Circuit Court for Montgomery County
Case No. 170968FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2028

September Term, 2021

RAMI ZACKARIA

v.

DALEEN ZACKARIA

Kehoe,
Leahy,
Friedman

JJ.

Opinion by Friedman, J.

Filed: October 3, 2022

Sometimes one misstep early in a case can have repercussions for the rest of the case. In this case, concerning the custody of the minor child of estranged parents, that one misstep was Father's failure to timely designate an expert.

BACKGROUND

At the beginning of the case, the circuit court entered an order appointing a custody evaluator. At the deadline for identifying experts, each parent designated the court-appointed custody evaluator as their own expert. The court-appointed custody evaluator, Ms. Rosalyn Hnasko, conducted an evaluation of Mother, Father, and the child. Hnasko's report recommended primary physical custody and tie-breaking authority for legal custody matters in the Mother. Months after Father's deadline to identify an expert passed and about two weeks after the parties received Hnasko's report, Father sought to designate an expert to rebut her report. The circuit court refused to allow this proposed rebuttal expert's designation, identifying three grounds for this refusal: (1) that the expert was designated too late; (2) that the expert's testimony would not be helpful to the court as the factfinder; and (3) that the expert had not produced an expert's report at all, let alone produced it in a timely fashion.

DISCUSSION

We begin our analysis by observing that while vociferously attacking the circuit court's ruling that his designation of the expert was too late, Father ignores the other two grounds on which the circuit court's ruling was based. This, in our view, constitutes a waiver of those grounds and is, by itself, a sufficient basis for us to affirm the judgment below. *See, e.g., DiPino v. Davis*, 354 Md. 18, 56 (1999). Because the best interest of the

child remains our overriding concern, however, we will also explain why the circuit court's decision to exclude the expert did not constitute an abuse of discretion. *See A.A. v. Ab.D.*, 246 Md. App. 418, 422 (2020).

I. EXPERT DESIGNATION WAS TOO LATE

Father attacks the circuit court's determination that he designated his expert too late. His argument is not that he complied with the scheduling order, because he clearly did not. His expert designation was due on February 12, 2021, but was not made until, at the earliest, July 30, 2021. Instead, Father advances four arguments: (1) that he had a constitutional right to produce a rebuttal expert; (2) that compliance with the scheduling order was essentially impossible because of the date on which he received Hnasko's report; (3) that the scheduling order was defective because it did not account for his need to identify a rebuttal expert; or (4) that the penalty for his late identification of the rebuttal expert was too harsh and unfair.

First, we begin by observing that Hnasko's role in this case was as a court-appointed custody evaluator. She was appointed by the circuit court. She had the duties and responsibilities set forth in Maryland Rule 9-205.3. She conducted an evaluation of Mother, Father, and the child pursuant to that Rule. She prepared and produced her report pursuant to that Rule. And she testified pursuant to that Rule. She was also subject to cross-examination by either party pursuant to this Court's interpretation of this Rule. *Draper v. Draper*, 39 Md. App. 73, 81 (1978) (explaining that both parties have the right to cross-examine the court-appointed custody evaluator). That Hnasko was also identified by both parties as an expert may have given them the right to call her in their respective cases-in-

chief (if the circuit court had not), but it did not change her status. Father has not explained, and we do not see why cross examining the court-appointed custody evaluator—as he is permitted to do under *Draper* and as he actually did—was not a constitutionally sufficient opportunity to defend himself against the court-appointed custody evaluator's testimony.

Moreover, because Hnasko was a court-appointed custody evaluator, there could be no surprise about what she would consider in making her custody recommendation. There are, by Rule, nine mandatory elements that must be included in every report produced by a custody evaluator. MD. R. 9-205.3(f)(1).[1] There are also six optional elements that are

[1] The mandatory elements of a court-appointed custody evaluation are:

(A) a review of the relevant court records pertaining to the litigation;

(B) an interview of each party and any adult who performs a caretaking role for the child or lives in a household with the child;

(C) an interview of the child, unless the custody evaluator determines and explains that by reason of age, disability, or lack of maturity, the child lacks capacity to be interviewed;

(D) a review of any relevant educational, medical, and legal records pertaining to the child;

(E) if feasible, observations of the child with each party, whenever possible in that party's household;

(F) contact with any high neutrality/low affiliation collateral sources of information, as determined by the [custody evaluator];

(G) screening for intimate partner violence;

(H) factual findings about the needs of the child and the capacity of each party to meet the child's needs; and

(I) a custody and visitation recommendation based upon an analysis of the facts found or, if such a recommendation cannot be made, an explanation of why.

MD. R. 9-205.3(f)(1).

permitted to appear in a custody evaluator's report. MD. R. 9-205.3(f)(2).[2] Those 15 elements together constituted the entire universe of elements that might have been in the custody evaluator's report. The only thing that Father did not necessarily know by the date his expert designation was due, February 12, 2021, was Hnasko's ultimate custody recommendation. But, knowing what he knew at that time, Father could certainly have identified a rebuttal expert just in case Hnasko recommended custody in the Mother. Or Father could have filed a motion to amend the scheduling order to add a date for designation of rebuttal experts in the event that he thought that he might need one. He did neither. We hardly see an abuse of discretion where the trial court followed the scheduling order and Father took none of the steps that were readily available to protect himself. *See Naughton v. Bankier*, 114 Md. App. 641, 653-54 (1997) (discussing importance of following deadlines in scheduling orders).

[2] The optional elements of a court-appointed custody evaluation are:

(A) contact with collateral sources of information that are not high neutrality/low affiliation;

(B) a review of additional records;

(C) employment verification;

(D) a mental health evaluation;

(E) consultation with other experts to develop information that is beyond the scope of the evaluator's practice or area of expertise; and

(F) an investigation into any other relevant information about the child's needs.

MD. R. 9-205.3(f)(2).

Next, Father argues that the lack of a date in the scheduling order by which to identify rebuttal experts renders it defective. We disagree. Our Rules require a scheduling order in every case. MD. R. 2-504. Sometimes, scheduling orders are drafted for a specific case. More frequently, they are generic documents designed for the broad run of cases, in this case, those cases assigned to Track 3 of the Family Division in the Circuit Court for Montgomery County. If, in a particular case, a party feels that the scheduling order needs to be modified, the party can so move. The only limitation on potential modifications is that, as the scheduling order says, "any modifications of this scheduling order must be requested by written motion filed before the compliance date(s)." Here, if Father felt that the scheduling order needed an additional date by which to designate rebuttal experts, he could have moved for a modification. But the mere fact that the standard Track 3 scheduling order does not automatically include such a date is not a defect.

Finally, Father argues that striking his proposed rebuttal expert was too harsh of a penalty for his late designation. We hold that the circuit court was acting under its general power to control the conduct of trials and to admit or to exclude witnesses. *See Levitas v. Christian*, 454 Md. 233, 243 (2017) (holding that decisions to admit or exclude expert testimony is within the discretion of the trial court). Given the lateness of the expert designation and that Mother had not had an opportunity to discover the proposed expert's opinion, we do not think that this was an abuse of that broad discretion. Moreover, even if we were to view the circuit court's decision to exclude the proposed rebuttal expert's

testimony as a discovery sanction and subject to the standards set forth in *Hossainkhail*,[3] as Father argues, we would not find the exclusion to have been an abuse of discretion. *See Watson v. Timberlake*, 251 Md. App. 420, 434 (2021) (holding that courts have wide discretion to determine appropriate sanctions for violation of scheduling orders). The trial court listened to and considered Father's counsel's proffer of the proposed expert's testimony and considered Mother's counsel's arguments regarding the prejudice caused by late expert designation. We presume that the trial court knew and applied the governing law. *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007). That the circuit court performed the weighing, and that it came out differently than Father wishes, does not make it an abuse of discretion.

Thus, none of Father's arguments as to this point are availing.

II. EXPERT'S TESTIMONY WOULD NOT ASSIST THE FACTFINDER

We have carefully read the circuit court's ruling on Mother's motion to strike the expert. The circuit court says, repeatedly, that the proposed expert's testimony would not be helpful because it is "one-sided." We do not understand the circuit court to have meant that it rejected Father's proposed expert because the expert was anticipated to favor Father, because that is the nature of hired experts and not necessarily a basis for exclusion. Rather, we think the correct understanding of the circuit court's ruling was that the factual basis

[3] *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 725-26 (2002) (citing *Taliaferro v. State*, 295 Md. 376, 390-91 (1983)) (identifying standards for trial courts to apply in assessing discovery sanctions).

underlying the proposed expert's opinion was "one-sided" because the information on which he relied came exclusively from the Father.

Rule 5-702 governs the admission of expert testimony. That Rule states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if 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. R. 5-702. The circuit court's determination of whether to admit expert testimony is reviewed with great deference and may only be reversed for an abuse of discretion. *Rochkind v. Stevenson*, 471 Md. 1, 10-11 (2020); *see also State v. Matthews*, 479 Md. 278, 305-06 (2022).

Here, the circuit court found that the proposed expert would not assist the court because the expert lacked a sufficient factual basis to support his opinion. That is because the expert had received information only from Father and Father's counsel and had not evaluated Mother or the child.[4] We see no abuse of discretion in this decision.

[4] Although the decisions that led to the proposed expert having insufficient information are not really challenged in this Court, we will review them briefly. As noted above, Father designated his proposed expert months late (although there is substantial disagreement about precisely when that expert designation was made). Mother refused to participate, and objected to the child's participation, in an independent custody evaluation with the proposed expert. Father sought the circuit court's intervention to force them to participate, but the circuit court declined, stating that Father's request came too late. As a

III. EXPERT DID NOT PRODUCE A REPORT

Finally, the circuit court based its refusal to allow Father's proposed rebuttal expert to testify on the grounds that the expert had not produced an expert's report at all, let alone produced one in a timely fashion.

In her interrogatories to Father, dated January 5, 2021, Mother sought information related to his proposed expert witnesses.[5] By Rule, this necessarily compelled Father to "state the subject matter on which the expert is expected to testify[,] state the substance of the findings and opinions to which the expert is expected to testify[,] and a summary of the grounds for each opinion." MD. R. 2-402(g)(1)(A). Usually, of course, this is provided in the form of an expert's report. Father did not provide an expert's report by February 12, 2021, his deadline to designate experts. He did not provide an expert's report on or about February 26, 2021, the date on which he provided answers to Mother's interrogatories.[6] He did not provide an expert's report by July 30, 2021, when he attempted to designate the proposed rebuttal expert. Even on the second day of trial, Father had not produced an expert's report from the proposed rebuttal expert.

result, then, the factual basis of the proposed rebuttal expert's opinion was information obtained only from the Father.

[5] There is no distinction between experts called in a party's case-in-chief and experts called in rebuttal. *Dorsey v. Nold*, 130 Md. App. 237, 262 (2000); *State Roads Comm'n v. 370 Ltd. P'ship*, 325 Md. 96, 106-11 (1991).

[6] And, of course, even if he did not yet have an expert's report by February 26, 2021, he had an obligation to update those answers and provide the expert's report as soon as he did. MD. R. 2-401(e).

Given that Father never produced an expert's report, and that, as a result, Mother had no opportunity to prepare for the proposed rebuttal expert's testimony, the circuit court did not abuse its discretion in excluding the expert.

CONCLUSION

As we noted at the outset, sometimes a misstep early in a case can have repercussions that continue throughout the life of that case. Here, Father's failure to timely designate a rebuttal expert precluded him from calling that expert.[7]

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

[7] Father also raises a second issue on appeal: whether "the lower court abused its discretion in reaching its ultimate conclusion." Although phrased as if Father is challenging the award of custody, Father is, in fact, pointing out minor inconsistencies Father sees with the custody order, including an alleged inconsistency between overnight visits during holidays and vacations as compared to overnight visits during the year, an alleged inconsistency between the circuit court's finding that Father has the ability and financial wherewithal to care for the child but restricts his parenting time, and alleged inconsistencies in the award of tie-breaking authority. In our view, these are not inconsistencies, but aspects of the ruling that went against Father. And, even if they are inconsistencies, they do not rise to the level of an abuse of the trial court's discretion.