Circuit Court for Charles County
Case No.: 08-C-11-000571

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1320

September Term, 2021

CRYSTAL KRAUSS

v.

RYAN KRAUSS

Berger,
Beachley,
Shaw,

JJ.

Opinion by Shaw, J.

Filed: July 8, 2022

Crystal Krauss ("Mother") appeals from an order of the Circuit Court for Charles County denying her motion for modification of child support and granting a modification of custody. Ryan Krauss ("Father") did not file a brief or participate in this appeal. Mother timely appealed the circuit court's order and presents the following issues, which we have consolidated and rephrased as follows:[1]

1. Whether the trial court erred or abused its discretion in denying Mother's motion to modify child support and determining that Father was not obligated to contribute to the children's private school tuition.

2. Whether the trial court erred or abused its discretion in ordering remote video visitation.

For the reasons set forth below, we vacate the judgment of the circuit court and remand for further proceedings.

BACKGROUND

The parties married on July 20, 2006 and have two children together: "M," born in 2006, and "O," born in 2010. On April 8, 2011, Mother filed a complaint for limited divorce. Father filed an answer but did not file a counter-complaint.

[1] The issues as presented in Mother's informal brief are:

1. Request that the monthly child support obligation be reevaluated and modified.

2. Request that the minor children's school fees, school costs, school supplies, school activities, and other extracurricular activities be shared equally up through and including college and/or trade school.

3. Request that the order for remote video visitation be repealed.

On June 24, 2011, the Charles County Child Support Enforcement Administration ("Child Support Enforcement") filed, on behalf of Mother, a complaint for child support ("the enforcement action"). The circuit court subsequently consolidated the enforcement case and divorce action, though the cases retained separate case numbers.

Following a hearing on September 20, 2011, the court entered a *pendente lite* consent order awarding Mother sole legal and primary physical custody of the children and awarding Father visitation. The court ordered Father to pay child support in the amount of $380.00 per month.

On February 8, 2012, Mother filed an Amended Complaint for Absolute Divorce. Following a hearing, the court entered a Judgment of Absolute Divorce by consent order dated March 20, 2012. The court ordered that Father shall have "reasonable rights of visitation with the minor children" and that the child support order in Case No.: CV11-1335 remain in full force and effect.

At a review hearing on April 22, 2015, Father was found in contempt for failure to pay child support. At the time of the hearing, Father's outstanding arrearage was $14,278.00. The purge amount was set at $2,000.00 and an order for commitment was ordered effective August 5, 2015. Father satisfied the purge amount and the commitment order was vacated.

Father filed a petition for contempt for denial of visitation on April 22, 2015, which was dismissed without prejudice on July 31, 2015. On December 10, 2019, Father filed a motion to modify visitation, alleging that he had been denied visitation with M and O since 2011.

February 20, 2020 Modification Hearing

Child Support Enforcement filed a motion to modify (increase) child support on behalf of Mother on January 9, 2020. On February 20, 2020, the family magistrate held a hearing on the motion to modify support. The magistrate noted that pursuant to a Consent Order entered on September 20, 2011, Father was ordered to pay $380.00 per month in child support. Mother testified that she had earned $44,604.00 in 2019 and $48,083.00 in 2018. The magistrate found that Father worked 30-35 hours per week, earning $16.50 per hour, and that Father had been employed off-and-on doing various jobs for the past eight years.

As evidence of their incomes, Mother submitted her 1099 tax form and profit/loss statement for 2019 and Father submitted paystubs. The magistrate found that Mother incurred $400.00 per month in childcare expenses. The magistrate found that the minor children attended private school at a cost of $5,938.80 per year plus a $200.00 registration fee and that private schooling was not mutually agreed by the parties. Based on the Child Support Guidelines Worksheet prepared by the magistrate, the magistrate recommended that Father's child support obligation be increased to $715.00 per month, beginning on February 1, 2020 and continue until each child marries, dies, emancipates, reaches the age of 18, or completes secondary school.

The outstanding arrearage as of February 20, 2020 was $30,616.85. The magistrate recommended that Father pay $35.00 per month toward the arrearage, beginning on March 1, 2020, and continuing until the arrearage is paid in full and payments shall continue following emancipation in the amount of current support plus arrearage amount until all

arrearages are paid. On March 24, 2020, the circuit court adopted the magistrate's Findings and Recommendations of February 20,2020 and granted Mother's Motion to Modify Child Support.

On May 14, 2020, the court ordered that Father and children participate in a minimum of eight sessions of therapeutic supervised visitation at the Center for Children. On September 28, 2020, the court issued an order for therapeutic supervised visitation at Trusted Wings, LLC. Mother filed a motion for appointment of a Best Interest Attorney on January 29, 2021.

On February 26, 2021, the case came before the court for a hearing on all pending motions, including Father's motion to modify visitation. The court ordered Mother to bring the children to the Center for Children on March 2, 2021 for supervised visitation with Father. The court also allowed Mother's motion for appointment of a Best Interest Attorney, "provided that neither party has to pay a fee." The parties subsequently reported to the court that the first scheduled therapeutic visit was cancelled due to a "panic attack" suffered by M at the time of the appointment.

At the review hearing on April 19, 2021, the court ordered that Father have temporary visitation with O via remote video conference (Zoom) each Monday evening at 7:00 p.m. The parties subsequently reported to the court that O had refused to participate in the Zoom video conferences with Father. The court determined that a custody visitation evaluation was appropriate to assist the court in deciding outstanding custody issues in the case and ordered that the custody visitation evaluation be completed, and a report be submitted to the court.

On July 9, 2021, Mother filed a petition to modify child support seeking an increase in child support. Mother alleged that "circumstances had changed" due to an increase in the children's private school costs and because Father had a new job which had resulted in a "significant increase in income," and a salary of approximately $68,704.00 per year.

On September 1, 2021, Father filed an answer to the petition to modify child support. Father admitted that he had started working at an elevator company but denied earning $68,704.00. Father asserted that the children's private school tuition was not a part of the parties' child support agreement, as he had not agreed to send the children to private school.

October 22, 2021 Modification Hearing

The circuit court conducted an evidentiary hearing on all pending motions on October 22, 2021. Neither party was represented by counsel. The court provided the parties with copies of the custody visitation evaluation prepared by Sharon G. Richardson, LCSW-C. The visitation evaluation was not marked as an exhibit at the hearing, nor was it included in the record provided to this Court on appeal, though it was docketed and entered in the case file. The court highlighted a portion of the visitation evaluation, reading it aloud to the parties:

> Should . . . supervise[d] visitation remain in effect? Virtual visits may present at most viable option for resuming very slowly. Consideration for easing any restrictions over time only if perpetrating parent has remained in compliance with the conditions and that it appears to be in the best interest of the children to allow continued[,] less restrictive visitation. Consideration for suspensions, if there's any violations[:] If children or child displays symptoms of present distress [and/or] Clear indications that parent has threatened to harm or flee with child.

The court noted that Ms. Richardson had further recommended that the children may benefit from psychotherapy intervention, which, the court stated, might already be occurring. The court indicated that it was inclined to order that Zoom meetings between the children and Father continue. Father expressed his agreement with that plan. Mother responded that "both children have said they're not willing to get on." The court determined, based on Ms. Richardson's evaluation, that "virtual visits are the most viable option." Mother asked the court, "what happens if the children won't participate?" The court responded that, in the event that the children refused to participate in virtual visits, the parties would be required to file appropriate pleadings to return to court.

Mother testified that she was seeking an increase in child support due to Father's change in employment. Mother requested that the child support agreement be modified to account for the cost of the children's private school tuition and provide for the payment of child support while the children attended college. Mother testified that M had attended private school when the parties were married. Mother also testified that Father had indicated in a text message to M that he would like to send her to private school.

Mother provided the court with documents identified as three exhibits: bus bill/tuition (Exhibit 1), text messages (Exhibit 2), and Mother's tax return (Exhibit 3). The docket indicates that the exhibits were retained by the trial judge. The exhibits are not contained in the record. Mother testified that tuition for one child's school had been paid in full. She stated that tuition for the second child's school had a balance of $6,000.00 outstanding, as $2,000.00 had been paid and the child had received a scholarship representing half of the total tuition of $17,600.00.

Father denied that the parties had an agreement to send the children to private school and testified that he could not afford private school.

Mother indicated to the court that she had evidence of Father's increased income:

> [MOTHER]: So [he] also screen shot a copy of his paystub to me which was stupid. But I know what he makes. And when I filed . . .
>
> THE COURT: Okay, I'll give you a chance to . . .
>
> [MOTHER]: . . . is what he makes.
>
> [FATHER]: Wrong.
>
> THE COURT: Okay. Any further questions?
>
> [MOTHER]: Um, no.
>
> THE COURT: Okay. And you have a screen shot or you know what he makes. You can tell me what you think he makes.
>
> [MOTHER]: It's on the petition. It was $68,000[.00].
>
> [FATHER]: At $25[.00] a hour that's not even possible.
>
> THE COURT: All right, any final comment on this issue? Any final comment?
>
> [FATHER]: I – I – I motion to not pay – have this go away, whatever it is, I'm not sure.
>
> THE COURT: All right. Folks, thank you. The – the – there's a case that – it's from 2018, not that long ago. Ruiz versus Kinoshita, it's a – Maryland . . . Court of Special Appeals [decision], 239 Maryland App. 395. It talks about interpretation of Family Law Article in child support case[s], . . . section 12-204 and it's subsection (i). By agreement of the parties or by order of court the following expenses incurred on behalf of a child [may] [be] divided between the parties in proportion to their adjusted actual incomes. Any expenses attending a special or private elementary or secondary school to meet the particular educational needs of a child or expenses for transportation of the child between homes and the parents. The case that I referred to, the Ruiz case, there is a – the following non-exhaustive list of six

factors as set out in the opinion for trial courts to consider when determining whether a child has a particular educational need in calculating child support for children attending a school or private elementary or secondary school. The child's educational history including how long the child has attended a school, the need for stability and continuity, the proportion of the parents' income the child would have received had the parents stayed together. So I haven't heard a lot about her – her schooling but this seems to be somewhat of a high school, which I assume that she's only recently gone into. The child's performance in private school. I'll assume she's doing well. The family history of attending a particular school particularly if it's religiously affiliated. Well, there's no history of attending this school as a family.

[MOTHER]: I went to private school all 12 years so . . .

THE COURT: Okay. Whether the parents decided prior to divorce to send the child to private school. It's clear that didn't happen either. Other specific facts of the case that may impact the child's best interest. Haven't really heard too much about that. The parents['] ability to pay. We have [Father] saying he can't. The Court's going to deny the request to increase child support to include educational expenses. I don't think there's a history here that indicates that these parties have really agreed to that, especially at the secondary level. I think there's evidence that $17,000[.00] a year figure would be extremely difficult for the father to . . . meet. There's no agreement to send her to private school especially at this . . . level, even . . . at her prior education level. So for all those reasons the Court denies that request. I get the order out for the Zoom meetings at Monday at 7 and good luck to both of you.

[FATHER]: Thank you.

[MOTHER]: Sir, what about the other things that were asked for?

THE COURT: What are you talking about?

[MOTHER]: Well, O's schooling. And M did go to a private school. She's been in private school.

THE COURT: Okay. But she . . .

[MOTHER]: She just continued on to high school.

THE COURT: Okay.

[MOTHER]: And modifying the child support based on our income[?]

THE COURT: I don't have any evidence of your husband's income.

[MOTHER]: But we were notified to come today with –

THE COURT: It's on the docket for the hearing.

[MOTHER]: Right.

THE COURT: So I'm not here to present – tell you how to present your cases on either side.

[MOTHER]: So I mean, what does that mean because he . . .

THE COURT: Some things you'll be . . . without. I'm not . . . going to continue this, the motion's denied. Have a good day.

[MOTHER]: Thank you.

Mother noted a timely appeal. We shall provide additional facts as necessary.

DISCUSSION

I.

Denial of Modification of Support

Mother contends that the trial court erred in failing to complete the Child Support Guidelines worksheet and make the requisite findings of the parties' income before denying her motion for modification of child support. She also argues that the court erred in determining that Father was not obligated to contribute to the children's private school tuition.

The decision of "[w]hether to grant a modification [of child support] rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Ley v. Forman*, 144 Md. App. 658,

665 (2002) (citing *Dunlap v. Fiorenza*, 128 Md. App. 357, 363 (1999)). We "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." Md. Rule 8-131(c). A trial court's factual findings are not clearly erroneous if supported by competent evidence. *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016). "[W]here the order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556 (2002) (quoting *Walter v. Gunter*, 367 Md. 386, 392 (2002) (internal quotation marks omitted)).

As a threshold matter, "[b]efore a court can consider the level of support to which a child is entitled under the guidelines, it must determine that it has authority to grant the requested motion." *Wills v. Jones*, 340 Md. 480, 488 (1995). Section 12-104(a) of the Family Law Article ("FL") of the Maryland Code, (1984, 2019 Repl. Vol.) authorizes a court to "modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." *See id.* In deciding a motion to modify child support, the trial court must first determine "if a material change in circumstances has occurred which justifies a modification." *Ley*, 144 Md. App. at 665.

An order for child support may be modified "only if there is an affirmative showing of a material change in circumstances in the needs of the children or in the parents' ability to provide support." *Payne v. Payne*, 132 Md. App. 432, 442 (2000) (citations omitted). A change is material when it is both "relevant to the level of support a child is actually

receiving or entitled to receive" and "of sufficient magnitude to justify judicial modification of the support order." *Wheeler v. State*, 160 Md. App. 363, 372 (2004) (quoting *Wills*, 340 Md. at 488-89). "In making this threshold determination that a material change of circumstance has occurred, . . . a court must specifically focus on the alleged changes in income or support that have occurred since the previous child support award." *Wills*, 340 Md. at 489.

In every child support determination, "the trial court must ascertain each parent's 'actual income.'" *Walker v. Grow*, 170 Md. App. 255, 267 (2006) (quoting FL §12-204(d)). The trial court "must verify the parents' income statements 'with documentation of both current and past actual income.'" *Id*. at 269 (citing FL §12-203(b)(1)). "The amount of actual income that drives the specific amount of the support award under the guidelines is a factual finding that is required in every case." *Id*. at 284.

If a court finds a material change in circumstance has occurred, it must then apply the Child Support Guidelines to determine the level of support to which the child is entitled. *See Wills*, 340 Md. at 491 (remanding for recalculation of father's child support obligation using monthly income earned while incarcerated); *accord Sczudlo v. Berry*, 129 Md. App. 529, 541-42 (1999) (remanding for calculation of appellant's child support obligation based on income and change in circumstance). Use of the Child Support Guidelines is mandatory. *See* FL §12-202(a) ("[I]n any proceeding to establish or modify child support, whether pendente lite or permanent, the court shall use the child support guidelines set forth in this subtitle"). The Guidelines provide a schedule of monthly obligation amounts based on the parents' combined actual income. FL §12-204(e). If the parties' combined

monthly income is $15,000.00 or less, the court is required to follow the Guidelines.[2] FL §12-204(e); *see Kpetigo v. Kpetigo*, 238 Md. App. 561, 583 (2018).

Expenses for private school education may be included in the basic child support obligation based on an agreement of the parties or an order of the court to divide private school expenses, or "any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child[.]" *Ruiz v. Kinoshita*, 239 Md. App. 395, 429 (2018) (quoting FL §12-204(i)(1)). In *Ruiz*, this Court explained the non-exhaustive list of six factors trial courts must consider when determining whether a child has a "particular educational need" under FL §12-204(i)(1)). 239 Md. App. at 429-30 (citing *Witt v. Ristano*, 118 Md. App. 155, 169-71 (1997)).

In this case, the court made no express findings as to whether there had been a material change in circumstances in the parties' income and/or the children's needs to warrant a change in the amount of child support. It appears that Mother provided evidence of her income and Father's employment. Father disputed Mother's allegation that his annual income was $68,704.00, and though Mother referenced a screen shot of Father's paystub, it is unclear whether any evidence verifying Father's income was admitted or considered by the court. The court did not address the parties' conflicting positions about Father's salary and failed to provide any explanation as to how it resolved the disputed evidence.

[2] FL §12-204 has been amended effective July 1, 2022, increasing the Guidelines range to $30,000.00.

The trial court denied Mother's motion for modification of support based on its analysis of the factors set forth in *Ruiz* and its application of those factors to the facts of the case. By jumping ahead to the *Ruiz* factors without first making an express finding as to the parties' incomes, and whether there had been a material change in circumstances warranting modification, the trial court's decision denying modification of child support was error.

Accordingly, we vacate the court's order denying the motion for modification of child support and remand the case to the trial court to make the necessary factual findings as to the parties' incomes and to explain its conclusions. *See Ley*, 144 Md. App. at 670 (remanding case where trial court failed to make specific findings of fact on parents' incomes, instead relying on approximations and estimations in deciding motion for modification of child support); *Kpetigo*, 238 Md. App. at 583-84 (remanding the case for recalculation of child support where court did not specify why it used parent's dated salary in its calculations); *Meyer v. Meyer*, 193 Md. App. 640, 663-64 (2010) (remanding case for court to make appropriate findings of fact and conclusions of law "[i]n light of the sparse record and the absence of any pertinent findings by the circuit court"). Should the court determine that a material change in circumstances occurred to justify modification, the expenses of private school and extracurricular activities are factors to be considered in calculating the child support obligation, based on the factors discussed in *Ruiz*. In the exercise of its discretion, the court may re-open the modification hearing for additional evidence as it deems appropriate.

II.

Modification of Visitation

Mother argues that the trial court abused its discretion when it ordered remote visitation between Father and the children. Mother asserts that the court ordered the remote visitation despite evidence that the children had experienced distress resulting from previous attempts at visitation and the children had refused to participate in future remote visitation.[3]

In deciding whether a modification of custody is appropriate, the trial court utilizes a two-step process. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). The court must first determine whether there has been a material change in circumstance, and if the court determines there has been such a change, the court considers the best interests of the child. *Id*. A "material change" in the context of custody modification refers to "'a change that affects the welfare of the child.'" *Id*. at 171 (citation omitted). The moving party has the burden of showing "'that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed.'" *Id*. at 171-72 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)).

Though the court did not make an express finding of a material change in circumstance, there was sufficient evidence in the record to support a finding that there had

[3] Mother states in her brief that following the court's order on October 22, 2021, Father called to speak with O, and O "immediately told him she did not wish to speak with him and they hung up on one another." Mother indicated that Father had not attempted to contact either child since that time.

been a material change of circumstances. After many years of no contact between Father and the children, Father sought to establish visitation with the children in 2019. Initial efforts at establishing visitation, however, were unsuccessful. On March 2, 2021, the first court-ordered supervised visitation appointment at the Center for Children did not occur because emergency medical services were called to the Center for Children when M suffered a panic attack at the time of the scheduled visit with Father. The first attempt at court-ordered virtual visitation also failed when O refused to participate in the virtual call.

At the hearing on October 22, 2021 the court allowed Father's motion to modify custody, ordering that Father have remote video visitation (via Zoom, Skype or FaceTime) with M and O each Monday evening at 7:00p.m., beginning October 25, 2021. The court further ordered the parties to cooperate and exchange necessary information to arrange the remote visitations.

In reaching its decision to order remote video visitation, the court relied exclusively on the visitation evaluation and recommendation of Sharon Richardson, MSW, LCSW-C. Ms. Richardson recommended that "[s]hould supervised visitation remain in effect, virtual visits may present as most viable option for resuming, very slowly." Ms. Richardson noted the family history of domestic violence and the emotional and behavior problems often experienced by child witnesses of domestic violence, particularly when exposed to "triggers (reminders) of the witnessed or known domestic violence," indicated that Father's visitation should be suspended if "the child displays symptoms of/appears to present with distress in response to (before and/or after) visitation," specifically, "distress, specific to minors of this case = panic attacks or nightmares."

Mother pointed out to the court that the children had experienced the "distress" identified by Ms. Richardson and that both children were unwilling to participate in remote video calls. Mother expressed concern that at some point, the children's feelings "ha[ve] to be taken into consideration." The court responded that consideration for suspension of visits may be appropriate "if these other issues appear."

In any decision to modify custody, "[t]he best interests of the child is the paramount concern." *Kowalczyk v. Bresler*, 231 Md. App. 203, 213 (2016) (citing *Wagner v. Wagner*, 109 Md. App. 1, 28-29 (1996)). In determining the best interests of the children, the court considers a number of factors to inform its custody decision, including but not limited to:

> (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender.

Montgomery Cty. Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 420 (1977) (internal citations omitted); *accord Braun v. Headley*, 131 Md. App. 588, 610-11 (2000).

In reaching its decision, the court made no reference to the "best interest" factors and expressed no findings as to the best interest of the children. Ms. Richardson's evaluation did not opine that remote visitation was in the children's best interest. Rather, she indicated that "*should* supervised visitation remain in effect," then "virtual visits *may* be the most viable option."

Based on the visitation evaluation report, the court signaled that it was "inclined to order that [remote visitation via Zoom] continue," but that it intended to "give everybody

a chance to testify and present testimony to go with continued Zoom meetings." The court did not hear testimony from the parties or receive any evidence regarding visitation beyond the visitation evaluation report. Though the court indicated that it was aware of "the children's preference," the court did not address Mother's concerns regarding the distress experienced by the children and the children's refusal to participate in virtual visitation.[4] There was evidence supporting both parties' concerns regarding visitation, though the court's resolution of that conflict did not appear in the record.

We remand this issue back to the trial court for a finding as to whether the proposed custody modification of virtual visitation is in the children's best interests.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

[4]On remand, appointment of a Best Interests Attorney (BIA) for the children, which the court had previously granted, may be a consideration on this issue. *See, e.g.*, *John O. v. Jane O.*, 90 Md. App. 406, 435-36 (1992) (noting that a BIA "is responsible for providing the court with an independent analysis of the child's best interests, not advocating either parent's position."), *abrogated on other grounds*, 340 Md. 480.