Circuit Court for Anne Arundel County
Case No. C-02-FM-16-003967

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 473

September Term, 2022

C. A.

v.

K. C.

Tang,
Albright,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: January 12, 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 Rule 1-104(a)(2)(B).

Appellant ("Father") and Appellee ("Mother")[1] are the formerly-married parents of two minor children. In 2020, Father petitioned the Circuit Court for Anne Arundel County to modify custody and visitation orders issued when the parties divorced in 2017. On his modification petition, Father was represented by *pro bono* counsel through the Maryland Volunteer Lawyers Service ("MVLS").[2] Mother, who was represented by privately-retained counsel, opposed modification and sought an award of attorney's fees from Father. A one-day bench trial was held, after which the circuit court modified the existing visitation order in Father's favor and ordered Father to pay $5,000 of Mother's attorney's fees. Here, Father challenges the attorney's fees award, arguing that there was insufficient evidence of his ability to pay it. We agree and reverse the judgment of the circuit court as to attorney's fees.

On appeal, Father presents one question for our review:

> Did the trial court err in ordering [Father] to pay $5,000.00 of [Mother's] attorney's fees in the absence of evidence regarding the parties' financial circumstances?

[1] Mother's last name now starts with C. We have changed the caption of the case to reflect this change. Nonetheless, in order to protect the parties' privacy, we use only the initials of their names on the cover page of this opinion. For this reason, we also refer to the parties as Father and Mother in the body of the opinion. We mean no disrespect in doing so.

[2] Father also received *pro bono* representation on several other related pleadings that the parties filed while the modification petition was pending. These included Mother's petition that Father be held in contempt for failing to pay child support and Father's petition that Mother be held in contempt for failing to abide by an interim consent order regarding visitation with the parties' minor children.

BACKGROUND

Prior to their divorce, Father and Mother had two children, a daughter born in 2012 and a son born in 2014. On February 2, 2017, Father and Mother were divorced via a Judgment of Absolute Divorce ("JAD") issued by the circuit court. Neither party was represented by counsel at the time. The JAD provided that Mother would have sole legal and physical custody of the parties' two children, "subject to [Father] having reasonable and liberal visitation as agreed upon by the parties." For child support, Father was also ordered to pay $200 per month to Mother until April 2017 and $400 per month thereafter. Though it did not specifically say so, as to custody and child support, the JAD appears to have incorporated an agreement that the parties had reached with the assistance of a court facilitator.

Though there were few findings about Father's financial circumstances at the time of the divorce, the record suggests that he was not working because he was receiving substance abuse treatment. In her divorce complaint, Mother listed Father's address as a substance abuse treatment center in Crownsville, Maryland. Father was served there a short while later. Father was also participating in the circuit court's drug court program. Accordingly, for the purpose of establishing Father's child support obligation, the parties agreed to impute income to Father at the rate of $1,008 per month based on thirty hours of minimum-wage work per week.

In October 2020, Father petitioned the circuit court to modify the custody, visitation, and child support orders contained in the 2017 JAD.[3] For this petition Father was represented by *pro bono* counsel through MVLS. Father alleged that he "currently ha[d] no income" and asked that Mother be ordered to contribute to his litigation costs and reasonable attorney's fees.

The material change in circumstances that Father alleged pertained to his substance abuse. Father said that he "was making substantial strides in addressing the substance abuse issues that plagued him at the time of the divorce proceedings in 2016 into early 2017[,]" and added that he "ha[d] been sober for approximately the past 2 years and . . . over the past year . . . ha[d] been the primary caregiver for his infant daughter." Father, now living with his fiancée, described himself as a stay-at-home dad, "caring for the infant child and assisting with the care of his fiancé[e]'s 12 and 13 year old children." With his petition, Father filed a financial statement showing no income, no alimony received, and no expenses incurred for the parties' children.

In her Answer, Mother asked that Father's modification petition be denied and that he be ordered to pay her attorney's fees. She argued that because of Father's substance abuse behavior and related history, it was in the children's best interests that Father's access to the children be supervised and not include overnights. She added that Father was "[s]killed and able to work" and, therefore, was "[v]oluntarily impoverishing

[3] Father subsequently amended his petition, dropping his request for child support modification.

himself" by being a stay-at-home father. Like Father, Mother filed a financial statement showing no income, no alimony received, and no expenses incurred for the children.

As the litigation went on, more allegations came out about the parties' financial circumstances. After answering Father's modification petition, Mother petitioned that Father be held in contempt for failing to pay child support. Mother alleged that Father owed her approximately $16,300 in child support. She repeated her assertion that Father was "skilled and . . . able to be gainfully employed" and said that Father "refuse[d] to seek gainful employment."

At the same time, Mother petitioned that Father undergo a substance abuse evaluation. In that petition, Mother made additional allegations about Father's legal and financial situation. She averred that there was more than $45,000 in civil judgments against Father, that Father had "a substantial criminal history in Maryland[,]" and that about seven months after the parties' divorce, Father was "terminated from drug court for noncompliance." Consequently, Father was ordered to undergo a rapid substance abuse screening urinalysis test and provide the results to the circuit court. The test was negative for illicit substances.

Following a contempt hearing held in April 2021, a Magistrate recommended that Father be held in contempt for not paying child support. Father then filed exceptions to the Magistrate's recommendations, contending that he did not have the ability to comply with the child support order due to incarceration and unemployment. He also asserted that, despite his limited means, he had "paid child support to [Mother] when he ha[d] the

financial ability to do so." Thus, he concluded that the Magistrate's recommendation that he be found in contempt was improper. Father also petitioned to be excused from supplying a written hearing transcript.[4] Father averred that he "[was] unemployed, . . . ha[d] not held a steady job in approximately 10 years, . . . ha[d] suffered from a debilitating addiction to drugs, . . . was in and out of prison arising from his addiction, and . . . ha[d] no assets or means to pay the costs of these proceedings." He reiterated that he was represented by *pro bono* counsel through MVLS and that the circuit court had already waived a mediation[5] fee for him. The circuit court granted Father's petition.[6]

The circuit court held a hearing on Father's exceptions in August 2021. Although the circuit court's resulting order reduced Father's child support arrearage to reflect the time that he was incarcerated,[7] it adopted most of the Magistrate's recommendations and

[4] An excepting party, on the filing of an affidavit of indigency and a motion, may supply an electronic recording of the proceedings from which exceptions are taken in lieu of a written transcript. If the motion is denied, the excepting party must order that portion of the written transcript that is necessary to rule on the exceptions and certify that he or she has done so. Md. Rules 9-208(g)(1) and (4).

[5] Mother and Father attended court-ordered mediation approximately three months before Father's request. At mediation, they reached a temporary agreement regarding Father's access to the minor children.

[6] Father requested and received similar relief in this Court. Citing his "limited financial means," among other reasons, Father asked that he be permitted to use the condensed-format trial transcript in preparing the record extract. This request was unopposed, and we granted it.

[7] Child support payments are not due, and arrearages do not accrue, if the obligor is sentenced to 180 days or more, is not on work release, has insufficient resources to

ordered Father to, among other things, continue to pay $400 per month in child support plus $100 per month toward the arrearage.[8]

In March 2022, the circuit court held a trial on the merits of Father's amended modification petition. Mother did not introduce much evidence at trial about her financial circumstances or Father's.[9] Mother testified that she worked for Prince George's County Public Schools as a paraprofessional and that she was the primary caregiver for the parties' two children. She took the children wherever they needed to go, such as school, sports practices, appointments, play dates, and drop-off and pick-up from Father. She explained that each child participated in one extracurricular activity per sports season, with some overlap toward the beginning and end of the season. One child participated in gymnastics, cheerleading, and basketball. The other participated in gymnastics, soccer, and basketball.

Mother testified that Father did not financially contribute to the children's extracurricular activities. She also asserted she could not rely on Father's timely payment of child support, as she would receive Father's monthly child support payments anywhere from the second to the twenty-fifth day of each month.

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make the payment, and did not commit the crime with the intent of becoming impoverished. Md. Code, Fam. Law §12-104.1(b).

[8] The circuit court subsequently purged the contempt case against Father following a review hearing in October 2021 during which Father confirmed his compliance with the August 2021 contempt order.

[9] Mother did not introduce the parties' financial statements into evidence.

As for her legal fees, Mother explained that she was "very far behind" on them, so much so that she and her husband were not moving to the bigger house that they wanted. As of March 28, 2022, Mother had incurred $10,016.08 in attorney's fees for services for this action.

Father testified that he was not regularly working outside the home. He explained that he lived with his fiancée and their toddler daughter, who was born in September 2019.[10] Father stayed home full-time with their daughter during the weeks that his fiancée was at work.[11] Father did "[his] best making money on the side, with having to work around the [fiancée's] schedule." During the crabbing season, which runs from April to October, Father would work intermittently as a crabber. He indicated that, at times, he would work up to four days a week between ten and fifteen hours a day, but said that his income would "fluctuate[] based on how much work [came] in [and] how much [the crabber sold]." Because of these income fluctuations, he added, recently he had "been struggling just to make enough to pay the child support." Father also admitted that he performed a number of side jobs as a handyman for some of his father's customers.[12]

[10] Father's fiancée's two teenage children lived in the home every other week.

[11] Father's fiancée worked outside the home every other week, Wednesday to Wednesday, with 12- or 14-hour work days.

[12] This income was not listed on any of Father's financial statements.

Father also testified about his history of addiction. He stated that his substance abuse started about ten years prior when he was prescribed pain pills following a landscaping accident. His addiction "took off from there[,]" and he eventually transitioned from pain pills to heroin. Prior to the parties' divorce, Father had been incarcerated for a few months for "thefts related to the drug addiction." At the time of the divorce, Father was participating in the circuit court's drug court program. According to Father, a counselor in that program preferred that Father not work because she thought that "[his] access to money was kind of like one of [his] biggest triggers." While participating in drug court, Father committed another crime and was incarcerated for it from July 2017 through May 2018. He relapsed in 2019 and attended a 30-day in-patient program thereafter. Father has maintained his sobriety since then. His probation was set to expire two months after trial.

With regard to his own attorney's fees, Father was represented *pro bono* through MVLS for his modification petition. Father explained that he "had to submit a bunch of paperwork to get approved . . . to show that [his] income was not enough to hire private counsel" and added that "it was a long process[.]"

THE CIRCUIT COURT'S DECISION

As to Mother's claim for attorney's fees from Father, after finding that both parties were justified in pursuing and defending the case, the circuit court turned "to the financial situation." It found as follows:

> The financial situation I'm assuming that there's not a lot of extra money from either side, based on mom's comment that she's not even considering moving because of her legal fees.
>
> Now, the defendant, as I said, is under employed if you look at it, but he's also – he may not feel that way with a two and a half year old all day but I understand, but he's – he doesn't have attorney's fees and that's big and [Mother's counsel] has had to represent the mother throughout this case.
>
> Now I can factor in as expenses that she has, the attorney's fees for the contempt hearings. I'm not going to award attorney's fees, but I'm factoring that in, in that there were several times at court.
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> So – and I'm also considering the fact that the father who indicates he doesn't have extra money and he kind of struggles to make it, I'm considering all of that, but I think he should pay half of the attorney's fees. So I'll award $5,000 in attorney's fees and that they'll be – the defendant pay [Mother's counsel] $5,000 and he can pay at the rate which is a small rate for now, $250 a month and they'd be due the first of each month beginning May 1st of 2022.

This timely appeal followed.

STANDARD OF REVIEW

We review a trial court's ruling pertaining to attorney's fees in a bench trial under the clearly erroneous standard. Md. Rule 8-131(c).[13] As such, we assess the ruling "on both the law and the evidence." *Id*. In so doing, "[w]e must assume the truth of all the evidence, and all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the [trial] court." On the other hand, "'[w]hen the trial court's

[13] Maryland Rule 8-131(c) states, in pertinent part:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

decision involves an interpretation and application of Maryland statutory and case law, the appellate court must determine whether the lower court's conclusions are legally correct.'" *Floyd v. Baltimore City Council*, 241 Md. App. 199, 207 (2019) (citing *Clickner v. Magothy River Ass'n Inc*., 424 Md. 253, 266-67 (2012)); *see also Petrini v. Petrini*, 336 Md. 453, 468 (1994) ("Consideration of the statutory criteria is mandatory in making the award [of attorney's fees] and failure to do so constitutes legal error").

DISCUSSION

Father's Contentions[14]

Father argues that the circuit court erred in awarding Mother's attorney's fees because there was not enough evidence that Father had the ability to pay those fees, a mandatory consideration under Md. Code, Fam. Law ("FL") § 12-103(b).[15] We agree.

Where a party seeks to enforce or modify a custody or visitation decree, the court may award attorney's fees to either party if such fees are "just and proper." FL § 12-103(a). In deciding whether to award attorney's fees, the trial court must consider and balance "(1) the financial status of each party; (2) the needs of each party; and (3)

[14] Mother did not file a brief or appear. Soon after the appeal was noted, Mother's trial counsel asked that her appearance not be entered in this Court pursuant to Maryland Rule 8-402(b)(2). Mother did not participate in the appeal.

[15] Father also argues that the circuit court (1) abused its discretion in finding that Mother was substantially justified in defending Father's modification petition; and (2) failed to consider the reasonableness of Mother's fees and the "reasonableness of the attorney's fees incurred" pursuant to Maryland Rules 2-703(e) and (f). Given our conclusion that there was insufficient evidence of Father's ability to pay a fee award, we do not reach these arguments.

whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b)(1);[16] *see also Reichert v. Hornbeck*, 210 Md. App. 282, 368 (2013) ("the trial judge must 'consider and balance' . . . the required [statutory] considerations" (quoting *Bagley v. Bagley*, 98 Md. App. 18, 39 (1993))). On finding that a party's position is substantially justified, the circuit court "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)[.]" *Davis v. Petito*, 425 Md. 191, 204 (2012). Of course, "[t]he burden of proof lies upon the party seeking fees." *Long v. Burson*, 182 Md. App. 1, 26 (2008).

Under Section 12-103, the trial court must conduct a "systematic review of economic indicators in the assessment of the financial status and needs of the parties." *Davis,* 425 Md. at 206. The overarching purpose of this systematic review is to determine the respondent's ability to pay an award to the petitioner. *Id.* (noting that 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"); *see also Painter v. Painter*, 113 Md. App. 504, 529 (1997) (vacating award of attorney's fees because while trial court "may have addressed the needs and financial status of appellee" it did not consider appellant's ability to pay).

[16] The other basis for a fee award is a finding that "there was an absence of substantial justification of a party for prosecuting or defending the proceeding." FL § 12-103(c). Neither party appears to have proceeded on this basis.

Moreover, in reviewing the parties' financial status and needs, "a comparison of incomes is not enough." *Davis*, 425 Md. at 205.

Here, there was no evidence that Father actually had the ability to pay the $5,000 attorney's fee award that the circuit court ordered in favor of Mother. Instead, the circuit court's "systematic review of economic indicators" showed quite the opposite. Specifically, the circuit court said, "I'm assuming that there's not a lot of extra money from either side," and observed that "[Father] doesn't have extra money and he kind of struggles to make it." The circuit court noted that Father was "under employed," and that he was with a two-and-half-year-old all day. The circuit court also recognized that Father was represented by *pro bono* counsel. Finally, the circuit court ordered that Father pay the award not in a lump sum but at the rate of $250 per month "for now."

Other evidence pointed in the direction that Father did not have the ability to pay the award. Father testified that he would work roughly every other week as a crabber during crab season, which runs about eight months a year, but that his income from crabbing would fluctuate such that he struggled at times to pay child support. He also performed a number of side jobs for his father's customers. He was supposed to be paying child support to Mother, but his payments were often late such that Mother could not rely on them. He also did not contribute to the cost of the parties' children's extracurricular activities.

That Father was represented by *pro bono* counsel, and had no attorney's fees of his own, while Mother had to pay her attorney, did not mean that Father had the ability to

pay Mother's attorney's fees. To be sure, we have said that "the status of the legal services provider" is not among the factors to be considered in awarding fees under Section 12-103. *Henriquez v. Henriquez*, 185 Md. App. 465, 478 (2009), *aff'd*, 413 Md. 287 (2010). In *Henriquez*, our Supreme Court recognized, as did we, that attorney's fees could be awarded to the non-profit legal services agency that represented a family law litigant even though the litigant did not actually incur legal expenses themselves. *Henriquez,* 413 Md. at 456; *Henriquez*, 185 Md. App. at 486.

Here, unlike in *Henriquez*, Father's representation through MVLS spoke to *his* financial status, not merely to the status of MVLS or the fee arrangement Father had with his *pro bono* counsel. Father qualified for *pro bono* counsel through MVLS because he did not have the financial ability to hire private counsel.[17] *Henriquez* does not render that fact immaterial.

Because Father did not have the ability to hire private counsel for himself, it was error to require Father to pay a portion of Mother's legal fees. This Court decided a similar issue in *Lemley v. Lemley*, 109 Md. App. 620 (1996). In that case, Mr. Lemley, who earned approximately half of what Mrs. Lemley did, represented himself in their divorce and custody case because he was unable to afford to hire counsel. *Id.* at 633-34. Nonetheless, the trial court ordered Mr. Lemley to contribute to Mrs. Lemley's attorney's fees. On appeal we concluded that this decision was in error, holding that "it is

[17] This testimony was undisputed, and there was no evidence that the income qualification process that Father had to go through was somehow flawed.

unreasonable to require Mr. Lemley to pay for the benefit of professional counsel for the opposing party, while being unable to afford that benefit for himself[.]" *Id.* The same is true here.

If Mother decided not to participate in this appeal because she could not afford the attorney's fees to do so, felt that she would not qualify for *pro bono* representation because she is employed, and did not want to represent herself by filing an informal brief, today's decision is undoubtedly frustrating for her. From her perspective, she is working outside the home while Father is voluntarily impoverishing himself. The circuit court's finding that Father is "under employed" may suggest as much. Nonetheless, without argument from the parties on whether § 12-103(b) allows for the imputation of income (the next step after a finding of voluntary impoverishment, at least in the realm of child support), let alone findings from below on how much to impute, we must leave those issues to another day. Md. Rules 8-131(c); 8-504(a)(6) and (c).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AS TO ATTORNEY'S FEES REVERSED. COSTS WAIVED.