

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1707

September Term, 2014

JENNIFER N. CUNNINGHAM

v.

RONALD J. SWINDER

Woodward,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: November 18, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant, Jennifer Cunningham ("Mother"), and the appellee, Ronald Swinder ("Father"), are the biological parents of two minor daughters: 1) Emma Swinder, born on April 6, 2006; and 2) Bella Swinder, born on August 18, 2010. It is unnecessary to detail the long and tedious custody battle between the Mother and the Father that began when the Mother, with both children, on August 23, 2010, walked out of the home she had been sharing with the Father and the children at a time when the younger child was five days old.

It is enough to note that the Father on June 14, 2013, filed in the Circuit Court for Baltimore City his Complaint to Modify Custody in which he sought sole legal custody and primary physical custody of both daughters. Judge Julie Rubin presided over a two-day hearing on the merits that began on August 11, 2014, and concluded on August 12, 2014. On September 12, 2014, Judge Rubin read from the bench an Opinion and Order announcing her rulings in the case. She, as requested, awarded sole legal custody and primary physical custody to the Father. She also ordered that the Mother would have supervised visitation privileges to be administered through the court. She finally ordered the Mother to make child support payments to the Father, imputing income to her for purposes of calculating the amount of child support.

Although the Mother on this appeal brings before us a wide-ranging jeremiad of allegations and complaints, the actual appellate contentions are reduced to three. She contends:

1. That Judge Rubin erroneously made her rulings on custody on the basis of legally insufficient evidentiary support;

2. That Judge Rubin erroneously accepted Nicole Montez, an investigator with the Department of Social Services, as an expert witness; and
3. That Judge Rubin erroneously imputed income to the Mother in ordering her to pay child support.

The Basic Custody Ruling In Favor of The Father

On September 12, 2014, Judge Rubin read from the bench a complete and thoroughly written opinion summarizing in meticulous detail the evidence on which she based her rulings. That opinion, as recorded in the transcript of the case, covers 75 pages and took an hour and thirty-seven minutes to deliver. Every bit of testimony was thoroughly analyzed and evaluated and there is no way in which we could conclude that awarding full legal custody and primary physical custody to the Father was not in the best interest of the two children.

Judge Rubin thoroughly considered each of the factors listed in Montgomery County Dept. Of Social Services v. Sanders, 38 Md. App. 406, 420-25 (1978). With respect to the psychological fitness of the Mother and the Father, Judge Rubin found:

"As I explained earlier, I have serious doubts and reservations regarding Ms. Cunningham's psychological fitness, both as a legal custodian and a physical custodian. I will address these concerns more momentarily. I harbor no such concerns with regard to Mr. Swinder, and I find that he is psychologically fit, both with respect to his competence as a legal custodian and a physical custodian. As to the parties' respective psycho – psychical home settings, I find that Mr. Swinder's home offers a physically suitable environment and that he competently completes fundamental tasks

underpinning the girls' day-to-day lives, including meals, appropriate discipline, playtime and activities and offering a safe place to call home."

(Emphasis supplied).

With respect to an occasion when the Mother simply walked out on her children and went to live in Salisbury for ten months, Judge Rubin described that incident:

"As to the period of time that Ms. Cunningham was in Salisbury, I find that during this period Ms. Cunningham voluntarily abandoned her children with no explanation whatsoever. This no doubt was traumatic to the girls and detrimental to their best interests insofar as the bond between a mother and each of her very young children suffers mightily as a result of such long-term inexplicable, indeed callous, absence.

"Also during this period I find that Mr. Swinder attempted to maintain contact between his children and their mother to no avail, due to Ms. Cunningham's failure to contact him, failure to maintain a working telephone or at least to provide Mr. Swinder her contact information, and failure to avail herself of meeting her children through Ms. Ferrari, opportunities which Mr. Swinder arranged with the cooperation of Ms. Ferrari."

(Emphasis supplied).

Even before granting the Mother supervised visitation privileges, Judge Rubin wanted her to be evaluated:

"I am referring Ms. Cunningham to the court medical services division of the court for mental health evaluation. Pending the conclusion of that evaluation and report to the court, Ms. Cunningham shall be provided supervised visitation with the minor children through the court's supervised visitation center."

(Emphasis supplied).

With respect to the Mother's unexplained move to Salisbury without the children, Judge Rubin described the Mother's testimony:

"Further, the Court notes that Ms. Cunningham testified on direct that she moved to Salisbury in July 2012, but letters from Essex Elementary dated April and May 2012 in Plaintiff's Exhibit 7 indicate she had already moved. Ms. Cunningham had no explanation for these discrepancies. Further, her testimony that she signed the IEP and that Mr. Swinder did not is proven untrue by Plaintiff's Exhibit 12.

"Ms. Cunningham admitted that she lived in Salisbury for 16 to 18 months and then moved in with her mother, Stephanie Ferrari, at Ridgemire in November 2013. She testified that when she returned from Salisbury in November 2013, Bella was at that time three years, fourth months old and had been gone for 18 months of her life. By my calculation the last time she'd visited with Bella then, Bella was 22 months old, not quite two. All told, Ms. Cunningham was gone for 45 percent of Bella's young life.

"Ms. Cunningham claims she video chatted with the children in the thirty-day period before returning to Baltimore, but otherwise states that she did not have personal face to face contact with the children for the entire time she was in Salisbury. Ms. Cunningham never provided any credible explanation or any explanation for her election to move away from her children."

(Emphasis supplied).

Judge Rubin also significantly contrasted the character of the Father vis-à-vis that of the Mother:

"As to the parties' respective character and reputation, there is no evidence as to reputation in the community regarding either party. I find that Mr. Swinder is of good character. And for the reasons I stated earlier I find that Ms. Cunningham's conduct demonstrates that where her interests and wishes are at stake she has shown herself to be capable of and willing to engage in selfish and dishonest acts, no matter the effect those acts have on others.

"For these reasons, Ms. Cunningham's character is severely damaged in the eyes of this Court."

(Emphasis supplied).

The older daughter, Emma, was having trouble in school, which Judge Rubin attributed to the Mother's having removed her from school for a period of two months.

"Until Ms. Cunningham removed Emma from school, the evidence is and Mr. Swinder testified Emma was on track in the first grade, doing well, but due to her nearly two-month absence at the hands of Ms. Cunningham she failed first grade and will have to repeat it. As a result of the gap in her schooling this past year as well as Ms. Cunningham's failure to execute all necessary documentation, the IEP recommendations of speech therapy and other remedial and therapeutic measures were unable to be implemented or completed.

"In my view, this turn of events for Emma represents a significant failure to honor Emma's best interests with respect to her education, developmental achievement and placement in a class of students in which she will thrive and feel a sense of belonging and normalcy.

"In my opinion, this has been taken from her a result of Ms. Cunningham's unilateral removal of Emma from school."

(Emphasis supplied).

The absolute gravamen of the Mother's claim that Judge Rubin did not have an adequate evidentiary basis for her findings is her specific charge that Judge Rubin was in error, as a matter of law, when she discredited the Mother's allegations that the two girls had been sexually abused by their paternal grandmother, the Father's mother. Judge Rubin did, indeed, find and rule that the charges against the grandmother were, from start to finish, a deliberate and unconscionable fabrication.

"I have grave concerns regarding the psychological fitness of Ms. Cunningham as a person to parent and rear her children. I find that Ms. Cunningham has a long and very troubling history of swearing out false applications for restraining orders against Ronald Swinder and against Mary Swinder. Likewise, I find that Ms. Cunningham has a history of making false CPS reports, alleging that Ms. Swinder has sexually abused one or both of the girls and that Ronald Swinder has neglected them by allowing it to happen.

"I further find that Ms. Cunningham's testimony regarding Emma's inserting her tongue into her mouth and reaching for her breast to lack credibility, against the backdrop of what I find to be false assertions of sex abuse and related neglect. In other words, I do not believe Ms. Cunningham or find her credible in her statements that Emma has exhibited sexual conduct toward her. Nor do I find that such assertions lead to a conclusion that Emma has been abused by Plaintiff or his mother."

(Emphasis supplied).

Judge Rubin described the Mother's attack as "an abhorrent and unrelenting practice on [the Mother's] part aimed at destroying [the Father] as well as his mother." The legal thrust of the Mother's argument is that the Mother's expert witness, Ms. Stephanie Reep, a therapist, believed that such abuse had occurred and that, "without any expert testimony to directly contradict" Ms. Reep, the failure to believe Ms. Reep "was not supported by substantial evidence." This argument is based on a misconception so fallacious as to be self-evident. Judge Rubin was the factfinder in this case. It is always the unfettered prerogative of the factfinder to assess credibility and no appellate tribunal can ever overrule that. Judge Rubin enjoyed the unreviewable entitlement utterly to disbelieve Ms. Reep, and Judge Rubin did just that:

"Ms. Reep's refusal to accept an appointment from Mr. Swinder made by his attorney against the backdrop of the accusations he was facing was in the view of the Court lacking in professionalism and independence and suggestive of an allegiance to, if not an effort to aid, one party, Ms. Cunningham, to the detriment of the other, Mr. Swinder.

"In addition, the Court observed Ms. Reep's demeanor closely as I observe all witnesses and I found her attitude toward questioning that challenged her opinions to be defensive and at times infused with incredulity verging on sarcasm. The Court notes that Ms. Cunningham's counsel disclosed to the Court on April 30, making several mentions in fact, that Ms. Reep is a personal friend of hers and while I stopped short of finding true bias, the Court would have found it rather helpful to know whether this friendship predated a colleague relationship or generally the extent of the friendship. I will say that my evaluation of Ms. Reep was that while – is that while she's certainly qualified on paper to render an expert opinion in the subject area on which the Court accepted her as an expert, I find that she lacked the hallmarks of a professional and independent expert, and for these reasons and the others I have stated, I did not find her testimony persuasive on the issue of whether Emma and or Bella have or has been victimized by abuse or neglect at the hands of either Mr. Swinder or Ms. Swinder."

(Emphasis supplied).

Even if we wished to do so (we do not), we would not be empowered to second-guess the factfinder's disinclination to be persuaded by the witness.

Nicole Montez As An Expert Witness

The Mother's complaint about Nicole Montez as a witness is so diffuse and so ambiguous that we will make every effort to pin it down to precisely what is alleged by the Mother's contention. The contention is:

THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY ACCEPTING NICOLE MONTEZ AS AN EXPERT WITNESS.

Among the charges, ultimately unfounded, that the Mother brought against the Father were that the children, while in the Father's custody, were subjected to sexual child abuse (inappropriate sexual touching) at the hands of the Father's mother (the paternal grandmother) and that the Father himself was negligent for not preventing the abuse. At the Father's specific request, the Department of Social Services conducted an investigation into the charges. The lead investigator was Nicole Montez. Judge Rubin ultimately found Ms. Montez's testimony about the course of the investigation and the outcome of the investigation to be extremely helpful.

"Ms. Montez testified based on her personal knowledge of the reports as an assigned investigator and also as an expert witness in the identification and investigation of child sex abuse. Ms. Montez testified that all reports regarding the minor children resulted in one of two outcomes: either DSS ruled out abuse and neglect or the Department determined that an investigation was not warranted, due to the fact that the same alleged abuse or neglect had previously been investigated or was already being investigated by DSS.

"Ms. Montez confirmed that a determination by DSS that abuse and neglect are 'ruled out' is the highest form of exoneration from DSS."

At the end of Ms. Montez's extensive testimony, Judge Rubin noted:

"The Court found Ms. Montez as a witness to be tremendously informative, helpful, clear, appropriately disinterested and independent and professional."

At the very outset of Ms. Montez's testimony, the Father requested that she be received as an expert witness. On direct examination, Ms. Montez recited her educational and professional experience.

- "a. She works for the Dept. of Social Services in the Sex Abuse Unit;
- "b. She is [a] graduate of the John Jay College of Criminal Justice;
- "c. She has a BS in Forensic Psychology;
- "d. She holds a certificate and training for forensic interviews in the City of Baltimore, which requires her to do twenty (20) continuing education units (hours) for training in the Department of Social Services to be completed every year.
- "e. She worked for the DSS Sexual Abuse Unit for eight (8) years and in that time worked on approximately 60-75 cases a year – all involving children."

When offered an opportunity to cross-examine Ms. Montez about her qualifications, counsel for the Mother declined to do so:

"THE COURT: Well, would you like an opportunity to voir dire the witness if that's the basis of your objection?"

"[COUNSEL FOR MOTHER]: It's not that I doubt the qualifications."

In all of Ms. Montez's testimony, what the Mother was really objecting to was not the expertise of Ms. Montez. She was objecting to revealing the result of the child abuse investigation, which vindicated the Father with its verdict of "ruled out." The Mother wanted to conceal that verdict under a cloak of confidentiality. That objection, right or wrong, goes to the substance of the inquiry and not to the expert status of the witness. In that capacity, it is not properly before us.

The stark reality is that full 99%, if not 100% of Ms. Montez's testimony was in effect the testimony of a fact witness. She testified as to what she actually saw and what she actually heard as she visited the respective homes and interviewed everyone connected with the case. In going over her extensive testimony, we have found no occasion where she was

asked to render an expert opinion based upon her factual observations. Even if, arguendo, one is erroneously qualified as an expert witness, it does not matter until the "expert" actually renders an expert opinion. In any event, we see no error.

Assessing Reasonable Child Support

With the Father having primary physical custody of the two children, it was appropriate for Judge Rubin to determine whether the Mother was able to pay some child support and if so, how much. If the Mother was in a state of voluntary impoverishment, it was appropriate to impute a reasonable income to her. As this Court pointed out in Lorincz v. Lorincz, 183 Md. App. 312, 330, 331 (2008):

"[A] parent's 'potential income' may be used to calculate the amount of the child support obligation if the parent is 'voluntarily impoverished.' A parent's potential income is defined as income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.

...

"[F]or purposes of the child support guidelines, a parent shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources."

(Quotations and citations omitted).

In determining voluntary impoverishment, moreover, the court must consider the list of ten factors spelled out in John O. v. Jane O., 90 Md. App. 406, 422 (1992). Judge Rubin made very specific findings of fact as she imputed a reasonable income to the Mother.

"I am imputing to Ms. Cunningham the ability to earn minimum wage at employment of 35 hours a week based on her work history at Kohl's as a point of sale employee from June 2011 to November 2013 at a minimum wage for 18 to 35 hours per week. There is no evidence in the record to suggest that Ms. Cunningham is not capable of seeking and obtaining work.

"Despite testimony of various possible diagnoses and conditions, Ms. Cunningham submitted no evidence whatsoever of any physical or mental health condition or disability that would impair or does impair her ability to seek and obtain gainful employment. Moreover, Ms. Cunningham has gone on record that she wishes to home school her children ages eight and four. In my view, if Ms. Cunningham alleges she has the physical and mental stamina and ability to home school two young, active girls, she is able to find work for wages to contribute to the support of her minor children. Based on the evidence and support – and pursuant to the Maryland child support guidelines, the Court will award child support in the amount of \$325 per month, the first payment of which is due October 1, 2014. Payments shall be made through the Baltimore City Office of Child Support Enforcement."

We see nothing clearly erroneous in these findings and we see no error in the award of child support.

**JUDGMENT AFFIRMED; COSTS
TO BE PAID BY APPELLANT.**