Circuit Court for Montgomery County
Case No. 148174FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1737

September Term, 2017

SHEELAGH P. ORTEGA

v.

SERGUEI V. SVIATYI

Reed,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Friedman, J.

Filed: July 30, 2019

Appellant Sheelagh Ortega, representing herself, appeals from an order of the Circuit Court for Montgomery County denying her petition for a final protective order against her ex-husband, appellee Serguei Sviatyi. For the reasons that follow, we affirm the ruling of the circuit court.

BACKGROUND

During divorce proceedings, Sviatyi was awarded sole legal and primary physical custody of the parties' son, S.S. Ortega was allowed supervised visitation with S.S. through a court-designated visitation program. During the custody hearing, the circuit court ruled that if Ortega underwent a mental health evaluation and complied with treatment recommendations, her visitation would revert to unsupervised. Following Ortega's compliance with the conditions, however, the court held a second hearing at which it determined that Ortega's visitation with S.S. should remain supervised, but could be supervised by Ortega's mother and expanded to include overnight visitation at Ortega's mother's house.

Also during the divorce proceedings, Ortega consented to a protective order giving Sviatyi use and possession of the marital home for one year. The protective order expired on August 15, 2017. On September 15, 2017, Ortega returned to the house "to reconcile" with Sviatyi. Upon her arrival, Sviatyi left to file an emergency motion to prevent her from moving back in. In his absence, Ortega picked S.S. up from school and brought him to the house. After several hours, Ortega decided that they should go to her mother's house. As Ortega was getting S.S. into her car, Sviatyi returned and blocked her in with his vehicle. Sviatyi called S.S. to come over to him, and then put S.S. into his vehicle. When Ortega

tried to get S.S. out of the car, Sviatyi locked the doors. The police were called to the scene. Ortega described that S.S. was crying but Sviatyi refused to let him out of the car. After 20 to 30 minutes, Ortega's mother arrived, and both Ortega and S.S. were allowed to leave with her for Ortega's scheduled supervised visitation at her mother's house.

A few days later, Ortega sought a temporary protective order against Sviatyi, alleging that she and S.S. had been falsely imprisoned and placed in imminent fear of bodily harm. After hearing testimony only from Ortega, the district court issued a temporary protective order on September 22, 2017. Contrary to the existing custody order from the circuit court, the terms of the temporary protective order granted Ortega primary custody of S.S. and the sole use and possession of the marital home.[1] Because Ortega and Sviatyi's divorce proceedings were still pending in the circuit court, the protective order was transferred to the circuit court to be consolidated.

On September 25, 2017, the circuit court held a hearing on the parties' pending divorce and granted Sviatyi a judgment of absolute divorce from Ortega. As part of that final judgment, Sviatyi was awarded sole legal and physical custody of S.S., and the use and possession of the marital home for an additional three years.

On September 29, 2017, the circuit court held another hearing, this time on Ortega's petition for a final protective order. Ortega was the only witness. After hearing Ortega's

[1] A temporary protective order may be issued after a hearing at which only the petitioner appears. MARYLAND CODE, FAMILY LAW ("FL") § 4-505(a)(1). The temporary order lasts for 7 days after service of the order on the alleged abuser. *Id*. The statute sets out what relief may be granted in the temporary order, including use and possession of the family home and custody of a child. FL § 4-505(a)(2)(iv), (vii).

testimony, the judge found that although Ortega had been allowed back in the marital home, her other actions had been in clear violation of the custody and visitation order, which required Ortega's time with S.S. to be supervised. The judge concluded that there was nothing unlawful about Sviatyi's behavior in refusing to release S.S. to Ortega until Ortega's mother was present, as required by the custody and visitation order. The court denied Ortega's petition for a final protective order. It is from that denial that Ortega now appeals.[2]

DISCUSSION

Ortega has designated 11 issues for our review, which we have consolidated and reordered for clarity.

I. ADMISSION OF TESTIMONY AND EVIDENCE

Ortega first argues that the hearing judge erred in ruling on the final protective order without hearing additional testimony. Specifically, Ortega asserts that the judge should have received testimony from Ortega's mother, who was designated as a witness and was waiting outside the courtroom, and that the judge should have required Sviatyi to testify and explain his actions. Ortega also challenges that the judge erred by admitting the custody order into evidence.

Maryland Rule 2-517(a) requires that an "objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." MD. RULE 2-517(a); *see*

[2] During the pendency of this appeal, Ortega has filed two motions to supplement the record. We will address those motions below. *See* infra, n.4.

also Scott v. Prince George's County Dept. of Social Services, 76 Md. App. 357, 383-84 (1988) (failure to object to introduction of written opinion from previous termination of parental rights trial waived any objections to the evidence on appeal).

Following Ortega's testimony, the hearing judge asked Ortega's attorney whether there was any other evidence to present. Counsel responded, "No, Your Honor. Just argument, thank you." Because Ortega's attorney rested her case without attempting to call any additional witnesses, Ortega has waived any objection she may have had to the judge moving forward with a ruling.

Likewise, when Sviatyi's attorney offered the custody order into evidence and the judge asked for any objections, Ortega's attorney responded: "I don't, Your Honor, thank you, the document speaks for itself." Because the custody order was admitted without objection, Ortega has waived any objection on appeal.

II. SUFFICIENCY OF THE EVIDENCE

Ortega next challenges the sufficiency of the evidence supporting the hearing judge's decision to deny the petition for a final protective order. Specifically, Ortega contends that the judge did not give Ortega's testimony enough credit and argues that if the judge had considered the evidence properly, it would have found that S.S. and Ortega were the victims of domestic violence and Sviatyi was the aggressor.

To be granted a final protective order, the party seeking the order must show "by a preponderance of the evidence that the alleged abuse has occurred." MARYLAND CODE, FAMILY LAW ("FL") § 4-506(c)(1)(ii); *Barton v. Hirshberg*, 137 Md. App. 1, 21 (2001). In reviewing the denial of a final protective order, we defer to the hearing court's

assessment of the credibility of the witnesses and accept the facts as they are found by the court unless those findings are clearly erroneous. *Barton*, 137 Md. App. at 21. We apply the law to those facts without deference, however, and make our own independent appraisal of the court's ultimate conclusion. *Piper v. Layman*, 125 Md. App. 745, 754-55 (1999).

In making her ruling, the hearing judge stated that she gave full credit to all of Ortega's testimony and accepted that everything happened just the way Ortega described. Based on Ortega's testimony, the judge found that while Sviatyi had blocked in Ortega's car, at no point did he injure or threaten to injure Ortega or S.S., and although S.S. had been upset and crying while he was waiting in Sviatyi's vehicle, that was insufficient to support a finding that S.S. was in imminent fear of bodily harm, as the statute requires. The hearing judge further found that Ortega's primary concern that day had been her right to go back to the marital home and her interest in S.S. had been secondary. We see nothing clearly erroneous in the judge's finding that Ortega failed to prove her allegations. Moreover, we agree with the court's determination that there was nothing unlawful about Sviatyi taking steps to enforce the custody and visitation order. We therefore affirm the court's denial of a final protective order.

III. USE AND POSSESSION OF THE FAMILY HOME

Ortega next argues that, prior to the hearing on the final protective order, the circuit court erred in granting Sviatyi use and possession of the family home for an additional three years as part of the final judgment in their divorce. Ortega argues that the judgment should be considered invalid because it violated the terms of the temporary protective order that was in place at the time.

Ortega's assertion that the terms of the temporary protective order should somehow have controlled the final judgment of divorce is mistaken. Ortega's petition for a protective order did not supersede the divorce proceedings or conclusively resolve any of the issues pending between she and Sviatyi. *See Coburn v. Coburn*, 342 Md. 244, 253 n.8 (1996) ("Filing a petition for protection from abuse does not initiate divorce proceedings, award permanent custody of children, issue a restraining order, or file criminal charges") (quoting Christopher L. Beard and Jacqueline J. Judd, *Victims No More: Changes in Domestic Violence Law*, 25 THE MARYLAND BAR JOURNAL 29, 30 (July/August 1992)). Jurisdiction over the protective order was transferred to the circuit court so that it could be consolidated with the pending divorce action. Thus, rather than binding the circuit court, the terms of the protective order were subject to modification by the court, either after notice and a hearing under § 4-507 of the Family Law Article or as part of collateral litigation between the parties. *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 137 (2001); FL § 4-507(a)(1). We therefore conclude that the circuit court did not err in granting Sviatyi use and possession of the marital home as part of the final judgment of divorce.

IV. MODIFICATION OF VISITATION

Ortega next challenges that the order requiring her visitation with S.S. to be supervised by her mother is invalid because the judge's original ruling was that her visitation would automatically revert to unsupervised. Ortega argues that because she met the conditions set out by the court at the first hearing, the circuit court violated its own ruling by holding a second hearing and, thus, did not have the authority to order that her visitation continue to be supervised.

Ortega has raised this argument before, and this Court held in an unreported opinion that the circuit court did not abuse its discretion in holding a review hearing on the visitation order. *Sviatyi v. Sviatyi*, September Term 2017, No. 781, Slip Op. at 14 (filed July 30, 2018). We will not reconsider an issue that has already been ruled upon.[3] *Scott v. State*, 379 Md. 170, 184 (2004) ("'[d]ecisions rendered by a prior appellate panel will generally govern the second appeal' at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice." (quoting *Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (1994))).

V. *EX-PARTE* COMMUNICATION

Finally, Ortega argues that there was prohibited *ex parte* communication between Sviatyi's attorney and the circuit court judge in the time period after the final judgment of

[3] We note that Ortega's argument, both now and in her previous appeal, seeks to apply the law of the case doctrine to the circuit court to prohibit it from altering its previous ruling. This argument is misplaced for two reasons. *First*, the law of the case doctrine is a rule of appellate procedure that provides that once a question has been resolved *on appeal*, litigants and lower courts are bound by the ruling. *Scott*, 379 Md. at 184. The doctrine generally does not apply to judges of the same level—that is, a trial judge is not bound by a prior ruling in the same case made by another judge of the same court. *Scott*, 379 Md. at 184. *Second*, because circuit courts retain "continuing jurisdiction over the custody of minor children, no award of custody or visitation, even when incorporated into a judgment, is entirely beyond modification, and such an award therefore never achieves quite the degree of finality that accompanies other kinds of judgments." *Frase v. Barnhart*, 379 Md. 100, 112 (2003). In exercising that jurisdiction, a court may "from time to time, set aside or modify its decree or order concerning the child." FL § 1-201(c)(4). The circuit court was therefore not bound by its own custody order.

divorce but before the hearing on the final protective order. In support of her argument, Ortega relies on an invoice from Sviatyi's attorney which reads:

> Phone call to Judge's Chamber regarding the actions of the opposing Party re the Child on the previous evening. Phone call to Client. Left vmail message.
>
> Travel to Detention Center to conduct Hearing with Commissioner. Client was released. Phone calls with Judge's chamber to get copy of Order. Travel to Office to get copy of Order. Provide same to Client. Transported Client to marital residence.
>
> * * *
>
> Email to Judge's chamber requesting an amendment to the Final Order. Returned Client's call. Left vmail message.

The entries were all for September 27, 2017.[4]

Ortega is right that judges are not permitted, generally, to talk with one party when the other isn't there. Under the Maryland Code of Judicial Conduct, "A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge out of the presence of the parties or their attorneys, concerning a pending or impending matter." MD. RULE 18-102.9(a). *Ex parte* communication is permissible, however, for scheduling, administrative, or emergency purposes, not addressing

[4] It is not plain from our review of the record and the proposed supplements, *see supra* n.2, by what procedural mechanism Ortega came to possess opposing counsel's billing records. We suspect, although we do not know, that they were provided post-hearing as part of a request for counsel fees under FL § 12-103. Because of the presumed order of events, we think Ortega did not have the opportunity to object before the circuit court and make those billing records part of the record on appeal. We therefore grant the motion to supplement the record as it applies to the billing records (Exhibit E) and have reviewed those records in considering this argument. The other documents proposed to be added to the record are either duplicative or irrelevant, and as to these, the motions to supplement are denied.

substantive matters, "provided: (A) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and (B) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond." MD. RULE 18-102.9

Although the document submitted by Ortega does show that Sviatyi's attorney contacted the judge's chambers, there is no indication that counsel communicated directly with the judge as opposed to administrative personnel or a law clerk, or what was discussed, whether it was substantive or merely administrative. All open matters then pending between the parties appear to have been resolved on the record in open court. Moreover, a judge "is presumed to know the law, and is presumed to have performed his duties properly." *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003) (cleaned up). In the absence of any evidence to overcome that presumption, we must conclude that there was no prohibited *ex parte* communication.

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