Circuit Court for Montgomery County
Case No. 116381FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2079

September Term, 2021

S.C.

v.

M.S.S.

Beachley,
Shaw,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: August 18, 2022

This appeal arises from an order entered by the Circuit Court for Montgomery County, granting increased visitation to appellee M.S.S.[1] ("Mother") with her minor child J.S. Appellant S.C. ("Grandmother") , J.S.'s then-sole legal and physical guardian, opposes the increased visitation, arguing that the circuit court did not make the requisite findings that there was good cause to increase visitation based on clear and convincing evidence and that the increased visitation was in the child's best interest, pursuant to Md. Code, § 9-101.2 of the Family Law Article ("FL").[2] Grandmother further claims bias on the part of the circuit court and asserts error in the court's failure to recuse itself from deciding the matter of visitation. For the reasons that follow, we dismiss Grandmother's appeal as moot in light of the court's subsequent order granting sole legal and physical custody to Mother.

[1] For confidentiality, we refrain from using the parties' names and will instead use initials.

[2] FL § 9-101.2 provides, in pertinent part:

> (a) Except as provided in subsection (b) of this section, unless good cause for the award of custody or visitation is shown by clear and convincing evidence, a court may not award custody of a child or visitation with a child:
>
> (1) to a parent who has been found by a court of this State to be guilty of first degree or second degree murder of the other parent of the child, another child of the parent, or any family member residing in the household of either parent of the child[.]
>
> * * *
>
> (b) If it is in the best interest of the child, the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

FACTUAL AND PROCEDURAL BACKGROUND

On or about December 13, 2013, Mother fatally stabbed her husband Jo.S. (J.S.'s father), reportedly in self-defense after repeated incidents of domestic violence. Mother surrendered to police, and upon her arrest, she requested that her mother, Grandmother, take temporary custody of J.S. At that time, J.S. was approximately 18 months old.

On December 20, 2013, Grandmother filed an "emergency complaint for custody" of J.S., alleging that the child's parents—one deceased and one incarcerated—could not provide the child with protection or a stable home. The circuit court granted Grandmother temporary sole legal and physical custody of J.S.

On September 17, 2014, Mother consented to Grandmother's sole legal and physical custody of J.S., agreeing that it was in the child's best interest for Grandmother to be the child's custodian.[3] The circuit court entered an order on December 31, 2014, granting Grandmother sole legal and physical custody of J.S. It further ordered that Mother "shall have reasonable access to the child within [Grandmother's] discretion."

On September 8, 2015, Mother entered an *Alford* plea[4] to a charge of second-degree murder and was sentenced to 30 years' incarceration with all but ten years suspended. While imprisoned, Mother maintained contact with J.S. to the best of her ability—having

[3] Mother stated that she did not intend the custody arrangement to be permanent.

[4] An *Alford* plea, derived from *North Carolina v. Alford*, 400 U.S. 25 (1970), is a "guilty plea containing a protestation of innocence." *Bishop v. State*, 417 Md. 1, 19 (2010) (citations omitted).

in-person visits when possible, speaking to him on the phone, and sending him cards and letters. She also took numerous parenting and therapeutic classes.

The circuit court later modified Mother's sentence reducing the time served of her incarceration. Mother was released from prison on August 16, 2019. Following her release, Mother obtained stable housing and employment, engaged in therapy, began a long-term relationship, and sought to re-establish a strong relationship with J.S.

On February 24, 2020, Mother moved to modify custody on the ground that, during her incarceration, Grandmother had only permitted her in-person visits with J.S. approximately three times per year. She further indicated that, since her release from prison, Grandmother has denied her access to J.S. and to his school and health records and has refused to accept her calls. Mother therefore sought joint legal custody and reasonable visitation. In light of Grandmother's alleged continued denial of Mother's access to J.S.,[5] on October 8, 2020, Mother amended her motion to modify custody, requesting sole legal and shared physical custody of J.S. with increasing access until Mother regained sole physical custody. Mother requested a *pendente lite* hearing on the issue of visitation.

Prior to the April 6, 2021, *pendente lite* hearing, J.S., then nine years old, spoke with a court-appointed evaluator and expressed a desire to spend more time with Mother. The evaluator believed that J.S. would benefit from the opportunity to develop a stronger

[5] Grandmother reported that, as a person with underlying health risks, she was not comfortable with Mother and J.S. visiting in person during the COVID-19 pandemic, especially after reviewing social media accounts that she said suggested that Mother was not following health guidance protocols.

relationship with his mother. The evaluator therefore recommended "frequent and consistent contact" with Mother.

At the conclusion of the *pendente lite* hearing, the magistrate acknowledged that the issue of visitation was governed by FL § 9-101.2. The magistrate declined to find good cause by clear and convincing evidence that visitation between Mother and J.S. should be unsupervised. However, the magistrate found that Mother was a fit and proper person to have access to J.S. and that it would be in the child's best interest to have supervised, consistent visitation with his mother that is "not constrained by being under the watch" of his grandmother or maternal aunt, who lived in Grandmother's home. Since Mother's release from prison, the magistrate continued, "the access schedule needs to be modified slightly" on a *pendente lite* basis to permit Mother to spend more time with J.S. on a graduated schedule. The magistrate therefore recommended visitation supervised by an outside company specified in the recommendation.

The circuit court accepted the magistrate's recommendations and ordered that Mother have supervised physical access to J.S. every other Saturday from noon to 2:00 p.m. and every Wednesday from 5:00 p.m. to 7:00 p.m. at Mother's residence, along with Zoom or Facetime access—without Grandmother's participation—on Mondays and Fridays. On October 20, 2021, the circuit court ordered a change in that Mother was to participate in the Supervised Visitation Program, with a visitation supervisor to be assigned by the Family Division of the court. The order required weekly 45 to 60 minute visits between Mother and J.S. over a three-month period. The court later clarified that the referral order superseded the *pendente lite* order.

The circuit court heard argument on Mother's motion to modify custody on February 2, 3, 16, and 24, 2022. During the February 3 hearing, the court determined that the amount of visitation then in effect was not sufficient. The court temporarily changed Mother's access schedule, increasing her access to 10:00 a.m. to 4:00 p.m. every Saturday and Sunday, along with Facetime access on Mondays and Fridays, as well as more time if J.S. expressed a desire to speak with Mother.[6]

Thereafter, the hearing continued with testimony on Mother's motion for modification of custody. No witness who had observed or supervised Mother's visits with J.S. expressed any concerns about her parenting or fitness as a parent, nor about the possibility of Mother having unsupervised visitation with J.S. Instead, they found her "very loving" and "nurturing and so attentive to his needs."

Grandmother, in requesting that she retain sole legal and physical custody of J.S., stated her preference that Mother's visitation be made contingent upon J.S. receiving therapy or a therapist making a decision as to whether supervised visitation would be in his best interest. In Grandmother's view, a healthy relationship between Mother and J.S. involved Mother "respecting boundaries" and "following rules and guidelines." A court-

[6] The court originally set access at Saturday and Sunday from 10:00 a.m. to 2:00 p.m. and Wednesday from 5:30 to 7:30 p.m., but Grandmother objected to the Wednesday evening visit because J.S., who suffers from Attention Deficit/Hyperactivity Disorder ("ADHD"), has an 8:00 bedtime on weekdays and is "mentally exhausted" by then. The court removed the Wednesday visitation but increased the weekend visitation to make up the hours. In doing so, the court commented that "it is possible, moving forward, there will be a weekday dinner, so everyone needs to figure out what that's going to look like and how that's going to work. And I appreciate the ADHD thing, I have three boys who all have it, who are older, who have made it through, so I get it, but it's workable."

appointed social worker testified that Grandmother's gatekeeping behaviors with regard to Mother's visitation were disruptive to J.S. and could lead to his resentment of a missed opportunity to get to know his mother better and spend time with her.

After attempting to fire her attorney for what she perceived to be failures to act in her best interest, Grandmother, *pro se*, filed a motion for recusal of the trial judge on February 16, 2022, just prior to what was intended to be the conclusion of the hearing on the motion to modify custody. Therein, Grandmother claimed that the trial judge expressed bias against her in making rulings, especially as related to the temporary increased visitation schedule, improperly used *ex parte* information "to decide this case unfairly," and failed to abide by the mandates of FL § 9-101.2 in granting Mother increased visitation with J.S. Grandmother also claimed that J.S. was "legally competent to give his view as to whether he wants to have visitation with [Mother]" and should have been permitted to testify.

Grandmother ultimately continued with her attorney's representation, and counsel explained Grandmother's rationale in seeking the circuit court's recusal. According to Grandmother, the court should have expressly considered FL § 9-101.2 before increasing visitation. In addition, in Grandmother's view, the court's comment that it, too, had children with ADHD and that an increased visitation schedule on weeknights could nonetheless be workable was improper.

The circuit court explained that in changing Mother's access to J.S., it had not made a new ruling about visitation. Instead, it had merely reverted to supervised visitation with Supervised Visitations & Investigations, LLC, which the court had previously found

appropriate. Moreover, the increase in Mother's visitation related only to "making up time for [Mother]" after Grandmother had denied her visitation. The court confirmed that, to the extent it had not already done so, it would make the requisite § 9-101.2 findings when it put a permanent order into effect.

The circuit court further clarified that it had made the "ADHD reference. . . in passing," and its personal experience did not affect the ruling on visitation or custody. The court emphasized that it had made no decision regarding the modification of custody, as the hearing had not yet concluded. As far as Grandmother's claim that J.S. should have been permitted to voice his own opinion, the court reminded Grandmother that it was up to her attorney to raise that issue, and that the issue was not appropriate for a recusal motion.

Making clear that it would remain fair and impartial in rendering a decision, the circuit court denied Grandmother's motion to recuse. The court also ordered that its temporary visitation schedule would remain in effect until the rescheduled conclusion of the hearing on February 24, 2022.[7]

The modification hearing concluded on February 24, 2022, and the court entered an interim visitation order on March 4, 2022. The court determined that it would, pending its ruling on the custody modification issue, change Mother's supervised visitation to 10:00 a.m. to 8:00 p.m. every other Saturday and Sunday and 5:30 p.m. to 8:00 p.m. on

[7] In light of the time spent on argument relating to Grandmother's recusal motion, and the limitation of the time availability of a witness specially scheduled for that day, the court extended the conclusion of the hearing until February 24, 2022.

Wednesday on the weeks she did not have weekend visitation, with Facetime access to remain the same. The court also ordered Mother and J.S. to participate in reunification therapy with a licensed therapist. Before that order was entered however, Grandmother, *pro se*, filed a notice of appeal of the circuit court's denial of her motion to recuse on February 25, 2022.

On March 14, 2022, Grandmother, again *pro se*, moved to alter or amend the interim order arguing in part that the court's order was not supported by the requisite findings of FL § 9-101.2. On March 28, 2022, Mother also moved to modify the interim order, asserting that Grandmother had hindered her court-ordered visitation with J.S. Mother therefore sought unsupervised visitation, or, in the alternative, visitation supervised by trusted family friends. The circuit court denied both motions.

By order entered April 8, 2022, the circuit court granted Mother's motion to modify custody, awarding her sole legal and physical custody of J.S., with the transition from Grandmother to Mother to be completed by July 1, 2022. The court also awarded Mother unsupervised overnight visitation with J.S. on a graduated basis to facilitate the change to Mother's sole custody. In its memorandum opinion, the court thoroughly considered the requirements of FL § 9-101.2 and determined: first, that Mother's release from prison and efforts to create a stable environment for J.S. comprised a material change in circumstances to consider a modification of custody; second, that Mother had proven by clear and convincing evidence that good cause existed for the court to award her custody of J.S. by demonstrating that J.S. was safe from any future acts of serious domestic violence; and third, that it was in J.S.'s best interest for the court to modify custody and/or access.

Grandmother, through counsel, noted a timely appeal of the circuit court's order modifying custody.[8] She thereafter filed a motion to stay enforcement of the custody order pending the completion of the appeal. The court denied her motion.

ISSUES PRESENTED

In her briefs, Grandmother asserts that she appeals the "02/16/2022-Judge's Denial of 'Plaintiff's Motion to Recuse[.]'" In her issues presented, however, Grandmother's argument centers on her claim that the circuit court erred in awarding Mother increased visitation with J.S. during the February 3, 2022, modification of custody hearing without making the findings mandated by FL § 9-101.2. Specifically, Grandmother asks us to consider the following questions:

> I. Did the lower court violate Md. Code Ann., Fam. Law § 9-101.2. Parents Guilty of Murder, when it failed to make a finding of good cause based on clear and convincing evidence to award visitation as required by the statute?
>
> II. Did the lower court err when it failed to make a fact-finding determination on the minor child's best of interest as required by Md. Code Ann., Fam. Law § 9-101.2 Parents Guilty of Murder?[9]

[8] That appeal is currently pending in this Court.

[9] In her initial brief, Grandmother added a third issue, "Did the lower court abuse its discretion when it failed to avail the minor child, who was 10 years old, the opportunity to speak on his own behalf?" Grandmother appears to have abandoned that issue in her subsequently filed Supplement to Informal Brief of Appellant, but even if she intended for that issue to remain, it too is moot in light of the circuit court's grant of sole legal and physical custody to Mother.

DISCUSSION

To the extent that Grandmother appeals the denial of her motion of recusal, "[t]he decision to recuse is interlocutory, and is therefore not subject to immediate appeal." *Doering v. Fader*, 316 Md. 351, 360 (1989). *See also Breuer v. Flynn*, 64 Md. App. 409, 415 (1985) (holding that a trial judge's refusal to recuse herself is not "the type of interlocutory order from which a party may immediately enter an appeal."). Despite the fact that the circuit court's interlocutory order modifying visitation is, by statute, subject to immediate appeal—*see* Md. Code, § 12-303 of the Courts & Judicial Proceedings Article—the issue of recusal may not be reviewed in conjunction with that ruling. *See Forward v. McNeily*, 148 Md. App. 290, 296 n.2 (2002) ("[A] non-appealable order may not be combined with an appealable interlocutory order so as to confer jurisdiction upon this Court.").

Additionally, to the extent that Grandmother argues error in the circuit court's grant of a temporary increase in Mother's supervised visitation in its interim orders pending its ruling on Mother's motion to modify custody, the issue is moot. The interim visitation orders were superseded by the court's order granting Mother sole legal and physical custody and graduated unsupervised visitation, to increase until J.S. was in Mother's custody full-time by July 1, 2022, a date that has already passed.

A case is moot if "there is no longer any existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 561 (1986). As we explained in *Wagner v. Wagner*, 109 Md. App. 1, 22–23 (1996),

> [w]hile interlocutory orders in domestic cases may, in most instances be appealed after a final order, in some circumstances, the final order moots the issues that might have existed earlier in the proceedings. In the case *sub judice,* we hereafter affirm that the trial court neither erred nor abused its discretion when it rendered its 1994 custody order. We lack the power to reverse time in order to transfer the child's custody between 1992 and 1994 to Ms. Wagner, even were we to desire to do so. In respect to this particular issue, no remedy is now possible. The issue has become, by passage of time and subsequent court action, moot.

The same rationale applies in this matter. Even were we to find error in the circuit court's temporary grant of increased visitation pending its final order on custody modification, there is no remedy we can offer to Grandmother.

Although this Court has discretion to consider a moot issue, we exercise that discretion "only in rare instances which demonstrate the most compelling of circumstances." *Reyes v. Prince George's Cnty.*, 281 Md. 279, 297 (1977). "Therefore, generally when a case becomes moot, we order that the appeal or the case be dismissed without expressing our views on the merits of the controversy." *Jackson*, 306 Md. at 562 (1986). In the absence of compelling circumstances, we will do so here.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.