Circuit Court for Montgomery County
Case No.: 82381FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1507

September Term, 2021

MARGARET CHU DUFOUR

v.

RONNIE EUGENE NASH

Kehoe,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: May 31, 2021

Appellant, Margaret Chu DuFour ("Mother"), appeals the Circuit Court for Montgomery County's decisions denying her request for modification of child custody and visitation and denying her request for an award of attorneys' fees against appellee, Ronnie Eugene Nash ("Father"). In substance, Mother presents four questions for review, two of which are properly before this Court:[1]

1. Did the court err by dismissing Mother's petition to modify custody and visitation for lack of jurisdiction?

2. Did the court err in denying Mother's request for legal fees?

For the reasons we shall discuss, we affirm.

BACKGROUND

The parties are divorced and share two minor children: G.N., born in 2005, and J.N., born in 2007. Both children have been diagnosed with autism. In March of 2011, the court entered a judgment of absolute divorce between the parties, which set out custody and

[1] Though represented in the circuit court, Mother proceeds *pro se* on appeal. In Mother's brief, she phrased the issues on appeal as: 1. "The Court erred [by] dismissing [Mother]'s Motion To Modify Custody and Visitation on the grounds of jurisdiction[;]" 2. "[Father] was NOT found in Contempt of Court after refusing to provide retirement statements to [Mother] or pay [Mother] cost of living allowance increases for three consecutive years. The Court also denied [Mother] legal fees to enforce the Order[;]" and, 3. "Incompetent Counsel."

We interpret Mother's second issue as two separate issues: the court's denial to award Mother legal fees (which we discuss, *infra*) and the court's denial to hold Father in contempt. Regarding Mother's request for contempt, the circuit court's denial to hold Father in contempt is not appealable. *See Pack Shack, Inc. v. Howard Cnty.*, 371 Md. 243, 246 (2002) (holding that "a party that files a petition for constructive civil contempt does not have a right to appeal the trial court's denial of that petition"). Further, Mother's last issue, "incompetent counsel[,]" was not raised in the circuit court and thus, is not properly before us on appeal. *See* Md. Rule 8-131(a) (providing that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court").

visitation of the children. Approximately four months later, the court entered an amended judgment of absolute divorce ("Amended Divorce Judgment"), which included a provision that stated that, by consent of the parties, Mother was entitled to 30% of Father's military pension.

In 2013, Mother and both children moved from Maryland to Tennessee. In 2018, Father also moved from Maryland and, while working as a travelling nurse, has resided in different states outside of Maryland since that time. Father currently resides in Tennessee.

In September of 2019, Father filed a motion for the court to relinquish jurisdiction to Tennessee, which was opposed by Mother. In August of 2020, the court held a hearing and, after analyzing the inconvenient forum factors under Md. Code Ann., Family Law ("FL") § 9.5-207(b), denied Father's motion. Specifically, the court found instructive the parties' familiarity with the court, the court's ability to hear the case through virtual means, and a history of domestic violence between the parties in ruling that even though "none of these parties live in Maryland," there was a "significant connection with [Maryland] by virtue of this Court having already made custody determinations." Father thereafter filed a motion for the court to exercise its revisory power over that decision pursuant to Maryland Rule 2-535, which Mother opposed, and the court denied. Father did not appeal that ruling.

In December of 2020, Mother filed a petition to modify child custody and visitation, requesting, among other things, that Father's "physical access schedule be modified to only supervised visitation with no over[]night access[,]" that Father's access to the children's health care providers be limited, and that Father's "daily phone/video calls" with the

children be restricted "to one time per week[.]" Mother also sought attorneys' fees and contempt for Father's failure to provide statements and cost-of-living adjustment ("COLA") increases from his pension as required under the Amended Divorce Judgment.

On November 1 and 2, 2021, the court held hearings on Mother's requests, where the court *sua sponte* raised the issue of its jurisdiction.[2] Although it was undisputed that neither the parties nor the children lived in Maryland, Mother maintained that jurisdiction had already been decided by the court, explaining that, "the issue when it was presented to Judge Mc[C]ally was that she felt that there was an institutional history that needed to be maintained because of the abuse by [Father] when they originally brought this matter for divorce." The court responded that, "[w]e're going to go ahead and get started[,]" but that "I have to tell you I really – it just jumped out at me as soon as I started reading, you know, the issues and the papers that were before me. I just questioned why this case was here. There's, there's absolutely no connection to Maryland at this point."

At trial, it was undisputed that Mother was entitled to 30% of Father's pension. Father had received three COLA increases to his pension, and Mother testified that she had not received her proportionate share of those increases, nor statements relating to the pension, as required under the Amended Divorce Judgment. Father maintained that his failure to provide the increases and statements was due to the parties' disagreement about the "interpretation of the order as to what amount of the COLA increase [Mother] gets[.]"

[2] Father explains that "[w]hile neither party raised jurisdiction as an issue in the matter that was before the [c]ourt on November 1 and 2, [Father] had raised the jurisdiction issue before the court on several occasions since 2019 and each time was unsuccessful in having the matter transferred to Tennessee."

The court dismissed Mother's petition to modify child custody and visitation for lack of jurisdiction, finding that "neither the children nor the parents presently reside in Maryland[and] that Tennessee is now the home state of the children, and [] that under FL § 9.5-202(b) this Court does not have the authority to modify custody at this time because the Court would not have jurisdiction to make an initial custody determination[.]"[3] Further, the court ordered Father to pay the unpaid portions of the COLA increases to Mother, but declined to find Father in contempt and declined Mother's request for attorneys' fees.

Mother timely appealed.

STANDARD OF REVIEW

This Court has previously stated that, "[w]hether the trial court correctly asserted jurisdiction is an issue of statutory interpretation that we review *de novo* to determine whether the court was legally correct." *Cabrera v. Mercado*, 230 Md. App. 37, 80 (2016). We review such issues "without deference" to the circuit court. *Wheeling v. Selene Fin. LP*, 473 Md. 356, 373 (2021). "The issue of subject matter jurisdiction need not be raised by a party, but may be raised by a court, sua sponte, at any time." *Lewis v. Murshid*, 147 Md. App. 199, 202-03 (2002).

[3] The court explained that in its previous jurisdiction ruling, it had mistakenly "presumed that it retained jurisdiction simply because of the party's history of litigation in Maryland." Specifically, the court stated that the FL § 9.5-207 factors previously relied upon "apply in determining whether a court at this stage should decline or relinquish jurisdiction under the express language of 9.5[-]207a, [but] before you reach that issue, you have to find that the state still has jurisdiction," before determining that the court no longer had jurisdiction given the parties' relocation from Maryland.

Additionally, "[w]e review a trial court's decision to award attorneys' fees and costs for abuse of discretion." *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436, 476 (2018). A trial court abuses its discretion "when it disregards established principles or adopts a position that no reasonable person would accept." *Pinnacle Grp., LLC*, 235 Md. App. at 476.

DISCUSSION

Mother first asserts that the court erred in dismissing her petition on the grounds of jurisdiction because the court had already determined that the case should remain in Maryland under the inconvenient forum factors set forth in FL § 9.5-207. Mother maintains that the parties' extensive litigation history before the court – including that it "has heard over 53 hours of testimony between the parties and have litigated the matters of custody and visitation for thirteen (13) years" demonstrates the parties' connection to Maryland, and that it would not be in the best interests of the children to "start[] all over again in a new state[.]"

Further, Mother asserts that the court erred in denying her request for attorneys' fees given Father's failure to provide COLA increases and statements from his pension. Specifically, Mother points to the Amended Divorce Judgment, which provides that, "if either party takes legal action to enforce any part of [the original or Amended Divorce Judgment] the prevailing party shall be awarded the costs associated with the enforcement action, including reasonable attorneys['] fees[,]" to support her position that attorneys' fees should have been awarded.

Father responds that the court correctly dismissed Mother's petition because Maryland neither maintained "exclusive and continuing jurisdiction" under FL § 9.5-202(a)(2), nor "jurisdiction to make an initial custody determination" under FL § 9.5-201(a). Additionally, Father asserts that the court correctly found that Mother was not entitled to attorneys' fees because he had since complied with the Amended Divorce Judgment, and because there was a "genuine dispute" as to the interpretation of the Amended Divorce Judgment.

I. Jurisdiction

The court's jurisdiction to make a child custody determination is set forth under the Uniform Child Custody Jurisdiction and Enforcement Act, FL § 9.5-101, *et. seq*. A court may modify child custody if it has "exclusive, continuing jurisdiction" under FL § 9.5-202. A court that has previously made a child custody determination maintains exclusive, continuing jurisdiction over that determination until one of two conditions under FL § 9.5-202(a) is met:

> (1) a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
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> (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

If the court no longer has exclusive, continuing jurisdiction under FL § 9.5-202(a), it may modify a child custody determination "only if it has jurisdiction to make an initial

determination[.]" FL § 9.5-202(b). An initial child custody determination may be made under four conditions as set forth in FL § 9.5-201(a):

> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
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> (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
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> > (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
> >
> > (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
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> (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

Here, the court ordered dismissal of Mother's petition after it determined that it neither had continuing exclusive jurisdiction nor jurisdiction to make an initial child custody determination. The court explained that it did not have continuing exclusive jurisdiction because "neither the child nor the parents presently reside in Maryland." Further, the court found that it would not have jurisdiction to make an initial child custody determination because "Tennessee is the child's, the children's home state" and that "[n]one of the other exceptions in [FL § 9.5-201] in my opinion are satisfied."

We agree that the court no longer had jurisdiction to make a child custody determination under FL § 9.5-202(a). It was undisputed that under FL § 9.5-202(a)(2), Mother, Father, and both children no longer "presently reside[d]" in Maryland. Nor, under FL § 9.5-201(a)(1), did Mother, Father, or either of the children live in Maryland in December of 2020, when Mother filed the present action. In fact, at the time of the court's decision, neither the parties nor the children had lived in Maryland in over two years. Further, under FL § 9.5-202(a)(1), regarding whether evidence is "available in this State concerning the child's care, protection, training, and personal relationships[,]" the court determined that "the evidence presented in this case I think highlighted that the children's medical, school, and other records are in Tennessee[.]" The court's findings that the parties no longer had significant connections with Maryland and that substantial evidence regarding the children's care, protection, training, and personal relationships no longer existed in Maryland were supported by the record.[4]

Mother asserts that the parties' connections to the state are demonstrated by their extensive litigation history before the court. However, as this Court has previously held, and as the trial court correctly noted, continuing litigation is not enough to confer jurisdiction upon the court. *Kalman v. Fuste*, 207 Md. App. 389, 402 (2012) (holding that "the court erred when it presumed that it retained jurisdiction simply because of the parties'

[4] Nor is Mother's reliance upon the inconvenient forum factors under FL § 9.5-207 persuasive. As the trial court correctly noted, these factors go towards whether another state may be a more convenient forum, but "before you reach that issue, you have to find that the state still has jurisdiction[.]" *Solomon v. Solomon*, 118 Md. App. 96, 109 (1997) (noting that an inconvenient forum determination is made "[s]ubsequent to the jurisdiction determination").

history of litigation in Maryland"). As we have previously stated, "if the facts and allegations, so viewed, fail to afford a claimant relief if proven, or in this case, establish a lack of subject matter jurisdiction[,]" dismissal is proper. *Lewis*, 147 Md. App. at 203. Here, the facts and allegations established that, as stated by the court: "Nobody's lived here in years. There is no contact with Maryland whatsoever." Accordingly, Mother's petition to modify child custody and visitation was properly dismissed.

II. Attorneys' Fees

"Maryland generally adheres to the common law, or American rule, that each party to a case is responsible for the fees of its own attorneys, regardless of the outcome." *Friolo v. Frankel*, 403 Md. 443, 456 (2008). A party seeking attorneys' fees "bears the ultimate burden of providing sufficient evidence to prove its damages." *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 457 (1994). As we have previously stated, "[t]he sufficiency of the evidence presented as to attorneys' fees must be more than simply the number of hours worked, but less than a line by line analysis of services rendered." *Long v. Burson*, 182 Md. App. 1, 26 (2008).

Here, the court determined that it was "without sufficient information to make" an award of attorneys' fees to Mother. The court explained that "[e]ven assuming that [Mother] here was the prevailing party as that phrase is used in the [Amended Divorce Judgment], the only evidence presented with respect to this issue was a highly redacted summary from which the court could not possibly parse the fees 'associated with the enforcement action' from other claims pending between the parties."

The record indicates that at trial, Mother's counsel introduced a 33-page worksheet of fees totaling over $26,000. Although it is clear that the fees accrued beginning in February of 2020, it is unclear what portion of the fees were "associated with the enforcement action" pursuant to the Amended Divorce Judgment. By way of example, the worksheet includes pages of largely redacted labels, such as "appear for/attend [redacted][,]" "filing [redacted][,]" "draft/revise [redacted][,]" "plan and prepare for [redacted][,]" "time [redacted][.]" Nowhere does it indicate which appearance(s), filing(s), or occurrences of drafting and revising or planning and preparing were to "enforce" the Amended Divorce Judgment, and which, for example, were in furtherance of Mother's petition to modify custody and visitation. Moreover, the explanation offered at trial was simply that the fees were accrued "defending and fighting this current litigation[.]"

Accordingly, we are unpersuaded that the court's decision that Mother was not entitled to a fee award was an abuse of discretion. As we have previously stated, "the law is clear that the trial court's evaluation of a claim for attorneys' fees must be based on a record that includes information that sufficiently and competently supports the court's findings." *Maxima Corp.*, 100 Md. App. at 458. *See also Long*, 182 Md. App. at 29 (determining that the party awarded fees "did not meet their burden of production on the issue" where the party '"simply listed the attorneys' total number of hours"') (citation omitted); *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 630 (2000) (remanding a fee award after determining that "it appears from the record that the court merely accepted a compilation of hours multiplied by fixed hourly rates"); *Holzman v. Fiola Blum, Inc.*, 125

Md. App. 602, 642 (1999) (remanding a fee award where the court determined that "the evidence did not support the award").

Accordingly, the judgment of the circuit court shall be affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.