UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1685

September Term, 2016

ALLAN LEROY REED, JR.

v.

LAURA MICHELLE BARNES

Kehoe,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: May 24, 2017

This appeal arises from two cases in the Circuit Court for Carroll County relating to the child support and custody arrangements for Allan Reed ("Father") and Laura Barnes's ("Mother") sole minor child, K.R. Mother and Father had never entered into a formal agreement regarding child custody and support, but had agreed informally that K would live with Mother and that Father would have weekend and holiday visitation rights and pay monthly child support. This worked until Father stopped paying child support. Mother, through the Carroll County Bureau of Support Enforcement (the "Bureau"), brought suit to collect support, and Father filed a counter-complaint for custody and visitation. Mother later filed a separate complaint against Father for child custody and the circuit court consolidated the two cases.

In the course of the litigation, Mother and Father attempted to negotiate a parenting agreement, but never fully executed one. Father contends that an agreement had been formed, and he served a subpoena on Mother's former counsel in an effort to prove it. The lawyer moved to quash the subpoena and the circuit court entered a protective order. The parties proceeded to trial and the circuit court entered judgment awarding Mother custody of K as well as child support and arrearages. Father appeals, and we affirm except as to the child support arrearages, which we vacate and remand for a new calculation.

I. BACKGROUND

K was born in 2003. Father and Mother never married or lived together, but by agreement, K lived primarily with Mother while Father had visitation and access on some weekends and holidays, and Father paid Mother $350 in monthly child support. Everybody

agrees that Mother denied Father visitation with K on only two occasions: once in September 2015, when Father allegedly threatened to take K away from Mother and not return her,[1] and again within the next month for health reasons.

In 2015, Father stopped paying child support,[2] and on August 19, 2015, the Bureau filed a complaint for child support on Mother's behalf. Father answered the complaint and filed a Counter-Complaint for Visitation and/or Custody. Father propounded discovery, and the Bureau responded.

At the same time, Mother hired counsel to initiate a child custody proceeding. On September 14, 2015, she filed a complaint for custody. Father responded with a Counter-Complaint for Visitation and/or Custody, which Mother answered. On January 4, 2016, Mother filed a Motion to Strike the Appearance of her counsel, and the circuit court granted the motion on February 2, 2016. Mother's new counsel entered his appearance on February 12, 2016.

At a hearing on January 27, 2016, the parties advised the court that they had reached a temporary agreement regarding child support, which included the payment of $350 in monthly child support, and placed the terms of that agreement on the record. The court entered a temporary child support order on February 17, 2016, and scheduled a hearing to review permanent support.

[1] This incident prompted Mother to initiate the child custody suit discussed next.

[2] Mother testified that Father stopped paying child support because he lost his job.

On March 2, 2016, the Bureau's attorney asked the court to consolidate the child support case with the child custody case. A week later, the court entered an order consolidating the cases, terminating the Bureau's services to Mother, ordering Father to provide health insurance coverage for K, and stating that its temporary child support order would remain in effect.

In the course of discovery, Father noted the deposition of Mother's discharged counsel,[3] and counsel filed a Motion to Quash. Mother joined counsel's position and arguments. Father filed an opposition, and the court held a hearing on July 8, 2016 and granted a protective order, the remedy it determined was more appropriate than quashing the subpoena. On July 25, 2016, Father filed an amended counter-complaint that added a breach of contract count.

The case then came up for (a bench) trial, and the court took testimony regarding child custody and support. About two weeks later, the court entered a Judgment of Custody that granted legal and physical custody to Mother, visitation to Father, child support of $585 per month from Father to Mother, and an additional $100 per month toward arrearages of $2,800. An opinion accompanied the judgment. Father filed a timely notice of appeal. We discuss additional facts as necessary below.

[3] According to Father, the lawyer transmitted via email, a set of settlement terms, and Father wanted him to testify about the facts and terms of the alleged agreement.

II. DISCUSSION

On appeal, Father challenges three of the circuit court's decisions: *first*, the Protective Order denying him the opportunity to depose Mother's discharged counsel; *second*, its computation of child support and arrearages; and *third*, its failure to enforce the pretrial deadlines in the scheduling order.[4] We agree that the court miscalculated child support arrearages in a minor way, but otherwise find no error.

A. The Circuit Court Correctly Entered A Protective Order For Mother's Discharged Counsel.

First, Father argues that the court erred in entering a protective order in favor of Mother's former counsel because that decision precluded the court from addressing whether the parties had a binding settlement agreement. This was reversible error, he contends, because the agreement contained provisions, such as the deduction for the child on either parent's tax return, that would not be subject to the circuit court's statutory modification power. (citing Md. Code (1999, 2006 Repl. Vol.), §8-103 of the Family Law Article ("FL")). Citing *Barranco v. Barranco*, 91 Md. App. 415 (1992), Father claims that

[4] In his brief, Father phrased the issues as follows:

> 1. Did the Circuit Court err in granting the Protective Order of Paul Capriolo thereby precluding Allan Reed from enforcing the Settlement Agreement entered into by the parties in December 2015?
>
> 2. Did the Circuit Court err in its computation of child support and arrears?
>
> 3. Did the trial court abuse its discretion in waiving the pre-trial requirements it established for Ms. Barnes?

"[t]here is no question that the settlement agreement i[s] enforceable." He posits that the parties formed a contract that he "forwarded . . . back for execution by [Mother] who later apparently changed her mind and refused to honor the Agreement," and that Mother's former counsel had authority to bind Mother to the agreement.

Mother's first counsel withdrew from the case on February 2, 2016. Several months later, Father sought to depose counsel about a Parenting Agreement he and Father's counsel had negotiated and that Father, but not Mother, signed.[5] Father served a subpoena, and counsel filed a Motion to Quash, arguing that the subpoena sought attorney work-product and would violate client confidentiality and attorney-client privilege. During the hearing, the court, rather than quashing the subpoena for a deposition, granted a protective order because it did not believe that it was proper to depose counsel for another party, especially concerning matters related to settlement negotiations between the parties.

The court correctly prevented Father from deposing opposing counsel. Generally, "[a] party may obtain discovery regarding any matter that is *not privileged*." Md. Rule 2–402(a) (emphasis added); *see also* Md. Rules of Professional Conduct 19-301.6(a). The attorney-client privilege is "a rule of evidence that prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice."

[5] Email correspondence between Mother's first counsel and Father's attorney reveals that counsel emailed an unsigned Parenting Agreement on December 17, 2015, and that Father's attorney sent a signed Parenting Agreement on December 29, 2015. Counsel later informed Father's attorney that he was no longer representing Mother. In a letter dated February 25, 2016, Mother's new attorney informed Father that the Parenting Agreement that Father had signed was not the final version of the agreement and that Mother did not agree with Father claiming K as a dependent on his taxes.

Peterson v. State, 444 Md. 105, 158–59 (2015) (quoting *Newman v. State*, 384 Md. 285, 302 (2015)). Consistent with the common law evidentiary privilege, the legislature has written into statutory law that "[a] person may not be compelled to testify in violation of the attorney-client privilege." *Id.* at 158 (quoting Md. Code (1974, 2013 Repl. Vol.), § 9-108 of the Courts & Judicial Proceedings Article). Counsel's communications with Mother—and indeed, the communications Father sought—included privileged discussions and confidential information, not just information that he was directed by Mother to impart to Father's counsel. *Cf. Litzenberg v. Litzenberg*, 57 Md. App. 303, 317 (1984) (stating that, "[w]hile having trial counsel testify in the proceeding 'is looked on with disfavor except in unusual circumstances, … such testimony is not inadmissible…[,]"' but such testimony involving confidential communications from a client would not be admissible (quoting *Bris Realty v. Phoenix*, 238 Md. 84, 90 (1965))).

Barranco does not help Father's position. That case involved an oral agreement concerning a property dispute in which the party attempting to disavow the agreement admitted that an agreement had been struck. *Barranco*, 91 Md. App. at 416–19. In contrast, the alleged agreement in this case—a document transmitted via email and signed by one party—involved legal custody of a minor child, and Mother disputed that there was an agreement. Furthermore, in *Barranco*, the parties each called *their* counsel to testify and effectively waived their attorney-client privilege. In this case, Mother has not waived her privilege with her former counsel, and Father cannot force her to do so.

B. The Circuit Court Correctly Calculated Child Support, But Incorrectly Calculated Arrearages.

Father contends *second* that the court erred when it used incorrect monthly gross income figures for both Father and Mother in determining child support and when it failed to disallow an alleged health insurance payment of sixty-six dollars. Additionally, Father finds error in the circuit court's calculation of arrearages and its failure to credit him for payments he made during the period between Mother's pleading requesting child support and the parties' hearing.

Among other things, the circuit court's order of September 21, 2016 awarded child support to Mother in the amount of $585 per month and determined that Father owed arrearages in the amount of $2,800. The court calculated the prospective child support payment using the parties' actual monthly income: $4,680 for Mother and $4,197 for Father. To determine the amount of arrearages, the circuit court determined that Father owed child support of $350 per month—the amount he had paid by agreement of the parties—for eight months, or $2,800.

1. The circuit court correctly calculated child support.

When determining child support, the court looks to the child support guidelines set forth in sections 12-201 to -204 of the Family Law Article. FL § 12-202(a)(1). In addition to the monthly obligation calculated under the guidelines, courts may also require parents to pay other costs, including a share of "extraordinary" medical expenses. *Bare v. Bare*, 192 Md. App. 307, 311 (2010). The statute creates a rebuttable presumption that the amount of child support resulting from application of the guidelines "is the correct amount

of child support to be awarded." FL § 12-202(a)(2)(i). That presumption may be rebutted, however, "by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii).

According to Father, the circuit court "blindly accepted the Child Support Guidelines Worksheet submitted by" Mother without any basis. Father points to several facts that, he claims, undermine the court's child support determination.

First, Father disagrees with the court's finding that he earned a monthly income of $4,197 because, he argues, it improperly included overtime pay for which he had no continuing expectation. Father contends that the circuit court should have annualized his overtime, rather than attributing it on a monthly basis, and he distinguishes *Brown v. Brown*, 119 Md. App. 289 (1998), in which the father earned overtime for over seven years.

During the hearing, the court received Father's updated financial statement that showed his average monthly income. Father testified that he had only worked overtime during the previous five weeks and produced pay stubs, all of which showed overtime payments. But he offered no evidence besides his own testimony to suggest that his overtime payments were *not* a regular occurrence. To the contrary, all of the pay stubs that Father produced contained overtime payments. In the absence of any evidence to suggest that overtime was not regularly available to him, we see no abuse of discretion in the circuit court's calculation of Father's income.

Second, Father argues that the court improperly ignored Mother's prior employment with Golden Living Centers, and that Mother had "reduced her income levels in an attempt

to manipulate the child support award or to voluntarily impoverish herself to the detriment of" Father prior to the hearing. But this argument mischaracterizes the evidence. The record revealed that Mother's circumstances had changed—she had graduated from nursing school, no longer worked at Golden Living Centers (which was a stopgap job) as of February 2016, and that she had taken a full-time nursing job at the Maryland Baltimore Washington Medical Center. Mother testified that her new salary represented the most money that she ever made and that her employment at the Maryland Baltimore Washington Medical Center offered her the possibility for advancement, which was not the case at Golden Living Centers, which offered only periodic shifts. We see no error in the court's decision not to factor Mother's prior employment at Golden Living into her current income.

Third, Father asserts that the circuit court failed to take into account extraordinary medical expenses that he paid for K's medical care in 2015. Mother counters that Father did not pay K's medical expenses and that he did not show that the amounts he allegedly paid were part of a "single illness or condition" that fell into one of the categories laid out in FL § 12-201(g). We agree with Mother that the expenses Father identifies are not extraordinary medical expenses for which he could get a credit under FL § 12-201(g). Mother and Father carried simultaneous health insurance for K, and for 2015 and 2016, Father's policy was primary and Mother's was secondary. During the hearing, Father testified that he incurred $1,686.62 in non-covered medical expenses for K. "Extraordinary medical expenses" are "uninsured expenses over $100 for a single illness or condition." FL § 12-201(g)(1). They include "uninsured, reasonable, and necessary costs for

orthodontia, dental treatment, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders." FL § 12-201(g)(2). Father doesn't identify what types of medical expenses he incurred for K through testimony or medical bills, but seems instead to complain about the cost of insurance premiums, which do not fall within any of the proscribed categories of FL § 12-201(g)(2). Again, we see no error in the court's conclusions in this regard.

2. The circuit court incorrectly calculated child support arrearages.

Father argues next that the circuit court incorrectly ordered him to pay eight months of arrearages, even though only six months elapsed between the filing of the complaint and entry of the temporary order. According to Father, the Bureau's complaint was filed on August 19, 2015, not in May 2015 as Mother testified, and the temporary order was placed on the record on February 20, 2016, and FL § 12-101 only authorizes retroactive child support from the date of filing. Also, citing FL § 12-101(b), Father argues that the court erred when it failed to credit him for a $250 payment that he allegedly paid towards the arrearages.

Father is correct about the period for which he owes arrearages. Section 12-101(a)(2) of the Family Law Article provides that "unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading filed by a child support agency that requests child support, the court shall award child support for a period from the filing of the pleading that requests child support." The Bureau filed

a complaint for child support on Mother's behalf in August 2015 and the circuit court entered the temporary order, which included child support payments, in February 2016. Accordingly, the circuit court should have only awarded child support arrearages for six months. We cannot tell from the record, though, when the $250 payment was received, and specifically whether it was received before or after the filing of Mother's complaint. For this limited reason, we vacate the portion of the judgment ordering father to pay eight months' arrearages and remand solely for entry of a judgment in the amount of six months' arrearages and further consideration of whether Father is entitled to a credit for payment of $250.

C. The Circuit Court Did Not Abuse Its Discretion By Receiving Evidence From Mother.

Third, Father disputes the circuit court's decision to receive exhibits—two paycheck stubs, an insurance card, and a purported insurance bill—offered by Mother at trial that had not been produced pursuant to the court's scheduling order. Mother responds that Father suffered no prejudice from the circuit court's decision to proceed with the trial, that the issues in the case were "pretty cut and dry from the start" without "wrinkles" and that "[b]oth parties' positions have also been made abundantly clear" with "no surprises." We agree with Mother.

Under Maryland Rule 2-504(b)(1)(D), the court enters a scheduling order that contains "a date by which all discovery must be completed." "The principal function of a scheduling order is to move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur," including discovery

events. *Dorsey v. Nold*, 362 Md. 241, 255 (2001). Rule 2-504 "was intended to promote the efficient management of the trial court's docket, not to erect additional opportunities for a court to dismiss meritorious claims for lack of strict compliance with arbitrary deadlines." *Maddox v. Stone*, 174 Md. App. 489, 506–07 (2007). "[G]ood-faith compliance with scheduling orders is important to the administration of the judicial system and providing all litigants with fair and timely resolution of court disputes." *Helman v. Mendelson*, 138 Md. App. 29, 47 (2001). The trial judge should consider a number of factors when determining whether a party has demonstrated good faith and substantial compliance with the court's scheduling order:

> whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance.

Taliaferro v. State, 295 Md. 376, 390–91 (1983).

"Scheduling orders must be given respect as orders of the circuit court, and the court may, under appropriate circumstances, impose sanctions upon parties who fail to comply with the deadlines in scheduling orders." *Maddox*, 174 Md. App. at 507. Although the rule governing violations of scheduling orders does not, by its terms, provide for sanctions, sanctions may be appropriate for violations of a scheduling order. *Station Maint. Sols., Inc. v. Two Farms, Inc.*, 209 Md. App. 464, 487 (2013). The decisions whether to impose sanctions and, if so, which sanctions to impose are committed to the discretion of the circuit court, and "the more draconian sanctions, of dismissing a claim or precluding the evidence

necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice, either to a party or to the court." *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 545 (2000). We review a circuit court's decision regarding the violation of a scheduling order under the abuse of discretion standard. *Butler v. S & S P'ship*, 435 Md. 635, 650 (2013).

The scheduling order in this case required the parties to complete discovery ninety days before trial and to serve a list of all of their exhibits and copies of all paper exhibits upon the other party twenty days prior to trial. At the hearing on September 8, 2016, Father's attorney pointed out that he had received neither exhibits nor an exhibit list from Mother, and therefore that he could not calculate child support.[6] Mother's attorney stated his intention to only use two current pay stubs and offered them to Father's attorney. The court took a recess to allow Father's attorney to run the guidelines program with the information provided by Mother's attorney. After the recess, the trial resumed with Mother's first witness. Later in the trial, during Mother's testimony, her attorney introduced a bill for K's health insurance and a copy of K's insurance cards. Father's attorney objected because these exhibits were not previously produced, and the court received them into evidence.

We disagree that the court abused its discretion by allowing Mother to offer updated financial information. There is no dispute that Mother failed to provide these exhibits and

[6] Father's attorney did not argue that this new information would affect the issue of child custody.

an exhibit list to Father at the time prescribed by the scheduling order. Even so, Father knew from the beginning that Mother's income, like his own, might change leading up to trial, requiring the computation of updated guidelines figures. Father's attorney had an opportunity, if perhaps a limited one, to examine Mother's new pay stubs prior to trial and compute the guidelines results.[7] And if Father's counsel needed more time, he could have requested a continuance or some other relief from the circuit court. But he did not, and instead proceeded to trial with Mother's newly produced pay stubs in hand.

Further, when Mother introduced an insurance bill and health insurance card during trial, the circuit court admitted them over Father's objections, stating that Father could question her about them during cross:

> [FATHER'S COUNSEL]: I will object [to the admission of the insurance bill], Your Honor, it has never been produced and it doesn't say it is [K's] insurance -- it is not for [K]. There is nothing on here that mentions this child's name.
>
> THE COURT: Well, there normally is not. So you can inquire -- you can handle that on cross but she has identified it and I will allow it -- overruled. It is received.
>
> * * *
>
> [MOTHER:] Yes, sir. I have copies of her insurance cards.
>
> * * *
>
> [FATHER'S COUNSEL]: Same objection, Your Honor.

[7] When Mother's recent pay stubs were received into evidence during trial, Father did not object.

THE COURT: Noted and overruled.

* * *

[MOTHER'S COUNSEL]: I move for admission [of the insurance cards], Your Honor, just the --

THE COURT: Received over objection.

Put another way, the court gave Father an opportunity to learn more about the insurance Mother maintained for K. On cross, Father's counsel determined that Mother used Father's insurance as the primary for K and her insurance as the secondary. Mother testified on cross that her insurance premiums were zero when the Bureau first disclosed financial information to Father. Father's counsel, however, failed to ask when this cost changed, and thus when Mother should have supplemented her financial information to include the sixty-six dollar premium for K's secondary health insurance. "Scheduling orders are but the means to an end, not an end in and of themselves." *Maddox*, 174 Md. App. at 507. Where, as here, the additional information Mother supplied at trial required only minor reconfiguration of the guidelines calculation and Father had a fair opportunity to explore the issue on cross, we see no abuse of discretion in the circuit court's decision to proceed in the manner it did toward a resolution of the case.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY VACATED AND REMANDED AS TO CHILD SUPPORT ARREARAGES, AND OTHERWISE AFFIRMED. APPELLANT TO PAY 75% OF THE COSTS AND APPELLEE TO PAY 25%.