UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2222

September Term, 2015

ALLISON J. ZWEIG

v.

JAMES G. CORCKRAN, III

Kehoe,
Berger,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 9, 2017

FACTS AND LEGAL PROCEEDINGS

The litigants here, Allison J. Zweig and James G. Corckran, III, divorced in December 2008. As president of a manufacturing company (Clendenin Brothers), Corckran earned an annual salary of $240,000 at the time. Zweig worked as an Anne Arundel County Public School kindergarten teacher,[1] earning approximately $33,000 per year.

Prior to the divorce, on 27 August 2008, the parties entered an Agreement, requiring Corckran to pay alimony to Zweig in the amount of $36,000 per year for four years, and $410 per month to support the parties' two children. The Agreement required also that Corckran pay health insurance costs of $267 per month and expenses associated with the children's attendance at Indian Creek School, amounting to $2,470 per month.

The alimony payments ended in August 2012. Zweig filed in the Circuit Court for Anne Arundel County, on 31 August 2012, a Petition to Modify Child Support and Other Relief, requesting the court "to modify the child support payment by the Defendant [Corckran], to require that the Defendant pay the children's private school expenses on his own and without contribution by the Plaintiff, to award her the reasonable counsel fees incurred by her in these proceedings, and for such other relief as the Court may deem proper." A hearing on the merits took place over 8-9 October 2013. In his answers to

[1] In her 8 October 2013 testimony leading to the present appeal, Zweig stated that her $2,750 monthly income ($33,000 annualized), as of December 2008, came from working as a therapist. In her brief, however, she states that she worked as a kindergarten teacher earning $33,000 per year in 2008.

interrogatories and testimony during the hearing, Corckran explained his employment history and assets. From late 2007 to early 2008, he transitioned from president to vice-president of Clendenin Brothers, receiving a reduced salary of $175,000. In March 2010, he quit to explore other life options, such as training for Ironman triathlon competitions, while receiving severance pay until March 2011. At the time of the hearing in October 2013, Corckran began a position as a teaching assistant (TA) at the University of Maryland, earning $600 every two weeks. In supplementation of his income, Corckran received regular distributions from a trust fund administered by his parents, as well as annual Christmas gifts of cash from his parents, which the court imputed to be $124,000 annually, including his TA salary.

At the time of the August 2008 Agreement, Zweig had an annual income of $69,000, $36,000 of which was alimony payments from Corckran pursuant to the Agreement. By the time of the hearing in October 2013, Zweig earned approximately $53,000 per year as a teacher. She testified that she lived a modest lifestyle, but that the accommodation of the children's increasingly expensive preferences, the termination of alimony payments in 2012, an increase in private school expenses for the children, her monthly mortgage payments (an expense spared Corckran), and growing attorneys' fees justified an increase in child support payments from Corckran. Zweig's legal fees amounted to $29,946.65 for services rendered from the time she filed the petition in August 2012 until the October 2013 hearing; Corckran's attorney's fees defending the Petition over the same period totaled $65,000, $45,000 of which his parents paid.

On 12 November 2013, the hearing judge denied Zweig's petition, finding no material change in circumstances (since the prior child support order, which was consistent with the 2008 Agreement) that would justify an increase, and that, in the alternative, modification of the order would not be in the children's best interests:

> At the hearing, evidence was presented that Plaintiff's income had increased and that Defendant's income had decreased. The alimony award to Plaintiff has expired. Defendant continues to pay 100% of the two minor children's health, dental, and tuition expenses, the cost of which has increased dramatically since the original support award.
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> Individually, these facts might be sufficient to constitute a material change in circumstances. However, taken together, these factors balance each other out to the extent that the Court finds no material change in circumstances from when the original support order was entered.

Zweig requested review by an *in banc* panel, claiming that the hearing judge erred by finding no material change in circumstance. Zweig argued, among other things, that, although the income she earned from her career increased since the 2008 Agreement, she experienced a net decrease of $15,500 per year because Corckran's Agreement-derived alimony payments had ceased.

On 28 October 2014, the panel held to be clearly erroneous the hearing judge's finding of no material change of circumstances. The panel explained that the hearing judge failed to consider:

1. Whether the Defendant has voluntarily impoverished himself, and if so, what, if any, income should be imputed to him.
2. Whether the Defendant is receiving gifts that amount to income for purposes of calculating child support.
3. Whether the parties[']combined incomes "exceed the guidelines", and if so, how much child support the minor children should receive in order to enjoy the same standard of living they would have experienced had their parents remained together.

4. The basis for the denial of an award of counsel fees.
5. If a child support modification is granted, whether, and to what extent, it should be a retroactive award.

(footnote omitted). The panel vacated the trial court's judgment and remanded the matter, instructing the hearing judge "to make specific findings as to each party's income and to address all of the arguments set forth by [Zweig]."

On 5 August 2015, the hearing judge issued a memorandum opinion addressing the panel's directions on remand. He held that Corckran did not voluntarily impoverish himself; his trust income and gifts should be imputed as income for child support purposes at $110,000 annually; increasing his child support obligations would not be in the best interest of the children; and, Zweig's accrued attorney's fees of $30,000, and her request for Corckran to pay $25,000, were unreasonable given that "the parties were only at trial for two days and child support modification is fairly straightforward." The judge's reasoning underlying the last point included the erroneous statement that Corckran's attorney's fees amounted to only $8,500, but this does not seem to have been a basis for his finding that Zweig's $30,000 attorney's fee was unreasonable. He concluded that, despite a material change in circumstances, modifying child support was not in the children's best interest.

Zweig filed a Motion to Revise Order (Attorney's Fees) on 4 September 2015, arguing solely that the court erred in calculating Corckran's attorney's fees at $8,500, instead of $65,000, and requesting an award of $25,000 toward her attorney's fees. The judge agreed obliquely, in an order on 20 November 2015 (as explained in a memorandum

opinion entered 15 December 2015), that he had miscalculated the parties' attorneys' fees, but he declined to hold that he abused his discretion in denying Zweig's request for attorney's fees.

Zweig filed a Notice of Appeal from the November 20 order on 18 December 2015. She advances the following question for our review:

> Did the Trial Court abuse its discretion in failing to award the Appellant any contribution toward her attorneys' fees where the Court found (1) that there had been a "material change in circumstances" and (2) the Appellee's financial circumstances included an income differential in his favor of over $70,000 per year and a net worth differential in his favor of over $2 Million, among other financial circumstances?

STANDARD OF REVIEW

The abuse of discretion standard applies to our consideration of an appeal from a court's determination on a motion to revise:

> An appeal from a denial of a motion to revise or "motion for reconsideration," pursuant to Rule 2-535(a), does not serve as an appeal from the underlying judgment, and the applicable standard is whether the court abused its discretion. *New Freedom Corp. v. Brown,* 260 Md. 383, 386, 272 A.2d 401 (1971), *rev'd on other grounds,* 352 Md. 31, 720 A.2d 912 (1998). As we said in *B & K Rentals v. Universal Leaf,* 73 Md.App. 530, 537, 535 A.2d 492 (1988), however,
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> > that the matter is left to the discretion of the trial court does not mean that if the action of that court is clearly arbitrary or has no sound basis in law or in reason, it could not be reviewed, but it does mean that we will not reverse the judgment of the trial court unless there is grave reason for doing so.
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> The fact that an error may have been or was committed and not corrected by a trial court on a motion to revise is not necessarily an abuse of discretion. The nature of the error, the diligence of the parties, and all surrounding facts and circumstances are relevant. Thus, the determination is case specific. The real question is whether justice has not been done, and our review of the exercise of a court's discretion will be guided by that concept.

Wormwood v. Batching Sys., Inc., 124 Md. App. 695, 700, 723 A.2d 568, 570–71 (1999) (some citations omitted); *see also Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 723–24, 795 A.2d 816, 820–21 (2002).

> An abuse of discretion occurs where no reasonable person would take the view adopted by the [trial] court or the trial court acts without any guiding rules or principles. An abuse of discretion constitutes an untenable judicial act that defies reason and works an injustice. We do not disturb a trial court's discretionary ruling simply because we would not have made the same ruling. Further, because the exercise of discretion under these circumstances depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal.

Shih Ping Li v. Tzu Lee, 210 Md. App. 73, 96–97, 62 A.3d 212, 226 (2013), *aff'd*, 437 Md. 47, 85 A.3d 144 (2014) (citations and quotation marks omitted).

ANALYSIS

Zweig argues that "the trial court abused its discretion in not making any award of counsel fees toward Ms. Zweig's legal fees of approximately $30,000.00 where her annual income was $70,000 less that Appellee's income, her net worth was at least $778,000 less than Appellee's net worth, and Appellee's parents paid $45,000 in Appellee's own fees as a gift to him." (formatting changed to sentence-case). Corckran answers that: 1) "the trial court did not abuse its discretion in refusing to revise its order of August 5, 2015 in which it denied Appellant's claim for attorney's fees in the underlying child support modification proceedings;" 2) "the issue of Appellant's claim for contribution to fees is not properly before this court;" and, 3) "the trial court did not abuse its discretion by denying Appellant's claim that Appellee contribute to her fees." (formatting changed to sentence-

case). Zweig retorts that "the filing for in banc review does not preclude the Appellant from appealing the trial court's decision on remand." (formatting changed to sentence-case).

Because Zweig appealed only from the trial court's denial of her Motion to Revise Order (Attorney's Fees), the only issue properly before this Court is whether the trial judge abused his discretion in denying that motion. Pursuant to Zweig's Motion to Revise, the judge revisited the matter to determine whether he abused his previous exercise of discretion in denying Zweig's request for attorney's fees. On appeal, our task is, essentially, to determine whether the hearing judge abused his discretion in determining that he had not abused his discretion in denying Zweig's request for attorney's fees. As discussed above, our principled adherence to *stare decisis* precludes us from reversing this decision unless we find a "grave reason" to do so. We do not find such grave reason here. We explain.

In her Motion to Revise Order (Attorney's Fees), Zweig argued:

> 1. That the Court's failure to award the Plaintiff any attorney's fees is clearly erroneous and / or an abuse of discretion.
> 2. That the Court made a gross error in determining the total of the parties' respective attorney's fees, failed to consider the Defendant's financial circumstances in determining his ability to contribute to fees, mischaracterized the nature of the child support modification proceeding, and failed to apply Maryland law in denying any contribution toward the Plaintiff's fees.

The hearing judge addressed these points in turn on remand.

First, he explained that "[t]he Family Law Article permits, but does not require, an award of counsel fees, etc." (citing Maryland Code, Family Law Art. ("Fam. Law"),

§ 12-103 (2012 Repl. Vol.) and *Simonds v. Simonds*, 165 Md. App. 591, 886 A.2d 158 (2005)). Fam. Law § 12-103, "Award of expenses," states that "[t]he court may award to either party the costs and counsel fees that are just and proper under all the circumstances" in a child support modification dispute, and that the court's determination must follow consideration of "(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." The *Simonds* Court stated that "[t]he Family Law Article permits, but does not require, an award of counsel fees, etc. to a dependent spouse. The circuit court has discretion to grant or to deny a request for attorney's fees." 165 Md. App. at 616, 886 A.2d at 173 (footnote and citation omitted).

After the judge found substantial justification on Zweig's part to bring the Petition to Modify, following the steps laid out in *Davis v. Petito*, 425 Md. 191, 39 A.3d 96 (2012), he turned to the reasonableness of the attorney's fees. 425 Md. at 204, 39 A.3d at 103–04 ("A judge, after finding substantial justification, then must 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)."). Reviewing his prior reasoning, the judge stated:

> In this case, this Court has considered the attorney[']s fees of each party, approximately $95,000 combined, their incomes, their net worth, and their ability to pay. In determining the reasonableness of the attorney's fees, the court has to take into consideration the issues raised. Here, the modification action was filed due to the change in annual income for both parties and the increase in the cost of private school since the time the Agreement was executed. As discussed previously, Defendant never wavered in his obligation to support the children and continued to pay the entire increased

> cost of tuition for the children even after his resignation and decrease in income. Although Plaintiff argued that Defendant voluntarily impoverished himself, this Court after considering all the factors, discussed at length in its previous opinion that Defendant did not voluntarily impoverish himself and continued to meet his obligations despite his voluntary resignation.
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> Based on the facts and review of the record of this modification, this Court does not find it reasonable for the parties to have accrued $95,000 of combined attorneys['] fees. The issues were not as complex as to require this amount of attorneys['] fees.

(footnote omitted). Zweig argues that the court's consideration of the parties' melded attorney's fees was erroneous: "it is simply illogical to conclude that one party's [Corckran's] decision to spend twice as much money in a proceeding as the other party [Zweig] serves to render **the other party's** fees unreasonable." Perhaps such an action would be illogical, but that is not exactly how the judge's reasoning proceeded. In his prior opinion, when he believed that Corckran's fees amounted to only $8,500, he found unreasonable Zweig's $30,000 of attorney's fees, without explicit reference necessarily either to Corckran's fees or to the combined fees accrued by the parties.

Zweig alleges correctly that the court made no effort to explain which elements of the proceedings were not substantially justified such that their cost in attorney's fees was unreasonable, and which costs could be subtracted from the total of $30,000, to achieve a reasonable total. By citing to *Flanagan v. Flanagan*, 181 Md. App. 492, 546, 956 A.2d 829, 861 (2008), however, for the premise that the court is required to separate the reasonable from unreasonable proportions of a party's total attorney's fees, Zweig misses the mark. The *Flanagan* Court did not decide the issue of attorney's fees because such fees were vacated automatically by the court's vacation of the monetary award; rather, it

discussed the issue "for the benefit of the chancellor and the parties on remand." 181 Md. App. at 544, 956 A.2d at 860. The *Flanagan* Court analogized its case to others in which the lower court failed to evaluate the reasonableness of attorneys' fees at all, and noted that in its case, "the court made no express findings as to which, if any, of the legal actions of appellant were not substantially justified, and what proportion of the attorneys' fees were attributable to those unjustified positions." 181 Md. App. at 545-46, 956 A.2d at 861. This does not mean necessarily that, as Zweig claims, courts are required to engage in such an exercise in differentiation. In the present context of holding the $30,000 fee unreasonable, clarifying which parts of the proceedings were unjustified would serve certainly as evidence of an orderly mind. Nevertheless, because the decision whether to award any attorney's fees falls within the discretion of the trial court, we do not find it an abuse of discretion to leave that reasoning unstated.

Second, the hearing judge reviewed his prior consideration of the parties' financial circumstances in light of "[t]he standard in determining an award for attorney's fees [which] is that the financial status and needs of each party must be balanced in order to determine the ability to pay the award to the other; a comparison of incomes or financial status is not enough." The court noted its prior imputation of $124,000 in annual income to Corckran and calculation of $53,500 for Zweig's annual income. Recognizing its previous error in attributing only $8,500 in attorney's fees to Corckran, instead of the true number of approximately $65,000, the court cleared itself of Zweig's allegation of "gross error" because Corckran paid personally only $20,000 of his fees, his parents having paid

the remainder. The court found, therefore, that incorporating the true value of Corckran's attorney's fees did not change substantively its earlier analysis. The judge reviewed also his consideration of each party's net worth. He rejected Zweig's assertion that Corckran had access to a $1.3 million trust because much of funds were "in IRA or 401K accounts and not accessible by Defendant until he reaches a certain age." In any event, the court noted Zweig's $422,000 net worth and concluded that "both parties[']net worth [is] substantial and both have the means and ability to pay their own attorney's fees."

Zweig argues that this reasoning fails because Corckran's total assets dwarf those of Zweig "by *multiples* in both net worth and income and he had access to a seemingly bottomless trust fund." Zweig cites *Lieberman v. Lieberman*, 81 Md. App. 575, 568 A.2d 1157 (1990), where this Court remanded the issue of attorney's fees with instructions to consider, among other factors, "how much can reasonably be afforded by each of the parties," in a case where the trial judge awarded less than 41 percent of one party's attorney's fees, that party's "financial status . . . pales in comparison to that of [the other party]," and the "bare record . . . in the absence of any reason" failed apparently to state any reasoning for the decision. 81 Md. App. at 601–02, 568 A.2d at 1170. By contrast, the hearing judge here provided the reasoning for his decision, including explicitly the factor Zweig noted above—whether she could afford reasonably to pay her attorney's fees—and the judge concluded that she could.

We do not believe that, in this case, no reasonable judge would take the view adopted by the lower court. Although he did not explicate fully his reasoning, the hearing

judge found Zweig's legal fees unreasonable, and, in any event, he determined that she had sufficient assets to afford them reasonably. The court did not act without any guiding rules or principles, because, granted a second bite at the apple on remand from the *in banc* panel, the court considered all of the relevant touchstones necessary to decide the motion. Even if we would not have made the same ruling as the hearing judge, we do not sit as an *über de novo* family law court. In the absence of grave reason or manifest injustice, we shall not disturb the exercise of the court's discretion. Accordingly, we hold that the court did not abuse its discretion in denying Zweig's Motion to Revise (Attorney's Fees).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.