Circuit Court for Frederick County
C-10-FM-18-000850

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1253

September Term, 2022

MICHAEL A. HARDEN

v.

KATHERINE HARDEN

Reed,
Albright,
Eyler, James R.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Albright, J.

Filed: August 22, 2023

*At the November 8, 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 December 14, 2022.

Michael Harden ("Father"), appellant, appeals from a judgment entered by the Circuit Court for Frederick County granting him primary physical and joint legal custody of his son with Katherine Harden ("Mother"), appellee, but not establishing reasonable child support. He poses two questions,[1] which we have combined as one: Did the circuit court err by not ordering Mother to pay reasonable child support? We answer that question in the affirmative and shall vacate the portion of the judgment declining to award child support and remand for further proceedings.

BACKGROUND

Father and Mother are parents of a son, G, age six. They divorced when G was two years old. After the divorce and throughout the proceedings in the trial court, Mother lived in the former marital home in Frederick County, while Father lived in Allegany County. The distance between their homes was approximately 90 minutes.

Under the terms of a consent custody order entered when the parties divorced, they shared joint legal custody and split physical custody of G on a 50/50 basis, with exchanges occurring on Wednesdays and Sundays at 2 p.m. Neither party was ordered to pay child

[1] The questions as posed by Father are:

> I. DID THE CIRCUIT COURT ERR WHEN IT FAILED TO ESTABLISH CHILD SUPPORT?
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> II. DID THE CIRCUIT COURT ERR IN DENYING THE MOTION TO ALTER OR AMEND FILED BY THE APPELLANT RELATED TO CHILD SUPPORT?

support. The consent order provided that when G turned four years old, this would be a "significant material change in circumstances to justify either party filing for a modification of custody[.]"

In February 2021, when G was about to turn four, Mother filed a complaint to modify custody in the circuit court. She sought primary physical custody and sole legal custody of G and asked the court to establish child support. She attached a short form financial statement to her complaint.

In April 2021, Father answered Mother's complaint and counterclaimed for modification of custody. Like Mother, he sought sole legal and primary physical custody of G and asked the court to establish child support. He likewise attached a short form financial statement to his complaint.

Mother filed an updated financial statement in August 2021 to reflect a reduction in her income.

In November 2021, the court entered a *pendente lite* consent custody order that modified certain terms of the prior consent order and ordered Father to contribute $225 per month toward work-related childcare expenses for G incurred by Mother when he was in her physical custody.

A merits trial was held over three days in July 2022. We summarize the evidence adduced on the issue of child support.

Mother, age 30, is a registered nurse. She was then working as a breast cancer nurse navigator for Meritus Medical Center in Hagerstown, earning $73,000 annually. Prior to

beginning that job in May 2022, she had worked as a school nurse for Frederick County for the 2021-2022 school year and as a breast cancer nurse navigator for University of Maryland Medical Center ("UMMC") for seven years before that. Mother occasionally picked up weekend shifts at UMMC on an as-needed basis, for which she was paid an hourly rate. If she was awarded primary physical custody, Mother planned to enroll G in his zoned public school and would incur work-related childcare expenses of $80 per week.

Mother's health insurance covered G. She introduced evidence that the cost of health insurance for her *and* G was $93.51 per pay period or $2,431.26 per year. The health insurance statement did not break down the separate cost for G, however.

Father, age 29, remarried in 2021. He and his wife, Brittany Harden ("Brittany"),[2] have two children together, then ages two years and nine months, and Brittany had primary custody of her then five-year-old son from a previous marriage. Brittany is a registered nurse. She worked two 12-hour shifts per week, on Saturday and Sunday, earning around $55,000 annually.

Brittany testified that Father was on disability retirement from the District of Columbia Metropolitan Police Department due to a foot injury and a shoulder injury he suffered while on duty and did not currently work. She was asked whether his injuries precluded him from working and replied that he had a "limited range of motion" in his

[2] Because Mother, Father, and Father's wife all share the same last name, we refer to Father's wife by her first name for clarity. We mean no disrespect by this appellation.

right arm and that his foot was "fused," which prevented him from going "on a three-mile run."

Father testified that he was in an on-duty accident, which required surgery on his right shoulder, foot fusion surgery, and surgery to repair a ruptured spleen and a punctured lung. He had not worked since the accident and was receiving $29,000 annually in disability pay.

The court queried whether Father could work if he desired to do so, adding that Father was "obviously able to do something, maybe not something physical[.]" Father responded that he and his wife would incur childcare expenses if he worked[3] and that they had decided as a family that it was in the best interests of their children for him to stay home right now.

If he were awarded primary custody, Father testified that G would attend kindergarten at the private religious school where he had attended preschool. The tuition was approximately $6,000 per year.

In closing argument, Mother's counsel argued that she should be awarded primary custody and that Father should be ordered to pay child support. Her attorney asserted that Father was choosing not to work and that the court should impute income to him based on a full-time job paying $13 per hour. She also "grossed . . . up" his disability income by 15 percent because Father did not pay taxes on his income. Based on these additions, Father

[3] The evidence reflected that Father and his wife were both home with their children Monday through Friday, however.

would earn a potential income of $61,995 annually. Mother's counsel submitted two proposed child support guidelines worksheets based on those figures.

During his closing argument, Father's counsel disputed that the evidence supported a finding that Father was voluntarily impoverishing himself. He asserted that if that were the case, every stay-at-home mother would be voluntarily impoverished. He emphasized that this was a "family decision" for Father to stay home and that it would not be equitable to impute income to him. With respect to the appropriate child support schedule for calculating child support—shared custody or primary custody—Father's counsel argued that that would depend upon "the ultimate decision the Court [made] with respect to the custodial arrangement." Father's attorney noted that it was Mother's burden to establish the cost of health insurance expenses for G and that by submitting documentation of only the total cost of her health insurance premium, she failed to do so.

In her rebuttal closing argument, Mother's counsel argued that imputation of income to stay-at-home mothers was not at all uncommon and that there was a statute dictating that a parent could not claim an inability to work based on being a primary caregiver for the parties' child if the child was above a certain age.

The court took the matter under advisement and issued its written decision five days later. As pertinent, the court awarded Father primary physical custody of G during the school year, commencing the Sunday before school starts and ending on the last day of school. G would be in Mother's custody two consecutive weekends alternating with one weekend in Father's custody for the duration of the school year. Mother was also entitled

to one weeknight dinner as determined based on her work schedule. In the summer, the parties would operate on a week on/week off schedule, but Mother was entitled to two, two-week vacations with G each summer in addition to her regular custody schedule.

Regarding child support, the court's order stated: "It is also noted that [Mother]'s salary and [Father]'s disability income, when combined with his wife's salary, are nearly equal. In closing, [Mother] requested child support and provided a guidelines worksheet, whereas [Father] never requested child support[.]" The court ordered Father to pay the cost of G's private school tuition. It did not order either party to pay child support.

Within ten days, Father moved to alter or amend the judgment. As pertinent, Father argued that the court clearly erred by finding that he did not request child support, noting that he requested it in his counterclaim to modify custody, referenced that request in his pre-trial statement, filed a short form financial statement, and offered proof of his income during the merits trial. Counsel also noted that he had argued in closing that income should not be imputed to Father and that the determination of which child support schedule applied would be based on the court's ultimate custody decision. He argued that the court could calculate child support based on the evidence adduced at trial, including by applying the factors enunciated in *John O. v. Jane O.*, 90 Md. App. 406 (2012), before imputing income to Father. Father calculated that G would be in Mother's care 108 overnights per year based

on the schedule set out in the court's custody order. Father attached four alternative child support worksheets as exhibits to his motion.[4]

Also, within ten days, Mother moved to alter or amend the judgment. She alleged that she was moving out of her residence in Frederick County, seeking employment in Allegany County, moving in with her parents in Allegany County, and selling her home in Frederick County. She asked the court to amend its order to reestablish 50-50 shared custody of G.

By order entered August 25, 2022, the court denied the cross motions to alter or amend the judgment. Thereafter, Father noted this timely appeal.[5] We shall include additional facts as necessary to our discussion.

DISCUSSION

Before turning to the governing law, we hold, as a threshold matter, that the trial court clearly erred by finding that Father did not request child support. As set out above, Father requested child support in his pleading, filed a short-form financial statement, referenced the request in his pre-trial statement, adduced evidence bearing on child support during the trial, and argued, through counsel, in closing that the court should determine

[4] Two worksheets used shared physical custody calculations and two used primary physical custody calculations. *See* FL § 12-204(l)-(m). Father proposed calculations based on the parties' actual income and based upon the income imputed to Father as requested by Mother. The resulting child support figures ranged from $813 per month at the high end to $451 at the low end.

[5] Mother noted a timely cross-appeal but did not pursue it in this Court.

child support based upon the appropriate child support schedule after determining custody.[6] Under the circumstances, the trial court was without discretion to decline to establish child support unless it found that 1) Mother lived with G and would be contributing to G's support, or 2) was unemployed and had no financial resources from which to pay child support for statutorily delineated reasons.[7] *See* Md. Code, Fam. Law ("FL") § 12-202(a), (b)(1) (mandating the use of the child support guidelines to determine child support but permitting a court to decline to establish child support if certain statutory criteria are met). Because none of those findings were, or could have been, made on this record, we shall vacate the provision of the custody order declining to impose child support and remand for further proceedings.

We provide the following guidance on remand. First, the court found that Mother and Father's actual income was nearly equal when Brittany's income also is taken into consideration. Because Brittany is not G's natural or adoptive parent, however, her income does not factor into the court's calculation of child support. *See, e.g., Knill v. Knill*, 306

[6] We recognize that Father did not file a child support worksheet, as required by Md. Rule 9-206(b), whereas Mother did. We agree with Father, however, that given the numerous permutations that the custody order might reflect, it was difficult for Father to know which worksheet to use. He argued as much in closing, asking the court to determine the appropriate schedule based upon its ultimate custody ruling. In any event, Father did submit proposed child support worksheets with his post-judgment motion.

[7] The case Mother cites to the contrary, *Broseus v. Broseus*, 82 Md. App. 183 (1990), was decided in March 1990, before the General Assembly made application of the child support guidelines mandatory and before it created a rebuttable presumption that the guidelines figure was correct. *See* Acts of 1990, Ch. 58 (effective Apr. 10, 1990); *Petrini v. Petrini*, 336 Md. 453, 460-61 (1994) (noting that the guidelines were advisory when first adopted, but later became mandatory).

Md. 527, 531 (1986) ("The duty of child support extends to the natural parents of an illegitimate child, but not to a stepparent.").

Second, on remand, the court must determine whether Father, by choosing not to work, has voluntarily impoverished himself. FL § 12-204(b)(2) ("If there is a dispute as to whether a parent is voluntarily impoverished, the court shall[] make a finding as to whether, based on the totality of the circumstances, the parent is voluntarily impoverished[.]"). This issue was raised at the merits hearing by Mother and disputed by Father.

In assessing whether a parent is voluntarily impoverished, a court must "inquire as to the parent's motivations and intentions." *Wills v. Jones*, 340 Md. 480, 489 (1995); *see also Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993) ("[A] parent shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources."). "A parent is not excused from support because of a tolerance of or a desire for a frugal lifestyle." *Malin v. Mininberg*, 153 Md. App. 358, 395 (2003). "Indeed, the law requires a 'parent to alter his or her . . . lifestyle if necessary to enable the parent to meet his or her support obligation.'" *Id*. (quoting *Goldberger*, 96 Md. App. at 327).[8]

[8] The factors the court must consider in assessing if a parent is voluntarily impoverished are:

(1) his or her current physical condition;
(2) his or her respective level of education;

(Continued…)

If the court finds that Father has voluntarily impoverished himself, it must determine Father's potential income by considering the following factors:

> (1) the parent's employment potential and probable earnings level based on, but not limited to:
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> (i) the parent's:
>
> 1. age;
> 2. physical and behavioral condition;
> 3. educational attainment;
> 4. special training or skills;
> 5. literacy;
> 6. residence;
> 7. occupational qualifications and job skills;
> 8. employment and earnings history;
> 9. record of efforts to obtain and retain employment; and
> 10. criminal record and other employment barriers; and
>
> (ii) employment opportunities in the community where the parent lives, including:
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> 1. the status of the job market;
> 2. prevailing earnings levels; and
> 3. the availability of employers willing to hire the parent;
>
> (2) the parent's assets;
> (3) the parent's actual income from all sources; and
> (4) any other factor bearing on the parent's ability to obtain funds for child support.

> (3) the timing of any change in employment or other financial circumstances relative to the divorce proceedings;
> (4) the relationship between the parties prior to the initiation of [any] divorce proceedings;
> (5) his or her efforts to find and retain employment;
> (6) his or her efforts to secure retraining if that is needed;
> (7) whether he or she has ever withheld support;
> (8) his or her past work history;
> (9) the area in which the parties live and the status of the job market there; and
> (10) any other considerations presented by either party.

Lorincz v. Lorincz, 183 Md. App. 312, 331 (2008) (citing *John O. v. Jane O.*, 90 Md. App. 406, 422 (1992), *abrogated on other grounds by Wills*, 340 Md. at 480).

FL § 12-201(m).[9] The record reflects that Father sustained an injury to his shoulder and his foot while on duty as a police officer that resulted in him receiving a disability retirement. He suffers some lasting effects from the accident that could limit his ability to perform certain jobs. Father did not testify that he was unable to work, however. He testified that he chooses not to work because he prefers to stay home with his four children, two of whom, including G, are now school-age and two of whom are not. On this evidence, the court can decide whether Father is voluntarily impoverished. The court may, in its discretion, hold additional evidentiary proceedings to determine the amount of any potential income to impute to Father.

Third, the court ordered Father to pay the entire cost for G's private school tuition. Under FL § 12-204(i)(1), expenses for private school education *may* be included in the basic child support obligation if the parties so agree, which did not occur here, or by order of the court. The statute provides the court may order that "any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child" be "divided between the parents in proportion to their adjusted actual incomes[.]" *Id.* In *Ruiz v. Kinoshita,* 239 Md. App. 395, 429 (2018), this Court explained that in "determining whether a child has a 'particular educational need[,]'" a trial court

[9] Potential income may not be imputed to a parent who is unable to work because of a mental or physical disability or who is "caring for a child under the age of [two] years for whom the parents are jointly and severally responsible." FL § 12-204(b)(3).

should consider a "non-exhaustive list of six factors" derived from *Witt v. Ristaino*, 118 Md. App. 155, 170-71 (1997). Those factors are:

> (1) The child's educational history, including how long the child has attended a school, the need for stability and continuity, and the proportion of the parents' income the child would have received had the parents stayed together;
> (2) The child's performance while in private school;
> (3) The family history of attending a particular school, particularly if it is religiously affiliated;
> (4) Whether the parents decided prior to the divorce to send the child to the private school;
> (5) Other facts specific to the case that may impact the child[]'s best interests;
> (6) The parents' ability to pay.

Ruiz, 239 Md. App. at 429-30 (cleaned up). These factors "should be evaluated on a 'case-by-case basis, taking into consideration the best interests of the child[.]'" *Id*. at 430 (quoting *Witt*, 118 Md. App. at 169-70). On remand, if G remains enrolled in private school, the court should consider these factors, as applicable, and any other factors relevant under the particular facts of this case, in assessing whether it would be in G's best interest for his private school tuition to be divided between the parties.

For all these reasons, we vacate the provision of the child support order declining to establish child support and remand for further proceedings not inconsistent with this opinion. Given the passage of time since the entry of the custody order, the court may, in its discretion, choose to hold additional evidentiary proceedings before establishing child support.

CUSTODY ORDER VACATED, IN PART AND CASE REMANDED TO THE CIRCUIT COURT FOR FREDERICK COUNTY FOR

FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.