Circuit Court for Prince George's County
Case No: CAD04-19730

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1079

September Term, 2018

RAOUF B. ABDULLAH

v.

TONEKA S. ABDULLAH

Nazarian,
Leahy,
Beachley,

JJ.

Opinion by Leahy, J.

Filed: June 16, 2020

Appellant, Raouf B. Abdullah ("Father"), appeals from an order entered by the Circuit Court for Prince George's County granting his complaint for child support. In pertinent part, the order directs appellee, Toneka Spears (formerly known as "Toneka Abdullah") ("Mother"), to pay $320.00 per month in support towards the care of their child. Father contends that the circuit court, in assessing Mother's monthly obligation, deviated from the child support guidelines in violation of Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL") § 12-202,[1] resulting in a lower assessment than mandated by the guidelines to the detriment of the child and his best interests. Specifically, he argues that the court erroneously used the "shared physical custody" formula for calculating support and mistakenly transposed the number of overnight visits attributable to each parent in its calculation. Accordingly, Father raises three questions for our review, which we have consolidated into one:[2] Did the circuit court err in its calculation of Mother's monthly child support obligation?

[1] As will be explained in more detail below, a few sections of the Family Law Article relevant to this appeal were amended by the Maryland General Assembly during the 2020 legislative session. Except where noted, we refer to the statute as set forth in the 2019 Replacement Volume.

[2] Father's questions are presented in his brief as follows:

> "A. Did the Court Err in its Calculation of Child Support, Reflecting Appellee as Having More Overnight Visits with Minor Child than Appellant, Although Appellant is Recognized as the Custodial Parent?
>
> B. Is it in the Best Interest of the Child for the Court to Order Appellee to Pay less Child Support than is Mandated in the Maryland Child Support Guidelines?

We conclude that the circuit court erred in failing to either 1) determine how many overnights are actually awarded to each parent under the extant custody order, or 2) take evidence and make factual findings regarding the actual number of overnight visits the child had with each parent during the preceding year in accordance with FL § 12-202. Because of this error, we cannot assess whether the circuit court accurately attributed the number of days the child was in the actual custody of each parent. Accordingly, we shall vacate the decision of the circuit court and remand for further proceedings consistent with this opinion.

BACKGROUND

Physical Custody and Visitation Orders

On November 21, 2005, a judgment of absolute divorce was entered in the Circuit Court for Prince George's County dissolving the marriage of Father and Mother. A consent order, entered on the same day, stated that Mother would exercise primary physical custody and that the parties would share joint legal custody of their child. Awarded "reasonable and liberal visitation[,]" Father was afforded overnights with his child every Wednesday night and, on alternating weekends, Friday and Saturday nights. Father was also granted ten days in June, two weeks in July, and two weeks in August for summer visitation. Holidays were divided between the parties such that Father would exercise visitation on Thanksgiving and New Years' Days, and Mother would exercise visitation on Christmas

C. Can the Court deviate from the Maryland Child Support Guidelines without adhering to Md. Family Law § 12-202?"

and Easter. Lastly, the consent order imposed a monthly $896.00 child support obligation on Father.

Between 2005 and 2017, the parties frequently relitigated the provisions of the consent order, resulting in moderate changes to Father's visitation schedule.[3] Most notably, an order entered by the circuit court on April 24, 2014 modified the visitation schedule by granting Father an additional overnight on alternating Sundays. It also reduced Father's monthly child support obligation to $313.00.

However, on August 28, 2017, a significant modification in custody occurred when the circuit court entered an order essentially switching the parties' custody and visitation rights. By its terms, Father was awarded primary physical custody of his child and his child support obligation was terminated. Mother's new visitation schedule with Child afforded her overnight visitation on Wednesday nights and, on alternating weekends, every Friday and Saturday night. If a weekend was followed by a Monday on which a federal holiday was observed, Mother was entitled to a Sunday overnight on that weekend as well. The holiday schedule remained unchanged except as explicitly modified.

Father's Complaint for Child Support

Following the reversal in custody, Father filed a complaint for child support in the Circuit Court for Prince George's County. Accompanying the complaint was a financial statement, signed and affirmed by Father, reflecting that his total monthly income before

[3] Though not pertinent for our consideration in the present appeal, the history of litigation between the parties is outlined in our prior unreported opinion in *Abdullah v. Abdullah*, No. 1000, Sept. Term 2015 (Md. App. February 5, 2016).

taxes was $2,657.50. The financial statement was unaccompanied by any pay stubs, tax returns, or other documentation supporting his claimed wages. Although Mother did file an answer to Father's complaint, she failed to appear before a magistrate of the circuit court for the March 7, 2018 hearing on child support.[4]

At the child support hearing, Father testified regarding Mother's visitation schedule per the August 28, 2017 order. He testified to being "self-employed" and that his annual salary in 2017 was $31,575.00, though he did not enter into evidence any documentation corroborating his wages. Father testified to paying $96.75 in monthly health insurance premiums for the child, but later clarified that the premiums were paid directly by his wife's employer. He testified that the child did not have any extraordinary medical needs or any work-related child-care needs.

As to Mother's income, Father testified that she was employed by a law firm, where she had worked for approximately 11 years. Based on *his* recollection of Mother's prior testimony in a 2017 hearing, Father believed that Mother's annual salary was $108,000.00. However, Father could only provide the magistrate with Mother's paystubs from June to August of 2013. Father notified the magistrate that Mother had also submitted financial documentation to the court in April of 2017 which reflected her salary. The record shows that Mother did file financial documentation with the circuit court on April 25, 2017,

[4] On March 7, 2018, the date of the child support hearing, Mother filed a motion seeking a continuance which alleged that her son "was out of school with a high temperature" and that she "didn't have anyone available to look after him." **[R. 640]**. The record does not disclose that this motion was ever ruled on by the circuit court.

including pay stubs reflecting her bi-weekly pay, as well as her 2016 W-2 reflecting wages in the amount of $110,517.17.

On March 7, 2018, the magistrate issued findings of fact and recommendations on Father's complaint for child support. She found that the 2013 financial documentation provided by Father as to Mother's income was "four years old" and insufficient. The magistrate did not consider the April 2017 financial documentation filed by Mother and contained in the record, stating that the 2017 hearing was a "separate and distinct proceeding." Because Mother's income was not established, the magistrate recommended that Father's request for child support be denied due to insufficient evidence.

Motion for Reconsideration

Following the magistrate's recommendations, Father filed a motion for reconsideration, arguing that he was unfairly prejudiced by Mother's failure to provide a financial statement with her answer and by her failure to appear at the child support hearing. He further argued that the magistrate, in determining Mother's income, should have relied upon the 2013 paystubs entered into evidence or upon Mother's 2017 financial documentation contained in the record. Lastly, Father requested that the court exercise its revisionary power pursuant to Maryland Rule 2-534 and receive additional evidence of Mother's wages.

As an exhibit to his motion, Father included 13 newly acquired pay statements from Mother's employer for the period August 27, 2017 through February 24, 2018. The statements reflect that Mother worked 1,085.58 hours over a 13-week period and that her

pay rate was $56.0770 an hour. Additionally, a second exhibit included charts prepared by Father reflecting the number of visitation days attributable to each parent in 2018 per month "per [the] August 2017 Order." Father calculated that Mother would have 127 days of visitation in 2018 and that he would have 238 days in 2018. On April 19, 2018, the magistrate issued a memorandum denying Father's motion for reconsideration without explanation.

Exceptions to the Magistrate's Recommendations

Father also filed exceptions to the magistrate's recommendations. The exceptions, like the motion to reconsider, contended that the magistrate erred in refusing to accept "unrefuted evidence" as to the mother's income. Attached to his exceptions, Father resubmitted the exhibits filed previously with his motion for reconsideration.

At the exceptions hearing in the circuit court, Father appeared pro se and Mother, again, failed to appear. Father asserted that Mother should not have been rewarded by the magistrate for not appearing at the child support hearing or for failing to file the requisite financial disclosures. He further argued that the magistrate should have considered Mother's pay stubs under seal from April 27, 2017 in determining her income. In the alternative, he requested that the circuit court, pursuant to Maryland Rule 9-208, consider the newly acquired pay statements he filed with his exceptions. He again testified that the 2017 custody order provided him with 238 overnights and Mother with 127 overnights, to which the court replied, "that's essentially shared custody."

On June 20, 2018, the circuit court entered an Order in which it rejected the magistrate's recommendations and directed Mother to pay $320 per month in child support commencing on July 1, 2018 via wage lien. The court noted that "there was sufficient evidence in the record [of Mother's income], specifically [Mother's] financial statement filed on or about April 26, 2017, which included her recent pay stubs." The circuit court calculated Mother's wages to be $9,576 a month and Father's wages to be $2,631 a month. Contrary to Father's testimony, the court attributed Mother with 237 days of visitation and Father with 128 days of visitation in calculating support, as evidenced by the child support guidelines worksheet prepared by the court.

On July 13, 2018, Father timely noted an appeal of the circuit court's order. Mother failed to file a brief.

DISCUSSION

Standard of Review

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*, 131 Md. App. 207, 240 (2000)). In reviewing an order involving "an interpretation and application of Maryland statutory and case law" for legal error, we consider "whether the trial court's conclusions are 'legally correct' under a de novo standard of review." *Knott v. Knott*, 146 Md. App. 232, 246 (2002) (quoting *Walter v. Gunter*, 367 Md. 386, 392 (2002)). In reviewing a court's ruling on the evidence, we "will not set aside the judgement of the trial court . . . unless clearly

erroneous." Maryland Rule 8-131(c). A trial court's factual findings are not clearly erroneous "[i]f there is any competent evidence [in the record] to support [them.]" *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002).

Calculating Child Support Based on Shared Physical Custody

The Maryland Child Support Guidelines, as codified in § 12-201 through § 12-204 of the Family Law Article,[5] were designed to "remedy the low levels of most child support awards relative to the actual cost of rearing children," to "improve the consistency and equity of child support awards," and to "improve the efficiency of court processes for adjudicating child support awards." *Tannehill v. Tannehill*, 88 Md. App. 4, 11 (1991). Though courts are required to use the guidelines "in any proceeding to establish or modify child support," the presumption that the guidelines would result in the correct amount of support may be rebutted "by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(1), (2)(ii). If the court determines that the presumption has been rebutted, it is required to "make a written finding or specific

[5] This year, the Maryland General Assembly enacted House Bill 269, which amended FL § 12-202 and FL § 12-204. The statute previously provided that shared physical custody meant that each parent kept the child overnight for more than 35% of the year. The bill changed the definition of "shared physical custody" to specify that it "means that each parent keeps the child or children overnight for at least 25% of the year . . . ." This amendment, however, is not relevant to the case before us as the General Assembly provided that the 2020 amendments apply only to cases filed after the effective date (October 1, 2020). Child Support – Shared Physical Custody, 2020 Maryland Laws Ch. 142 (H.B. 269).

finding on the record stating the reasons for departing from the guidelines." FL § 12-202(a)(2)(v).

Father contends that the circuit court deviated from the child support guidelines, in violation of FL § 12-202, when it "decided to calculate child support under the Shared Custody guidelines instead of the Primary Custody guidelines."[6] He further contends that the circuit court "acted outside" of his child's best interests in doing so. We must first consider, therefore, whether it was error for the circuit court to calculate child support based on shared physical custody.

The statutory requirements for determining "shared physical custody[,]" are set forth in FL § 12-201(n), which provides:

> (n)(1) "Shared physical custody" means that each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of child support.
>
> (2) Subject to paragraph (1) of this subsection, the court may base a child support award on shared physical custody:
>
> (i) solely on the amount of visitation awarded; and
>
> (ii) regardless of whether joint custody has been granted.

We interpreted this statutory provision in *Rose v. Rose*, opining that "if a parent can demonstrate that a child stays with that parent more than 35% of the overnights in a year, then 'shared physical custody' is established, pursuant to FL § 12–201(n)(1), for the

[6] Though the issue is not presently before us, we note that it was error for the circuit court to render a factual finding as to Father's income without the requisite financial documentation to support his claim of yearly earnings pursuant to FL § 12-203.

calculation of child support. 236 Md. App. 117, 135 (2018), *reconsideration denied* (Mar. 28, 2018), *cert. denied*, 459 Md. 417, 187 (2018). We also highlighted subsection (n)(2), which provides, alternatively, that "the court *may* base a child support award on shared physical custody: (i) solely on the amount of visitation *awarded*[.]" *Id.* (quoting FL § 12-201 (n)(2) (emphasis added)). We explained that a trial court cannot make a child support award unless it "first determines that the amount of visitation *awarded* in the extant order exceeds 35% of the overnights per year." *Id.* The court has discretion whether or not to rely on the extant custody order. *Id.* This means that a court does not have to rely on an extant custody order in deciding whether to use the shared custody formula, but if a court chooses to rely on the custody order, the court must "determin[e] that the order actually awards a parent more than 35% of the overnights per year." *Id.*

> In other words, (n)(1) *requires* the court to use the shared physical custody formula for child support where a parent has actually kept the child for more than 35% of the overnights, while (n)(2) *permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than 35% of the overnights, but has actually kept the child for 35% (or fewer) of the overnights.

Id. at 136.

In *Rose*, the trial court decided to use the shared physical custody formula for calculating the child support obligation of Mr. Rose, father. *Id.* at 132-33. However, the court refused to hear testimony from Mr. Rose regarding the actual number of overnights on which he kept his children. *Id.* at 133. Instead, the court determined that the parents shared physical custody, relying only upon the number of overnights awarded in the custody order. *Id.* We held that the trial court "erred by not making a threshold factual

determination under FL § 12-201(n)(1) whether [Mr. Rose] actually kept the children for more than 35% of the overnights in a year." *Id*. at 137. At that time, subsection (n)(1) required courts to "use the shared physical custody formula for child support where a parent has *actually kept* the child for more than 35% of the overnights." *Id*. at 136 (emphasis added). Therefore, to comply with this provision, we said that courts must make a factual finding as to each parent's "actual possession" of the child and determine the number of overnights the child has actually stayed with either parent. *Id*. at 135. Further, in order to satisfy the 35% requirement, we explained that "a child must stay overnight with each parent for a minimum of 128 nights to trigger a shared custody child support calculation." *Id*. at 135 (quoting *Guidash v. Tome*, 211 Md. App. 725, 748-49 (2013)). We reversed and remanded the case to the trial court to provide the parties an "opportunity to present evidence relevant to determining the appropriate child support formula as prescribed by FL § 12-201(n)." *Id.* at 137-38.

In the present appeal, the circuit court did not indicate how it determined that Mother has the child for 237 overnights and Father has the child for 128 overnights. The Court did not state on the record, or in its order, that it actually determined that the custody order awarded either of the parents more than 35% of the overnights per year. *See id.* at 135. It is not clear on the face of the order how many overnights were awarded to each parent because that schedule shows only that primary physical custody is awarded to Father, and that Mother would have her child on Wednesday nights and, on alternating weekends, every Friday and Saturday night, as well as certain holidays. This formulation, together

with Father's charts, indicating that "per [the] August 2017 Order" he would have the child for 238 overnights in 2017, suggest that the court may have accidentally reversed the designations, as Father suggests.[7]

For the foregoing reasons, we remand the case to the circuit court with instructions to make a finding as to whether the extant custody order actually awarded either parent more than 35% of the overnights per year and explain how it attributed the overnights on the child support worksheet. If the court finds that Mother kept her child for less than 35% of the year, the court is still permitted, but not required, to utilize the shared physical custody formula to calculate the child support award under FL § 12-201(n)(2). *Rose*, 236 Md. App. at 135. In order to exercise its discretion under subsection (n)(2), however, the circuit court must first find that "that the amount of visitation awarded in the extant order exceeds 35% of the overnights per year." *Id.*

[7] The overnight visitation charts submitted by Father with his motion for reconsideration and exceptions may not have accurately reflected the number of overnight visits attributable to each parent "per [the] August 2017 order." Looking no further than January, Father's calculations do not allocate Mother an overnight visit on January 14, 2018. Per the custody order, Mother would have been entitled to this day as the following Monday was a federal holiday, Martin Luther King Jr. Day. Additionally, Father allocated himself an overnight on Thanksgiving Eve, which fell on a Wednesday attributable to Mother. Though Father was entitled to visitation on Thanksgiving Day, the record does not reveal that Father was specifically entitled to the preceding day. We do not here decide the number of days in 2018 to which each party was entitled pursuant to the August 2017 custody order. We merely point out that should the circuit court proceed to an analysis under subsection (n)(2), it would be required to "determine that the amount of visitation in the extant order exceeds 35% of the overnights per year."

Attribution of Overnights in Calculating Support

In the child support guidelines worksheet prepared by the circuit court on June 14, 2018, the court attributed Mother with 237 overnights and Father with 128 overnights. Because he was designated the custodial parent and because there is no evidence in the record reflecting that Mother had 237 overnights with the child, Father contends that this action by the court was clearly erroneous. As a result, Father contends that the court calculated and imposed a lower child support obligation on Mother than mandated by the guidelines.

We agree, in part, with Father's contentions. Were the circuit court basing its allocation of overnights solely on the terms of the August 2017 custody order, the worksheet should have reflected that Father, the custodial parent, had more overnights than Mother. Moreover, because there was no clear evidence regarding the actual number of days each parent kept the child during the preceding year, as previously explained, the record does not disclose any competent evidence upon which the court could have found that the parties kept the child for the number of overnights reflected in the worksheet. Accordingly, we hold that it was clear error for the circuit court to attribute 237 overnights to Mother and 128 overnights to Father on the June 14, 2018 child support guidelines worksheet. Consequently, if the circuit court determines that it is appropriate to use the shared physical custody formula for calculating support, the court will still need to correct the number of overnights reflected in the child support guidelines worksheet and recalculate the child support award.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED FOR FINDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.