UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1687

September Term, 2015

KERBY L. PARKER

v.

RENEE DAVIS PARKER

Woodward, C.J.
Beachley,
Wilner, Alan M. (Senior Judge, Specially Assigned
JJ.

Opinion by Wilner, J.

Filed: May 19, 2017

This appeal arises from a motion by appellant to modify what he regards as a child support provision in a judgment of divorce entered by the Circuit Court for Prince George's County in July 2012. In nearly all of its aspects, and particularly with respect to the issues before us, the judgment, which the parties asserted was a consent judgment, adopted the provisions of a somewhat peculiar settlement agreement reached by the parties.

The court formally denied appellant's motion to modify child support, although it did amend the specific provision in the judgment that appellant asked the court to amend and provided relief that we shall regard as the equivalent of granting the motion. The stated basis for the formal denial of the motion to modify child support was (1) that appellant had not established a change in his circumstances warranting a reduction of child support, and (2) that the provision he wanted modified, and that **was** modified, did not constitute child support subject to modification. Appellant challenges both of those conclusions. We shall affirm the Order entered by the court.

The parties married in November 1992. Their marriage produced twin boys, born in August 1999. In May 2011, appellee filed for divorce. It is evident that the couple were quite well-to-do and enjoyed a comfortable lifestyle, and they wanted their children to continue to have the benefits of that lifestyle notwithstanding the divorce. At the time of the divorce, the parties owned four pieces of real estate, one of which was to be sold and one was to become the property of appellee and her mother. The other two, which were residences, were to be retained, at least until one of the parties remarried, which has

not happened. One of the retained homes, on Spriggs Request Way, was owned jointly and was denominated as the marital, or primary, home; the other, on St. Francis Way, is sometimes referred to as the secondary home. It was titled in the name of appellee.

The judgment awarded the parties joint legal custody and shared physical custody of their children, to be implemented through what was termed a "nesting arrangement." The children would remain in the marital home. Each parent would enjoy alternating weeks with them, moving into that home and having the use and possession of it during the week that he or she exercised visitation and living in the secondary home during the week that the other parent exercised visitation. The secondary home was thus for the use of the parents, not the children. There was no express child support provision in the judgment; the term is not even mentioned. In its place, the parties opened what became a joint checking account and each was required to deposit $180,000 into that account on January 2 of each year.

The funds in that account were "to be used to pay household expenses, taxes, tuition, and mortgage expenses." Unlike the "nesting" arrangement, which was to last only until the children graduated high school, the judgment did not specify how long their obligation to fund the joint account was to last, other than when "there is a surplus and the parties agree that it is not needed."

The judgment provided for the disposition of other property owned by the parties. Relevant here were provisions (1) requiring appellee to pay a monetary award of $1,785,000 to appellant, $1,000,000 as his equitable share of her interest in two

companies that she owned and $785,000 as his equitable share of her other personal assets, (2) directing that M&M Technology, Inc., a company appellant owned, was to remain the sole property of appellant, and (3) that for a period of one year, from July 1, 2012 to June 30, 2013, appellee was to cause her companies to retain the services of M&M for the sum of $12,500 per month.

Appellant's motion for modification, filed in April 2015, alleged these basic facts and averred that there had been a material change in circumstances since the divorce judgment was entered, specifically that there had been a substantial decrease in his income and financial resources, that appellee's income had increased substantially, and that the financial needs of the children had decreased. His request for relief was that "his obligation to pay $180,000 per year into a joint checking account be modified retroactively [to the date his motion was filed]."

The financial information supplied by appellant, in light of the judgment, was, to say the least, odd. For 2011 – the year immediately preceding the divorce – the parties filed a joint Federal income tax return showing total income of $1,121,505, over $900,000 of which came from appellee's company, Quality Technology. In the years following the divorce, appellant filed individual income tax returns. His tax return for 2012 showed adjusted gross income of only $28,052, which remained fairly steady for the next two years – $27,895 for 2013 and $29,229 for 2014. In 2012-13, his company, M&M, earned $150,000 from the one-year contract with Quality Technology, none of which was directly reflected on his individual tax return. He testified that he had about

$2,000 in his savings account, approximately the same in his checking account, $20,000 in his business account, and $400,000 in a "401k" account.

Appellee fared a lot better. She stated that income from her business holdings approximately doubled since the divorce – from $120,000 a year to $240,000. She said that she also received disability payments of $10,000 a month, and a social security supplement of $2,000. She had purchased a home in Florida for $1.5 million. She acknowledged that, as the children were older and required less child care, their financial needs had diminished since the divorce.

With this evidence, the court was faced with determining, first, what the base line for child support was, in light of the facts that (1) there was no express provision in the judgment for any particular amount of child support, (2) because, at the time of the divorce, the parties' combined monthly income was far in excess of $15,000, there was no statutory guideline amount for the court to consider, (3) the stated purpose of the joint checking account – household expenses, taxes, tuition, and mortgage expenses – was broad enough to include expenses not normally regarded as in the nature of child support, (4) the evidence showed that substantial sums were, in fact, withdrawn from the joint account for purposes having no connection to child support, (5) the parties offered no evidence of what they thought was properly attributable to child support, and (6) all that appellant said he wanted modified was the requirement of depositing $180,000 into the account each year without specifying how much of a reduction from that amount he thought was appropriate.

That proved to be a frustrating and insurmountable problem for the court. The judge commented that "[t]here has been no child support set" and "to try and parse out what of this would be child support in the traditional, classic sense, would be absolute pure speculation."

Exacerbating the problem of identifying the base line child support that appellant wished to modify was identifying what his actual circumstances were when the judgment was entered and what they were when the motion to modify was filed. His income tax returns show virtually no change from 2012 through 2014 – just below $30,000 – which hardly could support the annual $180,000 contribution to the joint account he had agreed to provide and the divorce judgment required him to provide.

Appellant testified that *all* of his income came from M&M, that he uses the revenue earned by M&M to pay all of his expenses and all of M&M's expenses, that he calculates as income all of the expenses paid by M&M, and that he and his accountant decide how much of those expenses should be reported on his personal tax returns as income earned by him. He failed to produce documentation of what those payments were, however. The only alleged change in *his* circumstance for which there was clear evidence was the lapse of the one-year agreement between M&M and appellee's companies that produced $150,000 in revenue for M&M which, of course, was anticipated at the time of divorce.

The evidence showed that, except for $50,000, he had made no deposits into the account from his own resources and, with one exception, had no ability to make any such

deposits approaching anything close to $180,000, either at the time the judgment was entered or at the time the motion was filed. What, in fact, occurred was that, other than the $50,000, appellee or her companies, in discharge of the monetary award, had deposited appellant's share directly into the account on his behalf. At the time of the hearing, only $42,394 remained owing on the monetary award.

The court dealt with all of this in its June 22, 2015 Order. In that Order, the court (1) concluded that the provision for the bank account was not a child support provision and that, even if it were, appellant had failed to show a material change in his circumstances, (2) with the consent of the parties, clarified the permissible uses of the funds in the joint account,[1] (3) in light of the diminished needs of the children for a nanny – the children were then nearly 16 – reduced the required annual obligation of the respective parents from $180,000 to $150,000, and (4) directed that appellee deposit the $42,394 unpaid portion of the monetary award into the joint account as a credit towards appellant's 2015 required contribution.

In this appeal, appellant focuses on the court's conclusion that the joint account deposit requirement was not a child support order that was subject to modification, which

[1] The clarification defined the language "household expenses, taxes, tuition, and mortgage" as including mortgage payments, homeowners' insurance, real estate taxes, utilities, homeowners' association fees, repairs, lawn care, and housekeepers with respect to both the marital home and the secondary home, health insurance and care for the children, a $200 per month cash allowance for each child, the purchase and upkeep of an automobile for the children, summer camp (presumably for the children), an aquarium at the marital home, and, until August 2015, a nanny for the children. The nanny, it turns out, was appellee's mother, who received a salary for taking care of her grandchildren.

he claims was wrong, and on its further conclusion that he had failed to show a material change in circumstances that would justify a modification, which he claims also is wrong.

The parties agree on some of the fundamental principles governing child support – that they each have a non-waivable legal obligation to provide support for their children; that because their combined monthly income at the time of the divorce exceeded the $15,000 maximum provided for in the statutory child support guidelines, those guidelines did not apply; and that, as a result, the court had discretion in setting the amount. The problem here, of course, is that, in its divorce judgment, the court failed to set an amount or declare which categories or subcategories of expenditures from the joint account would be regarded as child support. The significance of that failure lies in the fact that, while child support is generally subject to modification by the court – discretionarily if the Order sought to be modified is a *pendente lite* one, on a showing of changed circumstances otherwise – financial terms not constituting child support ordinarily are not subject to court modification absent consent of the parties.

The Court of Appeals and this Court have recognized that child support can be, in whole or in part, in forms other than direct payments from the non-custodial parent to the custodial one. *See Walsh v. Walsh*, 333 Md. 492 (1994); *Knott v. Knott*, 146 Md. App. 232 (2002). Those two cases involved an agreement by the non-custodial parent to make all or part of the mortgage payments or pay other expenses on the marital home where the children would continue to live. Although there were other issues in those cases requiring a remand, the determination that the alternative form of payments constituted a

form of child support was fairly easy. They directly benefitted the children by helping to assure shelter for them.

Unquestionably, the parties' intent here was that the annual deposit of $360,000 was to be used, at least in part, to provide for the benefit of the children, not only for the basic needs normally contemplated in a child support award but a great deal more. The problem was that, under the judgment, the money in the account was anticipated for use, and, in fact, was used, for a variety of other purposes that had little or no connection with the children's needs. As noted, it was used to pay virtually all of the expenses on the secondary home, in which the children did not live or apparently even visit very often, if at all.[2] There was evidence that appellee made substantial withdrawals from the account for personal expenses that she regarded as "household" expenses.[3]

Under those circumstances, it would have been clear error for the court to regard the full amount of the annual deposits into the account as child support. What appellant really seems to be complaining about is that the court failed to sort through all of the scores of withdrawals from the account over a three-year period, *sua sponte*, with little or no assistance from the parties, and figure out which of those withdrawals could be regarded as constituting child support and which could not.

[2] Appellant testified that the children resided in primary home "24/7."

[3] There was evidence that appellee, who was the sole record title-holder of the secondary property, rented it out for approximately four months, kept the rental payments of $3,000 per month, but reimbursed herself from the account for the monthly mortgage payments.

Regarding any attempt to do that as an exercise in pure speculation, the court looked at the evidence regarding appellant's circumstances at the two relevant times, which we have recounted above. The only even marginally reliable evidence was appellant's three Federal income tax returns – his own official determination of his income -- which, as noted, revealed no significant change since the divorce. With respect to the fortunes of M&M, the court noted that the lapse of the $150,000 contract with Quality Technology was anticipated at the time of divorce and therefore was a circumstance that existed then. Appellant had the burden of proving a material change in circumstances, and he simply failed to overcome that burden. We find no error in the court's conclusion that appellant had failed to demonstrate any material change in his circumstances that would warrant a reduction in child support, even if child support could reasonably be calculated.

Apart from that, appellant ignores the fact that the court actually gave him what he asked for, indeed more than he asked for. Although captioned as a motion for modification of child support, his sole request for relief, apart from "such other and further relief as to the court seems just and proper," was that "his obligation to pay $180,000 per year into a joint checking account be modified retroactively to the date of the filing of his Motion for Modification of Child Support," and that request was granted, retroactive to January 1, 2015 – several months earlier than the filing of the motion. The annual contribution, commencing for calendar year 2015, was reduced to $150,000, a 16.66 percent reduction, and withdrawals for school-related expenses were to end when

the children graduated high school, which eliminated any obligation for college expenses. In short, his actual request was not denied, but granted.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.