Circuit Court for Montgomery County
Case No. 113274 FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 208

September Term, 2021

KARL A. ROSE

v.

FERN K. ROSE

Friedman,
Shaw,
Wilner, Alan M., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: July 13, 2022

Despite that the property settlement agreement between the parties anticipated Husband's retirement and automatically reduced his alimony obligation as his income diminished, Husband nevertheless moved to terminate or modify alimony, arguing that even the reduced amount contemplated by the agreement was not equitable. *See* MD. CODE, FAM. LAW ("FL") § 11-108(3) (stating that alimony may be terminated if "necessary to avoid a harsh and inequitable result"). The circuit court declined to terminate alimony but instead modified it to $4,000 per month. Thereafter, Husband moved, in effect, for reconsideration, arguing that the modification imposed by the circuit court was unfair because it eliminated the provision that automatically reduced his alimony obligation during retirement and created, in essence, indefinite alimony. The circuit court declined to reconsider the modification and Husband filed a timely appeal in which he argues, *first*, that the circuit court erred by refusing to terminate alimony entirely and, *second*, by refusing to reconsider its modification of his alimony obligation. We will affirm both decisions.

FACTS

Husband and Wife married in 1975 and divorced in 2014. Husband and Wife entered into a property settlement agreement that was incorporated but not merged into the judgment of divorce.[1] For present purposes it is sufficient to note that the agreement required Husband to pay Wife $10,000 per month in alimony (§ 3.a.) and allowed an

[1] "[W]here 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be incorporated but not merged in the divorce decree, the agreement remains a separate, enforceable contract and is not superseded by the decree." *Johnston v. Johnston*, 297 Md. 48, 58 (1983).

automatic reduction to 36.36% of Husband's earned income beginning in 2019 if not otherwise terminated or modified by a court (§ 3.b.).

In 2020, Husband moved to terminate or modify alimony. He argued that he had retired due to the COVID-19 pandemic, no longer had any earned income, and as a result, it was inequitable not to terminate or modify and reduce his obligation to pay alimony.[2] The circuit court found that even though neither party was working and no longer had earned income, Husband and Wife each had over $1 million in assets. Moreover, the court found that Husband would be required to start collecting income from his individual retirement account soon and thus had more unearned income than was otherwise accounted for. Finally, the court also found that each party's financial statements reflected some excessive discretionary expenses, indicating a greater ability to pay.[3] Given that, the court declined to terminate Husband's alimony obligation but instead modified it to $4,000 per month. As noted above, Husband moved for reconsideration, but that was denied.[4]

---

[2] Strategically, Husband was taking a significant risk by moving to terminate or modify. Had he simply left things alone, in a year his earned income for the preceding calendar year would have been $0 and so, based on the existing formula in the agreement, his alimony obligation would have been $0 ($0 x 36.36% = $0). Hoping, however, to avoid even the lag year, Husband sought to terminate but risked that the circuit court would impose a modification. The effect of such a modification was, however, (as we shall discuss) to eliminate the benefit of the automatic reduction provision of the agreement.

[3] This included Husband's budget line of $24,000 per year for vacations.

[4] As often happens, the story is more complex, but it doesn't much matter. What really happened procedurally was that Husband moved for reconsideration but, unbeknownst to the circuit court, Wife timely opposed Husband's motion. The circuit court granted Husband's motion, finding that it was unopposed, and ordered that the automatic reduction provision in the agreement still applied. Wife then moved to revise the circuit court's order, Husband opposed, and Wife replied. The circuit court granted Wife's motion to revise and in so doing retroactively denied Husband's motion and vacated its order

ANALYSIS

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO TERMINATE ALIMONY.

The circuit court had the opportunity to see the evidence, judge the credibility of the witnesses, and decide the equities. Husband asserts that the circuit court's failure to make findings of fact concerning each party's income and expenses, and its failure to calculate Husband's ability to pay alimony, constituted an abuse of discretion. The court did, however, make sufficient findings of fact regarding Husband's ability to pay. *First*, the court found that although Husband and Wife did not work, they each had over $1 million in assets. *Second*, the court found that Husband would be required to start collecting income from his retirement account soon. *Third*, the court found that each party's financial statements reflected some excessive discretionary expenses and that, as a result, Husband had a greater ability to pay than he might otherwise have had. If the court thought $4,000 per month was the right amount of alimony, we don't see any reason to disagree.[5]

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING HUSBAND'S MOTION FOR RECONSIDERATION.

As described above, and at n.2., Husband moved for reconsideration of the circuit court's decision to modify Husband's alimony obligation to $4,000 per month. Husband,

---

concerning the automatic reduction provision. The effect, however, was precisely the same as if the court had denied Husband's motion for reconsideration.

[5] We note that a circuit court only has jurisdiction to entertain a motion to terminate or modify alimony if there has been a material change in circumstances. *Ridgeway v. Ridgeway*, 171 Md. App. 373, 384 (2006). Here, the circuit court found that Husband's retirement constituted a material change in circumstance. Although a party's retirement may sometimes constitute a material change, *id.*, under the facts of this case, a different court might not have found it to be so because the agreement specifically contemplated and

in essence, asked the circuit court to amend the agreement to make the automatic reduction provision remain in effect despite the court's modification.

The relevant text of the agreement says:

> 3.b. (i) Unless otherwise terminated or modified by a court of competent jurisdiction (and this sub-paragraph b. will only apply if there has been no modification at any time and alimony has not otherwise terminated), commencing on May 1, 2019, and on May 1 or each succeeding year, the amount of alimony payable for the next 12 months (May through April of the next year) shall be recalculated to be 36.36% of Husband's earned income for the preceding calendar year ….

As a threshold matter, we first observe that this matter was not properly preserved below. Husband's original motion sought a termination or modification of alimony but did not mention in the motion that if such a modification was granted it would terminate the automatic reduction provision, nor did it seek to have the circuit court revise the agreement to eliminate the termination of this provision. Only in his motion for reconsideration did Husband, for the first time, ask the circuit court to grant this relief. A motion for reconsideration is not an opportunity to raise arguments that the party neglected to make earlier. *Morton v. Schlotzhauer*, 449 Md. 217, 232 n.10 (2016) (holding that circuit court does not abuse its discretion in declining to hear new legal argument made in motion for reconsideration that "could have, and should have, been made earlier, and consequently

---

provided an automatic reduction in alimony for Husband's retirement. Agreement at § 3.b. (calculating post-retirement alimony based on earned income). Nevertheless, we cannot say that this was an abuse of discretion, and in any event, no party has challenged the finding that there was a material change in circumstances.

was waived"); *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002) (holding that trial court is "virtually without limit" in its discretion to deny a motion for reconsideration). Thus, we hold that Husband has waived the issue.

Even if he had properly preserved the issue by timely bringing the matter to the circuit court's attention, we would not grant the relief Husband seeks. The plain language of this provision, quoted above, is that the automatic reduction provision only applies if there has been no modification. Agreement at § 3.b. ("Unless otherwise terminated or modified by a court of competent jurisdiction …"). Here, there was a modification. Therefore, as a matter of the plain language of the parties' agreement, the automatic reduction provision no longer applies. Moreover, Maryland law is clear that the parties may make provisions of a settlement agreement nonmodifiable by a court. FL § 8-103; *Shapiro v. Shapiro*, 346 Md. 648, 665 (1997) (holding that agreement may prohibit modification of some provisions but not others). That's what the parties did here. Given this, the circuit court had no choice but to deny the motion for reconsideration, and so it follows that the court did not abuse its discretion in so doing. This was the risk that Husband took when he sought to modify alimony. *See supra* n.2.

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