Circuit Court for Montgomery County
Case No. 116938 FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3391

September Term, 2018

JAMES MORTON

v.

FIORINA KYRITSI

Kehoe,
Arthur,
Wells,
JJ.

Opinion by Kehoe, J.

Filed: April 29, 2020

On cross-motions to modify child support for their minor child, N., the Circuit Court for Montgomery County increased the monthly child support obligation of James Morton ("Father") and awarded Fiorina Kyritsi ("Mother") five months of child-support arrears. On appeal, Father presents the following questions for our review, which we have rephrased and consolidated:[1]

[1] The issues, as posed by Father, are:

1. Did the trial court err by calculating excessive child support and arrears in favor of [Mother] based on sworn false testimony and/or misleading documents submitted by [Mother] before and at trial?
2. Did the trial court err (independent of being misled with a sworn false financial statement and misleading documents at trial) by ordering excessive payments for child support and arrearages in a manner that violated the law. Specifically by:
    a) Ordering [Father] to pay 99.4% of the (claimed, though inaccurate) cost of 2017 aftercare arrears and not just his 65% obligation.
    b) Failing to apply any income to [Mother] when calculating child support arrears despite [Mother] earning $200,000 annually at the time.
    c) Miscalculating basic child support arrears by wrongly presuming sole custody to [Mother] who shared joint custody at the time.
    d) Arbitrarily ordering $910 in speech therapy arrears in excess of the actual $280 cost.
    e) Classifying speech therapy (an insurance reimbursed benefit) as an extraordinary medical expenses for use in calculating above guidelines child support and arrears.
    f) Violating joint legal custody by ordering [Father] to pay for private school given [that Mother] unilaterally enrolled the child in breach of the prior agreement and expressed representation to pursue public schooling only.

1. Did the trial court err in its calculation of arrears by: (a) failing to impute income to Mother, (b) basing its calculation on a finding that Mother had sole custody, and (c) awarding arrears of $910 for speech therapy?

2. Did the trial court err in awarding aftercare expenses and tuition for 2017 and 2018?

3. Did the trial court err in ordering Father to contribute to N.'s private-school tuition?

For the reasons set forth below, we affirm the judgment of the circuit court.

Background

Father and Mother were married in 2011 and have one child, N., born in November 2013. Both parents are physicians. Mother is a Greek citizen who was admitted to the United States for medical-residency training.

On September 24, 2015, the circuit court granted Father's request for a judgment of absolute divorce. The court awarded the parents joint legal custody of N. and granted Mother primary physical custody. The court ordered Father to pay child support of $3,133 per month, awarded Mother use and possession of the marital home for a period of nine months and a monetary award of $110,000, and ordered Father to pay $90,000 toward Mother's attorney's fees.

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g) Violating joint legal custody by tolerating [Mother] blocking [Father] from confirming expenses directly with the private school until after trial and after child support had been set.

h) Ordering ongoing payment for private school tuition and aftercare in excess of [Father's] 65% obligation.

i) Tolerating [Mother's] obstructive behavior and accepting blatantly false claims regarding expenses that interfered with the adversarial process on material issues in violation of equal application and protection of the laws.

On July 13, 2017, after a two-day hearing, the court granted Mother's motion for modification of visitation and permitted her to relocate to New York in order to accept a job at a hospital that would accommodate her visa status. The court permitted N. to remain in Mother's primary physical custody and modified Father's visitation schedule by providing Father with visitation once per month for a period of eight consecutive days, a period of six consecutive weeks during summer break, and an alternating-holiday schedule.

On December 20, 2017, and after she had moved to New York City, Mother requested a modification of child support due to increased living expenses and additional expenses for private-school tuition, after-school care, and speech therapy for N. Father opposed Mother's request for modification and moved to modify child support. Father sought a decrease in child support, arguing that Mother's increase in salary from unemployment to an income of $180,000 per year far exceeded any increase in N.'s expenses. Father also objected to Mother's enrollment of N. in a private school.

The circuit court conducted a three-day hearing on these motions in September 17, 2018. Father and Mother both testified and were represented by counsel. At the conclusion of the third day of hearings, the court delivered an oral ruling. The court found that there had been a material change in the parties' circumstances: specifically, Mother's relocation to and employment in New York City, Father's increased income, and the termination of Father's obligation to pay approximately $9,000 per month in connection with Mother's use and possession of the marital home.

The court considered testimony, financial statements, tax returns, pay stubs, W-2 forms and bank statements in evaluating the parties' relative financial statuses. The court noted that Father's income had varied. In some years, he earned over $400,000, which the court attributed to his efforts to pay his support obligation during the use and possession period. Recognizing that Father might not sustain his highest earning levels, the court estimated Father's income conservatively at $360,000 per year, and estimated Mother's income at $200,000 per year, resulting in a combined annual income of $560,000.

The court determined that $6,043, that is, 12.95 percent of the parents' combined monthly income, was attributable to N.'s basic needs. The court assigned 65% of the child's basic support obligation to Father, which amounted to $3,928 per month. The court allocated additional child support for private-school tuition for the 2018–2019 school year, speech therapy, and Mother's work-related child care.

Mother initially requested that the court award modified child support retroactive to the date of the filing of her request for modification, which was December 20, 2017. Mother subsequently amended her request, asking the court to award an amount "that would assist [her] in making monthly payments toward the outstanding debt for the 2017/2018 school year." The court awarded Mother child support arrears for the five months preceding the court's modification order to account for the "shortfall" in support for the expenses Mother had incurred while the motion was pending.

On October 30, 2018, the court entered an order modifying child support and access. The court ordered Father to pay monthly child support of $5,672, effective October 1, 2018

through May 1, 2019, calculated as follows: $3,928 for basic support; $934 for private-school tuition for the 2018–2019 school year; $182 for speech-therapy sessions, provided that Mother submitted documentation to Father showing that N. had attended the sessions twice weekly; and $650 for work-related child care. Father received a monthly credit of $22 for the child's health insurance.

The court ordered that the revised child-support award would be retroactive to May 1, 2018, resulting in five months of child-support arrears. The court calculated an arrearage of $12,695 through September 1, 2018, and ordered Father to pay an additional $529.96 per month as additional child support for a term of twenty-four months. The court also authorized wage garnishment in the event that Father accumulated arrears in excess of thirty days of support.

The court further ordered that beginning May 1, 2019, Father would be obligated to pay $4,602 in monthly child support calculated as follows: $3,928 for basic support; $182 for speech-therapy sessions, as long as Mother submitted documentation to Father showing that N. had attended the sessions twice weekly; and $650 for work-related child care. Father continued to receive a monthly credit of $22 for the child's health insurance.

Father moved for reconsideration, requesting that the court modify the order by making speech therapy a variable monthly payment, remove the term "arrearage" and eliminate the arrearage payments and wage-garnishment provision, order that Mother provide receipts for tuition payments, and eliminate Father's obligation to pay private-school tuition. The court granted Father's motion in part; it amended the order to include a condition that

Father's obligation to pay $934 per month in private-school tuition was conditioned on Mother's providing him with copies of the invoices for tuition. The court denied Father's remaining requests.

Father filed a timely notice of appeal.

Analysis

1. The standard of review

"Pursuant to Maryland Rule 8-131(c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." *Friedman v. Hannan*, 412 Md. 328, 335 (2010). "[W]e will not disturb a 'trial court's discretionary determination as to an appropriate award of child support absent legal error or abuse of discretion.'" *Ruiz v. Kinoshita*, 239 Md. App. 395, 425 (2018) (quoting *Ware v. Ware*, 131 Md. App. 207, 240 (2000)). "As long as the trial court's findings of facts are not clearly erroneous and the ultimate decision is not arbitrary, we will affirm it, even if we may have reached a different result." *Malin v. Mininberg*, 153 Md. App. 358, 415 (2003).

2. The trial court's calculation of Father's arrearages

Husband contends that the trial court erred in calculating arrearages by relying on what he characterizes as Mother's false testimony and misleading documents, failing to impute income to Mother, mistakenly finding that Mother had sole custody during the arrears period, and calculating arrears of $910 for speech therapy. These contentions are not persuasive.

Child-support awards are generally within the sound discretion of the trial court. *Karanikas v. Cartwright*, 209 Md. App. 571, 596 (2013). When the parents' combined adjusted income exceeds the child-support-guidelines limit of $15,000 per month, the circuit court has greater discretion in determining the child-support award. *Ruiz*, 239 Md. at 425; Md. Code, § 12-204(d) of the Family Law Article ("Fam. Law").[2]

When a court exercises its discretion in an above-guidelines case, "[s]everal factors are relevant including the parties' financial circumstances, the reasonable expenses of the child, and the parties' station in life, their age and physical condition, and expenses in educating the child ." *Smith v. Freeman*, 149 Md. App. 1, 20 (2002) (cleaned up). We have recognized that the relevant legislative history of Fam. Law § 12-204 and the considerable body of reported appellate opinions interpreting the statute "do not obscure the fact that the Legislature left the task of awards above the guidelines to the [trial court] precisely because such awards defied any simple mathematical solution." *Chimes v. Michael*, 131 Md. App. 271, 289 (2000) (quoting *Bagley v. Bagley*, 98 Md. App. 18, 39 (1993)).

Father contends that the circuit court erred in failing to include Mother's income (representing a 35 percent share of the parents' combined income) in the computation of arrearages. Father complains that he should have been responsible for only 65 percent of the $3,133 monthly support that he paid during the nine months prior to trial because Mother was earning income during that period, which should have reduced the amount of

[2] Fam. Law § 12-204(d) states: "If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support."

support that Father had paid. Father claims that he was entitled to a "credit" of $4,338 for the nine months that he "overpaid" child support by $482 each month.

Fam. Law § 12-104(b) "makes clear that it is within the trial court's discretion whether and how far to retroactively apply a modification of a party's child support obligation up to the date of the filing of the petition for said modification." *Tanis v. Crocker*, 110 Md. App. 559, 570 (1996). In the present case, Mother filed her motion for modification nine months before the modification hearing. The court awarded arrears for only five of those months, rather than the full nine months that had elapsed since the filing of Mother's motion for modification. In deciding to award only five months of arrears, the court stated that it was attempting to balance the fact that Father had previously paid reduced child support in light of the expenses he was paying during the use and possession period with the fact that Mother had also incurred additional expenses during the nine-month period.

The court first subtracted the amount of monthly support that Father had paid during the arrears period, $3,133, from the modified amount of monthly support, $5,672, and multiplying that difference ($2,539) by five months, for a total of $12,695. Though the court did not include Mother's income in its calculation of retroactive child support, the court's decision was to award only five months, and not nine months, of arrears.

As we have explained, whether to award retroactive child support is a matter for the trial court's discretion. A court abuses its discretion when the decision in question is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Sumpter v. Sumpter*, 436 Md. 74, 85 (2013)

(quoting *North v. North*, 102 Md. App. 1, 13–14 (1994)). In the present case, the trial court struck what we view as a reasonable balance between Mother's and Father's conflicting interests in light of their respective incomes. Mother's decision to move to New York City was a reasonable one and, more to the point, the court had previously ruled that it was in N.'s best interest to continue to reside with Mother. We recognize that there might be other reasonable ways to resolve the parties' disputes but that is often so in child custody and support cases. We cannot characterize the trial court's decision to be "beyond the fringe of what [we] deem minimally acceptable." And unless that threshold is crossed, we will not disturb the trial court's decision.

Father also contends that the court erred in failing to reduce the amount of basic child support awarded during the five-month period preceding the September 2018 hearing because Father and Mother had shared joint custody during that time, and the court erroneously based the modified basic child support amount on Mother's sole custody of N. But the court explained that it had considered the financial circumstances of each parent during the nine-month period before the hearing and attempted to balance those equities. Though Father enjoyed liberal visitation with N. until September 2018, the court was not obligated to calculate arrears on a joint-custody basis. Indeed, between July 2017 and September 2018, Mother had primary physical custody of N. in New York City. We note that in an above-guidelines case, "the court may employ any rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it." *Malin*, 153 Md. App. at 410 (internal quotation marks and citation

omitted). Under these circumstances, we cannot say that the circuit court abused its discretion in calculating child-support arrears.[3]

Father also challenges the circuit court's award of $910 in arrears for speech therapy, arguing that documentary evidence introduced at trial established that the actual cost of the speech therapy during the period in question was $280. Mother testified that N. was scheduled to attend two speech therapy sessions per week and that she paid $35 for each session, or $70 per week. Mother testified that she had initially been charged $70 per session, and she had included those charges in her March 17, 2018, financial statement, before learning that she was being overcharged. She stated that she subsequently received a refund of the overpayments On September 16, 2018, Mother submitted an amended financial statement, indicating the accurate charge of $35 per session.

The court recognized that the expense for speech therapy was subject to variation based on N.'s attendance at the therapy sessions. To accommodate this concern, the court ordered that Father's payment for speech therapy was conditioned on Mother's providing documentation to Father showing that N. had, in fact, attended the sessions twice weekly.

[3] There is another aspect to Father's argument that the trial court erred in its child support calculation "by wrongly presuming sole custody to [Mother] who shared joint custody at the time because [Father] had shared physical custody." Fam. Law§ 12-201(n) states that parents have "shared physical custody" when "each parent keeps the child . . . overnight for more than 35% of the year and . . . both parents contribute to the expenses of the child in addition to the payment of child support." If these criteria are satisfied, then, *in cases governed by the child support guidelines*, the obligation to pay child support is modified. *See* Fam. Law § 12-204(m). But this is and always has been an above-the-guidelines case.

Because the court ordered that Father pay for speech-therapy expenses that were actually incurred and documented, we find his argument that he was obligated to pay expenses that were not incurred to be without merit.[4]

3. The 2017 and 2018 aftercare expenses and tuition

Father argues that after September 2018 hearing, he obtained information from the private school showing that, contrary to Mother's testimony and financial statement, she did not pay aftercare expenses in 2017, and she inaccurately reported tuition and aftercare expenses for 2018. Whatever the merits of these contentions might be, we will not consider them because they were not presented to the trial court. Md. Rule 8-131(a) states that, other than certain jurisdictional problems, "ordinarily, the appellate court will not decide [an] issue unless it plainly appears by the record to have been raised or decided by the trial court." This rule ensures fairness for all parties by requiring them to present their positions to the trial court so that the trial court has an opportunity to rule on the issues. *Wajer v. Baltimore Gas and Elec. Co.*, 157 Md. App. 228, 236–37 (2004). Md. Rule 8-131(a)

[4] Father also argues that the circuit court erred in finding that speech therapy qualified as an extraordinary medical expense under Fam. Law § 12-201(g). Even if we thought that this contention had any merit—and we don't because there was substantial evidence to support the circuit court's conclusion—Father's current views are inconsistent with the position that he took before the circuit court. In that proceeding, Father's counsel stated in his closing argument that speech therapy "probably now fits the definition of [an extraordinary medical expense]" because "[i]t's only now this month that the child is incurring $35 twice per week." Father's counsel also acknowledged that Father had conceded that N. should be receiving speech therapy twice per week and agreed that speech therapy was "an appropriate expense." A trial court doesn't err by making findings that are consistent with what both parties are saying are the facts.

applies equally to self-represented litigants. *See Tretick v. Layman*, 95 Md. App. 62, 68 (1993).

4. The court's allocation of N.'s tuition

Father argues that the circuit court "overreached its authority" by ordering him to contribute to N.'s private-school tuition. He argues that because he and Mother shared joint legal custody of N., and he had not agreed with Mother's decision to enroll N. in private school, the court erred in including private-school tuition in Father's child support obligation.

At the September 2018 hearing, Mother testified that she had relocated to New York City in July 2017 and began working as a primary-care doctor for Mount Sinai Health System in October 2017. She testified that, though she had intended to enroll N. in public preschool, she was unable to obtain a position for her in public school before the 2017–2018 school year began. As a result, she enrolled N. at a private preschool operated by the church that she and N. attended, located two blocks from their home.

According to Mother, N. suffered separation anxiety and had difficulty adjusting to preschool. N. did not enjoy attending school until the last day of the school year. Based on recommendations from N.'s teachers and Mother's own observations, she decided that it was in N.'s best interest to remain at the same school for kindergarten to provide N. with a stable and familiar school environment. Mother testified that N. had since done well in kindergarten, showing no signs of anxiety.

Father testified that before N.'s birth, he and Mother had discussed his strong

preference for public schooling over private schooling. Father stated that he had asked Mother to secure public schooling for N. in New York before she moved there. Father located public preschools that he suggested N. attend, but Mother did not think those schools were appropriate. Mother had informed him that she planned to enroll N. in the private school for one year only. Before the start of N.'s second year at the school, Father had determined that there was availability for N. at the public school in her district. Father disagreed with Mother that it was better for N. to stay in the private school for kindergarten for purposes of stability.

Based on the evidence presented at the hearing, Father contends that the circuit court erred in applying the factors set forth in *Witt v. Restanio*, 118 Md. App. 155, 169–70 (1997), resulting in the erroneous determination that he was obligated to contribute to N.'s private-school tuition. Again, Husband's arguments are not persuasive.

In *Witt*, we explained that trial courts should consider a number of factors when determining whether a child has a "particular educational need" to attend or to remain at a private school, including how many years the child has attended the school; the child's school performance; any family tradition of attending the particular school; any agreement between the parents regarding schooling; whether the parents could afford the tuition; and any other factor impacting the child's best interest. 118 Md. App. at 169–72. We review the trial court's first-level findings of fact as to the *Witt* factors for clear error. *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002).

Appling the *Witt* factors, the court found that N.'s history of attendance at the private school for one year, though not wholly insignificant, was not a determinative factor. The court explained that a component of the school history factor also included considering N.'s need for stability and continuity "during the difficult time of the parent's separation and divorce." *Witt*, 118 Md. App. at 170. The court observed that Mother's main reason for keeping N. enrolled in the private school was the child's need for stability and continuity, which, according to Mother and N.'s teachers, was best served by continuing at the school.

The court also found that, though it was difficult to evaluate academic performance in preschool, there was evidence indicating that N. had progressed positively at the school in her first year. The court noted there was no family connection at the school. The court acknowledged that Father and Mother had discussed Father's preference for public school. It found that Mother had made a good-faith effort to enroll N. in public school, but that she had difficulty finding availability in the public preschools. With respect to the parents' ability to pay for the schooling, the court found that they could afford to send N. to the private school for kindergarten. Ultimately, the court determined that N.'s need for stability and continuity were critical to her well-being and therefore it was in N.'s best interest to remain at the school for kindergarten. In short, our review of the record shows that the circuit court conducted a considered analysis of the *Witt* factors and the evidence presented.

The parties are not the first set of parents, nor will they be the last, to disagree as to where and how their child should be educated. When such disagreements come to a

Maryland court for resolution, the court will give due weight to the parties' preferences, their family traditions, and their economic circumstances. But the lodestone of the court's analysis is—and should always be—the best interest of the child. Thus, regardless of the depth and sincerity of Father's preference for public school education, the trial court did not abuse its discretion by deciding that N. should remain in her current school environment. We find no error in the court's findings as to the *Witt* factors and no abuse of discretion in its decision obligating Father to contribute to N.'s tuition at the private school.

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