Circuit Court for Montgomery County
Case No. 128616FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 566

September Term, 2018

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YVON A. RESPLANDY

v.

IRINA CHAYKA

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Graeff,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: May 16, 2019

On June 19, 2015, Irina Chayka ("Wife") filed a complaint for absolute divorce against appellant Yvon Resplandy ("Husband") in the Circuit Court for Montgomery County. On September 18, 2015, Husband filed a counter-complaint for limited divorce against Wife. As part of those proceedings, the circuit court scheduled a hearing to determine care and custody of their minor child. Prior to that hearing – scheduled for March 15, 2016 – Husband filed a motion to postpone the custody hearing, a motion to appoint a "child privilege attorney" for the child, and a motion to appoint a "single judge" to preside over the proceedings.

At a hearing on March 15, 2016, the circuit court denied Husband's motion to postpone, but did not make a ruling on his motion to appoint a child privilege attorney or his motion to appoint a designated judge to preside over all hearings in the case.[1] The court then proceeded with the custody hearing, during which counsel gave opening statements and the court questioned the parties about the facts of the case. Before the evidence was concluded, the court recessed so that the parties could "talk." When the court reconvened a short time later, the parties advised the court that they had reached an agreement regarding custody of their child.[2] The court asked both Husband and Wife several questions regarding their understanding of the agreement before placing the terms on the record.

[1] On May 9, 2016, the court entered an order denying Husband's motion for appointment of a designated judge. It does not appear from the record that the court ever ruled on Husband's motion for appointment of a child privilege attorney. According to the court's docket, that motion was deemed "moot."

[2] At the March 15, 2016 hearing, the parties also agreed to equally divide a joint investment account as well as any income tax refund.

During the court's inquiry of the parties, Husband affirmed that he had no questions about the agreement, that he did not need anything "to be clarified," that he believed the agreement was in the child's best interest, and that he understood that he could not "go out and change [his] mind and not abide by [the] agreement." On April 12, 2016, the court entered a judgment memorializing the parties' agreement.

More than seven months later, on November 15, 2016, Husband filed a motion for modification of custody. At the same time, Husband filed a motion for the appointment of a best interest attorney for the child, a motion to postpone the November 28, 2016 merits hearing for the divorce, a motion for a psychological evaluation of Wife, and a motion to shorten time of response. On November 28, 2016, the court held a hearing on Husband's motions. Following the hearing, the court denied Husband's postponement request but did not expressly rule on his other motions.

At the divorce hearing held the same day before a different judge, the parties informed the court that they had reached an agreement regarding disposition of their marital property. That agreement was then read into the record. Regarding the "custody access issue," the parties informed the court that they had "not agreed to a final resolution" but had agreed to a temporary access order that might "set them up for a decent [*pendente lite*] order or a final order." The terms of that agreement, which included the appointment of a best interest attorney for the child, were then read into the record. Immediately thereafter, Husband, upon being questioned by the court, indicated that he understood the terms of the agreements and that he was entering into the agreements voluntarily. The court then received testimony to substantiate the grounds for an absolute divorce. The court instructed

the parties to submit a proposed judgment to the court.

On December 9, 2016, before the court had even entered judgment, Husband filed a motion to alter or amend judgment.[3] In that motion, Husband asked the court to rule on his motion for psychological evaluation of Wife and to "stay" entry of the judgment of absolute divorce "until after the results of the evaluation are presented to the court[.]" Husband further stated that, if the psychological evaluation determined that Wife was incompetent, Husband would "move the court to vacate the judgment."

On December 21, 2016, the court denied Husband's motion to alter or amend and his motion for a psychological evaluation of Wife. That same day, the court entered a judgment of absolute divorce, which incorporated the parties' agreement regarding marital property and their interim agreement regarding custody. On January 5, 2017, Husband dismissed his motion for modification of custody and his motion for the appointment of a best interest attorney.[4] Because Husband's motion for modification of custody represented the only unresolved issue after the court issued its December 21, 2016 judgment of divorce, Husband's dismissal of that motion meant that the December 21, 2016 judgment of divorce became final.

Over a year later, on March 26, 2018, Husband filed a "Motion to Revise Custody Agreement and Divorce Agreement." In that motion, Husband asked the court to "use its revisory power" to vacate the parties' custody agreement, which the court had approved

[3] We note that the court had not yet entered a judgment as a result of the November 28, 2016 hearing. The judgment of absolute divorce was entered on December 21, 2016.

[4] This was accomplished by the filing of a joint motion for dismissal.

and entered on April 12, 2016, and to vacate the parties' marital property agreement, which the court had incorporated in its December 21, 2016 judgment of absolute divorce. Regarding the custody agreement, Husband maintained that the court had "treated [him] unfairly," "showed a lack of diligence," and "violated [his] right to be heard." Specifically, he asserted that, at the custody hearing on March 15, 2016, the court failed to consider his pending motions for the appointment of a child privilege attorney and for the appointment of a single judge. Regarding the marital property agreement, Husband maintained that the court again treated him unfairly, showed a lack of diligence, and violated his right to be heard when, at the divorce hearing on November 28, 2016, the court failed to consider his pending motion for a psychological evaluation of Wife. Husband also alleged that, during the divorce hearing on November 28, trial counsel met with the trial judge and that, following that meeting, Husband's counsel informed him that "trial would not take place," that "the parties were to find an agreement," and that the trial judge had stated "there was no reason not to divide the assets equally." Husband argued that the court's actions in facilitating the marital property agreement "made it impossible to arrive at a fair and equitable division of properties." Finally, Husband claimed that, at the time both agreements were accepted by the court, he was suffering from various mental-health issues that "impaired his judgment" and, as a result, he "lacked the capacity to voluntarily provide truly free-will consent to the agreements and the court decrees." Husband thereafter requested that the court declare both agreements "null and void."

The court ultimately denied Husband's motion to revise, without a hearing. In this appeal, Husband presents a number of questions for our review which can be consolidated

into a single question: Did the circuit court err in denying Husband's motion to revise the parties' custody and divorce agreements?[5] We answer that question in the negative and affirm the judgment of the circuit court.

## DISCUSSION

Husband contends that the circuit court erred in denying his motion to revise because the court failed to recognize "the numerous errors of law committed in the handling of the case," which Husband set forth in his motion to revise and reasserts in the instant appeal. In addition to those "errors of law," Husband raises several additional

[5] The Husband's questions verbatim are:

> Question 1 did the court err by ignoring pending motions, both during custody trial and divorce trial[?]
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> Question 2 did the court err by ignoring the ADR process it had ordered, and/or by ignoring the ADR process after it failed[?]
>
> Question 3 did the court err by imposing negotiations on the parties while the ADR process had failed[?]
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> Question 4 did the court err or abuse its authority when it ignored the factors described in MD-Rule 8-205[?]
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> Question 5 did the court err when, through a staff of the court, it imposed pressure on the Appellant to conclude his discussions with the Appellee on the divorce trial day[?]
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> Question 6 did the court err when it ignored the fact related to the alienation of the child from her father and ignored the history and cultural background of the parties[?]
>
> Question 7 did the court err, when it ignored prior errors of law in handling the case and denied the motion to revise[?]

claims that were not raised in his motion to revise, including that the court: failed to follow the case management process outlined in Maryland Rules 16-302, 16-303, and 16-304;[6] erroneously assigned various judges to preside over the motions and merits hearings; ignored its order that the parties attend alternative dispute resolution prior to the custody hearing; exhibited "bias against male parties"; imposed "impromptu negotiations" on the parties at both the custody and the divorce trials; ignored "the factors of MD-Rule 8-205";[7] forced the case to trial; and imposed "pressure on [Husband] to conclude his discussion with [Wife]."

Before delving into the merits of Husband's claims, we first set forth some general principles of appellate review, as Husband has raised a number of claims that either fall outside the scope of our review or were not presented in his motion to revise. Maryland Rule 8-131(a) provides that, ordinarily, we will not decide any non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]"[8] The purpose of this Rule is: 1) to require parties to bring their positions to the

[6] Maryland Rule 16-302 governs the duties of the County Administrative Judge in assigning and managing actions set for trial. Maryland Rule 16-303 outlines the County Administrative Judge's powers in determining how pending motions and other preliminary matters are heard. Maryland 16-304 governs the duties of the County Administrative Judge in designating a "chambers judge" and outlines the chambers judge's duties.

[7] This is almost certainly a typographical error, as Maryland Rule 8-205 governs the filing of information reports pursuant to a notice of appeal filed in this Court. In all likelihood, Husband meant to cite Md. Code (1984, 2012 Repl. Vol), § 8-205 of the Family Law Article ("FL"), which sets forth the factors that a court is required to consider in granting a monetary award following a divorce. FL § 8-205(b).

[8] Maryland Rule 8-131(a) uses the word "ordinarily" to grant an appellate court the discretion to address unpreserved issues, provided that such an "exercise of its discretion

attention of the trial court so that it can address, and possibly correct, any errors in the proceedings; and 2) to prevent the trial of cases piecemeal, which in turn "accelerat[es] the termination of litigation." *Md. St. Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 517 (2012) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)). The Rule also serves "to ensure fairness for the parties involved and to promote orderly judicial administration." *King v. State*, 434 Md. 472, 479 (2013) (quoting *Jones v. State*, 379 Md. 704, 714 (2004)).

Moreover, "an appeal from the denial of a motion asking the court to exercise its revisory power is not necessarily the same as an appeal from the judgment itself." *Estate of Vess*, 234 Md. App. 173, 204-05 (2017) (citing *Bennet v. State Dep't of Assessments & Tax'n*, 171 Md. App. 197, 203 (2006)). In reviewing a judgment, we generally confine our review to those issues raised in the trial court leading up to entry of that judgment. Md. Rule 8-131(a). In reviewing a motion to revise a judgment, however, "the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion." *Canaj, Inc. v. Baker & Division Phase III, LLC*, 391 Md. 374, 400-01 (2006) (quoting *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997)).

Husband did not raise in his motion to revise many of the issues he now raises in the instant appeal. Consequently, those issues are not preserved for our review. Moreover,

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will promote the orderly administration of justice" and does not unfairly prejudice the parties. *King v. State*, 434 Md. 472, 480 (2013) (quoting *Jones v. State*, 379 Md. 704, 715 (2004)). We are not persuaded that addressing the unpreserved issues in the present case would satisfy either of those aims.

many of the issues Husband raised, including those that were preserved, involve perceived errors committed by the court at various times throughout the history of the case. On appeal, we are not concerned with such "errors." The sole issue is whether the court erred in denying Husband's motion to revise.

We hold that the circuit court did not err in denying Husband's motion to revise. Maryland Rule 2-534 provides that a court may alter or amend a judgment "on motion of any party filed within ten days after entry of judgment[.]" Rule 2-535(a) provides that "[o]n motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534." *Accord* Md. Code (1977, 2013 Repl. Vol.), § 6-408 of the Courts and Judicial Proceedings Article ("CJP"). "After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule." CJP § 6-408; *accord* Md. Rule 2-535(b). "Accordingly, after a judgment becomes enrolled, which occurs 30 days after its entry, a court has no authority to revise that judgment unless it determines, in response to a motion under Rule 2-535(b), that the judgment was entered as a result of fraud, mistake, or irregularity."[9] *Thacker v. Hale*, 146 Md. App. 203, 216-17 (2002).

[9] The "failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule," as stated in CJP § 6-408, can also be considered an "irregularity" within the meaning of Rule 2-535(b). *Estime v. King*, 196 Md. App. 296,

In this case, Husband asked the circuit court to exercise its revisory power to vacate the April 12, 2016 "Consent Custody Order" that had incorporated the parties' custody agreement, and the December 21, 2016 judgment of divorce that had incorporated their marital property agreement. Husband did not, however, file his motion to revise those judgments until March 26, 2018, over a year after the entry of judgment. Because Husband filed his motion to revise more than thirty days after entry of judgment, the court could have granted the motion only upon a showing of fraud, mistake, or irregularity.

"To establish fraud under Rule 2-535(b), a movant must show extrinsic fraud, not intrinsic fraud." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008)). "Fraud is extrinsic when it actually prevents an adversarial trial but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, the truth was distorted by the complained of fraud." *Id.* at 290-91 (quoting *Jones*, 178 Md. App. at 73). "In determining whether or not extrinsic fraud exists, the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the fact finder at all." *Green v. Ford Motor Credit Co.*, 152 Md. App. 32, 48 (2003) (citations omitted).

Next, under Rule 2-535(b), a "mistake is limited . . . to jurisdictional error, such as where the Court lacks the power to enter judgment." *Id.* at 51.

> It is only when the court lacks the power to render a decree, for example because the parties are not before the court, as being improperly served with

307 (2010) (quoting *J.T. Masonry Co. v. Oxford Constr. Servs., Inc.*, 74 Md. App. 598, 607 (1988)).

> process, or because the court is without authority to pass upon the subject matter involved in the dispute, that its decree is void.

*Thacker*, 146 Md. App. at 225 (emphasis removed) (quoting *First Federated Commodity Tr. Corp. v. Comm'r of Sec.*, 272 Md. 329, 334-35 (1974)).

Lastly, "[a]n irregularity is the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done." *Pelletier*, 213 Md. App. at 290 (citing *Davis v. Attorney Gen.*, 187 Md. App. 110, 125 (2009)). "As a consequence, irregularity, in the contemplation of [Rule 2-535(b)], usually means irregularity of process or procedure, and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Thacker*, 146 Md. App. at 219 (citing *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975)). "Courts, therefore, have held that if the judgment under attack was entered in conformity with the practice and procedures commonly used by the court that entered it, there is no irregularity justifying the exercise of revisory powers under Rule 2-535(b)." *Pelletier*, 213 Md. App. at 290 (quoting *De Arriz v. Klingler-De Arriz*, 179 Md. App. 458, 469 (2008)).

> Irregularities warranting the exercise of revisory powers most often involve a judgment that resulted from a failure of process or procedure by the clerk of a court, including, for example, failure to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication.

*Thacker*, 146 Md. App. at 219-20.

We note that "[t]he overarching aim of Md. Rule 2-535(b) . . . is the preservation of the finality of judgments, unless specific conditions are met." *Powell v. Breslin*, 430 Md.

52, 71 (2013). To ensure that aim, "the movant must carry his or her significant burden of proof – to establish the existence of fraud, mistake, or irregularity by clear and convincing evidence." *Peay v. Barnett*, 236 Md. App. 306, 321 (2018) (internal quotations omitted) (quoting *Pelletier*, 213 Md. App. at 290). "Moreover, the party moving to set aside the enrolled judgment must establish that he or she 'act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense.'" *Thacker*, 146 Md. App. at 217 (citing *Platt v. Platt*, 302 Md. 9, 13 (1984)). "Ordinary diligence includes moving to vacate a judgment 'as soon as' a party learns of the judgment and investigates the facts." *Bland v. Hammond*, 177 Md. App. 340, 357 (2007) (citations omitted).

Against that backdrop, we hold that the court did not err in denying Husband's motion to revise. None of the "errors" raised by Husband, including those that were unpreserved, constituted a fraud, mistake, or irregularity as contemplated by Rule 2-535(b). Moreover, Husband failed to set forth, nor could we find, any evidence to suggest that Husband "act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense." *Thacker*, 146 Md. App. at 217. Husband has provided no explanation why he was unable to timely challenge the two judgments after they were entered by the court. Nor has he provided any explanation why he waited over a year after the judgments were entered to file his motion to revise. Indeed, the record shows that Husband was actively involved in all relevant proceedings throughout the case's history. Each judgment was entered pursuant to a consent agreement between Husband and Wife and was placed on the record in open court, at which time Husband affirmatively stated that he was entering into each agreement knowingly and voluntarily and that he understood the agreement's

terms. Although Husband did ultimately challenge the divorce agreement by way of his motion to alter or amend following the divorce hearing, Husband only raised the issue of his motion for a psychological evaluation of Wife, and he did not file an appeal when his motion to alter or amend was denied.

In sum, Husband failed to carry his burden of showing fraud, mistake, or irregularity, and he likewise failed to carry his burden of establishing that he acted with ordinary diligence. Accordingly, the court did not err in denying his motion to revise.

**JUDGMENT OF CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**