Circuit Court for Anne Arundel County
Case No. C-02-FM-15-004483

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1769

September Term, 2017

K.B.

v.

D.B.

Kehoe,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 19, 2018

This case is before us on appeal from an order of the Circuit Court of Anne Arundel County giving D.B. ("Father"), appellee, primary physical custody of his son, J.B. ("Son"), during the school year. Prior to the custody order, Son had been living with his mother, K.B. ("Mother"), appellant, following Mother's separation from Father in 2015.

On appeal, Mother presents the following question for our review, which we have rephrased as follows:

> 1. Whether the trial court erred and/or abused its discretion in making its custody determination.[1]

For the reasons explained herein, we shall vacate the judgment of the circuit court.

FACTUAL BACKGROUND

I. History of the Family Prior to the Separation of Mother and Father in 2015

A. General Information

Mother was born in Arnold, Maryland in 1968. Mother received a bachelor's degree from Towson University and worked for four years as a flight attendant. Mother pursued a master's degree in teaching at Johns Hopkins University, but she dropped out prior to graduation after the dissolution of her first marriage.

[1] Mother asks generally "[w]hether the trial court erred when it awarded custody of the minor child to Appellee and whether in doing so it abused its discretion[.]" As we explain *infra*, the circuit court actually gave Mother and Father joint legal custody and shared physical custody of Son. More specifically, Father was given primary physical custody of Son during the school year, and Mother was given primary physical custody of Son during the summer. Mother's main objection to this arrangement is that "the minor child was taken from Annapolis, Maryland where he had lived all but a few months of his life, and from his school mid-semester and removed to New Hampshire with his father."

Father was born in 1955 in Exeter, New Hampshire. After graduating from the University of New Hampshire with a business degree in 1980, Father worked for Nike in sales and marketing. Father moved to Annapolis, Maryland in 1982. Four years later, Father left Nike and became a salesman for commercial jets. In 1991, Father and two co-workers formed their own company, which buys, sells, and brokers corporate jets.

Father and Mother met in 1996 when Mother was working at Father's business. Father and Mother were married in 1998 in Meredith, New Hampshire. Father had three children from a prior marriage. For most of their marriage, the couple lived in Anne Arundel County, Maryland.

B. Birth of Son

Son was born in 2003. Mother testified that she was the primary caregiver for Son and that she tended to his daily needs, made his meals, bathed him, and put him to bed. Mother testified that she took Son to school and extracurricular activities and picked him up afterward. Mother testified that she was responsible for planning social events, birthday parties, holidays, and family events. Mother testified that she made doctor and dentist appointments for Son, attended school functions and parent-teacher conferences, helped Son with homework and school projects, and volunteered in Son's classrooms.

Father testified that Mother was frequently unable to care for Son due to health issues. Father testified that Mother suffered from severe depression, fibromyalgia, Lyme disease, and bipolar disorder. Father testified that Mother would stay in bed for long periods of time. Father testified that these health issues interfered with Mother's ability to parent for "40, 50 percent" of their relationship, leaving Father to take on the role of

primary caregiver for Son. Father testified that he sometimes took Son to school, made meals for Son, and took Son shopping. Father testified that he regularly took Son to the pediatrician and dentist during his marriage to Mother.

Mother denies that she has any mental health problems that have affected her parenting. Mother testified that she suffered from "situational depression" after discovering her father's dead body, and that she was prescribed an antidepressant around that time, but she no longer takes it. Mother also testified that she was prescribed 25 milligrams of Seroquel -- an anti-psychotic at much higher dosages -- as a sleep aid. In a letter supporting Mother's request to take a support animal on an airplane, Mother's therapist stated that Mother suffers from depression. Mother testified that Father had obtained a similar letter, and that the purpose of the letters was to facilitate traveling with their pets.

Father testified that his work schedule during the marriage was erratic and that he worked forty to fifty hours a week, including nights and weekends. Father testified that he sometimes had to travel for business, but not more than one day every couple of weeks. Father testified that Mother took two or three vacations by herself every year for many years, and that Father took care of Son during these times.

Father testified that he had a good relationship with Son prior to the spring of 2015. Father testified that he and Son would play baseball, ride all-terrain vehicles and dirt bikes together, and do "a lot of that kind of stuff." Father also testified that Mother began turning Son against him prior to the dissolution of their marriage. Father testified that as "the disciplinarian," he was "vilified" and became "the common enemy" of Son and Mother.

C. Allegation Molestation of Son by His Half-Brother

In October of 2007, when Son was four years old, Mother and Father separated. Throughout the separation, which lasted approximately six months, Son lived with Mother and visited Father regularly. During the week of Thanksgiving, Father asked M.B., Father's son from a previous marriage, to watch Son. M.B. was eighteen years old at the time. M.B. and Son were alone in a playroom until a friend of Mother's arrived to pick up Son. Mother alleges that Son told her and Father on separate occasions that M.B. sexually molested him in the playroom. That allegation led to an investigation by the Anne Arundel County Department of Social Services ("the Department"). After interviewing Son, Father, Mother, Mother's brother and mother, and Son's therapist, the Department found that M.B. had sexually abused Son.

Following the incident in 2007, Mother and Father reconciled. Mother testified that she and Father agreed to keep M.B. away from Son. Father testified that he had doubts about the incident from the beginning, but that Mother became furious whenever he expressed those doubts.

M.B. appealed the findings of the Department, and a contested hearing was held in March of 2009. After the hearing, the administrative law judge ruled out child sexual abuse due to inconsistencies in the reports, the failure of some witnesses to testify, and Son's inability to differentiate between fact and fantasy.

Son still believes that M.B. molested him. Son raised the issue in his interview with Judge Silkworth and in his first session with Dr. Maureen Vernon ("Dr. Vernon"), the court-appointed reunification counselor. Mother testified that she believes "something

happened." Mother also testified that she does not want Son to doubt himself, and that she lets him believe what he wants to believe. When asked if she ever told Son that Father did not believe him, Mother said, "I may have. I don't recall." Dr. Vernon testified that she was trying to get Son to acknowledge that his memory was "not, perhaps accurate." Dr. Vernon testified that the issue "needed to be explored" because Son's previous therapist thought "something happened" based on "some things that [Son] told him." In response to a hypothetical question, Dr. Vernon testified that whether the molestation did or did not happen, "it should not have been brought up to the child on a regular basis."

D. Allegations of Alcohol and Drug Use

Mother testified that Father drank alcohol to excess throughout their marriage and would become verbally abusive when drunk. Mother testified that on one occasion Father was out of work for a week because he was "detoxing," and that Father tried to check himself into a rehabilitation facility. Son told the trial judge and Dr. Vernon that he was concerned about Father's consumption of alcohol and marijuana, which he had seen first-hand. Son told Dr. Vernon that Father would become angry and call him names when he was drunk. Son and Mother both stated that Father had a breathalyzer in his car.

Father testified that he is a social drinker and that alcohol has never affected his ability to parent or perform his job. Father testified that he has never been cited for an alcohol-related offense. Father testified that he has never missed work due to alcohol consumption and that he has never blacked out. Father admitted that he and Mother had both used marijuana. The parties agree that Father was never arrested for drunk driving, possession of illegal substances, or any other offense during their marriage. Dr. Vernon

testified that she saw no indication that Father was abusing drugs or alcohol or that Son was unsafe around Father. Dr. Vernon testified that she had eight or nine meetings with Father and that he never appeared to be under the influence of drugs or alcohol.

An American Express statement entered into evidence reflects that Father spent nearly twenty thousand dollars at various liquor stores in a two-year period. Father testified that he does a significant amount of business entertainment, and that he typically celebrates the closing of a deal by giving his customer an expensive bottle of Patrón tequila. Father testified that such gifts are beneficial to his business, which is based on relationships.

Father testified that Mother became addicted to prescription painkillers in 2014. Father testified that Mother was in pain after a botched dental procedure as well as several cosmetic procedures. Father testified that Mother would obtain as many as three prescription bottles of painkillers at a time. Father testified that a doctor helped Mother "titrate off" the medication over a period of four to six weeks. Father also testified that on two separate occasions Mother drank too much at a party and "dropped right down and paramedics came."

Mother denies that she ever abused prescription medication. Mother testified that she was prescribed powerful painkillers after a botched dental procedure, which required multiple corrective surgeries over a six-week period. Mother testified that after the last surgery she abruptly stopped taking the pain medication, which caused her to go through withdrawal. Mother testified that her dentist advised her to "titrate down" her dosage over a week, and that she successfully weaned herself from the medication. Mother testified that she was also prescribed medication after surgeries for skin cancer and an endometrial

ablation in 2015. Mother testified that she typically did not finish the prescription bottles. Mother testified that she only drinks occasionally.

II. Separation of Mother and Father

In late 2014, the family began living in a house in Alton, New Hampshire that they had purchased the previous year. Mother testified that it was essentially a vacation house, whereas Father testified that they had purchased the house with the intention of moving to New Hampshire. Mother testified that the family was vacationing at the new house in December of 2014 when Father stated that he did not want to return to Maryland. Mother testified that she agreed to remain in New Hampshire for a six-month trial period. Father testified that both Mother and Son were "on board" with the move.

Mother testified that she and Son were isolated and lonely in New Hampshire. Mother testified that the rural milieu made it difficult for Son to make new friends. Mother testified that Father's drinking and drug use escalated in New Hampshire, and that Father would verbally abuse, bully, and intimidate Son and her. Mother testified that Father would call Son "a disrespectful little punk" and tell Son that his opinion did not matter. Mother testified that Father called her names and "physically intimidated" her in front of Son. Mother testified that Son did not like the way Father spoke to her, which led to "many verbal go-arounds" between Father and Son. Mother testified that Son would tell Father "that he hated him and that he hated where we lived and he wanted to go home."

Father testified that Son was excited to live in New Hampshire. Father testified that the house was on a lake and five miles from a mountain, giving Son many opportunities to enjoy his favorite outdoor activities. Father testified that Son enjoyed boating and fishing

on the lake, and that Son frequently went snowboarding with friends. Father testified that he often observed Son snowboarding with "huge smiles on his face." Father testified that Son adapted to his new school, made friends, and ran track. Father testified that the family joined a local church and Son befriended the pastor's son. Father testified that Son was thriving in a clean, healthy environment, and that "by every account and every conversation I ever had with him, he was happy."

In May of 2015, Mother and Son took a 2-day trip to Maryland to attend a party in their old neighborhood. During that trip, Mother decided that she and Son would not return to New Hampshire. Mother testified that Son asked her "why we were living in a place where we didn't want to be for someone that didn't treat us with kindness." Mother testified that "[a]t that point I realized I really had failed my son." Mother told Father, "I can't live here and [Son] and I are moving back to Maryland." Father testified that he was shocked and asked Mother to stay. Mother and Son returned to New Hampshire for a short period so that Son could finish the school year before returning to Annapolis. Father testified that he told Son he did not have to leave, to which Son replied, "Dad, you know, mom needs me."

Father testified that his marriage to Mother was characterized by a pattern of separation and reconciliation. Father testified that Mother had abandoned him and taken Son on three of four occasions prior to this, and that Mother had threatened to leave Father many more times.

III. History of Family After the Separation

A. Son's Visit to New Hampshire in July 2015

In July of 2015, Son flew to New Hampshire to spend a week with Father. The parties agree that the visit did not go well, with Son leaving after two days. Father testified that Son was rude and angry when Father picked him up from the airport. Father testified that Son's friends in New Hampshire came over to play, but that Son became upset when the other kids used his wakeboard. Father testified that Son "sat on the couch underneath a blanket," which humiliated and embarrassed Father. Father testified that Son cried hysterically, demanded to leave, and called Mother ten times a day. Father testified that Mother flew to New Hampshire to pick up Son.

Mother testified that Son was upset because Father had brought a "young voluptuous girl in [a] bikini" boating with Son and his friends, and that Son thought the woman was Father's girlfriend. Mother denied that she flew to New Hampshire. Mother testified that Son flew back to Annapolis on his own.

B. Argument Between Mother and Father and Alleged Assault in August 2015

In August of 2015, Father was staying with the family in Annapolis after attending one of Son's lacrosse games. After dinner, Mother and Father began arguing about two family pets that Father had kept after the separation. Mother testified that Father began "screaming and yelling" at her and calling her names. Mother testified that Son ran over to Father and starting hitting him while saying, "I hate you, I hate you." Mother testified that she managed to separate Father and Son and push Son out of the kitchen. Mother testified that Father "slapped his hand on the upper kitchen cabinet," at which point Son

turned around and told Mother, "He's going to kill you." Mother testified that there was "another physical altercation," and that Mother took Son upstairs. Mother testified that Father followed them upstairs, where he picked Mother up and told Son, "[S]he's mine, I can do whatever I want to her, you little fuck." Mother testified that she finally got Father out of the room and locked the door.

Father testified that he left the house after the argument and never returned. Mother testified that she woke up the next morning with Father standing over her, his fingers poking into her chest, saying, "Wake up, you fucking bitch." Mother testified that Father left after she threatened to call the police. Mother acknowledged that she never called the police or reported any bruises, contusions, or injuries. Father denied that he ever physically or verbally abused Mother at any time during their marriage.

C. Text Messages Between Mother and Father

On October 10, 2015, Mother asked Father via text message if he was "with someone." Father replied that he was with his new girlfriend, and that he had "moved on." Mother responded with a series of text messages in which she took responsibility for the separation and asked Father not to give up on their marriage. At one point, Mother wrote, "I caused all of this, me, me, me." Mother told Father that he was a good husband, and that she wanted to give him back a "great love affair." Concerning Father's alleged drug abuse, Mother said, "You are not an alcoholic or a drug addict. I was a miserable pain in the ass." At another point, Mother said, "If you want to get Hogg [sic] get high." Mother also told Father that if he wanted "to drink Patron for breakfast lunch and dinner" she would serve it to him, and that she would "reprimand [Son] if he so much as comments."

Father, for his part, repeatedly asked Mother to let Son live with him in New Hampshire. Father asked Mother to "[a]llow [Son] to come back to New Hampshire where he will thrive." At another point, Father said, "I want you to relocate to New Hampshire so that you and I can coparent peacefully and lovingly." Mother replied, "My son lives with me because he wants to. He will never live without me. Enjoy your new found family and congrats on the big find and two daughters."

The following day, Mother sent a text message to Father denying that she was solely responsible for their separation:

> You know I just read over this and it grieves me. I am basically acting like I am responsible for everything and that's not reasonable or right.

A month later, Mother filed for divorce.

D. Relationship Between Father and Son from October 2015 to July 2016

Father testified that after the separation he made regular attempts to see and talk to Son, but that Mother prevented him from doing so. Mother testified that during this time she continued to support Son's relationship with Father. She testified that she sent text messages and photos from Son's games, kept Father apprised of Son's game schedule, and offered to send Son to New Hampshire. Mother acknowledged that Son frequently refused to see Father and that she did not force him to do so. The parties both testified that Dr. Scott Smith ("Dr. Smith"), Son's longtime therapist, had advised them not to force visitation between Father and Son.

Mother testified that in October of 2015, when Son was using Mother's phone to look at photos from one of his games, Son saw text messages concerning Father's

girlfriend. Mother testified that Son later found a picture of Father and his girlfriend together on Facebook, as well as a photo of the girlfriend's daughter on Instagram with the caption "DB's daughter." Mother testified that Son was very upset about these incidents because neither parent had discussed the possibility of a divorce with Son. Father alleges that Mother showed the text messages and photos to Son in order to turn him against Father.

On October 23, 2015, Father told Mother via text message, "[Mother], tell [Son] I would like to see him tomorrow or Wednesday night for dinner." Mother responded, "I told you already. He does not want to see you. He wants nothing to do with you. You have treated him horribly."

In November of 2015, the family started reunification counseling with Dr. Smith. On November 3, 2015, Father asked Mother to "please tell [Son] I would like to come to his practice tomorrow night and take him to dinner afterwards." Mother replied, "He does not want to see or talk with you DB. Remember that is why I didn't come back in May. He didn't want to live with you anymore." On November 11, 2015, Father suggested that he could pick Son up from school "and hang awhile with him." Mother responded, "That's up to [Son]. Not me[.] You'll have to talk with him."

On February 3, 2016, Mother sent Father a picture of Son playing basketball. Father responded, "Thank you for sending[.] I really miss him." Mother replied, "I know you do. I am doing all I can. You know how stubborn he is. He gets it from both of us. He gets angry at me when I push him[.]" On June 28, 2016, in response to Father's request to pick up Son for a visitation, Mother wrote that "[Son] does not want to go with you."

According to Dr. Smith, reunification therapy was suspended in June of 2016 because "it appeared that all involved parties were accepting of the status of the relationship at the time and motivation for further work had waned."

Father testified that in July of 2016 he received a "bizarre" text from Son asserting that Father was breaking God's rules, that Father was cheating on his wife and cheating on God, and that Son was praying for Father. Father testified that the text message also said that Father had lost his relationship with Son, and that Son would not see Father unless Father was willing to take the blame. Father testified that he subsequently received a similar text from Mother containing virtually the same message. Dr. Vernon testified that she saw the text message, and that the wording did not sound like it came from a twelve-year old.

PROCEDURAL BACKGROUND

I. History of Proceedings Prior to Trial

On November 6, 2015, Mother filed a complaint for absolute divorce in the Circuit Court for Anne Arundel County. Mother requested *pendente lite* relief in the form of child support, alimony, and counsel fees. Father filed a counter-complaint for absolute divorce on June 6, 2016.

A. Pendente Lite Order of July 2016

On June 22, 2016, a *pendente lite* hearing was held before Judge Laura S. Kiessling. After discussing the case privately and in chambers, the parties reached an agreement, which was read into the record and affirmed by each party. That agreement was commemorated by a written consent order entered on July 8, 2016 ("the First Order").

Under the First Order, Mother was awarded primary physical custody of Son, and Father was ordered to pay various expenses as well as undifferentiated support in the amount of $14,500 per month. Father was granted weekly visitation with Son every Wednesday from 4:30 P.M. to 7:30 P.M., as well as two one-week periods of visitation in the summer.

The First Order also provided "that the aforementioned visitation schedule shall only be utilized if the minor child agrees to the visits with [Mother], [and] if the minor child refuses to attend a scheduled visit with [Father], [Mother] shall not be held in contempt for the minor child's failure or refusal to attend the scheduled visit." Mother testified that she did not ask for this provision and was not present when it was discussed. Mother's counsel proffered that Father had requested the provision out of "concerns about [Son]'s behavior associated with being forced," and that both parents were merely following Dr. Smith's recommendation against forced visitation.

B. Relationship Between Father and Son Under the First Order

It is undisputed that Father rarely saw Son under the First Order. The parties have different explanations for why this occurred. Father asserts that he made continual good-faith efforts to see Son, but that Mother deliberately frustrated these efforts and turned Son against him. Mother alleges that Father "made certain perfunctory plans which [Son] often rebuffed," and that Father rarely showed up for Son's school or sports activities.

The record shows that Father reached out to Mother and Son a number of times to schedule visits. Father emailed Mother on August 8, 2016 asking to see Son. Mother replied that "[Son] said he responded to you and told you he doesn't feel comfortable." On August 30, 2016, Mother wrote that "[Son] does not want to go on Wednesday." On

September 8, 2016, Mother wrote that "[Son] said he got your text to go and eat but did not want to." Father testified that he sent texts to Son on more than 120 days from June 2015 to July 2017, but that Son rarely responded.

The record also shows that Mother kept Father apprised of Son's lacrosse schedule and asked Father to attend more games. On September 9, 2016, Mother sent the following email to Father:

> [Son] is upset with you as you know for many reasons and he did not want to go to dinner.
>
> You have not attended any school events nor sporting events this past year.
>
> In a few weeks fall lacrosse will start. When I receive a schedule I will forward it to you.
>
> Also in late October he will try out for St. Mary's basketball. I will let you know that as well.

On September 12, 2016, Mother wrote, "[Son] wants to know if you are coming to his game on Sunday?" The next day, Mother sent Father the following email:

> One game? You'd like to come to "one game?" Seriously? You have a son whose life you chosen [sic] not to participate in. You did not come to one basketball game last year nor one spring or summer lacrosse game and you'd like to come to "one" game?? Wow. That's pathetic. You are causing your son great pain and deep profound hurt.
>
> You have a son that needs his father. If you continue to not show up in his life you will continue to hurt him deeply.
>
> His game is this Sunday afternoon. I will send you the time when I receive it. It will be at Germantown Elementary.

Father testified that he attended three or four lacrosse games and two basketball games, but that Son refused to speak to him or make eye contact during these visits. Father testified that although Mother was present during the games, she did not try to make Son talk to Father. Mother acknowledges that Father "attended a few of [Son]'s games in the fall of 2016," but Mother asserts that Father stopped coming due to his "bruised feelings."

C. Reassignment of Case to Judge Silkworth and the Amended Order

On March 8, 2017, the case was reassigned to the Honorable Ronald A. Silkworth. On March 17, 2017, following a chambers conference with counsel, Judge Silkworth directed the parties to appear on April 3, 2017 for a "Status Conference." The directive further specified that "[c]ounsel is to meet and discuss Rule 2-431 regarding any pending supplemental discovery."

The parties appeared before Judge Silkworth on April 3, 2017. At the beginning of the hearing, Judge Silkworth *sua sponte* announced his intention to strike the provision in the First Order allowing Son to refuse visitation with Father. There is no indication that Father had requested a change to the First Order prior to this point.[2] Judge Silkworth stated that the provision was not in Son's best interest because "it is not appropriate to put the burden on a child to make [that] decision." Father's counsel proffered that Father had not seen Son in eighteen months, and that Mother was alienating Son from Father, but no

[2] It is unclear whether this issue was discussed during Judge Silkworth's in-chambers conference with counsel. Judge Silkworth noted that he "was not aware of" the offending provision in the First Order. At another point, Judge Silkworth said, "[I]t was my intention when I brought you back here, and I think I made it clear . . . that this cannot go on."

evidence was admitted. When Mother's counsel attempted to make a comment on the proposed change, Judge Silkworth interrupted her and ordered Mother to bring Son to the courthouse in two days and give him to Father for his weekly visitation. Later in the hearing, Mother's counsel requested a formal custody evaluation. Father's counsel described this as "just an opportunity to bash [Father]." Judge Silkworth declined to order a custody evaluation, noting that "in the event this goes to a contested hearing . . . I will talk to [Son]."

On April 5, 2017, the parties and Son appeared before Judge Silkworth as ordered, and Judge Silkworth interviewed Son alone in chambers. In his summary of the interview, Judge Silkworth recounted the following details:

> This is quite an emotional and it's difficult for me to determine whether or not it's real. And I say, I'm not -- I'm not saying he's faking. But his level of emotion and, for example, he referred to an incident that occurred with someone named [M.B.] on your side of the family, the father's side of the family, when he was two. And something and that immediately led him to tears.
>
> And he expresses a great deal of anger at the father. And it's very difficult to try to figure out why, except that he claims that his father -- because he -- what he did, decisions that he made, cussing in my face, drinking, part of it I think his decisions regarding his mother. Very often he talked about we, meaning me and mom.
>
> And as I said it's very difficult to make some sense out of what it is that makes him fear. Except he made some comment like "I've given him chances." I actually said to him, "What do you mean you gave him chances?" Do children give their parents chances? Do parents give their children chances? He expressed -- and this also was unusual for me from -- to come from a 13-year-old to express a desire that he not be

> required to go unless and until -- until he's seen Scott Smith who is his counselor.
>
> [. . .]
>
> He asked whether or not he could see Mr. Smith so he could talk about the -- the tremendous anger that is pent up and built up -- built up in him. And I, candidly, I'm troubled that the -- that at least what he expresses in his emotions and the anger that he expresses. I'm not -- and the trouble that I'm having is that there's -- this case doesn't suggest or at least from what I know so far that he should have all that anger.

At the same hearing, Mother presented a letter written by Dr. Smith stating that "[Son]'s estrangement from his father is the result of many interacting factors including his personal history with his father prior to the parental estrangement, the dynamics of his parent's [sic] marriage and the dynamics of their separation, as well as his direct negative personal experiences." Dr. Smith recommended reunification counseling, rather than forced visitation, to repair the relationship between Father and Son:

> As has been discussed with both parents, it is clearly in [Son]'s best interests to have a loving and healthy relationship with both his mother and his father. It is my opinion, however, that this is best achieved through reunification counseling involving gradual engagement in a neutral setting with a safe support person (counselor) and expanding from there. To force the matter, particularly given his age and developmental stage, is likely to be counterproductive, if not damaging to him and to the process.

Judge Silkworth appointed Dr. Vernon, a child psychologist, to act as reunification counselor.

Mother immediately filed a motion opposing the amendment to the First Order. The circuit court denied the motion. On April 10, 2017, the circuit court issued a written order

("the Amended Order") striking the provision in the First Order allowing Son to refuse visitation with Father. On April 26, 2017, Mother filed a motion asking the court to appoint a best interest attorney for Son. The circuit court denied the motion.

D. Relationship Between Father and Son under the Amended Order

Father asserts that his relationship with Son did not improve under the Amended Order. At trial, Father characterized his relationship with Son as follows:

> He's very hostile. He speaks in one word answers when asked questions. He refers back to the fact that -- the -- the reason that he doesn't want to see me and has such strong obvious, like, hatred for me -- I mean, he remembers none of the good times. As far as he's concerned, I didn't even arrive in his life until sometime in 2015. He recalls nothing positive and all these -- all he has to say -- he's hysterical. He cries in therapy.
>
> He doesn't want to go to the follow-up one hour visitation. And -- and then it is -- it is a litany of the same things that were referred to in this email where he's either interrogating me about [my girlfriend] or her children, or the fact that he doesn't -- the reasons he gives, he can't give specifics for why he doesn't like me anymore other than the fact that I am an alcoholic and I do drugs. And those are things that were never said to me before [Mother] left in May of 2015.

Father also alleged that Mother violated the Amended Order in numerous ways. Father testified that Mother took Son on a vacation to California in 2017 during spring break without Father's knowledge or consent, causing Father to miss his Wednesday visitation that week. Mother's counsel proffered that the vacation was scheduled prior to entry of the Amended Order and that Father's counsel was notified in advance. Mother testified that the vacation had been planned many months in advance, and that Father had cancelled several times in the weeks prior to the vacation.

Father testified that Mother had inappropriately discussed matters of custody with Son. Father testified that Son repeated things that Father had not discussed with him, and that the only way Son could know these things was if Mother had told him. According to Father, Son told him at one point that "Mom says you're -- you're trying to take me to New Hampshire." Mother testified that it was Father who told Son on a visit that he wanted Son to live with him in New Hampshire.

At another point, Mother asked Father to put his latest check for child support in an envelope and give it to Son. Mother testified that she did not realize this was a violation of the Amended Order, and that she did not think Son would know what was inside the envelope.

According to Father's testimony, Mother told Son that Father had hired a private investigator to film their visits. Mother testified that she discussed the private investigator with Son in sessions with Dr. Vernon, but only because Son had seen "something was going on" during a basketball game. Dr. Vernon testified that Son raised the issue after seeing someone filming him during a visit with Father.

II. Hearings on the Merits

Evidentiary hearings on the merits were held before Judge Silkworth on twelve separate dates, starting on June 26, 2017 and ending on September 19, 2017. The hearings covered all issues raised by the parties in the divorce proceedings, including custody and visitation.

A. Trial Judge's Interview with Son

At the start of the trial, Judge Silkworth interviewed Son in chambers for the second time. Judge Silkworth then summarized the interview for the record. In the interview, Son told Judge Silkworth that he loves Annapolis. Son said that he loves to play lacrosse, and that his goal is "to play at Navy." Son said that he is close with Mother, and that Mother was "trying so hard to get along." Son felt that Mother "was trying to make excuses for Dad."

Son said that his relationship with Father was "getting much better." Son said that they saw each other regularly at the reunification sessions and that they would go out to eat afterward. Son said that sometimes they would go to a basketball court, and that Father had come to a few of his basketball games. Son said that he had visited Father two summers prior, but "he felt that Dad spent time away from him when he did." Son said that Father always made sure the family was financially stable.

Son described the reunification sessions with Dr. Vernon in positive terms:

> And [Son], unlike when he was here last time, was in a much better frame of mind. He actually was smiling most of the time, if not all the time. He said Doctor Vernon is really nice. He likes Doctor Vernon. She, apparently -- he knows that his dad and he sometimes disagree, and Doctor Vernon has taught him how he should react appropriately when there is a disagreement, and yet still be -- without being disrespectful.

Son said that Father had missed a few appointments with Dr. Vernon; as a result, Son was not sure whether Father was serious about reunification therapy. Son also discussed his belief that M.B. had molested him:

> And he just offered that he believed that he got molested by [M.B.]. But Doctor Vernon has told him that it did not happen, and he recognizes that he was two or three years old when it happened. And he seems to be able to remember it. He said that does affect me and my dad's relationship some. But he is being counseled by Doctor Vernon that that is something that he has to put in his past.

Judge Silkworth noted that "for some reason he doesn't have a desire to have a relationship with [his half-siblings]."

Son said that he "feels for some reason Dad hates mom." Son said that "neither Mom nor Dad sat him down and explained to him the details behind their history of separation." Son said that his parents did not disparage each other in front of him, and that they did not use him as a go-between. Son said that "his mom has told him [Father] may not be the dad you want, but he is the dad you have." Son said that Mother never says bad things about Father.

Son described one argument between Mother and Father as follows:

> He mentioned an incident last year where Dad yelled at Mom in the kitchen. Apparently, he was invited down, they were in the kitchen, Mom and Dad got into an argument. He was calling her names and he told his dad to stop. And he claims his dad picked her up and said I can do what I want. He finally put her down. It didn't really lead to anything. He felt that his father was trying to mock him, because he was trying to stand up for his mother.

Son went on to describe the tension between Father and Mother prior to the separation:

> When they lived together, he felt he was in the middle. And there were times when he would go to his room crying. He's always tried, and wants to try to give his dad the benefit of the doubt. What he thought was mental abuse was occurring because he would hear his dad tell her something was wrong

> with her. Although he didn't seem to know what that was about.

Concerning his parents' alcohol consumption, Son said the following:

> He said Mom and Dad used to argue about drinking. Dad would drink too much, enough that he had a Breathalyzer in this car. And, apparently, he found some flasks which he thought were used for drinking when Dad left. Mom drinks but only three or four times a year.

Son also said that he wanted Father to stop drinking "and using any drugs." Son said that the only drug he had seen his father use was marijuana.

Son said that he wanted to have a better relationship with Father, but that he did not want to leave Annapolis. Son had the following to say about New Hampshire:

> And he liked New Hampshire, but it's more rural, it's, to him, deserted. It's more of a small town. It's not something he's used to. He did spend a lot of time when he was there snowboarding, and he did kind of like that. Apparently it's an extensive[3] hobby, but, and he was able to do it, lots of his friends, and he's made a few friends there, and lots of his friends were not able to afford that. So, it was kind of too far away for everyone else to be able to do what he could do. So, sometimes he would do it on his own.

Son said that when he visited New Hampshire "he didn't have lots to do" and there were times when he was bored. Son said that "he doesn't want to see Dad's girlfriend" because "he doesn't want to be in the middle of that." Son said that "it was awkward when he saw some pictures of Dad with the girlfriend." Son said that "he just feels like he's in the

[3] Given the context, it is likely that Judge Silkworth actually said "expensive" rather than "extensive" in reference to Son's hobby. The distinction is not particularly relevant to our analysis.

middle and until this is all resolved, and there's no more conflict, then he'd rather not be in the middle."

B. Mother's Witnesses

Mother's counsel called a number of witnesses to testify about Son's life in Annapolis. Son's school counselor, Janice Hubbard, testified that Son was doing "[e]xceptionally well," that Son's school is "a rigorous academic school," and that Son's lowest grade was "an 84%." Son's homeroom teacher, John Buzzelli, testified that Son was a good student and a hard worker with a very active social life. Steven Liszewski, the father of one of Son's friends, testified that Son was mature, well-adjusted, well-liked, and appeared to be thriving. Karen Gardner, a family friend, testified that Son was well-mannered, conscientious, and easygoing. Karen Gardner also testified that Son was thriving and that she had observed him "laughing, smiling" with her children.

C. Father's Plans for Son

Father testified that Son was not thriving in his current environment. Father testified that Son was suffering because Mother had alienated him from his father. Father testified that he wanted Son to live with him in New Hampshire, where Son would have friends, opportunities for sports and outdoor activities, and access to good schools. Father testified that if he and Son could spend more time together, they would get back to the relationship they had before the separation. Father testified that if he were awarded custody, Mother's emotional abuse would stop, and Son would come to realize that Father is the same person that Son used to love.

Father testified that he will raise Son to be a confident and independent adult who can overcome adversity. Father testified that if Son were in his custody, Son would learn a strong work ethic, honesty, and integrity. Father testified that he is a strong role model for Son, and that he offers a set of skills and experience that a young man needs.

Father testified that if he is awarded custody, Son will have what he needs, but not necessarily what he wants. Father testified that he supports Mother's relationship with Son. Father testified that he can communicate with Mother about matters of religion and health. Father testified that it would be harder to reach an agreement about other matters, such as schools, but that he is willing to try. Father testified that if Mother were awarded custody, she would continue to interfere with Father's relationship with Son.

D. Dr. Vernon's Testimony on June 27, 2017

On June 27, 2017, Dr. Vernon testified about the status of the reunification counseling. Dr. Vernon testified that in the first session she met with Father, Mother, and Son. Dr. Vernon testified that Mother "wanted her son to have a relationship with the father, but that she felt that it needed to be eased in, eased back in." Dr. Vernon testified that Father "felt that he needed to have more access to his son." Dr. Vernon testified that Father wanted to "go back to a normal relationship with his Son."

In the next session, Dr. Vernon talked to Son alone. According to Dr. Vernon, Son said that "he was afraid that his father was trying to take him away from his home, meaning Annapolis, his school, his friends, his sports, his life." Dr. Vernon testified that Son's biggest fear was being forced to leave Annapolis because "he felt that he had a life here." Dr. Vernon testified that Son "felt his father didn't believe him about something that had

happened when he was a child." Dr. Vernon testified that Son "was very, very much saying that he was hurt by his father" because Father didn't believe him.

In the third session, Dr. Vernon met with Mother alone. Mother's counsel was also present. Dr. Vernon testified that she gave Mother the following guidance:

> I told mom that she was a bit, she coddled him a bit much. And that being an only child, only son, only child, the relationship between them was pretty bonded. But that at his age, now approaching fourteen, that he was going to need to start being able to separate out.

Dr. Vernon testified that Mother seemed "very receptive."

In the fourth session, Dr. Vernon met with Father alone. Dr. Vernon testified that Father was "very impatient" and wanted reunification "to happen like right away." Dr. Vernon testified that Father wanted to explain his side of things to Son. Dr. Vernon testified that she tried "to get him to be optimistic about the possibility of entering into our work together."

In the fifth session, Dr. Vernon met with Father and Son together. According to Dr. Vernon, Father talked to Son about school and said that he wanted to spend time with Son. Dr. Vernon testified that Son was open to visiting Father in New Hampshire, but that Son repeatedly expressed his desire to continue living in Annapolis. Dr. Vernon testified that Father and Son began talking about M.B., but that they quickly changed the subject because Son was uncomfortable. Dr. Vernon testified that Father apologized for anything he had done to hurt Son, and that Son replied, "Why did you say I was lying?" Dr. Vernon testified that they postponed further discussion of that issue.

Dr. Vernon testified that Father "was not able to make" the next three sessions, but that she continued to have sessions with Son. Dr. Vernon testified that Son asked "why wasn't his father there." Dr. Vernon testified that Son was making progress and "starting to be much less emotional."

Dr. Vernon testified that Father scheduled a therapy session for June 21, 2017, but that he failed to appear. Dr. Vernon testified that Son "was pretty upset that his father just didn't show." According to Dr. Vernon, Son said the following:

> [Son] said that every time he meets with Dad, Dad says, "Don't you really, after this is all over, we don't have to go to Vernon, Doctor Vernon. We just have to go, if you want to we can go back to this guy David or whoever."

Dr. Vernon testified that Son said, "See I told you he wouldn't show again." Dr. Vernon testified that her secretary had to wait with Son until Mother picked him up.

Dr. Vernon testified that Father had only attended one session with Son. Dr. Vernon testified that Mother had been cooperative and made sure that Son attended the sessions as well as the court-ordered visits with Father. Dr. Vernon testified that reunification therapy was incomplete, and that bonding had not sufficiently occurred between Father and Son "based upon the damage that has been done."

E. Dr. Vernon's Testimony on September 13, 2017

On September 13, 2017, Dr. Vernon testified a second time about the status of her reunification counseling with Father and Son. Dr. Vernon testified that, prior to August 2, 2017, "there was very little progress at all, because . . . Dad wasn't making the appointments that were scheduled or wasn't scheduling the appointments with [Son]."

During this time, Father still had weekly visitation with Son pursuant to the Amended Order. According to Dr. Vernon, Son said that Father constantly disparaged the reunification process, saying that it was "a waste of time" and that Dr. Vernon "didn't know what [she] was doing." Dr. Vernon testified that Mother was supportive of the reunification therapy and ensured that Son attended the sessions even when Son did not want to do so.

Dr. Vernon testified that Father eventually began to attend the reunification sessions. Dr. Vernon testified that she had five additional meetings with Father and Son, and that the therapy had been "partially successful." Dr. Vernon testified that Father and Son had discussed going boating together, but Father said, "I don't feel comfortable going out, really, because I'm afraid of what he might say happened on the boat." Dr. Vernon testified that Son was willing to visit Father in New Hampshire, but that Father declined because it might interfere with the custody proceedings. Dr. Vernon testified that Son had wanted to work as an intern at Father's business over the summer, but that Father did not think it was the right time "because he felt that, again, the -- the spying or -- or it was tenuous time in the -- in the whole court situation."

Dr. Vernon testified that Father would occasionally "throw a bomb" in the sessions:

> Like the, "No, you might not be -- in thirty days from now, you might not be living here. You have to prepare for living in -- in New Hampshire." Okay? And he asked me -- Dad asked me if I should start preparing him for living in New Hampshire, and I said, "Well, wait a minute. Let's just take it a step at a time. Why would we have the child deal with exaggerated anxiety right now when he's just starting back to school, be- -- before anything is done?" And so he'll say things like that, with perhaps the intention of trying to do the right thing.

> Maybe Dad's intentions are good, but [Son] perceives them as, like, upsetting him; upsetting him, deliberately upsetting him. Deliberately bringing something up that's upsetting to him. Or, the thing about the broth- -- the siblings; you know?

According to Dr. Vernon, Son was adamant that he was willing to have a relationship with Father, but that he did not want to live in New Hampshire:

> And [Son] said, "We can have a relationship; we can start having a relationship; we're having a relationship. But -- but please don't take me away from here. I want to stay here. This is where I want to be."

Dr. Vernon described another argument between Father and Son as follows:

> Again, the -- the problem would -- would come up, that [Son] would question his father about, "Why do you want to keep doing this? Why can't you hear me? You want me to hear you, Dad, but you can't hear me. I like it here. I'm happy here. I like the water. I like being -- I like being at my school. I'm doing well at my school. I -- I have friends here. I have lacrosse here. I have -- " He's going to be playing soccer, too, this rec[reational] soccer on the weekends with his -- with some buddies; they get ready for lacrosse by working out, I guess running in soccer. And he -- he's got a whole crew of friends that he likes to -- he just feels an identity here. This is home to him, and -- and he likes it.

Dr. Vernon testified that Father told Son, "I love you very much, [Son], and I want a relationship with you." Dr. Vernon testified that Father told Son he was not thriving, to which Son replied, "I am thriving; I am thriving."

Dr. Vernon testified that in the last session with Father, Father asked to speak to her alone. Dr. Vernon testified that she asked Son to wait in the waiting room. Dr. Vernon testified that Father "was yelling at me, basically dressing me down about all the things I wasn't doing and how I was screwing up and how I was not listening to him and how I was

not helping anybody." Dr. Vernon testified that it "went on for about forty minutes or so." Dr. Vernon testified that Son heard Father screaming through the door. Dr. Vernon testified that Son "was very nervous and upset," and that one of her colleagues had heard the incident and asked her if everything was okay. Dr. Vernon testified that Son "was worried that somehow he was going to -- there was going to be some kind of altercation or whatever." Dr. Vernon testified that her secretary reassured Son by saying, "Nothing is going to happen. Everything is going to be okay."

Regarding Father's alleged drug use, Dr. Vernon testified that Son told her he had seen Father drinking and using marijuana. According to Dr. Vernon, Son did not like it when Father drank because "his anger would come out more when he was drinking." Regarding the alleged physical altercation between Mother and Father, Dr. Vernon testified that "[Son] recounted an incident in which he saw his father and his mother get into a physical altercation, and that [Son] tried to, like, basically break it up."

Near the end of her testimony, Dr. Vernon expressed concern about forcing Son to live with Father:

> THE COURT: And I assume that you would support the notion that his -- his feelings are important for anyone, or the Court, to understand. But it's not his call.
>
> [DR. VERNON]: No, Your Honor, but I find that -- and I'm a firm believer that the adults make decisions for children, and a fourteen-year-old is still a child. However, I also know that it's a very fragile time in a child's life, and that if you force them into situations, sometime they rebel by doing unacceptable behaviors. Even good kids go bad. And that's a concern that I -- a strong concern that I have.

Dr. Vernon testified that Father "has not really taken much responsibility for anything that he may have done to hurt [his] relationship with [Son]." Dr. Vernon testified that both Son and Father would have to move past their "misperceptions."

III. Ruling of the Circuit Court as to Custody

On October 2, 2017, Judge Silkworth issued an oral opinion and factual findings. Judge Silkworth found that Mother had promoted the deterioration of Son's relationship with Father, and that Son had "suffered a mental injury" as defined by Md. Code (1984, 2012 Repl. Vol., 2016 Supp.), § 5-701 of the Family Law Article ("Fam. Law").

Judge Silkworth ordered that the parties would have joint legal custody of Son, giving tie-breaking authority to Father. Judge Silkworth further ordered that Father would have primary physical custody during the school year, that Mother would have primary physical custody during the summer, and that Mother would have access to Son every other weekend throughout the year.[4] On October 5, 2017, the circuit court issued a custody order consistent with Judge Silkworth's oral opinion. On October 10, 2017, the circuit court issued an amended custody order specifying that Mother would appear at the courthouse the following day to transfer custody of Son to Father. Mother timely appealed.

[4] Legal custody is "the right and obligation to make long range decisions that significantly affect a child's life, such as education or religious training." *Santo v. Santo*, 448 Md. 620, 627 (2016) (quoting *Taylor v. Taylor*, 306 Md. 290, 296 (1986)). Physical custody is "the right and obligation to provide a home for the child and to make daily decisions as necessary while the child is under that parent's care and control." *Id.*

DISCUSSION

I. Standard of Review

We review child custody determinations using three interrelated standards of review. *Reichert v. Hornbeck*, 210 Md. App. 282, 303 (2013). When an appellate court scrutinizes factual findings, the clearly erroneous standard applies. *Id.* at 304 (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)); Md. Rule 8-131(c). If the trial court has erred in matters of law, "further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Id.* "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.* (brackets in the original).

The trial court retains broad discretion in matters of child custody because only the trial court "sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [the trial court] is in a 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 child." *Id.* (quoting *In re Yve S.*, 373 Md. 551, 585-86 (2003)). Accordingly, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.*; Md. Rule 8-131(c). "[I]t is within the sound discretion of the [trial court] to award 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." *Id.*

An abuse of discretion occurs when the decision under consideration is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *McAllister v. McAllister*, 218 Md. App. 386, 400 (2014)). "That kind of distance [from the center mark] can arise in a number of ways, among which are that 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). A court abuses its discretion "where 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." *In re Yve S.*, 373 Md. 551, 583 (2003).

II. The Circuit Court Abused Its Discretion in Making Its Custody Determination.

As a preliminary matter, we address Father's motion to strike Mother's reply brief. Under Maryland Rule 8-502(a), "[t]he appellant may file a reply brief not later than the earlier of 20 days after the filing of the appellee's brief or ten days before the date of scheduled argument." Father is correct in asserting that Mother's reply brief was filed after the deadline, and that this Court may strike a reply brief that is not timely filed. *See Heit v. Stansbury*, 199 Md. App. 155 (2011) (striking appellant's reply brief because it was not timely filed). In the present case, the late filing caused no delay to the proceedings of this Court, and Father has alleged no specific prejudice that he suffered as a result. In light of the factual complexities of this case, and the need to exercise particular care in safeguarding the interests of a minor child, we deem it appropriate to review all arguments and

authorities presented by both sides. We, therefore, deny Father's motion to strike Mother's reply brief.

Turning to the merits of the appeal, Mother argues that the circuit court abused its discretion in giving Father primary physical custody of Son during the school year. Mother asserts that such a ruling is completely unsupported by the evidence, and that the circuit court misapplied Fam. Law § 5-701 *et seq.* in finding that Son had suffered a mental injury. We agree.

"It is a bedrock principle that when the trial court makes a custody determination, it is required to evaluate each case on an individual basis in order to determine what is in the best interests of the child." *Reichert*, *supra*, 210 Md. App. at 304. The appellate courts have enumerated the major factors that should be considered in determining whether a joint custody arrangement is appropriate: (1) fitness of the parents, (2) the character and reputation of the parties, (3) the desire of the natural parents and any agreements between them, (4) the potential for maintaining natural family relations, (5) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment, (6) material opportunities affecting the future life of the child, (7) the age, health, and sex of the child, (8) the residence of the parents and opportunity for visitation, (9) the length of separation from natural parents, (10) whether there was prior voluntary abandonment or surrender of custody of the child, (11) potential disruption of the child's social and school life, (12) geographic proximity of parental homes, (13) demands of parental employment, (14) financial status of the parents, (15) impact on state or federal assistance, (16) benefit to parents, (17) capacity of parents to communicate and to reach shared decisions affecting

the child's welfare, (18) willingness of parents to share custody, (19) the relationship established between the children and each parent, and (20) the sincerity of the parent's request. *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986); *Montgomery Cnty. Dep't of Social Serv. v. Sanders*, 38 Md. App. 406, 420 (1977).

This list of factors is non-exclusive and is "in no way intended to minimize the importance of considering all factors and all options before arriving at a decision." *Reichert*, *supra*, 210 Md. App. at 306 (quoting *Taylor*, *supra*, 306 Md. at 303). The capacity of the parents to communicate and reach shared decisions "is clearly the most important factor in the determination of whether an award of joint legal custody is appropriate." *Taylor*, *supra*, 306 Md. at 304. In considering these factors, the best interest of the child is "the objective to which virtually all other factors speak." *Id.* at 303.

In the present case, the circuit court listed each of the factors and set forth its reasoning and conclusions in detail. Nevertheless, the evidence (and lack thereof) cited by the circuit court in its discussion reveals that the court did not properly consider all relevant factors in making its custody determination. In some cases, the circuit court's conclusions were based on clearly erroneous factual findings. Further, the circuit court's ruling had no logical connection to the announced objective of repairing the relationship between Father and Son. We, therefore, hold that under these circumstances, the circuit court abused its discretion.

A. The Circuit Court's Findings with Regard to Fitness

The trial judge concluded that "[b]oth of the parties here are fit individually in the sense that they can provide . . . a home and . . . get the child to school and do that kind of

thing[.]" This finding was amply supported by the testimony of the parties themselves, the witnesses called by Mother, and Dr. Vernon. The trial judge went on to express concerns about Mother's fitness "based upon [her] conduct." Noting the lack of contact between Father and Son under the First Order, which gave Son the choice to turn down visitation with Father, the trial judge stated that Mother "was content to promote the divide" between Father and Son. The trial judge further noted that Mother had caused Son to miss a scheduled visit under the Amended Order.

Although we agree that Mother should have done much more to foster and repair the relationship between Father and Son, Mother's failure in this regard does not support a finding that she is physically or psychologically unfit to be a parent to her natural child. Notably, the trial judge subsequently clarified that "I am not concluding that [Mother] is not a fit parent. I believe that she is." We agree. Mother presented numerous witnesses who testified that Son is thriving under her care in Annapolis. Father presented no testimony to the contrary, nor did he present any expert testimony concerning Mother's psychological condition. To be sure, Father testified that Mother has had problems in the past with mental illness and addiction to opiates. Nevertheless, he introduced no evidence to show that Mother is currently unable to care for Son. Insofar as the trial judge cast doubts on Mother's fitness, such remarks were merely *dicta* and were not supported by the evidence.

The trial judge further concluded that Son had "suffered a mental injury that was, as the statute defines, observable, identifiable, and substantial." The primary evidence

cited by the trial judge for this conclusion was that Son had cried during their first interview and did not want to leave Annapolis:

> I saw it in my chambers and I heard about it during the testimony, how he simply would break down and cry. And although I think there's been some progress that I'm happy to hear about, I think it continues through today. And even as it continued through the therapy with Dr. Vernon, [Son], I think, got a sense that, okay, I'll go if I have to go. But he then became -- his focus then became on negotiating away the custodial circumstance. In other words, he would be fine to have a relationship with his dad, as long as his dad decides to give up his effort to have custody. Because he -- [Son] felt he was going to take him away from Annapolis, from his friends, from his mom, from everything that he -- he loves.

In making this finding, the trial judge explicitly cited Fam. Law § 5-701, which defines "mental injury" as "the observable, identifiable, and substantial impairment of a child's mental or psychological ability to function caused by an intentional act or series of acts, regardless of whether there was an intent to harm the child." Father acknowledges that this statute "is inapplicable to the custody dispute that was before the trial judge." As Fam. Law § 5-702 makes clear, Subtitle 5 of the Family Law Article governs the investigation of suspected child abuse or neglect by state agencies. An investigation of a suspected mental injury must be undertaken by a local department or law enforcement agency and must include two assessments by certified professionals. Fam. Law § 5-706. No such investigation occurred in the present case.

Further, the evidence relied on by the trial judge does not support a finding that Son suffered "an observable, identifiable, and substantial impairment of [his] mental or psychological ability to function." The trial judge makes much of the fact that Son cried

during their first interview. That a fourteen-year old child was upset and anxious when he was interviewed by the trial judge is hardly surprising. We recognize, as Dr. Vernon testified, that "a fourteen-year-old is still a child," and that the teenage years are "a very fragile time in a child's life." Indeed, divorce proceedings are bound to be upsetting to the children involved, particularly when custody is an issue. The only other evidence cited by the trial judge was Son's preference for Annapolis, which, as we explain *infra*, was evidence *supporting* the existing custody arrangement. We hold, therefore, that the trial judge's finding of mental injury was clearly erroneous.

B. The Circuit Court's Findings with Regard to Son's Preference

The trial judge concluded that Son was "of sufficient age" to state his preference. We agree. The trial judge emphasized, however, that Son's preference would not control the result:

> I'm not sure that [Son] understands that it is currently not his call because he's been given that opportunity and authority he should not have had. He may understand it based upon the meetings with Dr. Vernon, but he is still insistent that he -- he have that. [Son] has said he does not want to be with his father and for the reasons given. That he doesn't want to be taken away from his -- Annapolis, his friends, an opportunity to play on a particular lacrosse team.

The trial judge went on to state that "[t]he ultimate issue of thriving is not an issue that revolves around a particular opportunity to play lacrosse or a particular school to go to." The trial judge also stated that children "need normalcy and wellbeing," which "includes having two stable parents who love them and are there to care for them."

This Court has held that "[t]he desire of an intelligent child who has reached the age of discretion should be given some consideration in determining custody, although the wish is not controlling." *Sullivan v. Auslaender*, 12 Md. App. 1, 5 (1971) (citing *Radford v. Matczuk*, 223 Md. 483, 491 (1960)). Although a child's preference is one factor among many, it must be given due weight, particularly where, as here, it overlaps with other factors, such as the potential disruption to the child's school and social life. A child's desire to stay in a familiar place with his friends and to maintain his ongoing activities is perfectly natural. Such a preference, when stated by a child of sufficient age and reason, is entitled to due consideration by the court.

In this case, the trial judge cited Son's strong preference for staying in Annapolis -- which has been Son's home for most of his life -- as evidence that Son suffered a mental injury at the hands of Mother and, therefore, needed to be placed with Father in New Hampshire. Indeed, the trial judge seems to have taken Son's preference for Annapolis as a sign of immaturity in need of correction. By proceeding in this manner, the trial judge essentially treated Son's reasonable preference for Annapolis as evidence supporting the *removal* of Son from Annapolis. To treat a child's strong preference for one home as evidence *against* keeping the child in that home is tantamount to not considering the child's preference at all. While trial judges certainly have broad discretion in weighing the relevant factors in a custody proceeding, the approach taken by the trial judge precluded a proper weighing of Son's preference.

C. The Circuit Court's Findings with Regard to the Potential Disruption of Son's Social and School Life

It is not clear that the trial judge considered the impact that a transfer of custody would have on Son's social and school life. The trial judge found that Son "has spent ample time in New Hampshire," and that Son "can benefit from his involvement in being at both locations." The trial judge also noted that Son would have the opportunity to engage in water sports and winter sports in New Hampshire. A general comparison of the advantages and disadvantages of the two locations, however, is not sufficient; the trial court needed to consider the connections that Son currently has to each place, and how those connections will be altered by a change in custody. Such an inquiry was especially urgent in this case because a transfer of physical custody to Father during the school year would necessarily take Son away from his school and his friends.

It is undisputed that Son has lived in Annapolis for most of his life. Son lived in New Hampshire for approximately five months in 2015, and his last visit to that area was a two-day trip in 2016 that, by all accounts, went badly. For the last three years, Son has been making friends in Annapolis and going to school in Annapolis. The testimony of Mother, Dr. Vernon, John Buzzelli, Steven Liszewski, and Karen Gardner, as well as Son's own statements to the trial judge, all indicate that Son has many friends in Annapolis and is doing well in school. Dr. Vernon testified that, in addition to Son's lacrosse games, Son is "going to be playing soccer, too, this rec[reational] soccer on the weekends with . . . some buddies."

Instead of discussing the possibility of disruption in light of the evidence, the trial judge merely stated that "any sort of a change can result and may result in some disruption." The trial judge failed to discuss the added disruption that would occur if Son were taken from Annapolis in the middle of a semester, even though his subsequent ruling made such an outcome possible, if not likely. The trial judge opined that any disruption to Son's life would be "temporary," but we find no support in the record for this conclusion. Critically, Dr. Vernon testified that forcing Son to live with Father could have lasting consequences:

> I'm a firm believer that the adults make decisions for children, and a fourteen-year-old is still a child. However, I also know that it's a very fragile time in a child's life, and that if you force them into situations, sometime they rebel by doing unacceptable behaviors. Even good kids go bad. And that's a concern that I -- a strong concern that I have.

We, therefore, hold that the circuit court failed to properly consider the potential disruption to Son's social and school life.

D. The Circuit Court's Findings with Regard to the Relationship Between Son and Each Parent

The trial judge found that Mother and Son "have a very close relationship." The trial judge went on to say, "It's obvious from talking to [Son] and everything that I've heard, she's been very involved in all of [Son]'s activities and makes sure that he gets where he needs to be, [and] is well cared for." The trial judge concluded that Son "doesn't want for anything." We agree. Indeed, the testimony of Mother, Dr. Vernon, John Buzzelli, Steven Liszewski, and Karen Gardner provides ample support for this finding. The trial judge further found that "[d]efendant's relationship [with Son] is very strained." This point is undisputed.

These findings -- that Son has a very close relationship with Mother and a strained relationship with Father -- would appear to support a custody arrangement where Mother retains primary physical custody of Son. Curiously, the trial judge reached the opposite conclusion, based on the assumption that "[e]very child needs a father figure and a strong male relationship." Notably, the trial judge did not cite any evidence in the record to support this sweeping statement, which he presented as a self-evident principle of child psychology. The only licensed mental health professional who testified was Dr. Vernon, who never claimed that "a strong male relationship" is necessary for a child to thrive. More broadly, the best interest of the child is not served when the *existence* of a parental relationship is promoted without regard for the *quality* of that relationship. That Father "[has] been devastated by the last two years and . . . wants that to be repaired" should not be the focus of the custody determination. We hold, therefore, that the circuit court failed to properly consider this factor.

E. The Circuit Court's Other Findings

The trial judge found that both parties were of good character. The trial judge explained that Father "is a successful businessman" with "a work ethic that is to be admired." As for Mother, the trial judge noted that "[n]umerous witnesses vouched for her good character and reputation, in particular her ability as a caring mom." We hold that these findings are well-supported by the evidence.

The trial judge further found that both parties were seeking custody and that their requests were sincere. Although Father agreed to a *pendente lite* order giving Son the right to refuse visitation, the trial judge concluded that Father "was trying to get some access."

We agree. The text messages and emails submitted by Mother show that Father asked for custody of Son as far back as November 2015, and that Father made numerous attempts to visit Son prior to the entry of the Amended Order.

The trial judge specifically determined that Father was more willing than Mother to renew Son's relationship with his half-siblings. Although we agree, this fact should have little bearing on the ultimate custody arrangement. Son's half-siblings, who are much older than he is, have not been a part of Son's life for many years, and Son expressed no interest in renewing these relationships.[5]

The trial judge appears to have addressed the material opportunities affecting Son's future and the residence of the parents under the same heading. The trial judge stated that Mother "doesn't work," that her life has "revolve[d] around [Son]" since the separation, and that "her current residence is suitable." These findings are well-supported by the evidence. The trial judge noted that Father "[m]akes a very good living" and "has a suitable residence in New Hampshire." The trial judge found that Father "works three days a week, has great flexibility in his job and . . . he plans to come to Maryland only every other week." Father actually testified that he works forty to fifty hours per week, including two

[5] Son's three half-siblings are older than him by nine years, fourteen years, and seventeen years, respectively. Son maintains that he remembers being molested by M.B. when he was four years old. Whether or not the incident occurred as Son remembers it, Son should not be forced to have a relationship with someone he still sees as his abuser. We are also concerned that the trial judge focused solely on Son's half-siblings and made no mention of Son's maternal grandmother and uncle, who live in Annapolis and visited him regularly.

and a half days that he spends in Annapolis every week. Father did testify that, if granted custody of Son, he would only fly to Annapolis every other week.

The trial judge found that Son was "fourteen years of age, male, in good health." The trial judge found that the length of separation "isn't terribly relevant here," and that "there's never been a voluntary abandonment by either side in this case." Although the residences of the parties are not geographically close, the trial judge concluded that "the financial resources . . . are there" to allow Son to travel back and forth between the parental homes as needed. The trial judge found that Mother is unemployed and that Father's job "certainly is demanding." The trial judge noted that "[t]he family has a degree of wealth that will enable [Son] to benefit from whatever he needs, not necessarily whatever he wants." The trial judge stated that both parents would benefit from an award of joint custody. We conclude that these findings are supported by the testimony of the parties.

The trial judge found that Mother and Father have frequently failed to communicate, but that "at other times . . . communication did occur." The trial judge concluded that both parents "have the inherent capacity to communicate to make effective decisions" and are "willing to communicate" moving forward. The trial judge found that Father "is willing to share custody and . . . able to share custody." The trial judge found that Mother had "contributed to the progressively poor relationship" between Father and Son, but that Mother "seems to be recognizing the problem and her role." The trial judge cited Dr. Vernon's testimony that Mother was supportive of Son's involvement in the reunification therapy sessions. We conclude that these findings are supported by the record.

The trial judge made no findings -- and the parties present no argument -- concerning the impact of the court's ruling on state or federal assistance.

G. The Circuit Court's Ruling

At the end of his oral opinion, the trial judge concluded that "it is clearly in the best interest of this young man that he have this opportunity to renew the relationship [with Father]." The trial judge noted that a child who "[is] in tears at the thought of seeing his own dad" cannot be thriving. On the basis of these findings, the trial judge awarded Father primary physical custody of Son during the school year. Although we agree that Son would benefit from an improved relationship with Father, the record does not support a finding that the custody arrangement devised by the circuit court will heal the rift between Father and Son.

The decision of the circuit court contravenes the recommendation of two different psychologists. In a letter dated April 4, 2017, Dr. Smith asserted that "[t]o force the matter, particularly given [Son's] age and developmental stage, is likely to be counterproductive, if not damaging to him and to the process." In a subsequent letter, Dr. Smith wrote that "[f]orcing [Son] to visit with his father without the adequate preparation of both parties creates tremendous pressure and stress on the child and presents the likelihood of setting the reunification process back rather than facilitating it."

Dr. Vernon, unlike Dr. Smith, supports regular court-ordered visits. Nevertheless, Dr. Vernon expressed "a strong concern" that forcing Son to live with Father would cause Son to become rebellious. When asked by the court about her future plans for the

reunification therapy, Dr. Vernon supported a gradual increase in voluntary visits outside of the court-ordered visitation schedule:

> I was hoping to continue to build that relationship and move it to doing something like, on a weekend together, like getting Dad to go to his -- his lacrosse games, or, you know, to his sport, sporting events; getting him to go to perhaps a football game together or -- or a, you know, an event together. Getting them to do -- Dad to come to his back-to-school night; those kinds of things. Yes, to start to build those kinds of relationships. And the hope was that -- the goal was that when Dad's down here on a Tuesday, Wednesday, Thursday time frame, that [Son] might stay over- -- and we talked about this, with both Dad and [Son] about staying overnight one of those nights.

This plan is remarkably similar to Dr. Smith's recommendation of "reunification counseling involving gradual engagement in a neutral setting with a safe support person (counselor) and expanding from there." Neither Dr. Vernon nor Dr. Smith supported an immediate transfer of primary physical custody, much less the immediate uprooting of Son from his life in Annapolis.

Further, a transfer of primary physical custody to Father will not address Son's concerns that Father does not care about his preferences, that Father is verbally abusive, or that Father's primary goal is obtaining custody rather than fostering a nurturing relationship. These concerns, far from being phantoms conjured by Mother, are well-supported by the record. Son and Mother are in agreement that Father would sometimes yell at them and verbally abuse them, and that, during one argument, Father picked up Mother and taunted Son. Dr. Smith concluded that "[Son]'s estrangement from his father is the result of many interacting factors including his personal history with his father prior

to the parental estrangement, the dynamics of his parent's [sic] marriage and the dynamics of their separation, as well as his direct negative personal experiences." These allegations are consistent with the behavior observed first-hand by Dr. Vernon, who testified that Father "can be bullying to many people." Dr. Vernon explained that Father once yelled at her for forty minutes within earshot of Son, causing Son to become "very nervous and upset" and "worried that . . . there was going to be some kind of altercation[.]"

Indeed, Dr. Vernon's testimony reveals that Father constantly tried to undermine the reunification process. Father went months without attending the sessions, even though Son "was pretty upset that his father just didn't show." Father told Son that they did not need to attend the sessions with Dr. Vernon, that the sessions were "a waste of time," and that Dr. Vernon "didn't know what [she] was doing." When Father began attending the sessions again, they made some progress, but Father would "throw bombs" in the sessions by bringing up sensitive topics too quickly. Inasmuch as Father was unwilling to participate in the court-ordered reunification therapy in good faith, there is no reason to believe that he will be willing to nurture a healthy relationship with Son in New Hampshire.

Dr. Vernon's testimony makes it clear that, by the end of the trial, the only obstacle to reunification was Father himself. Dr. Vernon testified that the reunification process had been "partially successful" and that the slow progress was due to Father's behavior. Son told both Dr. Vernon and the trial judge that he was willing to have a relationship with Father, but that he did not want to leave his life in Annapolis. Dr. Vernon testified that Son was open to visiting Father in New Hampshire, going boating with Father in Annapolis, and working as an intern at Father's place of business. It was Father who shot

down each of these possibilities, apparently out of a concern that Son would subsequently lie about what happened and imperil Father's request for custody. Dr. Vernon testified that Son had made significant progress in the sessions and demonstrated a willingness to reach out to Father. Father, on the other hand, "has not really taken much responsibility for anything that he may have done to hurt [his] relationship with [Son]."

As the foregoing makes clear, the circuit court decided *sua sponte* to alter the parties' agreed-upon custody arrangement at a status conference, without notice to the parties or an evidentiary hearing.[6] After hearing the evidence, the circuit court decided to relocate a child from his lifelong home, his friends, and the school where he was doing well, against the wishes of the child and the recommendation of the court-appointed reunification counselor, in order to place the child with a parent who sought to undermine the reunification process at every turn. Notably, the circuit court imposed this disruptive arrangement without the benefit of a custody evaluation or a best interest attorney. As a result, the circuit court's ruling did not follow logically from the findings or have a reasonable relationship to the announced objective of repairing the relationship between Father and Son.

[6] This manner of proceeding raises due process concerns. *See Burdick v. Brooks*, 160 Md. App. 519 (2004) (holding that a trial court violated a parent's right to due process in awarding temporary custody of the minor children to the other parent during a status conference); *see also id.* at 527 ("[I]t is axiomatic that [the parties] were entitled to adequate notice of the time, place, and nature of that hearing, so that they could adequately prepare." (quoting *Phillips v. Venker*, 316 Md. 212, 22 (1989)). Whether or not Mother's due process rights were, in fact, violated, the trial judge's actions at the April 3, 2017 hearing bolster our conclusion that the court was acting "without reference to any guiding rules or principles." *In re Yve S.*, 373 Md. 551, 583 (2003).

Accordingly, we vacate the determination of legal and physical custody of the circuit court and remand for further proceedings not inconsistent with this opinion. We further vacate the Amended Order of April 16, 2017, leaving the July 8, 2016 *pendente lite* order in effect until a full evidentiary hearing can be held. Upon remand, the circuit court is directed to order a custody evaluation and to appoint a best interest attorney for Son. The circuit court is then directed to hold a full evidentiary hearing regarding custody, to be completed in advance of the 2018-2019 school year if practicable.[7]

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[7] We understand that the circumstances of Son's life and Son's relationships with the parties may have changed since the entry of the circuit court's order on October 10, 2017. Our determination in this case is based only on the evidence in the appellate record. On remand, the trial court must consider any and all facts relevant to a determination of the child's best interest.