UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1482

September Term, 2016

JIMMIE E. CUMMINGS, JR.

v.

KATHLEEN SUSOR

Leahy,
Beachley,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: May 5, 2017

*This is an unreported opinion, and 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 is an appeal from an order granting modification of a visitation schedule and a finding of contempt by the Circuit Court for Baltimore County. Appellant Jimmie E. Cummings and appellee Kathleen Susor are divorced parents who share custody of their three minor children. Appellee filed a Petition for Contempt and for Modification, in which she claimed appellant was in violation of the court's final divorce decree by failing to make court ordered payments and, further, requested that his visitation be modified as a result of her move to another state. Following a hearing on August 18, 2016, the circuit court issued a written Ruling and Order which found appellant in contempt and modified his visitation.

On appeal, appellant presents the following questions for our review:

1. Whether the trial court committed legal error by issuing an order modifying Father's custody and visitation with the children as part of a constructive civil contempt action?

2. Whether the trial court impermissibly modified the prior custody/visitation order?

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

BACKGROUND

Jimmie E. Cummings and Kathleen Susor were married on November 11, 2000. During the marriage, they had three sons: William Lindsey, born in 2002, Nathaniel James, born in 2005, and Andrew Reid, born in 2008. As of August 2006, the family resided in Catonsville, Maryland.

The parties filed for divorce in 2014 in the Circuit Court for Baltimore County and a merits hearing was held in September of 2015. On November 5, 2015, the court issued its written Opinion and Order, which awarded the parties joint legal custody. Appellee was granted primary physical custody of the three children and exclusive use of the family

home for a period of time. Appellant was ordered to make certain payments, including the home mortgage loan installments, alimony, and child support payments. The order also included a visitation schedule. Relevant to these proceedings, appellant was awarded overnight visits every Thursday and alternating weekends from Friday through Monday.

On June 6, 2016, appellee filed a Petition for Contempt and for Modification. She alleged that appellant had failed to make the required payments and requested a modification of appellant's visitation schedule. Appellee averred that she had acquired a full-time job in York, Pennsylvania, and that it was in the best interest of the children to relocate there. She also requested she be awarded full custody. A show cause order dated June 22, 2016, was issued by the court, ordering appellant to appear on August 18, 2016.

At the August 18, 2016 hearing, the court initially noted that the proceeding would address both the petition for contempt and the request for modification. No objection was lodged by either party.

Appellee testified that she began her employment in York, Pennsylvania in December of 2015, and that the commute was approximately an hour to an hour and a half. She further testified that it was not until she learned that the family home would be sold at a foreclosure sale on August 18 that she decided to relocate the family to York. Appellee stated that she hired an attorney to try to modify the loan payments based on her new income, or otherwise make an arrangement with the bank, but that appellant's failure to provide documents had prevented any resolution. Appellee continued that she had signed a lease for a new home in York the Friday before trial, and had been able to enroll the children in schools there on August 11th.

Appellee also testified that she attempted to discuss the relocation with appellant, but he refused to do so. Her email to appellant informing him of the children's enrollment was entered into evidence. She stated that she believed it was in the children's best interest to move to York before the beginning of the school year, since the future of the family home was uncertain.

Appellant testified that he had filed for bankruptcy to prevent the sale of the home, scheduled for the same day as the hearing, and had entered into negotiations with the bank. He denied that appellee had attempted to discuss the relocation with him, but stated that he was made aware of the relocation when appellee filed her motion. Initially, appellant testified he believed it was in the best interest of the children to remain in the marital home. Later, the Court had the following direct exchange with appellant:

> THE COURT: Mr. Cummings, the question that I have concerns the visitation access issue that has been presented before me. Understanding that the boys are now in York, Pennsylvania, regardless of the future, but at this time that is where they are, understanding that your interest would be to maintain your access with the boys as it is, am I hearing that correctly?
>
> [APPELLANT]: Yes, but I would prefer if they would be back in their schools –
>
> THE COURT: I understand that. But I'm saying as it stands now, you still would wish to have your Thursday nights; is that correct?
>
> …
>
> [APPELLANT]: Yes, I would.
>
> THE COURT: Do you believe that it would be in the best interests of the boys…for them to essentially have Thursday nights with you, understanding that they would have to be in school – this is during the school year primarily, that they would have to be in school on Friday morning and the transportation

> that would be involved from you being back in the family home in Catonsville to York, Pennsylvania?
>
> [APPELLANT]: No. I sacrifice for my kids, so I agree, that would not be in the best interest of the kids.

Following the close of evidence and argument of counsel, the matter was taken under advisement. On September 9, 2016, the court issued a written Ruling and Order, finding appellant in contempt for non-payment, and, further, modified appellant's visitation. The court held that appellee's move to York, Pennsylvania, constituted a material change in circumstance, and that it was in the best interest of the children to modify appellant's visitation. Appellant was granted visitation on alternate weekends, from Friday to Sunday during the school year. The court then stated that the visitation schedule for the summer months would be addressed at a later date. No modification was made as to custody.

This appeal followed.

STANDARD OF REVIEW

Maryland Rule 8-131(c) states

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

DISCUSSION

I. The court did not err by issuing an order modifying Appellant's visitation with the children.

Appellant argues that the circuit court committed legal error "[i]n ordering the modification of custody as a part of a show cause hearing" for a civil contempt action. In

our view, appellant has not properly preserved his contention that it was impermissible for the court to consider both matters, or that his due process rights were violated as a result. When the matter was heard, appellant did not lodge an objection to the nature of the proceedings, nor did he request a continuance or otherwise indicate that he was unaware of the issues before the court. However, assuming, *arguendo*, that appellant had properly preserved the issue, his claim would still fail.

Notably, in the instant case, the court did not affect custody, but only modified appellant's school year visitation. The court made clear several times during the hearing that it was "not going to consider anything as it pertains to changing custody." Moreover, the court specifically held in its order that both "parties will continue to have shared legal custody," and only visitation during the school year was being modified. The court further stated that visitation during the summer months would be addressed at a future hearing.

To support his proposition that the circuit court erred in ordering a modification during a civil contempt action, appellant relies on *Kowalczyk v. Bresler*, 231 Md. App. 203 (2016). In *Kowalczyk*, the father filed an emergency petition for civil contempt, asserting that the mother had violated orders regarding visitation with the child. The circuit court, thereafter, found the mother in contempt and suspended her visitation with the child.

On appeal, we first noted that "[a] proceeding for civil contempt is 'intended to preserve and enforce the rights of private parties to suit and to compel obedience to orders and decrees primarily made to benefit such parties." *Id.* at 209 (citing *Marquis v. Marquis*, 175 Md. App. 734, 745-46 (2007)). "Civil contempt proceedings are remedial in nature and intended to coerce future compliance." *Marquis*, 175 Md. App. at 745-46 (citing

Bahena v. Foster, 164 Md. App. 275, 286 (2005)). We continued that "[a]ny order imposing a penalty in a civil contempt action must include a purging provision with which the contemnor has the present ability to comply." *Kowalczyk*, 231 Md. App. at 210 (citing *Elzey v. Elzey*, 291 Md. 369, 374 (1981)). "A lawful purge provision 'affords the defendant the opportunity to exonerate him or herself, that is, to rid him or herself of guilty and thus clear him or herself of the charge." *Kowalczyk*, 231 Md. App. at 210 (citing *Jones v. State*, 351 Md. 264, 281 (1998)). We concluded that the modification of the mother's visitation by the lower court was punishment for her past failure to comply with the visitation orders, and because "there was no way for mother to perform some act and thereby avoid sanction," the contempt and sanction, and therefore the modification, were invalid.

Appellant argues that *Kowalczyk*, therefore, supports the proposition, in the instant case, that the court was in error for modifying custody or visitation at a civil contempt hearing. We disagree. In *Kowalczyk*, we held that "[a]s part of a contempt proceeding, a court may issue 'ancillary orders for the purpose of facilitating compliance or encouraging a greater degree of compliance with court orders." *Id.* at 213. If such an order "involves a change to custody, however, the court must engage in a procedural analysis [to determine the best interest of the child] before making a custody modification." *Id.* at 213 (citing *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012)). *Kowalczyk*, therefore, contemplates a judge's authority to modify visitation or custody as part of a civil contempt order.

The case at bar, however, is quite different. Here, the modification of appellant's visitation was not punishment for failing to pay court ordered payments, nor a result of the contempt petition. Rather, appellee's request for modification was a separate and distinct

issue, derived from her commute and relocation from the area. Although filed jointly, the issues were argued and addressed individually by both the parties and the court. Neither the dictates of *Kowalczyk*, nor any of the Rules, prohibit a judge from addressing appellee's petition for contempt and request for modification at the same hearing. Likewise, it was in the interest of judicial economy for the court to have considered both issues.

Appellant also contends that modifying his visitation violated his due process rights. He argues that the fifty days between appellee filing her request and the date of the hearing was not "sufficient notice" "reasonably calculated…to apprise [him] of the pendency of the action and afford [him] an opportunity to present their objections" to the visitation issue. He also asserts that appellee's "devious" "procedural gamesmanship" in failing to file a case information report as provided under Maryland Rule 2-111, and in failing to provide him with the new schools for the children until 10 days before trial, deprived him of a sufficient opportunity to investigate their new schools and residence.

Appellant's arguments, however, are unpersuasive. Importantly, appellee's filing, and the hearing, were captioned as both a motion for contempt and modification. The sixth count in appellee's filing specifically refers to modifying appellant's visitation. The petition explicitly states that appellee's "job-related relocation from Catonsville, Maryland to York, Pennsylvania necessitates a modification of [appellant's] visitation schedule" with the children. Further, appellant made no objection when the court, prior to hearing testimony, stated that both the petition for contempt and request for modification would be heard. To the contrary, throughout the hearing, appellant's counsel repeatedly referred to the visitation issue as "[t]he bigger part of this case."

To be sure, Maryland Rule 2-111, in combination with the Circuit Court for Baltimore County Family Law Differentiated Case Management Plan, requires a plaintiff in certain proceedings to "file with the complaint an information report substantially in the form available from the clerk." Appellee failed to do so, which appellant claims denied him notice of the issue by "camouflaging" appellee's motion for reconsideration as only a petition for contempt. However, in addition to the above established notice, Rule 2-111 specifically states that "[i]f the plaintiff fails to file a required information report with the complaint, the court may proceed without the plaintiff's information to assign the action to any track within the court's differentiated case management system." The case information report is required for case management purposes, but courts are authorized by Rule to proceed without one. In addition, appellant made no objection to appellee's failure to file a case information report.

Based on a plain reading of the motion, appellant was on notice of the issues to be addressed. His contention that he was not provided a "meaningful opportunity" to be heard in a "meaningful manner" is unsuccessful. Due process is met when there is both notice and "there is at some stage an opportunity to be heard suitable to the occasion." *Drolsum v. Horne*, 114 Md. App. 704, 731, *cert. denied*, 346 Md. 239 (1997). Appellant testified fully to both the contempt and visitation issues. His counsel conducted an examination of appellant, cross-examined appellee, and argued on behalf of his client at the close of evidence. As such, his claim is without merit.

Appellant further argues that it was a denial of due process for the court to grant appellee's motion *in limine*. However, the court granted the motion because he had failed

to respond to appellee's discovery requests. Under those circumstances, the court was fully authorized to do so and it did not violate his due process rights. *See* Rule 2-433; *see also Heineman v. Bright*, 124 Md. App. 1, 12-13 (1998). As explained above, appellant was allowed to fully testify at the proceedings, and was allowed to enter evidence of his pay.

In sum, appellant's due process rights were not violated. He had ample notice and a meaningful opportunity to be heard.

II. The court did not impermissibly modify the prior visitation order.

Appellant argues that the lower court impermissibly modified his visitation by failing to conduct the proper analysis. Appellant alleges appellee's move to York, Pennsylvania is not a material change in circumstances, and that, moreover, the Court failed to explain what factors it used to determine that the change in visitation was in the best interest of the children.

In the circuit court's Ruling and Order, the court began by addressing the standard for modification of visitation. Citing *McMahon v. Piazze*, 162 Md. App. 588, 593-94 (2005), the court continued: "first, the Court must find there has been a 'material' change in circumstance." "Then if a finding is made that there has been a material change, the court then proceeds to consider the best interests of the child."

The court ultimately held that appellee's "relocation to York, Pennsylvania constitutes a material change in circumstance," and that it was "in the best interest of the child to modify [appellant's] visitation."

A trial court's findings are reviewed by this Court based on both the law and the evidence, with deference to the trial court's opportunity to assess and judge the credibility

of the witnesses. "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996).

In the case at bar, there was sufficient evidence in the record to establish that appellee's move to another state, necessitated by the uncertainty of the pending foreclosure on the family home, was a material change in circumstances. There was also more than sufficient evidence to establish that allowing appellant to keep visitation every Thursday evening while the children lived in another state would not be in their best interest. To that point, appellant himself conceded.

Moreover, "[a]lthough consideration of the factors is mandatory, the trial court need not 'go through a detailed check list of the statutory factors." *Malin v. Mininberg*, 153 Md. App. 358, 429 (2003) (internal citations omitted). "This is because a judge is presumed to know the law, and is not required to 'enunciate every factor he considered on the record,' as long as he or she states that the statutory factors were considered." *Id.* (internal citations omitted).

We, therefore, find that the judge's decision was fully supported by the evidence and was not clearly erroneous.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.