Circuit Court for Anne Arundel County
Case No. C-02-FM-16-2584

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 15

September Term, 2018

JULIE CARSKADON

v.

DAVID CARSKADON

Wright,
Nazarian,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: May 14, 2019

On December 27, 2017, the Circuit Court for Anne Arundel County issued an Order requiring David Carskadon ("David"), appellee, to pay Julie Carskadon ("Julie"), appellant, child support arrearages in the amount of $7,980.00.[1] The circuit court determined the amount David would pay by using the shared custody child support guidelines instead of the sole custody child support guidelines. Julie challenges the circuit court's Order and presents the following questions for our review, which we have reworded and consolidated as follows:[2]

1. Whether the circuit court erred by determining child support arrears with the shared custody child support guidelines instead of the sole custody child support guidelines?

For the reasons presented below, we answer this question in the affirmative and reverse the circuit court's judgment.

BACKGROUND

Julie and David were married on December 15, 1994, in Edison, Nebraska. The parties separated on March 21, 2016, when Julie vacated the marital home with the

[1] For ease of discussion, we will refer to the parties by their first names throughout this opinion. We mean no disrespect to either party in doing so.

[2] Julie presented her questions to the Court as follows:

1. Was the Trial Court clearly erroneous and abuse its discretion [sic] when it denied Appellants' [sic] request for child support arrearages using the sole child support guidelines?

2. Was the Trial Court clearly erroneous and abused its discretion [sic] in reducing post[-]petition child support arrearages?

parties' two children.[3] On June 26, 2016, David filed a Complaint to Establish Child Custody, Child Support, Visitation, and Request for Immediate Hearing; Julie filed her Answer on August 30, 2016. About seven months later, on March 27, 2017, David filed a separate Complaint for Absolute Divorce; Julie filed her answer on September 21, 2017. The two cases were eventually consolidated into a single matter. Notably, neither party requested a *pendente lite* hearing on child custody or child support during the pendency of the litigation.

On September 30, 2017, about two weeks before their hearing was set to commence, the parties entered into a Marital Separation Agreement (the "Agreement"). The Agreement covered areas such as alimony, the payment of various expenses, property resolution, and retirement distribution. It also established that the parties would have "joint legal custody and shared physical custody" of the children moving forward, and that David would have "up to 140 overnights" a year with them. Child support was the only issue that the parties did not resolve in the Agreement.

On October 12 and 13, 2017, the parties appeared for a hearing in the circuit court to resolve the issue of child support. Most relevant to this appeal, the parties presented evidence as to how many nights they each kept the children.[4] David presented evidence

[3] The parties have one son, who was 12 years old at the time of the hearing, and one daughter, who was 10 years old at the time of the hearing.

[4] The parties also presented evidence as to whether various childcare and healthcare expenses should be included in the child support calculation. However, those expenses are not relevant to this appeal, and we will not discuss them here.

that between the date of the separation and April 10, 2016, he saw the children three nights a week, but that he was "not allowed" to have them overnight during that period. From April 10, 2016, to June 15, 2016, he testified that he had one overnight a week with the children, but that from June 15, 2016, to July 21, 2016, he had "no overnights and nothing during the day." Beginning July 21, 2016, David had the children for two nights every other weekend; this arrangement continued until January 11, 2017. Finally, David testified that from January 11, 2017, onward, he had the children for five nights out of every two weeks.

Julie testified that she used a spreadsheet to keep track of the time the children spent with David, and that she entered data into the spreadsheet contemporaneously with any events taking place. She went on to state that according to her records, their son spent 77 overnights with David between March 21, 2016, and December 31, 2016, and that their daughter spent 65 overnights with David during that same period. She also testified that beginning January 11, 2017, David had the children for five nights out of every two weeks.

In closing argument, Julie's counsel averred that based on the evidence presented, the circuit court should not use the shared physical custody guidelines to calculate child support.[5] The following colloquy ensued:

[5] According to Md. Code (1984, 2012 Repl. Vol.) Family Law Article ("FL") § 12-201(n)(1), "'shared physical custody' means that each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of child support." Once a

> [COUNSEL]: Now, going backward, we have several things. And I look at it as 2016, 2017 up to the date of the agreement. Now, in reviewing the documents, . . . from the date of filing through . . . July 11th, 2017[,] Mr. Carskadon did not have shared custody. We know that.
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> THE COURT: Right.
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> [COUNSEL]: And that's pretty clear.
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> THE COURT: I wouldn't waste your time on a lot of that argument.

At the conclusion of the hearing, the circuit court placed its ruling on the record. The court first stated that it would "grant the [request for] absolute divorce[,]" and that it would "incorporate, but not merge, the [Agreement]." The court then addressed the issue of child support. Based on the parties' monthly incomes,[6] their monthly child-related expenses, and the shared physical custody arrangement set out in the Agreement, the court ruled that beginning October 1, 2017,[7] David owed Julie $442.00 a month in child support.

As to child support prior to the Agreement, the circuit court noted that its Order would cover the 15 months between the date that David filed his first Complaint and the

court has determined that parents have shared physical custody over their children, it relies on FL § 12-204(m) to calculate child support accordingly.

[6] The circuit court found that Julie's monthly income was $12,272.00, and that David's monthly income was $7,666.66.

[7] October 1, 2017, was the day after the parties signed the Agreement.

date on which the parties signed the Agreement.[8] The court then explained that it calculated David's obligation using the shared physical custody guidelines "[b]ecause [David] did have the ability to visit[,] . . . [and because the parties] could have split overnights." The court further stated that it would not "punish [David] for not being able to [have more overnights with his children] when he did make an effort and wanted to do that." Upon applying the shared physical custody guidelines, the court determined that David owed Julie a total of $3,092.00 in arrears,[9] and ordered that David pay Julie an additional $100.00 a month until the arrearage was paid.

On December 27, 2017, Julie filed a Motion to Alter or Amend or in the Alternative Motion to Reconsider and argued that the court erred by using the shared custody child support guidelines to calculate child support. The court denied Julie's Motion on February 7, 2018, and Julie filed notice of this appeal on March 5, 2018.

STANDARD OF REVIEW

Circuit courts use the guidelines in Md. Code (1984, 2012 Repl. Vol.) Family Law Article ("FL") § 12-204 to calculate child support awards. "Ordinarily, child support

[8] Under FL § 12-101(a)(3), "for any . . . pleading that requests child support [other than one requesting child support *pendente lite*], the court may award child support for a period from the filing of the pleading that requests child support."

[9] The circuit court first determined that David's monthly child support obligation for the 15 months prior to the Agreement was $532.00, making for a total arrearage of $7,980.00. However, the circuit court gave David credit for $1,500.00 that he paid in child support prior to the hearing and for $3,388.00 that he previously paid toward daycare expenses.

orders are within the sound discretion of the trial court." *Reichert v. Hornbeck*, 210 Md. App. 282, 316 (2013). As such, "[i]n an appeal of [an] award for child support, we review the trial court's factual findings for clear error, while each ultimate award is reviewed for abuse [ ] of discretion." *Fitzzaland v. Zahn*, 218 Md. App. 312, 329-30 (2014) (quotations and citation omitted). An abuse of discretion occurs when the use of discretion was "manifestly unreasonable," or when it was "exercised on untenable grounds, or for untenable reasons." *In re Don Mc.*, 344 Md. 194, 201 (1996) (quotations and citation omitted).

DISCUSSION

Under FL 12-201(n)(1), "shared physical custody" exists when "each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of child support." As explained above, even though David did not actually keep his children overnight for more than 35% of the year, the circuit court calculated child support using the shared physical custody guidelines. *See* FL § 12-204(m).[10] In explaining its ruling, the circuit court stated that it would not "punish [David] for not being able to [have more overnights with his children] when he did make an effort and wanted to [do so]."

Julie avers that the circuit court erred in applying the shared physical custody guidelines because the evidence established that David did not have overnights with his

[10] FL § 12-204(m) provides the specific formula to be used to calculate child support in instances of "shared physical custody."

children for more than 35% of the year. She further argues that "[David] did not seek out more time [with his children] by asking for a *pendente lite* hearing or by some other request for a temporary order[.]" In response, David asserts that "there was never any order granting [Julie] 'sole custody' . . . and it was [Julie's] deliberate conduct that precluded [him] from having his children stay overnight with him as much as he desired."

As such, our key task here is to determine how the facts of this case fit into the definition of "shared legal custody" under FL § 12-201(n)(1). *See* supra n.10. In *Rose v. Rose*, 236 Md. App. 117 (2018), this Court analyzed the application of "shared physical custody" under similar circumstances. There, the parties entered a Consent Custody Order that entitled appellant to keep the children for over 35% of overnights. *Id*. at 122. Despite the Order, appellee presented evidence that appellant kept the children for less than 30% of overnights in each the previous three years leading up to litigation. *Id*. Due to time constraints, the circuit court did not permit appellant to present evidence on the issue. *Id*. at 132. However, because the Order provided appellant the *ability* to have more than 35% of overnights with his children, the circuit court determined that it should calculate appellant's child support obligation using the shared custody guidelines. *Id*. at 133.

Appellee filed a cross-appeal challenging the circuit court's support calculation, and argued that the "[circuit] court erred in basing [appellant's] child support obligation on the amount of overnights *awarded* in the Consent Custody Order." *Id*. at 133. In analyzing how FL § 12-201(n) applied, this Court stated the following:

We review *de novo* a trial court's interpretation and application of a statute. In construing the meaning of a statute, the primary goal of statutory construction is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision. In so doing, we look first to the normal, plain meaning of the language of the statute, read as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory. Where the language of the statute is ambiguous and may be subject to more than one interpretation, however, we look to the statute's legislative history, case law, purpose, structure, and overarching statutory scheme in aid of searching for the intention of the Legislature.

The plain language of FL § 12-201(n)(1) defines "shared physical custody" as occurring when each parent "keeps" the child or children overnight for more than 35% of the year and contributes to the expenses of the child or children in addition to child support payments. *Black's Law Dictionary* (10th ed. 2014) defines a "keeper" as "someone who has the care, custody, or management of something who usually is legally responsible for it. We think that the plain meaning of the word "keeps" means to maintain actual possession, or in this case, for a child to actually stay with the parent overnight. We find support for our interpretation of the word "keeps" in this context in *Guidash v. Tome*, 211 Md. App. 725 (2013). There, we described the 35% threshold for "shared physical custody as follows: "a child must stay overnight with each parent for a minimum of 128 nights[11] to trigger a shared custody child support calculation." Thus, if a parent can demonstrate that a child stays with that parent more than 35% of the overnights in a year, then "shared physical custody" is established, pursuant to FL § 12-201(n)(1), for the calculation of child support.

On the other hand, FL § 12-201(n)(2) provides that, "[*s*]*ubject to paragraph (1) of this subsection*, the court *may* base a child support award on shared physical custody: (i) solely on the amount of visitation *awarded*[.]" The plain meaning of this subsection makes two things clear. First, that FL § 12-202(n)(2) is subject to FL § 12-201(n)(1), meaning that a court cannot grant child support based on shared physical custody unless it first determines that the amount of visitation *awarded* in the extant order exceeds 35% of the overnights per year. Second, the word "may," by its definition, generally connotes a discretionary act, *i.e.*, one that is not required. Although it is discretionary for a court to rely on a court-ordered

[11] "128 overnights represents 35% of the overnights in a year." *Rose*, 236 Md. App. at 135 n.6.

> award of visitation when determining shared physical custody for child support purposes, a court may only exercise such discretion after determining that the order actually *awards* a parent more than 35% of the overnights per year.
>
> A few examples based on common family law scenarios will assist in understanding FL § 12-201(n). If a parent establishes that he or she actually keeps the child overnight for more than 35% of the year, then the court's analysis should begin and end with FL § 12-201(n)(1). Under that scenario, the parent would be entitled to have child support based on the shared physical custody formula set forth in FL § 12-204(m). If, on the other hand, the parent cannot demonstrate that he or she keeps the child for more than 35% of the overnights, then that parent may request the court to exercise its discretion pursuant to FL § 12-202(n)(2) to utilize the shared physical custody child support formula based on the amount of visitation *awarded*. The court, however, may only exercise its discretion under FL § 12-201(n)(2) if the amount of visitation awarded exceeds *35% of the overnights* as mandated in subsection (n)(1). In other words, (n)(1) *requires* the court to use the shared physical custody formula for child support where a parent has actually kept the child for more than 35% of the overnights, while (n)(2) *permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than 35% of the overnights, but has actually kept the child for 35% (or fewer) of the overnights.

Rose, 236 Md. App. at 134-136 (cleaned up) (footnotes omitted).[12]

This Court held that the circuit court "erred by not making the threshold factual determination . . . whether [appellant] actually kept the children for more than 35% of the overnights in a year[s]" before concluding that shared custody existed. *Id*. at 136-37. We

[12] The Court of Appeals recently explained the recent increase in use of "cleaned up" as a parenthetical. The parenthetical "signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotations marks, ellipses, footnote signals, internal citations, or made un-bracketed changes to capitalization) without altering the substance of the quotation." *Lopez v. State*, 458 Md. 164, 195 n.13 (2018).

therefore remanded the case to the circuit court so that both parties could "present evidence relevant to determining the appropriate child support formula [under] FL § 12-201(n)." *Id*. at 138 (footnote omitted).

Here, an application of *Rose* demonstrates that the circuit court erred by calculating child support by using the shared custody guidelines. The evidence presented by both parties established that David did not "keep[] the . . . children overnight for more than 35% of the year." FL § 12-202(n)(1). During the twelve months prior to the signing of the Agreement, David only kept the children for roughly 31% of the total overnights.[13] And, during the full fifteen months between the filing of the complaint and the date the parties signed their Agreement, David kept the children for roughly 30% of the overnights.[14] Since the testimony from both parties clearly indicates that David did not keep the children overnight for more than 35% of the year, we hold that there was not "shared physical custody" under FL § 12-201(n)(1).

According to *Rose*, FL § 12-201(n)(2) "*permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than 35% of the overnights, but has actually kept the child for 35% (or fewer) of the overnights." *Rose*,

[13] According to the evidence presented by both parties, David kept the children for, at most, 114 overnights in the twelve months prior to the signing of the separation agreement. There are 365 total nights in a year. 114 overnights out of 365 total nights equals roughly 31%.

[14] According to the evidence presented by both parties, David kept the children for, at most, 138 overnights in the fifteen months between the filing of the complaint and the date on which the Agreement was signed. There were 462 total nights in that period. 138 overnights out of 462 total nights equals roughly 30%.

236 Md. App. at 136. Here, neither party requested a *pendente lite* order on child custody during the pendency of litigation, and there was no formal agreement as to child custody until September 30, 2017. Though the circuit court stated that the parties "could have split overnights," and that it would not "punish [David] for not being able to [have more overnights]," there was simply no agreement or order granting David any overnights with his children during the fifteen months between the filing of the complaint and the signing of the Agreement. Since David was not awarded more than 35% of overnights, the circuit court was not permitted to exercise its discretion to declare that shared physical custody existed. *See Rose*, 236 Md. App. at 137; FL § 12-201(n)(2).

CONCLUSION

As neither definition of shared custody is satisfied here, we hold that the circuit court erred in finding that the parties had shared physical custody over their children for the fifteen months between the filing of the complaint and the signing of the Agreement. Further, we hold that the circuit court abused its discretion in calculating child support during that period with the shared support guidelines. We therefore reverse the circuit court's judgment and remand for proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED; COSTS TO BE PAID BY APPELLEE.