Circuit Court for Prince George's County
Case No. CAD1645887

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0270

September Term, 2021

ANCEL EKPENYONG

v.

EMA EKPENYONG

Nazarian,
Beachley,
Murphy, Joseph F., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: February 10, 2022

Ancel Ekpenyong ("Father") and Ema Ekpenyong ("Mother") were married on November 9, 2006. They are the parents of three minor children. Father has two other minor children from another relationship. On December 21, 2016, Father filed a Complaint for Absolute Divorce in the Circuit Court for Prince George's County ("Complaint"). In January 2017, Mother responded with a letter requesting a stay of the matter for one year, which the court treated as an Answer. A merits hearing on the Complaint was held on March 24, 2017. Mother was not present. The court entered a Judgment of Absolute Divorce on April 18, 2017.

On August 21, 2018, Mother filed a Motion to Vacate Judgment of Absolute Divorce ("Motion to Vacate"). A hearing on the Motion to Vacate was held in June 2019 and the court vacated the judgment. On June 26, 2019, Mother filed a Counter Complaint for Absolute Divorce and Other Relief ("Counter Complaint") requesting, among other forms of relief, an absolute divorce from Father and child support. A merits hearing was held on March 31 and April 1, 2021, and the court awarded child support retroactive to August 21, 2018, the date Mother filed the Motion to Vacate. Father appeals this decision and we affirm.

I. BACKGROUND

In Father's initial Complaint, filed on December 21, 2016, he sought an absolute divorce, joint legal custody of the three children, "reasonable child support," and "[a]ny other appropriate relief." The words "child support" didn't appear again in either side's filings until Mother's Motion to Vacate in August 2018. In that motion, she urged the court

to vacate the original Judgment of Absolute Divorce because the judgment "was obtained by fraud."[1] Because of this fraud, she contended that she had "been deprived of over two years of child support for the parties' [three] children." It was not until Mother's June 26, 2019 Counter Complaint, however, that she specifically requested "reasonable child support pursuant to the Maryland Child Support Guidelines, *pendente lite* and permanently, and that such award be made retroactive to the date of filing of [Father's] Complaint."

On February 23, 2021, before the merits hearing in this case, a Consent Custody Order ("Consent Order") was entered in the Circuit Court for Montgomery County between Father and the mother of his other two children. The Consent Order directed Father to pay, starting on March 1, 2021, $2,200 per month "for the support of the parties' minor children, pursuant to the Maryland Child Support Guidelines . . . . " The court arrived at that amount using the formula provided on the Guidelines worksheet, which listed the mother's income as $9,598 per month and Father's income as $9,645 per month.

The merits hearing between Mother and Father took place virtually on March 31, 2021 and April 1, 2021. The court found that Father failed to appear on both days of the hearing. On the first day, Father had problems with his cell phone, and the court rescheduled the matter for the next day. The second day, Father experienced additional technical difficulties. Counsel for Father asked the court if he could participate by audio, but the court denied this request, reasoning that because Father was giving testimony, the

[1] As the basis for this allegation, Mother asserted the parties did not separate until December 2017, refuting Father's statement in his December 21, 2016 Complaint that the parties had been separated for one year prior to his filing.

court had to see his face. After finding that Father had failed to make good faith efforts to attend the hearing, the court proceeded without Father's participation. He has not challenged that decision on appeal.

Indeed, although the merits hearing concerned the distribution of property and child support, only the latter is at issue on appeal. The parties stipulated Father's income at $9,645 per month and Mother's income at $1,300 per month, but disagreed on the child support calculation. Father asserted he should only be required to pay child support for two of the three minor children because the eldest child resided in a state care facility and did not live with either parent. Mother responded that while the eldest child did not live with either parent, parental rights had not been terminated and Mother continued to "provide for the child's personal needs like clothing, personal products, that sort of thing."

As for arrearages, Father argued he should not be required to pay child support for the "retroactive period" because Mother had received support during that time:

> During this period, the children were receiving Social Security disability funds from the Social Security Administration; and, in addition, [Mother] also received food stamps for the children. . . . [F]or those reasons, I do not believe that it's equitable for [Father] to be assessed child support arrears for the retroactive period, because the children were receiving support and were taken care of.

Mother contended that child support should be calculated back to the date of separation because Father "made no effort to support the children since the date of separation. The fact that [Mother] is on food stamps is because she wasn't receiving any child support and was unable to care for the children without state assistance." Father replied that when he

"filed his complaint," in December 2016, "there was no request for child support."[2]

Despite the finding that Father had failed to appear on both days of the merits hearing, the court allowed him to testify briefly about his financial statement. Father verified that he paid $1,000 in rent each month, and had a mortgage payment of $1,923.26 on another property. He also testified he paid $2,200 each month towards child support in Montgomery County. After the court reporter stated several times that they were not able to transcribe the testimony because of technology problems on Father's part, the court moved on to Mother's testimony.

Mother testified that she was not then employed because she was the caretaker for her two disabled children. The monthly expenses for herself and her two minor children totaled $3,949.15. Mother stated that because Father had not provided any financial support since the separation, she was supporting herself and the children through Supplemental Security Income. She began receiving food stamps in 2020 "[b]ecause we could hardly afford food." When questioned why she did not provide Father with contact information so he could send her money, Mother responded "[h]e was threatening the [children] and I the entire time. He was not supposed to know where I was."

After the testimony concluded, the court heard argument on the issue of retroactive child support. Father remained adamant that he could not afford to pay retroactive child support but argued that if the court were inclined to make child support retroactive, it

[2] As discussed below, Father was wrong on this point. In his Complaint, Father specifically checked the box requesting joint "legal custody of the minor child(ren) and reasonable child support."

should start payments as of June 26, 2019 because that is when Mother asked for child support explicitly. Father contended the court did not have jurisdiction to date the child support before June 26, 2019. The court disagreed, citing the "exception" contained in Family Law ("FL") Section 12-101, and found that starting the retroactivity period on June 26, 2019 would produce an inequitable result:

> [THE COURT]: When was your first pleading on the case?
>
> [COUNSEL FOR MOTHER]: My very first pleading was when I filed the motion to overturn the divorce . . . .
>
> [THE COURT]: And that's where we would start counting from.
>
> * * *
>
> [COUNSEL FOR FATHER]: Your Honor, the Code is clear. So, I tracked it to the date of filing, because—I mean, the Court doesn't have the authority to predate, and it was June 26 [2019].
>
> [THE COURT]: Unless I find it produces an inequitable result. I have that exception.
>
> [COUNSEL FOR FATHER]: For any other pleading that requests child support. The Court vacating a judgment doesn't request child support.
>
> [THE COURT]: But listen to the chain of events. She overturned the judgment, and within two weeks she had to get a countercomplaint and answering.
>
> [COUNSEL FOR FATHER]: Right.
>
> [THE COURT]: So, my point is . . . we treat her initial pleading at the point that she was able to move to overturn that judgment so that [Mother] could seek the relief that she wanted, one which was child support. . . .
>
> Like I said, I have authority if it produces an inequitable result, and I think here it does. The child support—especially if the divorce was overturned. No. That would be unfair. That would be totally unfair, so, you know, we're going to start from [August 21, 2018].

The court reasoned further that it would be unfair "to give [Father] ten months for free" because of his child support obligations in Montgomery County:

> So, I'm taking into consideration this child support order that just came out in February in Montgomery County where he is ordered to pay for child support on two other kids. What I did was I compared the child support guidelines if he wasn't paying $2,200 . . . and if he was. And the difference in the payments if I take into consideration the $2,200 that he was ordered to pay in Montgomery County, he would be ordered to pay, under the child support guidelines, $1,621. If I don't take into consideration that $2,200, he would be ordered to pay, under the guidelines, an extra $558.
>
> Now, if you look at the differences in the situation, in the other child support order that he has to pay, the mother in that case is making about as much money as he's making. It's actually a case that's out of guidelines. The combined income of both parties in that case is about $20,000, and there's only two children, and he's ordered to pay $2,200 in that case.
>
> In this case, if I take into consideration the $2,200 that he's paying, under the guidelines, I'm coming up with $1,621 for three children, and a mother who's making far less than him. So, I'm going to hold him for the child support arrears starting all the way from August 21, 2018, and what he's going to pay towards those arrears is the difference. It's going to be the difference in the amount that he would be paying if that other order did not exist, which is $558.

The court concluded that Mother "intended to seek child support" in her August 21, 2018 Motion to Vacate and ordered the payments to start on September 1, 2018:

> So, we're not going to do it at the point where she filed her countercomplaint. We're going to do it when she filed the motion to vacate, which was . . . August 21st, 2018, so the child support payments would start September 1st, 2018.

On April 14, 2021, the court entered a Judgment of Absolute Divorce and ordered Father to pay child support to Mother in "the amount of $1621 per month." The court also

ordered Father, starting May 1, 2021, to "pay $558.00 per month towards arrears . . . ." The court found Father had "accumulated arrears in the amount of $69,728.00 . . . accounting from September 1, 2018 through May 1, 2021" in the amount of $2,179 per month. Counsel for Father asked the court to apply a different retroactive amount of child support for the months of March and April 2021 because the Consent Order from Montgomery County had gone into effect March 1, 2021. The court denied this request, stating "my goal is to keep that 2,179 consistent starting from September, 2018." We supply additional facts as necessary below.

II. DISCUSSION

Father raises four questions on appeal that we condense and rephrase.[3] *First*, did the circuit court err in awarding child support retroactive to August 21, 2018? *Second*, did the circuit court err in its calculation of the total amount of arrears Father owes Mother? And

[3] Father has phrased his Questions Presented as follows:

1. Did the trial court err by awarding child support retroactive to the date Appellee filed her Motion to Vacate Judgment of Absolute Divorce Pursuant to Rule 2-535(b)?
2. Did the trial court err in calculating child support for the months of March 2021 and April 2021 without factoring an already existing child support order entered on February 23, 2021 in the Circuit Court for Montgomery County?
3. Did the trial court err in awarding arrearages from September 1, 2018 through May 1, 2021 and then also commence Appellant's child support obligation on May 1, 2021?
4. Appellant's Long Form Financial Statement, Reflects that He Cannot Afford to Pay an Additional $2,179.00 Each Month.

third, did the circuit court err in ordering Father to pay $2,179.00 for the months of March and April 2021 by not including the Consent Order from Montgomery County in its calculations? We hold that the circuit court did not err and affirm.

In an action tried without a jury, we "review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses." Md. Rule 8-131(c). Factual findings that are not clearly erroneous "'should be disturbed only if there has been a clear abuse of discretion.'" *Jose v. Jose*, 237 Md. App. 588, 598 (2018) (*quoting Wagner v. Wagner*, 109 Md. App. 1, 39–40 (1996)). Therefore, "'[w]e will not disturb the trial court's discretionary determination as to an appropriate award of child support absent legal error or abuse of discretion.'" *Johnson v. Johnson*, 152 Md. App. 609, 615 (2003) (*quoting Smith v. Freeman*, 149 Md. App. 1, 20 (2002)).

A. The Circuit Court Did Not Err In Making Child Support Retroactive To August 21, 2018.

First, Father contends the trial court erred in awarding thirty-two months, as opposed to twenty-two months, of retroactive child support. Father bases his argument on the contention that Mother did not request child support explicitly in her August 21, 2018 Motion to Vacate. Because Mother did not request *pendente lite* and permanent child support until her June 26, 2019 Counter Complaint, Father argues that the retroactive period should have begun, at the earliest, on July 1, 2019. We disagree and see no abuse of discretion in the circuit court's decision to make child support retroactive to August 21,

2018.

FL § 12-101(a)(1), (1984, 2021 Repl. Vol.), provides that "[u]nless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that requests child support pendente lite, the court shall award child support for a period from the filing of the pleading that requests child support." The court utilized the "inequitable result" exception to find that even though Mother did not explicitly request child support *pendente lite* until her Counter Complaint, she intended to seek child support in her Motion to Vacate:

> [W]e treat her initial pleading at the point that she was able to move to overturn that judgment so that [Mother] could seek the relief that she wanted, one which was child support. . . .
>
> Like I said, I have authority if it produces an inequitable result, and I think here it does. The child support—especially if the divorce was overturned. No. That would be unfair. That would be totally unfair, so, you know, we're going to start from that date.

The court did not err in finding that awarding child support retroactive to June 26, 2019 would lead to an inequitable result. It made specific findings, on the record, that it considered the Consent Order from Montgomery County, where the mother of Father's two other children received about the same income as Father. She distinguished the circumstances of that case from this case. In this case, three children, not two, needed support, and Mother made "far less than [Father]." The circuit court, therefore, acted within its discretion in awarding child support retroactive to August 21, 2018. Indeed, the court would have acted within its discretion even if it awarded child support retroactive to December 21, 2016.

Father's Complaint was the basis on which the court entered a Judgment of Absolute Divorce in April 2017.[4] In November 2019, the Judgment of Absolute Divorce was vacated pursuant to Maryland Rule 2-535(b).[5] In vacating the judgment, the court ordered Mother to file an answer and counter complaint to Father's initial pleading, the December 21, 2016 Complaint. In Mother's Counter Complaint, she requested "reasonable child support pursuant to the Maryland Child Support Guidelines, *pendente lite* and permanently, and that such award be made retroactive to the date of filing of [Father's] Complaint." And, importantly, Father checked the box on the complaint form requesting "[j]oint . . . legal custody of the minor child(ren) and *reasonable child support*." (Emphasis added.) Father himself initiated this divorce action and put child support at issue from the very beginning. And the court's decision to vacate the original judgment of absolute divorce reinstated Father's Complaint as the operative pleading and, based on his allegations, the potential starting point for child support. As such, we discern no error in the circuit court's decision to start child support from the date it vacated the original judgment, August 21, 2018, the starting point for the phase of the litigation that led to the award Father challenges, even if it could have gone all the way back to the beginning.

B. The Circuit Court Did Not Err In Calculating The Amount Of Child Support Arrears Father Owes Each Month.

Next, Father asserts the circuit court erred in two different ways in calculating the

[4] Recall that Mother was not present at the hearing on the Complaint and never filed a formal Answer.

[5] Rule 2-535(b) provides the court with discretion to "exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."

amount of child support arrears Father owes. *First*, Father argues that the Judgment of Absolute Divorce added an extra month of child support arrears. In backdating the child support obligation to August 21, 2018, the circuit court calculated that Father owed $69,728 in arrears, but the court, in its oral ruling, didn't mention the number $69,728 explicitly. The court did, however, make it clear to the parties it was awarding child support retroactive for thirty-two months and that $2,179 was due each month:

> But the total amount of the arrears, it's starting from September 1st, 2018, all the way up until today, which would be April 1st.
>
> * * *
>
> It's 32 months times—because the order from Montgomery County just went out last month, so we're not counting that amount. So, we're going to count it as if it didn't exist. So, it would be 32 months times 2,179 . . . .

When the parties did the arrearage math, they came up with different numbers, so the court explained the calculation again:

> [COUNSEL FOR FATHER]: Your Honor, just to be clear, there's 30 months of retroactive child support?
>
> [COUNSEL FOR MOTHER]: Thirty-two.
>
> [THE COURT]: Thirty-two. September 1st, 2018.
>
> * * *
>
> [COUNSEL FOR FATHER]: I get 30 months. It's four months in 2018, 12 months in 2019, 12 months in 2020, and then three months in 2021 for the total of—
>
> [THE COURT]: You're counting—no, no. So, today is the 1st. We're counting January, February, March, April, four months in 2021.

Adding four months plus twelve months plus twelve months plus four months yields a total of thirty-two months. Even though the circuit court did not state in its oral ruling that Father

owed $69,728 in arrears, it reiterated on numerous occasions that child support would be awarded retroactively for thirty-two months with a payment of $2,179 due each month. Multiplying these two numbers brings us to a total of $69,728 in arrears.

In its Judgment of Absolute Divorce, the circuit court ordered "that [Father] has accumulated arrears in the amount of $69,728.00 in arrears accounting from September 1, 2018 through May 1, 2021." The Judgment should have said "accounting from September 1, 2018 through April 30, 2021," to convey the 32 months of retroactive child support Father owes. That minor linguistic discrepancy doesn't mean that the Judgment added an extra month of child support arrears. The arrearage math is correct and the circuit court did not err.

Second, Father argues his financial statement doesn't support the circuit court's ruling that he pay an extra $558 in arrears each month, and thus a total of $2,179 each month in child support. During the merits hearing, the court acknowledged, in response to Father's concern that he was in bankruptcy and might not be able to pay anything, that it might have a hard time ordering Father to pay that much each month:

> Yeah. I mean, it has to be what he can afford to pay. As long as he is not, you know, voluntarily impoverishing himself, then it's what he can afford to pay. So, where we start calculating may not be—we'll have to see how the numbers play out. And if it does produce an unfair result—and of course I have authority to award child support from the date that she filed that motion to vacate, but in looking at the numbers, that may not happen. So, I'll take it into consideration.
>
> * * *
>
> When I look at the income and the expenses—and we're going to make sure that we can award a payment that he can pay, but

I'm not going to order something that he can't.

But in its oral ruling, the court explained that it had considered Father's financial statement in arriving at an amount Father could afford to pay each month:

> I also want to go over—some of the things on his financial statement also let's me know that he can afford to pay the amount that I just ordered. . . .
>
> He's only paying a thousand dollars in rent, which is what he indicated in his financial statement, and his expenses were modest. I did not see expenses beyond about $800, and then a mortgage for a property that he's not living in, that he may or may not be paying. We know he's currently in bankruptcy right now. So, we don't know what's going to happen with the bankruptcy case, but we know he is in financial distress . . . but as far as the expenses that he's going to pay, which would be the 1,000 in rent, he's going to pay that. He's going to pay all the other little expenses to keep himself going every month. The only burden really is that mortgage, which he may get out of paying if he moves forward with that bankruptcy case. So, I don't find that it's unreasonable for him to pay an extra $558 on top of the $1,621 that I'm getting from the guidelines.

The record supports the court's finding that Father can afford to pay $2,179 in child support each month and the circuit court did not err in awarding that amount of support to Mother.

C. The Circuit Court Did Not Err In Ordering Father To Pay $2,179 For The Months Of March And April 2021 Because Father Did Not Present Evidence That He Actually *Paid* Child Support In Montgomery County.

Finally, Father argues the circuit court erred in imposing a monthly payment of $2,179 for the months of March and April 2021. "There is a rebuttable presumption that the amount of support resulting from the application of the guidelines is the correct amount." *Reuter v. Reuter*, 102 Md. App. 212, 235 (1994). This presumption "may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate

in a particular case." FL § 12-202(a)(2)(ii). In considering "whether the application of the guidelines would be unjust or inappropriate in a particular case, the court *may* consider . . . the terms of any existing . . . court order." FL § 12-202(a)(iii)(1) (emphasis added). This language necessarily provides the trial court with the discretion to depart from the guidelines, if following them "would be unjust or inappropriate."

Child support payments are calculated, in part, by determining each parent's monthly income. This monthly income is adjusted for "preexisting reasonable child support obligations *actually paid*." FL § 12-201(c)(1) (emphasis added). So when a court order directing a parent to pay child support "predates the point in time at which child support is being calculated for another child, and the monies directed to be paid have *actually* been paid, it . . . must be subtracted from the parent's actual income in calculating his adjusted actual income." *Lacy v. Arvin*, 140 Md. App. 412, 424 (2001) (emphasis added).

The key here, then, is whether Father actually paid his Montgomery County support. If the court factored in his child support obligations to his children in Montgomery County, Father argues, Father should only have been required to pay $1,621 for the months of March and April 2021, since the Consent Order went into effect March 1, 2021. Mother asserts, though, that Father presented no evidence during the merits hearing, aside from the Consent Order itself, that he "actually paid" child support in Montgomery County. Therefore, she says, Father failed to rebut the presumption that the trial court was correct "in including the months of March and April in the total arrearage calculated at $2179.00."

We agree with Mother. Although Father was responsible for child support pursuant

to the Montgomery County order, he presented no evidence that he actually had *paid* child support in Montgomery County for the months of March and April 2021. As such, the court was not required to adjust Father's monthly income in calculating how much Father owes in this case. Father bore the burden of rebutting the presumption that the amount of child support was calculated correctly. He could have presented "evidence that the application of the guidelines would be unjust or inappropriate in a particular case," FL § 12-202(a)(2)(ii), but he didn't.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.