Circuit Court for Charles County
Case No. 08-C-15-000399

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2004

September Term, 2022

RONALD MAURICE PETERSON, JR.

v.

AVYKA CAMPBELL

Beachley,
Shaw,
Killough, Peter K.
(Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 14, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant Ronald Maurice Peterson, Jr. ("Father") appeals the judgment of the Circuit Court for Charles County which granted Avyka Campbell's ("Mother") motion for modification of child support. Father presents the following questions for our review:

1. Did the trial court err or abuse its discretion as a matter of law in denying [Father's] motion for judgment where [Mother] failed to make a prima facie case for a modification of child support?

2. Did the trial court err when it improperly calculated the parties[']respective incomes and the subsequent modification of child support?

3. Did the trial court err in awarding [Mother] retroactive child support as arrears where no request for retroactive child support was plead [sic] in any request for modification for child support?

4. Did the trial court err as a matter of law in ordering retroactive child support as of the filing of the initial March 24, 2021 complaint [which was] superseded [in] January, 2022?

5. Did the trial court err or abuse its discretion when it granted [Mother's] request for orthodontist expenses already provided by [Father]?

For the reasons that follow, we vacate the judgment of the circuit court concerning orthodontia expenses and remand for further proceedings on that issue. We otherwise affirm.

FACTS AND PROCEEDINGS

Mother and Father had two children as a result of their marriage. On January 19, 2016, Mother filed a Complaint for Absolute Divorce that included a request for child support. The parties resolved all issues arising out of their marriage pursuant to a Consent Order filed on November 1, 2016. Relevant to this appeal, the Consent Order confirmed that "by agreement of the parties, [Father] shall pay to [Mother] $942 per month as child support for the two minor children[.]" In accordance with common practice, the Consent

Order stated "that the court reserves jurisdiction to modify the issues pertaining to custody, access and support based upon a material change in circumstances[.]"

On March 24, 2021, Mother filed a Motion for Modification of Custody, Child Support, and Request for Appropriate Relief. On January 21, 2022, Mother filed an Amended Motion for Modification of Custody, Child Support, and Request for Appropriate Relief. In her motion, Mother averred "[t]hat the circumstances have materially changed since the entry of the Consent Order." Relevant to this appeal, Mother alleged that Father's "income has doubled since the last custody order" and that "[w]hen the child support was last calculated . . . [Father] reportedly earned approximately $40,000 per year." Father filed an amended "Counter Motion for Modification" on March 10, 2022.

The parties appeared before the court for a hearing on the parties competing motions on June 28, 2022, July 1, 2022, and September 13, 2022.[1] On November 10, 2022, the court found that there were material changes in circumstances, including:

> The children's expenses have increased pursuant to the testimony. The parties' income has increased from the last court hearing. Additionally, both parties are making more money than they did at the time of the $942 per month back in 2016. Um, the children have had different medical bills associated with therapy, as well as, um, orthodontia. There have been changes in the work related child care expenses, as well as, the camp expenses. So, the [c]ourt does find that there have been material changes regarding the financial circumstances of the parties and the expenses related to the children.

On December 16, 2022, the court granted Mother's motion and increased Father's child

[1] The parties reached an agreement regarding custody and child access as evidenced by an Amended Consent Order dated October 14, 2022.

support obligation to $1,262 per month and established arrearages at $12,536. Additionally, the order required Father to "reimburse [Mother], $1,625.18 which represents one-half the [sic] of [child's] orthodontist's bill." [Amended Extract, part 2, 2]. Father then noted this timely appeal. Additional facts will be provided as necessary.

DISCUSSION

I. FATHER WITHDREW HIS MOTION FOR JUDGMENT PURSUANT TO MARYLAND RULE 2-519

We reprint Father's first "Question Presented" verbatim: "Did the trial court err or abuse its discretion as a matter of law in denying [Father's] motion for judgment where [Mother] failed to make a prima facie case for a modification of child support?"[2] At the close of Mother's case in chief, Father moved for judgment, asserting that Mother failed to establish a material change in circumstance to support her request to modify child support. The court denied the motion. After the court denied Father's motion for judgment, Father moved forward with his evidentiary presentation, providing both testimonial and

[2] Under this "Question Presented," Father makes an array of other unrelated arguments. We confine our analysis only to the question presented. *See* Md. Rule 8-504(a)(3) (requiring appellant to provide "[a] statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue"); *see also Peterson v. Evapco, Inc.*, 238 Md. App. 1, 62 (2018) (stating that "[c]onfining litigants to the issues set forth in the 'Questions Presented' segment of their brief ensures that the issues are presented and obvious to all parties and the [c]ourt" (quoting *Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426 (1999), *aff'd on other grounds*, 366 Md. 597 (2001))). We further note that the header for Father's first "Legal Argument" mirrors his "Question Presented."

documentary evidence.[3]

> Resolution of this issue is governed by Md. Rule 2-519(c), which states:
>
> > A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. *In so doing, the party withdraws the motion*.

(Emphasis added). "In Maryland, a motion for judgment, made at the close of an opponent's case and thereafter denied, is withdrawn when the party making the motion offers evidence in its own case-in-chief." *Gen. Motors Corp. v. Seay*, 388 Md. 341, 351 (2005). *See also Driggs Corp v. Md. Aviation Admin.*, 348 Md. 389, 403 (1998) ("It has always been understood and recognized, however, that a party who makes and loses such a motion has an option. The party (B) may proceed to present additional evidence in an effort to controvert, or further controvert, the evidence produced in A's case, in which event B effectively withdraws the motion for judgment and may not complain on appeal about the denial of it (Md. Rule 2-519(c)), or B may rest on the denial of the motion and challenge on appeal the court's determination that the evidence was legally sufficient.").

By offering evidence after the court denied his motion for judgment, Father's motion for judgment was withdrawn by operation of the Rule. He may not challenge its

[3] We see no merit to Father's counsel's claim at oral argument that the court directed Father to testify. The record actually reflects that after the court denied Father's motion for judgment, the court simply asked counsel, "Are you ready for your client to testify?," to which counsel responded "Sure."

denial on appeal.[4]

II. THE COURT DID NOT ERR IN CALCULATING THE PARTIES' INCOMES

Father argues that the court erred in calculating the parties' incomes. First, Father contends that the court miscalculated Mother's income because it failed to include Mother's commissions from her second job as a realtor. At the close of all the evidence, the court instructed the parties to "do like a two-page memorandum of what you believe the summary of information is and propose guidelines and submit that to me." In response to the court's request, Father's memorandum stated that "[t]he most accurate salary to use for [Mother's] annual income for calculating child support is $143,064 annually[.]" Father also used $143,064 for Mother's income in his proposed child support guidelines worksheet. The court then adopted Father's assertion that Mother's gross income was $143,064 per year. Based on this record, Father is estopped from now arguing that the calculation of Mother's income was incorrect. *Abrams v. Am. Tennis Cts., Inc.*, 160 Md. App. 213, 225 (2004) ("The doctrine of judicial estoppel provides that '[a] party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least

[4] We note that we would not review this issue even if the motion for judgment was not withdrawn by operation of the Rule because Father did not include the necessary transcripts in his record extract. Maryland Rule 8-501(c) is clear that "[t]he record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal." We could not review the propriety of the denial of a motion for judgment made at the close of a plaintiff's case in the absence of *all* evidence presented in plaintiff's case in chief.

where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.'" (quoting *Gordon v. Posner*, 142 Md. App. 399, 425 (2002))). We decline to hold that the court erred when it accepted Father's assertion as to Mother's income as set forth in his post-trial memorandum and proposed guidelines worksheet.

Father next argues that "[t]he court improperly assessed [his] monthly income" because "his income fluctuated from month to month." Specifically, he asserts that, as a servicemember deployed to Japan, his "income fluctuated and he lost his BAS[5] while deployed at sea."

We reject Father's argument because the court's findings as to his income are amply supported by the record. Father's year-to-date income as of his August 2022 Leave and Earnings Statement was $72,387.71. The court divided this sum by eight, fully supporting the court's determination that Father's gross income amounted to $9049 per month.[6]

Father makes a corollary argument that because his income fluctuated during deployment, "[t]he court erred in assessing permanent support and increasing [Father's] child support obligation during his temporary deployment." We held in *Johnson v. Johnson* that "bonuses already paid to a parent should be used to calculate child support

[5] "BAS" is an acronym for "Basic Allowance for Subsistence."

[6] In his brief, Father asserts that his October 2022 year-to-date income was $86,496.52, which is $7,208.04 monthly, and his December 2022 year to date was $100,554.66, which is $8,379.55 monthly. First, Father has not provided a record cite where these income statements can be found, nor are they part of the record extract. Moreover, the last income statement submitted as evidence was the August 2022 Leave and Earnings Statement that the court properly relied on.

even though it is unknown whether such a bonus will be paid in the future." 152 Md. App. 609, 622 (2003). We explained that "[i]n child support cases, it is oftentimes necessary to calculate child support based on currently existing circumstances, even though the [c]ourt and the parties are fully aware that there is a significant possibility that in the future conditions might change." *Id.* at 621. Therefore, even though Father's income could change after his deployment in Japan, the court did not err because "child support should be calculated based on the parent's *current* income." *Id.* at 622 (emphasis in original) (citing *Smith v. Freeman*, 149 Md. App. 1, 35 (2002)). We note that if Father earns significantly less at some point in the future, "he can petition the court for a child support modification."[7] *Id.* at 620. In summary, we discern no error in the court's income determinations.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RETROACTIVE CHILD SUPPORT

Father argues that "[t]he [c]ourt erred in awarding retroactive child support when [Mother] failed to plead a request for retroactive arrears." Mother did not specifically request retroactive child support in her original motion to modify or her amended motion to modify, but did request "such other and further relief as the nature of this cause may

[7] Father also argues that his child support obligation was incorrectly calculated because his "additional pay was for living quarters and utilities and other related expenses while deployed to Japan." He also avers that he pays for hotels while staying in Maryland and for his children's musical instruments, summer vacation to Punta Cana, IPODS, and cell phones. According to the child support guidelines, the only expenses subtracted from monthly actual income are preexisting child support payments and alimony. *See* FL § 12-201(c). Therefore, these expenses do not alter the child support calculus.

require."

We begin with FL § 12-101(a)(3), which states that "the court *may* award child support for a period from the filing of the pleading that requests child support." (Emphasis added). "By its plain language, section 12-101(a)(3) leaves [the granting of retroactive child support] to the discretion of the court[.]" *Chimes v. Michael*, 131 Md. App. 271, 295 (2000). A party may obtain a form of relief under a prayer for general relief, if the pleading informed the opposing party "that the particular form of relief fashioned by the court is within the range of reasonable possibility[.]" *Terry v. Terry*, 50 Md. App. 53, 61 (1981). In *Falise v. Falise*, this Court stated:

> Mrs. Falise contends that the trial judge was not authorized to grant a monetary award because none was specifically requested by Mr. Falise. We note, however, that in his Amended Bill of Complaint, Mr. Falise prayed "that the Plaintiff be awarded such other and further relief as the nature of his case may require." This prayer was sufficient to permit the trial judge to render any necessary equitable adjustments *vis-a-vis* a monetary award.

63 Md. App. 574, 582 (1985). Mother's motion to modify stated that Mother's "expenses for the minor children have substantially increased" and included a prayer for general relief. Moreover, attached to the motion was a copy of the younger child's daycare bills. We therefore reject Father's appellate claim as we conclude that he had adequate notice of Mother's request for retroactive child support and the statute expressly authorizes retroactive payments. Thus, the court did not abuse its discretion in awarding retroactive child support.

IV. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RETROACTIVE CHILD SUPPORT TO THE DATE OF THE INITIAL MOTION TO MODIFY

Father argues, without citing any legal authority, that "the earliest the trial court should have imposed arrears is one month after the filing of [Mother's] amended motion to modify filed on January 21, 2022." FL § 12-104(b) states, "[t]he court may not retroactively modify a child support award prior to the date of the filing of the motion for modification." "Section 12-[1]04(b) makes clear … that it is within the discretion of the trial court to determine whether and how far retroactively to apply a modification of a party's child support obligation up to the date of the filing of the petition for said modification." *Ley v. Forman*, 144 Md. App. 658, 677 (2002).

Mother's initial motion for modification, filed March 24, 2021, requested, *inter alia*, an increase in child support. On January 21, 2022, Mother filed an amended motion for modification that repeated her request "[t]hat the [c]ourt increase the child support awarded." Here, the court granted Mother's motion for modification and awarded retroactive child support beginning April 1, 2021. Because Mother's initial motion for modification was filed on March 24, 2021, the court did not award retroactive child support prior to the date of the filing of the motion for modification. We see no error or abuse of discretion in the court's retroactive award.

V. THE COURT ERRED IN FAILING TO MAKE THE REQUISITE FINDINGS FOR PAYMENT OF THE ORTHODONTIST'S BILL

In the last section of his brief, Father argues that the court erred in requiring him to pay half of the orthodontist's bill. The parties' Consent Order provided that Father "shall

maintain health insurance for the minor children so long as such health benefits are obtainable through his employment[.]" The Order was silent as to how unreimbursed medical expenses for the children should be paid. The evidence showed that one of the children had an orthodontist's bill totaling $3,250.36 that was not covered by insurance, and the court ordered "[Father] will reimburse [Mother], $1,625.18 which represents one-half [ ] of [child's] orthodontist's bill."

Extraordinary medical expenses are defined in the child support guidelines as "uninsured costs for medical treatment in excess of $250 in any calendar year." FL § 12-201(g)(1). These expenses include "uninsured, reasonable, and necessary costs for *orthodontia*, dental treatment, vision care, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders." FL § 12-201(g)(2) (emphasis added). And FL § 12-204(h)(2) instructs that "[a]ny 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." A party can argue that "the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii). Father testified at the hearing that he had orthodontia insurance for the children but presented no evidence to substantiate the amount covered by insurance.[8] Thus, the court

[8] Father argues that the court erred by "substitut[ing] personal experience for evidence" because "[t]he judge inferred that based upon her experience, she had never seen a scenario where no out of pocket expenses exist after insurance." But Father provided no evidence that there would be no out of pocket expenses if Mother went to a provider that (continued)

did not err in apportioning part of the orthodontist's bill to Father because Father did not present sufficient evidence that it would be unjust or inappropriate to do so in this case.

But the court divided the orthodontist's bill equally rather than "divid[ing] [the bill] between the parents in proportion to their adjusted actual incomes" as required by the child support guidelines.[9] FL § 12-204(h)(2). "F.L. § 12–202(a)(2)([v]) makes very clear that a departure from the Guidelines must be supported by the court's written finding or a specific finding on the record stating the reasons for departure." *Boswell v. Boswell*, 118 Md. App. 1, 35 (1997), *aff'd*, 352 Md. 204 (1998). "If the trial court fails to make these specific findings its order must be vacated." *In re Joshua W.*, 94 Md. App. 486, 501 (1993) (citing *Tannehill v. Tannehill*, 88 Md. App. 4, 15 (1991)). The court in its written finding and finding on the record did not explain why it chose to equally divide this bill rather than in proportion to the parents' adjusted actual incomes. Although we recognize that the end result may be *de minimis*,[10] we vacate and remand for the court to make the requisite findings. *Boswell*, 118 Md. App. at 35 (remanding because "[t]he court stated no reasons for declining to split extraordinary medical expenses according to income").

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accepted his insurance. Interestingly, the orthodontist's bill shows that even if Father's insurance was accepted, there would have still been out of pocket expenses.

[9] The court's order also stated "that the parties shall split all uninsured medical expenses totaling $250.00 or more in a given calendar year with [Mother] being responsible for 57% and [Father] being responsible for 43%." Thus, the court split uninsured medical expenses in proportion to the parents' adjusted actual incomes for future expenses, but not for the orthodontist's bill.

[10] The difference between a 50/50 division of the orthodontia bill and a 57/43 percent division is $227.53.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AS TO DIVISION OF ORTHODONTIA EXPENSES VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS ON THAT ISSUE. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BYAPPELLANT.