

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2034

September Term, 2014

ANDREW R. STEWART

v.

COKE M. STEWART

Zarnoch,
Hotten,
Reed,

JJ.

Opinion by Zarnoch, J.

Filed: June 16, 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.

This child custody case centers solely on the issue of attorney's fees. After awarding Appellee Coke Stewart sole physical and legal custody of the parties' child, the Circuit Court for Montgomery County also awarded her \$30,000 in attorney's fees. Appellant Andrew Stewart contends that the circuit court failed to make the required statutory factual findings under Md. Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 12-103. We agree with appellant and vacate the circuit court's award of attorney's fees. We remand this case to the circuit court for further proceedings consistent with this opinion.

FACTS AND LEGAL PROCEEDINGS

Andrew and Coke Stewart were married on December 31, 1994 and have one son, Miles, who was born on November 17, 2003. The couple initially separated in March 2009 and executed a separation agreement shortly thereafter on December 9, 2009. The 2009 agreement included shared legal and physical custody of the couple's son: "Andrew and Coke shall have joint legal custody of Miles and shall therefore have joint decision-making authority as to all important parental decisions affecting Miles' health, education, religion, and general welfare."

The agreement created a residential schedule for Miles based on three days with Andrew and four days with Coke. The agreement acknowledged that the parties "may need to revisit the allocation of nights and weekends under the custody schedule" if and when certain events occurred, including professional obligations and Miles' completion of elementary school. The provision in the separation agreement relating to attorney fees provided that "[i]n the event the parties cannot reach an agreement through mediation, and the matter is litigated, the substantially prevailing party shall be entitled to reasonable

attorney fees and costs.” The parties were divorced on June 17, 2010. The entry of Absolute Divorce incorporated the couple’s December 2009 custody agreement, but did not merge the two documents.

Before their divorce, the parties resided in Bethesda in order to allow Miles to attend highly sought-after Montgomery County schools. After the parties were legally divorced, both parties remarried and disagreements over Miles’ residential schedule began to arise. In 2012, Coke and her husband relocated to McLean, Virginia and the parties began to argue about Miles’ future schooling and his daily schedule. There were multiple attempts to mediate these disputes, but no lasting custody plan was created.

On October 30, 2013, Andrew filed a motion to modify the custody schedule, requesting that the court provide the parties with a predictable schedule for custody. This motion did not include any changes to the custody arrangements other than the schedule. Coke opposed the motion and filed a separate Motion to Enforce Separation, Custody, and Property Settlement Agreement, along with a Motion for Contempt. On January 3, 2014, Coke filed a Verified Counter-Motion to Modify Separation, Custody, Support, and Property Settlement Agreement, in which she requested sole physical and legal custody.

After two failed attempts on May 19 and June 24 to hold the trial, the case was finally set for July 29, 2014 and the trial lasted for three days. On August 12, 2014, the circuit court entered a written order, which granted Coke sole legal and physical custody of the couple’s son. The circuit court also ordered Andrew to pay Coke’s attorney’s fees in the amount of \$30,000:

I don't know how much money each of you has spent, but I know you've each spent a lot of money with this litigation and, and what I'm going to say to you, sir, is that – yes. . . . this litigation was more complicated than it needed to be and in large part that's because of the way that you participated. So as a result, generally speaking, I don't know if, attorney's fees on both sides were contentious, but in this case I am going to, I am going to order that there will be, you will be, sir, assessed a contribution to Ms. Stewart's attorney's fees of \$30,000.

Andrew filed a motion to alter or amend the award of attorney's fees in which the sole ground on which he objected was the lack of evidence before the court:

No evidence was before the Court of the parties' financial status or each party's needs. Neither party filed nor offered into evidence a financial statement. No evidence was before the Court as to either party's assets or Ms. Stewart's income. Md. Code Ann. Fam. Law § 12-103 does not permit a Court to make an award of attorney's fees without consideration of such evidence.

This motion was denied by the circuit court on October 29, 2014. Andrew then filed his appeal to this Court on the limited basis of attorney's fees.

QUESTIONS PRESENTED¹

Appellant presents three questions for our review, which we have consolidated into the following question:

¹ Appellant's original questions were:

1. Did the trial court err in ordering Andrew to pay \$30,000 of Coke's attorney's fees when it failed to make required findings related to that award and when it did not have sufficient evidence before it to make such necessary findings?

2. Did the trial court abuse its discretion when it awarded Coke any amount of attorney's fees when 1) Andrew's fees were higher than necessary due in part to a judicial officer's personal decisions, which caused a costly mistrial; 2) the majority of both parties' fees were incurred due to Coke's largely unmeritorious filings, not Andrew's; and 3) Coke unreasonably and unnecessarily abused the judicial process?

(continued...)

Did the circuit court abuse its discretion when it required Andrew to pay \$30,000 to Coke in attorney's fees?

Answering the above question in the affirmative, we remand this case to the circuit court for further proceedings consistent with this opinion.

STANDARD OF REVIEW

We review a circuit court's award of attorneys' fees for an abuse of discretion. *See Richards v. Richards*, 166 Md. App. 263, 285 (2005). An award "of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (Citations omitted).

DISCUSSION

Andrew contends that the circuit court did not make the required factual findings to award Coke \$30,000 in attorney's fees. Andrew further contends that there was no evidence before the court that could have led to a finding that Andrew lacked substantial justification for bringing the case or that Coke had a financial need for an award of attorney's fees. Coke responds that as the prevailing party, she is entitled to attorney's fees under the parties' separation agreement. She further argues that Andrew was not substantially justified in bringing his cause of action because his continued attempts to

(...continued)

3. Did the trial court abuse its discretion when it awarded Coke attorney's fees in the specific amount of \$30,000 when 1) the trial court failed to make any findings articulating its basis for awarding that fee amount; 2) there was no evidence that Andrew had the ability to pay the award; 3) that amount represented approximately one quarter of Andrew's gross annual income; and 4) that amount exceeded the amount of fees that Coke had actually paid by \$8,185?

Some of these issues were not properly preserved for our review. *See infra* n.2.

modify the child custody schedule were in bad faith under Md. Rule 1-341. Additionally, she responds that the evidence before the court showed the parties' relative financial status and needs. Therefore, Coke argues that the circuit court was correct to award her \$30,000 towards her attorney's fees.

Attorneys' fees in a child custody modification case can be awarded pursuant to FL § 12-103. This section "is an exception to the 'American rule,' the general rule in Maryland that requires litigants to be responsible for their own legal fees." *Davis v. Petito*, 425 Md. 191, 200 (2012). These decisions "rest solely in the discretion of the trial judge [and t]he proper exercise of such discretion is determined by evaluating the judge's application of the statutory criteria set forth [in FL § 12-103(b)] as well as the consideration of the facts of the particular case." *Petrini*, 336 Md. at 468 (Citations omitted). The FL § 12-103 (b) factors include: "(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." If the court finds that there "was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees." FL § 12-103(c).

When a party prevails on the merits, the result "carries with it an implicit finding of very substantial justification." *Davis*, 425 Md. at 203 (Citation omitted). Therefore, substantial justification is directly related to the "merits of the case against which the judge must assess whether each party's position was reasonable." *Id.* at 204. The circuit court

must then proceed “to review the reasonableness of the attorneys’ fees, and the financial status and needs of each party before ordering an award under Section 12–103(b).” *Id.*

The statute requires that the circuit court balance the “financial status and needs of each of the parties . . . in order to determine ability to pay the award to the other; a comparison of incomes is not enough.” *Id.* at 205 (Citation omitted). Typically, after the trial court looks at “the parties’ needs and resources; their financial status; the labor, skill, and time expended by each party’s attorney; and the benefit to the child of awarding attorney’s fees to [one party],” the court will conclude whether an award of attorney’s fees is justified and necessary. *Petrini*, 336 Md. at 468 (Citations omitted).

In a similar case, we vacated an attorney’s fee award when we were “unable to discern whether the trial court considered the then current ability of appellant to pay counsel fees in the sum of \$15,000.” *Painter v. Painter*, 113 Md. App. 504, 529 (1997). It was clear that the circuit court had “addressed the needs and financial status of appellee” after hearing evidence of the amount she paid in attorney’s fees. *Id.* However, this Court was required to vacate the award because we could not “discern upon which basis the award of counsel fees was made.” *Id.* at 528. We noted that if the circuit court makes an award of attorneys’ fees, that the court “ought to state the basis for [the] decision so it can be reviewed, if necessary, on appeal.” *Randolph v. Randolph*, 67 Md. App. 577, 589 (1986)²;

² In *Randolph*, we were asked to review the reasonableness of the attorneys’ fees. See 67 Md. App. at 588-89. Here, Andrew lodged a general objection at the end of the circuit court’s oral ruling and filed a motion to alter or amend the order shortly after the circuit court’s written order. His argument against the attorney’s fees award did not question the reasonableness of the award, but attacked the sufficiency of the circuit court’s factual findings as related to the parties’ finances.

see also Ledvinka v. Ledvinka, 154 Md. App. 420, 432-33 (2003) (“the trial court failed to make findings of facts to justify the award of attorney’s fees [and a]bsent the court stating the basis for its determination, this Court cannot properly review the decision”).

Here, the required statutory analysis was not conducted and as a result, we are unable to review the basis for the circuit court’s conclusion. With respect to the attorney’s fee award, the circuit court’s ruling stated:

I don’t know how much money each of you has spent, but I know you’ve each spent a lot of money with this litigation . . . as a result, generally speaking, I don’t know if, attorney’s fees on both sides were contentious, but in this case I am going to, I am going to order that there will be, you will be, sir, assess a contribution to Ms. Stewart’s attorney’s fees of \$30,000.

Both parties in their pleadings before the circuit court did request attorneys’ fees and costs to be assessed against the other party, but the evidence before the circuit court did not include detailed financial information. This lack of evidence prevents us from being able to evaluate the correctness of the circuit court’s conclusion regarding the appropriateness of any attorneys’ fees.

The record is devoid of evidence relating to FL § 12-103(b)’s first two factors: the financial status and needs of each party. While there is significant evidence about the parties’ employment as practicing government attorneys, the child’s activities, and the general nature of the parties’ lifestyles, the circuit court is not permitted to infer the financial status or needs of the parties. The only information provided was Andrew’s income of \$157,000 and some bills provided by the respective attorneys. Even in cases where the circuit court is “presented with significant information regarding the financial status of the parties [if] there is no indication that the court expressly considered any of the

factors listed in FL § 12–103(b)” we will have to vacate any award. *See Gillespie v. Gillespie*, 206 Md. App. 146, 178-79 (2012). Therefore, without additional evidence before the court, any attorney’s fee award would not be proper under the statutory language.

The circuit court’s conclusion that Andrew made the litigation “more complicated than it needed to be” based on the way he “participated” would only go to the substantial justification factor of FL § 12-103(b). Coke argues in her response to Andrew’s Motion to Alter or Amend that this statement exhibits the circuit court’s reliance on Md. Rule 1-341’s bad faith provision as opposed to FL § 12-103(b) factors. Md. Rule 1-341(a) provides that:

[i]n any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys’ fees, incurred by the adverse party in opposing it.

However, while the circuit court may award attorneys’ fees when it concludes that one party acted in bad faith, Md. Rule 1-341(b)(3) still requires the submission of financial evidence relating to the amount of work performed and the rate charged by the attorney.³

³ The rule requires that the request for attorneys’ fee contain:

- (i) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task;
- (ii) the amount or rate charged or agreed to in writing by the requesting party and the attorney;
- (iii) the attorney’s customary fee for similar legal services;
- (iv) the customary fee prevailing in the attorney’s legal community for similar legal services;
- (v) the fee customarily charged for similar legal services in the county where the action is pending; and

(continued...)

By only stating that Andrew’s participation made the litigation “more complicated,” the circuit court did not provide the required factual findings under Md. Rule 1-341. *See Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267-68 (1991) (explaining that the circuit court must make two separate findings: that the “proceeding was maintained or defended in bad faith” and that it warrants a sanction); *see also Talley v. Talley*, 317 Md. 428, 438 (1989) (A sanction under Md. Rule 1-341 “is an extraordinary remedy, intended to reach only intentional misconduct.”).

Here, the language of the parties’ agreement provides an additional avenue for the court to award attorney’s fees to the prevailing party.⁴ The agreement requires that the parties mediate prior to litigating any issues with the agreement and then if the issue reaches litigation, “the substantially prevailing party shall be entitled to reasonable attorney fees and costs.” There is no dispute over who was the prevailing party, as Coke was awarded sole legal and physical custody of Miles. The parties did mediate over the child’s schedule,

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(vi) any additional relevant factors that the requesting party wishes to bring to the court’s attention.

Md. Rule 1-341(b)(3)(A).

⁴ A change to the Maryland rules, effective January 1, 2014, provided procedures for awarding attorney’s fees pursuant to contracts. This case was filed prior to the enactment of these rules so these changes do not govern our analysis. *See* Md. Rule 2-701 *et seq.* However, even under Md. Rule 2-705(f)(2), a claim for attorney’s fees must be accompanied by evidence that is “sufficient to demonstrate that the amount claimed is reasonable and does not exceed the amount that the claiming party has agreed to pay that party’s attorney.”

but there is no evidence to show that the parties mediated over a change in custody. Thus, the agreement could not have authorized the attorney's fee award here.

Without additional findings from the circuit court, we cannot determine the basis for the circuit court's ruling. Upon remand, it is within the circuit court's discretion whether to take additional evidence to make a determination about the appropriateness of an attorney's fee award or to resolve the matter on the existing record.⁵ Accordingly, we remand for the limited purpose of making the required factual findings under FL § 12-103(b) and Md. Rule 1-341.

**JUDGMENT OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY AWARDED
ATTORNEY'S FEES VACATED. CASE
REMANDED FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION. COSTS
TO BE PAID BY APPELLEE.**

⁵ Coke noted at oral argument before this Court that because child support was not at issue, there were no detailed financial records entered into evidence. However, both parties requested attorneys' fees and it would have been appropriate to have this information in the record in order for the circuit court to properly review their claims under any of the statutory fee-shifting provisions including FL § 12-103(b).