

Circuit Court for Montgomery County
Case No. 157927FL

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 0404

September Term, 2022

KATELYN S. McMORROW

v.

VERNON KING, III**

Wells, C.J.,
Friedman,
Shaw,

JJ.

Opinion by Friedman, J.

Filed: February 9, 2024

* 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 Maryland Rule 1-104(a)(2)(B).

** During the pendency of the appeal, appellee, Jeanette King died. Pursuant to Maryland Rule 2-241, the court has recaptioned the case in the name of the remaining appellee, Vernon King, III. Because Jeanette King was involved in the events leading up to this appeal, however, we have described the appellee as “appellees” and “Grandparents” throughout the opinion to include her. We hope no confusion results.

The Circuit Court for Montgomery County entered an order denying a motion for attorneys’ fees because the motion was filed too late pursuant to Maryland Rule 2-706. We hold, however, that Rule 2-706 does not apply in this case and therefore remand for further proceedings.

BACKGROUND

This case arises in the context of a child custody and access dispute between the child’s mother, Katelyn McMorrow, and the child’s paternal grandparents, Vernon and Jeanette King. *McMorrow v. King*, No. 422, Sept. Term 2021, slip op. at 1 (unreported opinion) (filed Dec. 2, 2021) (<https://mdcourts.gov/sites/default/files/unreported-opinions/0422s21.pdf>). Under previous rulings, the Kings were found to be *de facto* parents and entitled to “significant access” to the child. *Id.* An Order from the circuit court set forth a regular access schedule. *Id.* Thereafter, the Grandparents alleged that Mother violated the access schedule and filed a motion for contempt. Slip op. at 2. The circuit court held a hearing and found Mother in contempt. Slip op. at 6. Mother appealed that decision to this Court. We reversed, finding that the contempt Order did not comply with Maryland law. Slip op. at 12. When the case returned to the circuit court, Mother sought an award of attorneys’ fees, pursuant to MD. CODE, FAM. LAW (“FL”) § 12-103,¹ for having had to

¹ Grandparents assert that Mother should be estopped from arguing that this is a custody case governed by FL §12-103, when she previously took an inconsistent position in her post-mandate motion and argued that it is an appeal from an illegal contempt order. Although the initial case may have been for constructive civil contempt, it was brought for the purpose of enforcing a decree of custody, for which FL §12-103 expressly provides the possibility for the recovery of attorneys’ fees. Moreover, Mother’s classification of the case does not impact her eligibility for fees. *See Poole v. Bureau of Support Enforcement*, 238 Md. App. 281, 294-95 (2018) (holding that despite a constructive civil contempt statute not

pursue the appeal. The circuit court refused to award attorneys' fees, holding that Mother's motion was filed too late pursuant to Maryland Rule 2-706. Mother has now appealed from that decision denying her attorneys' fees.

ANALYSIS

On appeal, before we can determine if the circuit court correctly applied Rule 2-706, we must first determine whether this case is even governed by the Rules in Title 2, Chapter 700 of the Maryland Rules. Rule 2-702(a) states the general rule that this Chapter governs claims for attorneys' fees. MD. RULE 2-702(a). Rule 2-702(b) provides four categories of exceptions to that general rule:

The procedural requirements of these Rules do not apply to claims for attorneys' fees (1) in an action under Code, Family Law Article where an award of attorneys' fees does not depend on the applicant's having prevailed in the action or on any particular claim or issue in the action; (2) in a proceeding under Rules 1-341 or 2-433, or any other Rule permitting an award of reasonable attorneys' fees as a sanction or remedy for the violation of a Rule or court order; (3) by an attorney for legal services rendered by the attorney to the attorney's client; or (4) in an action to foreclose a lien under Title 14 of the Maryland Rules. In determining the reasonableness of any requested fee in the proceedings enumerated in this section, the court may apply some or all of the evidentiary requirements and standards set forth in the Rules in this Chapter, as appropriate under the circumstances.

MD. R. 2-702(b). We hold, *first*, that by the plain language of Rule 2-702(b), that these four categories of motions for attorneys' fees are excluded from the procedural Rules in Title 2, Chapter 700. We hold, *second*, that a motion for attorneys' fees pursuant to FL § 12-103 is

providing for attorneys' fees, fees were recoverable because the underlying action was governed by FL § 12-101 *et seq.* and the purpose of bringing the action was to enforce a decree of support, for which FL § 12-103 expressly provides attorneys' fees.).

precisely the kind of motion contemplated by Rule 2-702(b)(1), that is, a “claim for attorneys’ fees ... in an action under Code, Family Law Article where an award of attorneys’ fees does not depend on the applicant’s having prevailed in the action or on any particular claim or issue in the action.” MD. R. 2-702(b)(1); FL § 12-103(a)(2)(iii) (stating that attorneys’ fees may be awarded to *either* party under this section); *see also* CYNTHIA CALLAHAN & THOMAS C. RIES, *FADER’S MARYLAND FAMILY LAW* § 15-7 (7th ed. 2021) (stating that Title 2, Chapter 700 of the Maryland Rules apply to non-family law claims for attorneys’ fees); PAUL V. NIEMEYER, LINDA M. SCHUETT, & JOYCE E. SMITHEY, *MARYLAND RULES COMMENTARY* 763-64 (4th ed. 2014) (same).² Moreover, we hold, *third*, that the timing of the filing is a procedural requirement (as opposed to an “evidentiary requirement [or] standard”) and that, as a result, the timing requirements of Rule 2-706 do not apply in this case.³ Because the circuit court decided the motion solely on this basis,

² That Rule 2-702(b)(1) makes it plain that the procedural Rules set forth in Title 2, Chapter 700 do not apply to requests for attorneys’ fees under FL § 12-103, does not explain why this should be so. We have carefully reviewed the minutes of the Supreme Court of Maryland’s Standing Committee on the Rules of Practice and Procedure in an effort to determine why they made this recommendation (and perhaps in the absence of procedural Rules, what was to replace them). *See* Rules Committee, Meeting Minutes (“Meeting Minutes”) at 63 (Apr. 15, 2011), available at <https://mdcourts.gov/sites/default/files/minutes-rules/04-15-11.pdf>. We found only the Committee members’ comments suggesting that the criteria for an award can be found in the statute permitting it. That, unfortunately, is a *non sequitur* as the statute provides substantive but not procedural criteria. Perhaps the Rules Committee might want to reconsider the scope of this exception in the future.

³ Grandparents claim that Mother should be judicially estopped from arguing that her case is exempt from the procedural requirements of Rule 2-700 because she initially relied on this rule as a basis for an award of attorneys’ fees at trial. To apply judicial estoppel, three elements must be met: (1) a party must take a factual position that is contradictory to a position they previously took; (2) that previous position must have been accepted by a court; and (3) the party taking the contradictory position must have

we must vacate its decision. We remand this matter to the circuit court for further proceedings consistent with this opinion.

We also offer a few observations to assist the circuit court on remand. As we have discussed, the procedural requirements of Title 2, Chapter 700 of the Rules, including the time for filing a motion for attorneys' fees, do not apply in this case. In the absence of a hard deadline in the Rules, the default deadline must be based on reasonableness. The circuit court should evaluate whether Mother's motion was brought in a relatively timely fashion or was brought only after an inexcusable delay. Similarly, the circuit court should evaluate if Grandparents suffered any prejudice as a result of Mother's delay in bringing the motion. In so doing, the circuit court may, but need not, consider the timeline in Rule 2-706, not as binding, but as a signpost to help it determine what the Supreme Court of Maryland has found to be reasonable in an analogous situation.⁴ If the circuit court

intentionally misled the court to gain an unfair advantage and manipulate the court. *Montgomery County Public Schools v. Donlon*, 233 Md. App. 646, 674 (2017) (citations omitted). Applying these elements to the case at hand, we hold that Mother is not judicially estopped from arguing that the procedural requirements of Title 2, Chapter 700 do not apply to the case at hand. Here, the record illustrates that Mother, both before the trial court and in her reply to the motion for opposition to attorneys' fees, advanced the arguments that this is a case enforcing a decree of custody and that under Rule 2-702(b), the procedural rules in the chapter therefore do not apply. These arguments are (1) not contradictory with those presented on appeal and (2) the court did not accept them. Moreover, (3) we will not assume that a party's intent is to mislead the court, absent evidence to the contrary. As none of the three elements are present, judicial estoppel does not apply.

⁴ If, as suggested above, the circuit court chooses to use Rule 2-706 as a signpost to guide its consideration of the reasonableness of the timing of Mother's filing, we additionally direct the circuit court's attention to Rule 8-606, which makes clear that the date from which to start the thirty-day clock for determining timeliness of motions for attorneys' fees is not the date on which the appellate court *issues* its mandate, but rather the

determines that Mother's motion was timely filed, it shall then proceed to consider the request for attorneys' fees on the merits. Nothing in this Opinion, however, is intended to express a view on the merits of that motion.⁵

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY IS
REVERSED AND REMANDED. COSTS TO
BE PAID BY APPELLEE.**

date of *entry* of that mandate by the clerk of the circuit court on the circuit court's docket. *See* MD. RULE. 8-606(D)(1), (E).

⁵ Grandparents argue that even if the circuit court erred in finding that Mother's request was time-barred, its decision to bar the motion was harmless for three other reasons: First, they argue that Mother did not put them on notice that she would be requesting attorneys' fees in her initial pleading. Second, they argue that Mother did not meet her evidentiary burden for the award of attorneys' fees. Third, they suggest that Mother did not meet her burden to show that the amount of attorneys' fees that she sought were reasonable. None of these were the basis of the circuit court's decision, however, and we cannot conduct the factfinding necessary to make a decision on these grounds on appeal. On remand, the circuit court may accept any evidence or argument it finds necessary to decide these issues, if they are renewed by the parties.