UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2300

September Term, 2015

FOSTER DALE WETTLAUFER

v.

ALLISON BRILL WETTLAUFER

Wright,
Nazarian,
Serrette, Cathy H.
(Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: July 28, 2016

This appeal arises out of the Circuit Court for Baltimore City's grant of the appellee's Motion to Dismiss Appellant's Complaint to Modify Visitation ("Motion to Dismiss"), filed on April 22, 2015. The appellant in this matter, Foster Dale Wettlaufer ("Wettlaufer"), is the ex-husband of the appellee, Allison Brill Wettlaufer ("Brill"). Wettlaufer and Brill were awarded a Judgment of Absolute Divorce on March, 15, 2013. In their Marital Settlement Agreement ("Agreement"), Wettlaufer and Brill determined the specific custody and visitation terms for their mutual child ("the child").

On September 27, 2013, Wettlaufer filed a *pro se* Motion to Modify Visitation in the circuit court. Wettlaufer voluntarily dismissed this action, without prejudice on the record, at a scheduling conference on May 6, 2014. On April 22, 2015, Wettlaufer filed a Complaint to Modify Visitation ("Complaint"). On June 16, 2015, Brill filed the Motion to Dismiss, for failure to state a claim upon which relief may be granted, and a Motion to Request a Hearing. On June 30, 2015, Wettlaufer filed a Response in Opposition to Appellee's Motion to Dismiss. On July 13, 2015, the circuit court issued an order scheduling a hearing for November 17, 2015. Following that hearing, the circuit court granted the Motion to Dismiss, and Wettlaufer subsequently appealed. On appeal, we consider the following questions:

> 1. Did the circuit court err when it granted the Motion to Dismiss for failure to state a claim upon which relief may be granted?
>
> 2. Did the circuit court consider and rely upon material outside of the Complaint when it considered whether to grant the Motion to Dismiss?

For the following reasons, we hold that the circuit court erred when it granted the Motion to Dismiss. Therefore, we reverse the judgment of the circuit court and remand for further proceedings consistent with this opinion.

FACTS

Wettlaufer and Brill were married on August 20, 2005, and had a daughter in April 2009. In December 2011, Wettlaufer experienced extreme depression, thoughts of suicide, and voluntarily sought treatment at Sheppard Pratt. At first, Wettlaufer received inpatient treatment and, after some time, he transitioned to intensive outpatient. Now, Wettlaufer has periodic appointments on an as-needed basis. This incident caused irreparable harm to his marriage with Brill, and they separated in December 2011. Once Wettlaufer began to work again, he held four different jobs within three years. Wettlaufer moved several times until he permanently relocated to Madison, Wisconsin, where he has lived since July 2012.

Wettlaufer and Brill were awarded a Judgment of Absolute Divorce on March 15, 2013, and, on that same date, signed the Agreement which was incorporated into the judgment of divorce on June 28, 2015. The Agreement awarded Brill sole legal and physical custody of the child and provided terms of visitation for Wettlaufer. The visitation terms provided that Wettlaufer had the right to supervised access with the child in Maryland. Wettlaufer and Brill must agree upon the supervisor, time, and location of the visits, two weeks prior to each visit. In addition to the in-person visits, Wettlaufer is allowed "reasonable, liberal, and regular" phone or Skype calls with the child.

Wettlaufer filed a *pro se* Motion to Modify Visitation on September 27, 2013, which he voluntarily dismissed without prejudice on the record at a scheduling conference on May 6, 2014. Wettlaufer later filed the Complaint on April 22, 2015. In the Complaint, Wettlaufer pleaded that since the Agreement, several circumstances had changed that could affect the standing visitation provisions. First, at the time of the Agreement, Wettlaufer conceded that he had not yet achieved personal or career stability and perhaps this restrictive provision was appropriate. Now, Wettlaufer pleaded that he has stability in his life and career and is ready to take on more responsibility with the child. Furthermore, he pleaded that the supervision is no longer necessary, emphasizing that the child is uncomfortable with the presence of supervisors. Second, Wettlaufer alleged that when he began to make more efforts to engage with his child, animosity developed between him and Brill. This ill will resulted in retaliatory actions by Brill, where she began to stand in the way of communication between Wettlaufer and the child. Third, Wettlaufer pleaded that the child does not understand his role in her life, and confuses him with her stepfather. The child has stopped calling him "dad" and refers to him as "Dale." Finally, Wettlaufer pleaded that he would like the child to know his parents, who are elderly and in poor health.

In his Complaint, Wettlaufer requested numerous modifications to the Agreement. He requested a regular phone and Skype schedule, unsupervised visitations, overnight visits once a month over the weekend, a two-week visit during summer vacation, and divided holidays. Wettlaufer also offered to have a psychological re-evaluation to prove

that he is ready to undertake this responsibility, if the circuit court should find it necessary.

On June 16, 2015, Brill filed the Motion to Dismiss on the grounds that Wettlaufer failed to state a claim upon which relief may be granted and filed a Motion to Request for a Hearing. On June 30, 2015, Wettlaufer filed a Response in Opposition to Appellee's Motion to Dismiss. On July 13, 2015, the circuit court issued an order that there would be a hearing on November 17, 2015. At the November 17, 2015 hearing, Wettlaufer argued that Brill submitted several facts that were not contained in the Complaint, as the parties had yet to engage in discovery. Wettlaufer opposed the introduction of these facts in the proceeding. At the close of the motions hearing, the circuit court granted the Motion to Dismiss. The court held that "there is no material change in circumstance" and that "the tone of [Wettlaufer's] complaint is one that gives the Court the impression that he is not satisfied with the deal that he struck." Wettlaufer subsequently appealed.

DISCUSSION

I. The circuit court erred when it granted the Motion to Dismiss.

i. The applicable standard of review of a motion to dismiss is *de novo*.

The circuit court granted the Motion to Dismiss pursuant to Md. Rule 2-322(b)(2), which states that the court may grant a motion to dismiss on the grounds of the complainant's "failure to state a claim upon which relief can be granted." A motion to dismiss for failure to state a claim "tests the sufficiency of the pleadings." *Ricketts v. Ricketts*, 393 Md. 479, 491 (2006) (quoting *Afamefune ex rel. Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 683 n.4 (2005)). "The grant of a motion to dismiss is proper if

the complainant does not disclose, on its face, a legally sufficient cause of action." *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 785 (1992) (citation omitted). The facts the trial court may consider are limited to "the four corners of the complaint and its incorporated supporting exhibits, if any." *D'Aoust v. Diamond*, 424 Md. 549, 572 (2012) (quoting *Converge Servs. Grp. LLC v. Curran*, 383 Md. 462, 475 (2004)).

"We review the grant of a motion to dismiss *de novo*." *Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin.*, 388 Md. 500, 509 (2005) (citation omitted). Upon review of a grant of a motion to dismiss, we must "assume the truth of the well-pleaded facts and all inferences that can be reasonably drawn from them." *Rossaki v. NUS Corp.*, 116 Md. App. 11, 18 (1997) (citation omitted). We must "determine whether the trial court was legally correct, examining solely the sufficiency of the pleading." *Ricketts*, 393 Md. at 492 (quoting *Benson v. State*, 389 Md. 615, 626 (2005)).

ii. The circuit court was legally incorrect when it found that the complaint failed to state a claim upon which relief could be granted.

Brill argued in the Motion to Dismiss that because Wettlaufer was stable at the time of the Agreement, there was no material change sufficient to constitute a modification in the visitation provisions of the Agreement. We hold that it was legally incorrect for the circuit court to grant the Motion to Dismiss.

When deciding whether a modification of a custody agreement is permissible, the courts traditionally employs a two-step analysis. *See, e.g., McMahon v. Piazze*, 162 Md. App. 588, 593-94 (2005). "First, the court must assess whether there has been a

'material' change in circumstances." *Id.* at 594 (citation omitted). "If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody." *Id.* (citations omitted). The court requires a material change to have occurred to preserve the principles of *res judicata*. *Id*. at 596. "Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child." *McCready v. McCready*, 323 Md. 476, 482 (1991). "A change in circumstances is 'material' only when it affects the welfare of the child." *McMahon*, 162 Md. App. at 594 (citation omitted). The burden is on the moving party to show that a material change has occurred sufficient to warrant a modification of a custody agreement. *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008).

Gillespie v. Gillespie, 206 Md. App. 146 (2012), is instructive on how a change in mental health can constitute a sufficient material change to warrant a modification of a custody agreement. In *Gillespie*, the mother argued that because her mental illness was present during the entire course of her marriage, her deteriorating mental health after the divorce was not a material change sufficient to modify a custody agreement. *Id*. at 172. The circuit court held that the "worsening of her symptoms was a material change," and we affirmed. *Id*.

Conversely, if the worsening of symptoms over time can constitute a material change, then an improvement of mental health over time can also constitute a material change. Brill asserted that because in the complaint filed by Wettlaufer he pleaded that he was stable at the time of the agreement, no change could not be a material change after

development at trial. That may well be true, but at minimum, he had only been stable for less than one year. With only several months of stability accounted for at the time of the Agreement, Wettlaufer could not have known that his mental health episode may well have been a singular incident. Now, over three years later, Wettlaufer can more confidently allege and support with evidence that his past episode was isolated, rather than chronic, or, in fact, would worsen. Assuming the well-pleaded facts to be true, that Wettlaufer had in fact achieved life and career stability, a court could find that a material change has occurred. Brill, in response, fails to assert by way of a coherent argument of how long we must wait for a party to be stable in order for a change to have occurred. Under Brill's reasoning, Wettlaufer can continue his stability for the entire minority of the child yet never have the opportunity to see his daughter unsupervised.

II. The circuit court did not consider or rely upon material outside of the Complaint.

On June 16, 2015, Brill filed a Motion to Dismiss on the grounds that Wettlaufer failed to state a claim upon which relief may be granted and filed a Motion to Request for a Hearing. On June 30, 2015, Wettlaufer filed a Response in Opposition to Appellee's Motion to Dismiss. On July 13, 2015, the circuit court issued an order that there would be a hearing on November 17, 2015. At the November 17, 2015 hearing, Wettlaufer alleged that Brill submitted several facts that were not contained in the Complaint, as the parties had yet to engage in discovery. Wettlaufer opposed the introduction of these facts in the proceeding. We hold that the circuit court did not rely on facts outside of the complaint when considering whether to grant the motion to dismiss.

As previously stated, when considering a motion to dismiss, the facts the trial court may consider are limited to "the four corners of the complaint and its incorporated supporting exhibits, if any." *D'Aoust*, 424 Md. at 572 (quoting *Converge Servs. Grp. LLC*, 383 Md. at 475). If the trial court departs from this limitation and considers facts outside of the four corners of the complaint and incorporated supporting exhibits, the trial court "must treat (and is presumed to have treated) the [Md.] Rule 2-322(b) motion as a motion for summary judgment under Md. Rule 2-501." *Converge Servs. Grp. LLC*, 383 Md. at 475-76 (citation omitted).

At oral argument in this case, counsel for Wettlaufer conceded that everything that the circuit court considered was pleaded in or attached to the Complaint. Thus, we conclude that the circuit court did not consider or rely upon material outside of the Complaint when determining whether to dismiss it. The court's grant of the Motion to Dismiss, however, was legally incorrect, and we reverse the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.