Circuit Court for Prince George's County
Case No. CAP 18-03166

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1714

September Term, 2019

A. U.

v.

E. P.

Kehoe,
Leahy,
Wells,

JJ.

Opinion by Kehoe, J.

Filed: April 21, 2020

This is an appeal from a judgment of the Circuit Court for Prince George's County that denied A. U.'s petition for custody of his minor child, "K." He raises numerous contentions on appeal, which we have reorganized and reworded:

1. Was the trial court biased against Mr. U. on the basis of his gender?
2. Did the trial court err in denying Mr. U. access to K.'s medical records?
3. Did the trial court err in declining to take judicial notice of the records of other cases between K.'s mother and her spouse?
4. Did the trial court err by failing to make findings required by Md. Code, §§ 9-101 and 9-101.1 of the Family Law Article ("Fam. Law")?
5. Did the trial court abuse its discretion in denying appellant's petition for custody?[1]

Our answer is no to the first three questions and, on the record before us, to the fifth as well. However, because our answer to the fourth question is yes, we will remand the case to the circuit court for further proceedings without affirmance or reversal pursuant to Md.

[1] Mr. U. articulates the issues thus:

1. Whether the lower Court's gender discrimination and bias against the Appellant violates the Equal Protection of the 14th Amendment and Maryland Declaration of Rights, Article 46, and Existing Maryland Laws and Best Interest of the Child?
2. Whether the circuit court's refusal to take judicial notice of Appellee's husband's history of domestic violence and adjudication of child abuse, and declining to follow the law is appropriate?
3. Whether it is in the best interest of the minor, [K.], to reside with an adjudicated child abuser and a mother that covers for the abuser?

Rule 8-604(d).[2]

Background

Mr. U. is the father of K., who was born in 2016. E. P. is K.'s mother. Ms. P. is married to M. P. Mr. and Ms. P. were married for several years prior to the events that gave rise to this appeal. They had three children, all of whom were minors in the period relevant to this case. At some point, Mr. and Ms. P. became estranged, and it was during this period that K. was conceived. In 2017, Ms. P. filed a petition for a protective order against Mr. P. on her own behalf and on behalf of her four minor children, including K. Mr. P. consented to the entry of a protective order with regard to Ms. P., but not as to the children. After a trial on the merits, the court entered a protective order against Mr. P. with respect to the four children. Ten months later, and before the order expired, Ms. P. filed a motion requesting that the court rescind the protective order. Mr. U. filed a motion to intervene as the father of K., a request for an emergency award of temporary custody, and a request for other relief. After a hearing, the circuit court granted Ms. P.'s motion and rescinded the final

[2] Md. Rule 8-604(d) states in pertinent part:

> (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

protective order. The court denied Mr. U.'s motion to intervene and for other relief as moot because the final protective order had been rescinded.

While the protective-order litigation was pending, Ms. P. filed a complaint for a limited divorce against Mr. P., and he countered with a complaint for absolute divorce. At some point in this period, Ms. P. and Mr. P. became reconciled, and in February 2018, they dismissed their divorce actions against one another.

At this juncture, Mr. U. filed the current action against Ms. P. He sought custody of K. as well as other relief. He filed a motion for a test of K.'s paternity, which the court granted. The test results indicated that there was a 99.9% chance that Mr. U. was K.'s father. Later in the proceedings, Mr. P. filed a motion to intervene, which was also granted.

In essence, the theory of Mr. U.'s case was that Mr. P. was a violent person who posed an ongoing danger to K. and other members of his family. Further, Mr. U. sought to prove that Ms. P. was an unfit mother, largely because she wished to live with Mr. P., and that K. had been physically abused and neglected while he was in Ms. P.'s care.

For her part, Ms. P. conceded that her relationship with Mr. P. had been strained in the past. But she testified that they had reconciled and were living together as a family. She characterized Mr. U. as a manipulative person who had "hoodwinked" and "brainwashed [her into] pulling out of [her] marriage." She also said that Mr. U. had been "the brain behind all of the filings" in the protective-order actions. According to her, many of the allegations regarding Mr. P.'s behavior in the petitions for protective orders were untrue and known by her and Mr. U. to be untrue. (The trial court found this testimony to be

credible.) She testified that K. was a happy, well-adjusted child who was somewhat developmentally delayed because he was born five months premature. Mr. P. provided her and all the children, including K., with support, "as a family, emotional, psychological, spiritual, financial and what have you."

After the trial, the court delivered a bench opinion in which it made findings of fact to address the so-called *Taylor* factors. *See Taylor v. Taylor*, 306 Md. 290, 304–11 (1986). Pertinent to the issues raised by Mr. U. in this appeal, the trial court found that:

(1) The allegations that Ms. P. "caused or permitted [K.] to be abused . . . have no validity."

(2) The evidence was "compelling and persuasive" that K. has not been abused by any member of the P. household or by Mr. U.

(3) There was no "credible, consistent or persuasive" evidence that Ms. P. had criticized or demeaned Mr. U. in the P. household or to K.'s half-siblings.

(4) The court-ordered *pendente lite* visitation between K. and Mr. U. had gone well and K. was developing an attachment to Mr. U.

(5) Both Mr. U. and Ms. P. were fit to be custodial parents.

(6) Ms. P. was of good character and reputation. The court expressed reservations about some aspects of Mr. U.'s character and reputation in light of the fact that he had

recently been disbarred by the Court of Appeals.[3]

Ultimately, the court determined that Ms. P. should have sole legal and physical custody because the parties were unable to communicate effectively about K. without "perceived threats, sometimes harassment [and] continuous involvement by the police." The court entered a judgment denying Mr. U.'s request for custody but granting him visitation every other weekend as well as arrangements for visitation during summer vacations and holidays. We will provide additional facts as necessary for our analysis.

The standard of review

There are three ways in which a trial court can commit reversible error in custody disputes. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010).

First, a trial court can make findings of fact that are clearly erroneous. *Id.* In reviewing for clear error,

> [t]he appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence. It is thus plain that the appellate court should not substitute its judgment for

[3] In its 2018 decision disbarring Mr. U., the Court of Appeals stated (citations omitted):

> We agree with Bar Counsel that disbarment is the appropriate sanction for [U.'s] misconduct. . . . After failing to order the transcripts [for a client's child-custody appeal], [U.] falsely represented to the Court of Special Appeals that [his client's] previous counsel was to blame for the delay in ordering the transcripts, and he falsely represented to [his client] and Bar Counsel that she was to blame. [U.] made these misrepresentations because he had the selfish motive of keeping the $6,200 that [his client] had paid him. In other words, [U.] was willfully dishonest for personal gain.

> that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence.

Ryan v. Thurston, 276 Md. 390, 392 (1975) (cleaned up). In this context, "substantial evidence" means evidence that either directly or by reasonable inference supports the conclusion drawn from it by the trial court.

Second, a judge can apply incorrect legal standards. Appellate courts review the trial court's legal reasoning without deference to the trial court's decision-making process. *Ta'Niya C.*, 417 Md. at 100.

Finally, trial courts often make decisions based upon consideration of multiple factors about which reasonable minds can and do differ. Judgments resolving child custody disputes falls into this category. *Santo v. Santo*, 448 Md. 620, 625 (2016). Accordingly, when we review a court's ultimate custody decision, we apply the abuse-of-discretion standard. *Ta'Niya C.*, 417 Md. at 100. Review for abuse of discretion is highly deferential to the trial court. Appellate courts do not reverse a discretionary ruling by a trial court simply because the appellate judges think that they would have made a different decision. Instead, appellate courts should affirm a discretionary decision unless it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re O. P.*, 240 Md. App. 518, 579 (2019) (quoting *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017)), *cert. granted*, 464 Md. 586 (2019). To put it another way, a trial court abuses its discretion only 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." *Santo*, 448 Md. at 625–26 (cleaned up).

We note that the best-interests-of-the-child standard is "of transcendent importance" and is "the sole question" for judicial resolution in child-custody disputes. *Boswell v. Boswell*, 352 Md. 204, 219 (1998) (cleaned up). That same standard is "[t]he light that guides" this Court in its review of the trial court. *Santo*, 448 Md. at 626.

Analysis

1. Gender bias

Mr. U.'s first contention is that the trial court was biased against him on account of his gender. We can dispose of this quickly. There is not even the faintest glimmer of factual support in the record for this argument. Moreover, the issue does not appear to have been raised to the trial court and is therefore waived. *See* Md. Rule 8-131(a); *Reed v. Baltimore Life Ins. Co.*, 127 Md. App. 536, 554 (1999).

2. Access to K.'s medical records

Mr. U.'s second contention is that the trial court erred in denying his request for access to K.'s medical records. He bases his argument on Fam. Law § 9-104, which states (emphasis added):

> *Unless otherwise ordered by a court*, access to medical, dental, and educational records concerning the child may not be denied to a parent because the parent does not have physical custody of the child.

The issue of Mr. U.'s access to K.'s medical records arose in a pretrial hearing in which the court awarded Ms. P. *pendente lite* custody of K. Mr. U. then requested that he be given

permission to contact K.'s medical care providers directly so that he could obtain copies of K.'s records. The court denied the request because it had granted sole custody of K. to Ms. P. Although the context is unclear from his brief because he does not provide any transcript references, Mr. U. contends to this Court that the trial court "violated Md. Rule [sic] 9-104" with its "refusal to enforce its order." But the only order Mr. U. directs us to is the court's order *denying* him access to K.'s records. He does not explain how or why this order should be interpreted as *granting* him access to K.'s records and, if the order should be so interpreted, how the court refused to enforce it. Nor does he direct us to anything in the record that shows that he otherwise asked the court to grant him access to K.'s medical records.

Md. Rule 8-504(a)(4) states that briefs must contain "[a] clear and concise statement of the facts material to a determination of the questions presented." Subsection (a)(6) of the same rule requires a party to present "[a]rgument in support of the party's position on each issue." If a party's brief fails to do these things—and Mr. U. has failed in both respects as to this particular issue—the appellate contention is waived. *See HNS Dev., LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 459 (2012) (Appellate courts will not "rummage in a dark cellar" to find support for a party's appellate contentions or to "fashion coherent legal theories to support appellant's sweeping claims.").

In any event, to the extent that Mr. U. is arguing that Fam. Law § 9-104 grants a non-custodial parent the absolute right to have access to a child's medical records, he is wrong.

The statute clearly permits a court to restrict or deny non-custodial parents such access by court order. That is exactly what happened in this case.

3. Judicial notice

Mr. U.'s third contention is that the trial court erred when it refused to take judicial notice of the records of other cases between Ms. and Mr. P. These records, he says, provided support for his contentions that Mr. P. had physically and emotionally mistreated Ms. P. and their children in the past. He asserts that Md. Rule 5-201 required the trial court to admit these records because Mr. U. requested the court to do so and his counsel presented the trial court with the court records. His contentions are not persuasive.

Md. Rule 5-201 provides for the admission of certain kinds of "adjudicative facts" without the need for formal proof. *See Lerner v. Lerner Corp.*, 132 Md. App. 32, 40 (2000); *see also* 5 Lynn McLain, *Maryland Evidence State and Federal* ("*Maryland Evidence*") § 201:1 (3d ed. 2013). Adjudicative facts are those that help the tribunal answer "questions of who did what, where, when, how, why, with what motive or intent." *Dashiell v. Meeks*, 395 Md. 149, 175 n.6 (2006). To be admissible under Rule 5-201, these factual assertions must be "not subject to reasonable dispute." Md. Rule 5-201(b). This means the facts to be noticed should be "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Md. Rule 5-201(b). Under this rule, courts may accept as true and without the need for formal proof matters like: that January 1, 1957, was a Tuesday; that the Prince George's County court house is located on Main Street in

Upper Marlboro; or that Lawrence J. Hogan, Jr. was the governor of Maryland in 2019. As Professor McLain observes in her treatise, "Trial time is better spent in receiving evidence as to disputed facts." 5 Lynn McLain, *Maryland Evidence* § 201:1 at 204.

Mr. U.'s judicial-notice argument, as we understand it, misses the mark in two ways. First, Md. Rule 5-201 is not a vehicle for the admission of *probative evidence*, but rather a means by which a court can quickly establish *incontrovertible facts*. Insofar as Mr. U. argues that the court records that he sought to introduce should have been judicially noticed as *proof* of Mr. P.'s prior abusive conduct, he has misconceived the function of the judicial-notice rule. The very same records might have been admissible for other purposes through other evidentiary rules (e.g., as party admissions within a public record, used to impeach Ms. P's testimony). But the trial judge was correct to deny their admission through the judicial-notice rule to the extent that Mr. U. argued to the court that the records conclusively established or even tended to prove anything relating to Mr. P.'s conduct.

Second, insofar as Mr. U. argues that the court should have taken judicial notice of the factual allegations contained within those court documents and filings, the substance of those allegations were clearly "subject to reasonable dispute." Md. Rule 5-201(b). At trial, no one contested the fact that Ms. P. had filed for protective orders against Mr. P. and that those petitions were granted. If these matters had been controverted—but they weren't—then, based on the documents proffered by Mr. U., the trial court could have taken judicial notice of the filings. This is because whether a specific pleading or a court order was filed in a particular case is a fact "capable of accurate and ready determination." Md. Rule 5-

201(b)(2). However, that a petition was filed and an order issued is one thing. That the *allegations* in the petition should be accepted as established facts is quite another. The parties certainly disagreed as to whether Ms. P.'s allegations in the petitions and other court papers were accurate—Mr. U.'s position—or whether they were, as Ms. P. claimed, misleading because they were rife with distortions, falsehoods and exaggerations placed in them at Mr. U.'s suggestion. Whether Mr. P. engaged in the alleged misconduct was certainly not "generally known" in the Seventh Judicial Circuit. Nor was it "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Cf. International Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings. . . . Facts adjudicated in a prior case do not meet either test of indisputability contained in [the federal equivalent of Maryland's Rule 2-501]." (cleaned up)).

In short, the trial court was under no obligation to take judicial notice of the records for the reasons urged by Mr. U. Indeed, under the circumstances, the court would have erred had it accepted the allegations in the records as proof of Mr. P.'s prior conduct. *See Abrishamian v. Washington Medical Group*, 216 Md. App. 386, 416 (2014) ("Noticing pleadings does *not* mean accepting what they say as true, only that they exist as public records." (emphasis in original)).

4. Fam. Law §§ 9-101 and 9-101.1

Mr. U. next argues that the trial court erred in granting custody to Ms. P. without making the findings that he asserts are required by Fam. Law §§ 9-101 and 9-101.1. We agree, but only in part. Section 9-101 states:

> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

In the present case, the trial court found that there was no credible evidence that K. had been abused by anyone. There was no factual predicate for the court to make any § 9-101 findings.

The situation as to Fam. Law § 9-101.1[4] is a bit different. That statute requires a trial

[4] The statute states in pertinent part:

> § 9-101.1. Evidence of abuse considered
>
> (a) In this section, "abuse" has the meaning stated in § 4-501 of this article.
>
> (b) In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:
>
> * * *
>
> (2) the party's spouse; or
>
> (3) any child residing within the party's household, including a child other than the child who is the subject of the custody or visitation proceeding.

court to consider evidence that a party to a custody proceeding (in this case Mr. P.) has abused, among other persons, the party's spouse (Ms. P.) or other children residing in the party's household (the P.s' minor children). If the court finds that abuse occurred, then the court "shall make arrangements for custody or visitation that best protect" the child who is the subject of the proceeding as well as any other victim of the abuse.

We believe that there was enough before the trial court to trigger a § 9-101.1 inquiry. Two protective orders were issued in other proceedings, one pertaining to Ms. P. and the other to her children, including K. The trial court found that there was no evidence that K. had been abused by anyone. But the protective orders also pertained to Ms. P. and K.'s half-siblings. There was testimony from Ms. P. that the allegations made to obtain the orders were exaggerated and concocted by Mr. U. She also testified that, in any event, she did not view Mr. P.'s actions as threats but rather as expressions of his anguish over their marital troubles. Although Mr. P. was a party, he did not testify, nor was he called by Mr. U. as an adverse witness.

> (c) If the court finds that a party has committed abuse against the other parent of the party's child, the party's spouse, or any child residing within the party's household, the court shall make arrangements for custody or visitation that best protect:
>
> (1) the child who is the subject of the proceeding; and
>
> (2) the victim of the abuse.

Fam. Law § 4-501(b)(1) defines "abuse" to include, among others, "an act that causes serious bodily harm" and "an act that places a person eligible for relief in fear of imminent serious bodily harm."

In its bench opinion, the trial court did not explicitly address whether Mr. P. abused Ms. P. or threatened to harm K. and his half-siblings.[5] From what we can discern from his brief, Mr. U. did not raise Fam. Law § 9-101.1 at trial. However, because the welfare and best interest of K. is our paramount concern, we think it is necessary and appropriate for the court to undertake a § 9-101.1 analysis, and we will remand the case to the court for that purpose. (We will provide further guidance as to what the trial court should do on remand later in this opinion.)

5. The custody decision

Finally, Mr. U. contends that the trial court erred in awarding custody of K. to Ms. P. instead of to him. He points to various items of evidence that demonstrate (in his view) that the court should have ruled in his favor. Based on the record before us, there is no basis for us to disturb the trial court's ruling.

As we have explained, in reviewing a trial court's custody decision, we focus on three aspects of the judicial decision-making process. We will address each in turn.

Was the trial court's decision based upon incorrect legal principles? We do not read Mr. U.'s brief as asserting that the trial court misunderstood the relevant legal principles

[5] A conclusion that Mr. P. did not pose a threat to Ms. P. or any of the children could well be implicit in the trial court's custody award because it is difficult to conceive how the court could have concluded that it was in K.'s best interest to remain in the Peter household if Mr. P. posed a threat. Indeed, in its findings at the conclusion of the *pendente lite* hearing, the court stated: "I am by no means saying that Mr. [P.] does not care about [K.]. I certainly think that he does." But Fam. Law § 9-101.1 requires more than implication.

for the resolution of custody disputes, and, in any event, the court did not. The Court of Appeals set out the analytical template for deciding child custody cases more than a generation ago in *Taylor v. Taylor*, 306 Md. 290, 304–11 (1986). And *Taylor*, with minor modifications, remains the law of Maryland. *See Azizova v. Suleymanov*, 243 Md. App. 340, 345–46 (2019); Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 5-3(a), at 5-9 to 5-11 (6th ed. 2016). In addressing the relevant *Taylor* factors, the trial court applied the correct legal standard.

Were the trial court's factual findings clearly erroneous? This is the principal focus of Mr. U.'s arguments. He argues that the evidence demonstrated that he was a fit parent for custody and Ms. P. was not. His contentions are not persuasive, principally because he misconceives the nature of an appellate court's role.

We have previously summarized the approach that appellate courts take in deciding whether findings by a trial court are clearly erroneous. To that, we add that we "may not substitute our judgment for that of the fact finder even if we might have reached a different result." *Gordon v. Gordon*, 174 Md. App. 583, 626 (2007) (cleaned up). The trial court concluded that Ms. P. was a credible witness and that Mr. U. was less credible. When, as in the present case, the trial court acts as the finder of fact, the trial judge is "entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness, including testimony that was not contradicted by any other witness." *In re Gloria H.*, 410 Md. 562, 577 (2009) (emphasis in original) (cleaned up). Ms. P.'s testimony provided a legally sufficient basis for the trial court to conclude that it was in K.'s best interest to remain in his mother's

household but to have some visitation with his father. To be sure, Mr. U. presented evidence to the contrary, but it is the role of the trial court, and not this Court, to decide which version of events was more credible and more persuasive.

Was the court's custody ruling "beyond the fringe of what the appellate court deems minimally acceptable" in custody cases? A trial court's ultimate ruling in a custody case amounts to an abuse of discretion when "the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *North v. North*, 102 Md. App. 1, 14 (1994).

As this Court has recently observed, "there is no such thing as a simple custody case," and judges often "agonize more about reaching the right result" in child custody disputes than they do in "any other type of decision." *Gizzo v. Gerstman*, ___ Md. App. ___, 2020 WL 1565548 at*15 (filed April 1, 2020) (quoting *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 502-03 (1992)). For this reason, "trial courts are entrusted with 'great discretion in making decisions concerning the best interest of the child.'" *Id.* at *15 (quoting *Petrini v. Petrini*, 336 Md. 453, 469 (1994)). In the present case, the trial court's ultimate ruling that it was in K.'s best interest for Ms. P. to have physical and legal custody certainly followed logically from, among other things, that: K. had been in Ms. P.'s care since his birth; K. was emotionally attached to his mother, his half-siblings, and Mr. P.; and except for some issues involving his premature birth, he was doing well in that environment. Moreover, Ms. P., a nurse, was well-equipped in terms of professional experience to deal with K.'s health issues. Equally clearly, the court's decision was reasonably related to its

objective, which was to resolve the custody dispute in K.'s best interest. Based on the evidence in the record, we cannot say that the trial court's decision to award custody to Ms. P. constituted an abuse of discretion.

With all of that said, we are aware that there was a missing piece in the trial court's analysis. We will next discuss this issue.[6]

6. Proceedings on remand

We will remand this case without affirmance or reversal for the trial court to make the findings that are required under Fam. Law § 9-101.1. That statute and Fam. Law § 9-101 are closely related, and the two "often need[] to be considered together." *Gizzo*, 2020 WL 1565548, at *11 (quoting *In re Adoption No. 12612 in Circuit Court for Montgomery County*, 353 Md. 209, 229 (1999)). Therefore, we will look to cases discussing § 9-101 for guidance in interpreting § 9-101.1. In discussing § 9-101, the Court of Appeals has explained:

[6] Mr. U. also contends that the trial court erred because it did not order that K.'s birth certificate be changed to reflect the results of the paternity test. We do not think that this is a basis for appellate relief because it is the obligation of the clerk of the circuit court to notify the Registrar of Vital Records of a change in paternity. *See* Md. Code, § 4-211(h) of the Health–General Article. If it is the practice in the Circuit Court for Prince George's County for a judge to direct the clerk to notify the registrar, and if Mr. U. asks to the court to do so, then the trial court can address the matter on remand.

At times in the circuit court proceedings, Mr. U. appeared to take the position that if K.'s birth certificate is changed, then K.'s surname must be changed to U. The legal basis for this proposition is unclear. In any event, we remind the parties that that the general rule in Maryland is that, if parents disagree as to a minor child's surname, it is for the court to resolve the issue according to the best interest of the child. *See Schroeder v. Broadfoot*, 142 Md. App. 559, 581 (2002).

> Section 9-101 focuses the court's attention and gives clear direction in the exercise of its discretion. It does not set an insurmountable burden; even upon substantial evidence of past abuse or neglect, it does not require a finding that future abuse or neglect is impossible or will, in fact never occur, but only that there is no likelihood—no probability—of its recurrence. Webster defines likelihood as probability, something that is *likely* to happen.
>
> The fear of harm to the child or to society must be a real one predicated upon hard evidence, it may not be simply gut reaction or even a decision to err-if-at-all on the side of caution.

In re Yve S., 373 Md. 551, 587–88 (2003) (emphasis in original) (cleaned up).

The purpose of § 9-101.1 is to protect children from being placed in situations where domestic violence is likely to occur. *Gizzo*, 2020 WL 1565548, at *11. In a manner analogous to § 9-101, § 9-101.1 is intended to focus the court's attention on possible abuse, and to give direction as to how the court should factor the possibility of abuse into its ultimate determinations of custody and visitation. However, as Judge Arthur noted for this Court in *Gizzo*, "the language used to describe the court's obligations in [Fam. Law] § 9-101.1 is by no means identical to or equivalent to the language used in [Fam. Law] § 9-101." *Id.* at *13. Judge Arthur explained (emphasis added):

> Section 9-101 states that the court "shall determine" the likelihood of further child abuse or neglect and that the court "shall deny" custody or unsupervised visitation unless the court "specifically finds" no likelihood of further child abuse or neglect. By contrast, section 9-101.1 states that the court "*shall consider*" evidence of abuse by a party against the child's parent and that the court "*shall make arrangements*" to best protect the child and the victim of the abuse, "[i]f the court finds" that the party has committed abuse against the other parent.

Id.

Like § 9-101, Fam. Law § 9-101.1:

> "does not scrap the overall best interest of the child standard in favor of another single, alternative standard." Rather, it obligates the court, when it receives evidence of a party's history of violence against certain household members, "to give due consideration to such violence in determining what is in a child's best interest."

Gizzo, 2020 WL 1565548, at *14 (quoting *In re Adoption No. 12612*, 353 Md. at 237, 238).

This brings us to the trial court's task on remand. First, the court must determine whether, in fact, Mr. P. abused Ms. P. or any of their children. This includes not only acts of violence but threats of violence as well. The burden of production and persuasion by a preponderance of the evidence as to this issue lies with Mr. U., as he is the party who is claiming that abuse occurred. If he fails to meet his burdens, the trial court's inquiry ends. If, however, he succeeds, then the burden shifts to Mr. and Ms. P. to show that there is no likelihood that abuse will occur in the future. *Gizzo*, at *16. They must establish this by a preponderance of the evidence; they are "not required to meet some heightened evidentiary threshold before the court [can] reasonably find that there was no likelihood of . . . further child abuse or neglect." *Id.* at *17 (citing *In re Yve S.*, 373 Md. at 588).

If the court concludes that there is no such likelihood, then there is no reason to modify the current custody and visitation order. If, however, the court finds that there is a likelihood of further abuse, then the court must consider what arrangements will best protect K. and any other victim(s) from future abuse consistent with the best interest of K. and to incorporate those arrangements in a revised judgment.

Finally, in order to keep the parties focused on the issue(s) that will properly be before the trial court, we remind them that "[t]he order of remand and the opinion upon which the order is based are conclusive as to the points decided." Md. Rule 8-604(d).

The current custody and visitation order shall remain in effect unless and until modified by the trial court.

CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY WITHOUT AFFIRMANCE OR REVERSAL FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPELLANT TO PAY COSTS.