Circuit Court for Montgomery County
Case No. 133290-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1731

September Term, 2017

L.S.

v.

Z.A.

Meredith,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 19, 2018

This case is before us on appeal from an order of the Circuit Court for Montgomery County granting sole legal and physical custody[1] of the parties' minor child to Z.A. ("Father"). L.S. ("Mother") raises five issues on appeal, which we have rephrased as follows:

1. Whether the circuit court erred by failing to appropriately consider the preference of the minor child and by declining to hear directly from the minor child.

2. Whether the circuit court impermissibly considered Mother's failure to comply with an order requiring a psychological evaluation when reaching its custody determination.

3. Whether the circuit court's findings regarding Dr. Newberger's testimony were clearly erroneous.

4. Whether the circuit court's findings regarding Mother's and Father's fitness and the likely cause of the minor child's pain were clearly erroneous.

5. Whether the circuit court erred by excluding the visitation supervisor's notes from evidence.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

Mother and Father met in 2006 when they were coworkers at a department store in Chattanooga, Tennessee. They moved into an apartment together later that year. They

[1] Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor v. Taylo*r, 306 Md. 290, 296 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.*

never married. Mother and Father are the parents of one daughter ("Daughter"), who was born on November 4, 2007. The parties lived together until they separated in late 2008. Following the separation, Father was Daughter's primary caretaker. Daughter resided exclusively with Father until June 2011.

In the spring of 2011, Mother informed Father that she had been accepted to American University's Washington College of Law and intended to relocate to the Washington, D.C. area. The parties agreed that Daughter would move with Mother, and Mother and Daughter moved to Silver Spring, Maryland in 2011. In December 2011, Father graduated from a pilot training program and accepted a job based out of Newark Airport. In October 2012, Father relocated to Maryland. After Father's relocation, Mother remained the primary caretaker for Daughter due to Father's schedule as a pilot. In January 2015, Father began to suffer from vertigo and migraine headaches. These symptoms ultimately ended Father's pilot career. Father subsequently sought and obtained disability benefits.

In January 2016, Father filed a complaint for custody and child support. Father asserted that Mother was unreasonably withholding access to Daughter. Father also filed an emergency motion seeking an immediate access schedule. Following a hearing, the circuit court issued an order on January 13, 2016 granting in part Father's motion for immediate access schedule and providing that Father would have visitation with Daughter on alternating weekends. Father filed a motion for contempt on February 19, 2016, alleging

noncompliance with the court's January 13 order. Mother filed an opposition on February 26, 2016.

On March 7, 2016, Mother filed a counterclaim for custody and child support, in which she asserted that Father had physically and emotionally abused Daughter. On March 16, 2016, the parties appeared for a *pendente lite* hearing and reached an agreement as to *pendente lite* custody. The agreement provided that Daughter would primarily reside with Mother and set forth a visitation schedule with Father. On April 13, 2016, the circuit court appointed a Best Interest Attorney ("BIA") for Daughter.

Before the case came before the court for trial on the merits, both parties filed various emergency motions.[2] Father filed a Verified Emergency Motion for Custody on October 13, 2016. Mother filed an opposition on October 18, 2016. A hearing was held on Father's motion on October 18 and 19, 2016. The circuit court granted Father's emergency motion. The circuit court granted Father temporary and immediate sole physical and legal custody of Daughter pending the custody merits trial. The circuit court further required that Mother, Father, and Daughter participate in psychological evaluations. Mother was granted supervised visitation.

[2] Mother filed an Emergency Motion to Modify *Pendente Lite* Access Order, or in the Alternative for Protective Order on Behalf of Child on April 28, 2016. Father filed an opposition on May 2, 2016. Father filed a Second Verified Motion for Contempt on May 10, 2016, which Mother opposed on May 31, 2016.

The merits trial was held over six days in January, February, and March of 2017. The major issue before the court at trial centered upon the extent of Daughter's various medical issues. At trial and before this Court, the parties have characterized Daughter's health and Daughter's need for medical testing and intervention quite differently from each other. According to Mother, Daughter has suffered from a series of serious ailments since infancy. Father, on the other hand, maintains that Daughter is, for the most part, a healthy child who endured a wide range of medically unnecessary tests and interventions over the years.

Mother testified that Daughter suffered between eight and eleven seizures in her first three years of life. Mother further asserted that Daughter suffered from in the past or continued to suffer from various allergies, asthma, neurological conditions, kidney and gastrointestinal issues, and autoimmune diseases. Mother sought medical treatment for Daughter's ailments at various institutions and from many medical specialists. Daughter received medical testing and treatment at, *inter alia*, Johns Hopkins Hospital, Children's National Medical Center, and Boston Children's Hospital. Father, as the circuit court found, was similarly engaged in seeking medical tests and treatment for Daughter's perceived ailments "as recently as late-2015," but "the evidence produced at trial suggests that he was simply a conduit for the alarming (and most often unsubstantiated) symptoms reported to him by [Mother]."

Because it is relevant to the issues on appeal, and in order to provide context to our discussion, we shall briefly summarize some of the evidence presented over the course of

the trial. We note, however, that the medical records at issue in this case are extensive. We do not attempt to set forth every relevant factual detail.[3]

The circuit court heard testimony from various medical providers, many of whom presented contradictory expert opinions. Dr. Eli Newberger, a pediatrician who served previously as the Medical Director of the Child Protection Program at Boston Children's Hospital from 1979-2000, testified on behalf of Mother. Dr. Newberger was not Daughter's treating physician but testified as an expert, having reviewed Daughter's medical records. Dr. Newberger testified that Daughter's records showed "complaints of severe pain, of frequent urination, of a variety of symptoms of disturbed sleep, of excitation of her neurological system and most importantly of incipient unfolding illnesses involving her cardiopulmonary system, her genitourinary system, her gastrointestinal system, and her immunological status." Dr. Newberger further testified that Daughter's symptoms were "associated with laboratory findings that have potentially ominous significance." Dr. Newberger opined that the medical treatments and tests performed on Daughter were necessary and appropriate.

Other medical professionals disagreed with Dr. Newberger's conclusions. Dr. Evelyn Shukat testified as an expert witness on behalf of Father. Dr. Shukat is a pediatrician and director of the Tree House Child Assessment Center, an independent organization that evaluates and treats children for issues relating to abuse and neglect. Dr.

[3] Furthermore, when possible, we attempt to discuss Daughter's medical history in general terms rather than in specific detail out of respect for Daughter's privacy.

Shukat testified that various diagnoses and allergies in Daughter's medical records were not substantiated by testing. For example, Dr. Shukat testified that Daughter's records showed that Mother had reported Daughter as having an allergy to penicillin and sulfa drugs, but Daughter had been treated with such drugs on multiple occasions with no adverse reactions.

Dr. Shukat further testified that Mother had reported that Daughter was allergic to shellfish, suffered from febrile seizures, and had up to ten urinary tract infections in one year. Dr. Shukat testified that nothing in the medical records -- apart from Mother's report -- substantiated Daughter's shellfish allergy, history of seizures, or recurrent infections. With respect to Daughter's diagnosis of ADHD, Dr. Shukat testified that Daughter had not been properly diagnosed. Rather, a screening questionnaire had been performed. Dr. Shukat's opinion was that Daughter "didn't have proper screening for ADHD." Father's response to the ADHD diagnosis was to attempt environmental controls rather than stimulant medication, but Mother wanted Daughter to be prescribed the stimulant drug Adderall. Daughter was ultimately prescribed Adderall. Dr. Shukat further testified that certain tests and procedures performed on Daughter were medically unnecessary, including a colonoscopy and other tests under general anesthesia, and that Mother often reported symptoms (such as fever or respiratory distress) that were not observed by medical personnel.

Dr. Shukat testified that she "believe[d] with certainty" that Daughter is allergic to grass and pollen and had three abnormal urine cultures. Dr. Shukat continued:

> I believe that [Daughter] has no anatomic or physiological abnormalities of the GI tract or urinary tract. I believe that based on the evaluation that she does not have any rheumatological disease for which she was tested, including ANA (unintelligible) which test[s] for lupus and other blood tests for celiac disease and all that, which all came back normal.

Dr. Shukat attributed some of Daughter's symptoms to her involvement "in a strenuous type of war" between her parents with respect to the custody dispute. Dr. Shukat recommended that Daughter participate in trauma focused cognitive behavioral therapy.

In addition to hearing from medical experts, the circuit court heard testimony from medical professionals who had actually treated Daughter. Allergist and immunologist Leon Kao testified that, contrary to Mother's statements, Daughter is not allergic to peanuts, tree nuts, or shellfish. Dr. Honbou Holly Kim, Daughter's current treating pediatrician, testified that she began treating Daughter in May 2016. Dr. Kim testified that Daughter had been seen in her office for various illnesses and injuries. Dr. Kim did not opine as to the accuracy of prior diagnoses by other providers, but testified that Daughter had been taken off all of her prior medications and that Daughter "does not have any of those diagnoses" at present. Dr. Kim described Daughter as "happy and healthy."

The circuit court also heard testimony from clinical social worker Ilana Kein, court appointed custody evaluator Rosalyn Hnasko, and psychologist James Kleiger, among others. Ms. Kein became involved in the case after the Department of Social Services received reports of suspected abuse or neglect involving Daughter. Ms. Kein first investigated allegations that Father had physically abused Daughter by grabbing her wrists

while she was trying to retrieve a book prior to going to school. Ms. Kein found that there were no concerns about physical abuse by Father and there was no credible evidence that Father had behaved in any way that put Daughter's health and welfare at risk of harm.[4]

Ms. Kein's second investigation focused on allegations that Mother was submitting Daughter to excessive, unnecessary medical testing and treatment. Ms. Kein observed, based upon Daughter's medical records, that Daughter "had been subjected to a number of invasive and unnecessary medical tests and ha[d] been provided with medications when they may not be necessary." Ms. Kein found that Daughter "did not appear to be a credible or reliable reporter and seemed to make allegations against her father with an ease indicative of the child having rehearsed her stories and affective responses." Ms. Kein testified that Child Protective Services was concerned that Mother had coached Daughter to tell "stories about her father that were significantly impacting her relationship with" Father. Ms. Kein expressed additional concerns about Daughter's ability "to keep herself safe as a credible reporting source if she is constantly telling stories which are not only are not [sic] corroborated by the evidence but are disproven by the evidence such as dad's throwing me down the stairs."[5]

[4] Father had security cameras installed in his home. Ms. Kein reviewed the security camera footage during her investigation.

[5] Ms. Kein specifically referred to an incident in which Daughter claimed that Father had thrown her down the stairs. Security camera footage from Father's home showed Daughter walk down the stairs normally and then pause a few steps above the landing, after which Daughter appeared to throw herself down the last steps.

Rosalyn Hnasko was appointed by the court to perform a custody evaluation. In connection with her evaluation, Ms. Hnasko interviewed each party, visited the parents' homes, interviewed Daughter, and interviewed various third parties, including four pediatricians who had treated Daughter. Ms. Hnasko reviewed Child Protective Services records, as well as medical and educational records provided to Ms. Hnasko by Father.

Ms. Hnasko testified that Mother had obtained a law degree from American University and was employed full-time working for the federal government. She detailed Mother's multiple diagnoses, including lupus, endometriosis, polycystic ovarian syndrome, neuropathy, migraines, anxiety, post-traumatic stress disorder, depression which may or may not have been seasonal affective disorder, attention deficit hyperactivity disorder, obsessive compulsive disorder, and dyslexia. Ms. Hnasko "had concerns about [Mother] not being in mental health treatment or not appropriately being in mental health treatment." Mother identified eleven medications she was prescribed for her various diagnoses, but refused to sign a release of information for Dr. Glen Yank, a psychologist in Tennessee whom Mother said she was seeing. Ms. Hsanko testified that she was "not able to confirm that [Mother] was seeing Dr. Yank who is in practice in Tennessee and not here where she has been living for a number of years."

Ms. Hnasko testified about her conversations with four pediatricians who had treated Daughter in the past several years. Ms. Hnasko testified that two of the pediatricians told her "that when they saw [Daughter] in their offices she appeared to be a

normal healthy child and that these symptoms and ailments that were being reported to them seem to be not accurate to what they were seeing in their office."

Ms. Hnasko reviewed video footage from Father's home security cameras. Ms. Hnasko "did not observe physical abuse." In particular, Ms. Hnasko described a video from July 27, 2016, when Daughter "was walking down the steps and appeared to intentionally throw herself down to fall on the steps."

On cross-examination, Mother's attorney inquired as to whether Ms. Hnasko had considered the effect Father's vertigo and headaches may have on his ability to care for Daughter. Ms. Hnasko testified that she had no major concerns about Father's ability to care for Daughter. Ms. Hnasko did not ask Father for documentation relating to his disability determination and/or benefits.

Clinical psychologist James Kleiger was appointed by the court to perform psychological evaluations on Mother, Father, and Daughter. Dr. Kleiger performed psychological evaluations of Father and Daughter prior to trial. Dr. Kleiger testified that Father "was under an enormous amount of stress" and had "feelings of anxiety" as well as "milder feelings of depression." Dr. Kleiger found that Father "has a number of personality resources, psychological resources." He explained that Father "thinks clearly. His appreciation of reality [is] intact. He has a capacity to form meaningful relationships. And he, in taking the testing, was deemed to be credible and forthright." Dr. Kleiger explained that Father was already participating in therapy at the time of the evaluation and opined that it was "clearly important that [the therapy] continue."

With respect to his evaluation of Daughter, Dr. Kleiger testified that he performed an approximately six-hour evaluation. Dr. Kleiger also reviewed the video recordings from Father's security cameras. Dr. Kleiger testified that he found Daughter "to be an extremely likeable, compelling, enjoyable to be with 9-year-old." Daughter was "very cooperative" and "did everything [Dr. Kleiger] asked her to do, and was a . . . very impressive child." In his report, Dr. Kleiger found that "[t]wo essential issues are key to a psychological understanding of [Daughter] at this point in time: (1) the enormous pile-up of stresses in her life, and (2) the significance of her somatic symptoms."

With respect to the stress in Daughter's life, Dr. Kleiger found that the stress "began with disruptions to the integrity of her family and home life between 2008 and 2011" when Daughter relocated with Mother to Maryland, and the stress "increased throughout 2015 when [Daughter's] life was rocked by multiple medical diagnostic procedures (some of which were highly invasive), along with associated parental anxiety, and the disruptions in school attendance . . . ." Dr. Kleiger further emphasized that "in 2016, [Daughter] was confronted with the angry breach in [M]other and [F]ather's co-parenting alliance, the perceived change in parents' mood and behavior, and the eventual forced move from [M]other's home."

Dr. Kleiger further found that "somatic distress has become a primary means of communication for [Daughter]." Dr. Kleiger opined that Daughter "is highly prone to *somatize* stress" and "may be inclined to *exaggerate* the level of pain or discomfort she is experiencing." (Emphasis in original.) Dr. Kleiger emphasized the importance of

predictability of scheduling time with each parent and recommended co-parenting mediation for Mother and Father. Dr. Kleiger "deferred at the present time" questions about whether Daughter might have ADHD or other processing difficulties. Dr. Kleiger further recommended conservative psychological treatment and respectful, supportive responses to Daughter's complaints of symptoms.

The circuit court had instructed Mother to complete her psychological evaluation prior to trial, but Mother did not do so. The circuit court specifically instructed Mother to complete her evaluation on October 19, 2016, November 22, 2016, and December 15, 2016. On February 3, 2017, Mother's attorney proffered that Mother's evaluation was in process and would be completed within "the next couple of weeks." The circuit court informed Mother that it would not consider the psychological evaluation even if Mother completed it. The circuit court explained that permitting the evaluation would be "trial by ambush and sandbag and I'm not doing that." Mother ultimately completed the evaluation through two sessions with Dr. Kleiger in February 2017, but the circuit court declined to consider it.

Following the trial, the circuit court issued a memorandum opinion and custody order. The court found that "[t]he issue of [Daughter]'s health and medical treatment has been an issue of great contention between the parties." With respect to the fitness of the parties, the circuit court found that Father "is a fit and proper person to have custody" of Daughter. The court found that Father had "demonstrated that he cares about the health

and wellness of [Daughter], and can offer her a stable living environment with a support[ive] family structure."

In contrast, the court found that Mother had repeatedly subjected Daughter to unnecessary medical testing, which the court characterized as "treatment in search of ailment." The circuit court found that "much of the pain and discomfort that [Daughter] suffers from can likely be attributed to the stress and anxiety that her parents have inflicted upon her throughout their contentious relationship, as well as the repeated invasive tests to which she was subjected at the urging of [Mother]." The circuit court concluded that Mother's "conduct regarding [Daughter] -- her treatment in search of a disease -- render her unfit."

The circuit court further considered additional factors, including the character and reputation of the parties, the potentiality of maintaining natural family relations, the preference of the child, material opportunities affecting the future life of the child, the age, health, and sex of the child, the residences of the parents and opportunities for visitation, and prior voluntary abandonment or surrender. With respect to the preference of the child, the circuit court found as follows:

> The [c]ourt, in its discretion, did not hear any credible testimony as to the preference of the minor child. This discretion was based on the lengthy medical records submitted at trial (which includes interviews with the minor child), Dr. Kleiger's examination of the minor child, and the determination by the BIA that the minor child did not possess considered judgment.

The circuit court granted Father sole legal and physical custody of Daughter. Mother noted this timely appeal. Additional facts shall be provided as necessitated by our discussion of the issues on appeal.

STANDARD OF REVIEW

We review child custody determinations using three interrelated standards of review. *Reichert v. Hornbeck*, 210 Md. App. 282, 303 (2013). When an appellate court scrutinizes factual findings, the clearly erroneous standard applies. *Id.* at 304 (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)); Md. Rule 8-131(c). If the trial court has erred in matters of law, "further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Id.* "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.* (brackets in the original).

The trial court retains broad discretion in matters of child custody because only the trial court "sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [the trial court] 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 child." *Id.* (quoting *In re Yve S.*, 373 Md. 551, 585-86 (2003)). Accordingly, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.*; Md. Rule 8-131(c). "[I]t 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." *Id.*

An abuse of discretion occurs when the decision under consideration is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *McAllister v. McAllister*, 218 Md. App. 386, 400 (2014)). "That kind of distance [from the center mark] can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *North v. North*, 102 Md. App. 1, 14 (1994). A court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *In re Yve S.*, *supra*, 373 Md. 551, 583 (2003).

DISCUSSION

I.

Mother's first appellate argument is premised upon the circuit court's decision to not hear directly from Daughter. Mother asserts that the circuit court erred by refusing to consider Daughter's preference as to custody. As we shall explain, our review of the record indicates that the circuit court did, in fact, consider Daughter's preferences which were communicated to the court by Daughter's BIA. Furthermore, the circuit court did not err nor abuse its discretion by determining that it would be inappropriate for Daughter to testify.

In custody disputes, "[t]he trial court has 'the discretion to interview a child.'" *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013) (quoting *Marshall v. Stefanides*, 17 Md. App. 364 (1973)). "While the preference of the children is a factor that *may* be considered in making a custody order, the court is not required to speak with the children." *Lemley v. Lemley*, 102 Md. App. 266, 288 (1994) (citing *Levitt v. Levitt*, 79 Md. App. 394, 403 (1989)). (emphasis in *Lemley*). *See also Karanikas*, *supra*, 209 Md. App. at 590 (explaining that "'the court has the discretion whether to speak to the . . . children and, if so, the weight to be given the children's preference as to the custodian'") (quoting *Leary v. Leary*, 97 Md. App. 26, 36 (1993) (citation omitted), *abrogated on other grounds, Fox v. Willis*, 390 Md. 620 (2006)).

A circuit court may consider various factors when determining whether to speak with the child or children whose custody is at issue in a particular case. A circuit court may consider a child's age and maturity level. *Leary*, *supra*, 97 Md. App. at 30 (quoting *Ross v. Pick*, 199 Md. 341, 353 (1952) ("'[T]he child's own wishes may be consulted and given weight if he is of sufficient age and capacity to form a rational judgment[.]'"). It is also appropriate for a court to consider the potential emotional distress a child might face through his or her involvement in a custody dispute. *See Marshall*, *supra*, 17 Md. App. at 369 (observing that "a child, particularly of young and tender years, could be subjected to severe psychological trauma because of a custody case" and recognizing that courts must "attempt to balance the right of the parents to present evidence as to what they deem to be

in the best interest of the child as against possible severe psychological damage to the child").

In the present case, the circuit court had the opportunity to hear from various sources about Daughter's wishes. Daughter's BIA specifically informed the court that, in her view, Daughter lacked considered judgment. Nonetheless, the BIA conveyed Daughter's wishes to the court, explaining that Daughter's "wishes are that she sees her mother, sees her mother regularly and that she would continue -- she would resume living with her mother. Those are her wishes."

In addition, the court was presented with evidence that Daughter had not been truthful or reliable in the past. In connection with her investigations of reports of abuse of Daughter, social worker Ilana Kein concluded that Daughter "did not appear to be a credible or reliable reporter." As discussed *supra*, the court was presented with evidence that Daughter had previously claimed that Father had physically abused her, but security camera footage did not substantiate Daughter's allegations.

The circuit court explained why it was not inclined to hear directly from Daughter as follows:

> This child has been observed by more professionals in her nine years than I've been observed in over six decades. What could I possibly learn that is not already reflected in doctor's reports, including, as you have correctly pointed out, reports where doctors spoke with and recorded what the child said. I have Dr. Kleiger's lengthy study of the child. I have all the descriptions by adults understanding that recollections vary. What could I possibly learn, and I have the determination by the BIA and based on what I've seen so far, the child does not have considered judgment[]. So, putting

> all that into the hopper, why would I . . . know something that Dr. Kleiger wouldn't know and why should I traumatize this child anymore.

On this record, we see no basis to disturb the circuit court's determination that hearing directly from Daughter would be inappropriate in this case.[6] The circuit court carefully balanced the potential harm to Daughter from a potentially traumatic experience against the potential probative value of hearing directly from Daughter. The circuit court further considered all of the evidence with which it had already been presented when determining that interviewing Daughter would potentially traumatize her while adding little to no new information. Accordingly, we hold that, under the circumstances, the circuit court did not abuse its discretion by declining to interview Daughter.

II.

Mother further asserts that the circuit court erred by "severing" Daughter from Mother based upon Mother's failure to comply with the court's order requiring her to participate in a psychological evaluation. As we shall explain, we disagree with Mother's characterization of the circuit court's reasoning. Contrary to Mother's assertion, the circuit court did not base its custody determination solely upon Mother's non-compliance with the circuit court's orders requiring her to participate in a psychological evaluation.

[6] At oral argument, counsel for Mother emphasized the portion of the circuit court's memorandum opinion in which the court commented that it had "not hear[d] any credible testimony as to the preference of the minor child." The record reflects that the circuit court was presented with evidence as to Daughter's preferences from a variety of sources. Nonetheless, it is the purview of the circuit court to weigh the evidence presented and assess the credibility of the evidence.

Before the circuit court, Mother argued that the order requiring a psychological evaluation was improper. Mother cites the case of *Laznovsky v. Laznowvsky*, 357 Md. 586 (2000), for the proposition that the "mere fact that the parties differ on custody does not mean that an invasive and wide-ranging examination of the mental health of a party should be ordered."[7] In the present case, Mother's mental health was a matter of significant controversy to the extent that it affected her ability to properly care for Daughter. The circuit court, therefore, had good cause for ordering her to participate in a psychological evaluation.[8] The circuit court appropriately considered Mother's failure to timely complete the psychological examination when determining an appropriate custody arrangement.[9]

While the court was entitled to consider Mother's noncompliance with its orders requiring her to participate in a psychological evaluation, the record reflects that this was but one of many factors influencing the circuit court's ultimate determination as to custody.

[7] Mother does not argue on appeal that the order requiring a psychological evaluation was improper. Rather, she discusses the motion she filed on this basis before the circuit court in the context of explaining why she failed to participate in the evaluation as ordered.

[8] On appeal, Mother does not argue that the order requiring a psychological evaluation was improper. She cites *Laznovsky* in the context of explaining why, in her view, the circuit court inappropriately reached a conclusion based upon her tardy participation in the custody evaluation.

[9] Mother emphasizes that she completed the evaluation prior to the sixth and final day of trial on March 9, 2018. Critically, as set forth *supra*, the circuit court had informed Mother that it would not consider her untimely evaluation, explaining that permitting Mother to submit the tardy evaluation would amount to "trial by ambush" and be unfair to Father.

The circuit court considered thousands of pages of medical records, video recordings, Mother's own testimony, and testimony and reports from the Child Protective Services social worker, the custody evaluator, Daughter's treating physicians, and expert witnesses, among others. Mother's failure to complete the psychological evaluation was in no way dispositive. Accordingly, we reject Mother's contention that the circuit court improperly based its custody determination upon her failure to participate in the psychological evaluation as ordered.

III.

Mother takes further issue with the circuit court's factual findings about the testimony of Dr. Eli Newberger. Dr. Newberger presented expert testimony on behalf of Mother. The circuit court summarized Dr. Newberger's testimony as follows:

> In support of her actions regarding [Daughter's] health, [Mother] presented the testimony of Dr. Eli Newberger, who was the Medical Director of the Child Protection Program at Boston Children's Hospital from 1979-2000. Dr. Newberger testified that the pain [Daughter] complained of was real and a result of various real illnesses. Dr. Newberger also opined that the medical treatments and tests that [Daughter] was subjected to were necessary and appropriate. Dr. Newberger admitted, however, that the physicians performing these tests typically found that [Daughter] was a relatively normal child who was not suffering from some undiagnosed disease.

Mother argues that the circuit court's finding that Dr. Newberger admitted that other physicians found Daughter to be "a relatively normal child who was not suffering from some undiagnosed disease" was clearly erroneous because it was "without foundation, and

cannot be deduced from [Dr.] Newberger's testimony." Mother asserts that Dr. Newberger's testimony focused upon abnormal findings in Daughter's medical records and that Dr. Newberger testified that Daughter's various treating physicians were concerned by their medical findings.

Dr. Newberger testified as an expert witness based upon his assessment of Daughter's extensive medical records.[10] During Dr. Newberger's testimony, Mother's attorney walked Dr. Newberger through various specific tests performed upon Daughter and inquired as to Dr. Newberger's opinion on the necessity of the tests as well as the results of the tests. For example, Dr. Newberger testified about an instance when Daughter was taken to the Shady Grove Emergency Department and was found to have an abnormally low level of oxygen saturation. Dr. Newberger also testified about, *inter alia*, an abnormally high blood urea nitrogen level, Daughter's positive allergy test results, and abnormal anatomical findings that could cause recurrent urinary tract infections. On cross-examination, counsel for Father inquired as to the clinical significance of the various medical tests that Dr. Newberger had testified were abnormal and other possible explanations for the results.

Indeed, Dr. Newberger testified that, in his view, the various medical testing and treatments performed upon Daughter were largely appropriate and necessary. Dr. Newberger acknowledged, however, that certain results were normal. Dr. Newberger read

[10] Dr. Newberger's testimony occupies 150 pages of the trial transcript.

from a letter written by Dr. Stuart Bauer indicating that Daughter did not require any additional urological testing or treatment. Dr. Newberger further acknowledged the results from Daughter's second colonoscopy showed no abnormalities. Dr. Newberger testified that Mother had reported that Daughter suffered from febrile seizures, but acknowledged that no medical professional had actually diagnosed a febrile seizure from the medical records.

Our review of the record reflects that the circuit court's factual findings with respect to Dr. Newberger's testimony were not clearly erroneous. To be sure, Dr. Newberger's testimony overwhelmingly supported Mother's assertion that the medical testing and treatment sought for Daughter was necessary and appropriate. Nonetheless, Dr. Newberger testified that certain of Daughter's medical providers had concluded that Daughter's various test results were normal.

Furthermore, the circuit court was not required to believe Dr. Newberger's testimony. The record reflects that the circuit court credited the testimony of Dr. Evelyn Shukat, an expert in pediatric medicine whose testimony largely conflicted with that of Dr. Newberger. The circuit court, as the finder of fact, was entitled "to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony." *Pryor v. State*, 195 Md. App. 311, 329 (2010). When presented with conflicting expert testimony, the fact-finder is free to credit the testimony of one expert while discounting the testimony of another. *Elec. Gen. Corp. v. Labonte*,

229 Md. App. 187, 197 (2016), *aff'd*, 454 Md. 113 (2017). We will not, therefore, disturb the circuit court's findings with respect to Dr. Newberger's testimony on appeal.

IV.

Mother contends that the circuit court's findings with respect to the parties' fitness and the likely cause of Daughter's pain were clearly erroneous. As we shall explain, we are not persuaded.

When applying the clearly erroneous standard, "this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *Lemley*, *supra*, 109 Md. App. at 628. "Instead, our task is to search the record for the presence of sufficient material evidence to support the chancellor's findings. Additionally, all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below." *Id.*

Mother contends that the circuit court's findings with respect to Father's fitness and Mother's unfitness were clearly erroneous. Mother asserts that Father himself was very involved in Daughter's medical care and that Father was equally, if not primarily, responsible for seeking medical testing and treatment for Daughter. Mother disputes the circuit court's conclusion that Father was only conveying the information he received about Daughter's symptoms from Mother, arguing that minimal evidence shows Mother asking Father to obtain medical care for Daughter. Mother asserts that no witnesses other than Father himself testified that Mother was manipulating Father or causing Father to subject Daughter to invasive medical procedures. In addition, Mother argues that Father's own

symptoms, including dizziness, inability to drive, and issues relating to depression and anxiety, render him unable to care for Daughter. For these reasons, Mother contends that the circuit court erroneously concluded that she was unfit and that Father was fit.

In our view, there is ample evidence in the record to support the circuit court's findings as to the fitness of the parties. The record reflects that various medical providers concluded that Daughter was generally healthy with normal test results, including urologist Dr. Bauer, gastroenterologist Dr. Nurko, rheumatologist Dr. Susan Kim, and Daughter's pediatricians Dr. Coleman, Dr. Hsu, and Dr. Holly Kim. Nonetheless, Mother continued to maintain at trial that Daughter had serious health problems. Indeed, Child Protective Services had investigated reports from medical professionals about Mother's suspected exaggeration of Daughter's symptoms. The record further reflects that Mother had previously alleged abuse of Daughter by Father, but the allegations of abuse were unsubstantiated. The circuit court also had evidence before it that Mother had permitted Daughter, then age seven, to self-administer an Epi-Pen injection after a shellfish exposure despite the fact that Daughter had previously tested negative for shellfish allergies. Mother explained that she permitted Daughter to self-administer the injection because Daughter "wanted to do it herself."

The circuit court credited the testimony of Child Protective Services social worker Ilana Kein and court appointed custody evaluator Rosalyn Hnasko. Ms. Kein and Ms. Hnasko both found that Father was capable of caring for Daughter appropriately and recommended that Father be awarded sole custody of Daughter.

As discussed *supra*, the circuit court, as the finder of fact in this custody case, was entitled "to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony." *Pryor*, *supra*, 195 Md. App. at 329. The circuit court was in a much better position than this Court to assess Mother's and Father's relative credibility, and we will not disturb the circuit court's credibility determinations on appeal. *See Reichert*, *supra*, 210 Md. App. at 304 (explaining that the trial court retains broad discretion in matters of child custody because only the trial court "sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [the trial court] 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 child.") (internal quotation and citation omitted).

Our review of the record indicates that there is sufficient evidence to support the circuit court's conclusions as to the parties' fitness. We recognize that different fact-finders might have made different credibility determinations or weighed the evidence differently. We acknowledge that the parties view the evidence quite differently from each other in emotionally fraught custody disputes such as this. Our task on appeal, however, is to scour the record for evidence that supports the circuit court's findings. *Lemley*, *supra*, 109 Md. App. at 628. We will not sit as a second trial court and reassess the evidence on appeal. Because there is sufficient evidentiary support for the circuit court's findings as to fitness, we will not disturb them on appeal.

Mother further asserts that the circuit court improperly "diagnosed" Daughter's pain as "likely attributed to the stress and anxiety" of the parties' contentious custody dispute. In our view, the circuit court made no diagnosis. Rather, the circuit court interpreted the evidence presented and drew appropriate inferences as to the ways in which the parties' conflict affected Daughter. Indeed, the circuit court's conclusion as to the likely cause of Daughter's pain was consistent with the conclusions of psychologist Dr. Kleiger. Dr. Kleiger had explained that Daughter "is highly prone to *somatize* stress," i.e., to experience physical symptoms as a result of stress. Dr. Shukat also attributed Daughter's physical symptoms to the stress of her parents' custody dispute. We conclude, therefore, that the circuit court's attribution of Daughter's symptoms to the contentious dispute between Mother and Father was consistent with the evidence presented at trial and not clearly erroneous.

V.

Mother's final appellate argument is premised upon the circuit court's exclusion of the visitation supervisor's notes from evidence. Mother asserts that the visitation supervisor's notes were admissible pursuant to two exceptions to the rule against hearsay. Mother asserts that the notes were admissible as business records pursuant to Md. Rule 5-803(b)(6) and as present sense impressions pursuant to Md. Rule 5-803(b)(1).

At trial, Father objected to the admission of the supervisor's notes on the basis of hearsay. Mother argued that the notes were recorded in the course of regular business

activity, and, therefore, were admissible pursuant to Md. Rule 5-803(b)(6). The circuit court rejected Mother's argument, explaining as follows:

> Even if, and I'm not necessarily 100 percent persuaded that these are quote unquote business records, the problem, the bigger problem is the second level hearsay, it's what's reported therein. The declarants in these notes have no duty or obligation to report accurately or truthfully.
>
> So just as if when she was a police officer, she went out and took statements from civilians, even if her police report as a business record, the content of it would be excluded on second level hearsay because the statements of witnesses, if you will -- the witnesses have no duty to be truthful. Objection sustained.

The court further explained that the visitation supervisor's notes were "replete with second level hearsay for which there's no exception."

We agree with the circuit court. Even if the notes themselves were admissible pursuant to the business records exception or present sense impression exception to the rule against hearsay, they contained second level hearsay. The supervisor took extensive notes regarding what various individuals present at the visitation had said, and Mother offered no explanation of what hearsay exception would apply to permit the second-level hearsay within the supervisor's notes. "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Maryland Rule 5-805. The purpose of this rule is to ensure that "inadmissible evidence does not become admissible simply by being clothed within evidence that is admissible . . . ." *Streater v. State*, 352 Md. 800, 813-14 (1999)

(footnote omitted). Accordingly, we hold that the circuit court properly excluded the supervisor's notes from evidence because the notes contained second-level hearsay for which no exception applied.

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