UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1287

September Term, 2014

MARION LEVY

V.

DAVID PETERS

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: July 30, 2015

This appeal is from a custody and access review hearing order entered by the Circuit Court for Montgomery County on July 23, 2014. The order is the latest in a series of custody and visitation arrangements concerning the parties' minor child. The appellant, Marion Levy, is the mother of the child and has primary physical and sole legal custody. David Peters, the appellee, is the child's father.[1] The court's order expanded the appellee's rights of visitation during certain holiday periods. The order also included an award of attorney's fees against the appellant for discovery violations.

The appellant, appearing *pro se*, presents several issues for our review, which we have consolidated and rephrased as follows:[2]

> 1. Did the trial court err by consolidating and further expanding appellee's rights of visitation without a motion for modification being filed

[1]The appellee did not file a brief in this appeal.

[2]The questions as presented by the appellant were:

> "1. Regarding visitation: Did the court abuse its discretion by holding a review of expanded visitation before the visitation had taken place? Was it prejudicial error to expand the visitation even further without a motion by either side? Did expanding and consolidating visitation without giving the Appellant notice and a chance to hear and present any evidence regarding the best interests of the child deny the appellant due process?
>
> "2. Regarding attorney's fees: Was it legally correct for the court to make a decision based on evidence – the attorney's bill(s) – that had not been provided to the Appellant for review, and did doing so deny the appellant due process? Did the court err in determining attorney's fees for the Appellant's Motion to Compel Discovery that did not include a "Memorandum Regarding Costs and Expenses" as specified by Md. Rule 2-433, and without first seeing the financial statements of both parties as required by Maryland Family Law Section 7-107(c)? Did the court err in awarding a specific dollar amount for attorney's fees based solely on the Appellee's attorney's statement of those fees without looking at the bill presented?"

by either side and without giving the appellant notice of a further expansion in visitation?

2. Did the trial court err in awarding attorney's fees to the appellee where the request for fees was not supported by the verification now required by Maryland Rule 2-433 and without considering the respective financial situations of the parties?

Factual and Procedural Background

The minor son of the parties, who are unmarried, was conceived through artificial insemination and born in August 2003. The parties entered into a parenting agreement filed in the lower court on December 5, 2005. The agreement gave the appellant "sole legal and physical custody" of the child. It entitled the appellee to two daily visitations per week. At that time, the parties were both residing in Maryland.

In February 2010, the appellee filed a petition to modify visitation. The petition indicated that he had relocated to Troy, New York. Following a series of temporary custody orders, the lower court (Jordan, J.) issued a custody order on January 23, 2012, which provided: (1) the appellee would have three overnight weekend visitations throughout the year, and two weeks of continuous visitation in August; (2) the parties would equally divide Christmas break; and (3) the parties would alternate the Thanksgiving holiday on a yearly basis. The order also addressed child support and arrearages.

In December 2012, the appellee filed a second petition to modify visitation, indicating that he had again relocated, this time to Montagnola, Switzerland. The petition stated that the increased travel time had rendered the then existing visitation schedule "impracticable," and that therefore the appellee was seeking the following modifications:

> "[Appellee] desires to have additional time during the summer with his son, as well as an expanded school break and holiday schedule. In addition, [appellee] desires to exercise visitation in Switzerland, which would require the child to obtain a passport."

The appellant filed her *pro se* answer to the petition in May 2013, responding that she did not believe that traveling to Switzerland was in the best interests of the child and that the appellee's decision to move further away from the child for a second time should not serve as the basis for expanding visitation. A hearing on the petition was scheduled for December 2013.

Appellee certified to the court on June 17, 2013, that he had mailed discovery requests to the appellant. Specifically, appellee requested the production of documents, propounded interrogatories, and noted appellant's deposition. It appears that that deposition commenced on July 3, 2013, and that the responses to appellee's discovery requests were received on July 31, 2013. Appellee did not consider that the responses complied with the discovery rules.

Time records of appellee's counsel have been included in appellant's record extract and as an appendix to appellant's brief. They reflect that, as early as July 10, appellee's counsel began work on a notice of deficiency with respect to appellant's responses. In an effort informally to resolve the discovery dispute, appellee sent appellant a letter dated August 13, 2013, with exhibits. The letter consisted of fifteen pages. It sets forth the discovery request, appellant's responses, and the particulars of the claimed deficiency with respect to nine of at least twenty-eight interrogatories, and with respect to twenty of at least fifty requests for the production of documents.

On October 9, 2013, the appellee filed a motion to compel discovery and for sanctions. The motion claimed that the appellant "has made it clear that she will not voluntarily cooperate with [appellee] in discovery" without a court ordering her to answer. The motion included a request for attorney's fees pursuant to Md. Rule 2-433(d). The ten-page motion incorporated the August 13 letter, highlighted certain of the claimed deficiencies in the responses to interrogatories, and asserted appellant's refusals to answer questions on deposition, as evidenced by forty-eight pages of deposition transcript on twelve sheets.

Appellant did not respond to the motion to compel. She explains that she did not pick up her service copy of the motion out of her post office box until it was too late to respond.

By order dated November 1, 2013, the lower court (Burrell, J.) granted the motion to compel. The order directed that the issue of attorney's fees would be "reserved for determination at the merits hearing."

A multi-day hearing on the appellee's petition to modify visitation was conducted by the lower court from December 18-20, 2013.[3] On January 13, 2014, the lower court (Bernard, J.) entered a new custody and access order. The order provided, *inter alia*, that (1) the appellee would have continuous overnight visitation with the minor child for the duration of his spring break in 2014; (2) appellant would "do everything necessary to facilitate [the child's] obtaining of a passport"; (3) that visitation would take place in

[3]A transcript of that hearing is not part of the record in this appeal.

Maryland from July 12 to July 26 and in Switzerland from July 26 to August 23, 2014, but that the appellant would have visitation with the child on the night of July 16; and (4) that the minor child would spend Thanksgiving 2014 with the appellee. The order again directed that the issue of attorney's fees was reserved "pending a further hearing." The order scheduled for June 13, 2014, a one-hour "review status hearing" that was later rescheduled to June 27, 2014.

At the outset of the June review hearing, it became clear that an enduring point of contention was the appellant's reluctance, if not refusal, to obtain a passport for the minor child. The lack of a passport effectively precluded visitation from taking place in Switzerland during the summer of 2014 as had been provided in the January custody order.

The appellant eventually conceded that she would cooperate in obtaining a passport for the child. Because the summer visitation in Switzerland had been frustrated by the delay, it was agreed that the appellee would be permitted to have visitation in Switzerland during the child's winter break. To that end, it was further decided that instead of evenly dividing the child's winter break between the parties, one parent would have the child for the entire duration of the winter break. Winter break 2014 was to be spent with the appellee. It was expressly clarified that this arrangement would alternate between the parties on a yearly basis.

> "[APPELLANT]: What, is that just a one-time thing? I'm going to miss every Christmas with him? How is it going to work?
>
> "THE COURT: No, no, no.
>
> "[COUNSEL FOR APPELLEE]: It would be alternating.

"THE COURT: Then the following Christmas, you would have that same time period[.]"

This arrangement necessitated an additional alteration with respect to the Thanksgiving holiday, in order to avoid the child spending both Christmas and Thanksgiving with the same parent in a given year.

"[APPELLANT]: But since we're switching the Christmas around this coming year, he's going to have him for Thanksgiving and Christmas? He's going to be here with him for Thanksgiving and then go to Switzerland with him for Christmas? That doesn't seem right.

"[COUNSEL FOR APPELLEE]: I think the [appellant] is asking to stagger Christmas and Thanksgiving.

"[APPELLEE]: Uh-huh.

"THE COURT: Yes. Okay.

"[APPELLEE]: Well, can we keep Christmas and stagger Thanksgiving? That way, he gets the trip.

"THE COURT: Sure. So then this Thanksgiving, he'll be with his mom –

"[APPELLEE]: Okay.

"THE COURT: -- and then he'll be with you in Thanksgiving of 2015. Okay?

"[APPELLEE]: That would be great.

"[COUNSEL FOR APPELLEE]: And then switching every year thereafter.

"THE COURT: Yes.

"[COUNSEL FOR APPELLEE]: Okay.

"THE COURT: And that's fair.

"[APPELLANT]: That's fine.

"THE COURT: Okay? I'm so glad that we're able to work things out. So, and I guess that's it."

With the visitation concerns resolved, counsel for the appellee raised the issue of attorney's fees in connection with the October 2013 motion to compel. Although the record is not completely clear, it appears that counsel for the appellee provided copies of his firm's time records to the lower court and the appellant at the hearing. He orally represented to the lower court that the amount of fees incurred "for discovery" was $4,500.

"THE COURT: What is the amount that your client is asking for as contribution?

"[COUNSEL FOR APPELLEE]: The amount incurred for discovery was $4,500, which included –

"THE COURT: Okay.

"[COUNSEL FOR APPELLEE]: -- interrogatories, requests for production of documents, follow-up, a motion to compel for sanctions – [.]"[4]

The lower court asked if $2,000 would be sufficient for appellee. Shortly thereafter, appellee advised that $2,000 was acceptable. Appellant indicated that she was unable to pay that amount and suggested applying the award to the appellee's then outstanding child support arrearages which she estimated as amounting to approximately $7,000. The lower

[4]Counsel fees for compelling discovery do not include the value of services in preparing the discovery requests.

court accepted the appellant's suggestion and ruled that the appellee's support arrearages would be offset by the amount of the award.[5]

At the conclusion of the hearing, the court orally reviewed the order that it expected to be presented, but that review referred only to the counsel fee issue. Appellant spoke up and the following transpired:

> "[APPELLANT]: And what about the Christmas, staggering Christmas and Thanksgiving?
>
> "THE COURT: We can add that language that for Christmas 2014, you know, and then the Thanksgiving. So –
>
> "[COUNSEL FOR APPELLEE]: And each year thereafter.
> "THE COURT: Yes.
>
> "[COUNSEL FOR APPELLEE]: Okay.
>
> "THE COURT: Okay? All right. Thank you very much.
>
> "[COUNSEL FOR APPELLEE]: Thank you, Your Honor."

On July 23, 2014, the court entered the order from which the present appeal is taken, setting forth revised visitation provisions and also addressing the award of attorney's fees. The order provided that existing orders would remain in effect to the extent that they did not conflict with the July 23, 2014 order.

Rather than alternating the child's winter break between the parties, the order directed that the child would spend his entire winter break, save for the first day, with the appellee, every year, commencing in 2014. That provision reads:

[5] There is no issue before us concerning giving credit against child support arrearages in payment of discovery sanctions.

> "Winter Break. *Except as provided herein, the [appellee] shall have custodial time with the minor child for the entire Winter Break from school. This shall commence with Winter Break 2014 and shall continue each year thereafter*; however, [appellant] shall be entitled to overnight visitation with the minor child on the first day that the Winter Break commences until 9:00 a.m. the following morning at which time the [appellant] shall ensure that the minor child is returned to the [appellee]. Winter Break is defined as commencing close of school through to 6:00 p.m. the day before school resumes. The parties acknowledge except as provided herein the [appellee] shall have uninterrupted custodial time with the minor [child] for the duration of the Winter Break."

(Emphasis added).

The order alternated only Thanksgiving, beginning with the appellee in 2014:

> "Thanksgiving. The parties shall alternate the Thanksgiving Holiday … with the [appellant] having custodial time in years ending in an odd number, commencing in 2015, and [appellee] having custodial time in years ending in an even number, commencing 2014."

Lastly, the court's July 2014 order merged in each year the appellee's July 12-26 Maryland visitation period with his July 26 – August 23 Switzerland visitation period. The January 2014 order had provided for an overnight visitation with the appellant on July 16.

> "Summer Visitation: The [appellee] shall have summer vacation custodial time with the minor child each year commencing in 2014 from July 12 through August 23. The parties acknowledge that except as provided herein the [appellee] shall have uninterrupted custodial time with the minor child for the duration of his Summer Vacation[.]"

Discussion

I

Appellant contends that the revised terms of visitation in the order under appeal were not agreed to at the review hearing and that the visitation provisions as ultimately set forth in the lower court's order amount to a denial of due process. She submits:

> "[The court] did sign a new order as a result of the hearing, one that expanded visitation with the appellee to 42 continuous days during the summer and the entire winter vacation but for the first day, every year. It did not mention the temporary move to Switzerland or alternating years with the appellant, staggering Thanksgiving and Christmas, as had been discussed during the review hearing.
>
> "… By consolidating and expanding visitation without discussing it during the hearing or alerting the Appellant that that was even an issue, and without a motion by either party, in writing or during the hearing, the court denied the appellant due process."

Appellant's Brief at 7-8.

In the course of the June 2014 hearing, the court explained the nature of a review hearing. "[I]t's really just a status [hearing] to see what's going on." "[I]f [an issue] can't be resolved between the two parents," the court said, "then we'd have to set it in on a motion." And further, "So if the parties can't work it out, then I guess it does need to be set in for a hearing." Thus, any efficacy of the court's order was to be based on consent. Under the court's ground rules, the proceeding was much like a mediation. But, the record does not support a finding of agreement on certain aspects of the order entered July 23, 2014.

The principal difficulty lies in the provision dealing with visitation during "Winter Break." Excluding the first day of the break, the order provides for "uninterrupted

custodial time" with the minor child "for the duration of his Winter Break." The provision is effective for 2014 "and shall continue each year thereafter." The record for this appeal does not reflect what the visitation arrangements were, in fact, for the 2014 "Thanksgiving" and 2014 "Winter Break." Based on the transcript of the June 2014 review hearing, however, it appears that both parties contemplated an alternating arrangement under which the child would visit with appellee, in Switzerland or elsewhere, during "Thanksgiving" in one year and during "Winter Break" the next year. From the standpoint of an agreement between the parties, the "Winter Break" and "Thanksgiving" provisions are integrated.

Because they are contrary to the court's assurances to the parties that it would not act on visitation absent their agreement, we shall vacate the "Winter Break" and "Thanksgiving" provisions of the order entered July 23, 2014, and remand for further proceedings. We note that our remand is based on procedural grounds and is not a limitation on the discretion of the court in exercising its judicial power to fashion a visitation order in the best interests of the child.

The June 2014 hearing proceeded somewhat differently with respect to the "Summer Visitation" by appellee. Under the order entered January 13, 2014, appellee had overnight visitation in the Maryland/Washington D.C. area on June 13-15, June 27-29, and July 12-26. From July 26 to August 23, the minor child was to visit with Appellee in Switzerland where his father was to take him. The failure timely to obtain a passport for the child required that that plan be altered. At the June hearing father explained his plans for the child that included a day camp and a visit with the child's paternal grandmother.

Appellant asked a number of questions about the plans for the summer of 2014, and she seemed satisfied. There was no express discussion about later years.

Under the order appealed from, "Summer Visitation" with the appellee is from July 12 through August 23.

In this Court, appellant does not object to the provision in the July 23, 2014 order that makes it applicable "each year." The objection is that the number of continuous days is too long and "much more than [the child] had ever experienced before." Brief of Appellant at 6. Appellant submits that the court erred by "reviewing a visitation that had not yet taken place" and that, in fact, the expanded visitation "proved to be too long for" the child. *Id.*

First, any issues that appellant may have with the "Summer Visitation" provision as applied in the summer of 2014, are now moot. Second, we cannot consider on the record before us any arguably adverse effect of the 2014 "Summer Visitation" visit on the child. The record in this appeal closed with the order for appeal.

In any event, appellant can move in the circuit court to modify the "Summer Visitation" provision and explain why, in her opinion, the visitation is "too long" to be in the child's best interest.

II

The appellant challenges the lower court's award of attorney's fees in several ways. First, she contends that the trial court erred by awarding attorney's fees without first

considering the respective financial situations of the parties.[6] Although it may be an abuse of discretion to "impose a substantial monetary sanction on a litigant without first determining the financial ability of the litigant to pay the amount assessed," *Needle v. White, Mindel, Clark & Hill*, 81 Md. App. 463, 479, 568 A.2d 856, 864 (1990), the focus is distinct when the award is compensatory, rather than punitive. Where an award of attorney's fees is compensatory, "the test of an appropriate sanction is determined by what constitutes a reasonable amount for counsel fees." *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316, 336, 604 A.2d 506, 517 (1992).

The award of fees in this case was intended to compensate the appellee for additional discovery costs he incurred due to the actions of the appellant, rather than to punish the appellant for those actions. The appellant's ability to pay is immaterial. Moreover, it was at the appellant's suggestion that the award of $2,000 was applied to offset the appellee's outstanding child support arrearages. The lower court's failure to consider the financial situations of the parties was not error.

Secondly, the appellant argues that the lower court erred by determining the amount of the award without the documentation or verification required by Md. Rule 2-433(e), which reads in relevant part:

> "If a motion or a response to a motion contains a request for an award of costs and expenses, including attorneys' fees, the request shall (1) include,

[6]The appellant refers this Court to Md. Code (1984, 2012 Repl. Vol.), § 7-107(c) of the Family Law Article, which requires a court to consider "the financial resources and financial needs of both parties," before ordering attorney's fees in the context of divorce proceedings.

> or (2) be separately supported by, a verified statement in conformance with Rule 1-341(b)."[7]

Rule 2-433(e) was adopted October 17, 2013, effective January 1, 2014. Its requirements "apply only to all actions commenced on or after January 1, 2014 and shall not apply to any action commenced on or before December 31, 2013[.]" 40:22 Md. R. 1861 (Nov. 1, 2013). This action was commenced May 5, 2005. The most recent motion to modify visitation was filed January 23, 2012. Even the appellee's motion to compel, wherein the request for attorney's fees was made, was filed on October 9, 2013. The verification requirements of Rule 2-433(e) do not apply to appellee's motion to compel.

Appellant says that the billing statements furnished to her and the court do not support the representation of $4,500 for discovery. The total cost of discovery to a party is not the measure of a sanction for failing to furnish discovery. The measure is the added expense incurred by a party in trying to obtain discovery that should have been furnished

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[7] Md. Rule 1-341(b)(3)(A) provides:

> "Except as otherwise provided in subsection (b)(3)(B) of this Rule or by order of court, the statement in support of a request for attorneys' fees shall set forth:
> "(i) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task;
> "(ii) the amount or rate charged or agreed to in writing by the requesting party and the attorney;
> "(iii) the attorney's customary fee for similar legal services;
> "(iv) the customary fee prevailing in the attorney's legal community for similar legal services;
> "(v) the fee customarily charged for similar legal services in the county where the action is pending; and
> "(vi) any additional relevant factors that the requesting party wishes to bring to the court's attention."

when initially properly requested. *See A.V. Laurins & Co.* v. *Prince George's County*, 46 Md. App. 548, 420 A.2d 982 (1980).

When reviewing a request for counsel fees as a sanction for a failure of discovery under Rule 2-433, prior to its January 1, 2014 amendment, a circuit court applied substantially the same factors that now appear in amended Rule 1-341(b)(3). *See Blaylock v. Johns Hopkins Federal Credit Union*, 152 Md. App. 338, 361, 831 A.2d 1120, 1133 (2003). Here, the circuit court reduced appellee's request to $2,000. We have reviewed the time records furnished by appellee's counsel to appellant. The hourly rate is reasonable and the time spent on work reasonably required to enforce appellee's right to discovery has a value somewhat in excess of $2,000. We hold that the circuit court did not abuse its discretion in awarding the $2,000 sanction.

For the foregoing reasons, we enter the following mandate.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ORDERING APPELLEE'S VISITATION FOR THE "WINTER BREAK" AND "THANKSGIVING" PERIODS VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS. IN ALL OTHER RESPECTS THE JUDGMENT IS AFFIRMED.

COSTS TO BE EVENLY DIVIDED BETWEEN THE PARTIES.