UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 803

September Term, 2016

WALTER PRICE

v.

TRACY HARVEY

Arthur,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Arthur, J.

Filed: February 9, 2017

A magistrate recommended that a father's child support obligations be modified. The father took exceptions. The Circuit Court for Prince George's County overruled the exceptions. The father appealed. We affirm.

PROCEDURAL BACKGROUND

A. Events Before the Motion to Modify

Walter Price ("Father") and Tracy Harvey ("Mother") are the unmarried parents of a daughter born in 2005. By a consent order dated February 26, 2010, the Circuit Court for Prince George's County granted Father and Mother joint legal and shared physical custody of the child. The parties were each "charged generally with the support of the minor child."

On August 8, 2013, Mother, through the Prince George's County Office of Child Support Enforcement, filed a motion to establish child support. After a hearing in December 2013, a magistrate recommended that Father pay $647.00 per month in child support. Father filed exceptions, and on September 26, 2014, the circuit court rejected the magistrate's recommendations. Because of the consent order that had charged both parties "with the support of the minor child," the court reasoned that the matter should have proceeded as a request to modify rather than to establish child support.

B. The Motion to Modify

On December 11, 2014 the Office of Child Support Enforcement filed a motion to modify child support. On September 9, 2015, a magistrate conducted an evidentiary hearing. Both parties were represented by counsel.

1. Father's Income

At the hearing, the parties stipulated that Father's monthly income was $3,408.00 and that he paid $192.00 per month for the child's health insurance. The parties chiefly disputed the Mother's income and ability to work, as well as the number of overnight visits that each parent had with the child.

2. Mother's Income

From 2001 until May 2013, Mother worked as a support clerk for the United States Postal Service. She earned $14.39 per hour. She testified that she was "actually physically doing the mail and moving boxes."

Mother suffered from pulmonary sarcoidosis[1] and rheumatoid arthritis, which caused her to miss "four to five days a month, sometimes a week" of work. She said that her conditions put her in severe pain, she "kept getting upper respiratory infections," her mobility was limited, she experienced shortness of breath, and she coughed a lot. She described a litany of medications that she took to attempt to combat these symptoms.

Mother testified that in May 2013 she went on leave under the Family and Medical Leave Act ("FMLA"). She said that she had not worked since that time because she was "still ill." She had been receiving $503.00 per month in Temporary Cash Assistance since January 2015.

[1] Sarcoidosis is "a disease of unknown cause characterized by the presence of small tumor-like masses of tissue containing inflammatory cells." *Mardirossian v. Paul Revere Life Ins. Co.*, 376 Md. 640, 642 (2003). The lungs are one of the more common sites of sarcoidosis, but it can strike many parts of the body. *See* MOSBY'S MEDICAL DICTIONARY 1590 (10th ed. 2016).

According to Mother, she had had no additional income, she had a pending claim for Social Security disability benefits, and she had documentation from her doctor that said that she was unable to work. She had, however, continued to renew her cosmetology license, because if she did not renew it, she would "have to start all over again" (i.e., become relicensed).

In response to a question from Father's attorney, Mother stated that she had not earned income as a hairstylist since 2005. Mother testified that she "do[es her] family's hair, but not for cash." Father responded that he had observed her performing paid cosmetology services for clients in her home in 2012 or 2013. During closing argument, Father's attorney argued that it was "significant that we don't have anyone here saying [Mother] can't work."

3. Overnight Visits

The parties stipulated that, for purposes of computing the number of overnight visits that each had with the child, they would look only to calendar year 2015.

Mother contended that the parties had an equal amount of overnight visits with the child. Father responded that he had approximately 60 percent of the overnight visits with the child. Each relied on calendars that they had maintained.[2]

[2] Before Mother testified, she transcribed information about her calendar from her phone onto a piece of paper. Father complains that this was improper. We do not see why. Had they asked, he and his attorney could have inspected the calendar on Mother's phone.

Mother testified that the child stayed overnight with Father on Fridays, Saturdays, and Sundays; that the child stayed overnight with her on Tuesdays, Wednesdays, and Thursdays; and that the schedule on Mondays fluctuated. Mother admitted, however, that because of the beginning of the school year, the child had recently spent more Monday nights with Father. Father testified that the schedule sometimes fluctuated, but that he generally had the child overnight on Fridays, Saturdays, Sundays, and Mondays.

C. The Magistrate's Findings and Recommendations

The magistrate found that Mother had stopped working in May 2013 and that her loss of income was a material change in circumstances. He attributed no income to Mother in his child support calculations. The magistrate recommended that Father pay child support of $476.00 per month, retroactive to January 1, 2015. This recommendation resulted in an arrearage of $4,284.00, to be paid at the rate of $34.00 per month.

On the issue of overnight visits, the magistrate believed that both parents were truthful, but there were unaccountable discrepancies in their calendars and computations. Based on the testimony, the magistrate found that the parties shared custody on approximately an equal basis. Consistent with this finding, the magistrate credited Father with 183 overnights and Mother with 182 overnights. On September 22, 2015, the magistrate issued written recommendations that reflected his oral findings.

D. Father's Exceptions

Father, representing himself, filed exceptions. He contended that Mother did not show good cause to warrant a modification in child support and that the magistrate did not properly calculate the number of overnight visits. He also contended that the magistrate erred in determining that Mother had no income.

On June 3, 2016, the circuit court conducted an exceptions hearing, at which both parents were represented by counsel. At the hearing, Father contended that Mother did not produce any documents that showed an inability to work. He asserted that the court should have imputed minimum wage income of $1,430.00 per month[3] to Mother. Father argued that, if the court chose not to impute minimum wage income to Mother, it should impute a monthly income of $1,130.00 to her because "the law allows someone on disability to earn" that much. Father made no argument regarding the number of overnight visits.

The circuit court overruled the exceptions. In explaining its decision, the court remarked that the magistrate did a credible and reasonably exhaustive analysis and that he correctly decided not to impute income to Mother.

Father took this timely appeal on June 17, 2016. He and Mother are both self-represented on appeal.

[3] At the time of the hearing, a person who worked 40 hours per week at the minimum wage rate of $8.25 would earn about $1,430.00 per month.

QUESTIONS PRESENTED

Father's brief presents three questions. Two questions relate to Mother's income, and the other question concerns the general correctness of the child support obligation assigned to Father. We have condensed, reordered, and reformulated these questions as follows:

1. Did the circuit court err or was it clearly erroneous in declining to impute income to Mother?

2. Did the circuit court err or abuse its discretion in its calculation of child support?[4]

For the reasons explained below, we answer both questions in the negative and affirm the judgment.

DISCUSSION

I. Standards of Review

"When reviewing a [magistrate]'s report, both a trial court and an appellate court defer to the [magistrate]'s first-level findings (regarding credibility and the like) unless they are clearly erroneous." *McAllister v. McAllister*, 218 Md. App. 386, 407 (2014) (citing *In re Priscilla B.*, 214 Md. App. 600, 623-24 (2013)). "[W]hile the circuit court

[4] As phrased by Father, the questions presented were:

1. Did the trial court err when it established Appellant's child support obligation?

2. Did the trial court err in not finding that Appellee had voluntarily impoverished herself and that she was capable of earning income?

3. Did the trial court err in establishing Appellee's ability to earn income?

may be guided by the [magistrate]'s recommendation, the court must make its own independent decision as to the ultimate disposition, which the appellate court reviews for abuse of discretion." *Id.* (internal citations and quotation marks omitted).

This Court views the evidence in the light most favorable to the prevailing party, and if there is any competent, material evidence to support the trial court's findings, we cannot hold that those findings are clearly erroneous. *Hosain v. Malik*, 108 Md. App. 284, 303-04 (1996). To constitute an abuse of discretion, "'[t]he decision . . . has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *McAllister v. McAllister*, 218 Md. App. at 400 (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

II. Mother's Income

Father contends that the circuit court erred in imputing no income to Mother. We disagree.

When a court calculates a parent's payment obligations under the child support guidelines, the determinative factor is the "actual adjusted income" of each party. *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994). "Income" means "the actual income of a parent, if the parent is employed to full capacity," Md. Code (1984, 2012 Repl. Vol.), § 12-201(h)(1) of the Family Law Article ("FL"), or the "potential income of a parent, if the parent is voluntarily impoverished." FL § 12-201(h)(2). Voluntary impoverishment occurs when "the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate

resources." *Durkee v. Durkee*, 144 Md. App. 161, 182 (2002) (quoting *Digges v. Digges*, 126 Md. App. 261, 381 (1999)). If a parent "is unable to work because of a physical or mental disability[,]" he or she is not voluntarily impoverished, and "[a] determination of potential income may not be made[.]" *See* FL § 12-204(b)(2)(i).

Father argues that the circuit court based its ruling on factual findings that were clearly erroneous. He asserts that a magistrate assigned income to Mother in a hearing in December 2013[5] and that her circumstances had not changed because "[s]he is still unemployed and waiting on an appeal for disability." In addition, Father appears to contend that Mother has voluntarily impoverished herself because she renewed her cosmetology license, performs cosmetology services for free, and received an FMLA letter stating that she was able to go back to work. According to Father, this evidence shows that Mother's unemployment is of her own choosing and is not due to an inability to work. His contentions do not establish clear error.

Despite Father's genuine belief that Mother is able to work and should have some income imputed to her in the child support calculations, we cannot reverse a court's ruling that is based on findings that are supported by some evidence on the record. *See Hosain v. Malik*, 108 Md. App. at 304.

[5] The December 2013 hearing occurred in the proceeding in which the Office of Child Support Enforcement was attempting to "establish" child support notwithstanding the 2010 consent order that charged both parents "with the support of the minor child." In September 2014, the circuit court rejected the magistrate's recommendations in the earlier proceeding, because the Office should have pursued a motion to modify rather than to establish child support. This proceeding ensued. *See supra* p. 1.

The magistrate conducted a lengthy hearing that gave Mother and Father an ample opportunity to provide their testimony and competing versions of the scenario at hand. The magistrate engaged in a meticulous review of the evidence, while reaching credibility determinations and drawing inferences that were supported by the testimony. The testimony established that Mother has not worked since her medical conditions caused her to leave her employment at the Postal Service in May 2013. She suffers from severe pain in her knees, feet, arms, and hands. Her pain limits her mobility, and her frequent upper-respiratory infections result in shortness of breath when she attempts to carry out simple tasks, such as walking. We need not chronicle every physical ailment elicited in Mother's testimony and need go no further than to state that the magistrate heard sufficient testimony to find that Mother was unable to work. *See Allison v. Allison*, 160 Md. App. 331, 345 (2004) (stating that party's uncontradicted testimony about her physical problems, if believed, was sufficient to show that she was unable to work).

The magistrate and the circuit court were not required to impute income to Mother simply because she renewed her cosmetology license. Mother had not worked in a salon since 2005, and although she may have done her family members' hair in 2012 or 2013, that was before her medical conditions rendered her unable to work. In any event, the ability to perform occasional services for family members does not mean that Mother has the physical stamina and strength to perform such services with sufficient regularity to be able to earn a living doing so. It was not clear error to credit Mother's testimony that she

renewed her license only because if she did not, she would have to become relicensed, which the circuit court recognized would be a tremendous burden on her.

Nor was it clear error to conclude that Mother's loss of income represented a material change in circumstance that warranted a modification of child support. "'[A] material change in circumstances may be based . . . on a change in . . . the parents' ability to provide support.'" *Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014) (quoting *Smith v. Freeman*, 149 Md. App. 1, 20-21 (2002)), *cert. denied*, 441 Md. 668 (2015). At the December 2013 hearing, the magistrate imputed income to Mother because she was still employed by the Postal Service while on unpaid leave. At the hearing in this case, by contrast, the magistrate heard testimony that Mother's medical condition had worsened, that she had not worked in over two years, and that she had no earned income in 2014 or 2015. This evidence sufficiently supported the conclusion that Mother was unable to work, which was a material change in her circumstances that warranted a modification of child support.

The circuit court, in turn, did not err in its independent assessment of the magistrate's findings. The court considered and discussed the exceptions. After a full review of the record and testimony presented, the court specifically stated that it could not see where the magistrate erred, that he did a credible and exhaustive analysis, and that he correctly decided not to impute income to Mother. We see no reason to disagree.

III. Overnight Visits and Child-Support Calculation

Father challenges the finding regarding the number of overnight visits that each parent had with the child, calling it clearly erroneous. On the basis of the allegedly erroneous finding, he contends that the court incorrectly calculated the child support obligation. Again, we disagree.

Preliminarily, although Father raised the issue of overnight visits in his exceptions, he did not present the issue to the court during the exceptions hearing. In that hearing, the only mention of the number of overnights came from Mother's counsel. Even after the court asked if there was "anything further?," Father failed to address the issue of overnights. In view of the absence of any apparent dispute on the subject of overnight visits, the court seems to have believed that the parents had, in the court's words, an "agreement about the time split."

In these circumstances, Father arguably acquiesced in the court's ruling regarding overnight visits. *See Lieneweber*, 220 Md. App. at 65-66; *Horsley v. Radisi*, 132 Md. App. 1, 20 (2000). But even if Father had preserved the objection, we would reject it.

After carefully considering the conflicting testimony presented by Mother and Father, the court concluded that the parties shared custody on an approximately equal basis. To properly reflect this finding, the court assigned 183 overnights to Father and 182 overnights to Mother.

Mother testified that the child was with each party approximately an equal amount of time, while Father said he had the child slightly more than Mother. The magistrate

referred to the existing custody order, which afforded the parties shared custody of the child. The record contained competent evidence to support the court's finding that the parties shared custody on an approximately equal basis, and we cannot say that this finding was clearly erroneous.[6]

Father maintains that even if the court was not clearly erroneous in its calculation of overnight visits, the court erred in its calculation of child support. Father argues that Mother should have been required to pay child support to him because he had the child more than she did. That contention has no merit.

"[I]n 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). Although overnight visits are a factor in determining child support awards, they are not the only factor. Pursuant to FL § 12-204(m):

> (1) In cases of shared physical custody, the adjusted basic child support obligation shall first be divided between the parents in proportion to their respective adjusted actual incomes.
>
> (2) Each parent's share of the adjusted basic child support obligation shall then be multiplied by the percentage of time the child or children spend with the other parent.

Our review of the guidelines worksheet confirms that the magistrate and the court adhered to the guidelines and properly performed the child support calculations. The

[6] Father complains that the magistrate limited his analysis to 2015. The magistrate, however, limited his analysis in that way because Father and Mother stipulated that he should do so.

worksheet begins with Father's adjusted actual income, which the parties stipulated was $3,408.00. Because Mother had no income, and Father's adjusted actual income fell between $3,400.00 and the next-highest level ($3,450.00), the magistrate looked to the next-highest level in setting the basic child-support obligation (FL § 12-204(c)), which yielded a basic obligation of $636.00. Next, because the parents shared physical custody, the magistrate multiplied the basic obligation by one and one-half (FL § 12-204(f)), which yielded an adjusted basic child-support obligation of $954. Finally, because Mother had custody of the child for 49.9 percent of the time, the magistrate multiplied the adjusted basic obligation by .499, which yielded a net basic child-support obligation of $476.00. The magistrate's computations were impeccable, and the court was correct in every respect in accepting them.

Finally, Father asserts that he should have been awarded educational or transportation expenses because he drives the child to and from school each day. 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[.]" Costs may also be awarded to reflect "any expenses for transportation of the child between the homes of the parents." FL § 12-204(i)(2). In this case, however, there is no evidence that the child "attend[s] a special or private elementary or secondary school to meet [her] particular educational needs[.]" Likewise, there is no testimony or evidence as to any transportation expenses incurred by either parent on behalf of the child. Even if there had been evidence that Father incurred

educational or transportation expenses on behalf of the child, those expenses would have been "divided between the parents in proportion to their adjusted actual incomes" (FL § 12-204(i)), and Mother's adjusted actual income is $0.00. Therefore, even if Father incurred expenses of this nature, it would not have affected the child support award.

In summary, there is no merit to Father's unsupported contention that the court erred or abused its discretion in its calculation of his child-support obligation.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.