UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 877

September Term, 2015

ROD SCHWARTZ

v.

FREEDA ISAAC

Arthur,
Reed,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 23, 2017

On June 30, 2015, the Circuit Court for Prince George's County issued an order continuing sole legal and physical custody of J., a minor, with his mother, Freeda Isaac, appellee ("the mother"), and modifying visitation between J. and his father, Rod Schwartz, appellant ("the father"), from the visitation schedule in previous orders. The father filed an appeal from the court's order, presenting three questions for our review, which we have rephrased as follows:[1]

1. Did the court err in issuing the June 30, 2015 order when there was no request for modification before the court?

2. Did the court err in denying the father's motion for the recusal of Judge El-Amin?

3. Did the court err in conducting a hearing on the father's second amended petition for contempt when the father had filed a notice of voluntary dismissal?

We shall conclude that the court erred in modifying visitation, and accordingly, we shall vacate the court's order dated June 30, 2015. We shall further conclude that the issue of recusal is not properly before us in this interlocutory appeal. The third issue is moot.

[1] The questions presented in the father's brief were worded as follows:

1. Did the court err in conducting an unscheduled *ex parte* hearing on a [father's] petition to modify child custody that was already denied and was on *in banc* appeal, without notice to [father], and then granting relief in favor of [mother] to effectively terminate [father's] parental rights?

2. Did the court err in not recusing the assigned judge where the assigned judge received his "orientation" to the case from a disqualified judge, and thereafter made decisions exhibiting bias?

3. Did the court err in proceeding *ex parte* on [father's] petition for contempt where [father] filed a voluntary notice of dismissal without prejudice prior to the filing of a response?

FACTS AND PROCEEDINGS

Much of the fifteen-year history of this custody case is not relevant to the issues properly before us in this appeal. Accordingly, we shall recite only those facts that are pertinent to our review.

J. was born in 1999. Apparently, the underlying custody litigation was initiated by the father in 2000. Based on the docket entries that were included in the record extract filed in connection with this appeal, it appears that, in December 2000, a consent order was entered which provided that the parties had joint legal custody of J., and that the mother had sole physical custody. In June 2002, an order was entered, granting the mother sole legal custody and primary physical custody of J., and establishing a schedule of visitation for the father. In March 2004, the mother was granted sole legal and sole physical custody of J., and it appears that the mother has retained sole legal and physical custody of J. since that time. The father's visitation schedule has been modified over the years, but an order of the circuit court dated January 2014, which appears to be the last order that addressed visitation, before the entry of the order at issue in this appeal, reflects that the father had routine visitation with J. every other weekend, five weeks in the summer, and alternating holidays.

In June 2014, following a hearing on a domestic violence petition filed by the mother, the court found that the father had committed an act of domestic violence against J., and issued a protective order. The terms of the protective order provided, *inter alia*, that the father would have only four hours of supervised visitation with J. per week at the

Hyattsville Child Access Center. The protective order was to be effective for one year, with an expiration date of June 23, 2015.

In October 2014, the father filed a petition to modify custody, requesting *inter alia*, that he be awarded sole physical and legal custody of J. The circuit court denied the petition to modify custody in a written order dated May 7, 2015.

The father also filed, in October 2014, a "Second Amended Petition for Contempt" ("contempt petition"), alleging that the mother had violated the court's visitation order by denying the father access to J. during the father's scheduled visitation on various dates between February and June, 2014. In addition to requesting that the court find the mother in contempt of the court's order and assess fines for the alleged contempt, the contempt petition included a request to modify custody and grant the father sole physical and legal custody of J.

A hearing on the contempt petition was scheduled for March 30, 2015. The father filed a motion to postpone the hearing. By order dated March 27, 2015, the court granted the motion and ordered that the hearing on the contempt petition be scheduled for June 23, 2015.

On May 22, 2015, one month before the scheduled contempt hearing, the father filed a "Notice of Dismissal Without Prejudice" of the contempt petition.[2] On June 11, 2015, the court signed the proposed order that the father submitted with the notice of dismissal

[2] The Notice of Voluntary Dismissal also included a dismissal of the petition to modify custody (which the court had already denied). The father subsequently withdrew the request to dismiss the petition to modify custody on May 28, 2015.

of the contempt petition, but stamped it "TO BE HEARD AT TRIAL," presumably referring to the contempt hearing that was scheduled for June 23, 2015, as there was no trial date or other court date scheduled.

On June 23, 2015, the mother appeared at the hearing, but the father did not. The mother's attorney noted that the protective order was due to expire that day, and expressed his belief that the court had purposefully rescheduled the contempt hearing for that day, when it granted the father's motion to postpone the hearing, in order "to ensure that there [was] some visitation order in place." The court stated that it was "prepared today to revisit the issue of access" and read aloud from a report that had been sent to the court, from a social worker, who noted that the father had discontinued participation in the court-ordered supervised visitation with J., and had attempted to get J. to meet with him in a non-supervised setting, in violation of the court's order.

The court then brought up the father's petition for contempt, and noting that the father had failed to appear, asked if there was a motion. The mother made an oral motion to dismiss the contempt petition, which the court granted. The court then moved on to the issue of access and visitation, and asked the mother's attorney for a summary of J.'s progress. The mother's attorney requested that the court "maintain the status quo of no visitation," and review it at a hearing on a petition for contempt that the mother had filed, which was scheduled to be heard the following month.

The court asked the mother's attorney, "if the protective order is dismissed and [the mother] doesn't reapply for an extension of it, what would be the legal mechanism for me

to continue to deny him visitation[?]" The mother's attorney represented that the father's motion to modify custody was still before the court.[3]

After considering the factors to be taken into account when making a child custody determination,[4] the court stated it would order that the mother would have sole legal and physical custody of J., and that all of the father's visitation and/or access would be at the mother's "sole but reasonable discretion, and also with J.'s input[.]" The court then memorialized its ruling in the written order which is the subject of this appeal, which provides, in pertinent part:

> **ORDERED**, that the [father] shall have limited access/visitation with the parties' minor child as set forth herein below; and it is further
>
> **ORDERED**, the aforementioned access/visitation between the minor child and the [father] shall be at the sole, but reasonable, discretion of the [mother]; however, when making her decision regarding access/visitation, the [mother] shall factor in the minor child's opinions and preference[.]

DISCUSSION

I.

"It is clear that if a court is holding a hearing at which it will, or may, determine custody issues, a parent with custodial rights, or one who has the right to claim custody, must be notified that such an issue may be the subject of a hearing." *Van Schaik v. Van*

[3] The mother's attorney appears to be referring to the father's petition to modify custody, which was denied in May 2015, and contrary to the attorney's representation, was no longer before the court.

[4] *See generally Taylor v. Taylor*, 306 Md. 290, 303-11 (1986).

Schaik, 90 Md. App. 725, 738-39 (1992).[5] In *Van Schaik*, the trial court sent notice to the parents, who shared joint custody of their minor children, that a "HEARING ON VISITATION AND CHILD'S POSSESSIONS" had been scheduled for a certain date. *Id.* at 730. Mr. Van Schaik, who did not seriously contest visitation and property issues, decided he would not need assistance of counsel at the hearing, and appeared *pro se*. *Id.* At the conclusion of the hearing, the trial court terminated Mr. Van Schaik's joint custody rights, and he appealed. *Id.* We vacated the court's order, holding that due process was denied because neither parent had asked for a change in custody, or for a custody determination, and the notice given did not notify either parent that the court was contemplating making a custody decision. *Id*. at 739.

Similarly, in the instant case, there was no request to modify custody before the court at the hearing on June 23, 2015. The father's petition to modify custody, which was filed on October 22, 2014, had been denied by the court when it granted the mother's motion to dismiss or, in the alternative, motion for summary judgment on May 7, 2015. And, although a request to modify custody was included in the father's "Second Amended Petition for Contempt," which was scheduled for a show cause hearing on June 23, 2015, that request was dismissed, whether by the father's notice of voluntary dismissal of the contempt petition, or upon the mother's oral motion to dismiss. Consequently, there was

[5] "'Child custody determination' means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." Md. Code (1984, 2012 Repl. Vol), Family Law Article, § 9.5-101(d)(1) (emphasis added).

no request for modification of custody pending before the court when the court made its ruling.

Nor is there any indication in the record that the father was given notice that the hearing would address anything other than his petition for contempt. The only notice to the parties as to what matters the court would address at the hearing on June 23, 2015 appears to be the court's order dated March 27, 2015, granting the father's request for a postponement of the contempt hearing on March 30, 2015, and directing the Calendar Management Office to reschedule it on June 23, 2015. We see nothing in the record that suggests that the father had notice that the court intended to "revisit the issue of access" at the hearing, or that it would make a custody determination.

Accordingly, because there was no request for modification of custody or visitation before the court, and because the parties did not have notice that the court would address the issue of access or visitation at the June 23, 2015 hearing, the court erred in issuing an order modifying custody to change the father's visitation from the schedule included in previous orders, to "limited access/visitation" "at the sole but reasonable discretion" of the mother. *See also*, *Burdick v. Brooks*, 160 Md. App. 519, 526-27 (2004) (holding that parent's due process was denied when court modified custody at a status conference, where there was no notice that court would be making a custody determination).

II.

"The decision to recuse is interlocutory, and therefore, is not subject to immediate appeal." *Doering v. Fader*, 316 Md. 351, 360 (1989). *See also Breuer v. Flynn*, 64 Md.

App. 409, 415 (1985) (holding that a trial judge's refusal to disqualify or recuse himself is not "the type of interlocutory order from which a party may immediately enter an appeal.")

During the course of this litigation, the father filed several motions to recuse Judge El Amin, all of which were denied. In urging error in this Court, the father refers to "motions to disqualify," without specifying a particular motion or order. With respect to the issue of appealability, the father suggests that, because the circuit court's interlocutory order modifying visitation is, by statute, subject to immediate appeal,[6] the issue of recusal can be reviewed in conjunction with that ruling. Although the father does not specify a particular order denying a motion to recuse, we interpret his argument as relating to an order dated October 28, 2014, denying a motion to recuse.

Preliminarily, we note that, to the extent appellant argues error in denying recusal as a reason to vacate the order dated June 30, 2015, we need not address it because we have granted relief on another ground.

Regardless, the issue is not properly before us. "[A] non-appealable order may not be combined with an appealable interlocutory order so as to confer jurisdiction upon this Court." *Forward v. McNeily*, 148 Md. App. 290, 296, n.2 (2002) (citation omitted).

In light of the above, we shall treat the father's request relating to recusal as a request that, on remand, we direct the circuit court to assign the case to a different judge. This we

[6] Md. Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Article, § 12-303(x), allows an appeal from an interlocutory order "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order[.]"

decline to do. The Administrative Judge for the circuit court is in the best position to decide whether the case should be reassigned for consideration of any further proceedings.

III.

We need not decide the issue of whether the court erred in hearing and deciding the mother's motion to dismiss the father's Second Amended Petition for Contempt. When the court granted the motion, the dismissal was without prejudice, which is the same outcome that the father intended when he filed his notice of voluntary dismissal without prejudice. *See* Md. Rule 2-506(d) ("Unless otherwise specified in the notice of dismissal, stipulation, or order of court, a dismissal is without prejudice[.]") Accordingly, the issue is moot. *See Thana v. Bd. of License Comm'rs for Charles County*, 226 Md. App. 555, 567 ("[a] case is moot when there is no longer any existing controversy between the parties at the time that the case is before the court, or when the court can no longer fashion an effective remedy.") (citation omitted), *cert. denied*, 448 Md. 32 (2016).

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY DATED JUNE 30, 2015, VACATED. COSTS TO BE PAID FIFTY PERCENT BY APPELLANT AND FIFTY PERCENT BY APPELLEE.