Circuit Court for Montgomery County
Case No. 128602FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0121

September Term, 2021

M.H.

v.

L.P.

Fader, C.J.
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: December 8, 2021

This appeal arises from the dismissal by the Circuit Court for Montgomery County of an Amended Motion to Modify Custody and Visitation or for Access to Minor Child (the Amended Motion) filed by M.H. (Father). Based on intervening hearings and previous court orders, the circuit court determined that the Motion was moot because the only relief requested was for a "review and/or a status hearing on the issues of custody, visitation, and access to the minor child." Father challenges that decision and the award of attorney's fees to L.P. (Mother) for the costs incurred in deposing Father's mother.

On appeal, Father asks two questions[1] that we have consolidated and reworded into one:

> Did the circuit court's mootness determination and its award of attorney's fees and costs constitute appealable final judgments?

For the reasons explained below, we hold that neither the mootness ruling nor the award of attorney's fees and costs were appealable final judgments and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND[2]

[1] Father's questions presented are: "I. Did the circuit court commit error when it determined that the appellant's request for a review hearing was moot? II. Did the circuit court commit error when it awarded costs and attorney's fees for the claimed discovery failure?

[2] The procedural background in this case (over 200 docket entries) involves different motions and related hearings traveling on different procedural tracks with different judges (by quick count, fourteen) and magistrates along the way. This, it seems, has contributed to what one judge referred to as "some confusion," and caused another judge to state that everyone, including the judge, was "under an incorrect assumption" as to what was actually at issue in the hearing before the court.

Mother and Father are the parents of E. On March 9, 2016, they entered into a consent custody order. That order provided Mother with sole physical and legal custody of E, and continued an existing visitation schedule[3] for "six months and until a review/status hearing to follow upon request of either party." It further provided Father with certain telephone visitation rights but, except to contact Mother about E.'s wellbeing or medical, educational, athletic, or recreational events, Father was not to contact Mother. In addition, and prior to and until the "status/review hearing to be set by this court within six (6) months or by further order of this court," the consent order required Father's compliance with the following conditions:

> (a) provide documentation to [Mother's] counsel of clean drug screens each month, said documentation may also be provided by a rehabilitation program; (b) maintain sobriety and attend Alcoholics Anonymous meetings and provide proof of attendance to [Mother's] counsel each month; (c) comply with all prescribed medication and have a treating physician provide a monthly report to [Mother's] counsel evidencing [Father's] compliance; (d) enter and continue a therapy program with concentration towards alcohol and mental health and will address, if indicated, anger management and substance abuse issues, and provide monthly proof of attendance and compliance to [Mother's] counsel. [Father] shall follow all recommendations of the therapist; (e) provide HIPAA waiver[s] to each physician, therapist, or other healthcare provider to allow the provider to supply such reports as are defined in this order requiring a release to comply with the conditions set forth in above clauses a, b, c, d and f as necessary; (f) provide a list of all medical and therapeutic providers to [Mother's] counsel for the purposes of coordinating treatment for [Father]; and (g) provide a list of all employment applications and provide proof of employment and pay stubs to Mother's counsel for purposes of compliance and recalculation of child support.

[3] A prior pendente lite order granted Father's prior request for supervised access to E. through the court's supervised visitation program.

On September 20, 2019, Father, who was then self-represented, filed a Motion to Modify Custody and Visitation. In his prayer for relief he requested "sole physical and legal custody" of E. As to the changes in circumstances that warranted a change in custody, he stated that "[he had] changed in the past years and [was now] ready for joint physical and legal custody."

In response, Mother filed a motion to dismiss. And Father, having now retained counsel, moved to amend the September 20, 2019, motion. On November 6, 2019, the circuit court dismissed the initial motion without prejudice and allowed Father ten days to file an Amended Motion to Modify. With the assistance of counsel, Father filed the Amended Motion on November 13, 2019. The requested relief in the Amended Motion was "a review and/or a status hearing on the issues of custody, visitation, and access to the minor child."

On November 26, 2019, Mother served Father with interrogatories and document requests. Mother moved to dismiss the Amended Motion on December 3, 2019. On January 13, 2020, Mother served a second set of interrogatories and a request to produce documents.[4] A hearing for Mother's motion to dismiss was scheduled for February 7, 2020.

[4] Mother requested information and documents related to: any time since January 1, 2016, where emergency personnel were dispatched to Father's residence, including whether he was taken into custody or was hospitalized or voluntarily or involuntarily placed in a treatment facility; any time Father was hospitalized since January 1, 2016; the circumstances under which he obtained his medical marijuana card and a copy of the card;

Because Father had produced only interrogatory answers but nothing related to her document request, Mother moved to compel discovery and for immediate sanctions on January 17, 2020. The documents sought related to Father's compliance with the conditions imposed in the March 9, 2016, consent custody order. She again asked the court to dismiss the Amended Motion if Father failed to comply with the discovery requests.

At the February 7, 2020, hearing for Mother's motion to dismiss, Mother and Father entered into a second consent order allowing Father supervised visitation with E. through the court's Supervised Visitation Program for the next twenty-six weeks. A "Status/Review Hearing" was scheduled for August 28, 2020, to determine whether it would be in E.'s best interest to have the visits supervised under the court's program or by an independent third party.

Following the entry of the second consent order, Mother, on July 8, 2020, moved to reopen discovery because Father's "mental health and personal stability are at the heart of this case" and there is a "possibility that [Father's] access to the child [could] be

identifying the circumstances under which he's obtained marijuana; all medication he is prescribed and the circumstances under which he was prescribed the medication; the pharmacy where he has filled his prescriptions; the physicians or medical providers that have treated him; all treatment programs he has attended; the firearm Father keeps at his residence; monthly statements from his bank accounts or any other account in which he has money; his inability to work; copies of all telephone bills; any documents he intends to provide to the court in support of his claim that he should have unsupervised access; and his prior probation requirements and whether he has complied with them in three different cases.

expanded."[5] Father opposed reopening discovery. He argued that the information sought was not that important and that he was already obliged to supplement discovery responses, which he planned to do. The court denied the motion to reopen discovery on August 11, 2020.

On August 14, 2020, Mother filed a Motion to Compel Discovery and for Immediate Sanctions. She requested that Father cure deficiencies in the response to her first and second discovery requests. Also, because Father had represented that his mother was his legal guardian and that she was the only one who could get the requested information, Mother asked to depose his mother. Prior to ruling on that motion, the court held the scheduled review hearing on the second consent order on August 28, 2020. Following that hearing, the court, on September 3, 2020, permitted Father supervised access and visitation with a third party supervisor assigned by the court subject to the following conditions:

- Mother and Father are to contact the third party to set up an initial appointment;
- The visits can be supervised by the third party or any of its supervisors;
- Father is responsible for the supervised visitation fees;
- Father will have four hours to spend with E. every other weekend;
- Father shall have telephone access with E. on Mondays, Wednesday, and Thursdays for up to fifteen minutes;
- Father will have telephone access to E. on the Saturdays that he does not get to see E.; and

[5] In addition to general relief, Mother sought the reopening of discovery; keeping discovery open until the circuit court conducted a status/review hearing; and authorizing the judge presiding over the review hearing to extend discovery if the judge found good cause to do so.

- Father will comply with prescribed medications and continue participating in treatment.

The order of September 3, 2020, scheduled a review hearing for February 12, 2021, that was later rescheduled for March 1, 2021.

Father filed a motion to revise the September 3, 2020, order because it did not specify where the visits were to take place or who would choose the locations. The court, on October 28, 2020, revised its order to permit the parties to alternate who chooses the location for the visit, the selection being subject to the approval of the third-party supervisor. All of the other terms of the September 3, 2020, order remained in effect.

Mother's August 14, 2020, motion to compel discovery was granted in part on September 18, 2020. The court ordered Father to provide full and complete interrogatory answers and document requests within thirty days, and it extended discovery for a period of forty-five days for the limited purpose of taking Father's mother's deposition. On November 19, 2020, Mother filed a motion for sanctions alleging Father's failure to produce discovery in accordance with the September 18, 2020, order. In addition to attorney's fees, Mother sought to have Father's motions and pleadings stricken.

At the February 5, 2021 hearing on Mother's motion for sanctions and attorney's fees, Father's Amended Motion was discussed. The court, noting that its "prayers of relief are very simple," stated that Father had only requested a "review and, or a status hearing on the issues of custody, visitation, and access." The court explained its understanding that review or status hearings were not intended to be adversarial, but rather, to provide the

parties with an opportunity to "see if they can reach an agreement with the court."[6] The court pointed out that the August 2020 hearing was titled as a status hearing, but that hearing was "tied to the court's supervised visitation program" which "automatically sets up a status hearing."[7]

The court then expressed its concerns about the discovery failures in regard to Father's mental health. Viewing it to be "a central issue in the case," the court explained that Mother "ha[s] every right, even to go into a status hearing," to demand such information from Father because it would aid in reaching a consensual agreement at the status hearing. The order, entered on February 9, 2021, stated that Father's only request for relief in the Amended Motion was "for a non-adversarial Review/Status hearing," that had been scheduled for March 1, 2021. In regard to Mother's motion for sanctions and attorney's fees, the court granted Mother $3060.65 in attorney's fees and costs for Father's mother's deposition but denied all of Mother's other requests for relief.

On March 1, 2021, the parties appeared for the previously scheduled review hearing. At that hearing, the court explained that on August 28, 2020, the parties entered into a temporary consent order for supervised access, which fully addressed and settled the various motions for modification and the motion to dismiss or for summary judgment. It

[6] The court also stated that it did not know whether a status hearing on the March 9, 2016, custody order had been held.

[7] The court stated: "All right. The – I think everybody, the court included to an extent, has been proceeding under an incorrect assumption as to what is at issue here."

was the court's view that without "something put on the record," modification motions do not remain open for almost two years and that "the actual modification hearing that had been scheduled [was] off the docket and removed." As a result, what was "left now procedurally [was] just a review hearing in this case." Father's counsel explained that Father, viewing the previous consent orders to be temporary, was now "trying to achieve unsupervised visitation" with E., and that the August 28, 2020, order had reduced the conditions that were originally imposed in the March 2016 order "to just the condition that he continue his treatment." Pointing out that there were "no open motions for Father's amended motions for modification," and that the Amended Motion was now effectively moot, the court explained that it could only review how the private visitation supervision was going. But, in order "to change the current situation, a modification motion has to now be filed."

Prior to the entry of the circuit court's order on March 30, 2021, Father filed a notice of appeal on March 26, 2021, related to the March 1, 2021, hearing and "various interlocutory orders." In its order, the circuit court stated that [the Motion] (DN 159-60) [had been] rendered moot by the terms of the Temporary Consent Order [of February 21, 2020] (DN 185), the Order — Supervised Visitation [of September 3, 2020] (DN 204), and the [September 3, 2020] Order Revising Order for Supervised Visitation [of October 29, 2020] . . . (DN 212)," and that except for a review hearing, "no other action could occur. . ."

DISCUSSION

I. The Mootness Ruling

Contentions

Father contends that the circuit court erred when it held his Amended Motion had been rendered moot by the various intervening orders. He states that "[t]he parties understood that the review hearing" referred to in the March 9, 2016, order was to be in effect for "six (6) months and until a review/status hearing upon the request of either party," and that the Amended Motion was his request for the hearing referred to in that order. As he sees it, the requested hearing was to be adversarial and determine E.'s best interest. But, because there was still an "existing controversy between the parties for which the court could provide an effective remedy," he argues that the matter was not moot.

Mother contends that the circuit court did not err when it determined Father's Motion to be moot, and that Father "received the exact relief he asked for" at the March 1, 2021, review hearing.

Analysis

Before addressing these contentions we must first address whether the court's mootness ruling was a final judgment under Courts and Judicial Proceedings § 12-301 or is otherwise appealable under Courts and Judicial Proceedings § 12-303. Md. Code Ann., Cts. & Jud. Proc. §§ 12-301, 12-303. Section 12-301 states that "except as provided in 12-

303 of this subtitle, a party may appeal from a *final judgment* entered in a civil or criminal case by a circuit court." § 12-301 (emphasis added).

Maryland Rule 2-602 (a) explains that:

> Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action: (1) is not a final judgment; (2) does not terminate the action as to any of the claims or any of the parties; and (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

The March 31, 2021, determination that Father's November 13, 2019, Amended Motion had been rendered moot by intervening review hearings and the failure to request an adversarial merits hearing was not intended to be and was not a final adjudication of Father's claim for modification of the previous consent order. It did not terminate the action as to either of the parties. And all that is necessary for the case to proceed is a motion to modify that requests the proper relief. Therefore, we look to section 12-303 to see whether there is an exception to the final judgment rule that supports the appeal.

Section 12-303 allows the appeal of certain interlocutory orders entered by a circuit court in a civil case, including an appeal from an order "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order." § 12-303 (3)(x). But the March 31, 2021, ruling did not deprive Father of the care and custody of E. as provided for in the present custody and visitation order, or, in any

way, change the terms of that order. To be sure, Father titled the Motion as a Motion to Modify Custody and Visitation, but, as Mother and the circuit court correctly pointed out, the only relief requested was a review or status hearing of the March 9, 2016, consent order, which had been subsequently amended by consent in later review hearings prior to the March 2021 hearing. *See Frederick Cnty. Bd. Of Comm'rs v. Sautter*, 123 Md. App. 440, 453 (1998) (noting that "the titling of the motion does not determine whether the motion constitutes one for rehearing."); *Huntley v. Huntley*, 229 Md. App. 484, 490-91 (2016) (denying relief that was not actually requested in the filings); *Lasko v. Lasko*, 245 Md. App. 70, 74 (2020) (explaining that the requested relief at trial was denied because such relief was not requested in the appellant's filings).

II. The Award of Attorney's Fees

We review an award of attorney's fees for an abuse of discretion. *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 756 (2017). When the court considers applicable statutory or rule requirements and the circumstances of the case, "an award of attorney's fees will not be reversed 'unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong.'" *Henriquez v. Henriquez*, 185 Md. App. 465, 476 (2009).

Father contends that the medical records requested by Mother are protected by "Section 9-109 Courts and Judicial Proceedings Article, Annotated Code of Maryland," and that the circuit court erred and abused its discretion in awarding the attorney's fees for

the deposition of his mother if there was to be no evidence or testimony at the review hearing.

Mother responds that Section 9-109 does not prohibit disclosure in this case because Father's mental health has been central to the case since its inception and he expressly waived the privilege in the March 9, 2016, custody order. She argues that he is now asserting a change in his mental health in his Amended Motion to support modification of his current custody and visitation status, and that the information she was seeking is also clearly relevant and appropriate for her to have in preparation for a status and review hearing.

The February 9, 2021, order required Father to pay Mother $3,060.65 within sixty days, and if he does not pay it within sixty days, "then upon the filing of an Affidavit of Non-Payment by [Mother], judgment in favor of [Mother] against [Father] shall be entered in the amount unpaid." To our knowledge, that has not happened.

As we explained above, "a party can only appeal from a final judgment entered in a civil or criminal case by a circuit court." Md. Code Ann., Cts. & Jud. Proc. §§ 12-301. And like the mootness ruling, the award of fees and costs does not adjudicate all the claims in the action. As an exception to the final judgment rule, section 12-303(v) would allow an interlocutory appeal of an order "[f]or the sale, conveyance, or delivery of real or personal property *or the payment of money*, or the refusal to rescind or discharge such an order, unless the delivery or payment is directed to be made to a receiver appointed by the court."

(emphasis added). But an order to pay attorney's fees and costs as a discovery sanction would not qualify as an order for the payment of money under subsection (v).

As the Court of Appeals explained in *Simmons v. Perkins*, 302 Md. 232, 234 (1987): "The history of § 12-303 . . . indicates a legislative intent to allow interlocutory appeals only from those orders for the 'payment of money' which had traditionally been rendered in equity," such as "alimony, child support, and related counsel fees" in domestic relations litigation. *Id.* at 235. The Court held in *Simmons*, that an order to pay attorney's fees under former Rule 604(a) for filing a motion "without justification" is not an order for the payment of money under what was then Section 12-303(c)(5). The Court explained that the common thread in cases allowing interlocutory appeals is an order for "a specific sum of money," which "proceeds directly to the person" for which that person is "directly and personally answerable *to the court* in the event of noncompliance." *Id.* (quoting *Della Ratta v. Dixon*, 47 Md. App. 270, 285 (1980) (internal quotation marks omitted)).

We see no meaningful difference between the order to pay attorney's fees in *Simmons* and the order to pay attorney's fees as a sanction in this case. The order disposes of less than all of the claims before the court and does not satisfy the requirements of Rule 2-602(a). In short, the order to pay the attorney's fees and costs as a discovery sanction is not a final judgment.[8] Had it been, the appeal would not have been timely filed.

[8] Rule 2-602(b) provides for the appeal of a written order if the trial court expressly states there is no just reason for delay and directs the entry of a final judgment "(1) as to one or more but fewer than all of the claims or parties; or (2) pursuant to Rule 2-501(f)(3), for

Rule 8-202(a) requires notices of appeal to be filed within "30 days after entry of the judgment or order from which the appeal is taken." The attorney's fees order was entered on February 9, 2021, and the notice of appeal was filed on March 26, 2021. And in any event, as we will quickly explain, Father would not have prevailed on the merits.

As to Father's first contention that the requested information is privileged under § 9-109 and therefore is not discoverable, the patient-therapist privilege does not apply when "[t]he patient expressly consents to waive the privilege," or when "[t]he patient introduces his mental condition as an element of his claim or defense." Md. Cts. & Jud. Proc. § 9-109 (d)(3)(i), (d)(6). The last three conditions of the March 9, 2016, consent order required Father to:

> (e) provide HIPAA waiver[s] to each physician, therapist, or other healthcare provider to allow the provider to supply such reports as are defined in this order requiring a release to comply with the conditions set forth in above clauses a, b, c, d and f as necessary; (f) provide a list of all medical and therapeutic providers to [Mother's] counsel for the purposes of coordinating treatment for [Father]; and (g) provide a list of all employment applications and provide proof of employment and pay stubs to Mother's counsel for purposes of compliance and recalculation of child support.

And, insofar as the March 9, 2016, consent order conditions were changed in the September 3, 2020, order, Father is still required to comply with prescribed medications and continue participating in treatment.

---

some but less than all of the amount requested in a claim seeking monetary relief only." That was not done here.

By agreeing to provide waivers to all of the physicians and therapists treating Father and a list of all medical and therapeutic providers to Mother's counsel, Father effectively waived his patient-therapist privilege for the purposes of these proceedings. Moreover, Father has introduced his mental condition to support modification of the present custody and visitation order by expressly stating that his mental health had improved. In particular, he recounted all of the therapy that he had taken part in and the conditions he was required to meet, and stated that there had been "a positive change in circumstances as far as [his] progress in therapy, medication and life in general. . . . [A]nd [he] has made other significant progress toward his overall health and suitability as custodian of the minor child." According to Father, he has "made significant strides in treatment to hopefully make himself employable again in the future." The information is discoverable because Father has both waived and forfeited any privilege in this information for the purposes of these proceedings.

Father, in response to Mother's second motion to compel discovery, represented that he could not provide the requested information because his mother, who was his guardian, would have to request those documents. Based on that representation, Mother filed a motion requesting discovery to be reopened for the deposition of Father's mother. As it turned out, however, the guardianship was limited to receiving Father's social security benefits. Mother's counsel argued that Father "made a willful and knowing misrepresentation to the Court when he said I can't get it to you because my mom's my guardian."

At the February 5, 2021, hearing, prior to the award of attorney's fees award, the circuit court, noting the parties' ongoing discovery dispute, stated that it was "very concerned about the fact that [Father] . . . was ordered to provide [discovery responses] . . . and it doesn't look like he's done it." It further observed that "the mental health issues that [Father] has had to deal [with] [are] a central issue in this case." In the court's view, "[Mother had] every right, *even to go into a status hearing*, I think, and say hey, give us this information." (emphasis added).

Mother requested an award of $8,600. The court limited the award to $3,060.65. Considering all circumstances of this case, we are persuaded that the award of attorney's fees and costs incurred related to the deposition was legally correct and not an abuse of discretion.

APPELLANT'S APPEAL IS DISMISSED. COSTS TO BE PAID BY APPELLANT.