

Circuit Court for Prince George's County
Case No. CAD-17-14272

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 947

September Term, 2018

E. A.

v.

E. O.

Kehoe,
Arthur,
Reed,

JJ.

Opinion by Kehoe, J.

Filed: July 29, 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 June 15, 2018, the Circuit Court for Prince George’s County entered a judgment of absolute divorce in favor of appellant, E. A. (“Husband”), and granted Husband and appellee, E. O. (“Wife”), joint legal and shared physical custody of the couple’s minor child, with primary physical custody to Wife and visitation to Husband. The court ordered Husband to pay Wife child support in the amount of \$2,200 per month, along with alimony in the amount of \$1,000 per month for one year and \$500 per month for the following year.¹

Husband has appealed the order of the circuit court, raising the following issues for our consideration, which we have rephrased and consolidated:²

¹ Husband was to pay the mortgage, water bill, and gas bill for the marital home in lieu of child support until August 31, 2018, when Wife was required to vacate, and \$2,200 per month by earnings withholding thereafter. (R. 99).

² The issues, as posed by Husband, are:

1. Whether, under the Child Support Guidelines in Maryland, a Circuit Court may estimate the annual gross income of a parent who is employed to full capacity and submitted income documentations in support of actual income for purposes of child support calculation and child support obligation where Md. Family Law requires use of actual income for a parent who is employed to full capacity in calculating child support obligation.
2. Whether the Circuit [Court] erred in including incomes from overtime, weekend pay, differential for Sundays and everything else in Appellant’s annual gross income and child support obligation without first determining whether overtime, weekend pay, differential for Sundays and everything else were a regular part of Appellant’s Income.
3. Whether the Circuit Court Erred by Failing to Verify the Incomes of the parties for purposes of child support calculation and child support obligation. Maryland Family Law Article states: Income statement of the parents shall be verified with documentation of both current and past actual income.
4. The Circuit Court erred in awarding primary physical custody to Appellee where Appellee has a history of denying medical care to the minor child and denying Appellant access to the minor child.

1. Did the circuit court err in calculating the amount of its award of child support to Wife?
2. Did the circuit court err by awarding primary physical custody to Wife in the light of evidence that Wife denied the minor child medical care and denied Husband access to the child?

For the reasons that follow, we will affirm the circuit court's custody ruling but vacate the child support and alimony awards and remand the matter to the circuit court for further proceedings consistent with this opinion.

Facts and Legal Proceedings

Husband and Wife met in Nigeria in 2012 and married there in January 2013. After moving to Maryland, they married in a civil ceremony in Prince George's County on November 25, 2013. Their one child, M., was born in January 2015.

The marriage was strained almost from its inception. According to Wife, Husband told her, shortly after they were married, that she was not as beautiful as he had initially thought and that he did not love her. Husband claimed that in 2014 Wife asked him if a man can be charged with raping his wife in the United States; worried that she would accuse him of rape, he ceased sexual relations with her. He believed that Wife later committed adultery, based largely on his discovery of thousands of text messages between Wife and other men.

Following an argument that resulted in police intervention, Husband and Wife separated on or about October 16, 2016. Thereafter, M. resided with Wife in the marital home.

In June 2017, Husband filed a complaint for shared physical and sole legal custody of M., asserting that Wife had denied him access to the child since the separation. Wife

filed a counter-complaint for limited divorce, sole legal and physical custody, and child support, alleging that during the marriage, Husband had engaged in a pattern of physical, verbal, and mental abuse toward her, which was detrimental to M.'s health and safety and caused her to obtain a temporary protection order against Husband. Husband then filed a supplemental complaint for absolute divorce on the ground of adultery, stating that Wife had filed false complaints against him in an attempt to remain in the United States under the Violence Against Women Act. He further sought sole legal and physical custody of M., claiming that Wife's mental instability posed a danger to the child.

The trial in the divorce action took place in May, 2018.³ Husband, then aged 53, testified that he and Wife, then aged 33, had separated after an argument on October 16, 2016. During the argument, Wife slipped and fell on the basement stairs, after which she called the police, who investigated but did not arrest him. The next day, Wife served him with a protective order.⁴

Thereafter, when he tried to enter the marital home, which he purchased before the marriage and is titled solely in his name, Wife refused to allow him entry. Wife also permitted him only very limited visitation with M. Husband occasionally was able to visit M.

³ Husband filed a supplemental complaint for absolute divorce, on the ground of a one-year voluntary separation, prior to the start of the hearing on May 8. (R. 79).

⁴ Wife withdrew the protective order in December 2016, after Husband agreed to sponsor her for permanent residency in the U.S. He did not do so, however, and Wife's work visa expired. (H2. 22, 74).

at his daycare facility, but after the child was dis-enrolled from daycare because Wife refused to pay any portion of the \$275 weekly fee, all visitation with Husband ceased.

Husband requested that the court grant him visitation with M. every Friday and every other Saturday, Sunday, and Monday nights. He further sought sole legal custody of M., due to concerns about Wife's handling of the child's medical and school issues.⁵ He assured the court that he and Wife would be able to communicate effectively regarding M.

Husband went on to explain that he had been employed as a registered nurse in Washington, D.C., since 2001. He produced three recent pay stubs, along with his 2017 W-2 form documenting gross income of \$105,417.80 for the previous year.

Wife testified that she married Husband for love, not to obtain a green card, as her "dream wasn't even to come" to the U.S. Shortly after they married, however, Husband told her he did not love her. Wife became pregnant in 2014. Husband, was angry because he did not want a child. She testified that their relationship deteriorated and that he would not talk to her and stayed at work for days at a time.

Wife related that, after M. was born, Husband "didn't support [her] in any way," and she took care of herself and the baby. Although Wife made efforts to keep the marriage intact, Husband rebuffed her and, in her mind, his hostility towards her affected his feelings about M. Depressed and lonely, Wife nonetheless did not want a divorce at the time

⁵ His concerns over Wife's care of M., who had been diagnosed with Kawasaki disease as an infant, centered on: the pediatrician's recommendation that M. be evaluated for language delays, which Wife dismissed; the ophthalmologist's prescription that M. wear an eye patch to straighten his eye, which Wife refused to apply; and Wife's failure to seek medical treatment when M. had a fever of 103 degrees.

because of ethical considerations and because divorce is “no good for the innocent child.” (H2. 56, 70-1). By the time of the hearing, however, Wife had changed her mind and agreed that divorce was for the best. (H2. 72).

Wife acknowledged that she had exchanged numerous telephone calls, text messages, and video messages with other men, but denied engaging in an extra-marital affair. (H2. 96, 189). She said she also called numerous other people—including her priest, M.’s godfather, and a good female friend—upwards of ten times a day and reasoned that if she had been having an affair, she would have obtained her own cell phone account and not remained on Husband’s account, where he could review her call and text records.

Wife claimed that Husband was psychologically abusive towards her and that he had physically abused both her and M. She said she was “forced” to dismiss the protective order against him in 2016, following pressure from Husband and his family members. Wife admitted to failing to arrange for Husband to visit with M. since their separation but said it was because she was afraid of him, and she was unsure how to contact him because he had told her not to call him.

Despite the admission of M.’s medical records indicating “expressive language disorder” and a referral for speech therapy, Wife denied that M. had any speech delay. She also acknowledged that she had not informed Husband that she and M. were involved in a car accident in 2016, which necessitated a two-day hospital admission for the child; she claimed she did not call him because the protective order was then in effect.

Wife said that Husband did not want her to work in the United States because he believed she would send her earnings back to her family in her country of origin. At the time of the hearing, however, Wife was employed assisting people with disabilities. She stated that she works 40 hours per week, earning approximately \$14 per hour.⁶ When she is unable to work, for example, when M. was ill, she does not get paid. .

Wife said she did not believe Husband loved M., and she feared Husband would neglect or hurt the child. For that reason, she sought custody, with supervised visitation with Husband. She also stated a desire to stay in the marital home until she had accumulated enough money to move to a different residence and requested \$4,000 per month in alimony and child support.

At the close of the testimony, the court indicated that it would not grant a divorce on the grounds of adultery, as Husband's proof of Wife's alleged adultery had fallen short of the required standard.⁷ Based on the child support guidelines, the court calculated that Husband would be required to pay \$2,331 a month in child support if Wife had sole custody of M. and \$2,164 per month if the parents had joint custody. Because the mortgage payment on the marital home was \$2,200 per month, the court declared, "that's his child support." After Wife vacated the house in August 2018 (at the end of the court's use and possession

⁶ Wife introduced recent pay stubs and a financial statement into evidence. Her financial statement indicated gross monthly wages of \$2,101.60. (Financial statement).

⁷ The court advised Wife to file an answer to Husband's supplemental complaint for absolute divorce based on a voluntary one-year separation by May 18, 2018. She filed an answer on May 17, 2018.

order), Husband would be required to pay \$2,200 per month in child support to Wife in cash.

The court went on to find that “[t]his is not a case for permanent alimony” and determined that “alimony is going to be \$1,000 for one year and \$500 a month for the next year. That should give [Wife] time to transition.”

With regard to custody, the court stated that while it believed Husband is “a very good manager of affairs and finances,” it had “a problem” awarding Husband primary physical custody of M., because he had not previously asked for it—a telltale sign to the court that Husband had built his life around his work and merely wanted access to the child while Wife was his primary caretaker. The court therefore ordered an increase in Husband’s access to M., observing that Mother could face a contempt of court proceeding if she continued to withhold access. After considering the required best interest factors, the court granted Husband and Wife joint legal custody of M., with Wife to have primary physical custody and final decision-making authority on educational issues and Husband to have ample visitation and final decision-making authority on medical issues.

The court filed its written judgment of absolute divorce, incorporating and expanding its oral ruling, on June 15, 2018.⁸

⁸ Wife filed a motion to alter/amend the judgment of absolute divorce on June 25, 2018. The court denied that motion on April 22, 2019. (docket entries).

Husband filed a timely notice of appeal on June 29, 2018.⁹

Analysis

1. Child Support

Husband contends that the circuit court erred or abused its discretion in estimating his annual income by multiplying his 2018 first quarter's gross income by four, rather than referring to his documented 2017 actual gross income, in setting his child support obligation. The first quarter income, he argues, is not an accurate representation of his actual income, as it contained pay for irregular overtime, holidays, and administrative weather closings, which occur with more frequency in the first quarter of the year and would over-inflate his actual income if extrapolated to the entire year. Because the court failed to make a record as to how his income during the first quarter would repeat during the other three quarters, he avers that the child support award must be re-calculated. Husband further claims that the court underestimated Wife's income, which compounded the error in the child support calculation. We agree with Husband that his child support obligation must be recalculated but for reasons that differ from those he presents.

Generally, child support orders are left to the sound discretion of the circuit court. *Knott v. Knott*, 146 Md. App. 232, 246 (2002). We will not disturb a “trial court’s discretionary determination as to an appropriate award of child support absent legal error or abuse of discretion.” *Ruiz v. Kinoshita*, 239 Md. App. 395, 425 (2018) (quoting *Ware v. Ware*,

⁹ Although Wife filed a motion for extension of time to file her brief, which this Court granted on March 16, 2019, she did not file a brief by the deadline of March 22, 2019.

131 Md. App. 207, 240 (2000)). The circuit court’s factual findings are not clearly erroneous if they are supported by competent evidence. *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002).

Section 12-204 of the Family Law Article (“FL”) provides child support guidelines assigning child support obligations proportionate to the parents’ income. The guidelines require the circuit court first to determine each parent’s monthly adjusted actual income. *Voishan v. Palma*, 327 Md. 318, 323 (1992).

“Actual income” is “income from any source.” FL § 12-201(b). Section § 12-201(b)(3) enumerates sixteen sources of “actual income” including: “salaries;” “wages;” “bonuses;” and “commissions.” Although not specified in the statute, because “overtime pay constitutes ‘compensation due to an employee for employment,’ it is clearly ‘wages’” under FL § 12-201(b)(3) and is to be considered as actual income when a court fashions an award of child support, so long as the additional income is a regular part of the parent’s employment and is not speculative or uncertain. *Brown v. Brown*, 119 Md. App. 289, 294-95 (1998). And, if the court also awards alimony, it must be considered income to the recipient, and subtracted from the income of the payor, “before the court determines the amount of a child support award.” FL § 12-204(a)(2)(ii).

After determining each parent’s actual income, the court adds the two amounts to arrive at the parents’ monthly combined adjusted actual income. *Voishan*, 327 Md. at 323. After calculating the combined adjusted actual income, the court determines whether the figure falls within the range of incomes found in the schedule of FL § 12-204(e). *Id.* If

the parents’ monthly combined adjusted income is less than \$15,000, the use of the guidelines is mandatory. FL § 12-204(a), (e); *Kpetigo v. Kpetigo*, 238 Md. App. 561, 583 (2018). If the parents’ combined monthly income exceeds the statutory limit, the circuit court may exercise discretion in setting the amount of child support. FL § 12-204(d).

Additionally, and pertinent to the matter before us, FL § 12-204(a)(2)(i) requires that “the court shall decide the issue and amount of alimony . . . before determining the child support obligation under these guidelines.”

In the present case, the circuit court did not decide the issue of alimony before determining Husband’s child support obligation. Nor did the court adjust the parties’ incomes to reflect payment of that alimony to Wife when it calculated the amount of child support. For these reasons alone, we must vacate the child support award. Upon remand, when the court calculates the parties’ incomes for purposes of calculating child support, the circuit court should consider any alimony award to Wife as part of her income, and reduce Husband’s income by the amount of such alimony payment, as required by FL § 12–204(a)(2)(ii). *See also Malin v. Mininberg*, 153 Md. App. 358, 412 (2003).

There is, moreover, another clear error in the circuit court’s fact-finding, which must be addressed upon remand.

At the divorce hearing Husband produced his 2017 W-2 Wage and Tax statement, which indicated gross income of \$105,417.80 for the year. (E. 23). He also produced three recent paystubs from the following pay periods: March 4-17, 2018, showing gross income of \$4,259.86; March 18-31, 2018, showing gross income of \$5,718.17 and first quarter

gross income of \$41,328.97; and April 1-14, 2018, showing gross income of \$5,667.53 for that two-week period. Each paystub detailed extra pay in addition to regular earnings, including some combination of Saturday and/or Sunday premium, night differentials, overtime, and work during administrative closing. In response to questioning, Husband denied earning bonuses, but he offered no testimony about the amount and frequency of his overtime or other extra pay or whether or how it might differ in the ensuing quarters of the calendar year.

Wife testified that she worked 40 hours per week, at an approximate hourly wage of \$14, but said she does not get paid when she does not work. She produced a financial statement, which set forth her monthly gross wages as \$2,101.60. (financial statement). She also produced two paystubs from March and April 2018.¹⁰

On its child support worksheet, the circuit court calculated that Husband's actual gross monthly income was \$13,776 (\$165,312 when annualized) and Wife's actual gross monthly income was \$1,778 (\$21,336 when annualized). When Husband's attorney pointed out that the "the incomes are wrong for the parties. My client makes 105,000," the court responded:

THE COURT: Oh, no. Oh, no. That's on his W-2. You look at his worksheet. You look at his pay stub. Your client made in the first quarter of this year—with overtime, weekend pay and everything else, he made \$41,000.

¹⁰ Neither those paystubs nor any exhibits produced during the hearing are part of the record. Prior to trial, Wife filed her financial statement along with two paystubs from the following pay periods: September 24-October 7, 2017, showing 61.58 hours worked and gross income of \$970.64; and October 8-21, 2017, showing 76.54 hours worked and gross income of \$1067.73. (paystubs with affidavit to 11/17 financial statement).

Annualized, that's \$164,000. Your client makes—he made \$41,000 by March 31st. His W-2 form from last year is just a part of what he's made. He's earned a lot of money. He's making differential for Sundays. *So he's making \$13,776 a month. Mom is making \$1778 a month.*

(Emphasis added).

Husband's attorney also addressed the court's calculation of Wife's income;

[Husband's Attorney]: Your Honor, she's at 14.20 an hour. The number I had was 24.18. How many hours—

THE COURT: I annualized her income as well. She had the—I saw her pay stub dated—

[Husband's Attorney]: It was April—one in April and one in March.

THE COURT: April, yes. *And I took that 3—that's a quarter and I multiplied it by 3. It was 7000 something and I multiplied it by 3.*

[Husband's Attorney]: Wouldn't the better calculation be to take what she works per hour, the 14.20 times 40 and calculate—

THE COURT: No, because she doesn't work 40-hour weeks. Some weeks she's got 35 hours. Some weeks she's got 30 some hours. She doesn't—she's not working 40 hours a week. Trust me. I know what I'm doing and my math is more accurate than just hourly. It's not hourly.

At any rate, the guidelines—the only figure that I didn't really have is the health insurance expense and I gave husband, or Father, quite a bit of credit. I said that the child's share of his health insurance is \$300 a month. That's pretty high, but he's paying a pretty high premium.

At any rate, the guidelines have him paying \$2,331 a month for sole custody and close to that for shared custody, 2,164, which is about right, and it's almost what the house note is. You know, it's \$2,200 a month, basically for the house note. So that's his child support. (H2. 193-5).

(Emphasis added.)

Setting aside, for the moment, Husband's claim of error in the court's inclusion of overtime and other pay in its annualization of his first quarter income, it appears that the circuit court erred factually in calculating both Husband and Wife's actual monthly income. In its oral ruling, and on the child support guidelines worksheet it prepared, the court stated that Husband's monthly income, based on annualized income of \$164,000, was \$13,776. By our calculation, however, \$164,000 divided by twelve equals \$13,666.67, creating an overstatement by the court of Husband's income by approximately \$109 per month.

And, after reviewing two of Wife's paystubs, one of which apparently exhibited her 2018 first quarter income,¹¹ the court, in calculating her yearly income, stated, it, "that's a quarter and I multiplied it by 3. It was 7000 something and I multiplied it by 3." The court then presumably divided its total by 12 to reach monthly income of \$1,778. The proper calculation, however, would have been to multiply Wife's first quarter income by *four* and then divide the total by twelve. The court, in its incorrect calculation, excluded three months of Wife's income, understating her income by one quarter.¹² For these reasons, we

¹¹ We are unable to reference specifically the 2018 paystubs Wife provided to the court at the divorce hearing because the exhibits are not part of the record.

¹² By the court's calculation, Wife's gross annual income was \$21,336 (\$1,778 per month times 12 months). Wife, however, indicated on her financial statement that her gross monthly income was \$2,101.60, which would make her annual income \$25,219.20 (\$2,101.60 per month times 12 months). And, although the court declined to find that Wife worked 40 hours per week, based on two paystubs, Wife testified that she worked 40 hours per week, earning approximately \$14 per hour, which would make her annual income \$29,120 (\$14 per hour times 40 hours per week times 52 weeks per year). Either of Wife's calculations results in annual income significantly higher than \$21,336.

will vacate the child support award, subject to the conditions set out in part 3 of this opinion.¹³

2. Custody

Husband also contends that the circuit court erred in awarding primary physical custody of M. to Wife, when Wife has a history of failing to obtain needed medical care for the child and denying Husband access to him. In his view, M.’s welfare “is more likely to suffer than flourish under a primary physical custody arrangement to [Wife],” and it is in M.’s best interest for Husband and Wife to have joint physical custody. (Appellant’s brief, 24-5, 29).

This Court conducts only a “limited review” of a circuit court’s custody decision. *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996). “[A]n appellate court does not make its own determination as to a child’s best interest; the trial court’s decision governs, unless the

¹³ We are not persuaded by Husband’s argument that the circuit court should not have included all his first quarter overtime and other extra pay in its annualization of his income to \$164,000 because it would not necessarily continue at the same rate throughout the year. It is often necessary to calculate child support based on currently existing circumstances, even though the court and the parties are aware that there is a possibility that the conditions might change in the future. *See, e.g., Johnson v. Johnson*, 152 Md. App. 609, 621 (2003) (Trial court did not err when it included a large bonus in the father’s income for child support purposes even though there was no certainty that he would receive such bonuses in future years.). Returning to the present case, each of the paystubs submitted by Husband indicated that he received substantial overtime similar payments. The court did not err including these amounts in Husband’s income for child support purposes.

If Husband experiences a significant reduction in the income as calculated by the court, he will be entitled to file for a downward modification of his child support obligation. *Smith v. Freeman*, 149 Md. App. 1, 35 (2002); *Brown*, 119 Md. App. at 294-95.

factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion.” *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007). With regard to the court’s ultimate decision on the custody matter, an abuse of discretion exists if “no reasonable person would take the view adopted by the [trial] court[,]” or the ruling is “clearly against the logic and effect of facts and inferences before the court.” *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

Based on the record before us, we cannot say that the circuit court’s factual findings were clearly erroneous or that it abused its discretion in awarding primary physical custody of M. to Wife, with ample visitation with Husband. The court, which had the benefit of viewing the demeanor and credibility of the witnesses, heard testimony from both Husband and Wife regarding Wife’s handling of M.’s medical and school issues and Wife’s curtailment of Husband’s access to the child.

Wife acknowledged that she had failed to make arrangements for Husband to visit with M. and to notify him that M. had been involved in a car accident. To the court, she also denied that M. had any speech delay, despite the admission of M.’s medical records indicating “expressive language disorder” and a referral for speech therapy. The court nonetheless found that Wife was “in a little better position to exercise her custodial responsibilities because of [Husband’s] kind of weird [work] schedule.”

In its oral ruling and written custody order, the court, while granting Wife primary physical custody of M., addressed the concerns Husband raises in his brief. The court

ordered each parent to follow the recommendations of M.’s health care providers and granted Husband final decision-making over medical decisions regarding M. The court further admonished Wife that, were she to withhold access to M. from Husband, she would be held in contempt of court. Husband’s concerns do not warrant more. Given the record before us and the deference owed to the circuit court, we conclude that the court did not abuse its discretion in awarding primary physical custody to Wife.¹⁴

3. Proceedings on Remand

Because of the factual and legal errors in the court’s child support decision-making process, it is necessary to vacate the child support award and to remand the case to the circuit court for further proceedings. Like other forms of economic relief in divorce cases, alimony and child support “involve overlapping evaluations of the parties’ financial circumstances.” *St. Cyr v. St. Cyr*, 228 Md. App. 163, 198 (2016). For this reason, “when a trial court considers a claim for any one of them, it must weigh the award of any other [and when] this Court vacates one such award, we often vacate the remaining awards for reevaluation.” *Id.* (quoting *Turner v. Turner*, 147 Md. App. 350, 400–01 (2002)). Because the amount of the alimony award will affect Husband’s child support obligation, it is appropriate to give the circuit court on remand the ability to re-evaluate both forms of economic

¹⁴ The court granted Husband four overnights with M. over each 14-day period, along with five weeks each summer and alternating school vacations and holidays. (R. 99). While the visitation award to Husband is not equal with Wife’s access, the division of time does not amount to an abuse of discretion. *See, e.g., Gordon v. Gordon*, 174 Md. App. 583, 638 (2007) (concluding that five of 14 overnights with the father was “generous visitation”).

relief. Until the circuit court reconsiders these awards, the present alimony and child support awards remain in effect. *Simonds v. Simonds*, 165 Md. App. 591, 613 (2005).

Upon remand, the trial court should permit the parties to present evidence as to changes in their economic circumstances since the entry of judgment, and argument, based upon the existing trial record as well as any new evidence, on the alimony and child support issues.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED IN PART AND VACATED IN PART. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. THE ALIMONY AND CHILD SUPPORT AWARDS REMAIN IN EFFECT AS PENDENTE LITE ORDERS PENDING FURTHER ORDER OF THE CIRCUIT COURT.

COSTS ARE TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.