Circuit Court for Montgomery County
Case No. 80707FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2430

September Term, 2016

STUART J. WERTLIEB

v.

JENNIFER MAHONEY WERTLIEB

Wright,
Graeff,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 9, 2018

On November 17, 2015, Stuart Wertlieb, appellant, filed a Petition to Modify Child Support in the Circuit Court for Montgomery County, requesting a reduction in the amount of child support to be paid to his ex-wife, Jennifer Mahoney Wertlieb, appellee.[1] In May 2016, the circuit court granted the modification and reduced Mr. Wertlieb's monthly child support payment from $3,800 to $1,823. Ms. Mahoney filed a motion for in banc review of the child support order. After a hearing before a panel of three circuit court judges, the court issued an order reversing the May 2016 order declining to include work-related child care expenses in the child support calculations and remanding "for entry of an order for child support including One Thousand Three Hundred Eighty Two Dollars ($1,382) of work-related child care expenses pursuant to Md. Code Ann., Family Law § 12-204(g)." This order was entered on December 7, 2016. On December 22, 2016, on remand, the circuit court amended its May ruling and ordered that Mr. Wertlieb pay Ms. Mahoney $2,696 per month for child support. On January 26, 2017, Mr. Wertlieb noted this appeal.

On appeal, Mr. Wertlieb presents two questions for this Court's review, which we have rephrased, as follows:

1. Did the circuit court, on in banc review, err in finding that the expenses claimed by Ms. Mahoney were "work-related child care expenses" to be included in the computation of child support?

2. Did the circuit court, on in banc review, err by allowing Ms. Mahoney to challenge the circuit court's ruling when the issue was not preserved for review?

[1] Ms. Mahoney testified that, after the divorce, she resumed using her maiden name, although she has not officially changed her name. Because the parties and the court referred to her as Ms. Mahoney, we will do the same.

For the reasons set forth below, we will not address these contentions because we conclude that the appeal was not timely filed. Accordingly, we shall dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 1993, Mr. Wertlieb and Ms. Mahoney were married in Larchmont, New York. The parties had three children together: R.W., born in March 1998; M.W., born in June 2000; and K.W., born in December 2002.

On December 17, 2010, the Circuit Court for Montgomery County issued a Judgment of Absolute Divorce, granting Ms. Mahoney an absolute divorce. Ms. Mahoney was awarded sole legal and physical custody of the children. The circuit court ordered Mr. Wertlieb to pay Ms. Mahoney $3,800 per month for child support.

On November 17, 2015, Mr. Wertlieb filed a petition in the circuit court seeking to reduce the amount of child support due to his loss of employment. Ms. Mahoney filed an answer opposing Mr. Wertlieb's request for modification. Additionally, she filed a financial statement with the court, which showed a monthly expense of $1,382 for "work-related monthly child care expenses."[2]

At the May 25, 2016, hearing, the parties stipulated that Mr. Wertlieb previously had been unemployed, but on April 18, 2016, he obtained employment and earned a gross income of approximately $10,200 per month. With respect to the calculation of child

[2] Ms. Mahoney subsequently filed an amended financial statement explaining that the requested amount per month was the combination of $11,435 for "work-related child care costs" made to her daycare provider in 2015, as well as a future accounting of $5,150 for the cost of summer camp, a child care substitute.

support, counsel for Mr. Wertlieb advised that one of the children had reached 18 years of age, and he believed daycare was not necessary for the two other children, who were 15 and 13 at the time.

The parties each testified. Ms. Mahoney testified that she worked in New York at the College of New Rochelle as the college's Director of Annual Giving. She worked 8:30 a.m. to 5:30 p.m., but she also attended work events on evenings and weekends. She explained that she had a childcare provider who "picks the girls up at school and then takes them to various after school activities, sports practices and rehearsals, [and] helps with homework," and provides transportation for K.W's bi-weekly therapy sessions. Ms. Mahoney paid approximately $1,400 a month for these services during the school year. As a substitute for those services, during the summer, the youngest child, K.W., was scheduled to attend summer day camp for five weeks at a cost of $5,200.[3]

When asked why the parties' oldest daughter could not take care of the two younger children, Ms. Mahoney stated that "[R.W.] has an after school babysitting job three days a week[,]" as well as a volunteer position, and "it's not [her] responsibility to care for her younger siblings." She further stated that the two younger children could not be left alone to care for themselves because "[t]hey get nervous. [K.W.] has anxiety and if she has an anxiety attack it's very difficult for [M.W.] to manage," and "there needs to be supervision

[3] During the school year, K.W. took hip-hop dance one afternoon a week and played travel soccer, which held three practices a week. M.W. also played travel soccer. In the summer, R.W. and M.W. were employed as camp counselors.

in place to make sure that homework is getting done, that appointments [are] attended, and sports practices are able to be met." [4]

At the conclusion of the evidentiary portion of the hearing, counsel for Mr. Wertlieb argued that he should not have to pay for the childcare provider because the expenses incurred by Ms. Mahoney were more of a "transportation issue, [and] not really taking care of the children while she's at work," asserting that "the kids are old enough, 16 and 13 and a half, to dress themselves, take care of their needs." Counsel argued that the expenses were not consistent with work-related child care expenses under the child support guidelines, and therefore, Mr. Wertlieb should not have to pay for transportation and summer camp expenses.

The circuit court determined that the expenses requested did not qualify as work-related child care expenses. The court stated, as follows:

> There is absolutely nothing – and I can't point at any case law – I think it's an imaginative argument by [Ms. Mahoney's counsel]. But there's absolutely nothing that I can find that would support her argument that somebody to drive the children to their after school activities and to counseling is a work-related child care expense because mom can't be available to do that. Not with the children this age. That's not what work-related child care expense is all about and I just don't' think it's appropriate to add it in this case.
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> There are things like carpools that people can use. It certainly makes it more convenient, it makes it easier and it's very difficult to get these children to where they have to be and it's certainly in their best interests. But again it's just not – I don't believe that was ever contemplated as work-related child care expenses. And there's nothing in the previous calculation

[4] Ms. Mahoney testified that K.W. has a "clinical diagnosis of anxiety" and has received treatment since 2011.

of guidelines to indicate that it was and while it may be helpful certainly to [Ms. Mahoney] who has a difficult job trying to raise the three kids and move those three kids around, the Court is not going to include that amount of 1,400 or 1,382, whatever it was in the calculation of child support guidelines.

With regard to the summer camp expense, the court stated, as follows:

> In any event, the other question is what about summer camp? Well I think camp is probably reasonable for somebody like the 13-year-old who has anxiety and doesn't want to be or can't be left alone. There are many, many young girls at age 13 that actually babysit in the summer and serve as mama's helpers and other things with respect to that. But certainly you don't want a child sitting around idle doing nothing during the summer, there's no question about that. But to suggest that a camp that cost $5,200 for five weeks is appropriate for Mr. Wertlieb to kick in on – that works out actually to about $433 a month for 12 months of the year.
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> That's over $1,000 a week for summer camp. And that just doesn't seem reasonable to the Court and it doesn't seem reasonable because I look at what mom's income is and it's $5,950 a month. She wants to pay – now that's her gross income. Her gross income, she wants to pay one-sixth of her gross income or a little over one-sixth of her gross income before taxes for one week of summer camp for the youngest child. That just doesn't make financial sense to me. And in addition to that, I don't know how she can do it.

The circuit court then stated that the expense "has to be or can be determined by actual family experience," and in this case, "the actual family experience" was set forth in the May 2011 order, which the court summarized, as follows:

> [I]f you look at Exhibit A to the Court's order it says footnote one[,] for that work-related child care expenses code 1868, school year child care costs $130 a month for 10 months. Monday before care and 360 a week for 42 weeks, Tuesday to Friday morning care and Monday to Friday after care 16,420 divided by 12 is 1,368; does not include any incidental daycare costs due to sickness or snow days. Summer child care costs at 750 per week, 10 hours per day, $15 an hour for 10 weeks and then has that number down; does not include summer camp.

> So there's the family history right there in the guidelines. And for those reasons the Court does not believe under the facts and circumstances of this case it's appropriate to add in the expense of summer camp.

On June 8, 2016, the court entered its order granting Mr. Wertlieb's petition and reducing his monthly child support payments to $1,823.

On June 10, 2016, Ms. Mahoney petitioned for in banc review. On December 2, 2016, the panel heard arguments from the parties. It ruled as follows:

> [L]ooking at this case, we're under section 12-204[(g)](1), what is childcare expense? And, as [appellant's counsel] has pointed out in his argument, appellate courts have said this is not something that's optional, the statute says this is mandatory, shall. And, in this case, family experience has been that the children have gone to camp. The family experience has been that they've had activities. Judge Dugan, himself, found it was reasonable to go to camp and it was reasonable to do these activities. What he said, in fact on page 10, but that's not what work-related child care expense is all about. Well that is contradicted by the case law. While it may not have been, as I said in my questioning, the thriftiest of activities, that has been the family experience as determined by the mother in this case, who has legal authority to make those determinations. And therefore, we do find that the $1,382 for basically the driving by [the childcare provider] and the camp to be mandatory daycare expenses. And so, we will remand this case to Judge Dugan to enforce 12-204[(g)](1). That is our decision.

The panel's order was entered on December 7, 2016. On December 28, 2016, on remand, the circuit court amended its initial ruling and entered an order requiring Mr. Wertlieb to pay Ms. Mahoney $2,696 per month in child support, commencing on June 1, 2016. On January 26, 2017, Mr. Wertlieb noted an appeal.

DISCUSSION

Before addressing the merits of the issues raised on appeal, we must first determine whether this appeal is properly before this Court. Although the parties here did not raise

the issue of jurisdiction, "we must address the issue because appellate 'jurisdiction cannot be conferred by consent of the parties.'" *HIYAB, Inc. v. Ocean Petroleum, LLC*, 183 Md. App. 1, 8 (2008) (quoting *Pearlstein v. Maryland Deposit Ins. Fund*, 79 Md. App. 41, 48 (1989)). As explained by the Court of Appeals, "'[w]here appellate jurisdiction is lacking, the appellate court will dismiss the appeal on its own motion.'" *Schuele v. Case Handyman & Remodeling Servs.*, 412 Md. 555, 565 (2010) (quoting *Gruber v. Gruber*, 369 Md. 540, 546 (2002)).

Pursuant to Md. Rule 8-202(a), "the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." "The requirement 'that an order of appeal be filed within thirty days of a final judgment, is jurisdictional; if the requirement is not met, the appellate court acquires no jurisdiction and the appeal must be dismissed.'" *HIYAB*, 183 Md. App. at 8 (quoting *Houghton v. Cty. Comm'rs of Kent Cty.*, 305 Md. 407, 413 (1986)).

Here, Mr. Wertlieb argues that his January 26, 2017, appeal was timely because it was filed within 30 days of December 28, 2016, the date that the circuit court entered its order on remand. This argument, however, misconstrues the nature of in banc review. As explained below, the final, appealable order was the order issued by the in banc panel, not the post-remand order issued by the circuit court.

Article IV, § 22 of the Maryland Constitution provides litigants with the right to an "in banc review" of a circuit court's ruling. In *Phillips v. State*, 233 Md. App. 184, 204, *cert. granted*, 456 Md. 79 (2017), this Court discussed the nature of such review, noting

that the three-judge panel conducting an in banc review is a "substitute or alternative for an appeal" to this Court. *Accord Bienkowski v. Brooks*, 386 Md. 516, 553 (2005) (an in banc panel "functions 'as a separate appellate tribunal, not merely as an arm of the trial court.'") (quoting *Bd. of License Comm'rs for Montgomery Cty. v. Haberlin*, 320 Md. 399, 406 (1990)); *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 37 (2017) ("the role of the in banc court is not to reconsider the decision of the trial court," but "[i]nstead, is to engage in appellate review of the trial court's decision.").[5] Decisions of a court in banc "are reviewable as final appellate judgments." *Phillips*, 233 Md. App. at 199 (quoting *Estep v. Estep*, 285 Md. 416, 421 (1979)).

The party who sought in banc panel review "has no further right of appeal." Md. Rule 2-551(h); Md. Code (2013 Repl. Vol.) § 12-302(d) of the Courts and Judicial Proceedings ("CJP") Article. The party who did not seek in banc review, Mr. Wertlieb in this case, has the right to appeal the judgment of the in banc court. *Hartford,* 232 Md. App. at 37; *accord* Md. Rule 2-551(h) ("The decision of the panel does not preclude an appeal to the Court of Special Appeals by an opposing party who is otherwise entitled to appeal.").

With respect to the requisite timing to challenge the decision of an in banc panel, this Court explained:

[5] The Court of Appeals has suggested that this remedy, referred to as "the poor person's appeal," was included in the Maryland Constitution as a "response to a fear of the framers of the Constitution of that year that the distance to Annapolis and the concomitant delay and expense incident to prosecuting an appeal in the [appellate courts] would discourage or preclude many litigants from seeking justice by means of appellate review." *Washabaugh v. Washabaugh*, 285 Md. 393, 396 (1979).

> [T]he proper time to appeal a decision of an in banc panel is directly after the decision of the in banc panel. A party who waits to appeal until after remand and final judgment by the circuit court loses the ability to argue those points decided by the in banc panel.

Phillips, 233 Md. App. at 197. *Accord Buck v. Folkers*, 269 Md. 185, 188 (1973) (dismissing untimely appeal arising from actions taken by in banc panel); Kevin F. Arthur, *Finality of Judgments and Other Appellate Triggers* § 45, at 53 (2d ed. 2014) (in banc panel's ruling is final and appealable even when it reverses the initial ruling and "requir[es] a remand for further proceedings.").

Thus, the appealable order in this case was the in banc panel's ruling, which was entered on December 7, 2016. Because Mr. Wertlieb's appeal was not noted until January 26, 2017, more than 30 days after the entry of the order, it was not timely. Accordingly, we do not have jurisdiction to consider the appeal, and the appeal must be dismissed.

APPEAL DISMISSED. COSTS TO BE PAID BY THE APPELLANT.