

Circuit Court for Anne Arundel County
Case No. C-02-FM-17-000229

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 741

September Term, 2022

ROBERT BRIAN GARDNER

v.

RICA VILLA GARDNER

Wells, C.J.
Shaw,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 17, 2023

* At the 8 November 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on 14 December 2022.

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.

This case stems from an ongoing custody dispute between Rica Gardner (“Mother”) and Robert Gardner (“Father”), as part of a divorce action, regarding the parties’ minor child, R.G. In June 2017, the Circuit Court for Anne Arundel County entered an order awarding Mother sole legal and physical custody of R.G., with discretion to allow visitation with Father as she might see fit to do. In May 2019, Father filed a motion to modify custody. That motion was denied in April 2021. After Father noted an appeal, this Court affirmed in an unreported opinion. *R.B.G. v. R.V.G.*, No. 621, September Term 2021, 2022 WL 1092807 (filed 12 April 2022).

In January 2022, while Father’s appeal was pending, but before this Court’s opinion was filed, Father filed, in the circuit court, a “Motion to Set Access Schedule.” Mother moved to dismiss Father’s motion, and, after considering both motions, the court dismissed Father’s motion.

In February 2022, Father filed a timely Notice of In Banc Review, in which he sought review of the circuit court’s decision dismissing his Motion to Set Access Schedule. Although the court set the matter initially for an in banc hearing, the court dismissed Father’s Notice of In Banc Review shortly before it was to be held. Father appeals that decision.

In this appeal, Father filed an informal brief, raising two “issues.” For clarity, we have rephrased those issues and consolidated them into a single question.¹ That question is:

¹ Father’s “issues” read as follows:

(continued...)

Did the circuit court err in dismissing Father’s in banc appeal?

For reasons to follow, we hold that the circuit court erred in dismissing Father’s in banc appeal. We therefore reverse the court’s judgment and remand for further proceedings consistent with this opinion.

BACKGROUND²

Father and Mother were married in October 2012. In 2015, R.G. was born. In January 2017, Mother filed a complaint for absolute divorce. The following month, Mother and Father agreed to a custody order in which Mother would be granted sole physical and legal custody of R.G. In June 2017, the circuit court entered a judgment of absolute divorce. In so doing, the court ordered that Mother would have sole legal and physical custody of R.G. and that Father would have access “under such terms and conditions as determined by [Mother].”

In May 2019, Father filed a motion to modify the parties’ custody arrangement. In April 2021, following an evidentiary hearing, the circuit court denied Father’s motion and ordered that custody would remain as outlined in the parties’ judgment of absolute divorce.

Issue 1. The court granted a “Ghost Motion”. Appellant avers that this court is biased. The court is set on damaging the Defendant and in that spirit actually dismisses appeals without cause, interferes with visitation, and grants fictitious motions never filed.

Issue 2. This court is biased and should transfer the case to a different county.

² The facts surrounding the parties’ relationship and subsequent custody dispute were set forth in some detail in Father’s prior appeal. *R.B.G. v. R.V.G.*, No. 621, September Term 2021, 2022 WL 1092807 (filed 12 April 2022). We include here only a brief recitation of those facts.

Father thereafter noted an appeal in this Court, arguing that the circuit court should have set an access schedule for visitation and should not have given Mother complete control over his access to R.G. In April 2022, we issued an unreported opinion affirming the court’s decision on the merits. *R.B.G. v. R.V.G.*, No. 621, September Term 2021, 2022 WL 1092807 (filed 12 April 2022).

Motion to Set Access Schedule

Meanwhile, in January 2022, Father filed a “Motion to Set Access Schedule” asking the circuit court to establish a visitation schedule between him and R.G. In that motion, Father asserted that the circuit court had given “improper instructions” in its April 2021 order and “should have set the access schedule” at that time. Father argued that he had attempted to arrange visitation with R.G., but Mother, who had plenary authority to set the terms and conditions of Father’s access per the court’s June 2017 custody order, refused to grant him any access.

Mother filed a motion to dismiss, arguing that Father failed to state a claim upon which relief could be granted. After considering both motions, the circuit court granted Mother’s motion and dismissed Father’s motion. Father did not note an appeal from that decision.

Notice of In Banc Review

On 21 February 2022, following the circuit court’s dismissal of his Motion to Set Access Schedule, Father filed a Notice of In Banc Review, in which he sought review of the court’s decision dismissing his motion. On 7 March 2022, the court ordered a three-judge panel to sit in banc to hear and determine Father’s Notice for In Banc Review. On

22 March 2022, Father filed a memorandum outlining his various arguments, all of which centered around Father’s general contention that the court erred in failing to set a visitation schedule between him and R.G., in light of Mother declining any access.

In April 2022, Mother filed a memorandum in opposition to Father’s request for in banc review. In addition to raising various other arguments as to why in banc review was unwarranted, Mother incorporated in her opposition the arguments set forth in her motion to dismiss Father’s motion to set access schedule.

Several weeks later, the circuit court entered a “Directive” stating that the matter should be set for a one-hour in banc review hearing. The court set the date of the hearing for 30 August 2022.

In May 2022, Mother filed a “Motion to Dismiss Defendant’s Notice of En Banc Review.” In that motion, Mother referred to a separate motion that Father had filed – a “Motion to Compel Court to file a Child Support Guideline” – that the circuit court had dismissed on 22 April 2022, and for which Father had filed a separate notice of in banc review. Mother’s motion to dismiss did not mention Father’s Motion to Set Access Schedule.

In June 2022, the circuit court entered an order dismissing Father’s notice of in banc review and cancelling the in banc review hearing scheduled for 30 August 2022. The order stated that the court had considered “Plaintiff’s Motion to Dismiss Defendant’s Notice of In Banc Review.”

Father thereafter noted this timely appeal. Additional facts will be supplied below.

DISCUSSION

Motion to Dismiss Appeal

Mother has moved to dismiss Father’s appeal. She argues that there is no final judgment from which an appeal may be taken. Mother asserts that, when Father filed his Motion to Set Access Schedule, there was no underlying claim or matter in controversy.

We deny Mother’s motion. Father appeals the circuit court’s decision dismissing his in banc review. Although, ordinarily, a party who seeks and obtains in banc review has no further right to appeal, *see* Md. Rule 2-551(h), that prohibition does not apply where the in banc appeal is dismissed before a decision on the merits of the appeal is made by the in banc panel. *State Rds. Comm’n of Md. v. Smith*, 224 Md. 537, 539-44 (1961). Because Father’s in banc appeal was dismissed without the panel reaching a decision on the points reserved in Father’s Notice of In Banc Review, Father is not prohibited from challenging that dismissal here. *See Remson v. Krausen*, 206 Md. App. 53, 69 (2012) (“[I]t is well settled that before the proscription against a further appeal by the moving party in an in banc appeal is applicable, there must be a decision by the in banc [panel] on the points reserved.”) (citations and quotations omitted).

To the extent that Mother is claiming that Father’s appeal must be dismissed because the circuit court’s dismissal of his Motion to Set Access Schedule was not a final, appealable judgment, we disagree. A final judgement is one that “terminates the proceedings in that court and denies a party the ability to further prosecute or defend the party’s rights concerning the subject matter of the proceeding.” *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 299 (2015). Here, the “subject matter of the proceeding” was

Father’s request to have the court set an access schedule to facilitate visitation between him and R.G. because, according to Father, the existing schedule, which gave Mother plenary authority to determine visitation, was frustrating Father’s reunification efforts by virtue of her refusal to grant him any visitation. When the court dismissed Father’s Motion to Set Access Schedule, the court terminated effectively the proceedings and denied Father the ability to pursue that action. That decision constituted a final judgment and was therefore appealable. *See State v. Phillips*, 457 Md. 481 (2018) (permitting in banc appeal upon entry of final judgment by circuit court).

Parties’ Contentions

We now turn to the merits of the instant appeal. Father contends that the circuit court erred in dismissing his Notice of In Banc Review. He argues that the court’s decision was based on a “fictitious motion” because Mother did not file a Motion to Dismiss In Banc Review with respect to his Motion to Set Access Schedule, which was the basis for his request for the in banc hearing at issue here. He notes that the only “Motion to Dismiss In Banc Review” filed by Mother involved a separate motion and decision that had nothing to do with his Motion to Set Access Schedule. Father argues further that the court was “biased” and that it should have granted him access to R.G.

Mother argues that she moved properly to dismiss Father’s notice of in banc review and that, consequently, the court did not err in its dismissal. Mother contends also that there is no evidence in the record that the court was biased in its decision.

Analysis

We hold that the circuit court erred in dismissing Father’s in banc appeal. Generally, an unsuccessful litigant in the circuit court has the right to appeal the court’s decision to an in banc panel, provided the court has entered an appealable judgment and the litigant has complied with the various procedural requirements for securing in banc review. *See Phillips*, 457 Md. at 510-13; *see also Langston v. Langston*, 136 Md. App. 203, 218 (2000) (noting that the right to in banc review is guaranteed by Article IV, § 22 of the Maryland Constitution). Here, as noted, the court’s dismissal of Father’s Motion to Set Access Schedule was a final judgment subject to in banc review. Moreover, it appears from the record that Father satisfied the various procedural requirements set forth in Maryland Rule 2-551, which governs in banc review. Father was entitled to in banc review.

To be sure, Rule 2-551 states that the circuit court may dismiss an in banc appeal under certain circumstances, including if such review is not permitted by the Maryland Constitution, if the notice for in banc review was filed improperly, if the case has become moot, or if the party failed to file a timely memorandum. Md. Rule 2-551(g). We could find no indication in the record that any of those circumstances is applicable here or that the court relied on Rule 2-551 in dismissing Father’s in banc appeal.

In fact, the only explanation for the circuit court’s decision was provided in its order dismissing Father’s in banc appeal, in which the court stated that it had considered Mother’s Motion to Dismiss In Banc Review prior to issuing its decision. The problem with that rationale is that, as Father notes correctly, the motion cited by the court had nothing to do with the instant matter, as that motion involved a different notice of in banc

review. Although Mother filed a response to the notice of in banc review at issue here, that response focused on the merits of Father’s in banc appeal and did not include any argument suggesting that Father’s appeal should be dismissed. Thus, even if we were to assume that the court considered Mother’s corresponding response before dismissing Father’s in banc appeal, that response did not provide an appropriate justification for the court’s decision.

In sum, the circuit court failed to provide, and we could not find, any legal or factual justification for the court’s dismissal of Father’s in banc appeal. As such, we must hold that the court erred in dismissing the appeal. We remand so that Father may obtain the in banc review to which he was entitled.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
REVERSED; CASE REMANDED FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION; COSTS TO BE
PAID BY APPELLEE.**