UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0321

September Term, 2016

NIRMALA HARRY

v.

CHRISTOPHER O'HARA

Woodward,
Arthur,
Leahy,

JJ.

Opinion by Arthur, J.

Filed: December 16, 2016

The Circuit Court for Baltimore County ordered the father to pay a lesser amount of child support than was recommended by the Child Support Guidelines and did not require him to contribute to the children's private school education. The mother appealed. We vacate the judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Nirmala Harry ("Mother") and Christopher O'Hara ("Father") are the unmarried parents of two children, N. and D. N. was born in 2010, D. in 2011. For four years, Mother and Father have engaged in a dispute over custody, visitation, and child support.

On November 7, 2012, Father filed a complaint for custody, child support, and other relief, which resulted in a seven-day hearing in the Circuit Court for Baltimore County. On September 17, 2013, the court entered an order awarding joint legal custody to both parties and primary physical custody to Mother. The court used a child support worksheet to determine the amount under the Child Support Guidelines. Although the worksheet recommended that Father should pay $877 per month, the court ordered that he pay only $500 per month, noting that Mother lived with her parents and did not have to contribute to household expenses.

On July 25, 2014, Mother filed a petition to modify custody and visitation, seeking sole legal and physical custody, as well as a modification of visitation and child support. In her petition, Mother contended that modification was necessary because she had obtained full-time employment, which required her to place both children in daycare.

Mother's petition led to an array of additional disputes. Most notably for purposes of this appeal, Father alleged that his child support payments should be further reduced because Mother was still living with her parents despite obtaining a substantial increase in salary at her new job. In addition, Father alleged that, even though he had joint legal custody, Mother unilaterally enrolled the children in a parochial school without consulting him and without obtaining his consent.

The court held four hearings between August 25, 2015, and March 14, 2016. At the final hearing, the court ordered: (1) continued joint legal custody; (2) shared physical custody; (3) "tie-breaking" authority for Father, because of Mother's questionable behavior in raising a number of wholly unsubstantiated allegations of misconduct; and (4) continued child support in the amount of $500 per month.

In maintaining child support at the previous level, the court noted that Mother's income had increased significantly, but that she still lived with her parents and did not contribute to household expenses. The court also noted that Father contributed $217 per month for the children's medical care and $130 per month for their dental care. The court declined to order Father to contribute to the children's parochial school tuition.

Mother objected to the unchanged amount of child support. In response, the court requested supplemental letters from counsel.[1]

[1] The record on appeal does not appear to contain these letters.

On March 22, 2016, after considering those letters, the court issued an amended order. The amended order increased Father's child support payments to $600 per month, which is still below the level of the guidelines. The court did not expressly state how it serves the children's best interests to depart from the guidelines.

Mother filed this timely appeal.

QUESTIONS PRESENTED

Mother presents two questions:

> I. Did the trial court err and/or abuse its discretion in awarding child support to [Mother] in an amount less than indicated by the Child Support Guidelines?
>
> II. When the trial court failed to require [Father] to contribute to the children's private school tuition, did it err, was it clearly erroneous, or did it abuse its discretion?

For the reasons discussed below, we must vacate the judgment and remand for further proceedings.

DISCUSSION

I. Child Support

Mother contends that the trial court erred in departing from the guidelines because it did not make the requisite findings pursuant to Md. Code (1984, 2012 Repl. Vol.), § 12-202(a)(2)(v) of the Family Law Article ("FL"). In particular, Mother points out "the omission of any best interest analysis by the trial court." We agree that the trial court should have expressly determined whether the departure was in the children's best interest.

Child support orders are generally within the sound discretion of the trial court. *See Walter v. Gunter*, 367 Md. 386, 391 (2002). 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." *Id*. at 392 (citation omitted); *see also Jackson v. Proctor*, 145 Md. App. 76, 90 (2002) (noting that "[w]e will not disturb the trial court's determination as to child support, absent legal error or abuse of discretion").

In general, "in any proceeding to establish or modify child support, whether pendente lite or permanent, the court shall use the child support guidelines set forth in" Subtitle 2 of Title 12 of the Family Law Article. FL § 12-202(a)(1). "There is a rebuttable presumption that the amount of child support which would result from the application of the child support guidelines set forth in this subtitle is the correct amount of child support to be awarded." *Id.* § 12-202(a)(2)(i). "The presumption," however, "may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." *Id.* § 12-202(a)(2)(ii); *In re Joshua W.*, 94 Md. App. 486, 501 (1993).

"If the court determines that the application of the guidelines would be unjust or inappropriate in a particular case, the court shall make a written finding or specific finding on the record stating the reasons for departing from the guidelines." FL § 12-202(a)(2)(v). The findings "shall state":

> A. the amount of child support that would have been required under the guidelines;

B. how the order varies from the guidelines;

C. how the finding serves the best interests of the child; and

D. in cases in which items of value are conveyed instead of a portion of the support presumed under the guidelines, the estimated value of the items conveyed.

Id. § 12-202(a)(2)(v)(2)(A)-(D).

"If the trial court fails to make these specific findings its order must be vacated." *In re Joshua W.*, 94 Md. App. at 501 (citing *Tannehill v. Tannehill*, 88 Md. App. 4, 15 (1991)).

In this case, the trial court found "good cause" to depart from the guidelines because Mother "lives with her parents"; she "[d]oes not pay or contribute to the household expenses"; and "since the last time" the parties were before the court, her "income has increased substantially." The court made some, but not all, of the specific findings that are required under § 12-202(a)(2)(v)(2)(A)-(D). In particular, the court's order stated the amount of support that the guidelines would have required ($794 per month), and it sufficiently stated how its order varied from the guidelines (by ordering only $600 per month). The court did not, however, "make the crucial third finding, *i.e.*, how departure from the guidelines serves the best interests of the children." *In re Joshua W.*, 94 Md. App. at 502.[2]

[2] It is understandable why the court omitted this finding. The four days of hearings involved many other issues, such as Mother's spurious accusations of misconduct.

The trial court might have implicitly found that the downward departure was in the children's best interest for any number of reasons. On the record in this case, for example, the court might have found that the departure was in the children's best interest because it allowed Father, an assiduous saver, to accumulate assets to enhance his (and thus the children's) financial security. Without an express explanation, however, we cannot ascertain whether the court actually made the required findings, what the findings (if any) were, and whether the findings entail a factual or legal error or an abuse of discretion. Accordingly, we must vacate the judgment below and remand for further findings about whether and why it is in the children's best interests to order a downward departure from the guidelines.[3]

II. Private School Education

Under FL § 12-204(i)(1), a court may require a parent to pay his or her proportional share of the "expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child[.]" Citing § 12-204(i)(1), Mother contends that the trial court erred in not ordering Father to contribute to

[3] In addition to complaining that the court failed to make the required finding about whether a downward departure is in the children's best interest, Mother complains that the court made no express findings about why "the application of the guidelines would be unjust or inappropriate." FL § 12-202(a)(2)(v)(1). We reject that complaint. The court expressly found "good cause" to depart from the guidelines, which we interpret as the required "determin[ation]" that "the application of the guidelines would be unjust or inappropriate." *Id.* Aside from the findings that are explicitly required by FL § 12-202(a)(2)(v)(2), the statute does not require a court to explicate the specific factual basis for its "determin[ation]" that "the application of the guidelines would be unjust or inappropriate." *Id.* § 12-202(a)(2)(v)(1).

the children's parochial school education. In particular, Mother contends that the court misinterpreted the concept of "particular educational needs." Although we are not entirely convinced that the court really misunderstood the relevant concept, we will remand for further findings in light of the court's brief and potentially ambiguous explanation for the decision and the need to remand in any event on the issue of departing from the guidelines.

The phrase "particular educational need" is not limited to "learning, emotional, or physical disabilities[.]" *See Witt v. Ristaino*, 118 Md. App. 155, 163 (1997). To the contrary, a child, in some circumstances, may have a "particular educational need" to attend a private or parochial school. *See id*. at 169-71.

In determining whether a child has a "particular educational need" to attend a private school, a trial court should consider the following factors: (1) the child's educational history, such as the number of years the child has attended the school and the child's need for stability and continuity; (2) the child's performance while in the private school; (3) the family history, including any tradition of attending a particular school or whether other family members currently attend the school; (4) whether the parents made the choice to send the child to the school before their divorce or separation; (5) any particular factor that may affect the child's best interests; and (6) the parents' ability to pay for the school, with particular consideration of "whether a parent's financial obligation would impair significant his or her ability to support himself or herself as well

as support the child when the child is in his or her care." *Witt v. Ristaino*, 118 Md. App. at 169-71.

In this case, the court stated that "[t]here is no testimony regarding meeting the particular educational needs of the child." Because the court did hear testimony about some of the so-called "*Witt* factors," such as Father's ability to pay, the parents' respective religious traditions, and the children's performance in the school after Mother unilaterally enrolled them, Mother argues that the court must have erroneously equated the phrase "particular educational needs" with special education. The court, however, may have fully understood the relevant term, but in its extemporaneous comments may have imprecisely expressed the conclusion that it had heard no persuasive testimony about the children's "particular educational needs." Because of this ambiguity, we remand the case to the circuit court on this issue, without affirming, reversing, or modifying that part of the judgment (Md. Rule 8-604(d)), so that the court can clarify its conclusions about the children's "particular educational needs." *Witt v. Ristaino*, 118 Md. App. at 169.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED INSOFAR AS IT PERTAINS TO CHILD SUPPORT; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.