Circuit Court for Prince George's County
Case No. CASR04-18765

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2492

September Term, 2016

PRINCE GEORGE'S COUNTY OFFICE OF CHILD SUPPORT ENFORCEMENT *EX REL.* JASMINE R. FOWLER

v.

KENNETH J. DICKENS

Kehoe,
Arthur,
Reed,

JJ.

Opinion by Kehoe, J.

Filed: January 19, 2018

The Prince George's County Office of Child Support Enforcement (the "Office") appeals from a judgment of the Circuit Court for Prince George's County, which decreed that Kenneth J. Dickens is not the biological father of "J.", a minor child, and therefore is not obligated to pay child support to J.'s mother, Jasmine R. Fowler.

The Office presents two issues to this Court:

> 1. Did the circuit court err as a matter of law when it set aside Mr. Dickens's affidavit of parentage for [J.], because there was no proof of fraud, duress, or material mistake of fact?
>
> 2. Did the circuit court abuse its discretion in ruling on the Office's petition and motion for modification in the Office's absence and without giving the Office an opportunity to be heard?

The Office's contentions as to the first issue are not preserved for appellate review, and its arguments as to the second are meritless. We will affirm the judgment of the circuit court and remand this case so that the circuit court can rule on a pending motion.

Background

Before the circuit court entered the judgment that is the subject of this appeal, Jasmine E. Fowler and Kenneth J. Dickens were the legal parents of three minor children: "K.", "K.M.," and J. Ms. Fowler is a resident of the Commonwealth of Pennsylvania; Mr. Dickens lives in Prince George's County. The children reside with their mother in Drexel Hill and spend the summers with Mr. Dickens. K. and K.M. were born in Pennsylvania; J., on the other hand, was born in Maryland.

In 2005, the parties had only one child, K. The Office filed a petition for child support, and the circuit court entered a judgment ordering Mr. Dickens to pay $354 monthly in child support for K.

In 2016, and at the behest of the Pennsylvania child support enforcement agency, the Office filed a petition to modify Mr. Dickens's child support obligation to reflect the fact that the parties had two additional children, namely, K.M. and J. The court file contains a notice dated May 18, 2016 that states that a hearing on the petition would be held before a magistrate on June 22, 2016. The notice indicates that copies were mailed to the Office, Ms. Fowler, and Mr. Dickens. (The Office included a copy of this hearing notice in its extract.)

On May 19, 2016, Mr. Dickens filed a petition to establish paternity. He asserted that he was not J.'s father and requested a paternity test. Mr. Dickens, who was self-represented, served a copy of the petition on Ms. Fowler but did not serve the Office. In the court file is a notice of hearing dated June 14, 2016, which advised the parties that a motions hearing was scheduled on June 22, 2016 at 11:00 AM before the circuit court, and a hearing on the petition to modify child support was scheduled before a magistrate on the same day at 12:30 PM. Again, the notice indicates that copies were mailed to the Office, Ms. Fowler, and Mr. Dickens. (The Office did not include a copy of this notice in its extract and ignores its existence in its brief.)

On June 22nd, Ms. Fowler and Mr. Dickens appeared for the hearing on the motion to establish paternity. Counsel for the Office did not. After noting that counsel for the Office was not present, the trial court first considered the paternity petition. Mr. Dickens asserted that he was not J.'s biological father. Ms. Fowler agreed, informing the court that:

> [J.] is not his blood child, . . . he knows that because when I was pregnant with [J.] I told him. He didn't have to do a DNA test, I told him that [J.] wasn't his child.

The court pointed out that, in its petition, the Office had alleged that Mr. Dickens was J.'s father. Ms. Fowler then informed the court that the Office did so because Mr. Dickens "had signed [J.'s] birth certificate."[1]

At this point, the focus of the hearing shifted to the Office's petition to modify child support.[2] After again noting that the Office had not appeared, the court first explained the concept of the Maryland Child Support Guidelines to the parties and then elicited from them the information necessary to calculate child support. During this process, Ms. Fowler informed the court that she was seeking child support for K. and K.M. The Court

[1] J.'s birth certificate is in the extract. It isn't signed by either parent. In its brief, the Office asserts that Mr. Dickens actually signed an affidavit of parentage but this document isn't in the extract.

[2] The trial court initially thought that the Office's petition to modify child support was also scheduled before it. Later in the hearing, the court realized that the child support petition was scheduled for a hearing before a master. The court completed the hearing "to save you from going down and doing half of this again before a [m]agistrate[.]" Both Ms. Fowler and Mr. Dickens agreed and the court stated that it would notify the magistrate.

recessed briefly to perform the child support calculations, and then resumed the hearing to order that Mr. Dickens's monthly support obligation should be increased to $650. On the next day, that is, June 23, the court entered orders modifying Mr. Dickens's child support and addressing his paternity petition. The latter order read in pertinent part:

> ORDERED, that Kenneth J. Dickens is determined not to be the biological father of [J.]; and it is further
>
> ORDERED, that [Mr. Dickens's] name be stricken from the birth certificate of [J.]; and it is further
>
> ORDERED, that the Department of Vital Statistics is instructed to remove [Mr. Dickens's] name from the birth certificate of [J.].

On July 18, 2016, the Office filed a court paper titled "Motion for Reconsideration," which is actually a motion to revise the judgment pursuant to Md. Rule 2-535(a). Because the motion was not filed within ten days of the entry of judgment, it did not stay the thirty day period for filing a notice of appeal. Presumably with this in mind, the Office also filed a notice of appeal on the same day.

On August 10, 2016, the court entered an order which stated that the "Motion for Reconsideration" was to be "held in abeyance pending the outcome of the appeal filed on 7-18-16." With the benefit of hindsight, the entry of the August 10 order was unfortunate, for reasons that will soon become clear.

I.

The Office presents several contentions as to why the trial court erred as a matter of law when it granted Mr. Dickens's petition to determine paternity. None of the Office's appellate contentions on this issue are preserved for our review because none of them

were raised to the trial court before judgment was entered. *See* Md. Rule 8-131(a). (These arguments were raised in the Office's motion for reconsideration but the trial court hasn't yet ruled on the motion.)

In the interest of fairness both to the trial court and Mr. Dickens, we will not address the Office's contentions for the first time on appeal. (Our approach might be different if the trial court had ruled on the motion for reconsideration, but, as we will explain below, addressing the Office's substantive arguments before the trial court has a chance to rule on the motion for reconsideration would impinge upon the trial court's discretion.)

II.

The Office also argues that the trial court abused its discretion in entering judgment without giving the Office "an opportunity to be heard." The short answer to this contention is that the court file and the docket entries indicate that the clerk's office sent a notice of the motions hearing to the parties on June 15th. "'Docket entries are made under the eye of the court, and by its authority, and are presumed to be true until corrected.'" *Estate of Vess*, 234 Md. App. 173, 198 (2017) (quoting *Mateen v. Saar*, 376 Md. 385, 396–97 (2003)); *Estime v. King*, 196 Md. App. 296, 304–05 (2010). Moreover, there is a presumption that mail is received by the addressee. *See, e.g., Landover Assocs. Ltd. P'ship v. Fabricated Steel Prod., Inc.*, 35 Md. App. 673, 681 (1977).

These presumptions are rebuttable, but the Office doesn't attempt to do so. It does not assert in its brief that it did not have actual knowledge of the scheduled hearing.[3] Instead, the Office contends that, *had* one of its lawyers been present, he or she could have explained the applicable law to the court. Without doubt, the Office *should have* been present at the hearing on Mr. Dickens's motion. The Office's appellate brief does not posit any explanation, good, bad, or indifferent, as to why the Office failed to appear. Based on the information in the record before us, we have no basis to conclude that the trial court abused its discretion in proceeding with the hearing in the Office's absence.

III.

In its motion to revise the judgment, the Office presents several reasons as to why it might be appropriate for the court to vacate its judgment and schedule a de novo hearing. Those grounds, however, aren't necessarily the whole story—the court might possibly also consider fairness to the other parties as well as the importance of adhering to the court's schedule. *See, e.g., Naughton v. Bankier,* 114 Md. App. 641, 654 (1997) (Deviation from a scheduling order "without a showing of good cause is, on its face, prejudicial and fundamentally unfair to opposing parties[.]"). These considerations, and perhaps others as well, must be weighed by the trial court in deciding whether to grant

[3] As we have noted, the Office did not include a copy of the June 14 scheduling notice in its extract nor did the Office refer to it in its brief.

the motion. As an appellate court, we must be careful not to intrude upon the trial court's right, and indeed, its obligation, to exercise its discretion in the first instance.

With that said, we offer the following for the guidance of the parties and the trial court on remand:

First, in *Faison v. MCOCSE ex rel. Murray*, ___ Md. App. ___, No. 1486, September Term 2016, 2017 WL 5989055 (filed December 4, 2017), this Court held that genetic testing with the ultimate goal of disestablishing paternity is available to an individual who signed an affidavit of parenthood "based on the mistaken belief that he was the Child's father." *Id.* at *6. We explained that:

> [A]s the statutory text and legislative history confirms, *when an alleged father signs an affidavit of parentage on the basis of a genuine but incorrect belief that he is the father of the children, and he later requests a genetic test to show whether he is in fact the father of the children, he is entitled to one*. Then, if the test conclusively shows that he is not the father of the children, he no longer has the legal responsibilities that a father must have.

Id. at *6–7 (quoting *Davis v. Wicomico County Bureau of Support Enforcement*, 447 Md. 302, 349 (2016) (McDonald, J., dissenting) (emphasis added in *Faison*)).

In a letter to this Court, the Office states that *Faison* isn't applicable to the present case because "Mr. Dickens, unlike Mr. Faison, executed the affidavit of parentage with the knowledge that he was not [J.]'s biological father."

The record is not quite as clear on this point as the Office suggests. No one testified under oath at the motion hearing. Ms. Fowler stated several times that she had told Mr. Dickens that he was not J.'s biological father before J.'s birth. However, Mr. Dickens

neither admitted nor denied that he knew that he wasn't J.'s biological father when he signed the affidavit of parentage. If the trial court grants the motion for reconsideration and sets the case in for a new hearing, the parties should address this issue under oath, and the court should make specific findings.

Second, in its brief to this Court, the Office asserts "Mr. Dickens's paternity of [J.] [cannot] be set aside even though Mr. Dickens is not [J.]'s biological father" because he voluntarily signed an affidavit of parentage. In support of this proposition, the Office cites *Burden v. Burden*, 179 Md. App. 348, 367 (2008). *Burden* is different from the present case in one respect, however. The affidavit of parentage at issue in that case was executed in South Dakota. This Court held that the Full Faith and Credit Clause of the United States Constitution required Maryland to apply South Dakota law and concluded that, under the law of that state, the presumption of legitimacy created by an affidavit of parentage was conclusive and unrebuttable due to the passage of time. *Id.* at 368. As an alternative basis for our holding, we concluded that application of Maryland law would yield the same result. *Id.* at 368–69. But we also stated that "FL § 5–1028(d)(2)[4] does

[4] F.L. § 10-1028 states in pertinent part:

> (d)(1) An executed affidavit of parentage constitutes a legal finding of paternity, subject to the right of any signatory to rescind the affidavit:
> (i) in writing within 60 days after execution of the affidavit; or
> (ii) in a judicial proceeding relating to the child:
> 1. in which the signatory is a party; and
> 2. that occurs before the expiration of the 60-day period.

not fix any time limit within which the finding of paternity may be challenged on the ground of fraud, duress, or material mistake of fact." *Id.* at 369.

Third, the Office asserts that F.L. § 10-327[5] bars Mr. Dickens from raising the issue of paternity in this case, citing *Department of Human Resources v. Mitchell*, 197 Md. App. 48, 67 (2011). However, like *Burden, Mitchell* is distinguishable from the present case, and for some of the same reasons. *Mitchell* involved an attempt to enforce a child support order entered by a court in New York against a parent who was residing in Maryland. The support order was forwarded to Maryland pursuant to the Maryland Uniform Interstate Family Support Act, F.L. §§ 10-301–359, and here. We concluded that "nonparentage is *not* 'a defense under the laws of this State' to the validity or enforcement of a registered order under UIFSA." *Id.* at 63 (emphasis in original, quoting F.L. § 10-307).

> (2)(i) After the expiration of the 60-day period, an executed affidavit of parentage may be challenged in court only on the basis of fraud, duress, or material mistake of fact.
> (ii) The burden of proof shall be on the challenger to show fraud, duress, or material mistake of fact.

[5] The statute states:

> A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this subtitle.

Returning to the present case, there never has been a child support order regarding J. The present action was initiated by Pennsylvania's request that a Maryland court enter a child support order for him. The affidavit of parentage signed by Mr. Dickens isn't in the record. If it was executed in Maryland, Mr. Dickens can raise non-paternity as a defense, but only if he can prove fraud, duress, or a material mistake of fact. *Faison* stands for the proposition that Mr. Dickens can show "a material mistake of fact" by proving that he signed the affidavit of parentage in the good faith but mistaken belief that he was J.'s natural father.

Fourth, as a general rule, if a court enters a child support order at the request of a child support agency upon an initial pleading, the obligation to pay support relates back to the date of the filing of the pleading unless the court "finds from the evidence that the amount of the award will produce an inequitable result[.]" F.L. § 12-101(a)(2).

The initial pleading seeking child support for J. was filed on April 18, 2016. Our reading of the transcript leads us to conclude that Ms. Fowler and Mr. Dickens were acting in good faith at that hearing. Had the Office taken the trouble to appear at the hearing on June 22, 2016, perhaps this matter would have been resolved long ago. Had the trial court acted upon the motion for reconsideration, the substantive issues in this case could have been addressed in this appeal. If the trial court eventually decides to award child support for J., the court may wish to consider these matters when deciding whether the amount of any retroactive award would be inequitable.

We will affirm the judgment of the circuit court, and remand this case for it to consider the Office's motion for reconsideration.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY APPELLANT.