Circuit Court for Anne Arundel County
Case No. C-02-FM-16-003433

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1103

September Term, 2017

ELIZABETH MURPHY

v.

ROBERT MURPHY

Meredith,
Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: June 11, 2018

This appeal arises out of a decision by the Circuit Court for Anne Arundel County granting Elizabeth Murphy, appellant, an absolute divorce from Robert Murphy, appellee. On July 26, 2016, Mr. Murphy filed a complaint for absolute divorce, child custody, visitation, child support and other relief. Shortly thereafter, on August 23, 2016, Ms. Murphy filed a complaint for limited divorce, alimony, child custody, child support, and other relief. The circuit court consolidated the two cases and declared that Ms. Murphy's case would be the main case and that there would be no further filings in Mr. Murphy's case.

A *pendente lite* hearing was held before a magistrate, who issued a written report and recommendations. No exceptions were filed, and on March 23, 2017, the court entered a *pendente lite* order that, among other things, ordered Mr. Murphy to pay $1,369 per month in child support retroactive to September 1, 2016. With regard to the arrearage created by that retroactive child support award, the court ordered Mr. Murphy to pay an additional $131 per month. After the *pendente lite* hearing, but prior to a hearing on the merits, Ms. Murphy filed an amended complaint for absolute divorce, custody, and child support.

A hearing on the merits was held on June 15 and 16, 2017. The hearing was scheduled to address Ms. Murphy's initial complaint for a limited divorce. By agreement, the court and the parties proceeded on Ms. Murphy's amended complaint for an absolute divorce. In a written order, the court awarded Ms. Murphy an absolute divorce and, among other things, granted sole physical custody of the parties' children to Mr. Murphy, awarded child support to Mr. Murphy in the amount of $840 per month, ordered the parties to

maintain health insurance for their children and to share equally in the costs of all uncovered medical expenses, ordered both parties to share equally the costs of their children's agreed-upon extra-curricular activities, and terminated Mr. Murphy's *pendente lite* child support obligation including any arrears. This timely appeal followed.

QUESTIONS PRESENTED

Ms. Murphy presents the following four questions for our consideration:

> I. Did the trial court err in retroactively modifying the *pendente lite* order?
>
> II. Did the trial court err in retroactively deviating from the child support guidelines to reduce [a]ppellee's arrears, when it is undisputed that the minor children were in [a]ppellant's care from the filing of the [c]omplaint on August 23, 2016 until [the] court's ruling on June 16, 2017?
>
> III. Did the trial court err in ordering [a]ppellant to contribute to the ordinary medical expenses of the minor children in addition to ordering child support?
>
> IV. Did the trial court err in ordering [a]ppellant to contribute to the non-educational extra-curricular activity costs in addition to ordering child support?

For the reasons set forth below, we shall vacate the challenged provisions and remand this case for further proceedings consistent with this opinion.

PROCEDURAL AND FACTUAL BACKGROUND

In light of the questions presented for our consideration, a detailed recitation of the underlying facts is not necessary. It is sufficient to state that the parties were married on September 6, 1997 in Montgomery County, Maryland. They had two children together, Ian James Murphy, born January 14, 2001, and Declan Keating Murphy, born November 18, 2002. Mr. Murphy was employed as a marine biologist and Ms. Murphy was employed by Anne Arundel County Public Schools.

Although the parties separated at one time during their marriage, they reconciled in 2012 and lived together until on or about June 10, 2016, when Ms. Murphy moved out of the family home. As noted above, both parties sought an absolute divorce and a determination of, among other things, custody, visitation, and child support.

It is undisputed that Mr. Murphy made no child support payments from the date the initial divorce complaint was filed through the date of the *pendente lite* hearing. After a *pendente lite* hearing on the issues of child support, alimony, custody, and visitation, the magistrate recommended an award of primary physical custody to Ms. Murphy and child support retroactive to the date of the filing of the complaint. Neither party filed exceptions.

In its subsequent *pendente lite* order, the circuit court awarded Ms. Murphy primary physical custody of the children and granted "liberal access" to Mr. Murphy pending the hearing on the merits. In addition, the court ordered Mr. Murphy to pay *pendente lite* child support in accordance with the Maryland Child Support Guidelines in the amount of $1,369.00 per month, retroactive to September 1, 2016. The court noted that "[t]his creates arrears for which Mr. Murphy will pay an addition[al] $131 per month, for a total support obligation of $1,500 per month[.]"[1]

[1] Although the court did not explicitly state the amount of the arrears, it is clear that the unpaid child support from September 1, 2016 through March 1, 2017, was $9,583.00. At oral argument, counsel advised that, at the time of the hearing on the merits, the arrearage was $9,190.00.

The docket entries reflect that on April 3, 2017, Mr. Murphy filed a motion to modify child support. There is no indication in the docket entries that the motion was ever considered by the court, ruled upon, or withdrawn, but in his brief, Mr. Murphy asserts that he withdrew it on August 16, 2017. There is no dispute that Mr. Murphy paid the *pendente lite* child support as ordered until the judgment of absolute divorce was entered.

As a result of the merits hearing, custody and child support changed significantly. The court's subsequent order, among other things, granted Ms. Murphy an absolute divorce. The court awarded sole physical custody of the parties' minor children to Mr. Murphy and joint legal custody, although in the event of a disagreement, Mr. Murphy was to have "final decision making authority." The court awarded Ms. Murphy visitation every other weekend. A schedule was established for holidays and vacations.

At the hearing on the merits, the parties stipulated that Mr. Murphy's income was $6,288.00 per month and Ms. Murphy's monthly income was $4,261.00. With regard to child support, the court's order provided, in part, as follows:

> ORDERED AND DECREED, that effective July 1, 2017, [Ms. Murphy] shall pay child support monthly in accordance with the attached Maryland Child Support guidelines, in the amount of $840.00 per month until the first to occur (1) the Child(ren) have either died, married, become self-supporting, or arrived at the age of eighteen years, or until graduation from high school, but not past the age of nineteen in any event, or until the death of Plaintiff.

The court order also provided:

> ORDERED AND DECREED, that [Mr. Murphy's] *Pendente Lite* child support obligation to include any arrears are hereby terminated[.]

In addition, the order addressed health insurance coverage for the children and payment for the cost of their extra-curricular activities as follows:

> ORDERED AND DECREED, that both parties shall maintain health insurance for the minor children and equally share, fifty percent (50%) the costs of any and all uncovered medical expenses. The paying party shall provide the other party with bills and said contribution shall be paid within 30 days;
>
> ORDERED AND DECREED, that both parties are to equally share, fifty percent (50%), of all agreed upon extra-curricular activities, any extra-curricular activities that are not agreed upon shall be the financial responsibility of the parent enrolling the child(ren)[.]

With these facts and the procedural background of this case in mind, we consider the questions presented by Ms. Murphy.

DISCUSSION

I. & II.

The first two questions presented for our consideration involve the court's decision to terminate Mr. Murphy's *pendente lite* child support obligation including the arrears. Ms. Murphy argues that the trial court erred in reducing Mr. Murphy's child support arrearage to zero because a trial court is precluded from retroactively modifying child support back to the date of the initial filing absent a motion to modify that child support. In addition, she argues that in reducing Mr. Murphy's child support arrearage, the court, without explanation, deviated from the child support guidelines notwithstanding the fact that both children were in her care from the filing of the complaint on August 23, 2016 until the court's ruling on June 16, 2017. We agree and explain.

A. Standard of Review

Maryland Rule 8-131(c) governs our standard of review:

> (c) **Action Tried Without a Jury**. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

"Findings of fact that are clearly erroneous are marked by a lack of competent and material evidence in the record to support the decision." *In re Dany G.*, 223 Md. App. 707, 719 (2015) (relying on *Anderson v. Joseph*, 200 Md. App. 240, 249 (2011)("factual finding is clearly erroneous if there is no competent and material evidence in the record to support it.")). The clearly erroneous standard does not "'apply to a trial court's determinations of legal questions or conclusions of law based upon findings of fact,'" which we review *de novo*. *Rigby v. Allstate Indemnity Co.*, 225 Md. App. 98, 105 (2015) (quoting *Elderkin v. Carroll*, 403 Md. 343, 353 (2008)).

With regard to the circuit court's discretionary rulings, we recognize that an abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court," or "when the court acts without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1, 13 (1994) (internal citations and quotations omitted). Thus, a circuit court's factual findings regarding child support "will not be disturbed unless they are clearly erroneous, and rulings based on those findings must stand unless the court abused its discretion." *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994) (internal citations omitted).

B. Reduction of Mr. Murphy's *Pendente Lite* Child Support Arrearage

The court did not explain its ruling on the child support arrearage. Ms. Murphy argues that "there were only two possible explanations" for the trial court's decision to reduce Mr. Murphy's child support arrearage to zero. Either the trial court intended to modify the child support obligation retroactively to the date of the initial filing or the court was proceeding on a motion to modify that was filed by Mr. Murphy on April 3, 2017. In either case, according to Ms. Murphy, the trial court erred.

Mr. Murphy counters that the *pendente lite* order "did not assess or award any arrears" and that, in its final order, the trial court did not abrogate any child support arrears, but merely declined to award child support retroactively. He maintains that the *pendente lite* order of child support was temporary in nature and was extinguished and replaced by the final order entered after the merits hearing. In addition, because Ms. Murphy's amended complaint for absolute divorce did not incorporate or reference her initial complaint for limited divorce and did not request *pendente lite* child support, the trial court was limited to awarding child support retroactively to the date that Ms. Murphy's amended complaint was filed. Mr. Murphy also argues that the trial court determined that "retroactive child support was inappropriate." He asserts that the *pendente lite* order "died a natural death upon entry of" the final order and that "[t]his was proper because this was a request for an initial award of permanent child support, not a request to modify a prior award." In addition, he argues that the trial court was free to consider whether "having money flow out of the children's custodial home" would be in the best interest of the children.

As a preliminary matter, we reject Mr. Murphy's argument that the trial court was limited by the fact that Ms. Murphy's amended complaint for absolute divorce did not request *pendente lite* child support. At the time the amended complaint for absolute divorce was filed, the *pendente lite* award had already been entered and the court had established that Mr. Murphy had incurred an arrearage and ordered him to pay it. As a result, Ms. Murphy had no grounds to support an additional claim for *pendente lite* child support because that issue had already been fully adjudicated. In addition, the record indicates that the case proceeded to a hearing on Ms. Murphy's initial complaint for a limited divorce and that the parties and the court agreed to proceed on Ms. Murphy's amended complaint, in which she sought an absolute divorce.

Maryland courts have long recognized that one of the most fundamental duties of parenthood is the obligation of the parent to support the child until the law determines that the child is able to care for himself or herself. *Wills v. Jones*, 340 Md. 480, 484 (1995) (and cases cited therein). In Maryland, "in any proceeding to establish or modify child support, whether *pendente lite* or permanent," courts must use the child support guidelines set forth in Title 12, subtitle 2 of the Md. Code (2012 Repl. Vol., 2017 Supp.), Family Law Article ("FL"). FL § 12-202. A court may not modify a child support award except upon "the filing of a motion for modification and upon a showing of a material change of circumstances." FL § 12-104(a). Nor may a court retroactively modify a child support award prior to the filing of a motion for modification. FL § 12-104(b). There is a rebuttable presumption that the amount of child support resulting from the application of the guidelines is correct, and a different amount may not be awarded unless the court makes

specific findings in writing or on the record that application of the guidelines would be unjust or inappropriate. FL § 12-202(a).

In *Harvey v. Marshall*, 158 Md. App. 355 (2004), *aff'd*, 389 Md. 243 (2005), we examined the language and legislative intent of FL § 12-104(b), and held that our Legislature had, "in using the term 'modify' . . . followed the language of the Federal statute, intending to prohibit, *inter alia*, the courts from wiping out an arrearage accrued during periods before the filing of a motion for modification." *Harvey*, 158 Md. App. at 370. *See also Reuter*, 102 Md. App. at 235 ("The adoption of the child support guidelines . . . was intended to restrict the equitable discretion of the trial court and produce an award of support that is grounded in 'specific descriptive and numeric criteria.'") (quoting *Voishan v. Palma*, 327 Md. 318, 322 (1992)).

In *Reuter*, we explained that the Maryland rule allowing for modification of a child support order only upon a showing of changed circumstances was consistent with broader principles of *res judicata*. "[T]he doctrine of *res judicata* dictates that the parties may not relitigate matters that were or should have been considered at the time of the initial award." *Reuter*, 102 Md. App. at 241. With regard to *pendente lite* awards of child support we noted:

> A *pendente lite* award, of course, may also be modified in accordance with the guidelines at the time that a final award is made. In that situation, a showing of material change is not required, but *only* because the order granting a divorce terminates the *pendente lite* award. Because the *pendente lite* order is terminated, and a new order granted, the *pendente lite* order may not be retroactively modified in this manner.

Id. at 241 (internal quotations and citations omitted).

We went on to state that:

> A final child support order is a new award; hence, a *pendente lite* order may be *prospectively* "modified" at the time that a final award is made without a showing of changed circumstances. It may not be *retroactively* modified except as provided by FL § 12-104. Under no circumstances, however, is retroactive modification required.

Id. at 242 (internal citation omitted).

In the case at hand, in its *pendente lite* order, the trial court made two specific rulings. First, pursuant to the child support guidelines, it awarded child support to Ms. Murphy, effective as of September 1, 2016, in the amount of $1,369 per month. Second, as a result of its first determination, it ruled that Mr. Murphy had an accrued arrearage. Although the court did not set forth the amount of that arrearage, the numerical determination was a matter of simple mathematics. Seven months in which Mr. Murphy failed to provide support for his children multiplied by $1,369, the amount of *pendente lite* child support ordered by the court, resulted in an arrearage of $9,583. The court ordered Mr. Murphy to pay that arrearage by making monthly payments of $131.

In its final order, the trial court's entry of an award of child support in favor of Mr. Murphy had the effect of terminating the *pendente lite* award of child support in the amount of $1,369 per month. That constituted a proper "prospective" modification of the *pendente lite* child support. The court gave no explanation for its decision to terminate Mr. Murphy's obligation to pay the accrued arrearage on his child support obligation, however. Based on the record, it appears the ruling constituted an improper "retroactive" modification of the *pendente lite* child support in contravention of the purpose of Maryland's Child Support

Guidelines.[2] Accordingly, we shall vacate the court's order of child support and remand this matter for further proceedings.

III.

Ms. Murphy next contends that the trial court erred in ordering her to contribute to the ordinary medical expenses of the minor children in addition to ordering child support. In its final order, the trial court ordered that the parties "equally share, fifty percent (50%) the costs of any and all uncovered medical expenses." Ms. Murphy argues that this order was contrary to Maryland law. At oral argument, Mr. Murphy conceded error on this issue. We agree.

In Maryland, in addition to the basic child support obligation, parents, by agreement or order of the court, may share, in proportion to their respective adjusted actual incomes, **extraordinary** medical expenses incurred on behalf of a child. FL § 12-204(h)(2) (emphasis added)[3]. Extraordinary medical expenses are defined as "uninsured expenses

[2] In circumstances other than the entry of a final award of child support, which serves to terminate the *pendente lite* award of child support by the entry of a final award, a court does not have discretion under FL § 12-104 to terminate a parent's obligation to pay child support. In *Wills v. Jones*, 340 Md. 480 (1995), the Court of Appeals recognized that a trial court does not have authority under FL § 12-104(a) to terminate a parent's obligation to pay child support. Even in a case where a parent's income were low enough, or equitable considerations demanded that child support be $0 per month, the parent's obligation to provide support remains and the award of $0 could be increased when future circumstances justified an increase. In *Wills*, 340 Md. at 487, the Court recognized that FL § 12-104(a) "contains no provision allowing a court to entirely terminate a parent's obligation."

[3] Section 12-204(h)(2) of the Family Law Article provides:

(continued)

over $100 for a single illness or condition[,]" and include "uninsured, reasonable, and necessary costs for orthodontia, dental treatment, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders." FL § 12-201(g). Because the basic child support obligations, as set forth in FL § 12-204(e), are "designed to cover typical costs of raising children, including ordinary medical expenses such as [ ] medications and co-payments," trial courts generally may not order a parent to pay for ordinary medical expenses.[4] *Bare v. Bare*, 192 Md. App. 307, 317 (2010). The trial court erred in ordering Ms. Murphy to

> (2) Any extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted actual incomes.

[4] As we recognized in *Bare*:

> Of course, our interpretation of F.L. § 12-204 should not be misunderstood to mean that a court may ***never*** make an award of ordinary medical expenses in a guidelines case. As we tacitly recognized in *Boswell* [*v. Boswell*, 118 Md. App. 1 (1997)], the court may enforce an agreement to pay such expenses. *See Boswell*, 118 Md. App. at 35, 701 A.2d 1153. Alternatively, there may be some instances in which a significant number of ordinary medical expenses fall upon a parent who is in precarious financial circumstances, potentially warranting a deviation from the guidelines due to those unique difficulties, in accordance with F.L. § 12-202(a)(2). But in either of those situations, the court must still make an explicit finding that such special circumstances exist, with a particularized explanation of what the increase is and why it is in the child's best interest. *See* F.L. § 12-202(a)(2)(v); *Boswell*, 118 Md. App. at 35-36, 701 A.2d 1153.

Bare, 192 Md. App. at 318-19.

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pay ordinary medical expenses and, additionally, in ordering that those expenses be shared equally instead of in proportion to the parties' respective incomes.

IV.

Ms. Murphy argues that the trial court erred in including non-educational extra-curricular expenses in the child support order. Again, we agree. Although desirable, parents cannot be required to pay the costs of a child's ordinary extra-curricular activities. *See Horsley v. Radisi*, 132 Md. App. 1, 29 (2000)("[A] court has discretion to depart from the Guidelines in a given case, if it is satisfied that an academically challenged or gifted student requires remedial tutoring or advanced programming to meet the child's particular educational needs. Such expenses clearly do not have the character of ordinary extracurricular activities that are otherwise included in the basic child support obligation."). *See also Bare*, 192 Md. App. at 315.

Although expenses for attending a special or private elementary or secondary school to meet the particular educational needs of a child may be included in an award of child support pursuant to FL § 12-204(i), such expenses are to be paid by the parties in proportion to their respective incomes. *Voishan*, 327 Md. at 323; *Reuter*, 102 Md. App. at 235.

The record before us reveals no findings to support or discernible basis for the rulings on child support arrearage, uncovered medical expenses and extra-curricular activities. There is no finding that the medical expenses in question are extraordinary or that there are activities related to the children's particular educational needs, or that any special circumstances exist that would support the court's rulings on the three issues.

For the above reasons, we vacate the court's orders terminating Mr. Murphy's child support arrearage; ordering both parties to share equally the cost of uncovered medical expenses; and ordering the parties to share equally in the cost of the children's extra-curricular activities. On remand, the court may conduct further proceedings and reconsider these matters in a manner not inconsistent with this opinion.

THOSE PORTIONS OF THE JUDGMENT OF ABSOLUTE DIVORCE DATED JULY 7, 2017 OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY TERMINATING APPELLEE'S CHILD SUPPORT ARREARAGE AND ORDERING THE PARTIES TO SHARE EQUALLY THE COST OF UNCOVERED MEDICAL EXPENSES AND THE COST OF THE CHILDREN'S EXTRA-CURRICULAR ACTIVITIES VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.