Circuit Court for Howard County
Case No. 13-C-14-100545

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2257

September Term, 2017

DAVID DJAJAPUTRA

v.

SUSAN PAYNE

Graeff,
Leahy,
Wilner, Alan M. (Senior Judge, Specially Assigned

JJ.

Opinion by Wilner, J.

Filed: September 18, 2018

This appeal is from an Order of the Circuit Court for Howard County that granted appellee's motion to increase child support with respect to the parties' two children, awarded her attorneys' fees, and denied appellant's motion to modify custody of the children. The Order followed a hearing on cross-exceptions to findings, conclusions, and recommendations of a domestic relations magistrate and represented the court's view that, for the most part, though not entirely, the magistrate got it right. We shall affirm the court's Order (judgment).

BACKGROUND

The parties were married in June 2000 and divorced in September 2015. They have two sons, 13 and 10 years old. Pursuant to a settlement agreement, which the court incorporated into the divorce judgment, the parties were to have joint legal custody of the children, who were to reside primarily with appellee subject to a visitation schedule set forth in the agreement. Appellant was directed to pay child support in the amount of $3,750 per month. That amount was said to be based on the child support guidelines. Both parties were represented by counsel at the time.

Appellant touched off the current dispute in January 2017 with a *pro se* petition to give him sole legal custody of the children, subject to reasonable visitation by appellee. Ultimately, he asked that the children spend alternating weeks with each parent throughout the year but did not seek any change in the current child support order. The basis for his petition was his claim that appellee consistently had refused to communicate

with him on matters relating to the children and that the older child had moved from elementary school to middle school and had a different schedule than his brother. Appellee filed an opposition to that petition on February 2.

The next three events occurred on March 3, 2017. On that day appellee, through counsel, filed a cross-petition to increase child support which, according to the certificate of service, was hand delivered that day to appellant. The basis for her petition was that appellant's income had increased by at least 25 percent since the divorce judgment was entered and that extraordinary medical expenses incurred for the children and paid solely by her also had increased. She asked as well for attorneys' fees. Appellant, in turn, acting *pro* se, filed a 14-page supplement to his petition for modification of custody coupled with 59 pages of exhibits.

On that day as well, the county administrative judge, following a scheduling conference attended by the parties, issued a scheduling order, apparently focusing only on appellant's petition for modification of custody but anticipating that child support may become an issue with respect to that petition. The scheduling order set a hearing for April 25, 2017 and directed that (1) all discovery be completed by April 11, (2) the parties file a joint pre-trial statement by that date, (3) unless otherwise ordered by the court for good cause, the hearing be limited to three hours, and (4) any request to modify the scheduling order be filed in writing by April 11. There followed a flurry of motions, supplements, and responses, including one to postpone the scheduled hearing. Over

appellant's objection, that motion was granted and the hearing was postponed to June 26, 2017.

In their joint pre-trial statement filed on April 10, appellant, acting *pro se*, estimated that he would need eight hours at the hearing (appellee estimated only three hours). Appellant did not, however, request an amendment to the scheduling order to seek any additional time.

The hearing commenced as rescheduled, on June 26. Appellant appeared *pro se*. In response to an inquiry from appellee as to how the three-hour time limit would be allocated between the two petitions – for change of custody and increase in child support – the magistrate said that the time would be divided equally between the parties, to which counsel for appellee responded "okay" and appellant responded, "thank you." In calling on appellant to proceed, as he was the first to file, the magistrate confirmed that three hours was the total limit, that each side would have 90 minutes, and that "[y]our opening, your closing, your direct and cross-examination all count against your time." In response to a question from appellant, the magistrate clarified that an opening statement was not evidence, that appellant could make such a statement if he wished but it would count against his 90 minutes.

Appellant indicated that he understood and advised that, as he was not asking for any change in the current child support, he had no affirmative evidence to produce on that issue but did wish to defend against appellee's request for an increase. He elected to make an opening statement that consumed almost seven pages of transcript. He then

proceeded to testify on his petition for 21 pages, was cross-examined for 12 pages, testified on redirect for 14 pages, and was cross-examined again for three pages. He then called his sister to testify. Her testimony consumed seven pages, four of which were on cross-examination. Their testimony all dealt with the motion to modify custody. At that point, the court reminded appellant that he had 10 minutes remaining, to which he responded "okay."

Appellee then testified in her case. At the end of her testimony, the magistrate reminded appellant that he had nine minutes left of his allotted time but had not yet addressed appellee's child support petition. He asked appellee a few questions on cross-examination and then proceeded to make his closing argument. At no time did he request more time or suggest that he had additional evidence to produce.

The magistrate filed her report on July 19, 2017. In it, she made detailed findings of fact, not all of which need be repeated. She found in general that there was "very minimal change in circumstances, if any, regarding the children to warrant another evaluation on the children's best interest and a reconsideration of the existing custody and access schedule" and that "[b]oth parents continue to be fit and proper parents to the children." She did mention two changes. One was that the children now went to different schools and would continue to do so, which created an after-school-care issue, as both parents were employed, but noted that issue had been resolved by the parents through mediation.

The second change arose from appellant's relocation. The parties had lived in Ellicott City during the marriage, and the children went to school there. After the separation, appellant moved to Towson to be closer to his work. That was convenient for him, but to grant his request for alternating weeks would require that the children endure a 90-minute car commute to school on each school day in every other week, which the magistrate declared was not in their best interest. The magistrate concluded that "[i]t remains in the best interest of the minor children to continue to follow the well thought out schedule that the parents planned for the children upon their separation and divorce." The children, she said, "are doing well in their education and are successful in school and in their activities." She noted that there were a variety of health issues with respect to the children and that appellee "is mainly responsible for handling the meetings and appointments with the health care providers and with educators." For all those reasons, she concluded that "the custody and access schedule should not be upset."

With respect to child support, the magistrate found that appellant's annual income from his primary employer had increased since the divorce by at least $7,106 to $203,306, and that, with income from other sources, he currently earned at least $17,525/month ($210,300 annually). Appellee's income also had increased, from $66,996 to $69,399. Her pretax monthly income was $5,783.

In light of the combined monthly income of $23,308, the magistrate determined that the child support guidelines were no longer controlling. Based on the income figures in evidence, the magistrate found that appellant earned 75.2 percent of the combined

income and appellee earned 24.8 percent. After considering the evidence of extraordinary medical expenses and work-related child care costs, the magistrate concluded that the *extrapolated* guidelines would call for appellant to pay $4,097 per month but recommended that he pay only $4,000 per month, an increase of $250 per month. Though recognizing that the increase properly could be made retroactive to the date appellant filed her petition, the magistrate recommended that it commence from the date of the hearing.

Finally, with respect to appellant's request for attorneys' fees, the magistrate found that she had incurred "well over" $15,000 in such fees, $10,000 of which was still outstanding at the time of the hearing. The magistrate concluded that some of those fees were attributable to the conduct of appellant in filing non-meritorious motions, delaying responses to discovery requests, providing discovery in an unorganized fashion that required appellee's attorneys to spend three days sorting it out, and threatening to harass appellee unless she agreed to a 50/50 split of custody. The magistrate concluded that appellee was unable to afford the accumulated fees, that appellant was more able to do so, and that it was not in the best interest of the children that appellee bear the entire cost. She recommended that appellant contribute $7,250, which apparently was intended as a share of the fees that were still outstanding, rather than the total fees incurred.

Both parties filed exceptions to the magistrate's report and recommendations. This time through an attorney, appellant, for the first time, complained about the three-hour time limit on the magistrate's hearing. He complained as well about the

recommended increase in child support and the award of attorneys' fees. He did not except to the recommended denial of his petition for change of custody. Appellee excepted to the recommended reduction of support from the extrapolated guideline amount of $4,097, to the magistrate's failure to recommend that the increase be retroactive to the filing of the petition, and to her failure to recommend a contribution to attorneys' fees already paid.

In presenting his argument regarding the time limitation at the exceptions hearing before the court, appellant contended that, during the scheduling conference, he had asked for more time and that the request had been denied. Appellee's attorney responded that no such request was made, that three hours was standard in Howard County for a magistrate's modification hearing, and that if any request for a full-day hearing had been made, appellant would have been given a standard form to complete. That form, a copy of which, without objection, is included in appellee's appendix, makes clear that, if the form is not filed within 10 days of the scheduling conference, "the hearing will proceed on the date scheduled for THREE hours." As noted, when the magistrate confirmed that the hearing was scheduled for three hours, appellant said only "thank you."

Though recognizing that scheduling conferences conducted by the Circuit Court in Howard County are ordinarily not recorded, the court found as a fact, largely from the absence of any written request, either on the form or in a motion to amend the scheduling order, that no request for additional time was made by appellant. **E872**

As part of his complaint regarding the time limit, appellant contended that there were nine documents he would have presented to the magistrate had he been given time to do so. In rejecting that proffer, the court noted that eight of the nine documents were never provided in discovery and that two were dated nearly two months after the date of the magistrate's hearing and thus were not in appellant's possession on June 26.

With respect to appellant's exceptions dealing with the calculation of child support, most were denied, but some were sustained, in part to conform with the court's rulings on some of appellee's exceptions. The net effect was to set the child support at $3,858 per month, retroactive to March 3, 2017 – the date appellee filed her petition. The court sustained appellee's exceptions with respect to attorneys' fees and increased the award to $11,280.

As noted, in this appeal, appellant complains only about the child support and attorneys' fees, repeating the arguments he made in the exceptions proceeding regarding the time limit allegedly imposed by the magistrate, the finding of a material change justifying an increase in child support, and the award of attorneys' fees.

DISCUSSION

Standard of Review

In a nonjury case such as this, we review the judgment of the Circuit Court on both the law and the evidence but will not set aside the judgment on the evidence unless the court's findings are clearly erroneous. Md. Rule 8-131(c). Here, the trial court was

reviewing the report and recommendations of a magistrate. It took no additional evidence. Although a magistrate's findings of fact and conclusions of law are advisory only, the Circuit Court, in ruling on exceptions, is to treat the magistrate's findings of fact as prima facie correct and not disturb them unless it finds they are clearly erroneous. No deference is required with respect to proposed conclusions of law. The magistrate's ultimate conclusions and recommendations, however, must be reviewed with an independent exercise of judgment by the Circuit Court. *Harryman v. State*, 359 Md. 492, 507 (2000). Our task is to determine whether the Circuit Court correctly applied those principles.

The Time Limit

With respect to the time limit, we note first that the three-hour limit was not imposed by the magistrate but by the county administrative judge in the scheduling order signed by her. That order specified that any request to modify it must be filed in writing by April 11, 2017, and no such written request was made by appellant, either on or before that date or afterward. Indeed, in the objection he filed to appellee's request to postpone the magistrate's hearing scheduled for April 25, he asked that the hearing date *and time* currently set in the scheduling order "be preserved." Appellant had a full opportunity to request additional time in conjunction with his pre-trial statement in which he estimated that the hearing would consume eight hours. In conformance with the scheduling order, the magistrate quite properly scheduled only three hours, and she warned appellant at the

outset that his allotment of 90 minutes would include both opening statement, testimony, and closing argument. His only response was "thank you."

Appellant regards all of this as overshadowed by due process considerations. Noting that, in custody and support cases, "a judicial philosophy which promotes procedure over substance and technicality over justice is contrary to the best interest standard," he argues that "simply because Appellant, a *pro se* litigant 'should have' but did not file a written motion for a longer hearing, should not deprive him of his due process rights nor trump the best interest standard." The rhetoric is fine; its application to this case, however, is exceedingly weak.

The county administrative judge is responsible for supervising the expeditious disposition of cases filed in his or her court, which includes control over the court calendars, preparation of a case management plan for the court, and performance of administrative duties necessary to the effective administration and internal management of the court. Md. Rule 16-105. That includes the setting of reasonable time limits on the trial of cases.

Those limits can, should, and sometimes must be adjusted when there is good reason to do so and an adjustment is timely and appropriately requested or the need for it becomes unmistakably obvious. We are mindful of what this Court said in *In re Russell G.*, 108 Md. App. 366 (1996) where, in a CINA case, the trial court adhered rigidly to a preset time limit on a disposition hearing that turned out to be clearly insufficient, that precluded the child's mother from presenting her case and her attorney from making a

closing argument. We commented, in *dicta*, that, although it is not inappropriate, as a general rule, for a court to impose reasonable time limitations for the trial of a case, "it is not appropriate to limit the time or refuse to deviate from a limit previously fixed if the effect will be to prevent a party from presenting his or her case fully." *Id.*at 380.[1]

This is not a CINA case. More important, it is not clear that appellant actually was prevented from presenting whatever evidence he had regarding child support or that he suffered from any procedural default, as was the case in *Flynn v. May*, 157 Md. App. 389 (2004). He acquiesced in the three-hour limit set by the administrative judge more than three months earlier and, notwithstanding a prompt from the magistrate, chose to allocate his 90 minutes almost entirely to his petition for modification of custody, a petition that he then abandoned by failing to except to the magistrate's recommendation that it be denied.

Falling back on his status as a *pro se* litigant is unavailing. As the evidence showed, appellant was hardly a pauper unable to afford an attorney; having had counsel in earlier proceedings, including the one that led to the settlement agreement 15 months earlier, he chose to proceed in this proceeding, which he commenced, without one. Nor is the point he raises a technical one like that in *Flynn*, that might not be obvious to a lay person. Appellant was adept at filing numerous motions and other papers. If, as he now claims, he needed more time to present evidence regarding child support, he could have

[1] The comment was *dicta* and was recognized by the Court as such because the CINA finding was reversed for other reasons not involving the mother.

raised that at the scheduling conference, as he claimed he did but the magistrate and the court found he did not; he could have requested it in conjunction with his pretrial statement; he could have raised it in his opposition to appellee's request to postpone the magistrate hearing; and he could have raised it at the magistrate hearing instead of acquiescing to the 90-minute limit on his presentation.

Change in Circumstances

The increase in child support ordered by the court, from $3,750 to $3,858, was based on the findings that (1) appellant's monthly income had increased by $1,175 since the divorce; (2) appellee's monthly income had increased by $200; and (3) in the exercise of its independent judgment, the court disagreed with the magistrate's failure to include an aggregate of $348/month in expenses for the children and her reduction of the extrapolated guideline amount by $97/month.

Appellant's argument seems to be that this is not enough to warrant an increase in the support. He notes that Md. Code, §12-104 of the Family Law Article permits a modification of child support only upon a showing of "a material change of circumstances," which, in *Willis v. Jones*, 340 Md. 480, 489 (1995), the Court somewhat circularly defined as "a change of sufficient magnitude to justify judicial modification of the support order." Appellant notes that the increase ordered in this case amounted to only $108 per month, which was less than a three percent change.

The only exception appellant made to the magistrate's calculation of child support was that the magistrate incorrectly determined appellant's income and expenses. No mention was made about whether there was a sufficient change in circumstances. That contention was made in a memorandum submitted in support of his exceptions, but it was based not on what the magistrate found appellant's income and expenses to be but on what appellant believed the magistrate should have found them to be. Had the magistrate accepted appellant's views regarding the items in dispute, the increase in support, according to appellant, would have been only $22 per month. The court found that complaint waived because it was not articulated with particularity in the exception, as Rule 2-541(g) requires. That ruling was correct.

***Tae Kwon Do* Expenses**

Appellant testified at the magistrate hearing that the children were enrolled in a *tae kwon do* class. Her testimony regarding the cost of that was somewhat ambiguous; she mentioned figures of $154 and $200 per month. Although both parents agreed that the children should participate in that kind of activity, appellant has refused to share in the cost. The magistrate concluded that the cost should be borne by the parents in proportion to their income and assessed $172/month to appellee.

Neither party was happy with that result, and both filed an exception. Appellee contended that the monthly cost actually was $300, as documented by her bank statements. Citing *Horsley v. Radisi*, 132 Md. App. 1 (2000), appellant claimed that,

under the guidelines, no amount was appropriate. The court sided with appellee, concluding that (1) the children's participation was in their best interest, (2) because the guidelines were not controlling, the court had discretion to include an amount as an additional expense, and (3) the proper amount was $300 per month. We find no error or abuse of discretion in those determinations.

Attorneys' Fees

Appellant's final complaint concerns the award of attorneys' fees. As noted, the magistrate proposed that appellant pay a portion of only the unpaid balance of appellee's attorneys' fees. The court disagreed with that limitation. It found that appellee was justified both in opposing appellant's petition for change of custody and in seeking for herself an increase in child support and incurring attorneys' fees in those efforts. After recounting each party's ability to pay appellee's fees, the court determined that appellant should reimburse appellee for some of the fees she had already paid.

Appellant argues that those fees arose from various motions filed by appellee in which her request for attorneys' fees had been denied. He seems to believe that the denial of fees in the context of those motions precludes the court from awarding fees at the end of the case. There is no merit in that argument. An interlocutory ruling can always be revisited as the case progresses. *See* Md. Rule 2-602(a)(3).

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.