Circuit Court for Anne Arundel County
Case No. C-02-FM-18-003222

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 214

September Term 2020

S.K.

v.

N.K.

Leahy,
Reed,
Wilner, Alan M. (Senior Judge, Specially Assigned)

JJ.

Opinion by Wilner, J.
Concurring Opinion by Leahy, J.

Filed: July 9, 2021

This is an appeal from an Order of the Circuit Court for Anne Arundel County that awarded legal and physical custody of the two minor children of the parties, along with child support, to their mother S.K. (hereinafter "Mother) and set a schedule of unsupervised visitation to their father N.K. (hereinafter "Father"). To protect the privacy of the children, we shall refer to them as "daughter" and "son."

Mother complains that the court erred (1) in not requiring Father's visitation to be supervised; (2) in calculating the arrearage of child support; and (3) in the nearly six-month delay between the trial and the court's decision. Finding reversible error only with respect to the calculation of the arrearage, we shall reverse and remand for recalculation of that but otherwise shall affirm the Circuit Court judgment.

BACKGROUND

The parties were married in June 2013 and have two children, a daughter who was five years old at the time of the court's judgment and a son who was three. Both children have medical problems. The daughter had "balance issues," was delayed in walking, and was diagnosed with sensory processing disorder. The son's problems were, and are, far more serious and include a chromosome abnormality, atrial septal defect, intraventricular hemorrhages, oxygen desaturation, and developmental delays. The court found that he cannot walk or speak,[1] cannot clear his own airway, has trouble with coughing, choking,

[1] A pediatric expert who treated the son testified that he was "mostly non-verbal" but "does say some things" and does communicate, although she later said that she did not expect him to be able to "speak on his own."

and aspiration. He is prone to seizures, which are not always noticeable, during which he can suffer a drop in oxygen levels and decompensate quickly. He needs feeding and breathing support. He has a special bed and a pulse oxygen machine at home and has required both hospital and hospice care. He requires vigilance and expertise in monitoring his condition.

Both parties had a drinking problem when they met and married. Mother dealt with it and Father appeared to do so as well, at least for a while. They initially lived in Florida but in 2014, just before their daughter was born, they moved back to Maryland and stayed with Mother's mother in Odenton.

After their daughter's birth, Father relapsed and began abusing drugs as well – marijuana at first and then prescription drugs and heroin. In June 2016 – two weeks after their son was born – Father overdosed twice on heroin, once while at work, for which he was temporarily hospitalized, and, upon his release from the hospital that evening, the next day at home, for which he again was hospitalized. Upon his release, he enrolled in a one-year rehabilitation program in Baltimore but was discharged after three months for having a pocketknife on his person, which was prohibited by the program.

Father moved back in with Mother and the children in the maternal grandmother's home. Not long afterward, he resumed his drinking and drug use. On Christmas Day of 2016, while on a trip to Baltimore to purchase heroin, he got into an automobile accident and, with the discovery of syringes in the car, was arrested. Shortly thereafter, he entered

and later completed the Anne Arundel County drug court program, following which he completed a 26-week program**.**

In January 2017, Father moved out of the marital home and stayed away for 11 months, although the couple did see each other occasionally and he did visit the home to see the children. He returned in November 2017, but, by the following spring, things had deteriorated, and he left again in August 2018 after Mother had sought and received a temporary protective order because he had grabbed her ankle and pushed her. That was their final separation.

This action by Mother, for custody, child support, and other relief, was filed on August 13, 2018, the same day the protective order was dismissed at her request. The Complaint was based on allegations that (1) she had been the children's primary caregiver throughout their lives and is a fit and proper person to have custody of them, (2) Father had physically abused and assaulted her throughout their relationship, had a history of drug addiction, was then using illegal substances, had engaged in a course of conduct that indicated his inability to maintain a safe and stable environment for the children, and that he was not a fit and proper person to have custody or unsupervised visitation. Relevant to what is before us, she asked that she be awarded physical and legal custody of the children, that Father be granted supervised visitation, and that he be required to pay child support.

The thrust of Mother's case regarding custody and supervised visitation was the violence (coupled with sexual demands) on the part of Father with respect to Mother,

inappropriate touching and photographing of the daughter that had led to some inappropriate behavior on the part of the daughter, and an unwillingness and inability on his part to appreciate and be able to deal with the urgent physical needs of the son, which could significantly endanger the son's life during an unsupervised visitation.

Evidence was presented regarding each of these allegations. Both children were in therapy, but the main issue was the son because of his condition. He required 12 different specialty doctors and therapists. A principal concern was his lapsing into seizures that would not be apparent to someone not trained to recognize them but which require immediate attention.

Mother took the son to those therapy sessions and doctor's appointments and was taught and trained how to deal with the child's special needs. Father, for the most part, did not participate. Several of the medical personnel testified regarding the need for special training and offered to instruct Father. Father claimed that he did attend therapy sessions in the beginning, when they were scheduled at times when he was not at work. He testified as well that, while the couple was living together, he did watch the son and was able to feed and clothe him when Mother was not at home.

The allegedly inappropriate behavior with the daughter mostly involved Father's rubbing her nipples and taking pictures of her while she was naked. According to Father, the rubbing occurred when the child was very young, was always in the presence of Mother, and was not sexual in nature. He testified that the child would remove her top, Mother would tell her to put the top back on or Father would come over and rub her

"nubbies," and, if she did not obey, he would do that as a joke to get her to put the top on. Mother did not find that disturbing at the time. The photographs were taken, he said, when the child was doing something silly without any clothes on, that he shared those photographs with Mother, and, in some instances, Mother was present and is in some of the pictures.

The court ordered that Father be evaluated by Dr. Anthony B. Wolff, a clinical psychologist, who rendered a Report and who testified. In relevant part, Dr. Wolfe concluded:

(1) There was no evidence of current serious mental illness on the part of Father;

(2) There was a clear and acknowledged history of substance use disorder, for which Father had received treatment and that he was currently substance free and intends to remain so;

(3) In light of his normal cognitive functioning, his potential capacity for overall functioning and specifically functioning in a parental role would not be impeded by an underlying serious psychiatric or addictions related condition. But he had a history of extremely poor judgment, with questionable interpersonal skills;

(4) His minimization and denial regarding the son's medical condition and lack of insight raise continued concerns;

(5) The evaluation yielded significant discrepancies between the documented seriousness of the son's profound medical condition and Father's rather dismissive views concerning the son's health and needs;

(6) Insinuations and innuendos concerning his boundary issues with his daughter remain speculative; and

(7) The totality of these concerns rises to the level of significant concern as to his maturity level and current capacity to be entrusted with open-ended parental responsibilities.

In light of those concerns, Dr. Wolfe concluded that unsupervised parental responsibilities would be recommended only upon the satisfaction of five conditions:

(1) The healthcare providers for both children certify that Father fully understands and is fully prepared to attend faithfully to the needs of both children, especially the son's ongoing medical needs;

(2) Father participate in a parenting class or training that emphasizes appropriate boundaries in parental interactions with children;

(3) He be monitored on an ongoing basis for substance-free sobriety;

(4) He participate in individual counseling to address those concerns, to maximize his opportunities for future parental functioning and to minimize the risk of his relapsing into more problematic behavior patterns; and

(5) The well-being of both children be monitored closely in the event they come to spend unsupervised time with him.

Dr. Wolfe noted that, although his evaluation was conducted in the context of a legal dispute over custody and visitation, his evaluation did not constitute a custody evaluation and that no specific recommendations for custody or visitation were offered or implied.

The court also received a substance abuse evaluation of Father from the court's substance abuse assessor that was reviewed by the court's Custody Evaluation Unit Supervisor. The assessment was based primarily on self-report. The Report concluded that Father demonstrated overall good functioning, that he scored as having a high probability of having a moderate to severe substance use disorder and as being a problem drinker, but that, at the time of the evaluation, did not meet the criteria for a recommendation for substance abuse treatment.

A four-day hearing on the pending issues was held before a judge in August 2019. In addition to the parents, the court heard from Dr. Wolfe, the children's pediatric nurse practitioner, the substance abuse assessor, a speech language pathologist, a Board-certified clinical specialist in pediatric physical therapy, the children's maternal and paternal grandmothers, and Mother's sister.

Father testified that he was then living in a two-bedroom, two-bathroom first-floor condominium unit a half-mile from the maternal grandmother's home, where Mother and the children continued to live. He said he had moved there so that, if he got "supervised visitation," he would not disrupt the children's routine and could take them to their

appointments or to school.[2] He said that previously he had attended some of their appointments at times when he was not working and, prior to the son's birth, would accompany the Mother and the daughter to outings on Sundays. The maternal grandmother said that Father's participation in the child-raising involved mostly running errands for Mother to get supplies, that a few weeks after the son was born, Father overdosed in the house, checked into a treatment facility, and that he was gone for four months.

On all this evidence, the court found that Mother had been the nurturing parent, had been trained to provide the special care and alertness to the son's needs, that she was a fit and proper custodian, and that she had provided exceptional care to the children. The court found that Father had been a chronic drug and alcohol abuser, that he had participated in rehabilitative programs and claimed to have been free from intoxicants since 2016 or 2017, but that the court's substance abuse assessor testified that his risk of relapse was "high."

The court found as well that Father had abused Mother and, at times, had been dismissive of the son's condition and needs. Although he had completed a CPR course, he had no other necessary training in dealing with the son's medical issues. From the time the parties separated, his visitation with the children had been sporadic and supervised. The court found, however, that he had made efforts to improve his parenting

[2] The transcript shows that he said "supervised visitation." Extract at 568-69. We question whether he meant "unsupervised visitation." If the visitation was to be supervised, it is not likely that he would be taking the children anywhere.

skills, that he had been clean lately, had made efforts to understand the children's medical issues, and had a new interest in religion. The court expressed concern, however, that he had not been attending any Alcoholics Anonymous or Narcotics Anonymous meetings and "is considered to be a high risk to relapse." The court found that Father had not been sexually inappropriate with the daughter.

In its Memorandum Opinion, issued on February 12, 2020, the court summarized pertinent parts of the evidence and, after reciting the factors that it needed to consider in making an award of custody and visitation, concluded that it was in the children's best interest that Mother have sole legal and physical custody of them and that Father have unsupervised situation that would be set forth in an accompanying Order. Perhaps because, by then, the parties had divorced, the court found that Father's assaultive behavior was not likely to continue. It noted that, in November 2018, the parties had reached a temporary agreement under which Father, who had not seen the children for two months, would have supervised visitation on Thursdays and Sundays between 1:00 p.m. and 3:00 p.m. at the maternal grandmother's home supervised by the grandmother or Mother's sister.

In granting Father unsupervised visitation, the court "hedged its bets" a bit. It included in its Order a provision permitting Mother, if she had cause to believe that Father had been consuming or was under the influence of alcohol or drugs during a visit, to interrupt or deny the visit, upon the belief that that right should ensure that the Father would be clear of those substances and that the children would be protected. It also

stated expressly in its Order that it "retains jurisdiction over the minor children, and that all provisions pertaining to custody and support . . . are declared to be subject to further order of this Court."

In light of some of the testimony regarding the interaction between the two children and their interaction with the Father, the court concluded that it was in their best interest that Father have access separately with each child and not together – that if he spent time alone with them separately, each will get his attention. It added that, because the son needed special equipment, such as a hospital bed, which Mother had but he did not, there could be no overnight visitation with him.

In its Order, issued contemporaneously with the Opinion, the court set an unsupervised visitation schedule for the son every Sunday from 10:00 a.m. to 1:00 p.m. A schedule was set for the daughter from 10:00 a.m. to 4:00 p.m. on Saturday and for both children on four holidays. Father was to pick up the children at the grandmother's house and return them there. The court also awarded Mother the "Guideline" rate of child support in the amount of $776 per month commencing March 1, 2020 and found an arrearage of $5,432.

In October 2020, on Mother's motion, the court stayed the part of the February Order dealing with unsupervised visitation pending this appeal. The basis for the motion and stay order was that Father was then working in a nursing home and there was concern

about the prospect of the children, particularly the son, being infected by coronavirus (COVID-19).

DISCUSSION

Visitation

The standards that govern appellate review of child custody and visitation rulings are well-settled. We recounted them most recently in *Gizzo v. Gerstman*, 245 Md. App. 168 (2020). Paramount is that the trial courts, which have the advantage of hearing and viewing the witnesses and thus are better able to make reliable credibility determinations, are entrusted with great discretion in making those decisions concerning the best interest of the children. Their decisions govern unless the trial court's factual findings are clearly erroneous, they make a clear error of law, or there is a showing of an abuse of discretion in their ultimate decision. *Id.* at 200-201.

The clearly erroneous and abuse of discretion standards are deferential ones. Factual findings are not regarded as clearly erroneous if there is evidence in the record to support them. With respect to the ultimate custody or visitation decision, we will set it aside only upon a clear showing that the court abused its discretion – that no reasonable person would take the view taken by the trial court, that the court acted without reference to any guiding rules or principles, that its ruling is clearly against the logic and effect of facts and inferences before the court. *Id*. at 201.

In its Memorandum Opinion, implemented by its Order, the trial court showed an awareness of Father's past deficiencies that, if unresolved, would have well justified a denial of unsupervised visitation but was convinced, from evidence, that he was dealing appropriately with those deficiencies and allowed the mother to monitor that progress, at least with respect to drinking and drug use. We find no indication of clearly erroneous factfinding, misstatement or misapplication of relevant law, or abuse of the court's discretion in ordering unsupervised visitation with the conditions the court attached to it.

At the moment, that conclusion is moot. On October 8, 2020, the court stayed its visitation Order due to the changed circumstance of the COVID-19 pandemic and Father's employment in a nursing home. Since then, there apparently has been no face-to-face visitation with either child; it apparently has all been remote. We assume that, during the interim between the February 2020 Order and the October stay, Father exercised unsupervised visitation pursuant to the February Order.

When this case returns to the trial court for recalculation of the child support arrearage, the court, in the exercise of its retained jurisdiction, may need to revisit the visitation issue in light of current circumstances. A year-and-a-half has elapsed since the court entered its February 2020 Order, and the evidence leading to that Order was as of August 2019. The children are nearly two years older, but other than that, there is nothing in the record regarding Father's or the children's current circumstances.

Delay in Decision

Mother's complaint about the six-month delay between the August hearing and the filing of the court's February Memorandum Opinion and Order is based on the unsupported supposition that the court may have forgotten what it heard or failed to make appropriate credibility decisions. We see no evidence of that in the record. The court's Memorandum Opinion accurately recited the relevant evidence and stated its reliance on that part of it that the court found persuasive.

Child Support Arrearage

Mother complains about an error in the court's calculation of the arrearage in child support, which she characterizes as a mathematical one. That complaint has merit and requires a remand.

In its Memorandum Opinion of February 12, 2020, the court stated that it was awarding child support at the guideline rate of $764 per month, adding that "the date of filing of the Complaint requesting custody dates back to August 13, 2018 making Father $4584 in arrears."

The court was correct that the Complaint was filed on August 13, 2018, which would make the correct arrearage at the rate of $764 per month $13,752 ($764 x 18), not $4,584 ($764 x 6). In its accompanying Order, however, the court (1) increased the amount of support effective March 1, 2020, to $776 per month, and (2) further compounding the ambiguity regarding the arrearage, declared that "because Father is in arrears from the date of filing of Mother's Complaint in August 2019 until the present in

the amount of $5432.00," it directed that Father pay an additional $124 per month, for a total of $900, until the arrearage was paid in full.

It seems clear, both from the Memorandum Opinion and the Order, filed the same day, that the court intended for the arrearage to date back to the filing of the Complaint, but, in both documents, failed to do so and calculated the arrearage as being only of six months duration rather than 18 months. The internal inconsistency in the Memorandum Opinion was mathematical in nature. The court got the right date for the filing of the Complaint but multiplied the monthly amount by the wrong number. The error in the Order was first assuming the wrong date for the filing of the Complaint and second, even using that date, making an arithmetic mistake in the multiplication ($5,432 rather than $4,584). We shall remand for a proper correction.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS IN CONFORMANCE WITH THIS OPINION; APPELLANT TO PAY TWO-THIRDS OF THE COSTS; APPELLEE TO PAY ONE-THIRD.

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I agree with the majority opinion and write separately only to underscore, and supplement, the majority's observation that, "in the exercise of its retained jurisdiction, [the court] may need to revisit the visitation issue in light of current circumstances. A year-and-a-half has elapsed since the court entered its February 2020 Order[.]" Maj. Op. at 12. My concern is directed to Father's experience and training in managing his son's critical medical needs during unsupervised visits after the stay is lifted. As the majority notes, the circuit court found that the son's health problems are severe such that he

> . . . cannot walk or speak, cannot clear his own airway, has trouble with coughing, choking, and aspiration. He is prone to seizures, which are not always noticeable, during which he can suffer a drop in oxygen levels and decompensate quickly. He needs feeding and breathing support. He has a special bed and a pulse oxygen machine at home and has required both hospital and hospice care.

Maj. Op. at 1-2. At trial, several medical professionals testified that tending to the son's needs requires "special training."

In her brief, Mother expresses concern that Father has never "acknowledged the fragility and precariousness of [their son's] health," and argues that "[the son] could die" if Father is not able to properly monitor his health. The court's memorandum opinion does not reflect whether, in accordance with Dr. Anthony Wolff's recommendation, healthcare providers have certified that Father understands and is capable of managing his son's care.

As the majority points out, however, the court wisely retained jurisdiction over the case. Accordingly, on remand the court may, and if requested, should, review whether son's current medical conditions require that Father have further training and support in

order to safely take care of his medically fragile son during any unsupervised or supervised visits.