Circuit Court for Frederick County
Case No. 10-C-13-002794

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 175

September Term, 2018

SHELTON L. ALEXANDER

v.

TAMARA ALEXANDER

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: November 1, 2018

Shelton Alexander ("Father") and Tamara Alexander ("Mother") were married in 2004 and divorced in 2014. The Circuit Court for Frederick County awarded them joint physical and legal custody of their son, S, and we affirmed that decision.[1] Ever since, the parents have fought vigorously over the more granular terms of custody and their respective compliance with them. The history of these disputes is long and continuing, and indeed not even resolved: they are scheduled for a merits hearing on the latest round, begotten of cross-motions to modify, in December 2018. In the meantime, the court entered an order modifying custody *pendente lite*, and Father appeals from that decision and the court's denial of his motion to reconsider. We affirm.

I. BACKGROUND

Father and Mother were married in 2004, S was born in 2006, they separated in 2013, and divorced in 2014. The history of their divorce proceedings is captured well in our 2015 opinion, which, among other things, affirmed the circuit court's decision to award joint legal and physical custody and ordering Father to pay child support. *See* n.1. In the time since, the parents have battled constantly over custody. They already were litigating a motion to modify custody while the first appeal was pending, *see id*. at 15 n.7, and the circuit court docket sheet now runs for 48 pages.

The relevant history begins in September 2016, when the circuit court entered a consent order that resolved a flurry of disputes, including cross-petitions for modification of custody and child support and petitions for contempt. The consent order provided,

[1] *Alexander v. Alexander*, No. 2189, Sept. Term 2014 (July 16, 2015).

among other things, that the parties would share physical custody according to a detailed schedule; that Mother would have sole legal custody as to health care decisions (but would share information with Father), Father would have sole legal custody as to educational decisions, and the parties would have joint decision-making authority as to S's extra-curricular activities; that the parties would consult with a parenting coordinator to devise a new holiday schedule; that they would consult a special magistrate before instituting any "nonemergency litigation related to their minor child;" and that each would have rights of first refusal, under certain circumstances, to take S during the other's custody time. But the consent order bought barely two months of peace before Father filed a petition seeking to hold Mother in contempt, alleging that she had failed to comply with the joint decision-making provisions. Further litigation then ensued over these and other holiday custody disputes before a master and the circuit court.

On July 27, 2017, Father filed a Motion to Modify Custody and Access and to Modify Child Support. He contended that there had been a material change in circumstances because Mother "has continually operated in a fashion that ignores every aspect of the [consent] order," and that "[b]oth parties agree that the current schedule is not working for the parties or the minor child." Mother responded with a Counter-Motion for Modification of Custody, Access, and Child Support. She argued as well that circumstances had changed materially, in her view because Father "is not abiding by the [consent] order and is continuing to challenge decisions by the Parenting Coordinator and Magistrate," and she asked for sole legal custody, primary physical custody, and a number of other

conditions defining the parents' rights and obligations. She raised a number of other issues relating to the implementation of earlier orders as well.

After some procedural wrangling on these motions (and continuing litigation on other disputes), the court's administrative judge ordered a scheduling conference for December 11, 2017. That conference resulted in a scheduling order that set a three-day merits hearing on the cross-motions to modify for December 11, 2018 and, among the pre-trial deadlines before that hearing, a half-day pendente lite hearing for February 8, 2018.

Obviously, the merits hearing hasn't happened yet—it is the decisions from that pendente lite hearing, as well as the circuit court's denial of his motion to reconsider them, that Father appeals now. The pendente lite hearing took place as scheduled, and began with a discussion among the court and counsel and parties about what was before the court that day. There wasn't any doubt—the parties expected the court to determine the terms of custody and access for the period between then and the merits hearing:

> THE COURT: [to Father's counsel] All right. You filed the first motion. Do you wish to make an opening?
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> FATHER'S COUNSEL: I will. And I'll basically request how we proceed today. We both filed motions to modify custody. Magistrate Minner said I'm going to set this for a PL because I think the merits hearing is just so far out. So we want to clarify things in the meantime. And I said having a PL on a post judgment? And she said I know. I know. I just think you need it. I said oh. Okay.
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> THE COURT: There's not much you can do when she sets it is there?
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> FATHER'S COUNSEL: Right. So the way that my client would like to proceed is we understand that this is a PL.

> THE COURT: Correct.
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> FATHER'S COUNSEL: Sort of getting through to the merits hearing. Sort of putting some clarification and some band aids on whatever, you know, issues they may have until the merits hearing.
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> THE COURT: Can I correct one thought in the history of this case? It is my hope and I hope it is your hope that it actually will accomplish that. But I have a feeling given the history of this case that it won't because we'll have this PL hearing in February. They will have to have some hearing in June. We'll have to have some hearing in September. All before the December hearing because we thought we had put this to bed in September of 2016. And we didn't.

After taking testimony from both parties and hearing argument from counsel over the course of the morning, the court agreed with the parties that the status quo wasn't working, and that the circumstances had changed since the operative custody order was entered:

> The parties agree they can't communicate effectively. They don't have joint legal custody. One person has to make the calls. This split legal custody hasn't really worked out.
>
> That doesn't mean that if I award legal custody to one of you that you don't communicate with each other about this. But the idea that every time one of you takes him to a doctor you have to get medical records and provide them to the other and oh my gosh. The two of you have to be exhausted. Absolutely exhausted trying to live your lives this way. Well, I do believe there has been a change of circumstances. The parties agree things aren't working.
>
> The mechanisms that were placed into the court order to prevent the parties from coming back to court have not worked. Parenting coordination didn't work. The backup to that -- it didn't work because you didn't give them enough time to do it. The backup to that special magistrate. You know I'm not blaming either one of you but I'm blaming both of you for these things not working because you just should have hung with Dr.

Snyder and stuck it out and fought it out with her and you wouldn't have been here.

* * *

So what do I do? Do I put you back? One of the things Mr. Cohn said is to just leave the schedule the way it is and shore up some of the holes. And you know I'd really like to do that but we're ten months away from the merits hearing.

And I'm not convinced that that will work. So what I really have to look at is what gives the best chance for -- all of the factors in Montgomery County versus Sanders and Taylor and all that. Yeah. Whenever we start hearing a case -- I did family law as a lawyer for 35 years. Tried many cases. And so I start immediately thinking of all those issues and have in this case since early this morning. But the factor that has struck me the most during this is which party will give the other the best chance of having a -- will give the other of having a good relationship with little [S].

* * *

But the most important thing is to lead by example. And I think of the large percentage of the time you [Father] do. But it's the small percentage that I don't.

And I think it's the rigidity that gets in your way from making the kinds of decisions you need to make for your son. . . . I'm going to grant [Mother] the custody. But you have to treat it like it's joint. You've got to give him information and tell him what's going on. And you need to -- when he has family things and what have you offer them more time.

That's the only way that this is going to work because this is a two edged sword. This is a pendente lite hearing because if it doesn't work out this way you know who I'm going to be looking at to try it back the other way. It's going to be you because if it doesn't work out with her then I'm going to look to you to do it. Somebody is going to have to step up to the plate and make this work for [S]'s sake.

So on a pendente lite basis I'm going to rule that as far as custody and access as set forth in the order of September 9, 2016 is abrogated. I'm going to grant sole legal and physical custody to [Mother].

The court then set an interim access schedule, and later entered a written order—an initial version on March 19 and an amended (only for style and formatting) version on March 27, 2018—memorializing its findings:

> ORDERED, that primary legal and physical custody is awarded to [Mother] pending litigation; and it is further
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> ORDERED, that [Father] be awarded access every other weekend from Friday after school through drop-off at school on Monday morning. If there is no school, and it is not a holiday, [Father] may keep the child the rest of the day; and it is further
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> ORDERED, that [Father] be awarded access every Wednesday after school until Thursday morning school drop-off. If there is no school, and it is not a holiday, [Father] may keep the child the rest of the day; and it is further
>
> ORDERED, that parties split summer access with [Father] having the first half of the summer uninterrupted and [Mother] having the second half of the summer uninterrupted except for holiday access, and summer access is to start no later than three days after school ends for the child and no later than Saturday morning before school starts; and it is further
>
> ORDERED, that [Father] be awarded access for the following holidays: Easter 2018 (evening before through Monday at the time of normal school drop-off), Labor Day (attaching to the weekend Friday through Tuesday morning), Father's Day (Saturday evening through Monday morning), and [Father]'s birthday (after school until school drop-off time the following day); and it is further
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> ORDERED, that [Father] can Facetime or call with child between 8:30 and 9:00 pm each night for fifteen minutes; and it is further
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> ORDERED, that [Mother] shall have Mother's Day (Saturday evening through Monday morning), Memorial Day attaching to the weekend Friday through Tuesday morning), and

> [Mother]'s birthday (after school until school drop-off time the following day); it is further
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> ORDERED that the parties alternate Thanksgiving (Wednesday through Thursday evening); and it is further
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> ORDERED, that, on an alternating basis, one parent shall have Christmas Eve (end of school through Christmas Eve at 9:00 pm) and the other party shall have Christmas Eve at 9:00 pm through Christmas Day; and it is further
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> ORDERED, that the parties split winter break with the party who has access on Christmas Day having access the first half of break beginning when school lets out, and the other party having the second half of the break through the beginning of school; and it is further
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> ORDERED, that [Mother] share information as to doctor's visits, illnesses, school information; and, it is further
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> ORDERED, that [Mother] bring child to extracurricular activities including sports and play practices, and games in which child is a team member; and it is further
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> ORDERED, that if [Mother] cannot bring child, she will allow child to be picked up by [Father] so that child can attend; and it is further
>
> ORDERED, that [Father] is to bring child to extracurricular activities chosen by [Mother]; and it is further
>
> ORDERED, that this order shall be in effect through the merits hearing.

Before the initial written order issued, Father filed on February 15, 2018 a Motion to Reconsider and/or to Vacate the Modification of Custody Order Issued Orally By Court on February 8, 2018. The motion challenged the court's authority to modify custody pendente lite, claimed that he didn't have notice that a change in custody was at issue at

that hearing, and argued that he was prejudiced by the result. Mother opposed this motion on March 9, and the court denied it, without holding a further hearing, on March 19, 2018.

Father filed a notice of appeal on March 27, 2018, citing § 12-303(3)(x) of the Courts & Judicial Proceedings Article of the Maryland Code.[2] Father filed an amended notice of appeal, presumably in reaction to the amended March 27 pendente lite order, on April 13, 2018.

In the meantime, Mother filed a motion to amend the pendente lite order on March 23, 2018. She objected to the manner in which Father's counsel forwarded a draft order to the court, and she asked the court to clarify some of the language and to add specificity about certain aspects of the holiday schedule. The record does not reflect any opposition to this motion from Father. On April 23, 2018 the court granted the motion in part and entered an amended pendente lite order that is substantively the same as the March 27 version, but adds provisions defining the parties' access on the Fourth of July, stating that the holiday schedule supersedes the normal schedule, and requiring the parties to "communicate and coordinate concerning the minor child's extracurricular activities." Father filed a second amended notice of appeal on April 26, 2018.

II. DISCUSSION

As a practical matter, this appeal is largely pointless. Although this pendente lite order is appealable since it curtailed Father's custody and access, *see* Maryland Code

[2] Father also filed a motion to stay the pendente lite order pending appeal on March 27, and, later, a motion to disqualify the judge who had issued the orders. The court denied both.

(1974, 2013 Repl. Vol.), § 12-303(3)(x) of the Courts & Judicial Proceedings Article (allowing interlocutory appeals 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"); *Frase v. Barnhart*, 379 Md. 100, 119–20 (2003), its purely short-term purpose remains unrequited by the pendency of the appeal, Father's motion to stay the order pending appeal, and new contempt petitions and motions for altogether new forms of emergency relief. The order has failed to bring about even temporary peace, and no matter what we decide here, the order will be superseded by the results of the merits hearing, which is barely a month away.

Even so, Father's brief seeks to raise four issues.[3] We can dispose easily of two, since the denials of Father's motion to disqualify the trial judge and motion for contempt

[3] Father's brief lists four Questions Presented:

> I. THE LOWER COURT ERRED IN MODIFYING CUSTODY IN FEBRUARY, 2018, DURING A POST-CUSTODY ORDER PENDENTE LITE HEARING, IN WHICH CROSS-MOTIONS TO MODIFY CUSTODY WERE SET TO BE HEARD IN DECEMBER, 2018, AT A MERITS HEARING AND WHEN THE COURT DID NOT NOTIFY EITHER PARTY THAT IT WOULD BE MAKING A DETERMINATION OF CUSTODY.
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> II. THE LOWER COURT ERRED IN MODIFYING CUSTODY WHEN NO MATERIAL CHANGE IN CIRCUMSTANCES WAS CITED AND WHERE APPELLEE DID NOT PROVIDE TESTIMONY OR EVIDENCE SHOWING APPELLANT VIOLATED ANY PART OF THE CONSENT ORDER TO SUPPORT HER ORIGINAL MOTION TO MODIFY CUSTODY.
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> III. THE LOWER COURT ERRED IN ALLOWING A JUDGE TO RULE ON AND DECIDE CUSTODY WHEN

are not appealable on an interlocutory basis. *See Breuer v. Flynn*, 64 Md. App. 409, 415 (1985) ("the trial judge's refusal to disqualify or recuse himself has in no way precluded the appellant from fully defending her interests . . . and thus in this context is not a final judgment. . . . [n]or . . .the type of interlocutory order from which a party may immediately enter an appeal"); *Pack Shack, Inc. v. Howard Cnty.*, 371 Md. 243, 246 (2002) ("[A] party that files a petition for a constructive civil contempt does not have a right to appeal the trial court's denial of that petition.").

This leaves two challenges to the merits of the pendente lite order. *First*, Father contends that the circuit court's "decision to accept a verbal motion from [Mother] to modify custody during a post-custody order pendente lite hearing was not legally correct as it violated [his] due process rights." That misstates the record. The pendente lite order occurred only after both parties filed motions to modify custody, after the court issued a scheduling order setting the merits hearing on the motion for a year hence, after meeting with a magistrate, and after—and this is the key—the parties agreed on the record with the circuit court that the court would be reconsidering the terms of the operative custody order on a pendente lite basis.

THAT JUDGE WAS REQUIRED BY LAW TO DISQUALIFY HIMSELF FROM HEARING TESTIMONY DURING THE HEARING.

IV. THE LOWER COURT ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S POST-JUDGMENT CONTEMPT MOTION AS MOOT WITHOUT A HEARING AS A RESULT OF THE JUDGES PENDENTE LITE RULING.

We acknowledge that a post-judgment pendente lite hearing and order is unusual. Motions to modify custody are nothing new, although they typically get to the merits faster than this one will. But this case has been unusually contentious, and Father's motion papers stated, and his counsel agreed in open court, that the status quo was not working. The merits hearing was ten months in the future at the time of the pendente lite hearing and the parties asked the court for help in the interim. The court agreed to consider making changes on a pendente lite basis and, after a half-day of testimony and argument, decided to make some. Father cannot credibly claim to be surprised that the court took his complaints seriously and acted on them. He was, of course, entitled to due process, *see Burdick v. Brooks*, 160 Md. App. 519, 528 (2004), but he had a month's notice of the hearing and ample opportunity to appear, testify, and produce evidence. We see no procedural errors or due process violations in the proceedings leading to this order.

Second, Father argues that Mother failed to prove a material change in circumstances and to provide any evidence that he violated the consent custody order. We agree that the court must find a material change in circumstances before modifying custody, *see McMahon v. Piazze*, 162 Md. App. 588, 593–96 (2005), but again disagree with Father's characterization of the record.

As a threshold matter, Father himself filed a motion to modify custody in which he argued that the consent order's custody and visitation terms were not working. Mother filed a similar motion. Both parties argued, with vigor, that the other was responsible for the ongoing conflict, and both presented testimony and evidence at the hearing to support their

contentions. The hearing transcript, which goes on for more than 240 pages not counting exhibits, directly refutes Father's claim that Mother didn't prove a change in circumstances or her entitlement to enhanced custody and access terms. To the contrary, the court *found*, in so many words, from the totality of the testimony and evidence and in the context of the parties' constant disputes, that the circumstances supporting the prior custody order had changed materially, and that their son's best interests would be served by modifying custody and access on an interim basis until the merits hearing. Whether the balance the court struck turns out to be right remains to be seen—the docket sheet suggests that the conflict continues unabated—and the parties will be free at the merits hearing to prove that modifications are (or aren't) warranted and, if so, on what terms.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. APPELLANT TO PAY COSTS.