Circuit Court for Baltimore City
Case No. 24-D-16-003107

CHILD ACCESS

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2171

September Term, 2022

M. S.

v.

M. J.

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

JJ.

Opinion by Albright, J.

Filed: January 5, 2024

Appellant ("Father") and Appellee ("Mother") are the unmarried parents of one minor son, J. This appeal arises from Father's petition to modify the 2018 custody-and-access order ("2018 Order") issued by the Circuit Court for Baltimore City. After a magistrate recommended minor changes to the 2018 Order, but declined to recommend attorneys' fees for Father, the circuit court issued a Memorandum Opinion that denied the parties' exceptions as to custody and access but failed to address Father's attorneys' fees claim. Father noted this appeal. Unfortunately, because the circuit court did not issue an Order ruling on Father's petition, we must dismiss Father's appeal.[1]

FACTUAL AND PROCEDURAL BACKGROUND

The parties separated shortly after J.'s birth in February 2016. Two years later, in 2018, the circuit court entered an original custody order awarding Mother sole legal and primary physical custody and awarding Father overnight access with J. every other

[1] Father presented the following questions:

1. Did the Court err in failing to apply its independent Judgment and award shared physical custody, after adopting the finding that there is a material change of circumstances because Mother unjustifiably denied the Father's access to the Minor Child for nine months?

2. Did the Court err in failing to apply its independent Judgment and award joint legal custody of the Minor Child, after adopting the finding that the Mother's communication was demeaning, condescending and argumentative?

3. Did the Court err in failing to award attorney's fees?

weekend (defined as Friday afternoon to Monday at 10:00 am) and certain holidays. For his weekend access, Father was ordered to pick up J. from daycare and return him there. As above, we refer to this order as the "2018 Order."

In 2021, Father petitioned to modify the 2018 Order. In essence, Father alleged that Mother had been denying him the access to which he was entitled under the 2018 Order. This denial, according to Father, combined with reduction in Father's commute to J.'s daycare, growth in J.'s relationship with Father's other child (J.'s half-sibling), and some positive changes in the parties' ability to communicate, amounted to a material change of circumstances such that modification was in J's best interest. Several months later, Father amended his petition ("Amended Petition"), specifying that he requested tiebreaking authority as a joint legal custodian of J., among other changes.[2]

Following a hearing, a magistrate issued a report and recommendations on Father's Amended Petition. The magistrate found that there had been a material change in circumstances but recommended that it would be in J.'s best interest for Mother to continue to have sole legal and primary physical custody. As to Father's access schedule, the magistrate recommended that it be modified such that Father have access every first, third, and fifth (where applicable) weekends of the month—instead of simply every other

[2] Though it was styled to include child support modification, Father's Amended Petition, like his original modification petition, included no specific request for child support modification or allegations that might have supported same. We assume that Father did not intend to pursue child support modification, as he took no exceptions to the absence of child support modification in the magistrate's report and recommendations.

weekend—and for two non-consecutive weeks during J.'s summer break, among other modifications.

The magistrate also recommended that Father's request for attorneys' fees be denied. Under Maryland Code, Family Law § 12-103(b) ("FL § 12-103(b)"),[3] the magistrate considered the financial status of each party and found Father had substantial justification in bringing the suit, but she was unable to determine the needs of each party. The magistrate did not make any findings or recommendations concerning the possibility of an award of Father's attorneys' fees under Maryland Code, Family Law § 9-105 ("FL § 9-105"), the other statute Father later argued was a basis for awarding him fees.[4]

[3] Section 12-103(b) of the Family Law Article permits an award of costs and counsel fees to either party in a custody or access modification case. Before making such an award, however, the court " . . . shall consider (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b).

[4] Section 9-105(3) of the Family Law Article permits an assessment of costs and counsel fees against a party "who has unjustifiably denied or interfered with visitation rights." It provides:

> In any custody or visitation proceeding, if the court determines that a party to a custody or visitation order has unjustifiably denied or interfered with visitation granted by a custody or visitation order, the court may, in addition to any other remedy available to the court and in a manner consistent with the best interests of the child, take any or all of the following actions:
>
> * * *

To facilitate the implementation of her proposed recommendations, the magistrate included language for a proposed order. This proposed language spanned more than three pages and, using separate ordered paragraphs, recommended specific parameters for the parties going forward. Among the specific proposed orders were orders pertaining to who would exercise legal custody (Mother), who would exercise primary physical custody (Mother), the manner in which the parties are to communicate (through an electronic coparenting app), who would be able to attend J.'s activities and appointments (both parents), and the consequence of Father's having demonstrated a material change of circumstances regarding his parenting time with J. (more parenting time). As to her recommended denial of Father's request for attorneys' fees, the magistrate included no corresponding language in her proposed orders.

Father and Mother both filed exceptions. Father's exceptions concerned the magistrate's findings and recommendations on legal custody, physical custody, and attorneys' fees. Father contended that while the court was correct in finding there was a material change in circumstances regarding legal custody, it erred in concluding that it was in J.'s best interest that Mother retain sole legal custody. Similarly, Father claimed

> (3) assess costs or counsel fees against the party who has unjustifiably denied or interfered with visitation rights.

FL § 9-105.

that the court correctly found a material change in circumstances regarding physical custody, but erred in concluding that it would not be in J.'s best interest to modify physical custody to a 50-50 schedule. Finally, Father argued the magistrate erred in recommending the court deny his attorneys' fees. He asserted that, in compliance with FL § 12-103, he had presented evidence of his needs, he was unable to pay his attorneys' fees in full, and his litigation was substantially justified. Father also argued that he should be awarded attorneys' fees under FL § 9-105 regardless of the factors from FL § 12-103.

Mother's exceptions concerned the magistrate's findings and recommendations on legal custody and physical custody. Mother argued it was clearly erroneous to find that Mother unjustifiably interfered with Father's parenting time. She also claimed that it was clearly erroneous to find that Father was denied access because the evidence did not support such a finding. Further, Mother asserted that the alleged denial of access was not a material change in circumstances regarding physical custody. Mother agreed, however, that her retaining sole legal custody was in J.'s best interest because of the ongoing conflict between Mother and Father and their lack of communication.

At the conclusion of its hearing on the parties' exceptions, the circuit court did not issue a decision. Instead, the court said it would read through all the materials, issue a written opinion, and have copies sent to all the parties. The accompanying docket entry said "Order to be GRANTED. Copies to be mailed to the parties."

About three months later, the circuit court issued a Memorandum Opinion denying most of the parties' exceptions. The circuit court discussed the magistrate's recommendations regarding legal custody, physical custody, and access, but did not address Father's exception to the magistrate's attorneys' fees recommendation. Nor did the circuit court issue a separate Order adopting the magistrate's proposed order language.

Father noted this appeal within 30 days of the filing of the circuit court's Memorandum Opinion.

DISCUSSION

Because the circuit court never entered a separate order consistent with its Memorandum Opinion, or directed the docketing of a judgment, the decision evident in the circuit court's Memorandum Opinion never became a judgment. As a result, even though Father noted his appeal within 30 days of the circuit court's Memorandum Opinion, there was no judgment from which to appeal. Accordingly, we must dismiss Father's appeal as premature. We explain.

The right to appeal is set out by statute. A litigant may appeal from a final judgment that disposes of all claims in a civil case. *See* Maryland Code, Courts and Judicial Proceedings § 12-301 ("CJP § 12-301"). In addition, a litigant may appeal from various interlocutory orders. One such order is " . . . an order depriving a parent[] . . . of

the care and custody of his child, or changing the terms of such an order[,]" CJP § 12-303(3)(x). This becomes an "interlocutory appeal."

Whether the appeal is from a final judgment, or from an interlocutory order, the judgment or order must be properly set out. Maryland Rule 2-601(a)(1) requires that "[e]ach judgment shall be set forth on a separate document[,]" among other requirements.[5] Thereafter, the clerk must docket the judgment " . . . by making an entry of it on the docket of the electronic case management system used by that court . . . ." Md. Rule 2-601(b)(2). Indeed, "[a] judgment is effective only when so set forth and when entered as provided in [Rule 2-601(b)]." Md. Rule 2-601(a)(4).

There are some circumstances in which the "separate document" requirement of Rule 2-601(a)(1) " . . . may be waived in order to a *preserve* an appeal, rather than eliminate it as untimely." *URS Corp. v. Fort Myer Construction Corp.*, 452 Md. 48, 67 (2017) (emphasis in original); *Suburban Hospital, Inc. v. Kirson*, 362 Md. 140, 156 (2000) (holding that "separate document" requirement may be waived). Thus, where there is a written opinion explaining the circuit court's decision, the clerk enters judgment on the docket, and no party objects to the absence of a separate document, the "separate document" requirement was held to have been waived. *URS Corp. v. Fort Meyers*

[5] The Rule also requires that the separate document " . . . include a statement of an allowance of costs as determined in conformance with Rule 2-603." The failure to include a statement of costs does not, however, preclude the judgment from constituting a final, appealable judgment. *Mattison v. Gelber*, 202 Md. App. 44, 58 (2011).

Construction Corp., 452 Md. at 70 (discussing *Suburban Hospital, Inc. v. Kirson*, 362 Md. at 151-157). On the other hand, the "separate document" requirement was held not to be waived where a judgment reflected a jury's verdict against one defendant but omitted its verdict as to the others. *Id.* at 68-69 (discussing *Taha v. Southern Management Corp*., 367 Md. 564, 570-71 (2002)). Even though other portions of the trial record suggested what the jury's verdict had been, the Supreme Court of Maryland found no waiver because there was no separate document and no docket entries reflecting the omitted verdict. *Id.*

A Memorandum Opinion that denies (or sustains) exceptions, even if that Memorandum is docketed, as it was here, is not a substitute for a judgment or Order. *O'Brien v. O'Brien*, 367 Md. 547, 554 (2002). In *O'Brien v. O'Brien*, following defendant's exceptions to the report and recommendations of a magistrate, the circuit court entered an order " . . . declaring 'that the exceptions filed by [defendant] are hereby sustained, without prejudice.' " *Id.* at 553. But, " . . . no order denying or dismissing [plaintiff's] motion for relief—[was] ever . . . filed." *Id.*

Concluding that defendant's appeal was premature, the Supreme Court explained that in order to terminate a case after sustaining or overruling exceptions, the circuit court must enter an order "*consistent with that ruling*." *O'Brien v. O'Brien*, 367 Md. at 555 (emphasis in original). The Supreme Court explained:

> Upon consideration of an exception, the court normally will come to one of three conclusions—that the exception has no substantive merit and that

> the court should act in conformance with the master's recommendation, that the exception has some substantive merit and that the court should therefore reject the recommendation, in whole or in part, and make a different ruling, or that there is or may be merit to the exception but that some further proceeding is required before a final ruling is appropriate. In either of the first two situations, the court must do two things in order to terminate the matter. It must rule upon the exceptions, either by sustaining or overruling them, *and it must then enter an appropriate order consistent with that ruling.* In this instance, where the court sustained the exceptions, the next required, and final, step would have been an order denying [plaintiff's] motion for relief. That would have terminated the case.
>
> Merely sustaining, or overruling, exceptions [to the magistrate's report and recommendations] does not end the case in the Circuit Court, and it therefore does not constitute a judgment, even if the parties and the court believe that, for practical purposes, the case is over. It is not over until a judgment, entered in conformance with Rule 2-601, is signed and entered on the docket.

O'Brien v. O'Brien, 367 Md. at 555-556 (emphasis in original).

Here, because there was no separate document or docket entry ruling on Father's Amended Petition, we must conclude that Father's appeal is premature. Having heard and denied the parties' exceptions, the circuit court never decreed a custody-and-access arrangement to reflect the material change in circumstances it apparently found. Although the circuit court may have intended to adopt the new arrangement reflected in the magistrate's proposed orders, it never issued an order doing so.

Nor can we conclude that the docket entry—"ORDER to be granted"—is sufficient. This docket entry only indicates an intent to enter judgment at some point, not the actual entering of judgment. More important, because the circuit court had not

decided the parties' exceptions at the time this entry was made, this entry cannot be read as entering judgment. Indeed, the circuit court had not yet decided what judgment to enter. That neither party has objected to the lack of a separate document entering judgment or an accompanying docket entry entering judgment and may have believed that the case was over "for practical purposes," *O'Brien v. O'Brien,* 367 at 556, does not cure this problem.

Dismissing this appeal will return the case to the circuit court. The circuit court may (or may not) reconsider its Memorandum Opinion. Given the lapse of time since the parties were last before it, the circuit court may (or may not) take additional evidence. If the circuit court sees fit, it may (but need not) remand the matter to the magistrate to take additional evidence. Regardless, before either party notes an appeal, the circuit court should enter an Order ruling on all claims in Father's Amended Petition.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.