Circuit Court for Baltimore City
Case No. 24-P-08002451

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 784

September Term, 2021

ERIC D. SMITH

v.

ALICIA T. JONES

Beachley,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Zarnoch, J.

Filed: March 18, 2022

The parties to this case, Eric D. Smith, appellant, and Alicia T. Jones, appellee, are the parents of a minor child, E., born on April 29, 2008. In this appeal, Smith challenges the decisions of an in banc panel, empaneled by the Circuit Court for Baltimore City, dismissing his two petitions for in banc review and denying his motion to reconsider. In his Informal Brief,[1] filed in proper person, Smith presented nine issues[2] for our

[1] Smith filed an Informal Brief pursuant to Md. Rule 8-502(a)(9).

[2] Smith set forth the following issues, which we quote:

> I. Did Judge Peters and Dipetrio and Magistrate Kelly and the Baltimore City Family Court violate the Due Process Clause and the Rules of Evidence by not f[o]llowing Procedural Law?
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> II. Ex Parte Communication – Did Magistrate Andrea Kelly with the Appellant & Judge Michael Depetrio communications a violation of Ex Parte Communication?
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> III. Did all court agents and the clerk of the Court violate the Rules of Evidence by willfully denying all rights of the Appellee because of his staus of being Without Prejudice will all documents submitted timely and in order?
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> IV. Did Judge DiPetrio violate the Due Process of the Appellee as mentioned in Fourteenth Amendment of the United States and Article 24 of the Maryland Constitution, Declaration of Rights[?]
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> V. Did Judge DiPetrio err when he dismissed the Motion to Stop Child Support by combining it with the Complaint for Modification that he also denied even though it was filed before the Appellant's case according to the docket of filings therefore Judge Dipetrio violated Maryland Rules[?]
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> VI. Did Judge Dipetrio err when combined the Child Support case with the Complaint for a Modification thereby subjecting the Appellee to laws that do not apply to him due to the documented status of being WITHOUT PREJUDICE in the State of Maryland?
>
> VII. Did the Baltimore City Family Court violate the rules of evidence by denying the Appellee the right to an In Banc Review?
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> VIII. If Magistrate Andrea Kelly violated the Rule of Evidence by not allowing the evidence of the mental health status which could have been used in favor of the Appellee when the case was before her and Judge DiPetrio did

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consideration, all of which pertain to the dismissal of his petitions for in banc review and denial of his motion to reconsider. For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case has a long history dating back to 2010 when Jones filed a paternity action against Smith asserting that he was E.'s father. We need not set out the details of the case except as necessary to address the issues before us. It is sufficient to state that the circuit court entered a consent paternity judgment declaring Smith the father of E. and ordering him to pay child support. Subsequently, the parties entered into a consent agreement, docketed on April 6, 2015, by which they agreed to the court ordering joint legal and shared physical custody. The court incorporated into that order a parenting plan that had been signed by both parties.

On October 28, 2019, Jones filed a petition for contempt in which she alleged that Smith had failed to comply with a court order requiring him to follow recommendations made by E.'s medical professionals. Three months later, Smith filed a petition for contempt alleging that Jones had filed a case with Child Protective Services that was determined to

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not allow the Appellee to share the evidence which is another violation of the Rules of Evidence by not allowing the evidence to be reviewed by him is that a violation due for just compensation?

IX. According to Maryland Rule 2-503 Consolidation, Separate Cases Under – Judge DiPetrio denied me my full faith and credit because he combined my cases and denied them without hearing the cases. This violates the separate trial rule.

In an amendment to his Informal Brief, Smith presented additional arguments in support of the issues raised in his original brief. We note that in some instances, Smith referred to himself as the appellee when he is, in fact, the appellant in this appeal, but that does not impact our consideration of the issues presented.

be "unfounded" and that she was denying him access to E. Thereafter, both parties filed motions to modify custody and Jones sought a modification of child support.

A hearing was held on both motions for contempt, both motions to modify custody, and the motion to modify child support. On March 12, 2021, the court announced its decision from the bench. The court determined that there was a material change in circumstances and that the parties had not been able to communicate or reach shared decisions regarding their child. Written orders denying both motions for contempt and Smith's motion to modify custody were entered on March 29, 2021. In a separate written order entered on April 16, 2021, the court granted Jones's motion to modify custody and awarded her sole legal and physical custody of E. The court granted Smith visitation on specific dates and times with certain conditions.

On April 8, 2021, Smith filed a petition for in banc review in which he asserted that he had not received the judgment denying his motion for contempt and motion to modify custody until April 6, 2021, that the transcript had been requested, and that he intended to file a memorandum within 30 days. By order dated May 13, 2021, the in banc panel dismissed Smith's petition because he had failed to file the memorandum required by Maryland Rule 2-551(c).[3]

[3] Maryland Rule 2-551(c) provides:

> **Memoranda**. Within 30 days after the filing of the notice for in banc review, the party seeking review shall file four copies of a memorandum stating concisely the questions presented, any facts necessary to decide them, and supporting argument. Within 15 days thereafter, an opposing party who wishes to dispute the statement of questions or facts shall file four copies of

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Apparently, pursuant to Maryland Rule 2-535, on the last day for filing, Smith filed a motion to reconsider the dismissal of his petition for in banc review. He argued that he followed the court rules for requesting a transcript, that the transcription company had a delay in providing the transcript, and that the transcripts would be available within a week or so. Smith requested an extension of time to provide the transcripts. On June 17, 2021, the in banc panel denied the motion to reconsider.[4]

On April 23, 2021, a week after the court granted Jones's motion to modify custody, Smith filed another petition for in banc review. By order entered on June 17, 2021, the in banc panel dismissed Smith's petition because it was not accompanied by the memorandum required by Md. Rule 2-551(c). On July 16, 2021, Smith filed a notice of appeal from the dismissal of his petitions for in banc review and the denial of his motion to reconsider.

DISCUSSION

We shall begin our analysis by clarifying the issues before us. Preliminarily, we note that it has long been established in Maryland that a party cannot appeal from the denial of his or her motion to have another party held in contempt. *See generally Becker v. Becker*,

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> a memorandum stating the alternative questions presented, any additional or different facts, and supporting argument. In the absence of such dispute, an opposing party may file a memorandum of argument.

Under Rule 2-551(g)(1), the panel may dismiss a petition if the memorandum of the party seeking review was not timely filed.

[4] Under Maryland Rule 2-551(d), a judge of the panel, after reviewing the memorandum, decides whether a transcript is necessary.

29 Md. App. 339, 345 (1975); *Tyler v. Baltimore Cnty.*, 256 Md. 64, 71-72 (1969).[5] We also take note that Smith did not timely appeal the dismissal of his first petition for in banc review. The order of dismissal was entered May 13, 2021. His notice of appeal was filed July 16, 2021, more than 30 days after judgment. Smith's motion to reconsider (actually, a motion to revise under Md. Rule 2-535), although timely filed, did not automatically stay the time for appeal. *See Pickett v. Noba, Inc.*, 114 Md. App. 552, 557 (1997) ("If the motion is filed within ten days of judgment, it stays the time for filing the appeal; if it is filed more than ten days after judgment, it does not stay the time for filing the appeal."); and Md. Rule 8-202(a). Our conclusion that the appeal of the dismissal of the first petition was untimely will have little practical effect, because the identical issue is presented in his appeal of the denial of his motion for reconsideration. Accordingly, the only rulings that concern us are the orders of the in banc panel dismissing Smith's second petition for in banc review and denying his motion to reconsider the dismissal of the first petition.[6]

A. In Banc Review

Another issue we must confront is whether Smith could appeal the decisions of the in banc court. Article IV, § 22 of the Maryland Constitution[7] affords litigants the right to

[5] From Smith's informal brief, it is not clear whether he is seeking review of the denial of this motion.

[6] Thus, we do not and cannot address the custody and other issues Smith attempted to present to the in banc panels.

[7] Article IV, § 22 of the Maryland Constitution currently provides:

> Where any trial is conducted by less than three Circuit Judges, upon the decision or determination of any point, or question, by the Court, it shall be competent to the party, against whom the ruling or decision is made, upon

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in banc review of a circuit court's rulings. A party must choose whether to pursue in banc review in the circuit court or a direct appeal to this Court, as he or she cannot do both. *Bethesda Title & Escrow, LLC v. Gochnour*, 197 Md. App. 450, 460-61, *cert. granted*, 420 Md. 81, *appeal dismissed*, 421 Md. 192 (2011). The right to appeal in Maryland is determined by statute and thus must be "legislatively permitted." *In re C.E.*, 456 Md. 209, 220 (2017) (citations omitted). Generally, appeals may be taken only from "a final judgment entered in a civil or criminal case by a circuit court." *See* § 12-301 of the Courts and Judicial Proceedings Article ("CJ") of the Maryland Code. "To qualify as a final judgment, an order must be so final as either to determine and conclude the rights involved or to deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding." *In re D.M.*, 250 Md. App. 541, 555

> motion, to have the point, or question reserved for the consideration of three Judges of the Circuit, who shall constitute a court in banc for such purpose; and the motion for such reservation shall be entered of record, during the sitting at which such decision may be made; and the procedure for appeals to the Circuit Court in banc shall be as provided by the Maryland Rules. The decision of the said Court in banc shall be the effective decision in the premises, and conclusive, as against the party at whose motion said points, or questions were reserved; but such decision in banc shall not preclude the right of Appeal by an adverse party who did not seek in banc review, in those cases, civil or criminal, in which appeal to the Court of Special Appeals may be allowed by Law. The right of having questions reserved shall not, however, apply to trials of Appeals from judgments of the District Court, nor to criminal cases below the grade of felony, except when the punishment is confinement in the Penitentiary; and this Section shall be subject to such provisions as may hereafter be made by Law.

Section 22 was amended in 2021 to substitute "the Appellate Court of Maryland" for "the Court of Special Appeals." That amendment will be before the voters at the November 8, 2022 general election. Acts 2021, c. 82, § 1; Acts 2021, c. 83, § 1.

(2021) (quotations, citations, and emphasis omitted). The final judgment rule has three exceptions. They are:

> (1) appeals from interlocutory orders specifically allowed by statute [predominately orders enumerated in C.J.§ 12-303]; (2) immediate appeals permitted when a circuit court enters final judgment under Maryland Rule 2-602(b); and (3) appeals from interlocutory rulings allowed under the common law collateral order doctrine.

In re O.P., 470 Md. 225, 250 (2020) (citation and footnote omitted).

With regard to decisions that modify child custody, CJ § 12-303(x), which addresses appeals from judgments that are not final, provides that a party may appeal from an interlocutory 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[.]" In deciding whether a custody order is immediately appealable, the focus should be on whether the order, and the extent to which that order, changes the antecedent custody order. *In re Karl H.*, 394 Md. 402, 430 (2006). "If the change could deprive a parent of the fundamental right to care and custody of his or her child, whether immediately or in the future, the order is an appealable interlocutory order." *Id.*

Because an in banc panel functions as an appellate court, a party may pursue in banc review only if the ruling in question was a final judgment or was otherwise immediately appealable. *See State v. Phillips*, 457 Md. 481, 512 (2018) ("Subject to any law that, in a particular circumstance, would provide otherwise, in any case in which a party has a right to appeal from a final judgment to the Court of Special Appeals or the Court of Appeals, the party has the right to request in banc review of an interlocutory ruling properly reserved, but not until a final judgment is entered.") (emphasis omitted); *Bd. of License Comm'rs for*

Montgomery Cnty. v. Haberlin, 320 Md. 399, 407 (1990) ("Generally, an appeal under § 12-301 of the Courts and Judicial Proceedings Article must be authorized in order for a court in banc to exercise jurisdiction."); *Estep v. Estep*, 285 Md. 416, 421-22 (1979) (if circuit court ruling would not have been appealable under the final judgment rule or one of its exceptions, the in banc panel would lack appellate jurisdiction).

If a party seeks and obtains in banc review and fails to prevail, he or she "has no further right of appeal." Md. Rule 2-551(h); CJ § 12-302(d) (Section 12-301 "does not permit an appeal from the decision of the judges of a circuit court sitting in banc . . . if the party seeking to appeal is the party who moved to have the point or question reserved for consideration of the court in banc."); *Bienkowski v. Brooks*, 386 Md. 516, 544 n. 14 (2005) ("[T]he appellant before an in banc court does not have the right to appellate review at the next level, . . ."). On the other hand, the party who did not request in banc review may attempt to pursue appellate review of the in banc panel's decision. Md. Rule 2-551(h). The proscription against further appeals is applicable only where there has been an actual decision by the in banc panel on the points reserved. *Merritts v. Merritts*, 299 Md. 521, 526 (1984) ("It is well settled that before the proscription against a further appeal by the moving party in an in banc appeal is applicable, there must be a decision by the in banc court on the points reserved.").

In the instant case, Smith is not barred from seeking appellate review in this Court on the ground that he sought in banc review below. His petitions for in banc review were dismissed on a procedural ground prior to consideration on the merits and, as a result, the constitutional proscription did not come into play.

B. Smith's Motion to Reconsider

Smith's notice of appeal was filed within 30 days of the in banc panel's denial of his motion to reconsider. Nevertheless, Smith cannot show that the in banc panel abused its discretion in denying his motion to reconsider. As we noted in *Estate of Vess,* 234 Md. App. 173, 204 (2017), "[a]n appeal from the denial of a motion asking the court to exercise its revisory power is not necessarily the same as an appeal from the judgment itself." (internal quotations and citations omitted). Generally, the denial of a motion to revise is reviewed for abuse of discretion. *Hardy v. Metts*, 282 Md. 1, 6 (1978). An abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (internal quotations and citation omitted). Such an abuse may also occur when "the court's ruling is clearly against the logic and effect of facts and inferences before the court or when the ruling is violative of fact and logic." *Id.* (internal quotations and citation omitted).

The record before us shows that Smith failed to file the memorandum required by Md. Rule 2-551(c) within the required 30-day period. The Rule itself contemplates that the transcript is to be filed *after* the parties' memoranda are submitted. *See* Md. Rule 2-551(d) (providing that a judge of the panel shall review the memoranda, determine if all or part of a transcript is required, and, if so, order one of the parties to provide it). In his motion to reconsider, Smith complained about delays in obtaining the transcript, but under the Rule, he did not need the transcript to file the required memorandum within the 30-day period. Nor did he seek an extension of time for filing it. Maryland Rule 2-551 expressly

authorizes dismissal if a memorandum is not timely filed.[8] Thus, we conclude that the in banc panel did not abuse its discretion in denying Smith's motion to reconsider.

C. In Banc Panel's Dismissal of Smith's Second Motion

Seven days after the circuit court entered its order granting Jones's motion to modify custody and visitation, Smith filed his petition for in banc review of that ruling. Pursuant to Md. Rule 2-551(c), Smith was to file the required memorandum on or before Monday, May 24, 2021. Because he did not do so, on June 17, 2021, the in banc panel dismissed Smith's petition for in banc review.

When reviewing the grant of a motion to dismiss, the appropriate standard of review "'is whether the trial court was legally correct.'" *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019) (quoting *Blackstone v. Sharma*, 461 Md. 87, 110 (2018)). Therefore, "[w]e review the grant of a motion to dismiss de novo." *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 (2015) (quotations and citations omitted). This is also true when the dismissal occurs as a result of *sua sponte* action by the court.

As we have already noted, Maryland Rule 2-551(c) clearly requires the party seeking in banc review to file a memorandum within 30 days after filing the notice for in banc review. That Rule also provides that a party may file a motion to extend the requirements of the rule except for the time for filing the notice of in banc review. Md. Rule 2-551(f). In addition, the Rule provides that the panel may dismiss an in banc review

[8] Smith makes much of the fact that Md. Rule 2-551(g)(1) speaks in terms of "may," not "shall" and does not mandate dismissal. That is true. However, if the in banc panel has the discretion to dismiss for failing to file a memorandum, the only question we can review is whether the panel abused its discretion.

if, among other things, the required memorandum is not timely filed. Md. Rule 2-551(g)(1). The record makes clear that Smith failed to file the required memorandum and did not seek in a timely fashion to extend the 30-day period for doing so. For those reasons, the in banc panel's decision to dismiss the action was legally correct. Md. Rule 2-551(g).

D. Due Process and Other Arguments

Because Smith makes certain arguments that appear to challenge the jurisdiction of the trial court, we will briefly address them. Smith argues that the trial judges and magistrate who considered the case below violated his Due Process rights under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. He asserts that the judges and magistrates failed to acknowledge all of his evidence and rejected the argument that he was "Without Prejudice status." Similarly, he maintains that the trial judges and Clerk of the Circuit Court violated "the Rules of Evidence by willfully" denying him rights arising from his status "of being Without Prejudice[.]" According to Smith, the trial court also erred in combining "the Child Support case with the Complaint for a Modification," ordering child support without giving him "just compensation," and making disparaging comments, thereby subjecting him "to laws that do not apply to him due to the documented status of being WITHOUT PREJUDICE in the State of Maryland[.]" On the issue of child support, Smith argued that the court could not "force [him] to have an order of child support" because he was "not a part of the state's rules." He asserted that he was "without prejudice" and that he abided by federal rules but did "not abide by the state's rules."

Smith does not explain precisely what he means when he asserts he is a person "without prejudice," but it is clear to us that the circuit court had jurisdiction over the custody case and that Smith was subject to Maryland law. Smith himself filed numerous motions in the circuit court, including the motion to modify custody. Further, § 1-201(b) of the Family Law Article ("FL") of the Maryland Code provides that an equity court has jurisdiction over custody or guardianship of a child, except for a child who is under the jurisdiction of any juvenile court and who previously has been adjudicated to be a child in need of assistance, visitation of a child, and support of a child. In exercising its jurisdiction over custody, visitation, and support of a child, an equity court may, among other things, "direct who shall have the custody or guardianship of a child, pendente lite or permanently[,]" "determine who shall have visitation rights to a child[,]" determine child support, and "from time to time, set aside or modify its decree or order concerning the child[.]" FL § 1-201(c).

Moreover, as we have already noted, Maryland Rule 2-551 provided a procedure by which Smith was required to file a memorandum within 30 days of the filing of each of his petitions for in banc review "stating concisely the questions presented, any facts necessary to decide them, and supporting argument." Md. Rule 2-551(c). As in banc panels can place a burden on judicial resources, the required memorandum serves the important purpose of advising the panel about the issues presented for its consideration. Smith failed to file the required memorandum and, thereby, take advantage of the process that was available to him. His failure to file a memorandum in support of his request for in banc review does not constitute a denial of due process. Moreover, as a result of Smith's failure

to file the required memorandum, Smith's arguments about the circuit court's combination of certain motions, the court's refusal to acknowledge certain evidence, alleged *ex parte* communications, alleged violations of evidentiary rules, and the failure to allow certain evidence to be reviewed are not properly before us.

Lastly, Smith maintains that the circuit court violated the Maryland Administrative Procedure Act ("APA"), set forth in Article 10 of the State Government Article ("SG") of the Maryland Code. Smith's reliance on the APA is misplaced. The APA addressees, among other things, judicial review of final administrative agency decisions in contested cases. No provision of the APA applies to this child custody case. *See* SG § 10-101 *et seq.*

JUDGMENTS OF THE IN BANC PANEL OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.