Circuit Court for Cecil County
Case No.: 07-D-09-000071

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2224

September Term, 2017

ROBERT MALINOWSKI

v.

FLORENCE MALINOWSKI

Fader, C. J.
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: March 12, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2010, the Circuit Court for Cecil County granted Mr. Robert Malinowski, appellant/father, and Ms. Florence Lippincott (f/k/a Malinowski), appellee/mother, an absolute divorce that incorporated a consent order regarding custody of their two minor children. Seven years later, in November 2017, the court denied dueling motions to modify custody, finding no material change in circumstances. Mr. Malinowski then filed a motion seeking a new trial, new venue, dismissal of the judgment, and a custody evaluation, which was denied by the court after a hearing. He presents seven questions on appeal, which we quote:

1. Did the trial court abuse [its] discretion in allowing recused Judge Sexton to reenter the case before closing statements?

2. Was the trial court of Cecil County prejudiced against the father after recused Judge Sexton reentered the case to lobby for the mother, Florence Lippincott?

3. Did Judge Baynes make an error in his discussion of his decision by placing weight on the testimony of the Appellee's, Florence Lippincott's, addiction expert after testimony revealed that Florence Lippincott was not truthful with her own expert in a self-reporting exam?

4. Did Judge Baynes make an error in not considering the best interest and safety of the children by not considering the possible use of alcohol mixed with a variety of guns being fired within 50 feet of the home?

5. Did Judge Baynes make an error in not ordering a "Best Interest Attorney" for the children after stating the case may have been different if one had been ordered?

6. Was Judge Baynes attempting to deny due process while abusing discretion during the January 4, 2018 hearing for a Motion for New Trial, New Venue, Dismissal of Judgment, and Custody Evaluation?

7. Did Judge Baynes make an error in dismissing the motion for new trial, custody evaluation, new venue when he dismissed for improper filing time?

Ms. Lippincott filed a cross appeal and in her brief addresses all seven of Mr. Malinowski's questions and presents one additional one for our review:

> 1. Did the trial court err when Judge Baynes functionally vacated Judge Murray's Order of June 9, 2017, thereby allowing the appellant to introduce evidence of his income at trial?

For reasons to be discussed, we find no merit in either party's contentions and affirm the judgment.

BACKGROUND

In December 2009, the parties agreed by consent order to joint legal and shared physical custody of their two minor children, operating on a one week on, one week off schedule. That order was incorporated into the parties' judgment for absolute divorce in April of 2010. In 2016, Mr. Malinowski filed a motion to modify custody and visitation alleging that his eldest child, S.M., wished to live with him fulltime. He also filed a separate request for modification of school enrollment, stating that both children wished to attend school in his district. At this time, the children were about 11 and 9 years old, respectively. Ms. Lippincott also filed a motion to modify custody seeking sole custody of the children and a recalculation of the child support obligations. In the motions, Mr. Malinowski and Ms. Lippincott each sought full custody of their children. Each parent alleged obtaining full custody was in the best interest of their children because the other parent was uncooperative regarding co-parenting decisions, talked maliciously about the other to the children, and alienated the other parent. In August 2017, a hearing on the dueling motions to modify was held.

After three days of testimony, the court found that there was no material change in circumstances and ordered that the 50/50 custody arrangement remain unchanged. The court did not alter child support at that time, but ordered that a child support hearing be scheduled for a future date. A few days after the ruling, Mr. Malinowski filed a motion for a "New Trial, New Venue, Custody Evaluation, and to Dismiss the Judgment." The court denied the motion after hearing argument by both parties.

DISCUSSION

Mr. Malinowski essentially makes five assertions on appeal: that (1) Judge Baynes erred when he spoke with Judge Sexton, off the record, before closing statements at the hearing on the motions to modify; (2) the court erred in assessing credibility of the testimony at that same hearing; (3) the court erred in not ordering a best interest attorney for the two minor children; (4) the court violated Mr. Malinowski's due process rights and abused its discretion during the hearing on the motion for new trial and other relief; and (5) the court erred in dismissing the motion for a new trial and other relief based on untimeliness. We will address the assertions in reverse.

Untimely Filing

On November 1, 2017, the last day of the hearing on both parties' motions to modify custody, the court ruled from the bench stating: "I'm not going to change anything. I don't think there's been a material change in circumstance." The written order reflecting that ruling was docketed on November 20, 2017. In the interim, on November 13, 2017, Mr. Malinowski, then representing himself, filed his "Motion for New Trial, New Venue, Custody Evaluation, and to Dismiss the Judgment." At the subsequent hearing on that

motion, the court stated, "I would just initially point out that the [c]ourt's decision was dated [November] 1st, 2017.[1] This motion was filed with the [c]ourt on November 13th, 2017. The Maryland rules require a motion for new trial to be filed within ten days. It was not filed within the ten days required."

Maryland Rule 2-533(a) provides:

> "[a]ny party may file a motion for new trial within ten days after entry of judgment . . . A motion for new trial filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket."

Mr. Malinowski filed his motion on November 13, 2017, after the trial court announced its judgment but before the judgment was entered on the docket. The court's written judgment was entered on November 20, 2017, thus, the motion should have been treated as timely filed on the same day.

Even though the court's notation of the timing may have been an error, its ultimate ruling was not based on the untimeliness of the motion. Rather, the court went on to say, "the [c]ourt is denying your motion . . . I stated on the record the reasons why I made the [November 20th] decision. My decision was based solely upon my review and consideration of the evidence [at the hearing], what I felt was in the best interest of the children." Ultimately, the court found no compelling reason to dismiss the judgment, have a new trial, change venue, or order a custody evaluation. Because the ruling was not based on timeliness, we find no merit to this contention.

[1] The transcript says December 1st, 2017. We believe the court simply misspoke.

Abuse of Discretion and Due Process Violation

Next, Mr. Malinowski asserts that the court abused its discretion and violated his due process rights during the hearing on his motion for a new trial and other relief. It is unclear exactly what Mr. Malinowski found to be an abuse of discretion or a due process violation, but he states that the court "allowed" the bailiff to "literally lung[e] at [him] during the entire time of [his] testimony." He further states, "[u]pon review of the entire transcript of the hearing it will be clear that the behavior of the Bailiff was not acceptable and should not have been allowed by Judge Baynes." The transcript from that hearing does not indicate any behavior by a bailiff. The transcript reflects argument from Mr. Malinowski, then from Ms. Lippincott's counsel, then again from Mr. Malinowski, after which the court made its ruling. There is no mention of the bailiff, nor is there any indication of abuse of discretion or due process violations.

As Ms. Lippincott points out, "the court provided ample opportunity for [Mr. Malinowski] to be heard, despite no requirement to do so at that phase of the proceeding" because the court could have ruled on the motion without a hearing. Additionally, the court has broad discretion in granting or denying a motion for new trial and Mr. Malinowski has not pointed to any compelling facts that support an abuse of discretion or due process violation by the court. Moreover, it is not this Court's obligation to comb the record to find support for his argument. *See State Roads Commission v. Halle*, 228 Md. 24, 32 (1962).

Best Interest Attorney

Before closing statements at the November hearing on the motions to modify child custody, the court warned the parties that it was "struggling" to find a material change in circumstances. Then, during his closing statement, Mr. Malinowski's counsel stated that the children were the "gatekeepers" to the facts that would demonstrate a material change in circumstances and the rules of evidence, mainly hearsay, had prevented him from putting those facts on the record. He requested that the court interview the children in chambers to obtain these facts. The court responded by saying, "[i]t's too late now, but maybe the children should have had their own best interest attorney or something. I don't know." The court further explained its reason for not interviewing the children:

> I don't like to involve children in custody disputes if it all possible . . . they shouldn't be blamed for coming into court and then saying something or not saying something because that's what happens, as soon as they walk out the door with one party or the other, you know, they are, why did you say that, why didn't you say this, why didn't you say that, and it just – it's not a good situation.

Mr. Malinowski contends that the court "made error by not appointing a best interest attorney and refusing to speak to the children." Section 1-202 of the Family Law Article provides that in any action in which custody of a minor child is contested, "the court may: (1) appoint to represent the minor child counsel who may not represent any party to the action; and (2) impose against either or both parents counsel fees." The Court of Appeals stated in *Garg v. Garg*:

> The statute merely *authorizes* a court to appoint counsel in those kinds of cases; it does not *mandate* such an appointment. The decision whether to appoint independent counsel for the child is a discretionary one, reviewable under the rather constricted standard of whether the discretion was abused.

393 Md. 225, 238 (2006) (emphasis in original).

We find no abuse of discretion here. Based on our review of the record, neither party requested a best interest attorney and, as noted above, the court is not mandated to appoint such an attorney. Although Mr. Malinowski made vague suggestions in his testimony that perhaps a best interest attorney should be appointed, he does not point to a place in the record where such a request was made. The court, however, found no change in material circumstances since the initial divorce and separation. It pointed out that the children were doing excellent in school and credited both parties for that fact. It found no evidence that one school district was better than another. The court also explained that, although it had heard testimony about Ms. Lippincott's alleged alcohol abuse, it found no evidence to support that claim and did not think it was "proper" or "in the best interest" to involve the children in that issue. Under these circumstances, we find no abuse of discretion in the court's decision to not appoint a best interest attorney.

Credibility

As best we can discern from his brief, Mr. Malinowski's next contention is that the court assessed the credibility of the witnesses incorrectly. Mr. Malinowski argues the court erred "by not exercising discretion" when "on cross examination it was revealed that the Mother, and her witnesses, including the two teachers, were not credible." Also, that the court "made error when in [its] discussion [it] placed weight on the addiction expert" after it was revealed that Ms. Lippincott did not inform the expert of certain things about her past. Mr. Malinowski maintains that other testimony about the "possible use of alcohol mixed with a variety of guns" near the home "should have been an alarm for the Judge."

"Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *Fone v. State*, 233 Md. App. 88, 115 (2017) (internal quotes and citation omitted). "[W]e give due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and significantly, its opportunity to observe and assess the credibility of witnesses." *Id.*

Mr. Malinowski alleged in his testimony that Ms. Lippincott and her husband abused alcohol, used guns, and provided his then twelve year old son with a large knife. However, Ms. Lippincott and her husband both testified that they only drank socially on the weekends and did not have problems with alcohol. Ms. Lippincott's husband denied that he had ever given a large knife to the parties' son.

Ms. Lippincott called an alcohol abuse evaluator to testify that, based on her evaluation, she did not have alcohol problems. On cross-examination, Mr. Malinowski's counsel pointed out that Ms. Lippincott failed to tell the evaluator that she was charged with a DUI when she was eighteen years old. Ms. Lippincott later testified that she forgot about the charge as it had been expunged from her record and happened several years ago. Ms. Lippincott also called two of her son's past teachers who testified about her regular communications with them and her involvement in the children's school work.

In sum, although appellant contends the court should have assessed credibility and weighed the evidence differently, we give due regard to the court's findings and its resolution of conflicting facts. We are not persuaded that the court abused its discretion when it credited the testimony provided by and on behalf of Ms. Lippincott.

Judge Sexton

On April 3, 2017, prior to the hearing on the motions to modify, the judge in the case, the Honorable Brenda A. Sexton, recused herself.[2] The order does not indicate any reason for her recusal. The case was eventually reassigned to the Honorable Judge Keith A. Baynes for a hearing on the dueling motions to modify custody. At the hearing, before closing statements, the court briefly recessed and during that recess Judge Baynes spoke with Judge Sexton in his chambers. Mr. Malinowski claimed that he overheard their conversation and that Judge Sexton was "lobbying" for Ms. Lippincott. Mr. Malinowski raised these concerns at the hearing and Judge Baynes addressed the parties on the record stating that he spoke with Judge Sexton about administrative issues regarding the absence of his judicial assistant and that the discussion did not pertain to this case.

Nonetheless, on appeal Mr. Malinowski asserts that the conversation between the judges was a violation of the Maryland Rules of Professional Conduct, Judge Baynes was not truthful in his explanation of the contents of the conversation, Judge Baynes should not have allowed Judge Sexton to "reenter" the case, and Judge Baynes altered his opinion and demeanor in the case after the conversation. He claims that Judge Baynes changed his decision to interview the children after speaking with Judge Sexton. The record, however, indicates the contrary. Judge Baynes expressed hesitance to involve the children and interview them in chambers several times before the conversation with Judge Sexton.[3]

[2] Judge Robert O. Lidums granted the parties their absolute divorce. Judge Sexton was assigned the case when litigation began again, with a petition for contempt, in 2016.

[3] The court on August 22, 2017 stated, "I may or may not talk to the kids. I don't know. I guess that I reserved on that." Again, on October 31, 2017, "I've been sitting here debating whether I should interview the kids . . . I don't want to, again, put the kids in the

Further, there is nothing in this contention for us to review. Judge Baynes gave an explanation on the record about his conversation with Judge Sexton, after which Mr. Malinowski did not seek Judge Baynes' recusal. The record does not indicate that Mr. Malinowski was dissatisfied continuing the hearing with Judge Baynes presiding. At the subsequent hearing on the motion for a new trial and other relief, Mr. Malinowski again accused Judge Baynes of "allowing" Judge Sexton to "lobby" for Ms. Lippincott, of being prejudiced by such, and of lying on the record. Judge Baynes responded by reiterating that Judge Sexton did not discuss the case with him and that his ultimate decision was based on the evidence presented and nothing else.

CROSS APPEAL

Judge Murray's Order

Before the hearing on the dueling motions, Ms. Lippincott made several attempts to compel Mr. Malinowski to comply with discovery requests. After he continued to violate court orders compelling him to turn over financial documents, the court, by order from the Honorable Judge Jane C. Murray, sanctioned him by mandating that his gross monthly income for child support purposes would be $12,595.96 and that he would be prohibited from introducing any evidence regarding income and expenses at any hearing in this case. Mr. Malinowski filed a motion to dismiss that order, which was denied. Then at the hearing on the dueling motions to modify, the court (Judge Baynes presiding) allowed, over Ms.

middle here . . . if you want to have the kids available . . . I may have some initial arguments from counsel and then I'll make a decision."

Lippincott's objection, Mr. Malinowski to testify about and enter into evidence financial documents and related information. The court reasoned:

> Okay. Well, again, right now I'm going to admit it, see where we're going to go; but it's not anybody's here fault; but it's –you know, part of the problem with these files is that this is continuity. You've got probably every judge in this courtroom ruling in not only in this case, but other cases, you know, all kinds of motions and motions that they hear, and then a subsequent issue comes up, and then it goes to another judge, and he or she has no idea what happened in the first hearing, and you know – so, again, I'm going to try to sort through all this stuff, and we'll see where we go from there.

Ms. Lippincott contends the court erred in admitting this information and essentially "vacating" the earlier order without proper review of the issue. Ms. Lippincott asserts the court should have considered the issues that were before Judge Murray and determined whether Judge Murray had abused her discretion in ordering the sanction.

Even though the court admitted financial evidence in contradiction to Judge Murray's earlier sanction, the court ultimately reserved any ruling as to child support, and ordered that a full child support hearing be scheduled for a later date. "I'm not sure how Judge Murray established the previous obligation without any real benefit of a hearing, so I'm going to direct that a child support hearing be scheduled as soon as possible." Under the circumstances, we are not persuaded that the court erred.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED; COSTS TO BE PAID 75% BY APPELLANT AND 25% BY APPELLEE.