Circuit Court for Montgomery County
Case No. 118825-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 490

September Term, 2018

DOUGLAS MOORE

v.

BIBI KHAN

Arthur,
Reed,
Zarnoch
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: August 7, 2019

On January 26, 2015, Douglas Moore ("Appellant") agreed to pay his ex-wife, Bibi Khan ("Appellee"), $15,000 per month in child support for their son ("the minor child"). This agreement was based in part on the cost of full-time nanny services provided for the minor child. The agreement also stipulated that Appellant was to pay for "all costs associated with [the minor child]'s attendance at private school."

In the fall of 2017, the minor child was enrolled in full day preschool, which was paid for by Appellant. As a result of the minor child's enrollment, Appellant filed a Motion to Modify Child Support, seeking a decrease in child support based on the fact that the minor child no longer required a full-time nanny.

At the conclusion of Appellant's testimony during the motion hearing, Appellee made an oral Motion for Judgment. Granting Appellee's motion, the trial court ruled that there was no material change in circumstances requiring a modification of the parties' 2015 child support agreement. It is from this decision that Appellant appeals.

In his appeal, Appellant presents one question for review:

I. Did the trial court err in granting Appellee's motion for judgment based on a lack of material change in circumstances?

For the following reasons, we answer in the negative and affirm.

FACTUAL & PROCEDURAL BACKGROUND

This case involves an appeal from a ruling by Judge Mason of the Circuit Court for Montgomery County granting Bibi Khan's ("Appellee") motion for judgment at the end of Douglas Moore's ("Appellant") presentation of evidence to deny Appellant's motion to modify the custody and support order that the parties had originally agreed to in 2015.

In 2015, as a part of litigation regarding the custody of the parties' minor child, the parties agreed that Appellee would have sole physical custody of their child and joint legal custody with Appellee having the final decision if the parties did not agree on certain matters. The parties also agreed that Appellant would hire a full-time nanny for their child whenever the child visited Appellant. Finally, the parties agreed that:

> [Appellant] will pay to [Appellee] on the first of each month commencing on February 1, 2015 by way of direct deposit the sum of $15,000 a month in child support. [Appellant] will also pay for all unreimbursed medical expenses for [the minor child] as well as for private school.

The court ultimately entered an order that incorporated but did not merge the terms and provisions of the parties' agreement on March 4, 2015. The order, in part, stated:

> ORDERED, that commencing and accounting from February 1, 2015, and due on the first day of each ensuing month thereafter, [Appellant] shall pay, by direct deposit into an account designated by [Appellee], child support in the amount of $15,000 per month. In addition to this payment, [Appellant] shall promptly reimburse [Appellee] for unreimbursed medical expenses incurred for [the minor child]; and, it is further
> ORDERED, [Appellant] shall pay for all costs associated with [the minor child's] attendance at private school . . .

On June 2, 2015, Appellant filed a first motion to modify the March 2015 order to eliminate the requirement that he hire a full-time nanny for when the minor child was in his care. Appellee opposed his motion, filed a counterclaim, and moved to enforce the agreement and Order. On April 29, 2016, the parties dismissed their claims without prejudice.

On October 7, 2016, Appellant filed a second motion to modify the March 2015 order, again requesting the elimination that he hire a full-time nanny. Appellee again opposed his motion and filed a motion to enforce the original agreement. During a hearing

on Appellant's motion, Judge Mason granted Appellee's motion for judgment following the presentation of evidence by Appellant. Judge Mason then granted Appellee's request for attorney's fees totaling $51,176.00, ruling that Appellant's case lacked substantial justification. On July 24, 2017, Appellant filed a motion to reconsider the awarding of attorney's fees.

While his motion for reconsideration was pending, Appellant filed a third motion to modify the March 2015 order on August 30, 2017. This third motion sought a reduction in the $15,000/month child support payment required by the parties' agreement, claiming that the minor child no longer required a full-time nanny. Prior to being enrolled in preschool, Appellee hired her mother, the child's grandmother, at a monthly rate of $7,000 to provide full-time nanny services for the child. However, now that the child has been enrolled in preschool, the child is at school each day during the school year from around 8:45a.m. to 3:00 p.m. As such, Appellant's third motion to modify claimed that the child's grandmother's role as a nanny has been greatly reduced and that the child no longer requires a full-time nanny. Appellant argued that the reasonable cost of nanny services provided to the child has been reduced by $2,000, meaning the amount Appellant pays for child support should also be reduced $2,000.

On April 3, 2018, after hearing Appellant's evidence in support of his motion, Judge Mason granted Appellee's motion for judgment. In making his ruling, Judge Mason stated that [based on the evidence heard, "there [was] no material change in circumstances" that he could find for either Appellant and/or the child. Appellee then made a request for attorney's fees, which Judge Mason responded to by asking Appellee to "submit the bill."

On April 26, 2018, Appellant noted his appeal of Judge Mason's oral order granting Appellee's motion for judgment to deny Appellant's third motion to modify. On May 31, 2018, the court entered Judge Mason's written opinion and order awarding Appellee attorney's fees totaling $50,000.00 for her defense of Appellant's third motion to modify. A written opinion and order was never entered regarding Judge Mason's oral order granting Appellee's motion for judgment to deny Appellant's third motion to modify.

Appellant currently has a pending fourth motion to modify the March 2015 order regarding Appellant's requirement to hire a full-time nanny while his son is with him.

STANDARD OF REVIEW

Before modifying, the trial court first must find a material change in circumstances since the time of the operative award. *Horsley v. Radisi*, 132 Md. App. 1, 21 (2000) ("Once the support award is established, the trial court may only modify child support payments if there is an affirmative showing of a material change in circumstances in the needs of the children or the parents' ability to provide support."). We review decisions to modify child support for abuse of discretion:

> Whether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong. When an action has been tried without a jury, we will 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 we give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Ley v. Forman, 144 Md. App. 658, 665 (2002) (internal citations omitted). We review the underlying factual findings only for clear error. Md. Rule 8-131(c).

DISCUSSION

i. Motion to Dismiss

Appellee contends that Appellant's present appeal must be dismissed because the circuit court had not yet entered a "final judgment" in this matter prior to Appellant noting his appeal on April 20, 2018. Specifically, Appellee argues that Judge Mason's oral order had not been entered on a separate document at the time Appellant noted his appeal. As such, Appellee believes that Appellant's appeal was premature.

Maryland Rule 2-601(a)(1) requires that a judgment be set forth in a separate document signed by the judge or the court clerk, and that the judgment be entered on the court docket. Here, though the trial court orally ruled on Appellee's Motion for Judgment midway through the motion hearing and the judgment was entered on the court docket, no separate document was signed by the judge or the court clerk reflecting the judgment.

However, Maryland Rule 8-602(f) states that a notice of appeal filed after the announcement of the trial court of a ruling, decision, order, or judgment but before entry of the ruling . . . "shall be treated as filed on the same day as, but after, the entry of the docket." While Appellant noted an appeal after Judge Mason's oral order on April 3, 2018, a separate written order, signed by Judge Burrell, noting Judge Mason's oral order was filed on February 22, 2019. As such, Appellant's appeal is treated as being filed on February 22, 2019, and is therefore timely before this Court.

Appellee also contends that Judge Mason's oral order on April 3, 2018 cannot be considered a final judgment because the issue of attorney's fees was still outstanding. Rule 2-602(a) provides that an order that "adjudicated fewer than all claims in an action . . . or

that adjudicates less than an entire claim" is not a final judgment. However, Maryland courts have long held that the issue of attorney's fees is a collateral one. *See Litty v. Becker*, 104 Md. App. 370, 373 (1995) ("It is beyond cavil in Maryland that attorney's fees may be sought after a final judgment has been entered, because attorney's fees are considered to be a collateral matter.") (internal citations omitted); *Mercedes-Benz of North America, Inc. v. Garten*, 94 Md. App. 547, 568 (1993) ("Attorney's fees are considered a collateral matter and may be sought following final judgment on the underlying claim."). Therefore, Appellant was not required to wait for the trial court's determination regarding attorney's fees before noting his appeal to this Court.

Accordingly, we hereby deny Appellee's motion to dismiss this appeal and continue forward with our analysis of the issues presented to us.

ii. Modification of Child Support

A. Parties' Contentions

Appellant contends that the trial court erred in finding that a material change in circumstances did not exist and a modification of child support was not necessary. In doing so, Appellant argues that the trial court abused its discretion in focusing on his ability to pay child support when Appellant's motion was based solely on the minor child's enrollment in preschool. In reviewing the minor child's change in circumstances, Appellant asserts that the trial court held "Appellant to a different standard than it would for individuals of lower income levels." Appellant believes that the trial court misapplied the law and improperly considered his ability to pay when determining whether there was a material change in the minor child's circumstances.

Appellant also asserts that the trial court improperly placed the burden to prove the needs of the minor child on Appellant. Appellant claims that while the burden to show a material change in circumstances warranting child support modification falls on himself, Appellant does not have the burden to "verify and testify regarding the legitimacy of Appellee's childcare expenses."

Finally, Appellant contends that Appellee's lack of candor denied Appellant a fair hearing. Specifically, Appellant claims that Appellee failed to timely provide the court with updated financial statements reflecting the minor child's needs, which the trial court did not consider in making its final ruling. Appellant alleges that these updated financial statements, had they been reviewed by the trial court, would have shown that the minor child's childcare expenses have decreased since his enrollment in preschool. As such, Appellee's lack of candor prejudiced Appellant and prevented him from receiving a fair hearing.

Aside from her argument that Appellant's appeal should be dismissed, Appellee contends that the trial court did not err in its final ruling or misapply the law. Appellee argues that the trial court is required, when considering whether to modify a child support agreement, to consider whether modification is necessary based either on a change in "the needs of the children or in the parents' ability to provide support." Though Appellant does not claim that he can no longer afford to make the required $15,000 per month payments, Appellee asserts that the trial court did not err in reviewing Appellant's ability to pay.

Furthermore, Appellee contends that Appellant misconstrues Judge Mason's final order and that the minor child's change in circumstances were not commingled with

Appellant's ability to pay. Instead, Appellee argues that Judge Mason fully considered the minor child's enrollment in preschool but ultimately concluded that full-time nanny services were still necessary for the minor child. Specifically, Appellee relies on Judge Mason's consideration of the cost and time requirements of the minor child's care, as well as the fact that the minor child has had the same full-time nanny since 2015. As such, Appellee asserts that the trial court reasonably considered the relevant testimony and properly concluded that no material changes in circumstances existed regarding the minor child's childcare needs.

Finally, Appellee argues that the trial court's failure to consider the financial statements, that had not been offered by Appellant at the motion hearing, was not error, nor an abuse of discretion. Appellee contends that the burden to prove a material change in circumstances falls on Appellant, and Appellant provided "no meritorious excuse why he should be allowed to circumvent this responsibility by arguing evidence to this Court that he never presented in trial." Additionally, Appellee claims that nothing in any of her financial statements showed any abuse of discretion by the trial court, as each statement submitted prior to trial listed the minor child's nanny costs at well over $5,000 per month. As such, Appellee believes the trial court's order should be affirmed.

We agree.

B. Analysis

After a parent's child support obligation has been adjudicated, a trial court may only modify the obligation upon an "affirmative showing of a material change in circumstances or the parents' ability to provide support." *Payne v. Payne*, 132 Md. App. 432, 442 (2000).

This Court provided guidance regarding such reviews for modification of child support obligations in *Smith v. Freeman*, 149 Md. App. 1 (2002), stating:

> Pursuant to F.L. 12-104(a), "[t]he court may modify a child support award . . . upon a showing of a material change in circumstance." The statute does not define the concept of "a material change in circumstance," however. Rather, the meaning of that concept has been elucidated in several appellate decisions. In particular, the case law has established that, for purposes of the modification of child support, a material change in circumstances may be based either on a change in "the needs of the child or in the parents' ability to provide support." Moreover, the term "material" has been construed to "limit[] a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order."
>
> Nevertheless, a material change in circumstances does not necessarily compel a modification. Rather, a decision regarding modification is left to the sound discretion of the trial court, so long as the discretion was not arbitrarily used or based on incorrect legal principles.

Smith v. Freeman, 149 Md. App. at 20–21 (Citations omitted. Emphasis added).

As *Smith* discusses, a trial court may not change an adjudicated child support obligation absent clear findings of a material change in circumstances. Such findings must be based on "sound evidence on the record" with the view towards the child's best interests. Furthermore, a consent custody agreement should be changed without strong justification. "The child is often traumatized enough by the separation that engenders the dispute, and to the extent possible, the courts look to avoid unnecessary immediate disruptions in the child's life." *Frase v. Barnhart*, 379 Md. 100, 111 (2003).

In this case, Appellant makes no contention that he no longer possesses the ability to provide support for his child. Instead, Appellant's sole argument for a modification in his child support obligation is based on an alleged change in the needs of his child. Specifically, Appellant argues that he should no longer be required to provide Appellee

$2,000 of the $7,000 spent monthly on the minor child's full-time nanny services because the child has been enrolled in pre-school, which is paid for by Appellant.

i. Appellant's Ability to Provide Child Support

It should be noted that a bulk of Appellee's reply brief discusses the assets that Appellant currently holds, as well as the income Appellant earned prior to his retirement. However, our review does not require any consideration of Appellant's assets or worth, as Appellant believes the child support order should be modified based on his child's change in needs, not Appellant's change in his ability to pay such child support.

With this said, the trial court did not err in discussing Appellant's assets and ability to pay, as Appellant seems to suggest in his brief. According to Maryland law, a modification of child support is based on a material change in "the needs of the child *or in the parents' ability to provide support*." While Appellant sought a modification based solely on an alleged material change in the needs of his child, the trial court did not err in choosing to be safe by also analyzing the parents' ability to provide support.

By concluding that Appellant was just as able to pay $15,000/month as he was when the original agreement was reached in March 2015, the trial court concluded that a modification was not necessary based on his "ability to provide support," and thus moved forward to consider whether the child had a material change in needs.

ii. Material Change in Child's Needs

The reason for Appellant's third motion to modify and the primary focus of this Court's review centers around the minor child's enrollment in preschool. Prior to being enrolled in preschool, Appellee hired her mother, the child's grandmother, at a monthly

rate of $7,000 to provide full-time nanny services for the child, as Appellee works full-time during the week. However, now that the child has been enrolled in preschool, the child is at school each day during the school year from around 8:45a.m. to 3:00 p.m. As such, Appellant claims that the child's grandmother's role as a nanny has been greatly reduced.

Appellant claims that the reasonable cost of nanny services provided to the child has been reduced by $2,000, meaning the amount Appellant pays for child support should also be reduced $2,000. Appellant notes that the monthly cost of the child's schooling is paid for by Appellant, per the March 2015 order. Further, Appellant alleges that by allowing Appellee to continue paying her mother $7,000/month even though her role as nanny has been greatly reduced, the court would essentially be providing Appellee a windfall that has no relation to the needs of the child.

As previously stated, the decision to modify a child support order/agreement is left to the sound discretion of the trial court, so long as the discretion was not arbitrarily used or based on incorrect legal principles. As we have previously stated, a court may modify a child support award upon a showing of a material change in circumstance. Case law has established that a material change in circumstances may be based either on a change in "the needs of the child or in the parents' ability to provide support." Furthermore, the term "material" has been construed to "limit[] a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order."

In making its oral ruling in this matter, the trial court stated the following:

> [T]he argument here is that apparently the suggestion is that because the child has now enrolled in preschool, all-day preschool from roughly I think it was 8:45 in the morning until about 3:00 in the afternoon, that

> therefore ipso facto the needs of the child in terms of nanny care, and the expense of nanny care, have decreased.
>
> I don't think I necessarily accept that proposition, because you have a live-in nanny. It is the same live-in nanny they've had since 2014, when the earlier agreement, basically the order entered based upon what the parties were doing, is the same nanny.
>
> So the argument sort of assumes that because now the child is going to school, that you're able to hire a nanny to come for some hours in the morning, and then go do whatever she's going to do during the day, I guess another job during the day, and then come for some hours at night. And that I don't think necessarily flows logically.
>
> It's not, particularly for a live-in nanny, all that easy for them, you know, you can't cut their income in half or cut their income by two-thirds simply because the child is going to school. You could fire the nanny. You can potentially hire another nanny who would agree to work part-time, or maybe two nannies, one for the morning and one for the afternoon, but the testimony that I have heard here is that the custodial parent, the mother, has simply kept the same nanny, although the nanny's duties obviously have changed, and perhaps become easier.
>
> On the other hand, now she's got to get the child to school, which she apparently didn't have to before, and she's got to pick the child up after school. So the duties have changed somewhat, but she has lot more free time during the day.
>
> But the fact that the mother has decided to retain the nanny and to continue to pay the nanny at the sum previously paid again, that's a decision that she has made. There's no material change of circumstance in terms of the child's needs.

Providing the trial court discretion absent a finding that trial court arbitrarily used or based its decision on incorrect legal principles, this Court should affirm the trial court's decision. Here, the trial court found that the child's enrollment in preschool did not materially change his needs for full-time nanny services. The trial court stated that while the nanny's job requirements may have been greatly diminished while the child is at school, the fact that the child's current nanny is live-in and that it may be difficult to hire a part-time nanny to perfectly adhere to the child's schedule around school led the trial court to reject Appellant's argument that the cost of nanny care has decreased. Furthermore, as the

legal custodial guardian of the child, Appellee has the power to make nanny-hiring decisions, including whether to retain a live-in nanny even when the child is enrolled in school, as Appellee did here. Simply put, by continuing to pay $7,000/monthly for nanny services even when the child spends some time each day at school, the child is afforded consistency to make sure that he doesn't have any material changes in his life.

Finally, Appellant makes a claim regarding the handling of Appellee's financial statements from 2015-2017. However, those financial statements were not admitted by the trial court and therefore are not a part of the record for this Court to review. Furthermore, Appellant does not appeal the failure to admit those financial statements, as Appellant did not object when the statements were not admitted by the trial court. Therefore, this Court affords them no consideration in making its decision. This Court may only review the evidence that is on the record and before the trial court when it reached its decision.

As there has been no showing by Appellant that the trial court's ruling was arbitrary or based on incorrect legal principles, we must affirm the trial court's decision. Accordingly, we affirm the judgment of the Circuit Court for Montgomery County.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.