Circuit Court for Charles County
Case No. C-08-FM-20-000679

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1891

September Term, 2021

MILOUSE GERMAIN

v.

YSAMAILLE CASTOR

Berger,
Shaw,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: August 3, 2022

This matter stems from a child custody case in the Circuit Court for Charles County. In June 2020, Ysamaille Castor ("Father") filed a complaint for custody and visitation against Milouse Germain ("Mother"). After a three-day trial that took place in June, July, and December 2021, the court awarded Father primary physical and sole legal custody of the parties' four minor children. The court also awarded Father child support amounting to $400 per month. Mother appeals and presents three questions for our review:

1. Whether the trial court erred [as] a matter of law in failing to consider appellant's request for attorney's fees.

2. Whether the trial court erred as a matter of law in awarding sole legal and physical custody of the parties['] children to appellee-father.

3. Whether the trial court erred in calculating child support and child support arrears.

For reasons to follow, we shall vacate the judgment only as to the court's denial of Mother's request for attorney's fees and remand for further proceedings on that issue consistent with this opinion. We otherwise affirm the judgment.

BACKGROUND

Mother and Father have four children together: T. (born in 2008), G. (born in 2010), I. (born in 2012), and A. (born in 2016). All four children live with Father in a house that he owns in White Plains, Maryland. Mother resides in Frederick, Maryland, where she has lived since December 2021.

Mother and Father met in Haiti in 2005 and were never married to each other. Their oldest living child, T., was born in 2008 and first lived with Mother in Haiti before moving

with Mother to the United States in January 2010.[1] Around that time, Father filed an asylum petition for Mother, and they began living together. Later that year, G. was born.

In July 2012, Father bought a house in Waldorf, which became the parties' family home. The next month, they had another child, I. In January 2014, Father won a million dollars by playing the lottery. With that money, Father bought a house in White Plains. Father began renting the house in Waldorf and the parties moved into the White Plains house with their children. They had their youngest child, A., in 2016. The parties stopped living together in June 2020 when Mother took T. and I. and moved to New Jersey. Before Mother left Maryland, Father testified that he offered to let her live in their second home, but Mother declined and took T. and I. to New Jersey without Father's permission. At first, Father did not know where Mother had moved. After T. and I. called Father, Father determined where they were. Father then drove to New Jersey and brought T. and I. back to Maryland.

Father filed a complaint for custody and visitation in June 2020 and obtained an order of default in January 2021. Mother then obtained counsel and the order of default was vacated in March 2021. In May 2021, a best interest attorney was appointed for the children and Mother visited the children only after the attorney was appointed. Mother visited the children in June 2021, after the first day of trial. Mother picked up the children for her third visit outside the home of Moniqca Milus, who is a mutual friend of the parties. Milus testified that G., I., and A. were always happy to see Mother, but T. was "not at ease"

[1] Tragically, the parties' first child, who was born in 2005, was kidnapped in Haiti and killed.

when Mother visited. Milus testified about what she believed would happen if Mother received primary physical custody: A. and T. "will be a problem because they will want to stay with their father." According to Milus, the children would not be happy if they were separated and living with different parents. As the trial court found, "[i]t is clear that the children are doing well in their current school and social life."

Father works as a bus operator, where he has worked for nineteen years. In 2020, he earned about $60,000 from his employer. Before the parties separated, Mother was working as a certified nursing assistant. After Mother moved to New Jersey, she began working as a warehouse worker for Amazon where she earned $19.00 per hour. She testified on the second day of trial in July 2021 that she planned to move to an apartment in Frederick, Maryland, and she had asked Amazon to transfer her employment to Maryland: "I am planning on moving to Frederick, because that is where I asked my job to transfer me to." On the third day of trial in December 2021, Mother testified that she moved to Frederick, where she rents an apartment.

Mother testified that Father assaulted her in a series of incidents. Mother also testified that she sought some legal action against Father stemming from the alleged abuse, but Mother decided against pursuing that legal action:

> [FATHER'S COUNSEL]: [W]hat happened in court? Were the charges dropped? Were they pursued? What happened in court?
>
> [MOTHER]: I cancelled it because I didn't want him to have a problem. Him, also, he told me to cancel it.
>
> [FATHER'S COUNSEL]: So you cancelled it?

[MOTHER]: Because he told me he would be changed.

Father denied committing any abuse. The trial court did not find that Father committed any abuse.

T., the parties' oldest child, asked to speak with the court. The best interest attorney recommended that the court speak with T. in chambers, and the court agreed: "in this case I have agreed to meet with [T.] considering that he is thirteen years of age, but I am not going to subject a thirteen year old to cross-examination in front of his parents." The court spoke with T. in chambers with the best interest attorney, the court's law clerk, and the courtroom clerk present. The court placed the contents of its conversation with T. on the record, stating that T. is a "delightful young man." T. stated that he wanted to continue living with his Father in White Plains. The court noted as follows: "[T.] indicated he would be one to go spend a couple of weeks with his mom during the summer. He definitely wants more time with his mother, but wants to remain in his current school and with his current friends."

The best interest attorney also confirmed that the children wanted to spend more time with Mother, but they did not want to leave their home. The best interest attorney made these statements to the court:

> We have to look at the children. And I am looking from the children's perspective, not Mom's perspective, not Dad's perspective, but the children.
>
> They have been attending the same school system forever. They are getting excellent grades, their attendance is wonderful, they have friends, they have sports in the community. They have slept in that house for years.

> Is it right or fair to move them to a home where they haven't lived, to a town where they haven't been, to a school system they have never known? From the children's perspective, they say no.
>
> They say they want to have more time with their mom. They want to see their mom, they want a relationship with their mom. But they don't want to leave what they are accustomed to.
>
> Now, between the parties there is no trust. They both purposefully withhold information from each other. It is not just that they don't talk, they refuse to communicate, they refuse to share information.
>
> I can't imagine how this could be a joint legal custody case. I wanted it to be one. When we started, I wanted these parties to have joint and shared. I want them to share these children, that is what the children would prefer.
>
> But they can't have joint legal custody, by both of their admissions. They didn't use the words, I am using the words. It is an abuse of discretion for the Court to award joint legal custody when the parties cannot communicate to make shared major decisions for their children.
>
> * * *
>
> At this point, the best interest attorney would recommend that the father have legal custody, the children remain in the care and custody of the father, subject to the mother's rights of visitation to include the every other weekend, three weeks in the summer, maybe one week a month.

At the conclusion of the trial, the court awarded Father primary physical and sole legal custody of the parties' four children. The court ordered Father to share information with Mother including the children's "school event calendar, the dates of any extracurricular activities they are participating in," the contact information for any doctors, and "their school report cards[.]" Mother was granted visitation with the children "[o]n the second and fourth weekend of each month, from 7:00 pm on Friday evening until 6:00 pm on Sunday evening[.]" The court granted Mother a telephone or video call once per

week and granted each parent "uninterrupted access with the children for three non-consecutive weeks each summer, with the weeks selected by [Mother] by May 1st and by [Father] by May 15th in all odd numbered years, and by [Father] by May lst and by [Mother] by May 15th in all even numbered years[.]"

The court then calculated child support. Father's monthly income of $6,275 from his employer was undisputed and the court determined that Father's rental property income was $1,000 per month. His total income was calculated as $7,275 per month. The court credited Father $359 for health insurance expenses. The court held that Mother made $18.50 per hour. The court's calculation of Mother's income considered that her new visitation schedule would impede her ability to continue working the same amount of overtime:

> Since the defendant will now have visitation every other weekend, her opportunity to work overtime hours will be reduced. So, I reduced the number of hours per week for overtime from the ten requested by the plaintiff, to five hours of overtime per week. Based upon my calculation, that gives her an income of $3,807 per month.

The court made a downward deviation from the child support guidelines, which were calculated as $617 per month, and awarded Father $400 per month in child support to allow Mother "the ability to maintain her residence and the ability to pay when the children are with her for the items that the children may need." The court ordered that Mother pay child support arrears dating to July 2020, which was the month after Father filed his complaint, because Mother had paid no child support.

The court ordered both parties to pay their own attorney's fees.

DISCUSSION

I. The court erred in failing to explain its rationale for the denial of Mother's request for attorney's fees.

Mother first contends that the court erred in failing to explain its denial of her request for attorney's fees. Father claims that the court properly declined to award attorney's fees because the parties presented insufficient evidence to justify the award of such fees.

Md. Code § 12-103(a) of the Family Law Article ("FL"), permits a court in a custody action to award to either party their associated costs and attorney's fees. The statute provides that, before those costs and fees can be awarded, "the court shall consider: (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b). We review an award of counsel fees for an abuse of discretion. *Meyr v. Meyr*, 195 Md. App. 524, 552 (2010); *accord Petrini v. Petrini*, 336 Md. 453, 468 (1994). "The proper exercise of . . . discretion is determined by evaluating the judge's application of the statutory criteria . . . as well as the consideration of the facts of the particular case." *Petrini*, 336 Md. at 468 (citation omitted). When exercising that discretion, the court "is bound to consider and balance the considerations contained in FL § 12-103." *Frankel v. Frankel*, 165 Md. App. 553, 589 (2005). "Denial of a request for attorney's fees without consideration of the statutory factors has been deemed reversible error." *Best v. Fraser*, 252 Md. App. 427, 438 (2021).

In the case at bar, the court's opinion stated as follows: "Both sides are responsible for their own attorney's fees." The court's final order was similarly worded: "ORDERED, that neither party shall contribute to the legal fees incurred by the other[.]"

The record contains no indication that the court considered the requisite statutory factors before denying Mother's request for attorney's fees. Father claims Mother did not meet her burden of proof under FL § 12-103(b). We observe, however, that the court did not state that Mother failed to meet her burden of proof, nor did the court make any comments or assessment regarding the factors. Thus, we remand on this issue to allow the court to apply the statutory factors under FL § 12-103 and explain the rationale for its decision.

II. The circuit court did not abuse its discretion in awarding custody to Father.

Mother argues that the court erred in its child custody determinations because it failed to credit Mother's allegations that Father committed acts of abuse. Mother also claims that the court failed to properly apply the factors for making child custody determinations. Father responds by noting that the court made no finding that he had abused Mother, and he also contends that the court properly applied the factors for determining child custody.

We review child custody determinations using three interrelated standards of review, which we have described as follows:

> 'When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily

> be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.'

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). The abuse of discretion standard recognizes "the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses." *Santo v. Santo*, 448 Md. 620, 625 (2016) (quotation marks and citation omitted). An abuse of discretion "may arise when no reasonable person would take the view adopted by the . . . court[,]" "when the court acts without reference to any guiding rules or principles[,]" or when "the court's ruling is clearly against the logic and effect of facts and inferences before the court[.]" *Id.* at 625-26 (cleaned up). In all custody and visitation determinations, the best interest of the child is the overarching consideration. *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013).

According to Mother, "the court totally failed to give any consideration to the legion testimony of Appellee's abuse, disrespect and violation of the Appellant's rights as a mother and human being." Mother claims that the court failed to properly apply FL § 9-101.1, which provides:

> (b) In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:
>
> (1) the other parent of the party's child;
>
> (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.
>
> (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.

Mother relies on *J.A.B. v. J.E.D.B.*, 250 Md. App. 234 (2021) for support. In *J.A.B.*, this Court held that the trial court properly "utilize[d] the additional consideration of abuse in making a decision regarding custody and visitation which best protects the children and the victim of abuse, Mother." *Id*. at 252. There, "[t]he trial judge expressly found that Father was abusive to Mother throughout the course of their marriage." *Id*. at 245.

Here, the court made no such finding that Father had abused Mother and the lack of a finding of abuse is why Mother's reliance on *J.A.B. v. J.E.D.B.*, 250 Md. App. 234 (2021), is misplaced. Mother testified that Father abused her in a series of incidents. As to one incident in 2015, Mother testified that Father had hit her repeatedly. Father, however, denied committing any abuse. The court's oral opinion merely recognized that Mother alleged that Father had committed abuse: "The defendant alleged a series of abusive incidents from the plaintiff, both in Haiti and after she came to the United States." However, the court did not make a factual finding that the abuse actually occurred. "'Weighing the credibility of witnesses and resolving any conflicts in the evidence are

tasks proper for the fact finder.'" *J.A.B.*, 250 Md. App. at 250 (quoting *State v. Smith*, 374 Md. 527, 533-34 (2003)).

We hold, as a result, that the court complied with FL § 9-101.1(b) because it "considered . . . evidence of abuse[.]" A court's obligations under FL § 9-101.1(c) are triggered when a court finds that abuse occurred within the meaning of the statute. Because the court did not find that abuse occurred, there was no reason to consider FL § 9-101.1(c).

Next, we address whether the court properly considered the remaining factors for determining child custody. "[T]he power of the [trial] court is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interest of the child." *Taylor v. Taylor*, 306 Md. 290, 301-02 (1986). To help trial courts determine what is in a child's best interest, this Court and the Court of Appeals "have set forth a non-exhaustive delineation of factors" for trial courts to consider. *Azizova v. Suleymanov*, 243 Md. App. 340, 345-46 (2019).[2] As Maryland courts have repeatedly cautioned, no one

[2] *Fader's Maryland Family Law* compiled a list of twenty-one factors. *Azizova*, 243 Md. App. at 345-46. (citing Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 5-3(a), at 5-9 to 5-11 (6th ed. 2016)):

(1) The fitness of the parents;

(2) The character and reputation of the parties;

(3) The requests of each parent and the sincerity of the requests;

(4) Any agreements between the parties;

(5) Willingness of the parents to share custody;

(6) Each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest;

(7) The age and number of children each parent has in the household;

(8) The preference of the child, when the child is of sufficient age and capacity to form a rational judgment;

(9) The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;

(10) The geographic proximity of the parents' residences and opportunities for time with each parent;

(11) The ability of each parent to maintain a stable and appropriate home for the child;

(12) Financial status of the parents;

(13) The demands of parental employment and opportunities for time with the child;

(14) The age, health, and sex of the child;

(15) The relationship established between the child and each parent;

(16) The length of the separation of the parents;

(17) Whether there was a prior voluntary abandonment or surrender of custody of the child;

(18) The potential disruption of the child's social and school life;

(19) Any impact on state or federal assistance;

(20) The benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child;

(21) Any other consideration the court determines is relevant to the best interest of the child.

factor is determinative, *Santo*, 448 Md. at 629, and each custody determination is "to be made by a careful examination of the specific facts of each individual case[.]" *Azizova*, 243 Md. App. at 344.

Here, the court found that several factors did not favor either party. But the court found that five factors favored Father. We focus on those that the court relied in reaching its determination.

As to prior voluntary abandonment or surrender, the court examined the evidence and ruled:

> The defendant has had very minimal contacts with the minor children since August of 2020. There does not appear from the evidence that the defendant made significant effort to contact her children, or attempt to arrange for visitation.
>
> The court finds unpersuasive her attempts to blame the plaintiff for the minimal effort she, herself, exerted to see the children. This factor weighs in favor of the plaintiff.

Second, the court ruled that the preferences of the children favored Father. During the court's interview of T., T. "indicated that he wants to remain living . . . with his father[.]" Relying on T.'s statements and the best interest attorney's statements, the court also recognized that the children wanted to spend more time with Mother than they had spent with her since she left in June 2020. As a result, the court determined that the preference of the children weighed "in favor of the children staying in their current residence and having arranged, scheduled parenting time through court order with [Mother]."

Third, the court determined that the factor dealing with length of separation from the natural parents favored Father: "The children have been residing with the plaintiff since August of 2020. This factor weighs in favor of the plaintiff."

The fourth factor that the court found favored Father was the environment and surroundings in which the children will be raised:

> The children have resided in their current home for approximately the past seven to eight years, and the children have only attended Charles County public schools.
>
> And the children have friends and extracurricular activities in Charles County. Their medical providers are all located in the area.

The court recognized that the children were "doing well in their current location."

Fifth, examining the potential disruption to the children's school and social life, the court made the following determination: "It is clear that the children are doing well in their current school and social life. To change now would create a potential significant disruption to the children's school, extracurricular activities, and social life."

As to the legal custody determination, the court noted a "demonstrated inability of the parents to effectively communicate[.]" The evidence established that Mother contacted the children — instead of Father — for visitation, "which is troublesome . . . given the children's young age." In sum, the court "embarked upon a thorough, thoughtful and well-reasoned analysis congruent with the various custody factors," *Azizova*, 243 Md. App. at

347, and thus, we hold the court did not err in awarding primary physical and sole legal custody to Father.[3]

III. The court did not err in its child support calculation. Nor did the court err in ordering Mother to pay child support arrears.

Lastly, Mother claims that the trial court erred in calculating child support and ordering her to pay child support arrears.

A trial court must use the child support guidelines provided in FL § 12-204(e) "in any proceeding to establish or modify child support[.]" FL § 12-202(a)(1); *see also Petrini*, 336 Md. at 460. The guidelines establish a rebuttable presumption: a successful challenger must furnish evidence that the obligation mandated by the guidelines would be unjust or inappropriate under the circumstances. *Id*. at 460-61; FL § 12-202(a)(2)(i). The guidelines calculate a child support obligation "proportionately between the parents in relation to their 'adjusted actual incomes.'" *Id*. at 461.

The Family Law Article defines "income" as "(1) actual income of parent, if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished." FL § 12-201(i). "Actual income" is "income from any source." FL § 12-201(b). FL § 12-201(b)(3) enumerates sixteen sources of actual income, including "salaries;" "wages;" "bonuses;" and "commissions." The court must verify the parents' income with "documentation of both current and past actual income." FL § 12-203(b).

[3] Mother also argues that the court improperly considered the factor that deals with the potentiality of maintaining natural family relations. We disagree. The court examined that factor and properly determined as follows: "There was a suggestion that the minor girls go with one party, and the minor boy stay with the other party. But since the Court is not considering that, I find this factor to be equally weighted."

"[S]uitable documentation of actual income includes pay stubs, employer statements otherwise admissible under the rules of evidence, or receipts and expenses if self-employed, and copies of each parent's 3 most recent federal tax returns." FL § 12-203(b)(2)(i).

The court awarded Father $400 per month in child support by making a downward deviation from the child support guidelines, which were $617 per month. The court ordered the deviation because it "will allow [Mother] the ability to maintain her residence and the ability to pay when the children are with her for the items that the children may need." The court also ordered Mother to pay child support arrears:

> [Mother] is found to be in arrears in child support payments in the amount of seven thousand two hundred dollars ($7,200.00) as of December 31, 2021, based on the fact that no child support was paid from the filing date of June 26, 2020 until December of 2021; and that said arrears shall be paid by making an additional payment of fifty dollars per month through the Charles County Bureau of Support Enforcement, bringing the total payment each month to $450.00 per month, with fifty dollars going toward the arrearage[.]

Mother argues that the court erred in computing Father's income from his rental property, which the court valued at $1,000 per month ($12,000 per year). Mother overlooks FL § 12-201(b)(2), which states: "For income from . . . rent, . . . 'actual income' means gross receipts minus ordinary and necessary expenses required to produce income." Father's tax returns show that he received the following rent: $26,400 in 2018, $26,400 in 2019, and $19,800 in 2020. Father testified that he charged about $1,900 to $2,000 in rent. The court's calculation considered "that [Father] is taking a little over $12,000 in depreciation on his rental home." But even without considering the depreciation expenses

on the rental property, the other expenses on the property — which included the mortgage, taxes, insurance, management fees, and repairs — totaled $23,214 in 2018, $23,588 in 2019, and $18,412 in 2020. Father's tax returns from 2018 through 2020 showed that the actual income from the rental property was never above $3,200 per year.

Lastly, Mother argues that the court improperly awarded child support arrears. "The decision to make a child support award retroactive to the filing of [the complaint] is a matter reserved to the discretion of the trial court." *Petitto v. Petitto*, 147 Md. App. 280, 310 (2002). Father filed his complaint in June 2020. Mother argues that the award of retroactive child support produced an "inequitable result" under FL § 12-101(a)(1) because she did not receive notice of the proceedings until February 2021. We disagree. Although Mother took two children with her to New Jersey in June 2020, Father took them back to Maryland in August 2020, and all four children were residing with Father since that time. In addition, Mother had paid no child support. Under these circumstances, we cannot say that the court abused its discretion in ordering Mother to pay child support arrears.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED IN PART AND VACATED IN PART. JUDGMENT AS TO DENIAL OF APPELLANT'S REQUEST FOR ATTORNEY'S FEES VACATED. JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY APPELLEE.