UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 50

September Term, 2016

CHRYSOLOGUE GAKUBA

v.

ALLA P. GAKUBA

Meredith,
Beachley,
Eyler, James, R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 21, 2017

Chrysologue Gakuba ("Mr. Gakuba") appeals from a judgment of the Circuit Court for Baltimore County denying his request to reduce or terminate his alimony obligation to his former wife, Alla Gakuba ("Ms. Gakuba"). Mr. Gakuba presents two issues on appeal:

1. Where [Mr. Gakuba] has retired at age 74 and [Ms. Gakuba] received a monetary award which would have supported her indefinitely had she not chosen to live beyond her means, did the trial court err and/or abuse its discretion in failing to terminate or reduce alimony?

2. Where the trial court made no determination concerning [Mr. Gakuba's] ability to pay, did the trial court err in finding him in contempt?

We affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

By an order dated May 28, 1997, Mr. Gakuba was ordered to pay Ms. Gakuba indefinite alimony of $3,000 per month. Ms. Gakuba was also granted a monetary award in the amount of $82,219.51, as well as $32,692.64 from Mr. Gakuba's Individual Retirement Account ("IRA") and fifty percent of Mr. Gakuba's pension plan valued at $522,019.37. By an order dated May 4, 1999, the indefinite alimony award was reduced to $1,800 per month, effective January 1, 1998.[1] That order granted Ms. Gakuba an additional $10,588.44 from Mr. Gakuba's IRA.

On March 3, 2015, Mr. Gakuba filed a Complaint to Modify Alimony, alleging that a material change in circumstances existed because 1) he was 74 years of age; 2) had no

[1] Ms. Gakuba's alimony was reduced to $2,000 per month for the period between August 1, 1997 and December 31, 1997. That interim modification of alimony is not material to our analysis.

earned income as he had sold his medical practice; and 3) that Ms. Gakuba was able to be self-supporting. On November 9, 2015, Mr. Gakuba filed an Amended Complaint to Modify Alimony and Terminate Health Insurance Coverage. The purpose of Mr. Gakuba's Amended Complaint was to request termination of his obligation to provide medical insurance for Ms. Gakuba because she was eligible for Medicare[2]; he merely reiterated the reasons for seeking a modification of alimony as articulated in the original complaint. Ms. Gakuba filed an Answer to the Amended Complaint as well as a Petition for Contempt related to Mr. Gakuba's failure to pay the court-ordered alimony.[3]

Trial proceeded on February 12, 2016. Mr. Gakuba's principal argument for modifying alimony was that Ms. Gakuba was financially irresponsible and that, had she properly invested the monetary award and retirement distributions, she would be self-supporting. To support that argument, Mr. Gakuba presented expert testimony purporting to show that, had Ms. Gakuba properly invested and managed her money, she would have an account balance of $1,339,052. At a four percent withdrawal rate, the expert opined that Ms. Gakuba could prudently withdraw $53,562 per year, thereby making her self-supporting.

In opposing her former husband's attempt to modify alimony, Ms. Gakuba testified that, since the divorce in 1997, she had used a substantial portion of the monies she had

[2] Mr. Gakuba does not challenge on appeal that portion of the circuit court's order requiring him to reinstate medical insurance for Ms. Gakuba.

[3] Ms. Gakuba represented herself at the hearing which is the subject of this appeal.

received as a result of the divorce to pay living expenses. She testified that she had $142,000 in savings and received $906 per month in Social Security. In her financial statement, she claimed expenses of $3,873.35 per month. She further testified that she was 76 years old and in poor health, with no employment experience since 1992.

The circuit court denied Mr. Gakuba's request to either terminate or reduce alimony. The court specifically found that Mr. Gakuba had income exceeding $5,400 per month while Ms. Gakuba only had the $906 monthly Social Security allowance. The court further noted that both parties included expenses in their financial statements that could be eliminated or reduced, if necessary. The court implicitly rejected Mr. Gakuba's argument that Ms. Gakuba had voluntarily impoverished herself, stating

> I cannot fault you [Ms. Gakuba] for using the monetary award to live on. I think that was anticipated when this award was made. You have told me what you're left with. I have no reason to question that and given your health and your age, I don't believe, I, I think that if I were to terminate the alimony at this point, the harsh and unjust result would be on Mrs. Gakuba, not on Mr. Gakuba[.]

Accordingly, the court denied Mr. Gakuba's request to modify alimony and found Mr. Gakuba in contempt for failing to pay the alimony as ordered. As part of the contempt finding, the court established arrearages in the amount of $25,200 and ordered that they be paid in full within thirty days. Mr. Gakuba timely noted this appeal.

STANDARD OF REVIEW

Pursuant to Maryland Rule 8-131(c), "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will

give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Further, "[w]e will not disturb an alimony determination 'unless the trial court's judgment is clearly wrong or an arbitrary use of discretion.'" *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383-84 (2006) (quoting *Blaine v. Blaine*, 97 Md. App. 689, 698 (1993), *aff'd*, 336 Md. 49 (1994)). The circuit court's "decision on the question of modification . . . is left to the sound discretion" of the circuit court. *Cole v. Cole*, 44 Md. App. 435, 439 (1979).

DISCUSSION

I. The Denial of Mr. Gakuba's Complaint to Modify Alimony

Md. Code (1984, 2012 Repl. Vol,) § 11-107(b) of the Family Law Article ("FL") governs modification of alimony and provides that "[s]ubject to § 8-103 of this article and on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require." "A party requesting modification of an alimony award must demonstrate . . . that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification." *Ridgeway*, 171 Md. App. at 384 (citing *Langston v. Langston*, 366 Md. 490, 516 (2001)).

On appeal, Mr. Gakuba argues that the trial court erred in not finding that Ms. Gakuba had voluntarily impoverished herself. Mr. Gakuba's voluntary impoverishment claim is two-fold: 1) that he "presented evidence that [Ms. Gakuba] had not worked since the divorce" while Ms. Gakuba presented no evidence of her efforts to seek employment;

and 2) that Ms. Gakuba "fail[ed] to reconcile her claimed monthly expenses with the depletion of the retirement assets she received from the divorce."

As to the first claim – whether Ms. Gakuba could be gainfully employed – our careful review of the transcript reveals that Mr. Gakuba presented woefully little evidence regarding Ms. Gakuba's employment potential. Although Mr. Gakuba provided expert testimony concerning projected investment increases in funds Ms. Gakuba received from the divorce in 1997, no expert testimony was provided as to her past or present earning ability. The *only* evidence presented by Mr. Gakuba on this issue was an article in Florida Engineering magazine from January 2004 that referenced Ms. Gakuba's educational background and discussed some of her work experience. Ms. Gakuba, on the other hand, testified that she was 76 years of age, in poor health, and had not been employed since 1992. On this record, the circuit court was not clearly erroneous in failing to impute any income to Ms. Gakuba due to voluntary impoverishment.

Mr. Gakuba's second claim – that Ms. Gakuba depleted the monetary award and retirement funds she received after the divorce – is likewise without merit. To support this claim, Mr. Gakuba presented expert testimony from a financial expert, Bruce O'Heir. Starting with the assumption that Ms. Gakuba had $454,709 immediately after the divorce in 1997, Mr. O'Heir projected that, if properly invested, the $454,709 corpus should have grown to $1,339,052 by 2014. Mr. O'Heir then opined that a corpus of $1,339,052 would produce $53,562 per year at a four percent withdrawal rate and $40,172 per year at a three

percent withdrawal rate. According to Mr. Gakuba, either withdrawal rate would make Ms. Gakuba self-supporting.

Based on Mr. O'Heir's analysis, Mr. Gakuba posits that Ms. Gakuba must have made "extravagant withdrawals" between 1997 and 2014. The fallacy of Mr. Gakuba's argument is obvious. In Mr. O'Heir's analysis, he assumed that $454,709 was invested in 1997 and that *no withdrawals* were made from the corpus between 1997 and 2014. Mr. Gakuba produced no competent evidence to show how Ms. Gakuba actually used those funds after the divorce. Absent such evidence, Mr. Gakuba's voluntary impoverishment claim fails. *See John O. v. Jane O.*, 90 Md. App. 406, 421 (1992) (holding that, "in the context of a divorce proceeding, the term 'voluntarily impoverished' means: freely, or by an act of choice, to reduce oneself to poverty or deprive oneself of resources with the intention of avoiding child support or spousal obligations."). We have found no Maryland case where a court modified alimony based upon the payee spouse being voluntarily impoverished as a result of an intentional dissipation of assets. Although we recognize that a trial court, in an appropriate case, could reduce or terminate alimony where a spouse intentionally dissipates his or her assets, this was not the case here. *See Campitelli v. Johnston*, 134 Md. App. 689, 699 (2000) (citing *Lott v. Lott*, 17 Md. App. 440 (1973)) (stating that "A substantial change in one party's financial circumstances can, under appropriate circumstances, be legally sufficient to justify a change in spousal support."). When the trial court determined that "I can't fault you [Ms. Gakuba] for using the monetary

award to live on," it implicitly rejected Mr. Gakuba's claim of voluntary impoverishment. That determination by the trial court was not clearly erroneous.

In rendering its decision, the circuit court expressly considered the parties' incomes and expenses. It also considered Mr. O'Heir's expert testimony, but implicitly rejected any claim that Ms. Gakuba voluntarily impoverished herself. After considering all of the evidence, the court concluded that Mr. Gakuba had not met his burden to establish that a reduction or termination of alimony was warranted. Indeed, the court determined that, if alimony were terminated, "the harsh and unjust result would be on Mrs. Gakuba, not on Mr. Gakuba[.]" In our view, the circuit court did not abuse its discretion in denying Mr. Gakuba's request to reduce or terminate alimony.

II. The Contempt

After denying Mr. Gakuba's request to reduce or terminate alimony, the circuit court proceeded to find Mr. Gakuba in contempt for failing to pay court-ordered alimony for fourteen months. The court established the alimony arrearages at $25,200 and ordered Mr. Gakuba to pay the arrearages in full within thirty days.[4]

Mr. Gakuba acknowledges that, pursuant to *Arrington v. Dep't of Human Resources*, 402 Md. 79, 97 (2007), the present inability to comply with the support order does not preclude a finding of contempt under Md. Rule 15-207(e)(2). He argues, however,

[4] From our review of the record, the finding of contempt appears to be related exclusively to Mr. Gakuba's failure to pay alimony; the trial court's order requiring Mr. Gakuba to reinstate medical insurance does not appear to be related to the contempt.

that the trial court "erred as a matter of law" in setting his arrearages at $25,200 in the absence of any indication that "it disbelieve[d] [Mr. Gakuba's] financial statement." This argument is without merit. Mr. Gakuba's financial statement demonstrated that he had $237,000 in a money market alone, and $500,000 in mutual funds and an IRA. The trial court clearly did not err in determining that Mr. Gakuba could pay the $25,200 in arrearages.

Mr. Gakuba next argues that the trial court erred because, contrary to Rule 15-207(e)(4)(C), it did not state how the contempt could be purged. In a civil contempt proceeding, a coercive sanction must allow for purging. *Stevens v. Tokuda*, 216 Md. App. 155, 171 (2014). Although the order in this case fails to state how Mr. Gakuba could purge the contempt, by paying the arrearages, Mr. Gakuba has prevented us from fashioning an effective remedy, thus mooting the issue. *Sanchez v. Potomac Abatement, Inc.*, 198 Md. App. 436, 443 (2011). Mr. Gakuba purged the contempt when he paid the arrears. If it has not already done so, the trial court should pass an order purging Mr. Gakuba's contempt.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED WITH INSTRUCTION TO THE CIRCUIT COURT TO PASS AN ORDER (IF IT HAS NOT ALREADY DONE SO) THAT APPELLANT'S CONTEMPT IS PURGED DUE TO PAYMENT OF ARREARAGES. APPELLANT TO PAY COSTS.