

Circuit Court for Montgomery County
Case No. 123029FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0576

September Term, 2019

MARK CABRERA

v.

ISABELLE LORANT CABRERA

Graeff,
Leahy,
Shaw Geter,

JJ.

Opinion by Graeff, J.

Filed: December 20, 2019

*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.

On February 2, 2015, the Circuit Court for Montgomery County granted Mark Cabrera, appellant, and Isabella Cabrera, appellee, a divorce. The Judgment of Absolute Divorce incorporated the parties' Separation Agreement, in which they agreed to joint legal custody and shared physical custody of their minor children.

In 2016, the parties each filed a motion to modify custody. On August 7, 2017, the parties placed an agreement on the record, which resulted in a consent Pendente Lite Order ("PL Order"), with a revised custody and visitation arrangement and a provision that, if neither party filed a motion to revise the order by February 28, 2018, it would become permanent.

On February 14, 2018, Mr. Cabrera filed a motion to modify the PL Order. On January 15, 2019, after a hearing, the circuit court denied appellant's motion. Mr. Cabrera subsequently filed a Motion for New Trial, or to Alter/Amend the Judgment, which the circuit court denied on April 19, 2019.

On appeal, Mr. Cabrera presents two questions for this Court's review, which we have consolidated and rephrased, as follows:

Did the circuit court err in denying appellant's Motion to Modify the Consent Pendente Lite Order by treating the Pendente Lite Order as a final order and improperly limiting the evidentiary scope of the custody modification hearing?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On February 2, 2015, the circuit court entered the Judgment of Absolute Divorce, ending Mark and Isabella Cabrera's marriage. This Judgment incorporated the parties'

Separation, Custody, Support and Property Agreement (“PSA”), signed on November 18, 2014. The parties agreed that their children would reside at the family home until June 30, 2016, after which the children would reside primarily with Ms. Cabrera, and Mr. Cabrera would have visitation every other weekend from Friday after school until drop-off at school on Monday morning, five weeks in the summer, and divided holidays. The agreement provided that it was the intent of the parties that Mr. Cabrera have no less than 128 overnights with the children. Only one of the parties’ three children, “E.,” is still a minor and subject to the ongoing custody dispute.

On May 25, 2016, Mr. Cabrera filed a Petition to Modify Custody, alleging that Ms. Cabrera was disparaging him and denying him access to the children. He requested sole legal and physical custody and an award of child support. In response, Ms. Cabrera filed a counter-complaint to the Petition to Modify Custody, similarly requesting sole physical and legal custody.

On August 7, 2017, the circuit court held a hearing, and the parties consented to the entry of the PL Order. The PL Order provided that the parties would share joint legal custody, with Ms. Cabrera having tie-breaking authority after attempts to resolve disagreement through mediation. The children would reside primarily with Ms. Cabrera, and Mr. Cabrera would have visitation every other weekend, from Friday after school until drop-off at school on Monday mornings, and divided holidays and winter breaks. In addition, the PL Order provided, in pertinent part, as follows:

[I]n order to promote the reunification of the minor children with the father, the mother shall enroll the minor children in individual counseling with a

counselor she shall choose. After a minimum of four sessions of individual counseling, the children shall be enrolled in reunification counseling by the father with a counselor he shall choose. If a problem develops with regard to counseling the attorneys for the parties shall file a joint motion for appointment of a best interests attorney for the children[.]

The order provided that, if neither party moved to modify the agreement by February 28, 2018, “the terms of this Order shall become permanent.” The PL Order was entered on September 7, 2017.

On February 14, 2018, Mr. Cabrera filed a Motion to Modify Pendente Lite Order, asserting that he and E. had been going to counseling with “mixed results,” that he believed Ms. Cabrera had been “thwarting the benefit of the counseling with her statements and acts” and created an “atmosphere of gloom for the children,” and that he “had done everything in his power to try and reunite with the children including giving up visitations so that the children could have their way.” He requested a hearing to modify the “Consent Pendente Lite Agreement.” Although a hearing was the only relief requested in the motion to modify the PL Order, Mr. Cabrera subsequently stated that he was seeking “full custody of the children.”

On February 26, 2018, Ms. Cabrera filed a motion for enforcement of the Judgment of Absolute Divorce and for the appointment of a trustee to list and sell the marital home. She asserted that, pursuant to the PSA, Mr. Cabrera received title to the family home, with the requirement that he refinance within three years and remove Ms. Cabrera’s name on the mortgage, but Mr. Cabrera had not done so, had not been making timely payments on the mortgage, and Ms. Cabrera’s credit had been damaged. Ms. Cabrera sought the

appointment of a trustee to facilitate the sale of the property. She also sought the return of bedroom furniture that was the subject of the PSA.

The circuit court held a hearing on January 14–15, 2019. Counsel began by stating that there were two preliminary matters, one involving the wiretap statute, and the other involving the relevant time period for evidence. The parties discussed the admissibility of a 2015 and a 2016 cell phone video, and the court then established the temporal scope of the review. As discussed in more detail, *infra*, the court stated that, because the motion was to modify the order consented to in August 2017, Mr. Cabrera needed to show a material change in circumstances since the time of that order.

After some additional preliminary discussion, Mr. Cabrera testified. As relevant to the issue of custody, Mr. Cabrera testified that he was denied visitation on eight weekends in 2018, and he was denied overnights with E.¹ He testified that he believed that Ms. Cabrera thwarted his reunification with E. because he initially was not provided with E.’s insurance information, but his relationship with E. ultimately improved during the reunification therapy, which stopped in January 2018 because they had “reconciled pretty much.” Mr. Cabrera also testified regarding his vacation with E., and that E. was hospitalized in October and November 2018.²

¹ On cross-examination, Mr. Cabrera acknowledged that he had cancelled his visitation with E. for various reasons.

² Mr. Cabrera’s current wife, Olena Cabrera, testified that Mr. Cabrera and E. have a good relationship, but E. had become “more closed” recently.

On the second day of the hearing, January 15, 2019, Mr. Cabrera attempted to introduce testimony by Lorie Hood, a forensic traumatologist, as an expert in the area of parental alienation. The court, noting a lack of expertise or foundation to render an opinion, did not find her to be qualified as an expert to testify in the case.³ Mr. Cabrera does not challenge that ruling on appeal.

At the conclusion of the hearing, the court noted that the PL order gave either party the right to petition to modify the order, explaining that this meant “you have to set forth the basis for the modification and then you look at the law under modification. There has to be a substantial change in circumstances.” The court stated that it had heard “zero” about Ms. Cabrera interfering with counseling or thwarting Mr. Cabrera’s relationship with his son, “[a]bsolutely nothing.” The court then ruled, as follows:

So, at this point, I’ll grant the motion^[4] because based upon the petition filed, there’s been no evidence presented whatsoever that any current condition of this child has to do with the actions of the defendant and that’s what the allegation is in the motion to modify. There’s been no evidence at all that the defendant interfered with [Mr. Cabrera’s] ability to have counseling with the younger son, and by his own testimony, the older son stopped going because [he] didn’t, he has [not] talked to the older son in a year and a half.

So, I’ll grant the motion at this time.

The following then occurred:

³ Ms. Hood testified that she had not interviewed E. or Ms. Cabrera before trial and had met E once at a birthday party, but she had reviewed Ms. Cabrera’s deposition, as well as e-mails between the couple.

⁴ In context, and as shown by the subsequent written order, the court intended to deny Mr. Cabrera’s motion.

[Mr. Cabrera's Counsel]: So, what do we go on in the future, Your Honor? Do we go on the PL order? Do we go on what the consent that we made with the visitation got? What do we go on? What does he do tomorrow is what I'm trying to ask.

The Court: Well, as of this point, based upon your motion to modify, there's no modification.

[Ms. Cabrera's Counsel]: Your Honor --

[Mr. Cabrera's Counsel]: Well, but we had, okay, do we have the agreement for the 128 days?

Counsel for Ms. Cabrera then stated that he was going to call Ms. Cabrera regarding her motion involving the home.

On February 27, 2019, following the hearings, the court entered an order, which, as relevant to this appeal, denied Mr. Cabrera's Motion to Modify the Consent PL Order. On March 11, 2019, Mr. Cabrera filed a Motion for a New Trial and Motion to Alter/Amend and Clarify Judgment. He argued that the circuit court erred in interpreting the PL Order as a final order and restricting the time frame for the admission of evidence to events that occurred after the entry of the PL Order on September 7, 2017, "as opposed to the period of time from the entry of the order that was the subject of the modification proceedings, the parties' February 2, 2015 Judgment of Absolute Divorce."⁵ As a result, Mr. Cabrera requested that the court grant a new trial to hold a full hearing on the merits. Alternatively,

⁵ Mr. Cabrera stated in his Motion for New Trial, or to Alter/Amend Judgment, that the events prior to September 7, 2017, included "Mother's denial and interference with his access, failure to keep him informed of doctor's appointments, placing the children in the middle of their disputes, and other conduct on the part of Mother that Father believed was contrary to the children's best interest."

he requested that the circuit court make clear that the terms of the 2015 Judgment of Absolute Divorce controlled, not the 2017 PL Order.

Ms. Cabrera opposed the motion. With respect to the clarification requested, she stated: “The parties entered into a consent order in September 2017 with full knowledge of its terms.” Mr. Cabrera’s motion was denied by the circuit court on April 19, 2019.⁶

This appeal followed.

STANDARD OF REVIEW

In reviewing a child custody case, “Maryland appellate courts apply three different but interrelated standards of review.” *In re Adoption of Cadence B.*, 417 Md. 146, 155 (2010). The Court of Appeals has recently described these standards as follows:

When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon some legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion. *In re Adoption/Guardianship of Ta’Niya C.*, 417 Md. 90, 100, 8 A.3d 745 (2010) (alteration in original) (quoting *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297, 872 A.2d 662 (2005)).

In re Adoption/Guardianship of C.E., 464 Md. 26, 47 (2019).

DISCUSSION

Mr. Cabrera contends that the circuit court erred in denying his motion to modify the PL Order. He argues that the court erred in treating the PL Order as a final order,

⁶ The circuit court effectively ruled that the PL order had become a final order.

instead of a temporary pendente lite order, and this error led the court to erroneously apply the standard applied to a request to modify a final custody order, i.e., whether there was a material change in circumstances, as opposed to the proper standard, i.e., the best interest of the child. He asserts that this error then led the court to erroneously restrict the scope of evidence to that occurring after the September 7, 2017, PL Order, as opposed to allowing him to also introduce evidence of events occurring from the 2015 Judgment of Absolute Divorce to the entry of PL Order in 2017. Accordingly, Mr. Cabrera requests that we vacate the circuit court's order and remand for a custody merits hearing subject to the correct evidentiary scope.

Ms. Cabrera contends that the circuit court's order should be affirmed for either of two reasons. First, she asserts that Mr. Cabrera never objected to the court's ruling regarding the relevant evidence, and she notes that Mr. Cabrera failed to proffer any evidence that he wanted to produce, other than "two illegal cell phone videos." Second, she argues that the court's order was "correct on the merits." She asserts that, because the PL order, which was agreed to by the parties, was issued after the initial custody ruling for the purpose of giving reunification time to work, the trial court correctly concluded that Mr. Cabrera failed to present any evidence showing a material change in circumstances warranting a modification in custody.

We begin our analysis with Ms. Cabrera's claim that Mr. Cabrera failed to preserve his contention for this Court's review because he did not object below to the circuit court's statements that the issue before the court was whether there had been a material change in

circumstances since the time of the 2017 PL Order. Based on our review of the record, we agree that Mr. Cabrera’s contentions on appeal have not been preserved for review.

Maryland Rule 8-131(a) provides that, “[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court.” “[T]he application of the rule limiting the scope of appellate review to those issues and arguments raised in the court below ‘is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice.’” *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)). “[W]hen a party has the option of objecting, his failure to do so while it is still within the power of the trial court to correct the error is regarded as a waiver estopping him from obtaining a review of the point or question on appeal[.]” *Lohss v. State*, 272 Md. 113, 119 (1974). *Accord Halloran v. Montgomery Cty. Dep’t of Public Works*, 185 Md. App. 171, 202 (quoting *Caviness v. State*, 244 Md. 575, 578 (1966)) (“[U]nless a [party] makes timely objections in the lower court or makes his feelings known to that court, he will be considered to have waived them and he can not now raise such objections on appeal.”), *cert. denied*, 409 Md. 48 (2009).

Here, in discussing the scope of the hearing, the following colloquy occurred:

The Court: Okay. So, I thought there was a consent order in this case from August of 2017, and that’s --

[Mr. Cabrera’s Counsel]: There is.

The Court: -- what we’re here to modify.

[Mr. Cabrera’s Counsel]: No. Okay. The consent order from 2017 --

The Court: Right.

[Mr. Cabrera's Counsel]: -- stated that it was a pendente lite order, and that either party can request to modify that order to go back, and modify custody.

The Court: Right. So --

[Mr. Cabrera's Counsel]: Period, not just that consent order, custody period.

[Ms. Cabrera's Counsel]: This is the second issue -- the second preliminary issue we're talking about.

The Court: All right. So let's look at that, because I thought --

[Mr. Cabrera's Counsel]: Okay.

The Court: Either party shall have the right to petition the court to modify their pendente lite agreements that are contained herein. However, should neither party do so by February 28th, then the terms of the order shall become permanent.

[Mr. Cabrera's Counsel]: Correct.

The Court: So, the parties reserve the right to modify the terms that are in this consent pendente lite order.

[Mr. Cabrera's Counsel]: That's correct.

The Court: Okay.

[Mr. Cabrera's Counsel]: That's custody, visitation, the entire --

The Court: Right. Okay. **But in order to modify that, there has to be --**

[Mr. Cabrera's Counsel]: We have to go back. We --

The Court: -- **a change in circumstance since --**

[Mr. Cabrera's Counsel]: **That's right.** And we're going to --

The Court: -- **the time of the order.** So, anything that happened before the order is not really relevant to a change of circumstance. **So we're here for a modification. So, the modification would be a change in circumstance from the date of the order.** Anything that post date's the order might be relevant, it may not be relevant, I'm not sure, but **anything prior to the order would, in my view, clearly not be relevant --**

[Mr. Cabrera's Counsel]: **Okay.**

The Court: -- because the parties have entered into --

[Mr. Cabrera's Counsel]: For the change in circumstances.

The Court: **Anything prior to the date of the order,** which was August of 2017, **could not be considered a change of circumstance to an order that was issued.**

[Mr. Cabrera's Counsel]: **I know. I understand, but, however, if you find that there is a change in circumstance since that order, then we can go back a reasonable period of time to establish the terms of what would be required to do for a change of custody, such as character,** what each party brings to the table, et cetera, et cetera, et cetera, because if you find that there's no change in circumstance, fine, I understand, but if you find that there's a change in circumstance, then --

The Court: Okay. So, this is what I'm going to do. [B]ecause this is a modification, any facts that I'm going to be considering to determine the change of circumstance have to post-date that order. All of the conduct . . . that existed at the time of this order was known by the parties, so that was taken into consideration at the time that this was reached. So what I'm going to consider is anything that happened after that.

Nothing before that is going to be relevant to me, so that's the way we'll handle the evidence. All right. So, since this happened in 2015 and '16, this is beyond that, so I won't consider those actions that occurred in 2015 and '16, because they pre-dated the order.

(Emphasis added.) Neither party objected to the court's ruling in this regard.

Counsel for Mr. Cabrera agreed below with the Court's analysis that the relevant inquiry was whether there was a material change in circumstances since the time of the PL

Order, and the evidence was directed to that issue. Accordingly, he waived the right to challenge that ruling on appeal.

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that “appellate courts should rarely exercise” the discretion under Md. Rule 8-131(a) because “considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court’s ruling, action, or conduct be presented in the first instance to the trial court[.]” *Chaney v. State*, 397 Md. 460, 468 (2007). This requirement ensures “that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.” *Id. Accord Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 131 S. Ct. 2119 (2011). We decline to exercise our discretion to review the unpreserved issue in this case.

We note that Mr. Cabrera did raise the issue he raises on appeal in his Motion for New Trial, or to Alter/Amend Judgment. The circuit court denied the motion, and we review this decision for abuse of discretion. *See Miller v. Mathias*, 428 Md. 419, 438 (2012) (*quoting RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 673 (2010)) (“In general, the denial of a motion to alter or amend a judgment or for reconsideration is reviewed by appellate courts for abuse of discretion.”); *Mahler v. Johns Hopkins Hosp., Inc.*, 170 Md. App. 293, 321, *cert. denied*, 396 Md. 13 (2006) (*quoting Merritt v. State*, 367 Md. 17, 28 (2001) (“A trial court’s denial of a motion for a new trial is generally reviewed for an abuse of discretion.”)). “There is an abuse of discretion where no

reasonable person would take the view adopted by the [circuit] court, or when the court acts without reference to any guiding rules or principles.” *Bord v. Baltimore County*, 220 Md. App. 529, 566 (2014) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

This Court previously has indicated reluctance to find an abuse of discretion by the circuit court when a party raises, in a post-trial motion, an issue that could have been, but was not, raised at trial. In that situation,

the discretion of the trial judge is more than broad; it is virtually without limit. What is, in effect, a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been earlier but were not. Losers do not enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right.

Shini Ping Li v. Tzu Lee, 210 Md. App. 73, 97 (2013) (quoting *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484–85 (2002)), *aff'd*, 437 Md. 47 (2014). “When a party requests that a court reconsider a ruling solely because of new arguments that the party could have raised before the court ruled, the court has almost limitless discretion not to consider those argument[s].” *Scholtzhauer v. Morton*, 224 Md. App. 72, 85 (2015), *aff'd*, 449 Md. 217 (2016). Here, based on the record, we cannot find an abuse of discretion by the circuit court in denying the Motion for New Trial, or to Alter/Amend Judgment.

Accordingly, we affirm the judgment of the circuit court denying Mr. Cabrera’s Motion to Modify the Consent PL Order and his Motion for a New Trial, or to Alter/Amend the Judgment.

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