Circuit Court for Montgomery County
Case No.: 79745FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02498

September Term, 2016

WILLIAM F. FELLER, III,

v.

ROBIN J. FELLER

Graeff,
Leahy,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 16, 2018

INTRODUCTION

Appellee was granted sole legal and physical custody of the parties' two children. Through her counsel, she contacted appellant, her ex-husband, and requested child support, in accordance with a Marital Agreement they entered into prior to their divorce. After failed negotiations and mediation, appellee filed a Motion to Modify. The case was then heard before a Family Law Magistrate, who awarded appellee child support, retroactively applied to the date that appellee informally requested child support through her counsel. Appellant filed exceptions and the case was heard in the Circuit Court for Montgomery County. The circuit court judge also retroactively modified appellant's child support obligation to the date of the initial request. Appellant timely appealed and presents us with the following questions, which we have reordered and rephrased[1]:

I. Did the Magistrate err in retroactively modifying appellant's child support obligation to the date of appellee's initial written request and establishing an arrearage using that date?

II. Did the court err by including child care costs in the calculation of child support?

III. Did the court err in awarding appellant attorney's fees?

[1] Appellant originally presented the following questions, in verbatim, "A. Whether An Order of Court Modifying Child Support To A Date Before Any Judicial Request To Modify Was Filed Violates Federal Law And The Clear And Unambiguous Maryland Child Support Statute Prohibiting Modification Prior To The Filing Of A Motion To Modify Child Support. B. Whether the Establishment of Child Support Arrearages Which Is Based upon Improper Application of the Law Is an Error of Law and Clearly Erroneous. C. Whether Inclusion of Speculative and Un-Incurred Work-Related Child-Support Expenses, without Any Previous Family Experience, Was an Abuse of Discretion or an Error of Law. D. Whether an Award of Attorney's Fees to Appellee who Failed to Prevail In Her Claims for Child Support Constituted an Abuse of Discretion."

For the reasons stated below, we shall affirm.

BACKGROUND

William Feller, appellant, and Robin Feller, appellee, were married on January 26, 2002. Together they have two minor children, born in 2005 and 2007. The parties initially entered into a Custody Agreement, on April 27, which was later integrated into a broader Marital Settlement Agreement ("the Agreement") and incorporated in their divorce decree. They agreed to joint legal and physical custody of the children. Although the Agreement stated that "neither party shall be liable to the other…for a direct child support payment," it contained a modification clause which required an annual exchange of income documentation and authorized either parent to petition for child support "[i]n the event of a material change in the reasonable needs of [the children], the residential schedule, either parent's 'actual income,'…or economic status[.]" Upon such a material change, the parties were required to, first, "confer…with a view toward re-negotiating," and, if they could not come to an agreement, to participate in mediation with a predetermined attorney. Only if "the parents remain in disagreement after mediation, [may either] apply to any court of competent jurisdiction for a modification[.]" It then states that the "ultimate determination of any such modified amount shall be retroactive to the date of the first request for modification."

On January 15, 2015, appellee filed an Emergency Motion to Modify Custody, which was granted, and resulted in a Consent Custody Order[2] immediately awarding her

[2] The record suggests this agreement took effect on July 29, 2015.

sole legal custody and primary physical custody, with unsupervised visitation to appellant taking place every other weekend. In June of 2015, appellee, by her counsel, sent an informal written request to appellant for a reevaluation of child support. The Montgomery Office of Child Support Enforcement (CSE), on behalf of appellee, filed a Motion to Modify Child Support in the Circuit Court for Montgomery County, on October 9. Appellant opposed this request, alleging it violated the mediation clause. CSE withdrew their motion on October 23.

The parties participated in mediation, which proved unsuccessful, and, on November 17, 2015, appellee filed a Motion to Modify Child Support. A hearing was held before a Family Law Magistrate over the course of two days.[3] On September 1, 2016, the Magistrate issued Oral Recommendations retroactively awarding child support, at a rate of $1,135 a month, from July 2015[4] to May 2016; awarding $1,622 a month, beginning in June 2016; establishing an arrearage of $15,201, payable at a rate of $200 a month; and awarding $5,000 in attorney's fees to appellee. Thereafter, appellant timely filed Exceptions to the Magistrate's Recommendations.

The exceptions were heard before the Circuit Court for Montgomery County on December 8, 2016. The court found the Magistrate improperly imputed gift income to appellant, recalculated the time period during which work related child care expenses were to be included, and affirmed the date upon which the child support obligation was to

[3] The first day of the hearing was on April 5, 2016 and the second day was on July 12, 2016.

[4] July 2015 was the first day of the first month following appellee's initial informal request.

commence. The court also found the arrearage to be $13,173, payable at a rate of $183 a month and affirmed the Magistrate's award of attorney's fees. Appellant timely noted the present appeal.

ANALYSIS

I. Did the Magistrate err in retroactively modifying appellant's child support obligation to the date of appellee's initial written request and establishing an arrearage using that date?

Appellant argues that the plain language of § 12-104 of the Family Law Article, along with 42 U.S.C. § 666(a)(9)(C), prohibits courts from retroactively applying child support to a date prior to the filing of a Motion to Modify. He avers the court erred by awarding the modification and arrearage based on the date appellant was provided an informal written request. Appellee disagrees, contending the Magistrate's modification was proper because appellant contracted in the Marital Agreement that modification "shall be retroactive to the date of the first request for modification."

Section 12-104 of the Family Law Article states:

> **Modification of child support**
>
> (a) The 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.
>
> **Modification not retroactive**
>
> (b) The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification.

However, Family Law Section 8-101(a) provides that a "husband and wife may make a valid and enforceable deed or agreement that relates to alimony, support, property rights,

or personal rights." Further, under F.L. § 8-103(a), the court "may modify any provision of a deed, agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child." Modification of child support is within the "sound discretion of the trial court" and only reversed upon an abuse of discretion. *Knott v. Knott*, 146 Md. App. 232, 246 (2002). "[W]here the order involves an interpretation and application of Maryland statutory [law], [this Court] must determine whether the trial court's conclusions are 'legally correct' under a de novo standard of review." *Id.* (*quoting Walter v. Gunter*, 367 Md. 386, 392 (2001) (internal citations omitted).

Appellant argues that Section 8-103 is limited by Section 12-104(b)'s directive that a court "may not retroactively modify a child support award prior to the date of the filing of the motion for modification." We disagree. In interpreting the language of a statute, we look to whether "the words of the statute are clear and unambiguous, according to their commonly understood meaning" and, if so, "we end our inquiry there." *Ley v. Foreman*, 144 Md. App. 658, 669 (2002) (*quoting Reuter v. Reuter*, 102 Md. App. 212, 224 (1994)). The plain language of the statutes, when viewed in conjunction, speak for themselves. Section 12-104(b) is clearly a limitation on the court's power to exercise statutory modification, as granted in § 12-104(a), not a limitation on the right to enforce a valid marital settlement agreement under § 8-101. We, thus, "end our inquiry" and need not further consider the legislative intent.

Here, the Magistrate made the following Recommendation, as adopted by the circuit court:

> Now, the first issue I'm going to address is when should child support paid by defendant to plaintiff begin? There's no question that child support needs to be paid by defendant. The law is clear. All parents have a legal duty to financially support their children. Through his action, the defendant acknowledges he must pay child support by the fact that he voluntarily paid to plaintiff the total amount of $2,150 by way of a $300 payment in February 2016, a $600 payment in March of 2016, and a second payment of $1,250 in late March 2016.
>
> Plaintiff filed her motion to modify child support on November 17, 2015. Defendant argues that pursuant to section 12-104(b) of the Family Law Article, the Court may not retroactively modify child support award prior to the date of filing of the motion for modification. In this case, when the Court adopted the agreements of the parties and incorporated them into the judgment of absolute divorce, the terms of the agreements became part of a court order. As such, according to the defendant, the agreement that neither will pay child support to the other was an award by the Court, and then can only be modified retroactively to the date of filing the motion requesting modification.
>
> Plaintiff points out that the parties' agreement set forth in detail what the parties are to do with regard to determining ongoing child support. Section four, paragraph 3.5 of the parties' marital settlement agreement provides that the parties are to exchange documentation on a yearly basis, and other information that will help them determine what the appropriate amount of child support should be. If they can't reach an agreement, they are to go to mediation with attorney John Weaver. If they can't reach the agreement through mediation then either party may apply to the Court for modification to the child support provisions of the agreement.
>
> The agreement then states, quote the ultimate determination of any such modified amount shall be retroactive to the date of the first request for modification close quote. As shown by Plaintiff's Number Three, I find that in mid to late June of 2015, plaintiff requested a modification of the child support through her former counsel to defendant's former counsel.

> Under Maryland law, parents of children may contract with one other with regard to custody and child support. The Court may or may not accept the terms of such an agreement. In fact, the appellate courts have told trial courts not to simply rubber stamp agreements regarding children, so that children do not suffer because on parent had superior bargaining power over the other parent.
>
> In this case, this Court approved the process regarding the modification of child support appearing in the parties' agreement when it incorporated the agreements into the judgment of absolute divorce. Thus, the process for modification has already been settled in this case. In 2011 when the parties asked the Court to incorporate the agreements into the judgment of absolute divorce, the Court at that time did not find the process for modifying child support as outlined in the agreements to be detrimental to the best interest of the children. For what it's worth today, I also do not find the process to be detrimental to the best interests of the children.
>
> In any event, based upon the limited facts of this case, I believe that modification of child support may be retroactive to the date prior to the date of the filing. It can be retroactive to the date of the request made by the defendant when she—I'm sorry, by the plaintiff when she filed her motion to modify. I note that the defendant also argued that the interpretation in the agreement should be that the first request for modification should be interpreted to mean the date of filing. Giving the words their ordinary meaning that appear in the agreement of the parties, I find the first request for modification to mean when the request is made by one party to the other, not when one party has filed with the Court.

In our view, the ruling fully comports with the agreement entered into by the parties, the requirements of the Family Law Article, and was in the best interest of the children. For these reasons, we hold the Magistrate's decision to award retroactive modification to the date of appellee's initial request was legally correct and not an abuse of discretion.

II. Did the court err by including child care costs in the calculation of child support?

Appellant maintains "no previous history existed, or was testified to, regarding actual day care and/or work-related child care expenses incurred on behalf of a child." He

claims the Magistrate's inclusion of day care costs in his calculation was "merely speculative" and in error. Appellee, conversely, argues the Magistrate properly based his decision on the "unrebutted testimony of appellee" that their children had attended Wonders Day Care for "almost a decade" and planned on continued enrollment; appellant's own testimony that they had used Wonders in the past; enrollment contracts with Wonder that were admitted into evidence; and testimony that the children were enrolled in summer camp.

Under Family Law Article, Section 12-204(g), "actual child care expenses incurred on behalf of a child due to employment" may be considered in the calculation of child support and, in part, states:

> Child care expenses shall be:
>
> (i) determined by actual family experience, unless the court determines that the actual family experience is not in the best interest of the child[.]

The burden of proof "is upon the spouse who seeks actual child care expenses." *Shenk v. Shenk*, 159 Md. App. 548, 554 (2004). "Actual" means "[s]omething real, in opposition to constructive or speculative[.]" *Id.* (internal citations omitted). In *Shenk*, we held the court erred by including child care costs in a wife's child support award when "[t]here was no evidence that the wife had arranged for full-time employment or even that she was seeking such employment." *Id.* at 555. On appeal, "[c]hild support awards…will be disturbed only if there is a clear abuse of discretion." *Gladis v. Gladisova*, 382 Md. 654, 665 (2004) (internal citations omitted).

In the case before us, appellee provided evidence that her request was based on actual family experience. She testified that "[her eight-year old child] has attended Wonders [Day Care] since he was 10 weeks old. And [her ten-year old child] has attended Wonders since he turned 2. And he was in a different program before that." Appellant himself testified that previously, when the children were under his care, he would utilize the day care. Appellant further attested that, at the time of the hearing, the children were in day care at Wonders and introduced a day care enrollment agreement form into evidence. In light of these facts, the Magistrate did not abuse his discretion by including child care costs in his calculation of child support, as they were actual costs based on the family's history.

III. Did the court err in awarding appellant attorney's fees?

Finally, appellant argues the court abused its discretion in awarding appellee $5,000 in attorney's fees, "[g]iven that the Appellee was unsuccessful in convincing the Family Law Magistrate that Appellant's income should include gross revenue from Service Unlimited and that the vast majority of Appellee's efforts were directed toward proving this income." Appellant, thus, contends the court failed to properly consider the respective financial situations of each party.

Appellee responds that there was no error because the Magistrate "specifically articulated the required considerations before order payment of attorney's fee, and relied upon the authority given to the Court in Section 12-103."

Section 12-103 (a–b) of the Family Law Article provides:

(a) **Award of costs and fees-** The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:

(1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or

(2) files any form of proceeding:

(i) to recover arrearages of child support;
(ii) to enforce a decree of child support; or
(iii) to enforce a decree of custody or visitation.

(b) **Conditions for award of costs and fees-** Before a court may award costs and counsel fees under this section, the court shall consider:

(1) the financial status of each party;

(2) the needs of each party; and

(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

A decision to award attorney's fees in a child support modification case "lies within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion." *Tanis v. Crocker*, 110 Md. App. 559, 577 (1996) (internal citation omitted).

It is undisputed, in the case *sub judice*, that appellee "[applied] for a decree or modification of a decree concerning…support" for purposes of §12-103(a). In his calculation of child support, the Magistrate made detailed findings of facts, determining appellee's monthly income; day care, summer camp, and insurance costs for the children;

and appellant's monthly income and expenses.[5] The Magistrate then made the following Recommendation, regarding attorney's fees[6]:

> With regard to the request for attorney's fees, section 12-103 of the Family Law Article states that a trial court may award attorney's fees at any time that child support is being requested to be modified. But section 12-103 goes on to state that before a Court can award such costs and fees, it must consider the financial status of each party, the needs of each party, and whether there was substantial justification for bringing or defending the proceeding, and when the case law permits, attorney's fees must be reasonable.
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> Taking the fees incurred by the plaintiff in this matter, which I find to be reasonable, the respective financial circumstances of the parties, and the need for the defendants attorneys to do an extensive amount of work to try to unravel the financial records of the defendant which he even admits are confusing, and nothing more than poor accounting, I find that there was justification for bringing this action by the plaintiff, and will recommend that the defendant be ordered to pay to the plaintiff the sum of $5,000 within 30 days of the entry of the order I am recommending to the Court, and if not so paid, then that be reduced to a judgment upon the filing of an affidavit of non-payment by the plaintiff.

We hold the Magistrate's decision to award attorney's fees was in accordance with § 12-103 and not an abuse of discretion. The Magistrate discussed the financial status and needs of each party and clearly delineated why appellee had substantial justification for bringing the action.

[5] Appellant filed Exceptions and, after a hearing, the circuit court slightly recalculated the financial figures determined by the Magistrate and adjusted his award of attorney's fees accordingly. Appellant does not challenge the circuit court's accounting in the present appeal.

[6] Considering the Magistrate's detailed analysis of each parties' financial situation in the child support calculation section of his decision, we do not find he needed to repeat such analysis in the attorney's fees section.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.