Circuit Court for Prince George's County
Case No.: C-16-FM-23-003843
Case No.: C-16-FM-23-003109

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1183

September Term, 2023

DIANA JOHNSON

v.

OMAR HARGROVE

Nazarian,
Zic,
Robinson, Dennis Michael, Jr.
(Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: March 14, 2024

*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 Diana Johnson ("Mother") and appellee Omar Hargrove ("Father") each moved to modify a 2015 custody order, which had granted them joint legal custody and alternating two-week periods of physical custody of their minor child. Following a hearing, the Circuit Court for Prince George's County found no material change of circumstances to warrant a change in physical custody but did find a material change of circumstances to warrant a change in legal custody, from joint legal custody to joint legal custody with tie-breaking authority to Mother on issues relating to religion and to Father as to all other decisions.

Mother, *pro se*, noted an appeal of the circuit court's order, asking us to consider whether the circuit court erred or abused its discretion in entering a proposed order prepared by Father's attorney, when, in her view, the proposed order advanced Father's interests and did not accurately reflect the facts as presented at the custody modification hearing.[1] For the reasons that follow, we affirm the order of the circuit court.

FACTS AND LEGAL PROCEEDINGS

Mother and Father, who never married, had a son, D., in 2012.[2] Following mediation in Washington, D.C., in April 2015, Mother and Father reached a negotiated agreement regarding custody of D., by which they would share joint legal custody of the child, with each parent to have physical custody of him for alternating two-week periods.

[1] An interlocutory order depriving a parent of an important decision-making right with respect to the parent's child can be appealable under Md. Code, § 12-303(3)(x) of the Courts & Judicial Proceedings Article. *In re K.L.,* 252 Md. App. 148, 183 (2021).

[2] Mother had five other sons, and Father also had two daughters.

At the time, Mother and Father considered the arrangement practical because D. was not yet school-aged, and the parents did not live far from each other. By agreement, no child support was calculated during the mediation.

The Superior Court of the District of Columbia found that the agreement was in the best interest of the child and ordered that it be deemed a final order that addressed all the parties' issues relating to child custody, visitation, and child support. The superior court incorporated and merged the agreement into its final order.

Notwithstanding the terms of the custody order, Mother and Father "honestly never followed the order," by mutual agreement. From approximately 2015 through mid-2022, D. spent most of his time with Father, who at some point during that time period moved to Virginia. Before the start of the 2022/23 school year, however, Mother, at her request and with Father's agreement, obtained primary physical custody of D., and D. had lived with her in Prince George's County since then "more or less full time."

In April 2023, in case *Johnson v. Hargrove*, No. C-16-FM-23-003109 (Md. Cir. Ct. Montgomery County Nov. 22, 2023), Mother petitioned for enforcement of the D.C. custody order and for contempt, after Father removed D. from his school during Mother's period of custody and purportedly refused to return him to Mother's home.[3] Mother also moved for sole custody of D., with visitation with Father. Following a hearing on April

[3] In a District Court for Prince George's County petition for protective order, Father alleged that he had picked D. up from school because Mother had cut off his communication with the child and threatened to beat D. if he contacted Father. The court denied the petition on the ground that Father did not meet his burden of proof. Father apparently also filed two petitions for protective order in Virginia, which were denied.

26, 2023, the circuit court granted Mother temporary custody until further order by the court and issued an order requiring Father to show cause why Mother should not retain temporary custody.

In May 2023, Father filed his own motion to modify custody, in case *Johnson v. Hargrove*, No. C-16-FM-23-003843 (Md. Cir. Ct. Montgomery County Nov. 3, 2023), seeking sole custody of D., with periodic, supervised visitation with Mother.[4] Father asserted that D. had lived with him for "85% of his life," and Father believed that D. preferred living with him, "where his best interests are a priority." Father further requested that Mother be ordered to pay him child support.

Father requested an emergency hearing on the matter of custody, stating that: Mother abused D. and had cut off his communication with Father; D. did not feel safe in Mother's home; and D. felt like a burden to Mother's family. Following a hearing on May 24, 2023, the circuit court, finding that the matter was not deemed an emergency, denied the motion and ordered the case to proceed in due course.

The circuit court held a merits hearing on Mother's and Father's competing motions on July 3, 2023.

In his opening statement, Mother's attorney explained that in April 2023, Father had removed D. from Prince George's County and enrolled him in school in Virginia,

[4] By order entered June 20, 2023, the circuit court consolidated cases *Johnson v. Hargrove*, Nos. C-16-FM-23-003109 and C-16-FM-23-003843, (Md. Cir. Ct. Montgomery County Nov. 2023).

without Mother's permission. And, since the filing of his custody modification motion, Father had been harassing Mother with unfounded petitions for protective order.

Mother, counsel continued, believed Father should be held in contempt for disregarding the prevailing D.C. custody order. Mother further sought a modification of that custody order, asking for primary physical and sole legal custody (or at least a tie-breaking provision) of D.

Father's attorney explained in his opening statement that for the first eight years of his life, D. had lived with Father, visiting with Mother sporadically, notwithstanding the D.C. custody order. Since 2022, when D. began living with Mother, Mother had not always been available to the child, returning him to Father "for an extended period of time" when she had elective cosmetic surgery, for example.

Mother and Father had adequately co-parented until April 2023, when Mother said she wanted to have D. baptized, and Father disagreed because D. had not had enough of a religious education to be able to make a knowledgeable decision about baptism. According to Father, counsel concluded, Mother then became angry and threatened to cut off D.'s contact with Father and to punish him physically.

The circuit court then questioned why a modification of custody was required, rather than just a ruling about which party would have decision-making authority because, given the distance between the parents' homes, "whoever decides where the child goes to school is going to have the child." In other words, the court continued, "the only issue here is who needs to make the decision regarding where this child is going to

go to school." The court noted that the prevailing two-week alternating schedule would be better suited to summer breaks.

Mother testified that when it became apparent that D. was not doing well in school while in Father's custody, she and Father agreed that D. would live with her during the 2022/23 school year. In April 2023, however, Father removed D. from his Prince George's County school and registered him at a Virginia school without her knowledge or permission; this occurred around the same time Father and Mother were disagreeing about having D. baptized.[5] As a result, Mother notified the police, who suggested she petition for an emergency custody order. D. was returned to Mother after he had attended about six school days in Virginia.[6] Since then, Father had filed three protective orders against her, but only one was granted, *pendente lite*, prior to a July 2023 hearing that had not yet occurred.

Mother did not believe she and Father were effective at co-parenting D., particularly after Father had made false allegations against her about abuse. Moreover, she had provided D.'s health insurance since his birth, and she had made the majority of decisions about his care and upbringing. Prior to the change to her physical custody,

[5] Father asserted that he did not have a problem with D. being baptized, but he wanted to make sure it was D.'s decision and that the child understood what baptism entailed. Mother said she did not believe she was required to come to an agreement with Father about religious decisions.

[6] According to Mother, D.'s school grades were better when he was living with her and attending Maryland schools, although she acknowledged she liked the school D. had attended briefly in Virginia.

Mother said she had picked D. up from Father's home every weekend, and the child had spent his summers with her.

Mother acknowledged that she physically disciplined D., but she said Father had never indicated a problem with that parenting choice.[7] Mother further acknowledged that during a recent trip she had taken to Jamaica, D. had not attended school for approximately one week because her older son, who was supposed to take him, had not done so.

Father testified that D. had lived primarily with him from 2016 until approximately July 2022. He asserted that he had only agreed to let D. move in with Mother at the start of the 2022/23 school year because one of her other sons had died, and Mother said she wanted to spend more time with D. Nonetheless, D. had expressed a desire to live with Father.[8]

Father argued that it was in D.'s best interest to live with him because he put his children first, whereas Mother often left D. home alone without adequate food and interfered with D.'s communication with Father. Father believed himself to be the better parent to make education decisions for D. because he had been doing so for most of the child's life, although he acknowledged that D. did not do particularly well in school while living with him.

[7] Father denied using physical discipline with D.

[8] Mother agreed that D. "would do whatever it take[s] to be with his dad[.]"

Regarding the parents' disagreement about the baptism, Father stated that he had not intended to interfere with the event but that he had picked D. up on a Friday and was not inclined to drive him back to Maryland the next day to have the child at Mother's in time for the Sunday baptism. Father told Mother she was free to come get D., but Mother declined and began threatening Father. That was when, and why, Father had enrolled D. in school in Virginia.

The circuit court did not find any willful violation of the D.C. custody order by either party, and, therefore, denied Mother's petition for contempt. The court found Father's testimony credible that he had been the primary decision maker and caretaker of D. until Mother asked for more access after the death of her older son. The court further found that Mother, although happy with D.'s then-current school in Maryland, was not opposed to the Virginia school in which Father had enrolled D. The court added that the child had been "yanked back and forth between schools . . . due to conflict between the parties," but that much of that frustration could be alleviated by giving one of the parents tie-breaking authority over decisions relating to D.

The prevailing D.C. custody agreement essentially provided a 50/50 split in physical custody between the parents, the court continued, but the parents had agreed to deviations from the agreement, and the court "[didn't] want to disturb that. So long as this child is in school, obviously, you can't comply with the order. But when the child is outside of school, then you comply with whatever it is in that order that you two agreed to." To clarify, Father's attorney added, "that means that nine months out of the year,

mom will be on an every other weekend visitation schedule, which will give her about 4.3 [nights] . . . per month for nine months."

Considering the guiding factors in determining the best interest of the child in a custody matter,[9] the court did not find a material change of circumstances to warrant a change in physical custody because the parties had agreed to the terms of physical custody and to deviations from the D.C. agreement. Because Mother and Father were at an impasse about decisions regarding schooling and were unable to communicate effectively, however, the court found a material change of circumstances to warrant a change in legal custody. The court therefore awarded Mother and Father joint legal custody, but with tie-breaking authority to Father because the court found Father to have a better relationship with D. and because D. had stated a strong desire to live with Father. The court gave Mother tie-breaking authority on issues of religion.

After discussion about the number of overnights each parent would have with the child (the court settled on 105 overnights with Mother) and each parent's income, the circuit court set Mother's child support obligation at $1,219 per month (that amount credited Mother with her payment of D.'s health insurance premiums). The court then asked Father's attorney to prepare a proposed order for signature. Mother's attorney did not object.

[9] For the non-exclusive factors a court should consider in its best interest analysis in a custody matter, see *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986), and *Montgomery County Dep't of Soc. Services v. Sanders*, 38 Md. App. 406, 420 (1978).

Following the hearing, Father's attorney submitted a proposed written order to the circuit court. Mother's attorney moved to strike the proposed order, asserting that Father's attorney had made erroneous additions or representations, which were non-reflective of the court's oral ruling. Father countered that the motion was premature, as the order had been merely proposed and had not been signed by the circuit court. Moreover, the provisions about which Mother complained were statutory in nature and proper in any event. The circuit court denied Mother's motion.

In its written custody and support order, the circuit court granted Mother's request to register the 2015 D.C. Superior Court custody order. The court further ordered that Mother and Father would have joint legal custody of D., with Mother to have tie-breaking authority on issues of religion and Father to have tie-breaking authority on all other issues, including where to enroll D. in school. The court ordered that physical custody would remain the same as set forth in the 2015 custody, but when the parents could not follow the custody schedule "due to significant distance between them and the child's school location, the child shall remain with the parent closest to the school the child attends on all school days." The circuit court's order also set forth a specific holiday schedule that deviated from the D.C. custody order. The court further ordered Mother to pay Father child support in the amount of $1,219 per month, effective June 1, 2023, through a wage withholding order.

Mother moved for a new trial and requested the exercise of the court's revisory power in relation to the order. Mother claimed that because the court had made a finding that neither party had abused D., it had no factual predicate to change custody from

Mother to Father. The circuit court made further errors of law, Mother continued, when it did not permit the parties to undertake closing arguments to address case law on the best interest of the child standard. Finally, Mother argued that the circuit court was biased against her and had pre-judged the matter before hearing all the evidence. The court denied Mother's motion by order entered on August 10, 2023.

Mother, *pro se*, filed a timely notice of appeal.

DISCUSSION

In her informal brief, Mother argues that, after the circuit court requested that Father's attorney prepare the proposed order on the custody modification, his counsel "disregarded so many facts and evidence within the case" and "drafted the order on his own terms [and] added verbiage contrary to a foreign custody order that was submitted for enforcement of contempt." In Mother's view, Father's attorney's proposed order prejudiced both her and "the proper administration of [j]ustice" and served to "advance the interest of his client."

In support of this argument, Mother points to what she claims are factual discrepancies and "false testimony" put forth by Father and his attorney at the custody modification hearing, including the amount of time D. had resided with each parent and Father's asserted custody of his two daughters when only one was in his care. Mother further avers that Father's attorney intentionally presented the proposed order to a judge other than the one who presided over the hearing, thereby deceiving the hearing judge "without consideration to the best interest of [her] child."

Father did not file an appellate brief.

I. Standard of Review

In considering a motion to modify custody, the circuit court must engage in a two-step process. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). First, the court must determine whether there has been a material change in circumstances, which is a change that affects the welfare of the child. *Id*. If such a change is found, "'the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody.'" *Id*. (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)). "The light that guides the trial court in its determination, and in our review, is the best interest of the child standard, which is always determinative in child custody disputes." *Santo v. Santo*, 448 Md. 620, 626 (2016) (cleaned up).

When reviewing a circuit court's ruling in child custody cases, we utilize three interrelated standards:

> "When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second], if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion."

Kadish v. Kadish, 254 Md. App. 467, 502 (2022) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

II. Analysis

To the extent that Mother argues that Father's attorney erred in his preparation of the proposed custody order, we restate:

> [O]ne of the most fundamental tenets of appellate review: Only a judge can commit error. Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. The Fates do not commit error. Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling.

DeLuca v. State, 78 Md. App. 395, 397-98 (1989). That is because "'error' is a precise term of art in the appellate context." *Id*. at 398 (quoting *Ball v. State,* 57 Md. App. 338, 359 (1984)). Trial attorneys "'cannot, by definition, commit error; their conduct can do no more than serve as the predicate for possible judicial error.'" *Id*. (quoting *Ball*, 57 Md. App. at 359).

Our inquiry, therefore, will focus not upon whether Father's attorney acted inappropriately in drafting the proposed custody modification order, but upon whether the circuit court committed reversible error in entering the proposed order. And, upon consideration of Mother's arguments as set forth in her brief, we perceive no such error on the part of the circuit court.

Mother claims that Father presented factually incorrect evidence at the custody modification hearing, which affected the court's ruling, but we point out that both Mother and Father were represented ably by counsel, and each parent testified at length in relation to her or his custody modification request. To the extent that Mother now avers that the court accepted factually inaccurate statements from Father and his attorney—

such as that a child abuse investigation was pending when it had been ruled out in June 2023, asserting that D. had spent most of his life with Father when it was "impossible" for Father to have had D. for eight years, and stating that Father had custody of both his daughters when he later testified that only one daughter lived with him—we respond that she was given every opportunity to adduce her own evidence and cross-examine Father vigorously on his testimony.

And, despite Mother's claims of the circuit court's many instances of disregard for the "facts," it was precisely the role of the court as fact-finder to consider the testimony presented and determine whose evidence was the more credible. As we explained in *Yacko v. Mitchell*, 249 Md. App. 640, 679 (2021):

> It is well-established in Maryland that when weighing the credibility of witnesses and resolving conflicts in the evidence, the fact-finder has the discretion to decide which evidence to credit and which to reject. The fact finder may believe or disbelieve, credit or disregard, any evidence introduced, and a reviewing court may not decide on appeal how much weight must be given to each item of evidence. We accord significant deference to the circuit court's factual findings and limit our analysis to whether competent evidence supports the court's findings.

(cleaned up).

Moreover, the alleged factual discrepancies Mother points to were unlikely to have affected the court's ruling on what it deemed the sole issue before it—where D. would attend school. On that issue, Mother agreed that D. had spent a good portion of his life in Father's care, that D. preferred to live with Father, and that she had no problem with the Virginia school D. would attend if D. lived with Father.

Mother's argument appears to center more on her dissatisfaction with the court's ultimate ruling that, in practice, gave Father physical custody of D. during the school year, than on any legitimate error made by the court in its fact-finding or ruling. We find no clear error in the court's fact-finding.[10]

At the close of the hearing, the court asked Father's attorney to prepare a proposed order.[11] Counsel did so, but Mother moved to strike the proposed order, on the ground that it added representations that were not reflective of the court's oral ruling on the custody modification. The court denied the motion and entered the order as proposed by Father's attorney. Mother continues to assert that the order, prepared by Father's attorney, prejudiced her and advanced Father's interests. We disagree.

Mother, in her brief, does not specify in what manner Father's attorney's proposed order deviates from the court's oral ruling, but in her motion to strike the proposed order, submitted through counsel, the purported "erroneous additions or representations" in the proposed order all related to the child support provisions, as follows:

- "That th[e] [circuit court] Ordered [Mother]'s child support to be $1,090.00 per month, not $1,219.00."

This assertion is demonstrably false. The court, after calculating child support based on Mother's and Father's asserted income and Mother's credit for the payment of

[10] Mother does not, in her brief, make any specific argument how, or even that, the circuit court actually abused its discretion in modifying custody to give Father tie-breaking authority in all matters other than religion. Had she done so, we would have found no abuse of discretion, generally for the reasons as set forth by the court in its oral ruling.

[11] The court did not request a consent order by both parties.

D.'s health insurance premiums, stated, "So I'm showing Mom's child support is 1,219." Father's attorney agreed, "That's what I have as well, Your Honor." Neither Mother nor her attorney responded.

- "That th[e] [circuit court] never made a ruling of arrearages in this matter, but [Father]'s Counsel included language as if it was."

This is not an accurate statement. The order makes no mention of an arrearage, except to the extent that it imposed child support beginning on June 1, 2023, which was the first full month following Father's May 24, 2023, petition for modification of custody and child support.

- "That [Father]'s Counsel's Proposed Order included child support to begin starting June 1, 2023, prior to the parties' hearing. That no such determination was ever placed on the record."

Father made his request for child support on May 24, 2023, and, pursuant to Md. Code, § 12-101(a)(3) of the Family Law Article ("FL"), "the court may award child support for a period from the filing of the pleading that requests child support."

- "That [Father]'s Counsel's Proposed Order included language for a Wage Withholding Order, but no such ruling or request was granted."

Once a child support award is made, the parent to whom it is awarded may request that the sum be paid through an earnings withholding, and, pursuant to FL § 10-121(a), "[a]ny order under this Part III of this subtitle[, Child and Spousal Support-Earnings Withholding,] that is passed on or after July 1, 1985 shall constitute an immediate and

continuing withholding order on all earnings of the obligor that are due on or after the date of the support order."

Assuming that these are the arguments Mother continues to assert in her appeal, we find no error on the part of the circuit court in accepting and entering Father's proposed order. None of the provisions contained therein deviate substantively from the court's oral ruling, and all were within the court's authority to order.

Finally, Mother appears to argue error or abuse of discretion in the fact that a judge other than the hearing judge signed the proposed order. In her view, Father purposely submitted the order to another judge to advance his own interests.

Indeed, Judge Judy Woodall conducted the custody modification hearing, while Judge April Ademiluyi entered the written order on behalf of the court. It is unlikely, however, that Father submitted the proposed order to a particular judge. It is more likely that he uploaded the proposed order to MDEC, Maryland's electronic filing system, as required. And, while Judge Woodall heard argument on the parents' custody modification motions on July 3, 2023, Judge Ademiluyi presided over the off-the-record disposition hearing on July 19, 2023, which Mother's attorney declined to attend. There is nothing untoward in Judge Ademiluyi signing the order that came before her at disposition.

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.