Circuit Court for Baltimore County
Case No. 03-C-18-004516

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 532

September Term, 2022

ERIK A. HASENBOEHLER

v.

KIMBERLY HASENBOEHLER

Berger,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 25, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This case is before us on appeal from an order of the Circuit Court for Baltimore County addressing motions to modify custody filed by both Erik A. Hasenboehler, appellant ("Father"), and Kimberly Sonneborn (formerly known as Kimberly S. Hasenboehler), appellee, ("Mother"), regarding the parties' two minor children. At the time of the filing of the motions to modify custody, the parties had shared physical and joint legal custody of the children pursuant to a marital settlement agreement.

On November 6, 2019, Father filed a motion to modify child custody. In response, Mother filed a countermotion to modify custody on December 18, 2019. Following two years and three months of protracted litigation, the circuit court issued an opinion and order addressing child custody on February 4, 2022. The circuit court awarded Mother primary physical custody. The parties maintained joint legal custody, but Mother was awarded tie-breaking authority. Father subsequently filed a motion to alter and/or amend the circuit court's ruling, which was denied on May 10, 2022. Father noted a timely appeal.

On appeal, Father presents three issues for our consideration, which we have rephrased as follows:

> I. Whether the circuit court committed reversible error by barring the minor children's therapist from testifying during Father's case-in-chief.
>
> II. Whether the circuit court erred and/or abused its discretion by restricting the use and dissemination of the minor children's therapy records.
>
> III. Whether the circuit court abused its discretion by declining to remove the minor children's Best Interest Attorney and Child Privilege Attorney.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

Father, an orthopedic surgeon, was born in Italy, raised in Italy and Austria, and attended medical school in Switzerland. Mother, a physician assistant, was born in Fort Worth, Texas. They met in Texas in 1999, when Father was completing an orthopedic surgery residency. They married in 2001 in Switzerland, where they lived for a period of time. They are the parents of two sons, N., who was born on January 22, 2008, and L., who was born on September 14, 2009.

During their marriage, the parties lived in Texas, Colorado, and Kentucky, before moving to Maryland in 2011. The parties ultimately separated on August 19, 2017. They were able to reach an agreement as to custody, and, on December 5, 2018, the parties entered into a Custody Agreement and Parenting Plan ("CAPP"). Pursuant to the CAPP, the children generally were with Mother on Mondays and Tuesdays and with Father on Wednesdays and Thursdays; the children spent alternating weekends with each parent. The parties subsequently entered into a Marital Settlement Agreement ("MSA") on February 27, 2019, and the parties were divorced on April 24, 2019. The MSA incorporated the previously negotiated CAPP.

In the weeks and months following the entry of the judgment of divorce, both parties filed petitions for contempt, motions for protective orders, and other filings.[1] On November 16, 2019, Father filed the motion to modify child custody that ultimately gave

[1] We need not set forth details regarding all of the filings. We mention the filings in order to illustrate the general tone and tenor of litigation leading up to this appeal.

rise to this appeal. He asserted that a material change of circumstances had occurred because he had recently begun a new job at Holy Spirit Hospital in Harrisburg, Pennsylvania, and he planned to relocate.[2] On December 18, 2019, Mother filed a countermotion to modify. Each party sought sole physical and legal custody of the minor children.

One of the issues that arose before the circuit court was whether to permit testimony from the children's therapist, Tana Hope, Ph.D., a licensed clinical psychologist at the Kennedy Krieger Institute ("KKI"). The children had been seeing Dr. Hope since approximately October 2018. On or about January 14, 2020, Leon Berg, Esq., was appointed as the children's Best Interest Attorney ("BIA") and Child Privilege Attorney ("CPA"). The order appointing Mr. Berg as BIA/CPA required him to file an assertion or waiver of the children's privilege with respect to their therapy records with Dr. Hope by March 27, 2020.

On February 24, 2020, Dr. Hope sent an email to Mr. Berg informing him that Father's attorney had asked to speak to her. Dr. Hope contacted Mr. Berg seeking guidance as to whether she could speak with Father's attorney. On February 25, 2020, at a scheduling conference, Mr. Berg informed the parties' respective attorneys that he had not waived the children's privilege as to their communications with Dr. Hope. On February 26, 2020, Dr. Hope informed Mr. Berg that Father had requested and received the

[2] Father was previously employed at Johns Hopkins Hospital. His employment terminated in August 2021. Father had been advised months prior to that date that his contract would not be renewed.

children's therapy records directly from KKI on February 25. Mr. Berg contacted Father's attorney to object to the disclosure of the children's therapy records, and Father's attorney confirmed that Father had received and reviewed the records from Dr. Hope. Father's attorney challenged the right of the BIA/CPA to preclude a parent from accessing their child's therapy records. Father's attorney informed Mr. Berg that Father would not delete the records as requested by Mr. Berg.

On March 2, 2020, Mr. Berg sent an email to the parties, their respective attorneys, and Dr. Hope informing them that he planned to allow Mother to review the same records that Father had already obtained, but Mr. Berg explained that he was not waiving the children's privilege. Mr. Berg directed the parties not to disseminate the therapy records to anyone, including counsel. Mr. Berg further advised the parties and their attorneys that he would be filing a motion with the court requesting that it enter an order restricting the use and dissemination of the therapy records.

On March 9, 2020, Mr. Berg filed a Motion to Impose an Order Restricting the Use and Dissemination of the Children's Therapy Records and for Attorney's Fees and Costs. Father subsequently filed an opposition, and Mother filed a response in support of Mr. Berg's motion. On April 30, 2020, the circuit court issued an order granting Mr. Berg's motion. The court ordered that the parties delete and/or destroy Dr. Hope's therapy records and immediately identify all third parties with whom records were shared and secure return and/or destruction of the records. The court further ordered that "Mr. Berg, as Child Privilege Attorney, is the only individual permitted to determine the disposition of matters

covered by the privilege" and "that the parties are not permitted to discuss matters relating to the privilege with Dr. Hope or any other clinician covered by the privilege, unless authorized by Mr. Berg." The court's order provided that "this Order is not intended to, nor shall it, prevent clinicians or the parties from discussing matters in the ordinary course of the children's treatment." Father subsequently filed a motion seeking to revise or strike the order restricting the use of the children's therapy records, which the circuit court denied on July 7, 2020.

Father filed several pleadings during the course of litigation expressly requesting and/or suggesting that Mr. Berg be removed as BIA/CPA. For example, in his response to Mr. Berg's Motion to Impose an Order Restricting the Use and Dissemination of the Children's Therapy Records, Father alleged that Mr. Berg was biased against Father, that Mr. Berg's personality style was in conflict with Father's, and that Mr. Berg had "inexplicably aligned himself with" Mother. Furthermore, after Mr. Berg filed a motion requesting a custody evaluation, Father alleged that Mr. Berg had "caused a rift" between himself and Father as well as between himself and Dr. Hope. Father further alleged that the "expensive [custody evaluation] assessment" sought by Mr. Berg was unnecessary because Dr. Hope could assist the court with assessing each parent's ability to meet the children's needs. Ultimately, the circuit court granted Mr. Berg's motion for custody evaluation on April 30, 2020.

On June 16, 2020, Father filed a motion to strike the court's order appointing Mr. Berg as BIA/CPA and requesting that Mr. Berg be removed. Father alleged that Mr. Berg's

representation had been "fraught with violations of the Rules of Professional Conduct and the BIA Guidelines." Father complained about the reasonableness of the legal fees charged by Mr. Berg, as well as about Mr. Berg's decision not to waive the children's privilege with respect to their therapy records. Father further alleged that Mr. Berg had "acted in such a manner as to show bias in favor of [Mother] at every turn." Mr. Berg filed a response to Father's motion, addressing each claim raised by Father, and Mother filed a response adopting the allegations and arguments set forth in Mr. Berg's response and requesting that Father's motion to strike be denied. The circuit court denied Father's motion to strike the BIA/CPA's appearance on July 7, 2020. At the hearing, the circuit court expressly commented that Mr. Berg was "doing a terrific job so far" and observed that Mr. Berg was "doing the best [he] can."

In April and May 2021, Father filed pleadings and a letter referring to statements he attributed to Dr. Hope. Mr. Berg, in response, moved to strike the references. Mr. Berg explained that he was precluded from responding to, explaining, refuting, or otherwise addressing the statements attributed to Dr. Hope without waiving privilege. In an order dated June 29, 2021, the circuit court granted Mr. Berg's motion and struck all references made by Father to statements attributed to Dr. Hope, as well as references to purported discussions between the therapist and either parent. The circuit court further ordered "that Plaintiff, Defendant, and their respective attorneys shall make no reference to statements attributed to the children's therapist, or references to purported discussions between the

children and the therapist, or references to purported discussion between the therapist and either parent."

Shortly before trial, Father issued a trial subpoena to Dr. Hope, requesting that she testify and produce documents from prior to the parties' divorce through trial. Mr. Berg filed a motion *in limine* requesting that the court issue an order precluding Father from calling Dr. Hope, referring in testimony or argument to Dr. Hope, or producing documents from Dr. Hope or their content. Mother moved to quash the trial subpoena for Dr. Hope, arguing that documents sought from the children's therapist would have no relevance to the trial and that any testimony Father might elicit would be precluded by the court's June 29, 2021 order. The circuit court granted Mr. Berg's motion *in limine*. In response to Father's assertion that Dr. Hope should be permitted to testify as a fact witness, the court observed that it would be difficult to parse out the privileged from non-privileged matters. The court further commented that there had been no ability to depose Dr. Hope during discovery in light of prior orders. The circuit court judge commented, however, that he "may be willing to revisit this depending upon what the testimony is" and explained that he would "revisit this should the testimony make whatever issues that are not privileged an issue" at trial.

The circuit court heard from Dr. Hope's counsel on the first day of trial, who informed the court that Dr. Hope had cleared her schedule, was present in the hallway that day, and would prefer to testify that day if needed. The circuit court judge explained that, "per my order," Dr. Hope's testimony would only be necessary "if something comes up

that I did not envision at the moment." Father requested that he be permitted to call Dr. Hope during his case-in-chief to provide "limited testimony," but the circuit court denied the request. Father requested that Dr. Hope be permitted to testify via Zoom if her testimony was required later, and the circuit court judge responded that he "wouldn't expect that to be a problem." The trial proceeded.

After cross-examination of Father, Father's counsel commented that this was "technically" their case, but he might have to call a rebuttal witness and "potentially" Dr. Hope after Mother presented her case. After re-cross-examination of Father, Father's counsel commented that Holly Mayers may testify as a rebuttal witness, and he may call one additional potential rebuttal witness, but he did not expressly mention calling Dr. Hope as a witness. Father called no further witnesses and did not again request that Dr. Hope testify on any particular matter that arose in Mother's case-in-chief.

The circuit court issued an opinion and order on February 4, 2022, finding a material change of circumstances had occurred as a result of Father's relocation to Pennsylvania and granting primary physical custody of the children to Mother. The court ordered that the parties would continue to have joint legal custody, but Mother was granted tiebreaking authority. Father subsequently filed a motion to alter and/or amend on February 18, 2022, which was denied by the circuit court on May 10, 2022. This timely appeal followed.

Additional facts shall be set forth as necessitated by our consideration of the issues on appeal.

STANDARD OF REVIEW

In child custody, CINA, and termination of parental rights cases, this Court utilizes three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[3] has described the three interrelated standards as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8–131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584. We recognize that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. See also Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

opportunity to speak with the child; [the trial judge] 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." *Id.* at 585-86.

DISCUSSION

I.

The first issue raised by Father on appeal pertains to the circuit court's decision to preclude the children's therapist from testifying during Father's case-in-chief. Father asserts that the subpoena served on Dr. Hope was sufficiently narrowly tailored so as to not require the disclosure of any privileged information and that Dr. Hope should have been permitted to testify regarding non-privileged information. The subpoena requested:

> 1. All written communications between [Dr. Hope] and [Mother] from January 1, 2019, to the present.
>
> 2. All notes of calls/communications between [Dr. Hope] and [Mother] from January 1, 2019, to the present.
>
> 3. Copies of all complaints filed by [Mother] against you with your employer, or any other entity, agency, regulatory committee, or body related in any way to the Hasenboehler children from January 1, 2019, to the present.
>
> 4. Copies of all correspondence, emails, [and] text messages, received by you from any attorney representing [Mother] from January 1, 2019, to the present.

As we discussed *supra*, Mr. Berg subsequently filed a motion *in limine* to preclude Dr. Hope's testimony, and Mother moved to quash the subpoena.

The circuit court heard argument on the motions on the first day of trial, on November 29, 2021. Counsel for Father argued that Dr. Hope should be permitted to testify

as a fact witness regarding Mother's credibility and character, as well as regarding certain conversations she had with the parties. Counsel for Father asserted that "credibility is always relevant" and that Dr. Hope's testimony regarding Mother's credibility would assist the fact-finder.

The circuit court granted Mr. Berg's motion *in limine* as well as Mother's motion to quash and precluded Dr. Hope's testimony. The circuit court precluded Dr. Hope from testifying in Father's case-in-chief but explained that the court "may be willing to revisit this depending upon what the testimony is" and that the court would "revisit this should the testimony make whatever issues that are not privileged an issue" at trial. As we explained *supra*, Father did not seek to have Dr. Hope testify at any time following the conclusion of his case-in-chief. Accordingly, the only matter preserved for appellate review is the circuit court's decision to preclude Father from calling Dr. Hope as a witness in his case-in-chief. We turn, therefore, to the circuit court's decision to exclude Dr. Hope's testimony during Father's case-in-chief. "We review a circuit court's decisions to admit or exclude evidence applying an abuse of discretion standard." *Paige v. State*, 226 Md. App. 93, 124 (2015) (quotation and citation omitted).

Father proffered that Dr. Hope's testimony would assist the fact finder by providing insight regarding each parent's character and reputation as well as by refuting certain statements in Mother's pleadings. Before the trial court, BIA/CPA Mr. Berg argued that the only context in which Dr. Hope knew Mother or Father was through her role as the children's therapist, so Dr. Hope's opinions regarding the parents would necessarily be

drawn from "certain events that may or may not have happened within the context of that relationship." Mr. Berg further questioned how Dr. Hope could effectively be cross-examined "without entering into the area of privileged information," arguing that it would be "impossible to parse out what she knows that is not based on her confidential relationship with these children." The circuit court agreed with Mr. Berg that it would be difficult to parse out the privileged from the non-privileged information in Dr. Hope's testimony and expressed concerns that if Dr. Hope were to testify, "the parties are going to be trying to bring up things as straw men to knock down." Accordingly, the circuit court concluded that Dr. Hope would not be permitted to testify in Father's case-in-chief, but the court expressly informed the parties that the court would "revisit this should the testimony make whatever issues that are not privileged an issue."

In our view, the circuit court's determination that Dr. Hope's testimony should not be permitted during Father's case-in-chief, while leaving the door open to permit her testimony if certain issues arose at trial, was a reasonable exercise of discretion. The court carefully considered the issues that would be presented by the interplay between the matters to which Dr. Hope could testify and the importance of protecting the minor children's therapist-patient privilege. Under the circumstances, the circuit court judge's decision was not so "removed from [the] center mark" nor so "beyond the fringe of what [we] deem[ ] minimally acceptable" that it constitutes an abuse of discretion. *North v. North*, 102 Md. App. 1, 14 (1994). We, therefore, reject Father's contention that the circuit court erred by precluding Father from calling Dr. Hope as a witness.

II.

The second issue raised by Father on appeal is that the circuit court erred by issuing an order restricting access to the minor children's therapy records. Father asserts that the circuit court's April 30, 2020 order, which required that the parties delete and/or destroy Dr. Hope's therapy records, constituted reversible error. As we shall explain, we are not persuaded.

The April 30, 2020 order issued by the circuit court provided as follows:

> **ORDER REGARDING MOTION TO RESTRICT USE AND DISSEMINATION OF THERAPY RECORDS**
>
> By history, on January 14, 2020, the Court appointed Leon Berg ("Mr. Berg") to serve as Best Interest Attorney and Child Privilege Attorney for the parties' minor children. On March 9, 2020, Mr. Berg filed a Motion to Impose an Order Restricting the Use and Dissemination of the Children's Therapy Records, alleging that Plaintiff, [Father], had requested the parties' children's therapy records from Dr. Tana Hope. Mr. Berg stated that after learning that Plaintiff had read the therapy records, he had an identical copy of the records sent to Defendant, [Mother]. Since the therapy records are privileged, Mr. Berg now asks that the Court enjoin the parties from sharing the therapy records and require all disseminated records to be deleted. [Mother] filed a Response in Support of the Motion on March 12, 2020 and [Father] filed a Response in Opposition to the Motion on March 19, 2020.
>
> On April 24, 2020, by consent of counsel, the Court held an off-the-record status conference. During the status conference, the Court related it[s] view that [Father] should not have been granted access [to] the children's therapy records by Dr. Hope because only Mr. Berg, as Child Privilege Attorney, may grant a party access to the records. Although Mr. Berg permitted [Mother] to have a copy of the therapy records, the Court finds that it is appropriate to require that there be no further use and dissemination of the records by either party, given the nature of these proceedings.

> Accordingly, based upon a review of the papers and in consideration of the parties' respective positions as expressed during the status conference, it is this 30th day of April, 2020, by the Circuit Court for Baltimore County, hereby
>
> **ORDERED,** that the Motion to Impose an Order Restricting the Use and Dissemination of the Children's Therapy Records is GRANTED; and it is further
>
> **ORDERED,** that the parties shall delete and/or destroy Dr. Hope's therapy records, including any duplication, print out, written notes or summaries, or other material created based upon that information; and it is further
>
> **ORDERED,** that the parties shall immediately identify all third parties with whom the records were shared and secure return/destruction; and it is further
>
> **ORDERED,** that Mr. Berg, as Child Privilege Attorney, is the only individual permitted to determine the disposition of matters covered by privilege; and it is further
>
> **ORDERED,** that the parties are not permitted to discuss matters relating to the privilege with Dr. Hope or any other clinician covered by the privilege, unless authorized by Mr. Berg; and it is further
>
> **ORDERED,** that ***this Order is not intended to, nor shall it, prevent clinicians or the parties from discussing matters in the ordinary course of the children's treatment***.

(Emphasis supplied.) Father subsequently filed a motion seeking to revise or strike the order restricting the use of the children's therapy records, which the circuit court denied on July 7, 2020. Father asserts that the restrictions imposed by the circuit court on the use and dissemination of the children's therapy records inappropriately restricted his access to his children's mental health records.

The patient-therapist privilege is codified in Md. Code (1974, 2020 Repl. Vol.), § 9-109 of the Courts and Judicial Proceedings Article ("CJP"). The patient-therapist

privilege protects from disclosure "[c]ommunications relating to diagnosis or treatment of the patient" as well as "[a]ny information that by its nature would show the existence of a medical record of the diagnosis or treatment" in "all judicial, legislative, or administrative proceedings." CJP § 9-101(b). In child custody matters, "when a minor is too young to personally exercise [the patient-therapist privilege], the court must appoint a guardian to act, guided by what is in the best interests of the child." *Nagle v. Hooks*, 296 Md. 123, 128 (1983). "[T]he parents, jointly or severally, may neither agree nor refuse to waive the privilege on the child's behalf." *Id.*; *see also* CJP § 9-109(c) ("If a patient is incompetent to assert or waive this privilege, a guardian shall be appointed and shall act for the patient. A previously appointed guardian has the same authority.").

Father relies upon Md. Code (1982, 2019 Repl. Vol.), § 4-305(b) of the Health General Article ("HG"), when arguing that the circuit court's order inappropriately restricted his access to the minor children's therapy records. Specifically, Father points to HG § 4-305(b)(6), which provides that "[a] health care provider may disclose a medical record without the authorization of a person in interest . . . [i]f a health care provider makes a professional determination that an immediate disclosure is necessary, to provide for the emergency health care needs of a patient or recipient." Father also points to HG § 4-305(b)(7), which provides that "[a] health care provider may disclose a medical record without the authorization of a person in interest . . . [t]o immediate family members of the patient or any other individual with whom the patient is known to have a close

personal relationship" under certain limited circumstances, which we shall explain in more detail *infra*.

First, we observe that although HG § 4-305(b)(6) permits disclosure of records when needed to "provide for the emergency health care needs of a patient or recipient," Father at no time alleged any actual emergency of any kind that would have necessitated disclosure of the children's therapy records. Furthermore, although Father observes that HG § 4-305(b)(7) permits the disclosure of medical records without authorization of the person in interest to immediate family members, critically, the statute limits such disclosures to the following circumstances:

> (i) The disclosure is limited to information that is directly relevant to the individual's involvement in the patient's health care; and
>
> (ii) 1. If the patient is present or otherwise available before the disclosure and has the capacity to make health care decisions:
>
> A. The patient has been provided with an opportunity to object to the disclosure and the patient has not objected; or
>
> B. The health care provider reasonably infers from the circumstances that, based on the health care provider's professional judgment, the patient does not object to the disclosure; or
>
> 2. If the patient is not present or otherwise available before the disclosure is made, or providing the patient with an opportunity to object to the disclosure is not practicable because of the patient's incapacity or need for emergency care or treatment, the health care provider determines, based on the health care provider's professional judgment, that the disclosure is in the best interests of the patient . . . .

Id.

The statute specifically requires that a patient be "provided with an opportunity to object to the disclosure" before the records are disclosed. HG § 4-305(b)(7)(ii)(1)(A). No such opportunity was provided in this case prior to the disclosure of the children's therapy records, nor could Dr. Hope have reasonably "infer[ed] from the circumstances that, based on [her] professional judgment, the patient does not object to the disclosure." HG § 4-305(b)(7)(ii)(1)(B). Section 4-305(b)(7)(ii)(1)(B)(2) of the Health General Article permits disclosure if a "health care provider determines, based on the health care provider's professional judgment, that the disclosure is in the best interests of the patient," but only "[i]f the patient is not present or otherwise available before the disclosure is made, or providing the patient with an opportunity to object to the disclosure is not practicable because of the patient's incapacity or need for emergency care or treatment." At no time did Father assert that the children and/or their BIA/CPA, Mr. Berg, were unavailable to object to the disclosure, nor, as we discussed *supra* in the context of HG § 4-305(b)(6), did Father at any time allege a need for emergency treatment.

Furthermore, we emphasize that the order issued by the circuit court expressly provided that it was "not intended to, nor shall it, prevent clinicians or the parties from discussing matters in the ordinary course of the children's treatment." Indeed, in the event that the disclosure of the children's therapy records had been required due to some sort of medical emergency, such a disclosure would not have been barred by the circuit court's order because it would have been necessary for the ordinary course of the children's

treatment. The record does not reflect that any such emergency arose, and, accordingly, no such disclosure was necessitated.

Indeed, counsel for Father conceded that the records were obtained for the purposes of litigation at the July 1, 2020 hearing on Father's motion to revise and/or strike the order regarding the use and dissemination of therapy records in the following exchange:

> THE COURT: [Counsel for Father], don't argue to me -- don't argue to me in this case unless it is true that [Father's] reasons for approaching Dr. Hope were because there was an issue in the child's treatment that he wished to bring to the doctor's attention and but for receiving 90 pages in records, a conversation with his lawyer, a follow-up call from his lawyer to the doctor, he couldn't make sure that the children were being properly treated. I reject that notion. Nobody has argued that to me so let's not talk about a thousand possibilities. I have inferred from his conduct why he approached the doctor and it is for purposes related to the litigation until somebody tells me and convinces me otherwise.
>
> [COUNSEL FOR FATHER]: Well, you are right.
>
> THE COURT: Of course, I'm right.

In our view, Father's allegations regarding the "chilling effect the trial court's decision will have on the future of every parent's rights" and concerns regarding circumstances in which "a child has an immediate need, and a parent takes the child for emergency treatment" but is unable to obtain "relevant records to treat the emergency" due to a court order are hyperbole. The circuit court's order did not restrict the parents' access to information necessary for the children's legitimate medical needs. We reject Father's attempt to characterize the court's order more broadly by warning of theoretical dire implications.

Father further asserts that when Mr. Berg provided the minor children's therapy records to Mother for her review, any privilege pertaining to the records was waived. In support, Father cites the case of *Harrison v. State*, 276 Md. 122, 137-38 (1975), for the principle that "[o]nce the confidential matter has been disclosed, it is no longer secret and the privilege which might be claimed disappears." The Court explained, however, that "the intent to waive must . . . be expressed either by word or act, or omission to speak out." *Id.* at 137. Waiver of a privilege is "the intentional relinquishment of a known right." *O'Brien & Gere Engineers, Inc. v. City of Salisbury*, 447 Md. 394, 421 (2016). "[T]he party relying on a waiver of the privilege has the burden to show waiver." *In re Matthew R.*, 113 Md. App. 701, 707 (1997).

In an email to Mother's counsel explaining his decision to forward Dr. Hope's therapy records directly to Mother, Mr. Berg specifically explained that the records would be provided to Mother "[i]n view of the fact that [Father] has received Dr. Hope's therapy records." Mr. Berg specifically explained:

> By this email, and by a copy thereof to all parties and counsel, I am informing all that I am not waiving the privilege of confidentiality that exists between the Hasenboehler children and Dr. Hope. Therefore, this information is not to be disseminated by either of the parents to ***anyone***, including their attorneys, and I will ask the [c]ourt to enter an order to that effect . . . . In the meantime, all parties and their counsel are advised of same.

(Emphasis in original.)

The record reflects that Mr. Berg's consistent intention with respect to the therapy records was to protect the children's privacy, prevent further dissemination of the material, and

prevent any further breaches of confidentiality. This does not constitute an intentional waiver.

We further reject Father's contention that certain references to the children's participation in therapy that were contained in the body of Mr. Berg's motion to impose an order restricting access to the minor children's therapy records constituted an intentional waiver. The motion generally referenced the fact that the children had been attending therapy with Dr. Hope since approximately October 2018. The motion did not refer to any specific confidential information, and multiple persons (including the parties, their attorneys, and the children's nanny) were already aware of the fact that the children had been participating in therapy with Dr. Hope. Accordingly, we reject Father's waiver argument.

For these reasons, we reject Father's assertion that the circuit court's April 30, 2020 order restricting access to the minor children's therapy records constituted reversible error.

III.

Father's final argument on appeal is that the circuit court committed reversible error by failing to strike the appearance of Mr. Berg as the children's BIA/CPA. As we shall explain, in our view, the circuit court acted within its discretion when denying Father's motion to strike Mr. Berg.

We discussed a motion to strike a BIA in *McAllister v. McAllister,* 218 Md. App. 386 (2014). We described the BIA attorney's role as follows:

> The concept of a BIA is a creation of statute. See Md. Code (2012 Repl. Vol.) § 1-202(a) of the Family Law Article.

Section 1-202(a)(1)(ii) authorizes a court to appoint a BIA to represent a minor child "[i]n an action in which custody, visitation rights, or the amount of support of a minor child is contested." The BIA may not represent any other party to the action (*id.*) and must "exercise ordinary care and diligence in the representation of [the] minor child." *Id.*, § 1-202(b); *see Fox v. Wills*, 390 Md. 620, 890 A.2d 726 (2006) (rejecting the contention that BIAs have immunity from civil suit).

The essential characteristics of BIAs are outlined in the *Maryland Guidelines for Practice for Court–Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access*, which the Court of Appeals adopted in 2007. Section § 1.1 of the Guidelines defines the term "BIA" and outlines the BIA's basic role:

> "Child's Best Interest Attorney" means a lawyer appointed by a court for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. This term replaces the term "*guardian ad litem*." The Child's Best Interest Attorney makes an independent assessment of what is in the child's best interest and advocates for that before the court, even if it requires the disclosure of confidential information. The best interest attorney should ensure that the child's position is made a part of the record whether or not different from the position that the attorney advocates.

Similarly, § 2.2 of the Guidelines states that a BIA "advances a position that the attorney believes is in the child's best interest."

Because the BIA must advance a child's best interests in the midst of what are often bitter and contentious disputes between the child's parents, the BIA will frequently displease at least one, if not both, of the parties. If a parent believes (in good faith) that the BIA has injured the child through a breach of the standard of care, then he or she may assert a claim for negligence on the child's behalf. Md. Code (2012 Repl. Vol.) § 1-202(b); *see Fox v. Wills*, 390 Md. at 634, 890 A.2d 726; *but see* Md. Rule 2-202(b) (granting a parent with sole custody

> the exclusive right to sue on the children's behalf for a period of one year following the accrual of any cause of action). If, however, a parent merely claims that a BIA should be disqualified from representing the child because the parent disapproves of the BIA's representation, it is appropriate for courts to view the claim with some measure of skepticism.

McAllister, supra, 218 Md. App. at 402-04.

We further explained that when a parent moves to disqualify a BIA, such a motion is "closely scrutinize[d]" in order "[t]o guard against tactical abuse." *Id.* at 404 (quotation and citation omitted). "'When an opposing party moves for disqualification of the other party's counsel, the court will take a hard look at such a motion.'" *Id.* (quoting *Klupt v. Krongard*, 126 Md. App. 179, 206 (1999)).

We observed that such scrutiny is particularly important in the context of BIAs in custody disputes, explaining:

> In cases like this, involving motions to disqualify BIAs, close scrutiny is particularly important because a parent might use the prospect of disqualification as a tactic to deter the BIA from carrying out his or her duty to make "an independent assessment of what is in the child's best interest" and to advocate that position before the court. *Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access*, § 1.1.

McAllister, supra, 218 Md. App. at 404-05. We further explained that "[w]hen a party moves to disqualify another person's attorney, . . . the moving party must first 'identify a specific violation of a Rule of Professional Conduct,' *Klupt*, 126 Md. App. at 203, 728 A.2d 727, such as a disabling conflict of interest. *Id.* at 205-10, 728 A.2d 727." *McAllister*, *supra*, 218 Md. App. at 405.

With this analytical framework in mind, we turn to the specific reasons why Father asserts that Mr. Berg's appearance should have been stricken. Father asserts that he alleged multiple ethical violations that Mr. Berg made with respect to the Rules of Professional Conduct and the BIA Guidelines in his motion to strike Mr. Berg's appearance. On appeal, Father (1) challenges the reasonableness of counsel fees incurred between January and May 2020 and (2) alleges that Mr. Berg breached his duty of confidentiality by releasing the children's therapy records to Mother. Father further alleges that (3) Mr. Berg inappropriately determined not to waive the children's therapist-patient privilege and (4) Mr. Berg inappropriately failed to make a determination as to whether each child had considered judgment. Father further asserts that (5) Mr. Berg exceeded the scope of his duties and authority when he filed the Motion to Impose an Order Restricting the Use and Dissemination of the Children's Therapy Records and (6) Mr. Berg failed to meet with necessary parties, including Father's girlfriend, or to meet a sufficient number of times with the children.

The circuit court considered and rejected each of Father's allegations. First, the trial judge explained that "if [he] thought that Mr. Berg was not well serving his clients, in the capacity that has been designated by my order, I have every right to excuse him from the case." The court explained, however, that "the standard by which [the court] is called to determine whether to hold on to Mr. Berg or not in this case is not, as [the court] understand[s] it, one of who is winning a popularity contest with the clients." The court observed that "often one or both parties in a family law case like this may become

disenfranchised[4] with counsel for the children," but the "real question" before the court was "whether anything Mr. Berg has done rises to the level of dischargeable behavior." The court found that "Mr. Berg continues to serve the [c]ourt's best interests and the children's best interests." The court told Mr. Berg that he was "doing a terrific job so far" and that he was "doing the best [he] can." The court subsequently issued an order denying Father's request to strike Mr. Berg's appearance as BIA/CPA.

On appeal, we similarly find no merit to Father's contentions. The record supports the circuit court's conclusion that that the fees incurred by Mr. Berg were "not a big deal" in light of the many motions filed with the court in this case and the time incurred to respond to Father's many filings.[5] We perceive no error associated with Mr. Berg's decision to permit Mother to briefly review the children's therapy records -- which Father had already unilaterally obtained -- before ordering that they be destroyed.

Similarly, the record supports the circuit court's decision to uphold Mr. Berg's decision to refuse to waive the children's therapist-patient privilege. The record reflects

[4] The circuit court used the term "disenfranchised," which Merriam-Webster defines as having been "deprive[d] of a franchise, of a legal right, or of some privilege of immunity." *Disenfranchise,* https://merriamwebster.com/dictionary/disenfranchise (last visited July 19, 2023), archived at https://perma.cc/Q29X-EWT9. It appears likely that the court intended to refer to the term "disenchanted," which means "no longer happy, pleased, or satisfied." *Disenchanted*, https://merriamwebster.com/dictionary/disenchanted (last visited July 19, 2023), archived at https://perma.cc/AN3C-KKHA.

[5] The circuit court's comment regarding Mr. Berg's fees was made in the context of the motion to strike Mr. Berg's appearance. The court observed, however, that "[a]ll parties in this case are asking for fees" and acknowledged that "this is a case where everybody, certainly at some point will, if they choose to, bring to my attention their views regarding the reasonableness of charges."

that, consistent with Section 2.4 of the Maryland Guidelines for Child Custody Attorneys, Mr. Berg met with both parents, met with the minor children on multiple occasions, reviewed the children's mental health records, met with the children's school principal and reviewed the children's educational records, and communicated with the children's therapist. After considering the totality of information available to him, Mr. Berg exercised his independent judgment when determining that it would be in the children's best interest to not waive the therapist-patient privilege.

Father asserts that Mr. Berg failed to appropriately take into account Dr. Hope's opinion that it would serve the children's best interests if she were to testify.[6] Mr. Berg, however, was appointed to exercise his own independent judgment, and he was not required to defer solely to Dr. Hope's opinion. Furthermore, as court-appointed custody evaluator Briana Shirey, LCSW-C, observed in her custody evaluation, Dr. Hope was not a neutral source. Ms. Shirey commented that "[i]t is unfortunate that [Dr. Hope], whose role it is to be a neutral support to these children, appears to have aligned with [Father]." Mr. Berg was entitled to give Dr. Hope's opinion the weight he considered appropriate when making the privilege waiver determination.

Father further contends that Mr. Berg was required to determine whether the children had "considered judgment" prior to rendering a decision regarding waiver of the privilege. Although the Guidelines provide that the BIA/CPA "should determine whether

[6] Father submitted an affidavit from Dr. Hope expressing her opinion that the children's privilege should be waived.

the child has considered judgment," Section 2.1 of the Maryland Guidelines for Child Custody Attorneys do not require that this determination be made at any particular juncture, nor do the guidelines associate the "considered judgment" determination in any way with the waiver of privilege. Furthermore, when court-appointed custody evaluator Ms. Shirey testified before the circuit court, she explained that she did not weigh the children's preferences heavily because she felt that the children did not necessarily know what was in their best interest. The circuit court was persuaded by Ms. Shirey's opinion on this issue and expressly found that the children's stated preferences regarding custody "are most likely caused by excessive coaching by Father, and not the children's research or considered judgment." We reject Father's contention that Mr. Berg was required to make an express determination regarding the children's considered judgment before deciding that waiving the children's therapist-patient privilege would not serve the children's best interest.

Nor are we persuaded to reverse by Father's assertion that Mr. Berg exceeded the scope of his duties when he filed the Motion to Impose an Order Restricting the Use and Dissemination of the Children's Therapy Record. Mr. Berg was reasonably concerned that Father had obtained Dr. Hope's records when Mr. Berg had not waived the children's therapist-patient privilege. Moreover, as we discussed *supra* in Part II of this opinion, the circuit court did not commit reversible error by granting Mr. Berg's motion to impose an Order restricting the use and dissemination of the children's therapy records. In our view,

the filing of the motion was entirely appropriate under the circumstances, and we reject Father's characterization of it as beyond the scope of Mr. Berg's duties and authority.

Finally, we address Father's contention that Mr. Berg failed to meet with necessary parties, including Father's girlfriend, Ana Isaac. Father's assertion that Mr. Berg did not meet with the children is not supported by the record; the record reflects that Mr. Berg met with the children on multiple occasions. Furthermore, Mr. Berg was entitled to exercise his discretion when determining which parties to interview in connection with his representation of the minor children. Mr. Berg reviewed the transcript of Ms. Isaac's first deposition and was present at her second deposition. In Mr. Berg's response to Father's motion to strike his appearance, he explained that he "anticipate[d] that the girlfriend will be reviewed by the [c]ourt's custody evaluator, who will report on that interview as well." Mr. Berg further explained that, at that time, he "still ha[d] three months within which to speak to [Ms. Isaac] if [he] believe[d] it to be necessary or advisable." Deciding who to interview and when is precisely the type of judgment call appropriate for a BIA/CPA to make in the context of their representation in a child custody case.

As the circuit court observed, it is not unusual for a parent in a contentious child custody dispute to become disenchanted with counsel for the children. Based upon our review of the record, we conclude that Mr. Berg conscientiously endeavored to advance the children's "best interests in the midst of [a] bitter and contentious dispute[] between the child[ren]'s parents." *McAllister*, *supra*, 218 Md. App. at 403-04. Unsurprisingly, Mr. Berg's representation "displease[d] at least one, if not both, of the parties." *Id.* at 404.

Father "does not have the right to disqualify another person's lawyer merely because he disagrees with the strategy and tactics that the lawyer has employed." *Id.* at 405. Accordingly, we hold that the circuit court did not err by denying Father's motion to strike Mr. Berg's appearance.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.