Circuit Court for Prince George's County
Case No. CAD14-27381

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0346

September Term, 2018

KATRINA CHANTEL MITCHELL

v.

JAMAL KEONY MITCHELL

Kehoe,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 12, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Katrina Mitchell ("Mother") appeals from an order of an in banc panel in the Circuit Court for Prince George's County. After appellee Jamal Mitchell ("Father") and Mother divorced, a judge awarded custody and established child support in an order signed on December 1, 2015. Father moved to correct the order, arguing that his number of overnights with the children had been miscalculated and thus his child support obligation should be reduced. The court denied his motion. Almost nine months later, Father moved to modify his child support obligation.

At the ensuing motions hearing, the parties agreed that Father would have additional access to the children. Mother requested the opportunity to take discovery before resolving further issues. The court agreed to reconvene at a later date to address those issues, which included child support. The consent order resulting from this hearing was entered by the court on February 23, 2017.

On May 11, 2017, when the parties met before the same judge for the purpose of resolving outstanding issues, the judge did not allow the parties to argue or present evidence, and summarily denied all pending motions, including Father's motion to modify child support.

Seven days later, on May 18, 2017, Father moved for in banc review, which mother opposed. The circuit court granted Father's motion, and the parties appeared before the in banc panel on March 19, 2018. The panel decided that the court had increased Father's access to the children such that his child support obligation must be determined under the shared custody provisions of the Maryland Child Support Guidelines. The panel also held that the court abused its discretion by denying all pending motions without "a meaningful

hearing[.]" The panel remanded the case to a family magistrate. Mother appealed, and presents one question for our review, which we have rephrased for clarity:[1]

> Did the in banc panel err when it held that the court abused its discretion in denying Father's motion for modification of child support?

We affirm the in banc panel's judgment. Presented with Father's *prima facie* assertion that his increased number of overnights with the children placed him within the guidelines' range for shared physical custody, the circuit court should have provided Father a meaningful hearing to demonstrate whether his increase in access met the requisite threshold under the child support guidelines.

BACKGROUND

Complaint for Divorce

Mother filed a complaint for "Limited Divorce" on October 1, 2014, in which she asserted that the parties had voluntarily separated by agreement prior to May 2014. She requested, among many other things, that Father pay child support, and that the court award her sole physical and legal custody of their two children. Father filed a counter-complaint for divorce on November 7 in which he also requested sole physical and legal custody and child support. The parties met to resolve custody and other issues at a hearing on the merits held on January 7, 2015.

Following the hearing, on January 20, 2015, the parties agreed to the entry of a consent order, which provided that, until "a custody and/or access hearing occur[ed],"

[1] Mother asked: "Did the trial court properly deny [Father's] motion for modification of child support?"

Mother would have sole legal and physical custody and Father would have access to the children on alternating weekends. The consent order contained no provision for child support.

Hearing Before a Magistrate

On April 20, 2015, the parties met before a magistrate to resolve issues including pendente lite custody and child support. The magistrate filed a proposed order with the circuit court providing Mother sole physical custody and Father, pendente lite, access on alternating weekends, alternating Wednesday evenings, and on certain federal holidays and days during the summer. The proposed order suggested that Mother receive, pendente lite, $2,400 in monthly child support.

Pendente Lite Order and Judgment of Absolute Divorce

The circuit court entered a pendente lite order on June 18, 2015, adopting the magistrate's recommendations entirely. Nearly five months later, on November 25, 2015, the court entered a judgment of absolute divorce incorporating by reference the pendente lite order until the court issued an "[o]rder of custody, access, and child support[.]"

Custody and Child Support Order

The parties met before the circuit court on December 1, 2015 to sign a custody and visitation order, and an earnings-withholding order. The resulting order, signed by the court on December 1, and later entered on December 23 ("December Order"), provided for joint legal custody, with Mother to have tie-breaking authority. Mother was also awarded sole physical custody and Father was awarded access to the children per an attached access schedule. The order set Father's support obligation at $2,620 per month. The court

additionally found that Father had a child support arrearage of $14,400, dating from October 2014 through March 2015. The order provided that Father must pay the arrearage at the rate of $50 per month. That same day, the court entered a withholdings order for Father's employer to withhold from his monthly earnings $2,620 in current child support and $50 for the arrearage.

Father's Motion to Correct

On December 11, 2015, Father moved to correct the December Order. He alleged that, rather than the 115 overnights on which the child support calculations were based, Father was awarded 129 overnight visits.[2] The discrepancy, he claimed "[a]ffect[ed] the Child Support calculations, arrears[,] and other matters."[3] Father requested that the court "determine overnight visits so that this matter c[ould] be resolved." On February 19, 2016, Mother's counsel filed a "line" with the court amending the calendar of overnights. The line stated that "[p]ursuant to the Court Order [Father] has [] (120) overnights." The parties nevertheless appeared before the court on March 4, 2016. The court denied Father's motion to correct on April 1, 2016.

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[2] In his motion, Father's counsel explained the circumstances of the alleged mistake. Father's counsel was in another courtroom when the court called Father's case and signed Mother's proposed order. The order signed by the court, Father alleges, is based on Mother's incorrect computation of 115 overnights with the children.

[3] The December Order incorporated an "Access Schedule" attached as an exhibit. The schedule defined, for access purposes, weekends and holiday breaks, and awarded Father weekends on every 1st, 3rd, and 4th calendar month; Spring Break in odd-numbered years; Thanksgiving Break and a portion of Christmas Break in even-numbered years; and two weeks' access during Summer Break. **R**Neither the text of the December Order nor the attached Access Schedule stated explicitly the number of overnights Father would have with the children any given year.

Motions to Modify Custody & Support

Mother moved to modify visitation and legal custody on July 27. She alleged, among other issues, that Father refused to take the children to their extracurricular activities, failed to timely refill the children's prescriptions, refused to discuss therapy for the children, and would not allow the children to complete their homework. Father filed his opposition on September 7. He generally denied Mother's allegations and provided numerous exhibits in support of his motion. A hearing on these motions was postponed several times.

Just before the new year, on December 30, 2016, Father filed a motion to modify his child support obligation.[4] His motion insisted that, at the time of filing, Father had had more than 130 overnights with the children, and that under the December Order, he was entitled to 142 overnights. He claimed the additional overnights "significantly impact[ed] the [application of the] child support guidelines and the amount of arrears." Additionally, Father complained that the pendente lite order had stated that his child support obligation "would not exceed [$2400]," and yet his current obligation—$2,620—did.[5] Mother opposed the motion in a January 18, 2017 filing.

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[4] At oral argument before this Court, Father's counsel explained that he filed this motion almost nine months after the denial of his motion to correct because he wanted to establish for the court the exact number of overnights he had had over the year.

[5] The relevant text of the pendente lite order reads:

> ORDERED, that [Father] be and hereby is directed to pay to [Mother] the sum of $2,400.00 per month as pendente lite child support for the minor children, . . . commencing April 1, 2015. . . .

The parties met before a motions court on January 23, 2017 ("January 23 Hearing"). Father continued to insist that the pendente lite order supplied the correct calculation of child support and that his current obligation was based on an underestimation of his overnights. He asked the court to correct the December Order and reduce his obligation to $2,400, as it had been under the pendente lite order. After ironing out the access schedule, the parties agreed to continue the issue of child support so that Mother's counsel could "do a little bit of discovery to exchange the financial information to see if there is a change[.]" The court instructed the parties to schedule a time for a hearing at which they could "litigate whatever it is that [they] think is outstanding."

The agreed-upon access schedule was memorialized in a consent order entered on February 23, 2017 ("February 23 Access Order"). The order incorporated the transcript of the hearing and stated that the transcript's references to access would "supersede any prior [o]rder. . . in conflict thereto . . . save for those portions of any prior [o]rder] [] still in effect[.]" At the hearing, Mother's counsel put on the record that Father would have the children "every Thursday after daycare/school at 5:00 to Friday drop-off no later than 9:00 in the morning." Additionally, Father would have "every other Friday pick-up at daycare to drop off at Monday daycare no later than 9:00 a.m."

As the court instructed, the parties met again, on May 11, before the same judge ("May 11 Proceeding"). The court did not permit the parties to argue or to present evidence

> ORDERED, that. . . the obligor's child support obligation shall continue until such time as the children die, marry, become emancipated, reach the age of [18 years.]

and summarily denied all pending motions, and stated, "[i]f it is pending, it's denied." Father's counsel requested a family magistrate on the issue of child support, but the court refused.

In Banc Panel Review

A week later, on May 18, Father filed a "Request For Three[-]Judge Panel" to review the circuit court's denial of his motion to modify child support. He alleged that the February 23 Access Order increased his access to the children to "approximately 159 overnights." He recounted that, at the January 23 Hearing, the court scheduled the May 11 Proceeding to recalculate his child support obligation concomitant with the number of overnights. Yet, at the May 11 Proceeding, the court, "without giving any justification, indicated that [Father's] [m]otion [to modify] [wa]s denied."

On November 20, Mother filed her opposition. She alleged that Father had failed to identify a material change in circumstances that justified modifying child support and that, instead, Father merely wished to be credited for a perceived overage in child support payments. According to Mother, Father "ha[d] no right to a hearing on his [m]otion to [m]odify [c]hild [s]upport."

An in banc panel held a hearing on March 19, 2018. Father argued that, according to his calculations, his overnights had placed him over the 128-day threshold in the guidelines, entitling him to shared custody child support calculations. Mother reiterated that the court should deny Father's motion because Father had not alleged a material change in circumstances, as the change in the access schedule had occurred after Father filed his motion to modify child support. At the conclusion of argument, the in banc panel

ruled from the bench that the circuit court had increased Father's access at the January 23 Hearing and had postponed the matter of child support until May 11. Yet, at the ensuing May 11 Proceeding, the issue "was denied without an evidentiary hearing and [] that was an abuse of discretion."

On March 26, 2018, the in banc panel issued its written order ("In Banc Order"). The order noted that the February 23 Access Order increased Father's access from "±128 overnights per year to ±142 overnights per year[,]" and that "[a]t that time, the parties and the court agreed that a recalculation of child support, based on the new access schedule, was to be determined at a future hearing." The February 23 Access Order's "change to the access schedule constitute[d] a material change in circumstances, the result of which call[ed] for application of the Child Support Guidelines based on shared custody." Thus, the panel found that "the trial judge abused his discretion by failing to conduct a meaningful hearing" at the May 11 Proceeding. The panel ordered the case be remanded to a "[f]amily [m]agistrate to take evidence to recalculate the child support obligation based on shared custody[.]"

On April 11, 2018 Mother noted her appeal from the In Banc Order to this Court.[6]

[6] Per the In Banc Order, the parties met before the family magistrate, on June 1, 2018. The magistrate's proposed order, contained in the record on appeal, contemplates a gradual reduction of Father's monthly child support obligation: Father would pay $1,749 per month in 2017; his obligation would decrease to $1,454 for the period from January 1 through May 31, 2018; and his obligation would decrease to $1,052 per month from June 1, 2018 until the children became adults. At oral argument, the parties represented that exceptions were filed and that a final ruling had not been entered. In any case, neither party has raised any jurisdictional or mootness arguments, and we confine our review to the issue presented and the subject of this appeal: the in banc panel decision.

DISCUSSION

Mother argues that Father was not entitled to a hearing because his motion to modify child support failed to allege a material change "in the needs of the children or in parental income." She characterized his "sole request" as an entreaty for credit for an alleged overage: the difference between the pendente lite child support obligation of $2,400, which he thought should continue, and the child support obligation of $2,620 established by the December Order. Further, Father's "own pleading" suggested that there had been no material change in circumstance: his motion to modify child support alleged the December Order granted him 130 overnight visits with the children. Thus, Father already had over 35% of overnights before the February 23 Access Order. The increase in access Father alleges is not material, then, as it would not change the court's application of the guidelines. Lastly, Mother claims that Father never explicitly requested a hearing, and therefore, he was never owed a "meaningful hearing[.]"

Father disagrees with Mother's accounting of his overnights. He counters that his motion for modification was based on his increased access to the children, which constituted a material change in circumstances. Specifically, the December Order based his support obligation on only 115 nights with the children, and the February 23 Access Order increased his overnights to 142 per year. Father's support obligation, then, "need[s] to be recalculated to reflect the actual access" that he has with his children. Accordingly, the circuit court erred by failing to make these access findings.

The in banc court acts as an appellate court "with respect to the circuit court" and "its function is to review the findings and rulings of the trial court judge." *Langston v.*

Langston, 136 Md. App. 203, 218 (2000); *see also* Maryland Rule 2-551(a) ("When review by a court in banc is permit[ed] by the Maryland Constitution, a party may have a judgment or determination of any point or question reviewed by a court in banc[.]"). It is "subordinate to this Court just as we are subordinate to the Court of Appeals." *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 38 (2017) (citation omitted). The in banc court's decision is appealable to this Court. Md. Const. art. IV, § 22; *accord State v. Phillips*, 457 Md. 481, 510 (2018). When this Court reviews an in banc decision, it becomes "akin to the Court of Appeals, in the sense that we provide an additional level of appellate review." *Langston*, 136 Md. App. at 221. And just as the "Court of Appeals essentially reviews our review of the factual findings made by the circuit court," we review an in banc panel order by "analyzing the factual findings of the circuit judge in light of the record" for clear error. *Id.* Questions of law we review *de novo*. *Id.* at 225. Ultimately, however, "it is the judgment of the *trial court* that is under review." *Hartford Fire Ins. Co.*, 232 Md. App. at 38 (emphasis added). We proceed, then, to review *de novo* the circuit court's legal ruling, and its fact-finding for clear error.

When a party moves to modify his or her child support obligation, the trial court can do so if the party demonstrates a material change in circumstance justifying modification. Maryland Code (1984, 2012 Repl. Vol., 2018 Supp.), Family Law Article ("FL"), § 12-104(a); *Ley v. Forman*, 144 Md. App. 658, 665 (2002). "A change is 'material' when it meets two requirements. First, the change 'must be relevant to the level of support a child is actually receiving or entitled to receive.' Second, the change must be 'of sufficient

magnitude to justify judicial modification of the support order.'" *Wheeler v. State*, 160 Md. App. 363, 372 (2004) (internal citations omitted).

In Maryland, "[i]f the parties' combined monthly income is $15,000 or less, the court is required to follow the [g]uidelines" set out under section 12-201., *et seq.,* of the Family Law Article. *Kpetigo v. Kpetigo*, 238 Md. App. 561, 583 (2018). Section 12-204(e) provides a "[s]chedule of basic child support obligations[.]" In shared physical custody cases, the "adjusted basic child support obligation" enumerated in the schedule is "divided between the parents in proportion to their respective adjusted actual incomes[,]" and then each parent's share is "multiplied by the percentage of time the [] children spend with the other parent[.]" FL § 12-204(m)(1)-(2). Under this calculus, the obligor parent owes less than what he or she would owe under the basic child support obligation schedule.

To qualify for shared physical custody, a parent must satisfy the requirements of 12-201(n):

> *Shared physical custody.* – (1) "Shared physical custody" means that each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of child support.
> (2) Subject to paragraph (1) of this subsection, the court may base a child support award on shared physical custody:
> (i) solely on the amount of visitation awarded; and
> (ii) regardless of whether joint custody has been granted.

The 35% percent of the year the parent would need to keep the children to qualify for shared physical custody is equivalent to 128 overnights with the children. *Rose v. Rose*, 236 Md. App. 117, 135 (2018). Once a parent's number of overnights surpasses the 35% threshold, the court's application of the guidelines shifts from permissive to mandatory:

> [FL § 12-201](n)(1) *requires* the court to use the shared physical custody formula for child support where a parent has actually kept the child for more than 35% of the overnights, while (n)(2) *permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than 35% of the overnights, but has actually kept the child for 35% (or fewer) of the overnights.

Rose, 236 Md. App. at 136 (footnote omitted).

In *Rose*, Jonathan Rose appealed the circuit court's denial of his various motions aimed at terminating alimony support owed to his ex-wife, Andrea Rose. *Id.* at 120. Andrea cross-appealed, challenging the court's application of FL § 12-201(n) in calculating Jonathan's child support obligation. *Id.* at 120, 131-32. She argued that because Jonathan never kept the children for more than 35% of the year, the court should not have based its child support obligation on the shared custody calculation. *Id.* at 133-34. At trial, Andrea presented evidence that, despite the applicable custody order permitting Jonathan to keep the children for more than 35% of overnights, Jonathan had not in fact kept the children for at least 128 overnights. *Id.* at 132. Yet, "[d]ue to time constraints and scheduling concerns, the court refused to hear testimony from Jonathan on th[e] issue[,]" and instead "simply based the child support calculation[] on the amount of overnights awarded" in the custody order. *Id.*

We reversed, reasoning that "[i]f a parent establishes that he or she actually keeps the child overnight for more than 35% of the year, then the court's analysis should begin and end with FL § 12-201(n)(1)." *Id.* at 136. We explained further that "[a]lthough it is discretionary for a court to rely on a court-ordered award of visitation when determining shared physical custody for child support purposes, a court may only exercise such

discretion after determining that the order actually *awards* a parent more than 35% of the overnights per year." *Id*. at 135. Thus "[t]he trial court [] erred by not making the threshold factual determination under FL § 12-201(n)(1) whether Jonathan actually kept the children for more than 35% of the overnights in a year." *Id.* at 136-37. After Andrea had presented evidence that Jonathan had not had the children for 35% of the overnights, the court should have permitted Jonathan to present evidence to the contrary. *Id.* at 136. Then, if legally sufficient evidence supported Jonathan's claim that he actually kept the children more than 35% of the overnights, "the statutory definition of 'shared physical custody' in FL § 12-201(n)(1) would be satisfied and child support would be calculated accordingly." *Id.* at 137. If the court found insufficient evidence, Jonathan could still "request the court to use the shared physical custody child support formula based on the amount of visitation *awarded* in the [order], but *only if* the court determined that the [order] on its face gave Jonathan 35% or more of the overnights." *Id.*

Returning to this case, Father moved to modify his child support obligation, alleging that his increase in overnights with the children "significantly impact[ed] the [application of the] child support guidelines and the amount of arrears." As the in banc panel rightly concluded, this alleged change in circumstances was material. The increase that Father alleged was "relevant to the level of support" and, because it implicated the applicability of the mandatory guidelines, was "of sufficient magnitude to justify judicial modification of the support order." *Wheeler*, 160 Md. App. at 372.

Presented with Father's *prima facie* assertion that his increased number of overnights with the children placed him within the guidelines range for shared physical

custody, the circuit court should have made a factual finding as to whether Father actually had the children for 35% or more of the overnights. *Rose*, 236 Md. App. at 136-37. At the May 11 Proceeding, however, the court did not permit Father to present evidence and issued no finding of fact on the subject. We agree with the in banc panel that the circuit court abused its discretion by not providing Father a meaningful hearing to demonstrate that his access had increased beyond 128 overnights and that the guidelines should apply mandatorily. *See* FL § 12-104. Moreover, by failing to provide Father with a meaningful hearing, the circuit court also "erred by not making the threshold factual determination under FL § 12-201(n)(1) whether [Father] actually kept the children for more than 35% of the overnights in a year."[7] *Rose*, 236 Md. App. at 136-37; *see also Bass v. State*, 206 Md. App. 1, 11 (2012) (explaining that it is an abuse of discretion to exercise discretion based upon an error of law). We therefore affirm the judgment of the in banc panel.

JUDGMENT OF THE IN BANC PANEL OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[7] Even though "[t]he in banc panel does not make *de novo* factual findings," *Langston*, 136 Md. App. at 221, we note that, by the in banc panel's calculations, the February 23 Access Order (and the hearing transcript it incorporated) modified Father's access from "±128 overnights per year to ±142 per year[.]"