Circuit Court for Prince George's County
Case No. CAD12-36979

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1358

September Term, 2017

TARA M. BENN

v.

GORDON JOHNSON

Friedman,
Beachley,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: July 10, 2018

This is an appeal from an order of the Circuit Court for Prince George's County, denying appellant's Motion for Modification of Custody, modifying her preexisting support obligation from $446 a month to $300, and finding her in contempt of court for failure to pay court-ordered child support. Appellant presents us with the following questions, which have been rephrased and renumbered for clarity[1]:

I. Did the court err in denying appellant's Motion for Modification of Custody?

II. Did the court err in ordering appellant pay $300 a month in child support?

III. Did the court err in finding appellant in contempt of court?

For the reasons set forth below, we shall affirm, in part, and remand, in part.

[1] Appellant originally presented us with the following questions, verbatim: (1) Did the trial court err in calculating child support outside of the Maryland Child Support Guidelines? (2) Did the trial court abuse its discretion by finding the Appellant in contempt absent a written motion, a show cause order, proper notification and service? (3) Did the trial court misapply the "best interest" standards: (A) By stating the Minor child not receiving speech and language, developmental services, and being enrolled in child care instead of a public school where she could receive a Free and Appropriate Education (FAPE) under the Individuals with Disabilities Act (IDEA) was in the Minor child's best interest? (B) By discounting incidents of domestic violence perpetrated by the Appellee when determining the "best interests" of the child? (4) Did the trial court err when it did not determine a material change in circumstances occurred: (A) When it did not consider the Appellant's relocation to Maryland a material change in circumstance and subsequently allowed the Appellee to retain the tie-breaking authority and did not change the access schedule? (B) By determining the Appellee's acts of parental interference (withholding the Minor child, not providing medical insurance cards, withholding educational and medical records, not allowing the Appellant to speak to the Minor child via telephone, etc.) toward the Appellant were insufficient reasons to change the child access schedule to increase the Appellant's parenting time? (5) Did the trial court err by abusing its discretion and misapplying the law when it entered a second final order on September 12, 2017 changing the parties' shared-custody and granting the Appellee primary physical custody without applying the "best interest" standards or identifying a "material change in circumstances"?

BACKGROUND

Tara Benn, appellant, and Gordon Johnson, appellee, have a six-year old child named B.J. The parties, on November 7, 2013, entered into a consent agreement, which provided they would have joint legal custody, appellant would have primary physical custody of B.J., appellee would have visitation one week a month and holidays, in accordance with a schedule, and appellee would pay $572 a month in child support. The agreement also stated that the parties would exchange B.J. at the Oxon Hill Library. In December of 2013, appellant moved from Maryland to Georgia, to pursue an employment opportunity, and she took B.J. with her.

On April 25, 2014, appellant filed a Petition to Modify Visitation and Child Support in the Circuit Court for Prince George's County, which argued the visitation schedule was not in the best interest of the child because it interfered with her speech therapy; claimed appellee failed to allow video chats in violation of the Consent Agreement; and requested an increase in child support. She also filed a Motion for Contempt,[2] on August 21, 2014, alleging appellee violated the Consent Agreement because he refused to allow her telephone and virtual visitation with the minor child. Appellee filed timely responses to these motions.

The court, on June 16, 2015, held a hearing on the pending motions. A written opinion, dated August 13, 2015 and filed on August 31, modified the previous Consent

[2] The record shows appellant originally filed a Motion for Contempt in January of 2014, which was dismissed by the court for lack of service on May 20, 2014.

Agreement; awarded primary physical custody to appellee, with visitation to appellant[3]; maintained joint legal custody, with appellee possessing "tie-breaker" authority; terminated appellee's child support obligation; and stated "[e]ach parent is generally charged with the support of the minor child and will pay any cost and expense for the minor child when she is in his or her custody." The court also ordered that the parties would now exchange B.J. in Greensboro, North Carolina.

Appellant filed a "Motion to Revise Court Order," on September 29, 2015, which appellee opposed. Her motion was denied on October 26, 2015. She then filed a Petition for Modification of Custody on December 31, 2015, that alleged a material change in circumstances had occurred because she moved from Georgia to Manassas, Virginia, and claimed appellee assaulted her in North Carolina during one of the exchanges. She also filed a Petition for Contempt for Denial of Visitation on the same day. Appellee, on April 6, 2016, answered appellant's complaints and filed a Counter-Petition for Modification of Access and Child Support, Contempt and Other Relief, and requested a hearing. He denied assaulting appellant; contended that she "abused the legal system" and made "false allegations" in order to obtain custody; requested a modification of the visitation schedule so that appellant could have visitation every other weekend in Maryland; requested that appellant pay child support; and alleged appellant was in contempt of court by keeping B.J.

[3] The August 31, 2015 Order awarded appellant visitation on the following dates: For 2015, August 15 to August 29, October 10 to October 24, December 5 to December 19; For 2016, January 30 to February 13, March 26 to April 9, May 21 to June 4, July 16 to July 30, September 10 to September 24, November 5 to November 26, December 23 to January 14, 2017; For 2017, February 25 to March 11, April 22 to May 15, June 24 to July 1, August 12 to August 26, October 7 to October 21, December 6 to December 16.

in Georgia when she was supposed to be in his custody. Appellant answered appellee's Counter-Petition on April 14, 2016.

A hearing was held on August 22 and 23, 2016 to address the motions involving child custody. Thereafter, the court issued a *Pendente Lite* Child Access Order, dated August 29, 2016, which granted appellant access to B.J. on alternating weekends and certain holidays, changed the drop-off location to the Oxon Hill Police Station, and ordered that appellant be allowed to video chat B.J. while she was in her father's custody. A further hearing was ordered to take place on November 22, 2016, to address the pending petitions. Appellant filed a "Motion to Revise Order," on September 6, 2016, requesting the court "reestablish the visitation schedule outlined in the August 2015 order," which appellee opposed on October 12, 2016. Appellant filed another "Motion to Revise Order" on November 18, 2016, requesting that the court "vacate the 'Order' entered on August 31, 2015," re-establish the November 7, 2013 Consent Order, and dismiss all pending petitions.[4] That same day, she filed a "Motion to Expedite Consideration for Plaintiff's Motion to Revise," which was denied.

At the November 22, 2016 hearing, the parties engaged in negotiations and a Settlement Agreement, which addressed both child custody and support, was reached and placed on the record. The Agreement provided that appellee would maintain primary physical custody, with visitation rights to appellant; the parties would have joint legal custody; and appellant would pay $446 per month in child support. The court ordered

[4] This motion was dismissed at the November 22, 2016 hearing.

appellee's counsel to draft an Order encompassing the Agreement and the court signed it on December 16, 2016. Appellant claimed she withdrew her consent prior to the Agreement being finalized.

Appellant then filed a "Motion for Modification," requesting that appellee be found in contempt for "taking the child during [her] access time," and a "Motion and Affidavit for an Emergency Hearing," alleging appellee had taken B.J. out of the country during her access time.

Appellant, on December 23, 2016, filed a "Motion to Stay the Execution of the Order for Custody and Child Support," in which she claimed she "did not consent to the proposed order stated on the record on November 22, 2016." On the same day, she also filed a "Motion to Revise, Alter, or Amend Order and for a New Trial" that requested the court vacate its December 16 Order, with respect to child support; requested a new trial, with an opportunity for both parties to "re-open the record to receive evidence of [their] respective incomes"; and to "modify the current child support amount of $446.00 to $300.00 monthly paid directly to the Minor child's day care from August through June beginning January 1, 2017." She also filed a "Motion to Modify Child Support," on December 27, 2016, that maintained her income had decreased by about 35% and requested a retroactive decrease in child support.

On February 23, 2017, the court issued an order to reconsider the matter[5]; scheduled a rehearing for May 3, 2017; and ordered that the December 16, 2016 Order "shall remain in effect pending [the] rehearing."

On May 3, July 13, and July 19 of 2017, a rehearing was held, where both parties testified and presented evidence. At the conclusion of the hearing, the court made a ruling from the bench, memorialized in a written order dated August 8, 2017, which found that, although appellant had relocated, there was no material change in circumstances to justify a change in custody and that it was in the best interest of B.J. for the parents to have "shared physical custody…with the minor child residing primarily with [Appellee],"; granted joint legal custody, with appellee keeping "tie-breaker" authority; increased appellant's visitation to include overnight visits every Wednesday, B.J's spring break, alternating weeks during the summer, two weeks of vacation, and certain holidays; found that appellant was in contempt of court for "deliberately failing to make child support payments…following the Court's Order of December 16, 2016"; established an arrearage of $2,555, to be paid at a rate of $100 per month; and modified the previous Child Support

[5] While appellant filed a Motion to Revise Alter, or Amend Order and for a New Trial, the court's order actually stated, "UPON CONSIDERATION of Plaintiff's Motion to Reconsider the December 16, 2016 Order regarding Custody and Child Support, it is by the Circuit Court of Maryland for Prince George's County, this 23rd day of February, 2017,

ORDERED, that Plaintiff's Motion for Reconsideration is hereby GRANTED; and it is further

ORDERED, that this case be reset before the undersigned for a 3 hour hearing on Plaintiff's Motion to Modify; and it is further

ORDERED, that the December 16, 2016 Order shall remain in effect pending any rehearing.

Order to reduce appellant's obligation to $300 a month in child support. Appellant then brought this timely appeal.

ANALYSIS

I. Did the court err in denying appellant's Motion for Modification of Custody?

Appellant argues that the circuit court erred in denying her Motion for Modification of Custody "when it did not consider the appellant's move a material change in circumstances affecting the child's best interest." She also contends the court abused its discretion by entering a "second final order on September 12, 2017" without "applying the 'best interest' standards or identifying a 'material change in circumstances.'" Conversely, appellee argues the court properly determined that a modification of the custody arrangement was not in B.J.'s best interest.

When presented with a Petition for Modification of Custody, courts employ a two-step analysis. *McMahon v. Piazze,* 162 Md. App. 588, 593–94 (2005). First, the "court must assess whether there has been a 'material' change in circumstance." *Id.* at 594 (*quoting Wagner v. Wagner,* 109 Md. App. 1, 28 (1996)). "If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody." *Id.* While the principal consideration in a modification of child custody case is the child's best interest, "[u]nfortunately there is no litmus paper test that provides a quick and relatively easy answer to custody matters." *Montgomery Cty. Dep't of Social Serv. v. Sanders,* 38 Md. App. 406, 419 (1977). The court, therefore, must examine "numerous factors and [weigh] the advantages and disadvantages of the alternative environments." *Id.* at 420.

These factors include, but are not limited to:

1) Fitness of the parents;

2) Character and reputation of the parties;

3) Desire of the natural parents and agreements between the parties;

4) Potentiality of maintaining natural family relationships;

5) Preference of the child;

6) Material opportunities affecting the future life of the child;

7) Age, health, and sex of the child;

8) Residences of parents and opportunity for visitation;

9) Length of separation from the natural parents; and

10) Prior voluntary abandonment or surrender.

Id.

In the case at bar, following the presentation of witnesses and argument, the court made the following findings:

> [Appellee] is the stronger, more reliable parent who has exhibited far more candor with the Court in terms of his behavior in the community, being stable, offering [B.J.] a stable home, a stable school, a stable environment, a stable temperament.
>
> * * *
>
> [Appellee's] testimony on this witness stand today and in previous occasions has been refreshingly candid, honest, down to earth, and I just really have a difficulty [envisioning] any other parent confronted with the degree of opposition and constant challenge being sort of a more model Defendant or Plaintiff/Counter Defendant, in his demeanor on the stand and his approach to dealing with [Appellant].
>
> So, his lifestyle has been steady, his personal style has been steady, his history has been steady, and his demeanor has been steady. His support was

steady when he had to pay it and his tolerance of [Appellant] has been steady with certain limitations.

* * *

But if you take character and representation of the parents as one of the tailored factors, assuming even arguendo, that [Appellant] had made a case of change of circumstances, I would still award custody to [Appellee] based on the *Montgomery County v. Sanders* and the *Boswells* factors because his character and representation is just better demonstrated.

* * *

[Appellant] has demonstrated clearly a superior fitness to be a parent in terms of his integrity and his stability, which he has exhibited throughout this ordeal.

Surely, the desire of the parents might be – [Appellant] might have a stronger desire but I don't know, I think [Appellee's] desire is just a little understated. [Appellant's] desire is very dramatic.

* * *

So, the desire of both parents is strong, perhaps a little more on her side, but desire, ambition these are not things that are dispositive. Fitness is, character is, and then the other things [are] not really in play, perhaps, the child's preferences [is] not a relevant factor because of her age, maintaining natural family relations is probably neutral.

Material opportunities [affecting] the child's future life, I find that [Appellee] has demonstrated more opportunities because he is the one who has been supporting the child. And I am going to get to that in a minute.

He has provided the material opportunities. He is the one who is paying extra tuition for [B.J.] to go to a private daycare, private licensed daycare. It is not a school, but it is a licensed daycare. And, apparently, [B.J.] is flourishing at that school.

[Appellant] is a licensed school psychologist and counselor but she is between jobs. So, her ability to provide for [B.J. is] marginal at this point. She will be living off of $25,000 a year plus whatever she can cobble with what part time work.

And she is not done solidifying her career. [Appellee is] in the journeymen stages of his career, probably looking forward to retirement in the not too distant future.

As for residence of the parents and opportunity for visitation, now [Appellant] has come full circle. And we are glad to see her back here.

> Particularly, as far as, [B.J.] having to fly down to Georgia or drive down to Georgia and meet in North Carolina and all this stuff, it is very stressful on everybody.
>
> * * *
>
> Well...The homes of both parties that is the environment surroundings, seems to be neutral.
>
> Influences likely to be exerted on the child, that seems to be neutral. Physical, spiritual, moral wellbeing of the child, those seem to be neutral. Contact and bonding between child and parents, I think [B.J.] is attached to both mom and dad.

The court then concluded:

> So, the Court has far more confidence in father's ability to comply with Court orders and his ability to provide stability and stewardship and carry out his trust in raising [B.J.].

We review a trial court's custody determination under the abuse of discretion standard. *Santo v. Santo*, 448 Md. 620, 625 (2016). This standard of review "accounts for the trial court's unique opportunity to observe the demeanor and credibility of the parties and the witnesses," and, as such, we will not reverse its decision unless it is "well removed from any center mark imagined by the reviewing court." *Id.* at 625–26 (internal citations and quotations omitted). Here, the court engaged in a thorough analysis of the evidence and the applicable law. The court's determination that it was in the child's best interest to deny the modification was not an abuse of discretion, rather, it was a decision based upon a full evaluation of the appropriate factors and the witnesses' credibility and demeanor.

Moreover, appellant's contention that the court improperly entered "a second final order" is without merit. The court's September 2017 Order simply corrected errors contained in its previous order and was fully consistent with the court's oral ruling. Section 6-408 of the Courts and Judicial Proceedings Article provides that "[f]or a period of 30

days after the entry of a judgment…the court has revisory power and control over the judgment." During this period of "broad revisory power…the court may *sua sponte* revise its judgment." *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, 711 (2007). The court's amended order complied with the requirements of § 6-408 and was not in error.

II. Did the court err in ordering appellant pay $300 a month in child support?

According to appellant, the court erred when it "deviated from the child support guidelines [which] requires an application of the best interest standards as an explanation for deviating from the calculations." She contends "neither party provided child support worksheets prior or during the hearing." Moreover, she claims the court "disregarded [her] testimony that she received $230.00 weekly in pay and inflated her monthly income at $5,000.00 monthly."

In child support cases, courts are required to apply the Maryland Child Support Guidelines when parents have a monthly combined adjusted income of $15,000 or less. *See* MD. CODE FAM. LAW § 12-204. Child support orders are generally within the sound discretion of the trial court. However, "where the order involves an interpretation and application of Maryland statutory and case law, [the] Court must determine whether the trial court's conclusions are 'legally correct' under a de novo standard of review." *Walter v. Gunter*, 367 Md. 386, 392 (2002) (citing *In re Mark M.*, 365 Md. 687, 782 (2001)); *see also Jackson v. Proctor*, 145 Md. App. 76, 90 (2002), (noting that "we will not disturb the trial court's determination as to child support, absent legal error or abuse of discretion").

Here, after being ordered to pay $446 a month in child support in the December 16, 2016 Order of the court, appellant filed a motion requesting to:

> Modify the current child support amount of $446.00 to $300.00 monthly paid directly to the Minor child's day care from August through June beginning January 1, 2017.

During the first day of the merits hearing, on May 3, 2017, appellant testified to the following:

> **[Appellant's counsel]**: And what type of program are you in?
>
> **[Appellant]**: A doctoral program in school psychology.
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> **[Appellant's counsel]**: And when you receive – when do you expect to receive your doctorate?
>
> **[Appellant]:** By December of 2018.
>
> **[Appellant's counsel]:** How will that impact your employment potential?
>
> **[Appellant]:** Yes, I will be naturally certified. I will be able to sit for the E-triple P, which is the examination for the Professional Practice of Psychology, which would mean I could practice independently as a psychologist and I would not have to rely on the school systems for employment. Likewise, that would culminate in me having additional income to support myself and my daughter.
>
> * * *
>
> **[Appellant's Counsel]:** And what is your current income from Fauquier County Public Schools?
>
> **[Appellant]:** Approximately – and I am bad with, it's $20 an hour, so, I guess that's $36,000 per year more or less.

At the second day of the hearing, on July 13, 2017, she testified that she was no longer employed by Fauquier County. She then stated that she receives unemployment compensation from the state of Virginia and will receive a $25,000 per year stipend for pursuing her doctoral degree from Howard University. The court also heard testimony regarding appellant's monthly expenses.

The court then stated:

> But, [Appellee] needs help in paying for the major expenses in connection with [B.J.]. And [he] has elected on his own to put [B.J.] in school. He can at any time, take her out of that school and that is a nice $600, $700, $800 a month that he is "saving."
>
> If we went with [Appellant's] plan, [B.J.] would be in public school and she wouldn't have to pay that. So, I am not requiring [Appellant] to contribute that and I ran the guidelines and it came out to be about $336 based on the different income. His income versus yours. So, $300 is okay. And that is how I derived that for your information, [Appellee].

It is well-settled in Maryland that "[t]he availability of appeal is limited to parties who are aggrieved by the final judgment." *Suter v. Stuckey,* 402 Md. 211, 224 (2007) (citing *Thompson v. State,* 395 Md. 240, 248 – 49 (2006)). "A party cannot be aggrieved by a judgment to which he or she acquiesced…[or recognized] the validity of the decision below." *Id.* "The 'right to appeal may be lost by…otherwise taking a position which is inconsistent with the right of appeal.'" *Id.* (internal citation omitted). In the present case, appellant requested that she pay $300 a month in child support, which the court granted. She received exactly what she requested and, in our view, cannot now claim she was aggrieved. We therefore decline to examine the court's determination as to the amount of her child support obligation.

III. Did the court err in finding appellant in contempt of court?

Finally appellant argues the court's finding of contempt was in error because she was not "served with a petition for contempt nor a show cause regarding failure to pay child support," in accordance with Maryland Rule 15-206 and case law.[6] Appellee

[6] In support of her position, appellant cites *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584 (1990). That case involved a negligence claim against a property owner and the construction of a general liability insurance contract. It does not

maintains appellant was served with proper notice and, thus, the court did not err in finding her in contempt.

On April 6, 2016, appellee filed a "Counter-Petition for Modification of Access, Modification of Child Support, Contempt and Other Relief and Request for Hearing Thereon." In that motion, appellee requested the following:

> Find the Defendant in contempt of Court for failing to return the minor child to the custody of the Plaintiff after December 19, 2015 and order the Defendant to purge the contempt by allowing the Plaintiff to have [sic] make up the missed days by having the minor child from December 23, 2016 to January 14, 2017 and ordering the Defendant to reimburse the Plaintiff for the childcare costs incurred while [B.J.] was in Georgia.

According to the record, appellant's attorney, Jonathan Hoover,[7] was served with the Counter-Petition on April 5, 2016, and she filed an "Answer to Counter-Petition for Modification of Access and Other Relief" on April 14, 2016, denying she was in contempt of court, together with a written request to the Clerk of the Prince George's County Circuit Court to file her Answer and a "Notice of Service of Discovery," dated April 12, 2016. The attorneys for both parties were sent notices that a hearing on the pending motions was scheduled for August 22 and 23 of 2016. The contempt petition, however, was not heard at the August 2016 hearing and remained pending for a determination by the circuit court

involve contempt of court and the opinion does not even mention the word "contempt." We do not find the case applicable here.

[7] Appellant has been represented by several attorneys during this case. After appellant's Answer to appellee's contempt motion was filed, Mr. Oliver Denier Long filed a "Certificate of Attorney With Out-of-State-Office," requesting to represent appellant in her case. Mr. Hoover then withdrew his appearance on May 16, 2016. There is no evidence, nor does appellant make any allegations, that any attorney in this case failed to properly notify appellant of the court proceedings.

at the May and July 2017 rehearing. Following those hearings, the court in its August 8, 2017 Order directed appellant to pay child support and addressed the issue of contempt:

> **ORDERED,** that [Appellant] is found in **Contempt of Court** for willfully and deliberately failing to make child support payments to the [Appellee] following the Court's Order of December 16, 2016; and it is further
>
> **ORDERED,** that accounting from November 1, 2016, Mother is in arrears in the amount of $2,555.00 in child support; and it is further
>
> **ORDERED,** that said period of incarceration be, and hereby is, STAYED upon the faithful payment of child support to the Father as ordered herein[.]

Appellee's contempt petition however related to visitation, not child support. A further review of the record does not show that appellant received notice that she was allegedly in contempt for failing to pay child support. Because appellant did not receive such notice, we hold that the court erred as she was unable to properly defend against the allegation. We, thus, vacate the circuit court's judgment finding appellant in contempt of court and remand for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART, VACATED AND REMANDED IN PART FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLANT.