Circuit Court for Harford County
Case No. C-12-FM-20-000495

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2060

September Term, 2023

JULIET FARACE, ET AL.

v.

MELANIE CROSS, ET AL.

Berger,
Albright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: February 13, 2025

*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).

This appeal arises from an order denying a request for an award of attorney's fees in litigation between two sets of grandparents over the custody of a minor child. For the reasons to be discussed, we shall affirm in part, reverse in part, and remand for further proceedings.

FACTS AND LEGAL PROCEEDINGS

On March 15, 2020, the parents of a two-year-old child, D.C., died in an automobile accident. On March 20, 2020, D.C.'s maternal grandparents, Melanie Cross and Joseph Cross (collectively, "the Crosses"), the appellees in this matter, filed an action in the Baltimore County Circuit Court, in which they sought an order granting them joint legal custody and shared physical custody of D.C.[1] The complaint named the deceased parents as the only adverse parties. The Crosses alleged that they knew "of no other party who have or could claim a superior right of access and/or custody" to D.C. and that there were "no individuals who could object" to the requested relief. On the same date, the court issued an order awarding the Crosses temporary physical and legal custody of D.C.

On April 6, 2020, D.C.'s paternal grandparents, Juliet Farace and Michael Farace (collectively, "the Faraces"), filed a motion to intervene, which the court granted. The Faraces then filed a counterclaim against the Crosses in which they sought primary physical custody and shared legal custody of D.C.

[1] The action was styled as a "Complaint for Establishment of Custody."

On September 2, 2020, the Faraces filed a motion for a judgment of default on their counterclaim, as a sanction, pursuant to Maryland Rules 2-432 and 2-433, for the Crosses' failure to respond to requests for discovery. In addition, the Faraces requested an order awarding them sole legal and primary physical custody of D.C., as well as an award of reasonable attorneys' fees and costs incurred in attempting to obtain discovery responses and preparing the motion for sanctions. On September 28, 2020, the court declined to impose the sanctions requested but in its order reserved on the issue of attorneys' fees.

On July 12, 2021, the Faraces filed a second motion for discovery sanctions against the Crosses. They alleged that Melanie Cross had provided "incomplete and improper" answers to interrogatories and had failed to respond to requests for productions of documents, and that Joseph Cross had not responded to discovery at all. The Faraces again requested a judgment of default in their favor on their counterclaim, an order awarding them joint legal custody and primary physical custody of D.C., and an award of attorneys' fees incurred in an effort to obtain discovery responses and in preparing the second motion for sanctions. They also requested that Ms. Cross be compelled to "fully and completely respond" to the interrogatories served upon her. On September 15, 2021, the Faraces filed a "[r]enewal" of their second motion for sanctions. The court did not rule on the second motion for sanctions or the renewed motion prior to entry of the final judgment.

On April 6, 2022, the Faraces filed a "Motion for Counsel Fees, Costs, and Suit Money" pursuant to § 12-103 of the Family Law Article ("FL") of the Maryland Code. They alleged that the Crosses had not acted in good faith during the proceedings, and that, as a result, they had incurred substantial attorneys' fees. The Faraces requested an order of

attorneys' fees in excess of $100,000. The court did not rule on that motion prior to entry of the final judgment. However, it appears that this motion became moot when the court subsequently granted the motion to compel on October 3, 2022, as the grounds for the motion to compel overlapped with the grounds for the second motion for sanctions.

On September 27, 2022, the Faraces filed a "Motion to Compel and/or For Immediate Sanctions[.]" They alleged that the Crosses had failed to respond to requests to correct purported deficiencies in responses to discovery, and that, as a result, their ability to prepare for trial was significantly hampered. They requested an order compelling the Crosses to correct the deficiencies as well as an award of attorneys' fees pursuant to Maryland Rule 2-433(a)(3).

On October 3, 2022, the court granted the motion to compel. In addition to ordering the Crosses to provide comprehensive responses to discovery, the court awarded attorneys' fees in an amount to be determined:

> [The Crosses] shall pay [the Faraces'] reasonable expenses resulting from the filing of [the motion to compel], including attorney's fees, as a result of their failure to provide comprehensive [a]nswers to [i]nterrogatories or responses to the [request for production of documents], counsel for [the Faraces] to submit a separate [m]otion outlining said fees for consideration by the [c]ourt.

The Crosses later filed a motion to vacate the award of attorneys' fees on grounds that the motion to compel was filed after the close of discovery and without good faith efforts to resolve the dispute. That motion was denied.

On November 9, 2022, the Faraces filed a third motion for sanctions. They alleged that the Crosses violated the order of October 3, 2022, by "again provid[ing] insufficient

responses" to discovery. The Faraces claimed that, as a result of the Crosses lack of compliance with the court's order and refusal to respond to discovery, they had incurred attorneys' fees of approximately $27,198.00. The motion was supported by itemized bills for legal services from March of 2020 to October of 2022. The court denied the Faraces' third motion for sanctions.

On August 16, 2023, a week before the trial date of August 22, 2023, counsel for the Faraces wrote a letter to the court:

> At this time, the parties are making final edits to a Custody Agreement which we anticipate will resolve issues related to the minor child. However, the [Faraces] are still pursuing attorney fees in this matter and I'm unsure if this will be heard next week. In addition, in conjunction with the attorney fees are two motions that have not been ruled on. In particular, a Motion for Counsel Fees, Costs and Suit Money and Request for Hearing which was filed on April 6, 2022 as well as a Motion for Protective Order filed on or about November 23, 2022 on behalf of the [Crosses].[2] These motions, I believe, do have a significant bearing on attorney fees in this matter.
>
> The purpose of this correspondence is to request a brief conference call or [Z]oom meeting with your Honor to address these pending issues prior to next week.

The court held a teleconference with the parties on August 16, 2023. On August 17, 2023, the court sent a follow-up letter to the parties:

> As a follow-up to our teleconferences on August 16, 2023, you have advised me of issues regarding the open claim for attorney's fees by the Faraces. As I explained, the [c]ourt had previously been advised of a global settlement of this matter. As a consequence, the trial set to begin on August 22 had been removed from the [c]ourt's docket.

[2] Contrary to counsel's statement that the court had not ruled on the Crosses' motion for protective order, the record reflects that the court granted that motion on December 6, 2022.

* * *

> I have reached out to [the mediator] . . . to ascertain her availability to schedule another mediation session in the hope of resolving this remaining issue. Absent that, the [c]ourt will have to make a decision regarding the rescheduling of this matter either for a fully contested trial or motions proceeding.
>
> As I advised you in our teleconference, please be cognizant of the fact that the [c]ourt has discretion regarding an award of attorney's fees in a family law matter. Counsel should have serious discussions with their clients as to whether they wish to put the entire resolution of this very important matter at risk.

On August 31, 2023, the parties signed the custody agreement. The agreement made no mention of attorney's fees. On September 15, 2023, counsel for the Faraces wrote to the court to advise that the parties had executed a custody agreement but "remain[ed] at an impasse as to the language proposed in a [c]onsent [o]rder regarding the reservation of attorney's fees." Counsel asked the court if the mediator was available for another mediation session.

On September 21, 2023, the court responded:

> I have had the opportunity to discuss this matter with [the mediator] and review the transcript of the settlement of the matter, which was placed on the record . . . at the mediation, a copy of which is attached hereto. Based on [the mediator's] recollection and the transcript, we are both satisfied that the matter was concluded in its entirety during the mediation. As such, the [c]ourt will decline to hear the parties on the issue of attorney's fees, as that issue is not reserved and, therefore, all parties will be responsible for their own fees.[3]

[3] The transcript made no mention of a "global" settlement or of attorneys' fees.

On November 15, 2023, the Faraces filed a motion requesting an award of costs and fees in the amount of $24,692.00 which, they alleged, were incurred in litigating the motion to compel that the court had granted on October 3, 2022. The Faraces reminded the court that it directed them to submit a separate motion outlining the fees claimed, for the court to consider. Attached to the motion for costs and fees were itemized billing statements for services provided from March of 2020 to October of 2022.

On November 21, 2023, the court entered an order which incorporated the parties' custody agreement. The parties were awarded shared physical custody of D.C., as detailed in the agreement; and joint legal custody, with tie-breaking authority to a designated third-party. Ms. Farace was named as the guardian of D.C.'s property.[4] The order further provided, without further explanation, that the claims for attorneys' fees were denied. The Faraces noted this timely appeal.

QUESTIONS PRESENTED

Rather than make a frontal attack on the circuit court's ruling, the Questions Presented portion of the Faraces' brief presents three procedural questions for review:

I. Did the [c]ircuit [court] err in denying the Faraces' request for attorneys' fees on the basis of his *ex parte* communications with the mediator and independent investigation of adjudicative facts, without conducting an evidentiary hearing or providing the Faraces[] with an opportunity to respond?

II. Did the [c]ircuit [court] err in relying on the unverified transcript of the parties' oral mediation agreement and in finding that it supported his finding of waiver without the need for any additional evidentiary support?

[4] On February 3, 2022, Ms. Farace filed a separate action, in which she sought an order of guardianship as to D.C.'s property. On February 13, 2024, an order was entered in that case, appointing Ms. Farace as the permanent guardian of D.C.'s property.

III. In the event of a remand, should the [trial judge] be disqualified from hearing any further proceedings on attorneys' fees as a result of the personal knowledge obtained from his *ex parte* communications and independent investigation of adjudicative facts?

Although we will later speak to these issues, probing inquiries from the Court at oral argument, coupled with statements in the briefs of the parties and the circuit court's September 21, 2023 ruling, have led us to consider three more questions to appropriately resolve this appeal[5]:

1) If the Faraces are neither parents nor *de facto* parents, can they claim attorneys' fees under FL § 12-103?[6]

2) Is a request for an award of attorneys' fees as a sanction for failure to comply with discovery rules waived where the parties subsequently enter into a settlement agreement that contains no express reservation or waiver of such a claim?

3) Alternatively, if an interlocutory court order reserves a ruling on entitlement to a fee award requested as a sanction for a violation of discovery, or grants a request for fees but reserves on the amount to be awarded, do these reservations survive a subsequent settlement agreement that contains no express reservation of a claim for fees?

We answer no to question one, yes to question three and find it unnecessary to resolve question two. As to the Faraces' "Questions Presented" issues, they are essentially moot.

[5] Because these controlling issues are questions of law for the most part, they eliminate any difficulties created by the Faraces' factual challenges to the circuit court decision.

[6] After oral argument, both counsel filed supplemental authorities on the question. Even if they had not, because the issue affects the power of a court to award fees in the absence of legal authority, as well as the standing of the Faraces to seek fees under the statute, we may raise the question *sua sponte*.

STANDARD OF REVIEW

"Maryland generally adheres to the common law, or American rule, that each party to a case is responsible for the fees of its own attorneys, regardless of the outcome." *Friolo v. Frankel*, 403 Md. 443, 456 (2008). "Under the American system, courts can award attorneys' fees only if authorized by contract, statute, or rule." *Bessette v. Weitz*, 148 Md. App. 215, 236 (2002).

A ruling on a request for attorneys' fees "will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Collins v. Collins*, 144 Md. App. 395, 447 (2002) (quoting *Petrini v. Petrini*, 336 Md. 453, 468 (1994)). "[A]n exercise of discretion based upon an error of law is an abuse of discretion." *Brockington v. Grimstead*, 176 Md. App. 327, 359 (2007), *aff'd*, 417 Md. 332 (2010). Abuse of discretion is also said to occur when a ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result[.]" *North v. North*, 102 Md. App. 1, 13 (1994) (quotation marks and citation omitted).

DISCUSSION

1. The Faraces are not authorized to receive the substantial attorneys' fee award claimed under FL § 12-103.

Before we discuss the Faraces' procedural questions, this Court must necessarily examine underlying issues of law. The first question is the very power of the circuit court under the circumstances of this case to award attorneys' fees under the Family Law Article.

Section 12-103(a)(1) of the Family Law Article provides for an award of counsel fees in any case in which a person applies for an order concerning custody "*of a child of*

the parties[.]" (Emphasis added.) A plain reading of the statute would suggest that a grandparent would not ordinarily be a "parent" entitled to this remedy. In response to questioning during oral argument regarding the application of that statute to a custody dispute between third parties, the Faraces filed a notice of supplemental citation to *David A. v. Karen S.*, 242 Md. App. 1, 26-28 (2019), which they offer as authority for the proposition that a grandparent may be awarded fees pursuant to FL § 12-103.[7] In that case, however, the grandparent was eligible to recover attorney's fees and costs under FL § 12-103 only because of her status as a *de facto* parent of the child. *Id*. at 28. To establish status as a *de facto* parent, the proponent must show:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

E.N. v. T.R., 474 Md. 346, 352 (2021) (quoting *Conover v. Conover*, 450 Md. 51, 74 (2016)).

[7] The Faraces' notice of supplemental citation includes citations to two other cases, neither of which is relevant to the issue of their standing to assert a claim for attorneys' fees pursuant to FL § 12-103 or of the court's power to award such fees in a case like this one.

Neither Ms. Farace nor Mr. Farace claim to be a *de facto* parent of D.C., however, and the record on appeal does not support such a conclusion.[8] Accordingly, we hold that the court did not abuse its discretion in denying the Faraces' motion for costs and attorneys' fees filed pursuant to FL § 12-103. *See City of Frederick v. Pickett*, 392 Md. 411, 424 (2006) ("[C]onsiderations of judicial economy justify the policy of upholding a trial court decision which was correct although on a different ground than relied upon." (quoting *Robeson v. State*, 285 Md. 498, 502 (1979))).[9]

2. Express reservation by the court on an issue regarding an award of fees as a sanction for discovery violations supersedes any effect of the absence of an express reservation of a claim for fees in the parties' settlement agreement.

Given our conclusion with respect to fees sought under the Family Law Article, we turn next to the remaining claims for attorneys' fees as a sanction for discovery violations pursuant to the Maryland Rules. The question of whether such a claim is waived if not expressly reserved in the parties' settlement agreement was touched upon in the circuit court's ruling, the briefs of the parties, and, more extensively, at oral argument.

The legal effect of the absence, in a settlement agreement, of an express reservation of the right to attorneys' fees is a question that has divided courts around the country. Some conclude that, in the absence of an express reservation, the issue of attorneys' fees must be

[8] According to pleadings filed by the Faraces, D.C. did not live with them, and their involvement in his life consisted of "regular visitation, vacations, and some overnights[.]"

[9] It matters not whether the failure of the Faraces to satisfy the language of FL § 12-103 is viewed as their lack of standing or the court's inability to grant such relief. The result would be the same.

deemed to have been waived and subsumed in the negotiated agreement. *Ramires v. AGDG Car Wash Corp.*, 210 N.Y.S.3d 498, 500 (N.Y. App. Div. 2024). A greater number of courts appear to regard the lack of an express reservation of fees as not fatal to a subsequent fee award. *See, e.g.*, *Ritzenthaler v. Fireside Thrift Co.*, 113 Cal. Rptr. 2d 579 (Cal. Ct. App. 2001); *Warrington v. Vill. Supermarket, Inc.*, 746 A.2d 61 (N.J. Super. Ct. App. Div. 2000); *Keister v. Keister*, 458 So. 2d 32 (Fla. Dist. Ct. App. 1984).

The lone Maryland case that touches on these issues is *Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436 (2018). There, the Court held that language in the settlement agreement that provided for a general waiver of all claims did not preclude a claim for attorneys' fees where the agreement also contained an unambiguous provision stating that the right to petition for an award of costs and fees was not waived. *Id.* at 457-48. Obviously, this decision does not resolve the issue before us. Although it would eliminate any factual dispute, rather than enter uncharted waters on this legal issue, we believe the better course is to focus on the two orders at issue – orders that appear to expressly reserve the possibility of a fee award.

In our view, reservation of a fee issue in a court order must necessarily supersede the absence of an express reservation of the right to seek fees in the parties' settlement agreement. In this case, the reservation in the September 28, 2020 order only promises a determination by the court as to whether any fee should be awarded. The October 3, 2022 order contemplates a determination of the amount of the fee to be awarded. In our opinion, the case must be remanded for the circuit court to address the issues contemplated by these "judicial reservations."

3. The procedural issues raised by the Faraces are moot.

Even if the Faraces were correct in their procedural challenges, viz., the alleged ex parte communication, independent investigation by the court without an evidentiary hearing, and the reliance on the unverified transcript of the mediation proceeding, it would not permit a fee claim by nonparents under the Family Law Article. As to the two fee claims for asserted discovery violations, the Faraces are getting what they asked for – a right to be heard on whether they are entitled to a fee on one claim and a determination of the amount of the award under the other. In other words, the procedural issues presented in the Questions Presented are essentially moot.

The Faraces also assert that, in the event of a remand, the circuit court judge should be disqualified because he had personal knowledge of the facts that will be in dispute in a subsequent proceeding and could have his impartiality questioned. It appears that the Faraces' contentions are aimed at the "waiver" of fees. However, as a factual matter, that issue is no longer in this case. Moreover, the Faraces have made no showing that would rebut the circuit court judge's impartiality.

For all of these reasons, we will affirm the circuit court's denial of attorneys' fees claimed under the Family Law Article. To the extent the circuit court denied a fee claim that was the subject of the order of October 3, 2022 and declined to address the fee issue that was the subject of the September 28, 2020 order, those rulings are reversed and remanded for further proceedings consistent with this opinion. Finally, we reject the

Faraces' contention that the circuit court judge should be disqualified from resolving the fee issues remaining on remand.[10]

MOTION TO STRIKE APPENDIX TO APPELLEES' BRIEF DENIED.

ORDER DENYING APPELLANTS' CLAIM FOR ATTORNEYS' FEES AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. PARTIES TO PAY THEIR OWN COSTS.

[10] The Faraces filed a motion to strike an appendix to appellees' brief because the email and letter were not included in the record. The documents are clearly relevant to the issues as framed by the appellants' brief and help show that the circuit court judge did not act arbitrarily. The motion is denied.