Circuit Court for Prince George's County
Case No. CAD16-39034

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1745

September Term, 2022

JOANNA BENJAMIN GIBSON

v.

ERNEST JEAN-FRANCOIS

Arthur,
Albright,
Glenn T. Harrell, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: October 31, 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).

The parties are the formerly married parents of A., their 12-year-old daughter.[1] This appeal follows Appellant's ("Mother's") third, unsuccessful attempt to have a custody order modified so that she could reunify with (or have some access to) A. and Cross-Appellant's ("Father's") unsuccessful attempt to get an award of attorney's fees for having to defend Mother's modification attempt. The case was pending in the Circuit Court for Prince George's County. In essence, Mother argues that the circuit court abused its discretion in excluding expert trial testimony about reunification and then concluding that there was no material change of circumstances to warrant reunification. Father argues that the circuit court lent too much weight to Mother's inability to pay his attorney's fees compared to her lack of substantial justification for seeking modification.

Mother presents two questions for our review, which we re-order as follows:

1. Did circuit court abuse its discretion by excluding essentially all of the expert testimony offered by the Appellant?

2. Did the court below err by modifying the previous custody order after finding there had been no material change of circumstance?

Father presents one question for our review:

3. Whether the trial court erred by denying Father's request for attorney's fees based on the discovery violations and pursuant to Maryland Annotated Code, Family Law section § 12-103.

We answer "No" to all questions and affirm the circuit court's judgment.

[1] A. turned 12 during the pendency of this appeal.

FACTUAL AND PROCEDURAL BACKGROUND[2]

The Initial Custody Decree

Mother has not always been without some custodial or access rights to A. In 2016, after an episode of domestic violence that ended with Mother pointing a gun at Father's head (while A. slept in a bedroom), the parties both filed for limited divorce on the grounds of cruelty.[3] As a result of the domestic violence episode, Mother was arrested and charged with first-degree assault. Nonetheless, at a *pendente lite* hearing in their divorce case (and while the criminal case was still pending against Mother), Mother and Father mutually agreed that Mother would have custody of A., and Father would have *pendente lite* visitation on alternate weekends.[4] This agreement became a court order.

A few days after the *pendente lite* hearing, the criminal charges against Mother were dismissed when Father elected not to testify against Mother. Mother then attempted to create false allegations of sexual abuse against Father. Specifically, Mother alleged that A. disclosed that Father inappropriately touched her while A. was visiting with Father in Alexandria. Alexandria City police and Alexandria Child Protective Services

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[2]We set out the factual and procedural background to the extent necessary to decide these appeals.

[3] At the time, both parties lived in Clinton, Maryland. Father then moved out and settled in Alexandria, Virginia.

[4] Before the parties divorced, A. had lived with Mother's mother ("Grandmother") in South Carolina for two years because the parties could not secure childcare for A. After Father got custody of A., A. started weekly FaceTimes with Grandmother and Mother's other daughters. Mother was not included.

began an investigation into the allegations, and Mother secured a protective order[5] that prohibited Father from having contact with A. During their investigation, the police discovered a recording on Mother's phone of Mother attempting to hypnotize A. to say that her Father had sexually abused her. This recording predated A.'s alleged disclosure of the sexual abuse.

Fallout from Mother's false allegations prompted a change in A's custody such that she was placed in Father's sole legal and physical custody. After police discovered the recording, Mother was arrested and charged with Felony Child Endangerment, False Report to Child Protective Services, Contributing to the Delinquency of a Minor, False Report to Police, and Obstruction of Justice, all in Virginia. Shortly after Mother's arrest, and while she was in jail, the circuit court granted Father's emergency motion for temporary sole legal and physical custody of A.[6] About a month later, in July 2017, the circuit court awarded Father sole legal and physical custody as part of granting him a limited divorce.

[5] The protective order was issued upon the request of Mother by the District Court of Maryland, sitting in Prince George's County.

[6]After Mother's release on bail, Virginia also entered a protective order prohibiting Mother from having contact with A. Mother was later convicted and sentenced to incarceration for twelve months for Making a False Report about Abuse or Neglect; twelve months for Contributing to the Delinquency, Abuse or Neglect of a Minor; and twelve months for False Report to Police. The sentences were to run consecutively, with all twelve months for the False Report to Police suspended upon conditions including good behavior and supervised probation.

Father then filed for an absolute divorce, and the circuit court appointed Dr. Aisha King for the purpose of conducting a psychological evaluation of both parties. Dr. King was to have access to all Department of Social Service records pertaining to A. and the parties, including Protective Services records.

About 5 months later, in December 2018, at the time that it granted Father an absolute divorce,[7] the court denied Mother's Motion to Modify Child Access, wherein she sought access to A. During the absolute divorce trial, Mother alleged that Dr. King had recommended that A. needed contact with Mother. In Mother's estimation, Dr. King had recommended reunification therapy for Mother and A. But Dr. King's recommendations were different. Because A. was not comfortable having access with Mother, Dr. King recommended that a therapist make recommendations about when Mother could have access with A. This the circuit court would not do, explaining that it ". . . [could not] give my responsibility to a therapist to make a determination as to when and where access should be." Accordingly, the Judgment of Absolute Divorce included no order for reunification therapy.[8]

[7] Mother sought similar relief in her March 2018 Counter-Complaint for Absolute Divorce and Other Appropriate Relief, asking the circuit court to order reunification therapy and supervised access with A. until "a liberal access schedule is appropriate." Although the Judgment of Absolute Divorce does not mention this pleading, the docket sheet from the absolute divorce trial indicates that Mother's Counter-Complaint was dismissed as moot.

[8] Although we cannot locate a transcript from the absolute divorce trial in the record, the circuit court would later recount what that transcript said when it ruled on Mother's May 2019 Modification Motion.

Mother's May 2019 Motion[9]

Six months after the absolute divorce, Mother filed a motion for modification of custody, access, and other relief. In this motion, Mother claimed that Father was not complying with the custody order because he had not yet enrolled A. in therapy with the goal of reunification with Mother.[10] Father countered that the custody order did not order him to do so. He also argued that Mother was not a fit and proper parent to have any contact with A.

Another seven months later, the circuit court denied most of the relief Mother sought. The circuit court denied Mother's requests for custody modification and access, finding that there had been no material change in circumstances since the 2017 limited divorce wherein Father was awarded sole legal and physical custody of A. The circuit court also agreed with Father that the previous custody order had not ordered Father to put A. in therapy. As for Mother's request for appropriate relief, the circuit court granted it in part, ordering "that pursuant to the recommendations from [Dr. King's] psychological evaluation, [Father] shall provide individual counseling for the minor child, with a goal toward reunification with [Mother.]"

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[9] Mother styled this motion as Plaintiff's Motion for Appropriate Relief and/or Motion for Modification of Custody Order and/or Motion for Access with Minor Child.

[10] Mother's claim that reunification therapy had been ordered was apparently based on the circuit court's having discussed the results of Dr. King's evaluation at the absolute divorce trial.

Mother's April 2020 Modification Motion[11]

Four months after the circuit court's order, in April 2020,[12] Mother moved again for modification of custody.[13] Mother again argued that Father had not yet enrolled A. in therapy with the goal of reunification with Mother, contrary to the court's order.[14]

After the filing of this modification motion, there was more delay in getting A. into therapy. Father started A. with Dr. Pamela Waaland in June 2020, but because Mother was not seeing a therapist regularly, Father and Dr. Waaland did not feel comfortable moving forward with reunification. Dr. Waaland then requested that Mother undergo a forensic psychological evaluation. Eventually, Dr. Waaland resigned as A.'s therapist because Mother communicated with her repeatedly despite being directed to communicate only through attorneys. A. started seeing a new therapist in February 2021,

[11] Mother styled this Motion for Modification of Custody. She amended it in December 2021, seeking custody modification, access to A. that gradually escalated to shared physical custody, and shared legal custody, among other things.

[12] In March of 2020, the COVID-19 pandemic caused much of the United States to issue lockdowns, limiting meetings and social gatherings. Father contends that the global pandemic is part of the reason why A. was not enrolled in therapy until June 2020. Specifically, he alleges that he could not enroll A. in therapy because providers were initially not accepting new patients and A. could not meet the requirement for an initial in-person meeting with a provider.

[13] Mother also filed a motion for contempt against Father; however, she later withdrew this without prejudice.

[14] Around this time, a Virginia court also renewed the protective order prohibiting Mother from having contact with A. The order included a list of exceptions, one of which was for therapy and reunification.

Dr. Chayah Stoneberg, LMW, but Dr. Stoneberg resigned after getting threatening phone calls from someone she believed to be Mother.

In the meantime, the circuit court appointed a Best Interest Attorney ("BIA") for A. When Father moved for Mother to undergo the psychological evaluation Dr. Waaland had wanted, the BIA joined Father's motion. After some back-and-forth about how an evaluator would be selected, and at what and whose cost, the circuit court granted Father's motion for an evaluation, but permitted Mother to select the evaluator. She selected Dr. Brian Wald, Psy.D., to complete the evaluation, and he did so.

Trial on Mother's April 2020 Modification Motion lasted six days: April 19–21, July 27–28, and August 29, 2022. Mother testified and called her own mother and her two adult daughters. She also attempted to call three expert witnesses: Pamela Wilson, Linda Gottlieb, and Dr. Laurence Greenwood. Father testified and called Detective Douglas Quint, the detective who investigated Mother's crimes relating to her 2017 false report, and, via deposition transcript, Dr. Stoneberg.[15] Father also called Dr. Wald, the psychologist that Mother had selected to forensically evaluate her. We summarize the evidence below.

[15] Father attempted to have Dr. Stoneberg testify at trial in person, but she was unwilling to appear after getting the threatening phone calls referenced above. Consequently, the circuit court found that Dr. Stoneberg was unavailable, and in lieu of her testimony at trial, Father offered the transcript of Dr. Stoneberg's deposition, a deposition that was taken before the threatening phone calls.

Mother testified for much of the first day of trial. She spoke about her marriage to Father, her previous care for A., and her perspective on her crimes. She testified that she had gotten a Ph.D. and a new job since her last custody modification motion. She also testified that she was in therapy and felt that she was progressing in her behavior, coping, and decision-making. The court also listened to the recording the police had found on Mother's phone that led to her criminal convictions. Mother testified that she did not remember making it or her purpose for making it, but looking back, she thought her purpose in making it was to remind herself of what A. said so she would not forget. Mother explained that she thought she made the recording "relative to suppressed memories" and to "capture [her] thoughts in how [she] envisioned abuse occurred and questions [she] had." She said she did feel remorseful and sad about the recording.

Mother's family members testified about their perspective on all the events at issue and their role in them. One of Mother's adult daughters testified that she had never heard Mother speak like she did in the recording. She also testified that she was home with A. the night Mother pointed a gun at Father. Grandmother testified about her previous care for A. and her perspective on the divorce, the recording, Mother's childcare for A., and Grandmother's regular FaceTimes with A. Mother's other adult daughter then testified about her relationship with Mother and with A. She stated that on the recent regular FaceTimes with A., A. seemed more reserved about the questions she was willing to answer and would first ask Father (who accompanied A. on FaceTime) if she could answer them.

Mother also called two expert witnesses, but the circuit court declined to admit their testimony. The first was Ms. Wilson, a licensed marriage and family therapist with experience in reunification. Mother offered Ms. Wilson as an expert in marriage and family therapy with a focus on reunification. Before testifying, Ms. Wilson spoke with Mother and reviewed "about four court documents" that Mother had sent her. Based on only this information, Ms. Wilson prepared and sent a letter to the court for the case—a letter that, she clarified, she would not characterize as a report. Ms. Wilson did not interview any individuals in the case besides Mother, and she only reviewed the documents Mother forwarded. Father and the BIA objected to Ms. Wilson's testimony, apparently on the basis that Ms. Wilson's testimony did not have an adequate factual basis and was not relevant.[16]

The circuit court also declined to admit the testimony of Mother's second expert witness, Ms. Gottlieb, a licensed marriage and family therapist and licensed clinical social worker who specialized in disrupted[17] parent/child relationships, and who had fifty years' experience in the field of reunification. Mother offered Ms. Gottlieb as an expert

[16] Argument on Father's and BIA's objection was not transcribed. It appears that most, if not all, of the trial was conducted remotely. To hear argument on Father's and BIA's objection, the circuit court moved everyone to a non-recorded virtual breakout room. From other portions of the record, though, it appears that Father and the BIA argued that Ms. Wilson's testimony did not have an adequate factual basis and was not relevant.

[17] The transcript of Ms. Gottlieb's testimony says "disruptive." We assume this was a transcription error, and that Ms. Gottlieb was actually referring to "disrupted parent/child relationships," a term she used elsewhere in her testimony.

"in the field of clinical reasoning and findings, reunification therapy, child sexual abuse, restrictive gatekeeping, and potential psychological harm to a child due to the loss of a parent." Her proffered opinion, which appeared in an eight-page report, was on the importance of reunification and how it could progress, effective therapies for reunification, and clinical reasoning. Prior to testifying, Ms. Gottlieb had not interviewed anyone other than Mother and had not reviewed any documents specific to the case. She had received information from Mother's counsel. Father and the BIA objected to Ms. Gottlieb's testimony as lacking a factual basis and not relevant.

Finally, Mother called her treating psychiatrist, Dr. Greenwood, and asked that he be received as an expert on Mother's mental health. Father and the BIA objected because Dr. Greenwood had no expert opinions to offer at his deposition. The circuit court reserved ruling. With regard to Mother's mental health, Dr. Greenwood said that he sees Mother for supportive psychotherapy about twice per month, though it was more frequent when the treatment started in December 2020. He diagnosed her with Adjustment Disorder with Anxiety, but added that she was "essentially in remission for that condition." He described Mother's mental health as "very good[,]" and indicated that she had never missed a session with him. Dr. Greenwood described Mother's parenting skills as "very good" also. After listing the behaviors that would suggest to him that someone is not being truthful, Dr. Greenwood said he had not observed anything during his interactions with Mother that made him suspect that Mother was not being entirely truthful with him. Dr. Greenwood also believed Mother's explanation for making the

recording—that she initially did not believe A.'s disclosures of sexual abuse by Father and was researching whether someone could have hypnotized her to say that.

Detective Douglas Quint investigated Mother's allegations of sexual abuse, cleared Father of the allegations, and uncovered the recording that led to Mother's criminal convictions. He testified that when he initially found the recording,[18] he called Mother and asked her about it. Mother explained that she had made the recording in case A. forgot what happened over the length of the case. When Detective Quint pointed out that the recording was made before the alleged disclosures, Mother "didn't quite understand—how those recordings were there[]" and thought there was something wrong with her phone. At Detective Quint's request, Mother turned herself in and was arrested.

Dr. Stoneberg is the therapist who had worked with A. for over a year. They usually met twice a month, and A. regularly spoke to Dr. Stoneberg about her feelings regarding Mother, Father, and herself since Mother's incarceration. Dr. Stoneberg said that A. had massive feelings of guilt related to Mother's incarceration. She also said that A. relayed to her that she was afraid of seeing Mother in person. Dr. Stoneberg stated that she did not believe A. would receive any benefit from having contact with Mother, and she recommended against contact between them.

[18] Although the police extracted the recording and other data from Mother's personal phone, Mother had two other phones police were never able to search. In fact, Detective Quint discovered that Mother had called Grandmother from jail to ask her to hide Mother's phones.

Father testified that A. was doing well academically and enjoying various activities. He testified about how the events of the custody battle have affected A. He also spoke about having to attend therapy in relation to the gun incident, being suspended from his job because of Mother's abuse allegations, being in fear of Mother knowing where he and A. live, and how bothersome it is that Mother would not acknowledge her actions and what A. may be going through. He testified that if he and Mother had joint legal custody, he did not expect they would be able to communicate effectively on decisions regarding A. He also testified about his current earnings and his expenses from the trial, and he said that while Mother regularly pays child support, she owes him about $9,000 in arrears and only ever paid for one therapy session for A.

Dr. Wald was the forensic psychiatrist who evaluated Mother. Dr. Wald reviewed many court records, including those from Mother's criminal case, the recording from 2017 for which Mother was convicted, the 2018 psychological evaluation by Dr. King, Dr. Greenwood's deposition, and Dr. Stoneberg's deposition. He also conducted multiple interviews, including with Mother on at least four different occasions, Grandmother, Mother's two other daughters (A.'s sisters), Father, and Dr. Stoneberg. He conducted multiple psychological tests on Mother, including the MMPI-3,[19] the Parenting Stress

[19] According to the American Psychological Association (APA), the Minnesota Multiphasic Personality Inventory (MMPI) is "one of the most widely used self-report tools for assessing personality." *Minnesota Multiphasic Personality Inventory*, APA Dictionary of Psych., https://dictionary.apa.org/minnesota-multiphasic-personality-inventory (last visited Oct. 19, 2023). It uses a series of true-false questions to assess a

Index,[20] and the Child Abuse Potential Inventory,[21] and he reviewed Mother's psycho-therapy notes.

Dr. Wald summarized his findings from his forensic evaluation of Mother. Mother displayed broad defensiveness and an inability to acknowledge the possible wrongfulness of her past actions. These traits indicated Mother's unwillingness to admit even minor flaws, a stance Mother likely took because she was trying to look good for the court. While an essential parenting skill is understanding the needs of one's child, Mother was not able to anticipate A.'s needs. Because of this inability, Mother may attend to her own needs over A.'s. Ultimately, Dr. Wald did not recommend reunification between Mother and A., specifically saying he did not "think that it can happen at this moment, under [these] circumstances."

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person's symptoms, attitudes, and beliefs related to common clinical problems, including their tendency to lie. *Id.*

[20] The Parenting Stress Index is a "[s]creening and triage measure for evaluating the parenting system and identifying issues that may lead to problems in the child's or parent's behavior." *Parenting Stress Index*, APA, https://www.apa.org/pi/about/publications/caregivers/practice-settings/assessment/tools/parenting-stress (last visited Oct. 19, 2023).

[21] The Child Abuse Potential Inventory is a 160-item questionnaire "that was originally designed to provide an estimate of parental risk in suspected cases of child physical abuse." Joel S. Milner, *The Child Abuse Potential (CAP) Inventory*, *in Comprehensive Handbook of Psychological Assessment, Vol. 2. Personality Assessment* 237 (M.J. Hilsenroth & D.L. Segal eds., 2004).

The circuit court spoke with A. *in camera*.[22] A. talked about how she was doing in school and what activities she was doing. A. said she missed Mother and that it would be nice to talk to her on FaceTime. However, she also said that she would feel uncomfortable if she was with Mother unsupervised. As to her feelings about the current proceedings, A. said she did not know what the plan was but that she "just hope[d] everything is going good. . . . [l]ike, everything is going to plan and nothing unexpected is happening." A. said she would like a plan where "maybe [she] can one day see [Mother] on FaceTime and [they] could just talk for a few minutes or so."

The Circuit Court's Ruling

Ultimately, the circuit court denied Mother's April 2020 modification motion, finding no material change of circumstances to warrant the change. It explained:

> So there has to be a material change in circumstances that affects the minor child, and unfortunately, I can't find that anything has changed with respect to what I ordered in my last order, and that was some reunification counseling and something to get these parties back together.
>
> Does that mean I don't believe that reunification is a viable option? It does not mean that. And so I'm—I'm granting the motion[23] in part because I think that, you know, more efforts need to be made to get this family—this young girl back to speaking to her mother on some level until she's old enough to make a decision on her own.

[22] The circuit court interviewed A. after receiving closing arguments in writing from the parties and the BIA. The circuit court delivered its oral opinion after interviewing A. The circuit court's written order followed about two months later.

[23] With "granting," it appears the circuit court either misspoke, intending to say "denying," or was referring to the FaceTime provision.

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So the problem was is that I got nothing that I could make a determination about whether it was . . . safe for me to put this child and this mother back together.

With respect to the minor child, [A.'s] therapist, again, she had a couple of them. She stopped for whatever reason, you know, because the therapist was threatened or whatever, but you know, again, that doesn't assist me either. So, again, this case is in the same posture that it was in when it was first filed. Nothing has changed. Nothing has moved.

Now, having spoken to [A.] and what has been my sense all along, I don't know too many kids that don't want to have a relationship with both parents, which is what's been troubling me, but the – balancing that with the fact that while I believe that, you know, most kids want to have a relationship with a parent, the question is, is it safe, is it in the child's best interest, and I kept asking the question, what if this had been a physical injury, you know, would I be willing to put this child back in the care of a parent who had physically harmed the child?

Emotionally or mentally, we can't pop into somebody's head to see what's going on, so it makes it a little harder. So I'm denying the motion for modification, and I think the request was for shared legal and physical custody. That part is not happening. But what I am going to do is I am going to again re-order that a therapist – a family therapist be found to set up some type of access, supervised by [Father] in this case, so that the minor child can begin having maybe some [FaceTime] – some supervised [FaceTime] visits with her mother.

But, again, I need a therapist who's going to participate in this process.

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So, again, I'm denying the request for joint legal and physical custody. I think that that is inappropriate at this time. There has been no material change in circumstances. The testimony did not convince me – we had five – four – three or four experts. None of them convinced me that steps had been taken to reunite this family and this young girl with her mother[.]

With regard to reunification, the circuit court did order some next steps. Thus, Father was ordered to continue A. in individual counseling "with a goal toward reunification with [Mother]." The parties were to identify and submit the names of two reunification therapists "for the circuit court to select the therapist to work with the family as to whether and when supervised FaceTime calls between [Mother] and the Minor Child may occur, with [Father] or his nominee to supervise, when and if, the therapist believes it appropriate and in the Minor Child's best interest to do so[.]" We refer to this part of the circuit court's order as its "FaceTime provision."

The circuit court also denied Father's motion for attorney's fees. The court explained that while "some of this litigation has kind of [gone] on too long and wasn't necessary," it could not find that Mother had the ability to pay Father's attorney's fees. It did, however, order that Mother pay the costs of the reunification therapy.

In December 2022, Mother noticed this appeal. Later that month, Father noticed his cross-appeal.

We include additional facts and the circuit court's reasoning for the challenged evidentiary rulings below.

DISCUSSION

I. Mother's Appeal.

Exclusion of Expert Testimony

Mother argues that the circuit court abused its discretion by excluding the expert testimony of Ms. Wilson and Ms. Gottlieb, and by declining to receive Dr. Greenwood as

an expert witness. Specifically, Mother suggests that these experts could have testified as to whether there was a "material change regarding the fitness of the parents . . . [or] regarding the potentiality of maintaining natural family relations[.]" Mother adds that any concern about the bases for Ms. Wilson's and Ms. Gottlieb's conclusions goes to the weight to be accorded their testimony, not its admissibility. Ultimately, Mother argues, "the exclusion or limitation of three expert witnesses" prevented her from "making her case."

Father contends the court did not abuse its discretion in excluding their testimony. He argues that because Mother did not demonstrate a sufficient factual basis for these witnesses' opinions, their testimony did not meet the requirements of Maryland Rule 5-702.

We review the circuit court's decision on admission or exclusion of expert testimony for abuse of discretion. *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020) ("When the basis of an expert's opinion is challenged . . . , the review is abuse of discretion."). To warrant reversal, the circuit court's decision must be "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994).

Maryland Rule 5-702 states that expert testimony may be admitted "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md. Rule 5-702. This Rule allows the circuit court broad discretion in deciding whether to allow a witness to testify as an expert; a circuit court's

exclusion of an expert witness will seldom constitute grounds for reversal. *Rochkind*, 471 Md. at 10, 26 (finding that the circuit court abused its discretion where it did not contemplate any required legal considerations).

Under Maryland Rule 5-702, a witness will not be allowed to offer expert testimony unless

> . . . the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
> 1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
> 2) the *appropriateness* of the expert testimony on the particular subject, and
> 3) whether a *sufficient factual basis* exists to support the expert testimony.

Md. Rule 5-702 (emphasis added).

A. The circuit court did not abuse its discretion in excluding Ms. Wilson's testimony.

Here, the circuit court excluded Ms. Wilson's testimony because it lacked a factual foundation and, as a result, would have been unhelpful to the court. The circuit court explained:

> I think the time in terms of getting back to where these parties need to be was squandered. You know, you were bringing me people who, you know, have nothing—no clue about what's going on in this case. You know, I get two experts who basically haven't interviewed anyone in this case, haven't interviewed the child, and they just basically want to lecture the Court about what reunification means . . . . So to bring in two people just to say what reunification is and what should happen without having a connection to this family I thought, you know, really was a squandered opportunity.[24]

[24] Immediately after this, the court said, "With respect to Dr. Greenwood, I think that he served the purpose that he was supposed to serve[.]" Thus, we can infer that the "two experts" previously referred to are Ms. Wilson and Ms. Gottlieb.

As to Ms. Wilson's testimony, we discern no abuse of discretion in the circuit court's conclusion that it was without factual basis.[25] Ms. Wilson had never interviewed A., A's therapist, or Father. In fact, Ms. Wilson testified that, in forming the basis of her opinion, the only person to whom she had spoken was Mother, and she only reviewed a few court documents. Having so little connection to and knowledge of this case, Ms. Wilson could only have testified generically about reunification, and any opinions on whether this specific family should be reunified would be speculative.

As to whether Ms. Wilson's testimony was going to be helpful, it was the job of the court, as the finder of fact, to determine whether the reunification that it had already ordered for this family should move forward. It was not an abuse of discretion to exclude general reunification testimony that did not reveal why or when reunification would be appropriate for this family.

Mother's argument that the gaps in Ms. Wilson's testimony go to its weight rather than its admissibility likewise fails. It is well-settled in Maryland that "[t]he weight to be given the expert's testimony is a question for the fact finder." *Walker v. Grow*, 170 Md. App. 255, 275 (2006). However, Maryland Rule 5-702 sets out three *requirements* for expert testimony to be "admitted[.]" In assessing whether an expert's testimony meets these three requirements, "circuit courts are to act as gatekeepers in applying the factors

[25] As above, arguments about the admissibility of Ms. Wilson's testimony were not transcribed. Nonetheless, there is enough in the rest of the record for us to determine why the circuit court excluded her testimony.

set out by this Court in *Rochkind*[.]" *Abruquah v. State*, 483 Md. 637, 652 (2023); *see also Rochkind v. Stevenson*, 471 Md. 1 at 26 (2020) (adopting *Daubert*). The circuit court's conclusion that Ms. Wilson's testimony did not have a sufficient factual basis and would not assist the trier of fact was directly related to whether her testimony was admissible; therefore, the court did not abuse its discretion in ruling that Ms. Wilson's testimony failed these threshold tests.

B. The circuit court did not abuse its discretion in excluding Ms. Gottlieb's testimony.

For the same reasons, we see no abuse of discretion in the exclusion of Ms. Gottlieb's testimony. After lengthy argument from counsel, the circuit court had a problem "making the connection . . . for admitting [Ms. Gottlieb's] testimony[,]" and concluded that the testimony would not "assist [the court] as the trier of fact." It explained that since reunification had already been ordered, the main goal was to determine how to start reunification, meaning it did not need to hear about the merits of reunification in general.

Like Ms. Wilson, Ms. Gottlieb had no factual basis for an opinion specific to the family in this case because she had never interviewed A., A.'s therapist, or Father. Indeed, Ms. Gottlieb described herself as a generic witness. Even the report she provided to the court only mentioned Mother's name once in the opening paragraph and did not mention any of the other parties' names. As a generic witness, she did not have specific and individual information that would have allowed her to provide the court with guidance on how reunification should progress in this case. Without a factual basis for an

opinion on the family before the court, it was unsurprising that the circuit court concluded that Ms. Gottlieb's testimony would not assist it.

C. The circuit court did not exclude Dr. Greenwood's expert testimony.

Finally, with regard to Dr. Greenwood's testimony, we discern no error for the simple reason that the circuit court did not exclude his testimony. On being asked to receive Dr. Greenwood as an expert witness, the circuit court reserved ruling. Dr. Greenwood then testified about his diagnosis of Mother's mental health (Adjustment Disorder with Anxiety but in remission), his treatment of her (supportive psychotherapy), her compliance with treatment (compliant), her parenting skills (very good), his opinion as to her truthfulness (truthful), and his belief in her explanation of why Mother made the recording. Here, Mother identifies no testimony that Dr. Greenwood was prohibited from offering.[26]

Modification of the Custody Order

As to the changes in the custody order that the circuit court did order, Mother argues that these changes were insufficient in light of the evidence presented. Allowing a reunification therapist to determine when supervised FaceTime calls between A. and Mother might start is an improper delegation of authority to the therapist, Mother adds, and amounts to legal error that is not harmless. According to Mother, the circuit court

[26] Even though Father and the BIA objected to Dr. Greenwood's testimony as improperly crossing from lay to expert testimony, the circuit court overruled these objections and allowed Mother's counsel latitude in questioning Dr. Greenwood.

also erred by failing to conduct a best interest analysis before issuing its custody order. She therefore asks that the case be remanded to the circuit court to perform a best interest analysis and issue a new custody decree.

Father argues that the court did not need to find a material change of circumstances in order to include the FaceTime provision in its order. In the alternative, Father asserts that if the circuit court should have found a material change before including the FaceTime provision, then because the circuit court explicitly found no material change, it should simply strike that provision instead of remanding the case for further proceedings.

The procedure for determining whether to modify a child custody (or access) order is well-established. "*First*, the circuit court must assess whether there has been a material change in circumstances." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005) (internal quotations omitted); *see also Wagner v. Wagner*, 109 Md. App. 1, 28 (1996) ("unless a material change in circumstances is found to exist, the court's inquiry ceases."). A change is material when it affects the welfare of the child. In other words, the question for the court to determine is whether the changes since the past order are "sufficient to require a change in custody[,]" or whether modification would be in the best interests of the child. *McMahon*, 162 Md. App. at 594 (internal quotations omitted). Next, *if* the court finds a material change in circumstances, the court examines the best interests of the child "as if the proceeding were one for original custody." *Id.* The court must find a material change in circumstances even for a minor modification. *Id.*

In reviewing child custody decisions, this Court employs three familiar interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). First, we will not overturn a circuit court's factual findings unless they are clearly erroneous. *Id.* at 584. Second, we examine questions of law *de novo*; if the trial court erred as a matter of law, further trial court proceedings "will ordinarily be required unless the error is determined to be harmless." *Id*. at 586. "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.*

Mother's argument fails because it rests on the mistaken notion that the circuit court found the requisite material change of circumstances. Indeed, when ruling on Mother's April 2020 Modification Motion, the circuit court found that there was no such change. The circuit court said, "there has to be a material change in circumstances that affects the minor child, and unfortunately, I can't find that anything has changed with respect to what I ordered in my last order." The court later said, "Nothing has changed. Nothing has moved[,]" and "So, again, I'm denying the request for joint legal and physical custody. I think that that is inappropriate at this time. There has been no material change in circumstances."

To the extent that Mother here challenges the circuit court's finding about a lack of material change, the circuit court's finding was well-supported by the evidence. According to Dr. Wald, there had been no change and reunification was not appropriate

at that time. Mother continued to not acknowledge her past wrongs. She still could not anticipate A.'s needs, an essential parenting skill. She still would not be able to put A.'s needs above her own. A. herself felt that she would not be comfortable being alone with Mother. Additionally, Dr. Stoneberg agreed that reunification would not be appropriate at the time because it would not benefit A. and may even be harmful. Given this evidence, the circuit court did not abuse its discretion in declining to modify A.'s custody.

Mother argues that her completion of her Ph.D., her new job, and her treatment with a new therapist, Dr. Greenwood, did amount to a material change in circumstances. We disagree. Not all changes in the life of a family amount to material changes such that a modification of custody or access is warranted. *McMahon*, 162 Md. App. at 594 ("[i]n the more frequent case, . . . there will be some evidence of changes which have occurred since the earlier determination was made. . . . A change in circumstances is 'material' only when it affects the welfare of the child." (internal quotations omitted)). While Mother's progress was laudable, there was no evidence that the changes Mother outlined affected A.'s welfare. For example, Mother had started seeing a therapist but continued not to recognize her role in A.'s trauma and continued not to be able to put her daughter's needs above her own.

This conclusion does not mean that we vacate the circuit court's FaceTime provision, though. In his brief, Father argued that the circuit court's material-change-of-circumstances ruling should be affirmed. As to the FaceTime provision, Father said that it

was not the kind of modification that required a material change of circumstances.[27] Alternatively, Father urged us to simply strike the provision. What Father did not do, however, was include his challenge to the FaceTime provision in his cross-appeal.

If an appellee wants a different result than the one below, then they must cross-appeal. *Temple Hill Baptist Church, Inc. v. Dodson*, 259 Md. 515, 521 (1970) (finding that, even when the appellee raised the lower court's error as an argument, the issue was not before the court for decision because the appellee should have cross-appealed). By contrast, if the appellee merely presents alternative grounds for the same result, then they do not need to cross-appeal. *Health Servs. Cost Rev. Comm'n v. Holy Cross Hosp. of Silver Spring, Inc.*, 290 Md. 508, 514-15 (1981) (allowing the appellee to raise the lower court's error as an argument that the judgment should be affirmed).

By asking that we strike the FaceTime provision, Father wants a result that differs from what the circuit court ordered. Father filed a cross-appeal, to be sure, but did not include in it a challenge to the FaceTime provision. Instead, Father's cross-appeal challenged the circuit court's denial of his request that Mother pay his attorney's fees. Father's failure to include a challenge to the FaceTime provision in his cross-appeal means that we cannot strike that provision now. Though it modifies the circuit court's

[27] Mother challenges the FaceTime provision as an improper delegation of authority to the reunification therapist. We decline to address this argument because it assumes (incorrectly) that the FaceTime provision was the product of an appropriate material-change-of-circumstances finding.

existing custody order and is not supported by a material change of circumstances, we do not reverse the FaceTime provision.

II. Father's Cross-Appeal.

Father asserts that the circuit court improperly denied his request for attorney's fees. He argues that Mother was not justified in bringing litigation. Further, he maintains that the circuit court improperly weighed the factors used to determine the award of attorney's fees in custody modification cases, affording too much (if not exclusive) weight to Mother's ability to pay in comparison to her lack of justification in bringing the litigation. Mother counters that the circuit court denied both parties' attorney's fees requests and that the circuit court ordered Mother to pay for reunification therapy. She concludes that the circuit court properly considered the relevant factors and did not abuse its discretion in denying Father's attorney's fees request.[28]

The award of attorney's fees in a custody modification case is governed by Section 12-103 of the Family Law Article. Md. Code Ann. Fam. Law § 12–103 (West 2023) ("F.L. § 12-103"). Under this statute, the circuit court must look to the merits of the case and "assess whether each party's position was reasonable," *Davis v. Petito*, 425 Md. 191, 204 (2012), i.e., the extent to which each party's position was (or was not) substantially justified. "Substantial justification" means having "a reasonable basis both in law and fact." *Id.* n.8 (omitting citations and cleaned up). If the circuit court finds that

[28] Mother did not appeal the circuit court's denial of her request for attorney's fees.

a party's position was substantially justified, then it " . . . must proceed to review the reasonableness of the attorney's fees, and the financial status and needs of each party before ordering an award under Section 12-103(b). . ." *Id*. at 204. In considering such an award, the " . . . financial status and needs of each of the parties must be balanced in order to determine ability to pay the award to the other; a comparison of incomes is not enough." *Id.* at 205.

Where the circuit court finds an absence of substantial justification for a party's position, ability to pay is not part of the circuit court's consideration. Instead, the circuit court must award reasonable attorney's fees to the other party " . . . absent a finding by the court of good cause to the contrary." F.L. § 12-103(c).

The decision to award (or not award) counsel fees in a child custody case is one over which the trial court has discretion. Nonetheless, the trial court must evaluate the statutory criteria and "consider[] the facts of the particular case." *Petrini v. Petrini*, 336 Md. 453, 468 (1994). Ultimately, "[a]n award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Id.* (citing cases).

Here, we discern no error or abuse of discretion in the circuit court's denial of Father's attorney's fees request. The circuit court explained that while "some of this litigation has kind of [gone] on too long and wasn't necessary, . . . I have got to make a finding that [Mother] has the ability to pay, and I don't know that I can do that based on the testimony that I have." Although Mother was working full-time and owned her own

home, she also owed approximately $9,000 in child support arrearages to Father and had paid her counsel and expert witnesses for their assistance in this case. Mother paid one expert, Ms. Gottlieb, $5,000. Thus, although there was some evidence of Mother's financial circumstances, the evidence did not permit the " . . . systematic review of economic indicators in the assessment of the financial status and needs of the parties[]" that Section 12-103 "contemplates." *Davis*, 425 Md. at 206.

Father does not challenge the circuit court's conclusion that it did not have enough evidence about Mother's ability to pay. Instead, Father argues that the circuit court ascribed too much weight to Mother's ability to pay and did not focus enough on her lack of substantial justification in pursuing her April 2020 modification motion. We disagree. Father's theory for an award of attorney's fees in his favor was not that Mother had pursued modification without any justification, i.e. in bad faith. Indeed, Father told the circuit court that it "must consider 'the financial status of each party; the needs of each party; and whether there was substantial justification for bringing or defending the proceeding." As a consequence, even if Mother had little justification in pursuing a third modification motion (an issue we do not decide), the dearth of evidence about Mother's ability to pay Father's attorney's fees meant, as the circuit court correctly recognized, that it could not make a fee award in Father's favor.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY APPELLEE.