Circuit Court for Prince George's County
Case No.: CAD12-38217

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 023

September Term, 2016

RICHARD REDMAN

V.

YASMINE REDMAN

Leahy,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: August 1, 2017

This is an appeal from an order of the Circuit Court for Prince George's County terminating appellee Yasmine Redman's child support obligations. In 2014, following a merits hearing, the parties were granted a divorce and appellant Richard Redman was awarded custody of the two minor children. Appellee was granted visitation and ordered to pay $955.00 per month in child support. In October 2015, appellee filed a motion to modify child support and appellant then filed a petition for contempt, averring that appellee had failed to pay child support in accordance with the court's order. The matters were consolidated, and following a hearing, the court found appellee was unable to work, and, thus, did not willfully fail to pay child support. The court consequently terminated appellee's child support obligation and denied appellant's petition for contempt.

We have reordered appellant's questions presented as follows:

1. Did the circuit court err in finding that there was a material change in circumstances and that the appellee did not voluntarily impoverish herself?
2. Did the circuit court err in modifying appellee's support obligation to June 1, 2015?
3. Did the circuit court err in finding that appellee was not in contempt of the order of support?

For the reasons set forth below, we shall affirm in part and reverse in part.

BACKGROUND

The parties are the parents of two minor children. In an order dated January 24, 2014, the Circuit Court for Prince George's County granted the parties a divorce absolute and awarded sole custody of both children to appellant Richard Redman. Appellee Yasmine Redman was granted visitation and ordered to pay $955.00 per month in child support. Appellee subsequently made the monthly support payments until June 2015.

On October 20, 2015, appellee filed a motion for modification of child support, stating she was no longer employed as of May 1, 2015. Appellant, on October 26, 2015, filed a petition for contempt, alleging that appellee had failed to meet her child support obligation.

The matters were consolidated and scheduled for a joint hearing on January 21, 2016. Appellee there testified that she suffered from a bipolar disorder, which prevented her from performing work-related tasks. Because of the disorder, she stated she was unable to continue her employment and, thus, financially unable to make the child support payments. Appellee testified she had previously managed her illness with prescribed medication. However, beginning in March of 2015, upon becoming pregnant, she had ceased taking the medication because of the risk to the unborn child. She testified that she had taken the same course of action during her first two pregnancies and had not experienced any issues in performing her job. However, during this pregnancy, she developed both manic and depressive episodes, which greatly affected her ability to work. In April of 2015, she was admitted to the hospital for evaluation and treatment following a severe manic episode. She remained there for several days, after which she resigned from her job.

Appellee explained, she resigned because, "one, I was in a manic episode and I was having trouble focusing and doing my work properly and I felt – but I also, there was an incident that occurred at work and I didn't feel comfortable or safe there anymore." Appellee worked alone in a basement office of her employer's home. She stated a neighbor entered the basement office, and she realized "he was on drugs." She testified "he had a

saw in his hand and disrobed right in front of me." She was then able to escape to the upstairs residential part of the house, where her employer was, unharmed but "pretty shaken up and traumatized." The incident was not reported to the police.

Shortly after being discharged from the hospital in April, appellee began a depressive episode which could not be managed. Appellee further testified she unsuccessfully applied for several jobs during the month of May.

Appellee gave birth on December 12, 2015 and then resumed taking her medication. Appellee's psychiatrist, Dr. Steven Israel, testified that she had been under his care for approximately five years, including throughout her pregnancy, and he confirmed appellee's testimony regarding her illness. According to Dr. Israel, he had been unsuccessful in resolving her latest depressive episode. He further stated that as of March, 2015, she was not able to function in a work environment.

Appellant argued that the court should deny the request for modification of the child support payments because appellee's mental illness had previously been managed by medication and had never affected her ability to hold a job. He averred that appellee had voluntarily impoverished herself when she elected to stop taking her prescribed medication during a planned pregnancy, and should be found in contempt for willful non-payment.

Following closing arguments by counsel, the circuit court held that appellee was unable to work because of her mental illness and she had not voluntarily impoverished herself. The court subsequently granted appellee's motion for modification, ordered that her child support obligation be retroactively terminated beginning June 1, 2015, and denied appellant's petition for contempt.

STANDARD OF REVIEW

Maryland Code, Family Law Article § 12-104 provides:

> (a) The court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance.

On review, the appellate court must determine whether the circuit court was clearly erroneous in finding a material change in circumstance. *Gordon v. Gordon*, 174 Md. App. 583, 637–638 (2007). "A trial court's factual findings on the issue of voluntary impoverishment of a parent, for child support purposes, are reviewed under a clearly erroneous standard, and the court's ultimate rulings are reviewed under an abuse of discretion standard." *Sieglein v. Schmidt*, 224 Md. App. 222, 249 (2015) (citing *Long v. Long*, 141 Md. App. 341, 351–52 (2001)). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996).

DISCUSSION

I. The circuit court did not err in finding that there had been a material change in circumstances and that appellee had not involuntarily impoverished herself.

"It is well established that parents have an obligation to support their children." *Gordon v. Gordon*, 174 Md. App. 583, 644 (2007) (internal citations omitted). Section 12-204(a)(1) of the Maryland Code, Family Law Article requires "[t]he basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes." Section 12-104(a) states a "court may modify a child support award subsequent

to the filing of a motion for modification and upon a showing of a material change of circumstances."

A modification of child support is proper only when there has been "a 'material' change in the circumstances, needs, and pecuniary condition of the parties from the time the court last had the opportunity to consider the issue." *Guidash v. Tome*, 211 Md. App. 725, 742 (2013) (citing *Kierein v. Kierein*, 115 Md. App. 448, 456 (1997). The change must be "relevant to the level of support a child is actually receiving or entitled to receive[,]" and "of a sufficient magnitude to justify judicial modification of the support order." *Pettito v. Pettito*, 147 Md. App 280, 307 (2002) (internal citations omitted). "'[A] material change in circumstances may be based…on a change in…the parents' ability to provide support.'" *Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014) (quoting *Smith v. Freeman*, 149 Md. App. 1, 20–21 (2002)).

Appellant argues the circuit court erred in modifying the 2014 child support order because appellee failed to prove that there was a material change in circumstances, as required by § 12-104(a). He contends that appellant did not present any evidence "to suggest that [she] was physically unable to work," and that appellee's history of working throughout her previous pregnancies supports his contention that there was no proven material change in circumstances. According to him, "[u]nless…[a]ppellee can prove such a change [in circumstances] by a preponderance of the evidence, the issue of voluntary impoverishment need not be addressed." Conversely, appellee argues that she did establish a material change in circumstances, namely, her severe manic episode, loss of employment, and continuing depression. We agree.

The evidence presented, in the case at bar, sufficiently established that a material change in circumstances had occurred in that appellee was unable to provide support. Appellee testified her mental illness began to worsen in April 2015, thus, making her unable to perform her job and, that, further, her condition did not improve and was not controlled by medication. Her treating psychiatrist, Dr. Steven Israel, confirmed this testimony. Upon questioning by appellant's counsel, Dr. Israel stated:

> [Appellant's Counsel] Ok. During what periods of time over the past two years could she not function as an administrative assistant?
>
> [Dr. Israel] I think since, since she developed the manic episode.
>
> [Appellant's Counsel] No, I didn't ask you about - really I want to know dates, you know, during what months and what years was she unable to act as an administrative assistant in 19 – in 2014 and 2015?
>
> [Dr. Israel] I think since, since March 2015.
>
> [Appellant's Counsel] Okay. And is it your testimony that every day since that time she couldn't function as an administrative assistant?
>
> [Dr. Israel] I would have, if pressed I would say yes. I think the answer to that question is yes.
>
> [Appellant's Counsel] So she's been totally non-functional since March; is that your testimony?
>
> [Dr. Israel] Yes.

Dr. Israel also testified that appellee "had [at the time of the hearing] a lot of trouble even getting out of bed and functioning," and that she "spends most of the day in a semi sleeping…state that's sort of semi-somnolen[t], not really functioning." He continued that, after the birth of her child, he prescribed her previous medication, and, "whereas it had worked before, it had – it didn't work" and "had a negative affect" this time. He stated

"[i]t is not unusual for people to respond differently to [the same] medications at different times." We note that this testimony was not contradicted, nor did appellant present any evidence to the contrary.

Thus, in our view, the evidence clearly supported the circuit court's finding that appellee's ability to make child support payments ceased as of May 1, 2015, as averred in her motion to modify. Appellee's statements, coupled with the expert's testimony, clearly established that there was, in fact, a material change in circumstances. The court specifically acknowledged appellee's medical condition in its findings, in stating that if appellee "were, to, all of a sudden to overcome her inabilities and get further employment, the Court is open to reestablishing child support".

Appellant, nevertheless, contends that the court's finding of a material change in circumstances was based in "large part" on the admission into evidence of two letters given to appellee from her employer in April 2015. One letter discussed her job performance, the other was an acceptance of her letter of resignation. He argues that he objected to the admission of the letters as inadmissible hearsay because the letters were not properly presented as business records and they were not authenticated. Further, he contends that they were not submitted by appellee as nonhearsay, but rather for the truth of the matter asserted, i.e. that she was unable to work.

Upon examining the contents of the two documents, the court commented, "When you strip away the cover, the cover sheet, which is a certification of records, what you're left with are two letters identified by the witness as having been received by her from her

employer. They're admissible for that purpose, if not for business record purpose. Don't need a business record exception." The documents were then admitted.

In our view, the court's rationale is unclear. If the documents were admitted, as appellee requested, to establish its effect on her, then it was nonhearsay. However, the following discussion, after the admission of the letters, occurs:

> [Appellant's Counsel] Is Your Honor going to accept the content of the letter for the truth of the matter asserted? Is that the, is that what you've admitted it for?
>
> [The Court] I have no idea what the matter asserted – if the matter asserted is who ran in the 5th at Hialeah last week, no. If the matter asserted is you're out of here, yes.

Thus, it would appear that the letters were admitted as hearsay exceptions. However, under Maryland Rule 5-803(b)(6), "memorandum[s], report[s], record[s], or data compilation[s] of acts, events, conditions, opinions, or diagnoses" are admissible as business records only when the following conditions are met:

> if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation

Further, Maryland Rule 5-902 provides:

> (b) (1) *Procedure.* Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed

> within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

In the case at bar, there was no testimony that the documents were kept in the regular course of regularly conducted business activity and that they were made by a person with knowledge at or near the time of the act, in accord with Md. Rule 5-803. The documents were admitted through the testimony of appellee, not through a custodian of records. Alternatively, if the letters were admissible under Rule 5-902 (a)(11) as certified records, advance notice to appellant's counsel was required, which was not done. We rule, however, that, in light of the wealth of other testimony regarding appellee's condition and inability to work, the admission of the letters was harmless error.

Further, at the close of the case, during the court's conclusions, the judge specifically stated, "The first letter says you're not doing your job and we'd like you to do your job and we want you to, to take time off, get yourself together and come back here and do your job." As to the second letter, the court stated," "So I sort of discounted that [second] letter in toto." Based on these statements, neither letter impacted the court's factfinding regarding appellee's ability to work in June 2015 and thereafter. The court's findings that a material change in circumstances had occurred were not based "largely" on the documents, rather its findings were fully supported by other evidence which showed that appellee's depressive condition had left her unable to function in a job setting.

Appellant next argues that the circuit court erred when it failed to consider or address each of the mandatory factors enunciated in *Lorincz v. Lorincz*, 183 Md. App. 312 (2008), in determining whether appellee was voluntarily impoverished. He contends the

court's conclusion that appellee was unable to maintain employment or gain new employment was clearly erroneous. He argues appellee voluntarily impoverished herself by electing to stop taking the medication during this last planned pregnancy when she "knew the nature of her illness and knew what would happen when…she did not take her medications." He continues that, because appellee "voluntarily resigned from her job and voluntar[ily] refused to take any meaningful or significant steps to obtain subsequent employment," her actions constitute voluntary impoverishment.

Appellee argues that the circuit court sufficiently reviewed the *Lorincz* factors. Further, she contends, the evidence presented supports the court's finding that appellee did not voluntarily impoverish herself because "[a]ppellee's unemployment was not 'voluntary' as it was not the intended result of her conduct (i.e. to stop taking her medication to prevent risk of harm to her unborn baby)."

It is well established that parents may not avoid paying child support through voluntarily impoverishment. "A parent is 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.'" *Gordon*, 174 Md. App. at 644 (quoting *Digges v. Digges*, 126 Md. App. 361, 381 (1999) (internal citations omitted)). Section 12-204(b) of the Maryland Code, Family Law Article states, in part, "if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income." It continues, however, that "[a] determination of potential income may not be made for a parent who…is unable to work because of a physical or mental

disability." To determine whether a parent has become voluntarily impoverished, the court considers several factors, including:

(1) his or her current physical condition;
(2) his or her respective level of education;
(3) the timing of any change in employment or financial circumstances relative to the divorce proceedings;
(4) the relationship of the parties prior to the 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, 183 Md. App. at 331. Ultimately, however, we have previously stated that "for purposes of the child support guidelines, 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." *Id*.

In the instant case, the circuit court did address the *Lorincz* factors. The court acknowledged appellee's mental condition, as well as the timing of her change in employment. The court found "she lost a job and can't get gainful employment despite her education and apparent experience," that the child support payments "were made with great regularity prior" to her manic episode in April of that year, and that she had applied for some jobs since resigning her position.

Moreover, while these "factors must be considered by the trial court, the statute does not require the court to articulate on the record its consideration of each and every factor

when reaching a determination of child support." *Dunlap v. Fiorenza*, 128 Md. App. 357, 364 (1999) (internal citations omitted). "The exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981) (internal citations omitted). A "mere lack of an explicit discussion of each of the factors on the record by the trial court does not necessarily mean that the trial court erred in concluding that [appellee] was [not] voluntarily impoverished." *Long v. Long*, 141 Md. App. 341, 351 (2001).

Appellant also argues that the court specifically held that there was voluntary impoverishment when it stated "I am not convinced that this woman can't seek and obtain valid employment." However, appellant's argument is misplaced. The court stated the following:

> If, and I like to look at things from the reverse side. Let me look at the reverse of this.
>
> Let me say that I'm not convinced that this woman can't seek and obtain valid employment. Now if I were an Appellate Court, I'd say okay, Femia, what did you base that on, the fact that she made applications that were denied? The fact that she tried this ridiculous Internet site that she was going to sell services that she thought she possessed, no demonstration that she does?
>
> And the answer to that is I really have nothing to, to lay as a foundation for such a ruling. That would be a fallacious ruling.
>
> She's not paying, she's lost her job, or gave it up, as Mr. Basile would have me find, but it appears – I can't say that it was voluntary impoverishment.

We hold, based on the record, that the court properly considered each of the factors in its determination and sufficiently discussed those factors applicable to the case as fully

supported by the evidence presented. As such, its findings were not clearly erroneous and its ruling was not an abuse of discretion.

II. The circuit court erred in modifying appellee's support obligation to June 1, 2015.

The circuit court, in its written order modifying child support, ordered that appellee's "obligation to pay child support…is hereby terminated as of June 1, 2015." Appellant contends this was in error, as Section 12-104(b) of the Maryland Code, Family Law Article provides that the "court may not retroactively modify a child support award prior to the date of the filing of the motion for modification." He argues appellee did not file her petition for modification until October 20, 2015, and therefore she "continues to be obligated to pay support for the months of June 2015 through October [2015]." Appellee argues appellant has waived this argument, as he did not object at the hearing below. We agree with appellant.

The circuit court did err in retroactively modifying the child support obligation to a date prior to filing. Section 12-104(b) is clear and unambiguous in that a child support award may not be retroactively modified prior to the filing date of the motion for modification. Further, in *Harvey v. Marshall* 158 Md. App. 355 (2005), *aff'd*, 389 Md. 243 (2005), we examined the language and legislative intent of Section12-104(b), and we held that our legislature had, "in using the term 'modify'… followed the language of the Federal statute, intending to prohibit, *inter alia,* the courts from wiping out an arrearage accrued during periods before the filing of a motion for modification." *Id.* at 370. As such, regardless of whether an objection was raised during the hearing, the court had no authority

to modify appellee's child support obligations prior to the date she filed the petition for modification. We shall remand this matter for further proceedings consistent with this determination.

The circuit court also erred when it stated that it was terminating appellee's child support. Section 12-104 does not provide a court with discretion to do so.

The Court of Appeals addressed a similar issue in *Wills v. Jones*, 340 Md. 480 (1995). There, the Court stated:

> If…the circuit court's order was intended to terminate [appellee's] obligation to pay child support, its authority to do so cannot arise from § 12-104(a)[1]. Although it is conceivable that a child support award could be modified to $0 per month if a parent's income were low enough or equitable considerations demanded it, the *obligation* to pay child support would remain. Because the obligation remains, a child support award of $0 can be increased when future circumstances may justify an increase…Section 12-104(a), however, contains no provision allowing a court to entirely terminate a parent's obligation.

Id. at 486–87.

In accordance with *Wills*, we shall remand this matter to the circuit court to state whether its intent was to modify the child support award to $0 per month, in light of its factual findings.

III. The circuit court did not err in finding that the appellee was not in contempt of the order of support.

Lastly, appellant argues the court erred in finding appellee was not in contempt for her failure to pay child support. He contends that, for the same reasons the court should

[1] Section 12-104(a) states a "court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change in circumstance."

have found appellee voluntarily impoverished, the court should have held appellee in contempt. According to appellant, appellee failed to establish by a preponderance of the evidence that she never had the ability to pay more than the amount actually paid, and did not make reasonable efforts to become or remain employed, as required by Maryland Rule 15-207.

Appellee argues that the circuit court's finding of a significant change in circumstances constituted evidence of an inability to pay and thus "would more than likely rule out willful contempt of court." Appellee continues that, "[w]hen the court found that appellee had not voluntarily impoverished herself, it then follows that she was not in contempt of the support order because she did not cause or otherwise bring about her inability to pay."

Maryland Rule 15-207(e)(3) states a "court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment…"

As we held above, the court in the case *sub judice* found that appellee had not "voluntar[ily] impoverish[ed herself], just the opposite." The court continued that "she lost a job and can't get gainful employment despite her educational and apparent experience, attributes, and that she's obviously not in contempt of Court." Again, there was more than sufficient evidence to establish that appellee's failure to make the child

support payments were not willful contempt of the court, nor did she intentionally bring about her inability to pay. Rather, her circumstances were the direct result of functional instability caused by her mental illness. We therefore find the circuit court's finding that appellee was not in contempt was not clearly erroneous. The court's rulings, further, did not constitute an abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART AND REMANDED IN PART. COSTS TO BE PAID BY APPELLANT.