UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2276

September Term, 2014

VITALIS O. OJIEGBE

v.

VIOLA NJOKU

Hotten,
Leahy,
Friedman,

JJ.

Opinion by Hotten, J.

Filed: December 21, 2015

*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.

Appellant, Vitalis O. Ojiegbe appealed a decision of the Circuit Court for Prince George's County denying his Motion to Establish Child Support, in which he requested appellee, Viola Nwachukwu, (formerly Njoku) pay child support for the parties' two minor children. Following a three-day custody hearing, the court determined that appellant was required to demonstrate a material change in circumstances to warrant modification, due to the existence of a prior child support award. The court concluded that appellant demonstrated no such showing, and that his motion was barred under the doctrine of *res judicata*. This appeal followed. Appellant presents four questions for our review:

1. Whether the [circuit] court correctly held that one parent may waive the right to child support.

2. Whether *[res judicata]* principles bar an application for child support where the court could have determined child support in the prior custody proceeding.

3. Whether a parent seeking child support in an instance in which the [circuit] court did not previously fix child support in the custody proceeding must establish a change of circumstances.

4. Whether a [circuit] court may find that a tax return offered to show income is somehow suspect because it is offered by a physician who is self-employed, where there is no evidence to support such a finding.

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and appellee are the parents of two minor children, minor child M. and minor child U. ("the children"). The parties were never married. Appellant is a medical doctor who owns and operates Sunrise Medical Clinic, LLC, a private medical practice located in Berwyn Heights, Maryland. He currently resides in Maryland and has sole

physical custody of the parties' children, subject to appellee's visitation. Appellee currently resides in North Dakota with an infant child from her current marriage and is employed as a PRN on call nurse. The parties share joint legal custody of their children.

The parties have been involved in litigation regarding the care and custody of their children since October 2007. We limit our recitation of the procedural history to the events that are relevant to the instant appeal. On January 11, 2010 appellant filed his "First Amended Motion for Modification of Child Support, Child Support Arrearages and Visitation Schedule" of the circuit court's order issued on September 30, 2008.[1] In his motion, appellant requested a decrease in his child support obligation due to a material change in income, credit towards his child support arrearages, and modification of the location where the parties exchanged the children for visitation.

Following a hearing held before a magistrate on July 30, 2010, the circuit court issued an order on August 16, 2010, lowering the September 2008 order of *pendente lite* child support to $1,247 per month. A subsequent hearing addressing the issue of child support was held on September 16, 2010. Thereafter, on October 4, 2010, the circuit court issued an order reaffirming the child support modification amount of $1,247 per month and reserving the issues regarding retroactivity and arrears. On December 15, 2010, the circuit court issued an order settling the amount in child support arrearages to $4,984.

[1] The order awarded appellee physical custody of the children and shared joint legal custody to both parties. Additionally, appellant was granted visitation on alternating weekends and major holidays and ordered to pay $2,492 per month in *pendente lite* child support.

On December 8, 2011, appellant filed his second[2] emergency motion to modify custody and requested temporary and permanent custody of the children due to appellee's planned relocation to North Dakota. Appellant's motion was subsequently granted. Thereafter, on April 9, 2012, a hearing was held regarding appellant's December 8th motion. An order issued on April 25, 2012 awarded appellant physical custody and continued joint legal custody to both parties. Appellee was granted visitation during the summer months, and alternating visits for Thanksgiving, in addition to the spring and winter school breaks. The order also terminated appellant's child support obligation to appellee retroactive to December 2011 and directed the parties to equally divide the cost of air travel for the children's visits between the parties.

On September 7, 2012, appellant filed a motion to establish child support against appellee. Appellee filed a motion in opposition. Thereafter, on October 2, 2013, appellant filed a motion to modify custody and visitation requesting a modification of the parties' visitation schedule. In response, appellee filed a counter-motion to modify physical and legal custody. A three-day hearing on the parties' respective motions was held before the circuit court on June 24-25 and October 9, 2014. On October 21, 2014, the circuit court issued an order denying the parties' motions.

Appellant subsequently filed a motion to alter or amend the circuit court's ruling. The circuit court denied appellant's motion, concluding that appellant had not

[2] On September 10, 2008, appellant filed his first emergency motion for temporary legal and physical custody as a result of appellee's alleged neglect and abandonment of the parties' children, which was subsequently granted.

demonstrated a material change in circumstances since the prior child support order, and thus, *res judicata* barred re-litigation of the issue regarding child support. Appellant noted a timely appeal to this Court. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

In *Knott v. Knott*, 146 Md. App. 232, 246 (2002), this Court held that "[c]hild support orders are generally within the sound discretion of the [circuit] court. However, 'where the order involves an interpretation and application of Maryland statutory and case law, [the] Court must determine whether the [circuit] court's conclusions are 'legally correct' under a [*de novo*] standard of review.'" (citations omitted). Thus, "[w]hen presented with a motion to modify child support, a [circuit] court may modify a party's child support obligation if a material change in circumstances has occurred which justifies a modification. Whether to grant a modification rests with the sound discretion of the [circuit] court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Ley v. Forman*, 144 Md. App. 658, 665 (2002) (citing *Dunlap v. Fiorenza*, 128 Md. App. 357, 363 (1999)).

Similarly, Md. Code (1984, 2012 Repl. Vol.) § 12–104(a) of the Family Law Article ("Fam. Law") provides: "[a] court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." *See also Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014); *Ley*, 144 Md. App. at 665; *Smith v. Freeman,* 149 Md. App. 1, 20–21 (2002).

DISCUSSION

I. Waiver of Child Support

Appellant contends that the circuit court's denial of "[a]ppellant's motion for fixing of child support and motion to reconsider without a hearing were not legally correct because child support may not be waived and *[res judicata]* is inapplicable[.]" Appellant cites to *Staumbaugh v. Child Support Enforcement Admin*., 323 Md. 106 (1991) and argues that "[t]he duty [imposed upon each parent to pay child support] is so important that a parent may not 'bargain away' or waive his/her minor child's right to receive support." Specifically, appellant asserts that "[a] [c]ourt cannot deny the parties' minor children a right to support from their mother, the noncustodial parent, because [appellant] is able to financially meet the children's basic needs."

It is well-settled law in Maryland that each parent has a common law and statutory duty to support their minor child. *See Corby v. McCarthy*, 154 Md. App. 446, 482 (2003). *See also* Fam. Law, §§ 12-101 et seq.; Fam. Law, § 5-203 (defining the parents of a minor child as individuals who "are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and [ ] have the same powers and duties in relation to the child."). Accordingly, "[t]he duty [to support a child] is so important that a parent may not 'bargain away' or waive his/her minor child's right to receive support." *Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC*, 412 Md. 308, 320 (2010). This duty is heightened when the parties are separated. *See Smith v. Freeman,* 149 Md. App. 1, 23 (2002) ("a child should enjoy 'the same proportion of parental income, and thereby enjoy

the standard of living, he or she would have experienced had the child's parents remained together.'") (quoting *Voishan v. Palma*, 327 Md. 318, 322 (1992)).

The *Stambaugh* decision was predicated upon the existence of an *agreement* between the parents waiving one's support obligation to the other, which the court determined was against public policy, in as much as the child's best interest was of paramount concern and could be unjustly altered by parties. *See Stambaugh*, 323 Md. at 108-09, 111-12. In the instant case, there was no agreement between the parties waiving the children's right to support. In fact, there was no waiver relative to any matter regarding the children.

More importantly, an agreement between the parties in a contested proceeding is *distinguished* from a ruling of the court (*i.e.*, a court order). This is evidenced by the fact that a circuit court has the authority to either accept or reject an agreement reached by the parties *prior to* issuing a final disposition disposing of the matter, particularly if the agreement contravenes the best interests of a child. *See Walsh v. Walsh*, 333 Md. 492, 504 (1994) ("Even before the guidelines, [the Court of Appeals] made it clear that agreements between the parents were not binding on a court ordering child support.").

Thus, we agree with appellee's contention that appellant's reliance on *Stambaugh*, *supra*, and "[o]ther cases cited by [appellant] involv[ing] agreements by the parties to waive or significantly alter child support[]" is misplaced because, "[t]here were no agreements between the parties in this case[]" and "[a]ll child support orders have resulted from rulings of the [circuit] court in contested proceedings."

II. Res Judicata

Appellant avers that "[t]he [c]ircuit [c]ourt incorrectly adopted the argument that *res judicata* . . . applies when child support is initially determined, thus requiring a showing of changed circumstances. . . ." Specifically, appellant maintains that "[t]he cases holding that *[res judicata]* applies relate to a prior child support award." (emphasis omitted). However, "[s]imply put, there was no prior 'child support award' and no basis for applying *[res judicata]*." In contrast, appellee maintains that, "[t]he circuit court correctly considered [appellant's] motion as one for modification of child support, not for an initial order, thus *res judicata* applied when no change of circumstances was shown." We agree.

In *Lieberman v. Lieberman*, 81 Md. App. 575, 597 (1990), this Court held, "the doctrine of *[res judicata]* applies in the modification of alimony and child support and the court may not 're[-]litigate matters that were or should have been considered at the time of the initial award.'" (quoting *Lott v. Lott*, 17 Md. App. 440, 444 (1973)). *See also Reese v. Huebschman*, 50 Md. App. 709, 713 (1982). Moreover, the rationale behind the doctrine of *res judicata* is clear. As the circuit court noted during the June 2014 custody hearing:

> The [c]ourt finds or notes that the [d]octrine of *[res judicata]* is a doctrine that is developed so that parties don't keep coming and coming and coming back to court to re[-]litigate issues that have already been litigated before. *And so that imposes upon them an obligation to not only not re-litigate issues that are litigated but when the same parties and the same issues are before the [c]ourt, you have to raise all of the issues or the parties will be prevented from litigating those issues at a later time*.

(emphasis added).

Before addressing the merits of appellant's argument, we first address: 1) whether there was a prior child support award[3] and; 2) if so, whether there was a material change in circumstances warranting modification of the same. The record reflects the existence of a prior award. The transcript from the custody hearing indicated the following:

> THE COURT: It is my understanding from a review of the file that the [c]ourt did terminate [appellant's] support obligation, assess the arrears, ordered a repayment, correct? So, that's done.
>
> [APPELLANT'S COUNSEL]: Yes.
>
> * * *
>
> THE COURT: [Appellant] has also filed to establish child support. The order dated April 20, 2012 granted [appellant] custody of the two children, terminated his child support obligation, made that retroactive to December 1, 2011 and there was no request to have the mother [ ] pay child support at that time.

In its December 2014 Order, the circuit court concluded:

> In the custody hearing in April 2012, both parties were before the [c]ourt as was the issue of child support. [Appellant] sought and obtained a termination of his support obligation simultaneously with obtaining custody of the children. . . . [Appellant] could have asked for child support at that time but

[3] We note that in the judicial context, because an "award" is conferred in an "order" of the court, appellant's arguments emphasizing the meaning of the former, are unpersuasive. The word "award" means "[t]o grant by formal process or by judicial decree." Black's Law Dictionary (10th ed. 2014). The word "decree" means "a judicial decision in a court of equity, admiralty, divorce, or probate — similar to a judgment of a court of law. . . .", "[a] court's final judgment. . . ." or "[a]ny court order, but esp. one in a matrimonial case [ ]." *Id.* Moreover, the word "order" means "[a] command, direction, or instruction. . . ." or "[a] written direction or command delivered by a government official, esp. a court or judge." *Id*. *"[An order] generally embraces final decrees as well as interlocutory directions or commands[]" and is "[a]lso termed court order; judicial order*." *Id*. (emphasis added).

> for whatever reason elected not to do so. Thus the April [ ] 2012 order became an enrolled order.

Since the evidence demonstrates the existence of a prior child support award, (specifically the April 20, 2012 order terminating appellant's child support obligation retroactively to December 1, 2011), the circuit court properly considered appellant's motion to establish a child support obligation as a modification of the prior child support award. As a result, appellant was required to demonstrate a material change in circumstances to warrant a modification. As the circuit court further concluded:

> While child support can be modified in subsequent proceedings, the party petitioning must show a change of circumstances since the prior order. There was no evidence submitted in the last hearing to establish what the parties' financial circumstances were in 2012.
>
> The [c]ourt also noted that while [appellant] did offer a tax return, he has never produced the financial records of his medical practice. As he is self-employed, and the tax preparer relies solely on the documents turned over by the business owner, a W-2, a tax return, or a paystub from a self-owned business does not have the same reliability as these documents would be if prepared by a neutral employer. [Appellant's] resistance to turning over his books caused the [c]ourt to question the credibility of the evidence he offered to establish his income.[4]

---

[4] Specifically, the court observed:

> [T]here has just been no evidence of a change of circumstances. Frankly the [c]ourt is aware of what I absolutely [ ] believe [to be] the motivation for filing for this action because I know because I did the other case, [appellant] has two sets of children. He has the first marriage, he has the second marriage, there is a child there, I have heard both of these cases. In September of 2013, the [c]ourt's order was enrolled and [appellant] was ordered to pay child support for his youngest son, [minor child M]. . . . And I think without any doubt that it is that[,] that convinced [appellant] that if he had to pay child support for [minor child M.], then [appellee] should then have to pay child support for [minor child M., the parties' child and minor

(continued . . .)

Based upon the evidence presented, we find no error in the circuit court's conclusions. Nonetheless, appellant contends, "the [c]ircuit [c]ourt also made purported findings concerning [appellant's] income that was not supported by the evidence." "[S]pecifically, the [c]ourt relied upon statements made by counsel, not evidence adduced at trial[,]" which "is patently improper because arguments of counsel do not constitute evidence." However, the record does not support this contention.

Appellant further contends that "despite the [c]ircuit [c]ourt's 'analysis,' not every self-employed individual is a tax cheat and there is nothing to support any such claim here." Appellant's contention lacks merit. The evidence does not indicate that the circuit court labeled appellant a "tax cheat." Rather, the court noted the unique circumstances common to the tax preparation of a self-employed individual and the evasiveness of the evidence proffered by appellant relative to his income. The circuit court noted:

> The [c]ourt will also find that I have no confidence that [appellant] has made a full and honest disclosure of his income from his medical practice. He has been steadfast in his failure to let anyone look at his books. [He] doesn't mind us looking [at] a tax return but he is a self[-]employed guy. His accountant fills in that computer program, puts in whatever the numbers he shows. And obviously if there is cash that comes through that office, or if there is household expenses that are being diverted, that accountant doesn't go to his office and figure that out. They are not paid to do that. They just put in the numbers and run it — so I think that it is reported to income, it is probably really just based upon what he thinks IRS could prove because of reportings from other companies. And that certainly makes me disinclined to award him child support.

(. . . continued)

> child U]. But that is not a change of circumstances that involves these two children and these two parents. There is no showing of a material change in circumstances.

Accordingly, the circuit court properly concluded that because appellant failed to establish a material change in circumstances, his motion was barred by *res judicata*. *See Lieberman*, *supra*.[5]

Alternatively, appellant avers that "[e]ven if claim preclusion could be applied, the 'fundamental public policy of a state may sometimes require that a final consent judgment be vacated or not given preclusive effect.'" Appellant cites to *Jessica G. v. Hector M.*, 337 Md. 388 (1995) and maintains that "[c]hild support is such a fundamental public policy." However, *Jessica G.* is distinguishable from the circumstances before us. In *Jessica G.*, the Court of Appeals determined that a *res judicata* defense was inapplicable to a subsequent paternity action because the prior orders did not determine the merits of the paternity issue presented on appeal.[6] *See id*. at 405-06. In contrast, in the instant case, the April 2012 order determined the merits of the child support issue between the parties.

Moreover, as the circuit court noted *supra*, appellant failed to request child support at that time. Collectively, these facts are fatal to appellant's argument on appeal because the issue presented relative to his request for child support was the precise "re-litigation of

---

[5] Although it is unclear from the record why the circuit court terminated appellant's child support obligation and did not also establish a support obligation for appellee, in light of the foregoing, we conclude that such a finding is not dispositive of the issues presented on appeal.

[6] Appellant's reliance on *Sollars v. Cully*, 904 A.2d 373 (D.C. 2006) is similarly misplaced. The court in *Sollars* determined that a prior child support order did not bar consideration of a subsequent action because "the [prior] child support order was simply vacated without any issues being litigated." *Id*. at 376.

matters" that the doctrine of *res judicata* was intended to prevent. Accordingly, the circuit court's denial of appellant's motion was proper.[7]

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

[7] Appellee asserts that dismissal of appellant's appeal is warranted because he failed to comply with Md. Rules 8-501 (imposing a duty upon an appellant to "prepare and file a record extract" as an attachment to the brief submitted to an appellate court) and 8-504(a) (outlining the required contents of a parties' brief). Although we acknowledge the deficiencies in appellant's brief, they do not warrant dismissal of his appeal because all of the information necessary to decide the issues on appeal was included in appellee's appendix and appellee was not unduly prejudiced. *See Suburban Hosp., Inc. v. Kirson*, 128 Md. App. 533, 541-42 (1999).