trial court noted that Mother has not been able to find a job and that she plans to move to Texas and open a business but that she does not know what kind of business she will open or how much money she will be earning. The trial court also noted that S. would be living in a single room with Mother at her brother's home in Texas. Further, the trial court stated that Mother did not have a concrete plan as to where the daughter would

be enrolled in school. Critically, the trial court found after reviewing the totality of the circumstances that Mother's testimony was "without any merit," and that all allegations Mother made against Father were merely "bald assertions."

The trial court explained that S. is doing very well and loves being with Father. The trial judge noted that the current visitation schedule is "really not working," and proceeded to analyze the *Taylor* and *Sanders* factors. The trial court found that there was a material change in circumstances because Mother was intending to move out of the state and take S. with her. The trial court also found that the parents' ability to communicate and reach shared decisions was extremely difficult and that "that factor, in and of itself, can merit sole custody to one parent." The trial court also found that Father was willing to share custody, but that Mother was not. Further, with regard to the fitness of the parents, the trial court found that Mother has no financial resources and intended to rely on child support from Father. Critically, the trial court stated that there was "disharmony between the child and" Mother.

Additionally, the trial court noted that with Mother's plan to move to Texas, the geographic proximity factor leaned towards awarding custody to one parent. Notably, the trial court found that Father "is extremely sincere as to why he wants the minor child to be in his custody[,]" but that the trial court did not know why Mother wanted custody.

The trial court subsequently issued an Order outlining its ruling. First, the trial court denied Mother's motion for modification and granted Father's. Further, the trial court granted sole physical custody of S. to Father and awarded Mother supervised visitation

every other Monday for one hour. The Order also ceased Father's payment of child support to Mother and outlined that if Mother moved out of the D.C. Metropolitan area, Mother would be responsible for travel costs of S. and that access would be determined by Father. Mother filed a notice of appeal on December 16, 2019.

On January 31, 2020, Father filed a motion for modification with the trial court alleging that sharing custody had become too difficult upon Mother's relocation to Texas and requesting that Mother give Father S.'s passport. Mother filed a response on April 14, 2020. Mother filed a motion for modification and a motion for contempt on June 25, 2020, alleging that she had moved back to Maryland and that Father was not allowing Mother to see S. Father filed an opposition on July 10, 2020. Mother wrote a letter to Judge Sheila Tillerson Adams, the chief and administrative judge of the Circuit Court for Prince George's County, requesting that she change the custody schedule ordered by Judge Bright. Judge Adams replied with a memorandum letter on September 1, 2020 explaining that she did not have the appellate authority to do so.

On September 30, 2020, Father filed a motion "to obtain passports for [S.] [ ] and terminate [Mother's] visiting rights." Mother filed an opposition on October 6, 2020. The trial court set a hearing for these motions on October 19, 2020 before Judge Bright. On October 23, 2020, Mother filed a motion to recuse Judge Bright alleging that the trial judge favored Father and that she was not impartial. Judge Bright denied Mother's motion on November 6, 2020. The hearing was postponed to January 7, 2021 to allow Mother to attempt to retain counsel.

At the hearing on January 7, 2021, Mother again moved to postpone the case to allow her time to obtain counsel. Judge Bright denied the motion and proceeded with the hearing. The trial court heard testimony from Tracy Bowen ("Bowen"), a social worker with Anne Arundel County In-Home Services. Bowen testified that the case was transferred to her on November 15, 2019 and that she closed the case on February 13, 2020. Bowen testified that her main concern was S.'s mental health and, more specifically, her anxiety when in the presence of Mother. Bowen testified that she observed a visit between Mother and S. and that she had to interject multiple times because she could tell S. was getting uncomfortable.

The trial judge then explained that she wanted to have an *in camera* conversation with S. Mother objected. The trial court stated "[i]f you're not going to allow the [c]ourt to hear from the minor child, then with respect to your motion for a contempt, that would be denied. As to your motion to modify the [c]ourt order, that would be denied because the [c]ourt can't hear from the minor child as to using that to assess one of the factors that would be very important for the [c]ourt." Subsequently, Mother allowed Judge Bright to speak with S. Judge Bright spoke with S. *in camera* for approximately twenty minutes and afterwards described the conversation as "extremely helpful." The trial judge explained that she "just wanted to hear [S.'s] perspective and some of the things that she thought about."

The trial court then moved on to consider Father's motion for S.'s passport and inquired as to the status. Father explained that he wanted to take S. to Vietnam to visit

with her paternal grandfather. Mother stated that she did not agree and would not give Father the passport because she did not want S. to travel internationally during the coronavirus pandemic.

In its ruling, the trial court explained that it continued the case a number of times to allow for the parties to obtain counsel. From the bench, Judge Bright found that there was a material change in circumstances and proceeded to look at the *Taylor* and *Sanders* factors. The trial court explained that it "ha[d] questions as to [Mother's] primary focus of what is best for the minor child as opposed to what is best for herself and what she wants." Therefore, the trial court found that there was no basis to modify the custody Order and that Mother's supervised access should continue as previously outlined in the December 2, 2019 Order.

On January 20, 2021, the trial court issued an Order reflecting its decision. In its Order, the trial court explained that Father could not be held in contempt because his actions were not willful or intentional. Further, the trial court found that there had been no material change in circumstances "that affect the welfare of the minor child" or that should affect the terms of the December 2, 2019 Order. Accordingly, the trial court denied Mother's motion for contempt, denied Mother's motion for modification, denied Father's motion to terminate Mother's access to S., and held in abeyance Father's motion to obtain S.'s passport. Mother filed a timely appeal on February 17, 2021. The original notice of appeal was not received by the Court of Special Appeals until December 16, 2020. Mother's two appeals were consolidated before us.

DISCUSSION

Standard of Review

"Where modification of a custody award is the subject under consideration, [we] generally base [our] determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child." *Karanikas v. Cartwright*, 209 Md. App. 571, 589 (2013) (internal citation and quotation marks omitted). Critically, however, "there is no litmus paper test that provides a quick and relatively easy answer to custody matters." *Montgomery Cnty. Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 419 (1977). Indeed, "[t]he best interest standard is an amorphous notion, varying with each individual case . . . [t]he fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Id.* We review child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 585–86 (2003). The Court of Appeals has described the three interrelated standards as follows:

> we point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] 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. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (internal citations and quotations omitted). In our review, we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* at 584. We recognize that

> it is within the sound discretion of the [trial court] to award [or modify] custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

Id. at 585–86.

We will not make our own determination as to a child's best interest. *See Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007) (internal citations omitted). Rather, "the trial court's decision governs, unless the factual findings made by the [trial] court are clearly erroneous or there is a clear showing of an abuse of discretion." *Id.* (internal citations omitted). Generally, "[a] trial court's findings are not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (internal citation and quotation marks omitted).

The decision to interview, or not to interview, a minor child who is the subject of a custody proceeding is within the discretion of the trial judge. *Karinikas*, *supra*, 209 Md. App. at 590 (citing *Marshall v. Stefanides*, 17 Md. App. 364, 369 (1973)). "While the

preference of the child[ ] is a factor that *may* be considered in making a custody order, the court is not required to speak with the child[ ]." *Lemley v. Lemley*, 102 Md. App. 266, 288 (1994) (internal citation omitted).

On the issue of recusal of a judge, "there is a strong presumption . . . that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Conner v. State*, 472 Md. 722, 738 (2021) (internal citations and quotation marks omitted). Accordingly, "[t]he decision to recuse oneself ordinarily is discretionary and will not be overturned except for abuse." *Attorney Grievance Comm'n of Md. v. Shaw*, 363 Md. 1, 11 (2001) (internal citation omitted).

I. The trial court did not abuse its discretion in awarding sole physical custody to Father and restricting Mother's access to the minor child after considering all factors relevant to the best interest of the minor child.

"A change of custody resolution is most often a chronological two-step process. First, unless a material change of circumstances is found to exist, the court's inquiry ceases." *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). A "material change" is one that may affect the welfare of the child. *Id.* (citing *McCready v. McCready*, 323 Md. 476, 593 (1991)). If the trial court finds that a material change of circumstance is found to exist, "then the [trial] court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding." *Id.* Critically, however, if the changes in circumstances are not material, "there can be no further consideration of the best interest of the child because, unless there is a material change, there can be no consideration given

to a modification of custody." *Id.* at 29. Any reconsideration of a trial court order should rely on changes in circumstances which have occurred "subsequent to the last court hearing." *Id.* at 30 (internal citation and quotation marks omitted). Indeed, the trial court can find that there was a material change in circumstances and, nonetheless, find that a change in custody is not warranted in the best interest of the child. *Id.* at 29.

"The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child." *Shunk v. Walker*, 87 Md. App. 389, 396 (1991) (internal citation omitted). Both the Court of Appeals and this Court have identified several factors for a trial court to consider when making a custody determination as to a minor child. *See Taylor*, *supra*, 306 Md. at 508; *Sanders*, *supra*, 38 Md. App. at 406. The criteria for judicial determination includes, but is not limited to: (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreement between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health, and sex of the child; (8) residences of parents and opportunities of visitations; (9) length of separation from parents; and (10) prior voluntary abandonment or surrender. *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 265 (2021).

A. The trial court did not abuse its discretion in finding a material change in circumstances at the December 2, 2019 hearing and further limiting Mother's visitation with the minor child.

At the hearing on December 2, 2019 and in its subsequently issued Order, the trial court explained that there was a material change in circumstances related to the minor child. Specifically, the trial court stated that Mother's intention to move out of Maryland and relocate to Texas with S. was a material change in circumstances that directly affected the best interest of the minor child. Further, the trial court found that the DSS involvement resulting in the issuance of the Safety Plan related to S.'s suicidal tendencies also contributed to a finding of a material change in circumstances. The parties do not dispute the trial court's finding that there had been a material change in circumstances.[10]

Based upon our review of the record as a whole, we hold that the circuit court's determination that a material change of circumstances had occurred was supported by the evidence presented at the hearing on December 2, 2019. To be sure, a change is considered to be "material" only if it affects the welfare of the child. *McCready*, *supra*, 323 Md. at 481–82. There were several changes identified by the trial court that had evidentiary support and also affected the welfare of the minor child. Accordingly, we shall turn our attention to the trial court's specific determinations as to physical custody.

[10] Neither party raised an issue disputing the trial court's finding of a material change in circumstances. Indeed, *both* parties filed motions for modification in the proceedings below. By their nature, the filing of these motions suggests that both Mother and Father sought the trial court to find a material change in circumstances related to the best interest of the minor child, S.

Mother argues that the trial judge abused her discretion when she limited Mother's visitation with S. to one supervised one-hour visit every other week. Mother contends that the trial court can only restrict a parent's access upon proof of emotional or physical danger. Further, Mother argues that the trial court erred in refusing to hear from witnesses such as S.'s second-grade teacher and S.'s former babysitter.[11]

At the December 2, 2019 hearing, after determining that a material change of circumstances had occurred, the trial court examined the *Taylor* and *Sanders* factors and set forth its reasoning as to each factor. We need not reassess each of the factors on appeal. *See Gordon*, *supra*, 174 Md. App. at 637–38. Our review of the record demonstrates that the trial court considered the applicable factors when assessing whether the existing physical custody schedule should be further limited.[12] For example, the trial court found

[11] Mother's argument regarding the exclusion of her proffered witnesses is misplaced. The witnesses offered by Mother during the hearing only had knowledge of S. and her circumstances with her parents prior to the entry of the most recent custody order in the underlying case in March of 2018. S.'s second-grade teacher and babysitter from years prior would not have relevant testimony as to a change in circumstances occurring after March of 2018. *See Wagner*, *supra*, 109 Md. App. at 29–30 (internal citations omitted) (noting that when a movant seeks to modify custody, she must prove that there is "some evidence of changes which have occurred *since* the earlier determination was made").

[12] Indeed, the trial court was not making a determination as to a change from the original joint physical custody access schedule wherein both parents had access to the children approximately fifty percent of the time. Rather, the Safety Plan had already been instituted based on the findings of DSS by the time this hearing occurred and the trial court was determining whether a further modification needed to be made from that predetermined access schedule, wherein Mother was allowed two supervised one-hour visits with S. each week.

that the parents' ability to communicate and reach shared decisions was "extremely difficult" and noted that this factor, "in and of itself, can merit sole custody to one parent." Further, the trial court considered the fitness of the parents and found that Mother has no financial resources and intends to rely on child support from Father. Perhaps most critically, the trial court considered the relationship between the child and each parent. The trial court explicitly found that "there is disharmony between the child and the mother."

We disagree with Mother's assertion that there was no evidence of actual physical or emotional harm warranting a restriction on Mother's access to S. "[W]hen the child's health or welfare is at stake[,] visitation may be restricted or even denied." *Boswell v. Boswell*, 352 Md. 204, 221 (1998) (internal citations omitted). The necessary focus is on the welfare of the children, not the rights of the parents. *Id.* at 236.

The parties included the Safety Plan in the record that was created by DSS which was presented to the trial court during the December 2, 2019 hearing. The Safety Plan outlined that S. stated that "she ha[s] panic attacks when with her mother and thoughts of killing herself when she is with her mother." Further, the Safety Plan provided that S. had reported to the school guidance counselor that "she wanted to harm herself" and "does not want to return home to her mother." S. also stated to the social worker that "she would try to harm/kill herself if she returns to her mother." This evidence amounts to the showing of "actual emotional or physical harm to the minor child" and an "adverse impact" that Mother argues is necessary to allow a physical custody limitation. *Id.* at 225, 229.

Having reviewed and considered the record in this case, it is our conclusion that the trial court's factual findings were supported by the evidence and not clearly erroneous. Furthermore, the circuit court considered the applicable factors before modifying the physical custody schedule. We hold, therefore, that the trial court's determination that a material change of circumstances had occurred that warranted a modification of the child's physical custody schedule so as to further limit Mother's access to one supervised one-hour visit per week was not an abuse of discretion.

B. The trial court did not abuse its discretion in not finding a material change in circumstances at the January 7, 2021 hearing and, therefore, declining to modify the December 2, 2019 custody Order.

During the hearing on January 7, 2021, the trial court explained on the record that it found that there was a material change in circumstances. Although not explicit, the trial court explained that the material change was Mother's return to Maryland from Texas. The trial court then considered the motions from both parties to modify the current access schedule. The trial court explained that putting S. "in a situation where her mental health could be in jeopardy" was not something that the trial court was going to do. The trial court expressed that it had concerns as to Mother's "primary focus of what is best for the minor child and as to what is best for herself and what she wants." Accordingly, the trial court found that there was no basis for modifying the current custody Order from the December 2, 2019 hearing.

The trial court issued its written Order on January 20, 2021. In the Order, the trial court noted that "there has been no material change in circumstances of the Mother or the

Father that affect the welfare of the minor child." Further, the trial court found that "there has been no change in circumstances that should alter the terms of the [c]ourt's December 2, 2019 Order," and, therefore found "that it is in best interest of the minor child to continue living with the Father with supervised visitation with the Mother." Accordingly, the trial court denied both parties' motions for modification.

Mother argues that the trial court erred because there was a lack of physical or emotional harm necessary to restrict Mother's access to S., and, therefore, the trial court erred in refusing to modify physical custody. Mother also notes that the trial court changed its finding as to whether there was a material change in circumstances and questions the validity of the ruling and hearing.

First, despite the discrepancy between the trial court's ruling from the bench and the trial court's Order as to whether there was a material change in circumstances, the change is not relevant because it did not affect the outcome. Although the trial court found that there was a material change in circumstances during the hearing, the trial court nevertheless found that there was no change warranting a modification of the existing Order. The subsequent Order, while not finding a material change in circumstances, also did not find that there was a basis to warrant a modification of the existing Order. Therefore, this discrepancy is not relevant to our review.

Turning to Mother's argument that there was no evidence of emotional harm, we disagree based on the reasons set forth in our discussion, *supra*, based on the previously admitted Safety Plan and the evidence admitted during this hearing. Indeed, Bowen

testified that she had to interject and intervene during Mother's visitation with S. because S. was "visibly uncomfortable." Accordingly, we affirm the trial court's decision to deny Mother's motion for modification of the December 2, 2019 Order.

II. Although the trial court erred in interviewing the minor child *in camera* and not recording the interview, the decision to do so did not constitute reversible error as the minor child's wishes were already known to the parties and the interview did not factor heavily into the trial court's decision.

During both hearings, the trial judge expressed an interest in interviewing the minor child outside of the presence of the parties. At the December 2, 2019 hearing, Judge Bright announced that after a recess for lunch, she would conduct an interview "with the minor child in chambers, outside the presence of both parents." There were no objections from either party. Upon return from recess, Judge Bright again announced her intention to interview S. *in camera*, and proceeded to do so. Judge Bright then spoke with S. for approximately twenty-seven minutes. Judge Bright explained that she was hesitant to have either party or the court reporter in chambers during the interview because "the whole point is to have a frank discussion without any minor child or children feeling that they have to say one particular thing or agree with one particular parent or be persuaded in any way." Further, Judge Bright explained that having a court reporter in the room and the minor child knowing that everything is being recorded hinders the ability to obtain a full, frank conversation.

Judge Bright then told the parties that she would not say specifically word for word what took place, rather, she would summarize the conversation. Judge Bright emphasized that her overarching concern during the conversation was to gauge what was in the best

interest of the minor child. Judge Bright then told the parties that S. "loves both of her parents" and "[t]hat's without question." The trial judge also explained that S. "enjoys being with her father [and] enjoys being with her brother" and that she is "thriving." Finally, Judge Bright stated that based on her conversation, the supervised visits with Mother and S. "appear[ ] [to not] always be successful based on their interaction." There was no further conversation regarding the interview in chambers.

The sequence of events was quite different during the hearing on January 7, 2021. During the hearing, Judge Bright explained that she wanted to speak with the minor child because that is one of the factors the courts looks at, "especially if there [are] concerns regarding the child's mental health." At that point, Mother noted an objection because she "ha[d] not seen [her] daughter enough [during the] year for her to have an opinion." Mother expressed that the year was a very stressful situation for her and for S. Judge Bright questioned Mother and expressed that she thought it would be important to hear this directly from the minor child. Mother continued her objection. The trial court then explained that if the court could not hear from the minor child, both Mother's motion for contempt and her motion to modify would be denied. Mother then relented and allowed Judge Bright to speak with S.

Judge Bright then spoke with S. off the record for approximately twenty-one minutes. Upon her return, Judge Bright explained that the purpose of the conversation was not to let S. make a custody determination, but rather to "hear her perspective and some of the things that she thought about" as related to her best interests.

Mother argues that we must reverse the decision of the trial court because Judge Bright erred in not recording the conversations she had with S. Mother argues that this was clear error on the part of the trial court.

In *Marshall v. Stefanides*, a chancellor overruled a mother's objection to interview her two minor children in chambers and excluded both of the parties and their counsel from the interview. *Marshall*, *supra*, 17 Md. App. at 367. Afterwards, the chancellor did not reveal any of the substance of the children's statements. *Id.* The chancellor then awarded custody to the father and explained that he relied to a great extent on the information gathered during the interview with the minor children. *Id.* at 367, 370 n.4. Notably, the interviews took place after the father's testimony and the children were not excluded from the courtroom during the testimony. *Id.* at 369. Because of this, this Court assumed the children had heard the father's testimony and had been "possibly schooled" by such. *Id.* Accordingly, we agreed with the mother's argument because the mother had a "total lack of knowledge" of what the children told the chancellor. *Id.* We held that "the interview was fundamentally unjust." *Id.* "[U]nder the circumstances of th[e] case," we held that the interview "constitute[d] reversible error[.]" *Id.* at 370–71.

Our holding in *Marshall* more generally outlined that a trial court may, in its discretion, interview a child in a custody case even without the consent of parties or the presence of counsel. *Id.* at 369. "[U]nless waived by the parties," however, "the interview must be recorded by a court reporter." *Id.* Further, "[i]mmediately following the interview," its contents must "be made known to counsel and the parties." *Id.* One key

purpose of this requirement is to ensure that "some means of appellate review of the interview is available." *Id.* at 369–70.

This procedure is designed to "minimize[ ], as much as possible, the psychological impact on the child, and at the same time allow[ ] interested parties to produce all the evidence that is necessary to enable the court to arrive at a fair and just determination in accordance with the best interest of the child." *Id.* at 370. The Court of Appeals has endorsed the practice of "providing to the excluded part[ies] a recorded copy of a child's interview that occurs out of the presence of a party." *In re Maria P.*, 393 Md. 661, 678 (2006).

Indeed, this Court has held that "the record must affirmatively show the waiver" of the court reporter's presence. *Nutwell v. Prince George's County Dep't of Social Servs.*, 21 Md. App. 100, 110 (1974). Prior cases have demonstrated that a party waived the right to complain on appeal of the failure to record a child interview or to disclose its contents. *See Lemley*, *supra*, 102 Md. App. at 288 n.4 ("[T]he parties waived their right to have the interview recorded."); *Shapiro v. Shapiro*, 54 Md. App. 477, 480 (1983) (to preserve issues respecting *in camera* interviews for appeal, objections must be noted on the record or be waived). Notably, this Court has said that "even though the parties can affirmatively waive the presence of a reporter, the better practice is to have a reporter present in order that a

complete record will be available on appeal." *Denningham v. Denningham*, 49 Md. App. 328, 331 n.3 (1981).[13]

While we do not hold that Mother waived her right to have Judge Bright's *in camera* interview with S. recorded, this determination does not end our analysis.[14] While our previous opinions have reiterated the importance of the recording and disclosing requirement for child interviews, no case has ever held that an erroneous failure to record and disclose to the parties the contents of a child interview automatically requires the reversal of a custody determination. This case is distinguishable from our decision in *Marshall.* In *Marshall*, we determined that the chancellor did not record the interviews, did not make the substance of the interviews known to the parties, and heavily relied on the interviews in making its custody determination. *Marshall*, *supra*, 17 Md. App. at 369. Yet, in *Marshall*, this Court also determined that the interview was "fundamentally unfair" because the circumstances of that case left the mother "in the untenable position of being called upon to answer, explain, or defend the alleged preferences of her [children] when she did not know what preferences or 'desires' they had expressed." *Id.*

[13] We further note that the better practice is to obtain the consent of the parties before interviewing a child, and further, for the trial judge to take copious notes of the interview and share the details of the interview with all parties and counsel for all of the participants at trial.

[14] At the December 2, 2019 hearing, Mother said nothing when Judge Bright expressed her desire to speak with S. *in camera*. This ambiguous omission does not rise to the "affirmative waiver" that the case law requires. *Nutwell*, *supra*, 21 Md. App. at 109–110. Further, at the January 7, 2021 hearing, Mother initially objected to the *in camera* interview and later reluctantly agreed. Mother never explicitly waived her right to have a recording of the conversation. *See id.*

In the instant case, however, Mother cannot argue that she suffered unfair surprise when the trial court summarized the interview with the minor child and used the contents of the interview to assist in her decision to grant sole physical custody to Father. During the DSS investigation, S. stated that she would kill herself if she was forced to spend time with Mother. Further, S. told the social worker that she did not feel safe with Mother and wanted to stay with Father.

Mother asserts that we should find prejudice here because the trial court relied on the interviews to determine Mother's access schedule with S. Mother points to no explicit indication of prejudice, only speculation of prejudice. Essentially, Mother argues that the trial court's error here is significant enough that we should infer prejudice from the mere possibility of prejudice. The Court of Appeals has, on occasion, employed a presumption of prejudice for "particularly acute errors," such as errors that are likely to have affected the entire course of a trial. *Sumpter v. Sumpter*, 436 Md. 74, 88–89 (2013). The Court has emphasized, however, that any evaluation of prejudice "always requires a fact-intensive, case-by-case inquiry." *Id.* at 89 n.17.

The record before us does not show that this case is one of the exceptional, rare situations in which an appellate court should presume prejudice. *See Barksdale v. Wilkowsky*, 419 Md. 649, 659–60 (2011). By all indications from the transcripts from the proceedings, the statement from the interviews with the minor child that the trial court deemed most significant was that S. did not feel safe with Mother and that she was happy with Father. The lack of a record outlining this interview did not prevent Mother from

addressing S.'s preferences and feelings, which were known before trial; rather, the lack of a transcript merely deprived Mother of an *additional* potential opportunity to do so. Under these circumstances, the record fails to establish that the trial court's errors were likely to have affected the outcome of the case. Consequently, reversal is not warranted. *See Denningham, supra*, 49 Md. App. at 338.

III. The trial judge did not abuse her discretion in declining to recuse herself from presiding over further proceedings in the instant case because Mother did not meet the high burden of proving prejudice or bias on the part of the trial judge.

Next, we turn to Mother's contention that the trial judge erred in declining to recuse herself from hearing the case upon Mother's motion for her to do so. Mother alleges that the trial judge "assumed the mantle of an advocate, not an impartial adjudicator" and that she "orchestrated" all of the witness' testimony. Mother further alleges that the trial judge sustained "her own *sua sponte* objections to almost every question framed by [Mother]."[15] Mother also contends that the trial judge accused her of lying and that the trial judge's harsh views of Mother amount to a "bias."

Maryland Rule 18-102.11 provides:

> (a) A judge shall disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned, including the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party . . . or personal knowledge of facts that are in dispute in the proceeding.

[15] We take note that the trial judge also sustained objections and struck statements from Father during the hearings.

Further, Maryland Rule 18-102.2(a) requires a judge to uphold and apply the law and perform all duties of judicial office "impartially and fairly." Indeed, "[a] judge may make reasonable efforts, consistent with the Maryland rules . . . , to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." Md. Rule 18-102.2(b). A judge must also perform all duties of the judicial office "without bias or prejudice," and, in the performance of such duties, "a judge shall not, by words or conduct, manifest bias." Md. Rule 18-102.3(a)–(b).

"[B]ecause judges occupy a distinguished and decisive position[,] [ ] they are required to maintain high standards of conduct." *Jefferson-El v. State*, 330 Md. 99, 106 (1993) (internal citation omitted). "Generally speaking, a judge is required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judge's impartiality." *Matter of Russell*, 464 Md. 390, 402 (2019) (internal citations omitted). Indeed, there is a strong presumption in Maryland, and elsewhere, "that judges are impartial participants in the legal process." *Jefferson-El*, *supra*, 330 Md. at 107 (internal citation omitted).

"To overcome the presumption of impartiality, the party requesting recusal must prove that the trial judge has 'a personal bias or prejudice' concerning him or 'personal knowledge of disputed evidentiary facts concerning the proceedings.'" *Id.* at 107 (quoting *Boyd v. State*, 321 Md. 69, 80 (1990)). "Only bias, prejudice, or knowledge derived from an extrajudicial source is personal." *Id.* (internal citations omitted). Where knowledge is acquired in a judicial setting, "or an opinion arguably expressing bias is formed on the basis

of information 'acquired from evidence presented in the course of judicial proceedings before him,' neither that knowledge nor that opinion qualifies as 'personal.'" *Id.* (quoting *Boyd*, *supra*, 321 Md. at 77).

Critically, "[i]t is settled law that a motion for recusal may not ordinarily be predicated upon the judge's rulings in the case at hand or a related case." *Reed v. Balt. Life Ins. Co.*, 127 Md. App. 536, 552 (1999) (internal citations omitted). The burden on a party attempting to demonstrate that a judge is not impartial or biased is a high one. *See Conner*, *supra*, 472 Md. at 738. As we noted in *Koffley*,

> [r]are are the cases in which a Family Division judge should grant a motion for recusal on the ground that, as a result of prior rulings in an ongoing domestic relations case, the judge has become "prejudiced" against the party who has moved for the judge's recusal. In "family law" cases, however, parties are often overcome by emotion when they are disappointed by an adverse custody or visitation ruling.

Koffley v. Koffley, 160 Md. App. 633, 645 (2005).

Here, no reasonable person would question the trial judge's impartiality. The only arguments Mother makes in favor of recusal are that the trial judge limited Mother's access with S., found Mother not to be credible, and did not allow Mother to violate the rules of evidence throughout the presentation of her case. As noted above, just because a trial judge rules against a party does not lay the necessary groundwork for a trial court to grant a motion for recusal. *See Reed*, *supra*, 127 Md. App. at 552. Further, trial judges are entitled to weigh the credibility of the witnesses as they see fit because they are the fact finders and, therefore, are in the best position to do so. *See In re Yve S.*, *supra*, 373 Md. at 585–

86. Accordingly, we hold that the trial judge did not abuse her discretion in denying Mother's motion for recusal.

IV. The trial court did not err in refusing to appoint counsel for Mother because there is no right to counsel recognized in Maryland under the circumstances of this case.

Finally, we turn to Mother's contention that the trial court erred in refusing to appoint Mother counsel and refusing to grant a continuance for Mother to obtain her own counsel. Mother argues that her right to parent S. is a "fundamental right." Mother contends that in light of her language barrier and cultural difficulties, the trial court should have appointed counsel and the failure to do so resulted in an "error that so hamstrung her defense that every aspect of the trial was affected." Additionally, Mother argues that the trial court should have granted her motion for a continuance of the January 7, 2021 hearing so that Mother could further attempt to obtain her own counsel.

The Court of Appeals has stated that "the right to parent is fundamental even in custody disputes." *Touzeau v. Deffinbaugh*, 394 Md. 654, 676 (2006) (citing *McDermott v. Dougherty*, 385 Md. 320, 353 (2005)). "The fundamental nature to the right to parent, however, does not necessarily implicate" the due process protection of the right to counsel like in cases involving Child in Need of Assistance ("CINA") proceedings and involuntary termination of parental rights. *Id.*[16]

[16] Even in cases implicating CINA and involuntary termination of parental rights, the Court of Appeals has declined to provide the full due process rights afforded to criminal defendants. *See Touzeau, supra,* 394 Md. at 676 (citing *In re Blessen H.*, 392 Md. 684, 705–08 (2006)).

Mother is represented by counsel in this appeal and there is no indication that should there be any further litigation in this case, Mother would not be represented in that litigation. *See Frase v. Barnhart*, 379 Md. 100, 127 (2003). No case in Maryland has expanded the right to counsel afforded by due process protections to those with indigent status in a custody dispute. *See id.* at 126–28; *Touzeau*, *supra*, 394 Md. at 676–78.[17] Accordingly, we hold that the trial court did not err in refusing to appoint counsel to represent Mother in the proceedings below.

Mother also seems to argue that we must afford *pro se* litigants seeking counsel "a higher standard of scrutiny in our review of a denial of a motion for continuance." *Touzeau*, *supra*, 394 Md. at 677. Indeed, "[t]he granting or denial of a continuance or postponement is within the sound discretion of the trial court." *Fontana v. Walker*, 249 Md. 459, 463 (1968) (internal citations omitted). In *Touzeau*, the Court of Appeals declined to "elevat[e] the rights of litigants who" seek appointed or pro bono counsel, "over the rights of litigants who retain counsel." *Touzeau*, *supra*, 394 Md. at 677–78. To do so, the Court of Appeals acknowledged, would "creat[e] two distinct classes of litigants in our courts." *Id.*

In the instant case, Mother has failed to demonstrate that "she experienced an unforeseen circumstance in the contested custody proceedings that she reasonably could not have anticipated and that she acted with due diligence to mitigate the consequences of

[17] Indeed, in states where the right to counsel for parties involved in custody disputes is recognized, it has been explicitly provided for by statute. *See Frase*, *supra*, 379 Md. at 128 n.10 (internal citations omitted).

not being represented by counsel at the hearing to modify custody." *Id.* at 678.[18] Accordingly, we hold that the trial court did not abuse its discretion in denying Mother's motion for a postponement for the purpose of obtaining counsel.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[18] Notably, the trial court previously granted several continuances to allow the parties to obtain counsel. On November 24, 2020, more than one month prior to the January 7, 2021 motions hearing, the trial court advised the parties that if counsel was not present at the hearing, the case would not be postponed any further.