

Circuit Court for Montgomery County
Case No. 24933-FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0089

September Term, 2021

MOUSTAFA M. MOUSTAFA

v.

MIRIAM M. MOUSTAFA

Fader, C.J.,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 19, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A woman filed suit to collect more than a decade of alimony arrearages. Her former husband denied that he owed the arrearages and moved that his alimony obligation be reduced. The circuit court declined to reduce the alimony obligation and concluded that the husband owed over \$300,000 in arrearages.

The husband appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Moustafa Moustafa (“Husband”) and Mariam Moustafa (“Wife”) were married in Egypt in 1976, were divorced in 1985, and were remarried in Egypt in 1986.

On January 4, 2005, the Circuit Court for Montgomery County entered a judgment annulling the parties’ marriage on the ground of bigamy: Husband had been married to another woman when he remarried Wife. *Moustafa v. Moustafa*, 166 Md. App. 391, 394 (2005). The judgment of annulment required Husband to pay Wife \$5,750 per month in permanent alimony.

On March 6, 2006, the parties entered into a settlement agreement in which Wife agreed that Husband’s alimony obligation would be reduced to \$2,000 per month. On March 30, 2006, the court entered a consent order, which ordered that the judgment be “modified so as to reflect the terms of the Settlement Agreement between the parties filed herein.” Attached to the order was the parties’ settlement agreement.

It is undisputed that between 2006 and 2021 Husband paid a total of \$6,000 pursuant to the settlement agreement. He made the last payment in December 2006.

On October 9, 2019, Wife, representing herself, filed a Petition to Determine Arrears, Enforce Order, and for Contempt of Court. She asserted that Husband had failed to pay any alimony since 2006. In response, Husband filed a Motion to Decrease Alimony.

Through counsel, Wife filed an Amended Petition for Contempt, Enforcement and Other Relief on September 20, 2020.

The circuit court held a two-day evidentiary hearing in March 2021. At the hearing, Husband argued, among other things, that the statute of limitations barred Wife's attempt to recover past-due alimony payments dating back to 2007. Although Md. Code (1974, 2020 Repl. Vol.), § 5-102(a)(3) of the Courts and Judicial Proceedings Article ("CJP"), establishes a 12-year statute of limitations for actions to enforce a judgment, Husband argued that that provision did not apply because the 2006 consent order did not expressly state that the parties' agreement was incorporated but not merged into the judgment. In his view, the general, three-year statute of limitations (CJP § 5-101) required Wife to file suit to enforce the agreement by March 6, 2009, three years after the agreement was signed.¹

¹ Husband seems not to recognize that even if the three-year statute of limitations applied, Wife would be required to file suit within three years of his breach, and not within three years of the date of the agreement itself. Furthermore, as we explain below, the statute of limitations would begin to run anew after each successive breach (i.e., after each successive failure to make a monthly payment when the payment came due). *Miller v. Miller*, 70 Md. App. 1, 22 (1987).

Husband also argued that in 2008 the parties had entered into an oral agreement, under which he claimed to have given Wife his ownership interest in a condominium in Egypt, which he said would generate \$5,000 a year in rent. In exchange, he said, Wife allegedly agreed to release him from his obligation to pay \$2,000 a month in alimony. The alleged agreement was not in writing, according to Husband, because Wife did not want to jeopardize her ability to continue to receive government assistance. Wife completely denied these claims.

Finally, Husband argued that his poor health and financial obligations, including a new wife and several young children, made it impossible for him to satisfy an obligation to pay \$2,000 a month in alimony.

Following the hearing, the court denied Husband's motion to decrease alimony and granted Wife's petition for the payment of arrearages. The court concluded that the 12-year statute of limitations applied to Wife's action to enforce Husband's obligations even though the 2006 consent order did not expressly state that the parties' settlement agreement was incorporated into the judgment. The court found that Husband was not credible when he claimed that he could not afford to pay alimony and when he claimed that Wife had orally agreed to release him from his alimony obligations in exchange for the alleged transfer of the condominium in Egypt. In regard to Husband's ability to pay alimony, the court observed that he lived in a house that is worth more than \$500,000; that he has a swimming pool and a cleaning service that comes twice a month; and that he

had recently obtained a home equity line of credit, which he used to pay off his own debts rather than his debts to Wife.

The court directed the entry of a judgment against Husband in the amount of \$322,000, representing the amount of the arrearages dating back 12 years from the filing of Wife’s petition in 2019. Furthermore, the court ordered Husband to pay Wife’s attorney’s fees in the amount of \$14,000. Lastly, the court purported to sentence Husband to 15 days in the Montgomery County Correctional Facility, apparently for criminal contempt of the order requiring him to pay alimony, but allowed Husband to “purge” his contempt by paying the sum of \$12,000 to Wife.²

After paying \$12,000 to avoid incarceration, Husband noted a timely appeal.

² The final ruling, which Husband has not challenged, may evidence some confusion about the differences between civil and criminal contempt. “[T]he purpose of civil contempt is to coerce present or future compliance with a court order, whereas imposing a sanction for past misconduct is the function of criminal contempt.” *Breona C. v. Rodney D.*, ___ Md. App. ___, ___, 2021 WL 5355615, at *2 (Nov. 17, 2021) (quoting *Dodson v. Dodson*, 380 Md. 438, 448 (2004)). The ruling in this case appears to be an order of criminal, rather than civil, contempt, because it “punishes past noncompliance,” by imposing a sentence of incarceration for a definite term. *Breona C. v. Rodney D.*, ___ Md. App. at ___, 2021 WL 5355615, at *4. Although the ostensible “purge” provision allowed Husband to avoid incarceration, it does not compel present or future compliance with the court orders requiring the payment of alimony. Rather, it required Husband to pay a tiny fraction of the arrearages and did nothing to compel him to comply with the orders in the future. Thus, the “purge” provision resembles a criminal fine that Husband could opt to pay in order to avoid incarceration.

QUESTIONS PRESENTED

Husband raises three questions on appeal, which we have restated for clarity:³

- 1) Did the trial court err in concluding that the statute of limitations did not bar Wife's claim for alimony?
- 2) Did the trial court err or abuse its discretion in rejecting Husband's contention that he and Wife had entered into an oral agreement to eliminate his alimony obligation in exchange for the transfer of a condominium in Egypt?
- 3) Did the court err in denying Husband's motion to terminate alimony?

For the reasons below, we affirm.

STANDARD OF REVIEW

On an appeal when an action has been tried without a jury, we apply the standard of review set by Maryland Rule 8-131(c):

When 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.

³ Appellant formulated his questions as follows:

1. Did the trial court erred [sic] in by [sic] not barring the agreement dated March 7, 2006 under the statute of limitations where the language in the consent order dated March 30, 2006 does not include "incorporated, but not merged?"
2. Did the trial court erred [sic] in considering a verbal agreement between the parties where the transfer condominium in Egypt from Appellant's interest to Appellee would be an accord and satisfaction to terminate the alimony?
3. Did the trial court erred [sic] in denying the Defendant's Motion to Reduce or Terminate Alimony where Defendant's circumstances and justice require such an outcome?

If there is any competent, material evidence to support the circuit court’s findings, those findings cannot be clearly erroneous. *See, e.g., Figgins v. Cochrane*, 403 Md. 392, 409 (2008). “[W]e will not find clear error in a ruling based on a credibility determination.” *Collins v. Collins*, 144 Md. App. 395, 413 (2002). This Court will “accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings.” *Boemio v. Boemio*, 414 Md. 118, 124-25 (2010) (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)).

DISCUSSION

1. The Judgment and Consent Order

In Maryland, the general statute of limitations, CJP § 5-101, requires a person to file suit within three years after a claim accrues. The general statute of limitations is, however, subject to exceptions. One of the statutory exceptions is CJP § 5-102(a)(3), which requires a person to file suit to enforce a judgment within 12 years. The first question in this case is whether Wife is attempting to enforce a judgment, in which case the 12-year statute of limitations would apply; or whether she is attempting to enforce a contract (the settlement agreement), in which case the general, three-year statute of limitations would apply.

Husband contends that the three-year statute of limitations applies and, hence, that Wife is barred from recovering any of the arrearages. He relies principally on *Johnston v. Johnston*, 297 Md. 48 (1983), and *Hamilos v. Hamilos*, 297 Md. 99 (1983). He seems to argue that under those cases a settlement agreement becomes part of a judgment of

divorce, such that an action to enforce the obligations under the agreement can be an action to enforce a judgment, only if the judgment expressly states that the agreement is incorporated but not merged into the judgment. We disagree with Husband’s interpretation of the cases.

In *Johnston*, 297 Md. at 49, the Court of Appeals held that when a separation agreement is incorporated but not merged in a divorce decree, the agreement may not be collaterally attacked, because its validity has been established by the decree, which operates as *res judicata*. See also *id.* at 61 (“the approval and incorporation of the agreement conclusively established the validity of the agreement and precludes a collateral attack by either party”); *id.* at 66 (“where . . . the property settlement agreement is presented to the court for approval and is approved by the court and incorporated in the divorce decree, the validity of the agreement is conclusively established and the doctrine of *res judicata* operates so as to preclude a collateral attack on the agreement”). In reaching its decision, the Court observed that, “where the parties intend a separation agreement to be incorporated but not merged in the divorce decree, the agreement remains a separate, enforceable contract and is not superseded by the decree.” *Id.* at 58. The Court also observed that its prior cases “firmly establish that once incorporated, the contractual provisions become part of the decree, modifiable by the court where appropriate and enforceable through contempt proceedings.” *Id.* at 57.

In *Hamilos v. Hamilos*, 297 Md. at 104, the Court followed *Johnston* in holding that when a property settlement agreement was “made a part” of the judgment⁴ but not merged into it, the agreement “remained a separate, enforceable contract.” Following *Johnston*, the Court also held that the doctrine of collateral estoppel prohibited the parties from collaterally attacking the agreement, “as its validity was established in the divorce proceeding.” *Id.* The Court recognized that a party could set aside the agreement by proving the kind of fraud, mistake, or irregularity that will suffice to set aside an enrolled judgment. *See id.* at 105. In that case, however, the Court held that the proof of fraud, mistake, or irregularity was insufficient. *Id.* at 106-07.

In summary, *Johnston* and *Hamilos* generally concern the res judicata and collateral estoppel effect of an agreement that has been incorporated but not merged into a judgment of divorce. Although the agreements in those cases may have recited that they were incorporated into or “made a part of” the judgments but not merged into them, *Johnston* and *Hamilos* do not state, much less hold, that any magic words are necessary before a court can conclude that an agreement has become part of a judgment and has thus attained the status of a judgment. Thus, Husband is incorrect in asserting that under those cases a settlement agreement can become enforceable as a judgment only if a court order expressly states that the agreement has been incorporated into the judgment.

On the record in this case, the circuit court did not err in concluding that the parties’ agreement had been incorporated into the 2006 consent order that modified

⁴ *Id.* at 103.

Husband's duty to pay alimony (by reducing it considerably). The consent order decrees that the judgment was "modified so as to reflect the terms of the Settlement Agreement between the parties filed herein." Thus, the terms of the agreement became the terms of the new order. Moreover, the settlement agreement is attached to the order itself. It is impossible to determine what the consent order required the parties to do without looking to the terms of the agreement that modified the terms of the earlier order. Even without language reciting that the agreement was incorporated into the judgment, therefore, it is beyond any serious dispute that the parties' agreement became part of this consent order.

In short, the agreement was enforceable as a judgment. Therefore, the 12-year statute of limitations applies. CJP § 5-102(a)(3).

For purposes of alimony, Husband had a continuous obligation, based on the order, to make alimony payments. For that reason, "[t]he statute of limitations did not begin to run as to any payment [of alimony] until the payment became due." *Miller v. Miller*, 70 Md. App. 1, 22 (1987). In other words, because the statute of limitations for each payment is 12 years from the date when the payment came due, Wife could recover arrearages for each alimony payment that came due within 12 years of when she filed her petition to determine alimony arrearages.

Wife filed her petition on October 9, 2019. Therefore the statute of limitations had not run on alimony payments due on or after October 9, 2007. At \$2,000 per month for 12 months for 12 years, Husband had failed to pay Wife \$288,000 at the time of the filing of the petition.

Wife requested in her petition that she be permitted to enter evidence to establish all arrearages up to the date of her hearing. The date of the hearing, March 8, 2021, was an additional 17 months after Wife filed her petition. Two thousand dollars for 17 months was an additional \$34,000 that Husband failed to pay. Therefore, the court correctly calculated the amount of arrearages Husband owes to Wife: \$322,000.

2. The Judge was Unpersuaded that an Oral Agreement Existed

On a basic question of fact-finding, the trial judge was not persuaded by Husband’s testimony that the parties entered into an accord and satisfaction that relieved Husband of his obligations under the consent order. Husband contends that the trial court was clearly erroneous. His contention is devoid of merit.

“The clearly-erroneous standard is ‘a deferential one, giving great weight’ to the trial court’s findings.” *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (quoting *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000)). This Court is required to “give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c). “[W]e will not find clear error in a ruling based on a credibility determination.” *Collins v. Collins*, 144 Md. App. 395, 413 (2002).

Here, the court simply did not find Husband to be a credible witness. In particular, the court did “not find [Husband’s] assertion that he gave plaintiff the apartment in Egypt in exchange for her waiving alimony to be credible.” Because Wife had previously made a written agreement pertaining to Husband’s alimony obligation (in the settlement agreement that became part of the consent order in 2006), the court did not believe that

Wife would have made an oral agreement to reduce the amount of alimony that she would receive. In addition, the court reasoned that the annual rent that Wife would have received from the condominium—\$5,000—would not have been comparable to the \$24,000 Husband was required to pay Wife annually under the settlement agreement and consent order. The court expressly found that Husband “was not credible” in testifying that Wife agreed to “this drastic reduction.”

This Court has often said that it is almost impossible for judges to be clearly erroneous when they are simply not persuaded of something. *See, e.g., Bricker v. Warch*, 152 Md. App. 119, 137 (2003). This case is not an exception. The trial court was not clearly erroneous in declining to credit Husband’s uncorroborated testimony about the alleged unwritten agreement to transfer the condominium in Egypt in exchange for the extinguishment of his obligation to pay alimony.

3. Modification of Alimony

Husband contends that the trial court erred in not modifying or terminating alimony because, he says, he does not have the ability to pay the amount of \$2,000 per month. He further argues that the court was required to do at least some math before reaching its conclusion. We see no error or abuse of discretion.

Md. Code (1984, 2019 Repl. Vol.), § 11-107(b) of the Family Law Article (“FL”), governs the modification of alimony awards. In general, a trial court is permitted to “modify the amount of alimony awarded as justice requires.” FL § 11-107(b). “A party requesting modification of an alimony award must demonstrate through evidence

presented to the trial court that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification.” *Langston v. Langston*, 366 Md. 490, 516 (2001). It may be sufficient for the moving party to demonstrate a substantial change in one party’s financial circumstances. *Campitelli v. Johnston*, 134 Md. App. 689, 699 (2000) (citing *Lott v. Lott*, 17 Md. App. 440, 445 (1973)).

“In order to sustain a petition to modify alimony set by a prior judgment, the moving party must demonstrate a change in circumstances justifying modification.” *Baer v. Baer*, 128 Md. App. 469, 484 (1999). “In considering a petition for modification, a trial court has discretion to determine the extent and amount of alimony.” *Id.* Husband agrees that we review that determination for abuse of discretion.

Husband urged the court to modify his alimony obligation on the basis of a substantial change in his financial circumstances. According to Husband, these changes included a new wife, four children, and a failing business. The trial court, however, did not find Husband to be credible, nor did it find his reasons sufficient to justify modification of alimony. In making its credibility determination, the court observed that Husband “is living in a house worth over a half million dollars, that has a swimming pool, [and] he has a cleaning person coming twice a month.” Additionally, he has been able to pay off multiple debts, without having paid Wife anything. “As stated above, we will not find clear error in a ruling based on a credibility determination.” *Collins v. Collins*, 144 Md. App. at 413.

Husband relies on *Lee v. Andochick*, 182 Md. App. 268 (2008), for his argument that the court was required to do some math before deciding not to modify alimony. *Lee* is inapposite. In *Lee*, 182 Md. App. at 290, this Court reversed a trial court’s award of indefinite alimony in part because the husband was unable to satisfy the award and to satisfy his other, undisputed financial obligations. Here, by contrast, the parties disputed whether Husband’s financial obligations were so onerous that he would be unable to pay \$2,000 a month in alimony, and the court found that they were not. Because the record contains competent and material evidence to support the court’s finding, the finding is not clearly erroneous. *Gizzo v. Gerstman*, 245 Md. App. at 200-01.⁵

⁵ In his brief, Husband advances an argument on a question that he did not include in his questions presented: whether the circuit court abused its discretion in awarding attorneys’ fees to Wife. We may consider that question even though Husband did not include it in his questions presented. *Janelains v. Button*, 102 Md. App. 30, 35 (1994). Nonetheless, the argument has no merit. FL § 11-110 permits (and in some instances requires) a court to order one party to pay the other’s reasonable and necessary expenses, including attorneys’ fees, in a proceeding for the modification or enforcement of an alimony award. Before ordering a payment, a court must consider the financial resources and needs of both parties and whether there was substantial justification for prosecuting or defending the proceeding. FL § 11-110(c). Here, the record reflects that the court considered those factors. It found that “[Wife] does not have the ability to pay the attorney’s fees, and [Husband] does.” It also found that “[Wife] had substantial justification for bringing her action but [Husband] had no substantial justification for defending the action.” The amount of the award (\$14,000) approximates the bill that Wife had incurred before trial (\$11,472), plus the fees that she would have incurred during the two-day trial. A trial court’s decision to award attorneys’ fees is reviewed for an abuse of discretion. *Estate of Castruccio v. Castruccio*, 247 Md. App. 1, 42 (2020) (citing *Monmouth Meadows Homeowners Ass’n, Inc. v. Hamilton*, 416 Md. 325, 332-33 (2010)). In these circumstances, we cannot say that the court abused its discretion in awarding the fees.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED; COSTS TO BE PAID BY THE
APPELLANT.**