

Circuit Court for Harford County
Case No: 12-C-15-003264

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 524

September Term, 2019

KIMBERLY BARTENFELDER

v.

THOMAS BARTENFELDER

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 12, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Kimberly Bartenfelder (Mother), and appellee, Thomas Bartenfelder (Father), have been involved in ongoing, protracted divorce and custody proceedings in the Circuit Court for Harford County since 2015. This appeal stems from an April 2019 order which modified a 2017 consent pendente lite order regarding use and possession of the parties' marital home. On appeal, Mother raises the following question for our review:

Did the circuit court err in amending a contractual consent order and granting the appellee use and possession of the marital home?

For the reasons that follow, we shall affirm the judgment of the circuit court.

BACKGROUND

In April 2017, the circuit court entered a consent pendente lite order (“2017 P.L. Order”), effectuating a February 24, 2017 agreement reached by the parties. In pertinent part, the 2017 P.L. Order awarded the following: 1) Father would retain custodial access to the parties' four minor children on alternating weekends and every Wednesday night, 2) Mother would retain physical custody “during all other times,” and 3) Mother would retain exclusive use and possession of the parties' marital home in Pylesville, Maryland. Following its entry, however, the 2017 P.L. Order was modified by the court in three significant respects.

Firstly, on January 31, 2018, the court entered a pendente lite order awarding Father sole legal and physical custody of the parties' minor children. In exchange, Mother was to assume Father's prior visitation schedule as set forth in the 2017 P.L. Order. Secondly, following a motion by the children's best interest attorney raising concerns related to Mother's alcohol consumption and care of the minor children, the court entered a

November 2018 order restricting Mother’s custody to “supervised visitation with the minor children at the Harford County Visitation Center.”

Lastly, the court entered an April 16, 2019 order, awarding Father exclusive use and possession of the marital home in Pylesville, Maryland. In doing so, the court considered Father’s March 2019 motion to modify, as well as his affidavit and exhibits attached thereto. Father’s affidavit attested that there were no outward signs that Mother was residing in the marital home in November and December of 2018. Further, the affidavit stated that in February 2019, Mother communicated to him that she was no longer residing in the marital home. With regard to the attached exhibits, Father submitted bank records which, he argued, indicated that Mother had assets with which to support herself and that she had “commenced living in hotels in the Annapolis, Maryland area.” Relying on these exhibits, Father argued that “it [was] in the minor children’s best interest[s] to reside in their home...with the [parent] who has had sole legal and physical custody of the minor children for more than a year,” to return to “their bedrooms,” and to use “their personal property.” He also argued that it was “economically wasteful” to pay the expenses related to the marital home which, he asserted, was sitting vacant.

In response to Father’s motion, Mother filed an opposition and affidavit which asserted that she was in fact residing in the marital home, but that in February 2019, she was “forced to spend her nights at her parent’s home” due to a broken furnace that Father refused to fix. The opposition also included an affidavit from her mother attesting to the same. The court also considered argument of the parties from April 16, 2019. However,

no additional testimony or exhibits were offered by either party to support their arguments at the hearing.

After considering the pleadings, the court determined that it would be in the best interests of the minor children that Father be granted use and possession of the marital home and, therefore, entered its April 2019 order granting such relief. Mother noted a timely appeal of this order.¹

DISCUSSION

PENDENTE LITE CONSENT ORDER SUBJECT TO JUDICIAL MODIFICATION

We first address Mother’s assertion that the 2017 P.L. Order could not be modified because 1) it was entered into by consent of the parties, 2) there was no defect contained within the agreement rendering it invalid or unenforceable, and 3) there was no material change in circumstances warranting a change in its terms.

On the contrary, we hold that the circuit court was permitted to modify the 2017 P.L. Order even though it was entered into by consent of the parties. As an interlocutory order, the 2017 P.L. Order was “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.” Maryland Rule 2-602(a)(3). Further, as we have previously noted, when considering an interlocutory

¹ Following the circuit court’s order of April 16, 2019, Mother filed a timely motion for reconsideration on April 26, 2019. The court denied the motion for reconsideration on April 29, 2019, and Mother noted a timely appeal therefrom on May 29, 2019. *See* Md. Rule 8-202(c) (when a timely post-judgment motion to alter and amend is filed pursuant to Maryland Rule 2-534, within ten days of the judgment, the 30-day deadline is tolled and the notice of appeal must be filed within 30 days of either a notice withdrawing the motion or an order disposing of the motion).

order which “affects the care, custody, support and education of a minor child, the court is not bound by it, even though the parents have agreed to its terms.” *Knott v. Knott*, 146 Md. App. 232, 258-59 (2002). Accordingly, “[i]f the [c]onsent [o]rder is not in the best interest of the child, the court can refuse to accept it.” *Id.*

Moreover, the court was not required to find a defect contained within the 2017 P.L. Order itself to justify modification of the order. In asserting that the order could not be modified, Mother cites *Ruppert v. Fish*, 84 Md. App. 665, 676 (1990), to support her position that a consent agreement cannot be set aside “absent some defect that would make the agreement invalid or unenforceable.” However, *Ruppert* involved the attempted modification of a consent agreement reduced to final judgement. The instant appeal involves an interlocutory order which, as we have already stated, may be modified at any time before the entry of a final judgment to achieve the best interests of the minor children. Further, the court was permitted to modify the 2017 P.L. Order pursuant to § 8-103 of the Family Law Article which provides that “[t]he court may modify any provision of a deed, agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child.”

Lastly, the court was not required to find that there had been a material change in circumstances after the entry of the 2017 P.L. Order in order to modify the provisions contained therein. As this Court has previously held:

[I]t is not appropriate to apply the “change in circumstances” requirement to *pendente lite* orders. They, after all, are designed to provide for purely temporary needs on a short term basis, whereas the provisions for support in a final judgment of divorce are perforce intended to be more permanent and cover equally essential but less frequently recurring living expenses.

Payne v. Payne, 73 Md. App. 473, 481 (1988).

NO ABUSE OF DISCRETION IN MODIFYING THE CONSENT ORDER

We next turn to Mother’s contention that the circuit court erred in awarding use and possession of the marital home to Father. There are two statutory provisions relevant to the court’s determination regarding use and possession of the marital home. Pursuant to § 8-206 of the Family Law Article, the court was permitted to exercise its power to “enable any child of the family to continue to live in the environment and community that are familiar to the child” and “to provide for the continued occupancy of the family home ... by a party with custody of a child who has a need to live in that home.” Accordingly, § 8-206 of the Family Law Article “provides trial courts with the discretion to award exclusive use and possession of the family home to the custodial parent.” *Bussell v. Bussell*, 194 Md. App. 137, 159, 3 A.3d 480, 493 (2010).

Secondly, in evaluating a claim for use and possession of the family home, the court must consider the following factors:

- (1) the best interests of any child;
- (2) the interest of each party in continuing:
 - (i) to use the family use personal property or any part of it, or to occupy or use the family home or any part of it as a dwelling place; or
 - (ii) to use the family use personal property or any part of it, or to occupy or use the family home or any part of it for the production of income; and

(3) any hardship imposed on the party whose interest in the family home or family use personal property is infringed on by an order issued under §§ 8-207 through 8-213 of this subtitle.

Md. Code Ann., Fam. Law § 8-208.

On appeal, Mother argues that the court did not apply these factors in granting use and possession of the family home to Father and granted possession to Father with insufficient evidence to do so. The circuit court’s decision “in awarding possession and use of a family home will not be disturbed on appeal in the absence of a showing that it was exercised in an arbitrary manner or a showing that [the trial court’s] judgment was clearly erroneous.” *St. Cyr v. St. Cyr*, 228 Md. App. 163, 198-99 (2016).

Though Mother contends that the court “failed to consider or even apply” any of the factors contained within § 8-208 of the Family Law Article, our review of the record reveals that the court explicitly considered the best interests of the parties’ children. The court first noted the significant custodial changes that had occurred since the entry of the 2017 P.L. Order which, in essence, restricted Mother’s visitation with the minor children to a location outside of the familial home. Though Mother’s visitation may have been modified had she complied with terms of her visitation, thereby allowing the children renewed access to the familial home, the court observed that the conditions of her supervision had not been “complied with or adhered to at [that] point.” Indeed, at the time of hearing, Mother’s noncompliance with the court’s orders resulted in the children spending “more than five months away from their home and their things.”

Acknowledging the children’s inability to access the familial home due to Mother’s noncompliance, the court considered “what’s in the best interest of the children, their

stability, continuity, as well as their familiarity with the home, others that they associate with in the neighborhood, as well as their education.” In doing so, the court determined that “given that [Father] has sole legal custody of the children and primary physical custody of the children pendente lite, it [made] sense at this point to grant him use and possession of the marital home.” Moreover, this finding was consistent with § 8-206 of the Family Law Article. Based on the foregoing, the court did not abuse its discretion in finding that it was in the best interests of the minor children that Father be granted use and possession of the marital home.

With regard to the three remaining factors of § 8-208, we observe that Mother failed to submit any evidence towards proving any of these factors before or during the February 2019 hearing. The court specifically inquired whether the parties would like to call any witnesses at the hearing. Both parties indicated that they would not be calling any witnesses, relying instead on the written pleadings. Moreover, Mother’s counsel stated that he “would only proffer what was in the affidavits.”

However, the only assertion in Mother’s affidavit was that she was still living in the familial home and that she had only vacated the home for a short period in February 2019 due to a broken furnace. Her affidavit alone did not serve to prove or disprove that she had any interest in continuing to use the family home as a dwelling place, nor that she had any interest in using the family home for the production of income. Further, the affidavit did not serve to prove any hardship imposed on her in losing use and possession of the marital home.

Contrary to her assertion on appeal, there was no evidence submitted that she “had the absolute need to stay in the [h]ome” and that she “was subject to extreme hardship and danger caused by being dispossessed of the [h]ome.” Because Mother failed to raise and support these arguments at the hearing when she was specifically given the opportunity to do so by the court, we are not persuaded that the court abused its discretion by not considering factors for which no supporting evidence had been submitted. Moreover, by failing to raise these arguments in the circuit court, Mother failed to preserve these arguments for appeal. As we have previously stated, “[a] contention not raised below...and not directly passed upon by the trial court is not preserved for appellate review.” *Baltimore Cty., Maryland v. Aecom Servs., Inc.*, 200 Md. App. 380, 421 (2011) (internal quotations omitted).

**JUDGMENT OF THE CIRCUIT
COURT FOR HARFORD COUNTY
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**