Circuit Court for Montgomery County
Case No.: 111813 FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 248

September Term, 2021

DALE JOHNSON

v.

LYNN JOHNSON

Kehoe,
Beachley,
Shaw,
JJ.

Opinion by Kehoe, J.

Filed: December 9, 2022

Dale Johnson appeals from a judgment of the Circuit Court for Montgomery County, the Hon. Thomas L. Craven, presiding, that denied his request to terminate his obligation to pay alimony to his former spouse, Lynn Johnson.[1] Mr. Johnson presents one appellate contention:

> Did the Circuit Court for Montgomery County err in dismissing Appellant's Complaint on the grounds of judicial estoppel?

We will affirm the judgment of the circuit court.

Before we begin our analysis, we will clarify some imprecise terminology used by the parties. The outcome of this appeal turns on two judicial actions, one occurring in 2015 and the other in 2019. The parties refer to these as the entry of "consent orders" because the papers submitted to the court for its approval were titled as such. But these orders resolved pending claims and, as such, were judgments. *See Long v. State*, 371 Md. 72, 81 n.5 (2002) (distinguishing between an "order," which "[g]enerally . . . refers to the written direction or command issued by the court," and a "judgment," which is defined in Md. Rule 1-202(n) as "any order of court final in its nature entered pursuant to these rules.")

Moreover, when each of these were entered, they resolved all of the then-pending claims between the parties in the action. Therefore, the consent judgments were final judgments. *See* Kevin F. Arthur, FINALITY OF JUDGMENTS AND OTHER APPELLATE

[1] In the proceedings before the circuit court, and in their briefs to this Court, the parties refer to the appellee as "Ms. Johnson." We will do so as well for the sake of consistency.

TRIGGER ISSUES 1–2 (2d ed. 2018) (explaining that a court order that adjudicates all pending claims against the parties is a final judgment); *see also Kent Island, LLC v. DiNapoli*, 430 Md. 348, 360 (2013) ("A consent order entered properly carries the same weight and is treated as any other final judgment.")

BACKGROUND

Ms. Johnson filed for divorce from Mr. Johnson on May 30, 2013, and a judgment of absolute divorce was entered on June 19, 2014. Among other forms of economic relief, the judgment required Mr. Johnson to pay Ms. Johnson indefinite alimony as well as child support. On the same day, the circuit court entered a judgment holding Mr. Johnson in contempt of court for his failure to execute two qualified domestic relations orders that pertained to Ms. Johnson's marital share of his retirement accounts.

The 2015 consent judgment

After the judgment of divorce was entered, Mr. Johnson stopped making his support payments to Ms. Johnson. Within months after the judgment of divorce was entered, Ms. Johnson filed two petitions to hold Mr. Johnson in contempt. The first pertained to his continued foot-dragging regarding the execution of QDROs. The court granted the motion and Mr. Johnson eventually complied. The other contempt petition alleged that Mr. Johnson failed to pay alimony and child support as required by the judgment of divorce. In response, Mr. Johnson filed motions to modify his child support and alimony obligations. After a trial, the circuit court denied the motion to modify. Mr. Johnson

appealed the judgment to this Court. On November 19, 2015, Ms. Johnson dismissed her pending contempt petition.

After a mediation session with this Court's Alternative Dispute Resolution Division, the parties reached an agreement which was documented by a consent judgment filed in the circuit court on December 28, 2015. The 2015 consent judgment contained the following relevant terms:

First, the parties agreed that in lieu of the indefinite alimony ordered by the trial court, Mr. Johnson would pay "fixed and non-modifiable alimony" in the amount of $5,750 per month from the date of the order until May 31, 2018. Thereafter, he was obligated to pay $8,000 per month in alimony until October 11, 2027.

Second, the parties agreed that Mr. Johnson's alimony obligation would be subject to modification or termination only if he became disabled and that any dispute as to disability would be resolved through arbitration. The relevant provision of the 2015 consent judgment stated (emphasis added):

> ORDERED that the fixed and non-modifiable alimony *shall only be subject to termination or reduction in the event Dale Johnson's disability and for no other reasons*, to wit:
>
> a. The determination of whether Dale Johnson is disabled shall be in accordance with the standards set forth in the United States Code . . . for the definition of disability applicable to Social Security Disability income (SSDI); and
>
> b. In the event of any dispute over the fact of disability or the termination of or amount of modification of alimony, [the dispute will be resolved by binding arbitration pursuant to the Maryland Uniform Arbitration Act] . . . .

Third, the parties agreed that Mr. Johnson was $50,000 in arrears on his alimony and child support obligations and that he would pay the arrearages according to a schedule contained in the order.

Fourth, the consent judgment stated that it addressed "all outstanding issues on appeal." Because Ms. Johnson had dismissed her pending contempt petition against Mr. Johnson prior to the entry of the consent judgment, the consent judgment resolved all claims and was therefore a final judgment.

Ms. Johnson remarries

On July 25, 2017, Ms. Johnson remarried. At some point thereafter, Mr. Johnson became aware of this, although the parties disagree as to the exact date.

The 2019 consent judgment

On March 20, 2018, Mr. Johnson invoked the arbitration process. He sought an arbitral award to the effect that his obligation to pay alimony terminated on the date of Ms. Johnson's remarriage. Eventually, the arbitrator concluded that the arbitration provision in the 2015 consent judgment applied only in the instance of Mr. Johnson's disability and declined to arbitrate the issue of whether Ms. Johnson's remarriage terminated Mr. Johnson's obligation to pay alimony. The arbitrator notified the court and counsel of her conclusion on September 11, 2019.

On September 26, 2018, that is, while the arbitration proceedings were still ongoing, Ms. Johnson filed her fourth petition to adjudicate Mr. Johnson in contempt of court for failure to make the alimony and child support payments as set out in the 2015 consent

judgment. Among other things, she contended that the court's previous finding that Mr. Johnson was in civil contempt of court on April 1, 2014, as well as his continued defiance of the 2015 consent judgment, warranted a finding of contempt and his incarceration.

On February 4, 2019, Mr. Johnson filed an answer to Ms. Johnson's fourth petition. In it, he acknowledged that he was "seeking to terminate the alimony because [Ms. Johnson] is re-married."

On May 17, 2019, the parties signed another consent judgment. In it, Mr. Johnson acknowledged that he was in arrears in the amount of $7,196.09 but denied that his failure to make timely payments in full was contumacious. The consent judgment set out a schedule of supplemental payments over a five-month period to address the arrearages. The order stated:

> Now comes the parties, by counsel, who represent to the court as follows with Defendant consenting to the relief set forth herein,
>
> l. Defendant, Dale B. Johnson, makes no admission that he is in contempt of court.
>
> 2. Defendant does admit that he fell behind in payments in February and March 2018, due to withholding limitations imposed by the Fair Debt Collection Practices Act, 15 U.S.C. § 1671. The amount not paid because of this is $7,196.09.
>
> 3. Since there is no dispute about the amount or [Mr.] Johnson's general ability to pay, the parties have agreed to a payment schedule. Accordingly, it is
>
> ORDERED that Defendant shall make the following supplemental payments to Plaintiff through the Montgomery County Office of Child Support Enforcement:
>
> a) February 1, 2019 $500.00
>
> b) March l, 2019 $500.00

c) April 1, 2019	$2,000.00
d) May 1, 2019	$2,000.00
e) June 1, 20l9	$2,196.09[.]

When the 2019 judgment was entered, there were no other claims pending between the parties in the court proceeding.[2] The 2019 judgment was therefore a final judgment.

Although the parties disagree about exactly when Mr. Johnson learned of Ms. Johnson's remarriage, it is uncontested that by the time that the 2019 consent judgment was executed, Mr. Johnson was aware that Ms. Johnson had remarried.

The current dispute

On July 20, 2020, Mr. Johnson filed a complaint to terminate his alimony obligations on the grounds that Ms. Johnson's remarriage automatically terminated his duty to pay alimony. He further requested reimbursement of all alimony payments made by him after the date of her remarriage. Mr. Johnson asserted that it was "absurd" to construe the 2015 consent judgment, which in relevant part stated that "the fixed and non-modifiable alimony shall only be subject to termination or reduction in the event [of] Dale Johnson's disability and for no other reasons," as meaning that his alimony obligations did not terminate upon Ms. Johnson's remarriage.

Ms. Johnson opposed the requested relief. She filed a motion to dismiss the complaint, asserting that Mr. Johnson's claim failed as a matter of law because:

[2] Mr. Johnson was pursuing his efforts to terminate his alimony obligations in the arbitration proceeding but that proceeding was separate and distinct from the civil action.

> [T]he December 28, 2015 Order stated that Dr. Johnson's alimony obligation is "fixed and non-modifiable alimony shall only be subject to termination or reduction in the event Dale Johnson's disability and for no other reasons."
>
> * * *
>
> [T]he Court's December 28, 2015 Order is clear. [Mr.] Johnson can only modify his obligation if he becomes disabled. The Order leaves no room for any other interpretation.

(Emphasis added by Ms. Johnson.)

On February 5, 2021, the circuit court held a hearing on the motion to dismiss.

Relying on the Court's analysis in *Moore v. Jacobsen*, 373 Md. 185 (2003),[3] Mr.

[3] Although the parties did not brief the *Moore v. Jacobsen* issue on appeal, some explanation is useful for context.

Md. Code, Fam. Law § 11-108 states (emphasis added):

> *Unless the parties agree otherwise*, alimony terminates: (1) on the death of either party; (2) *on the marriage of the recipient*; or (3) if the court finds that termination is necessary to avoid a harsh and inequitable result.

The issue before the Court in *Moore* was whether a non-modification provision in a marital separation agreement was an "agree[ment] otherwise" for the purposes of Fam. Law § 11-108. The marital separation agreement provided that one spouse would pay the other non-modifiable alimony for seven years after the date of their divorce. The separation agreement also stated:

> The parties expressly covenant and agree pursuant to Section 8–101 through Section 8–103 of the Family Law Article . . . that no court shall have the power to modify this agreement with respect to alimony, support or maintenance of either spouse except as provided herein.

The Court concluded

> The public policy set forth in § 11–108 clearly states that alimony does not survive the remarriage of the recipient. To create an exception to that policy, an agreement must be equally clear. We think a bright-line rule requiring an express provision providing that support shall not terminate

(continued)

Johnson asserted that the language in the 2015 consent judgment did not, as a matter of law, constitute an agreement that his obligation to pay alimony did not end when Ms. Johnson was remarried. The court concluded that, although Md. Code, Fam. Law § 11-108 provides that the obligation to pay alimony terminates upon the remarriage of the recipient, the statutory rule can be modified through mutual agreement of the parties. The court denied the motion to dismiss, concluding that Mr. Johnson "arguably stated a claim upon which [he is] entitled to relief."[9]

The circuit court held a hearing on the merits of Mr. Johnson's complaint to terminate his alimony obligations motion on April 5, 2021. Although other matters were addressed in the hearing, the dispositive issue in the court's view was whether the principle of judicial estoppel barred Mr. Johnson from asserting that his obligation to pay alimony

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> upon remarriage fosters certainty, resolves ambiguity and reduces litigation. . . .
>
> * * *
>
> Section 11–108, in pertinent part, requires the parties to agree about remarriage, not about alimony duration or modification. An agreement must mention marriage expressly; other agreements, such as those in this case addressing nonmodification, will not suffice.

373 Md. at 190–95.

Moore dealt exclusively with marital separation agreements. There is nothing in *Moore* that addresses what must be included in a consent judgment to preclude termination of alimony upon remarriage of the payee spouse. Nor did *Moore* address how its holdings might apply to an enrolled consent judgment. *See Kent Island, LLC v. DiNapoli*, 430 Md. 348, 366 (2013) (holding that a court may modify an enrolled consent judgment "only . . . upon motion of a party to the proceeding proving, to the satisfaction of the court, fraud, mistake, or irregularity" pursuant to Md. Rule 2-535(b)).

terminated upon Ms. Johnson's remarriage. The parties' contentions focused on the 2015 and 2019 consent judgments and are the same as those they present on appeal.

The substance of Ms. Johnson's position was that the 2015 consent judgment was the result of the mediation process ordered by this Court and, that pursuant to that order, the parties agreed that Mr. Johnson's obligation to pay alimony for a term of years could be modified or terminated only if he became disabled. Her counsel asserted that Mr. Johnson's contention that his obligation to pay alimony terminated upon Ms. Johnson's remarriage was inconsistent with both the 2015 and the 2019 consent judgments and that the doctrine of judicial estoppel barred him from making that contention.

The court then posed the following question to Mr. Johnson's counsel:

> [H]ow can [Mr. Johnson] in one document that [was] signed by him or on his behalf, say that these post remarriage payments are payable and now the position that they are not?

Mr. Johnson's counsel responded:

> Your Honor[,] it's really simple. At the time he learned of the remarriage [he had fallen] behind in his alimony, [and Ms. Johnson had] filed a petition once again seeking his incarceration. Agreeing to a consent order to bring the alimony back up-to-date to avoid contempt does not in any way equate to some kind of waiver when in fact, he's filed a motion to terminate alimony. It is merely a practical effort on his part because the alimony is not yet terminated by a Court of law to make sure he's not going to jail. So I don't see how the one has anything to do with the other.
>
> * * *
>
> The fact that he consented to bring up back alimony, which he may, or may not owe in order to avoid a contempt finding keeping in mind that he's a physician and a fairly reputable one. And keeping in mind that he certainly did not want to be incarcerated for going to the Court and just saying I'm not paying, which is what happens, and no way is that an acknowledgment

> of his obligation to pay alimony after a marriage, especially since he's already disputing it.

After considering the parties' arguments, the court denied Mr. Johnson's motion to terminate. The court observed that it did not know how Mr. Johnson could "be behind in a payment that he's not required to make."

The circuit court subsequently entered a written order denying Mr. Johnson's motion for termination of alimony. The order stated in pertinent part (emphasis in original):

> The Judgment of Absolute Divorce provides for "indefinite alimony." Subsequent to the divorce, but before [Ms. Johnson's] remarriage, a Consent Order was entered which provided "the fixed and nonmodifiable alimony shall only be subject to termination or reduction in the event [of] [Mr. Johnson's] disability. . . . (obviously including death) and for "*no other reasons*."
>
> Nearly two years after [Ms. Johnson's] remarriage, and more than a year before filing the instant complaint, [Mr. Johnson] entered into a Consent Order, acknowledging being in arrears regarding alimony payments and agreeing to a payment schedule. No mention was made regarding termination of alimony.
>
> Accordingly, the Court finds that [Mr. Johnson's] obligation to pay alimony has not terminated and his [motion] is . . . denied.

ANALYSIS

Judicial estoppel ensures "the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (cleaned up)). The doctrine was first explicitly articulated in *Cave v. Mills*, 7 H. & N. 913, 927–28, 158 E.R. 740, 747 (1862). It was first applied in Maryland fifteen years later in *Eads v. Garey*, 46 Md. 24, 41 (1877)

("'A man shall not be allowed' says the Court of Exchequer, in *Cave vs. Mills*, 'to blow hot and cold, to claim at one time and deny at another.'" (citation omitted)).

In the intervening 145 years, the Court of Appeals has addressed judicial estoppel issues on numerous occasions. *See, e.g.*, *Dashiell v. Meeks*, 396 Md. 149, 170, (2006); *Underwood–Gary v. Mathews*, 366 Md. 660, 667 n.6, (2001); *WinMark Ltd. P'ship v. Miles & Stockbridge*, 345 Md. 614, 620 (1997); *Van Royen v. Lacey*, 266 Md. 649, 651–52 (1972); *Stone v. Stone*, 230 Md. 248, 253 (1962); *Kramer v. Globe Brewing Co.*, 175 Md. 461, 463 (1938): *Scanlon v. Walshe*, 81 Md. 118, 132 (1895); *Hall v. McCann*, 51 Md. 345, 351 (1879). Distilling its reasoning in these and other cases, the Court of Appeals has explained that:

> Before judicial estoppel may be applied, three circumstances must exist: (1) one of the parties takes a position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage.

Bank of New York Mellon v. Georg, 456 Md. 616, 624–28 (2017) (cleaned up) (quoting *Dashiell v. Meeks*, 396 Md. 149, 170 (2006)).

Mr. Johnson contends that none of these criteria are satisfied by the facts of this case. Ms. Johnson asserts that all of them are. We agree with Ms. Johnson.

Judicial estoppel's first requirement

The first requirement that must be met in order for judicial estoppel to be applicable is that one of the parties takes a position that is inconsistent with a position it took in

previous litigation. In the current litigation, Mr. Johnson maintains that his duty to pay Ms. Johnson alimony was terminated upon her remarriage.

There are two relevant previous actions. The first was the adjudication of Mr. Johnson's efforts in 2015 to modify his child support and alimony obligations that culminated in the entry of the 2015 consent judgment. The second was the 2019 adjudication of Ms. Johnson's fourth petition to hold Mr. Johnson in contempt for failure to pay his alimony and child support obligations. In the 2015 consent judgment, he agreed that his obligation to alimony for a term of years was "fixed and non-modifiable" and was "subject to termination or reduction in the event Dale Johnson's disability and for no other reasons[.]" In the 2019 consent judgment, he agreed to pay accumulated arrearages in his alimony obligation that resulted from his falling behind in his alimony obligations in February and March 2018. These arrearages accrued after Ms. Johnson's remarriage in July of 2017. It is undisputed that the 2019 consent judgment was entered after Mr. Johnson learned of Ms. Johnson's remarriage.

In his brief, Mr. Johnson does not address the 2015 consent judgment. He argues that there is no inconsistency between his current position and the 2019 consent judgment because "the settling of a contempt charge, eliminating the risk for incarceration, is not inconsistent with concurrently seeking to terminate alimony."

The relevant provision of the 2015 consent judgment, *viz.*, that his alimony obligation "shall be subject to termination or reduction in the event of [his] disability and for no other reason" is flatly inconsistent with Mr. Johnson's current contention that his

obligation to pay alimony to his former spouse ended when she remarried. The terms of the 2019 consent judgment in which he agrees to make alimony payments for a period after Ms. Johnson's remarriage are also inconsistent with his current position that his obligation to pay alimony terminated when she remarried.

Mr. Johnson's argument that he agreed to the 2019 consent judgment in order to avoid incarceration for a finding of contempt does not assist him. We see no reason why we should permit him to induce Ms. Johnson to drop her contempt proceedings by conceding that he has alimony obligations and then to argue that he is not obligated to pay alimony after she has done so. His attempts to adopt inconsistent positions is contrary to the principle a litigant may not "blow hot and cold, . . . claim at one time and deny at another." *Eagan v. Calhoun*, 347 Md. 72, 88 (1997) (quoting *Edes v. Garey*, 46 Md. at 41).

Judicial estoppel's second requirement

The second part of a judicial estoppel analysis is whether the previous inconsistent positions were accepted by the court. Mr. Johnson asserts that he:

> initiated the Arbitration action to terminate his alimony obligation prior to Appellant's filing of the Petition for Contempt. Accordingly, no position taken by Appellant was accepted by the lower, or any other, court. The only position taken by the Appellant was to enter a payment schedule, which is not an affirmation of the Order.

Mr. Johnson is wrong. As to both the 2015 and the 2019 consent judgments, entry of the judgments constituted the court's acceptance and approval of their substantive terms. *See, Long*, 371 Md. at 82 ("A consent judgment or consent order is an agreement of the

parties with respect to the resolution of the issues in the case or in settlement of the case, that has been embodied in a court order *and entered by the court, thus evidencing its acceptance by the court*." (emphasis added)).

Judicial estoppel's third requirement

The third step in a judicial estoppel analysis is whether the party who is maintaining the inconsistent positions intentionally misled the court in order to gain an unfair advantage. Sometimes, a party's intent is difficult to surmise. Not so in this case. We are dealing with consent judgments. The circuit court would not have entered them absent Ms. Johnson's consent. Mr. Johnson induced Ms. Johnson to consent to judgments that explicitly (the 2015 consent judgment) and by necessary and unavoidable implication (the 2019 consent judgment) bound him to obligations that, as it turns out, he has no intention of honoring. He deceived Ms. Johnson and, in doing so, deceived the court.

In arguing otherwise to this Court, Mr. Johnson asserts that both Ms. Johnson and the circuit court should have known better than to take him at his word:

> [I]t is manifestly ridiculous to think that [when] Appellant agreed [in 2019] to catch up on alimony he was challenging [in the arbitration proceeding] for the purposes of misleading Appellee . . . . [M]aintaining his compliance with the alimony payments, in accordance with the [2015] Order during the termination litigation, served to keep Appellant, a highly regarded interventional radiologist, out of jail. At the same time, it also allowed Appellant to maintain clean hands for future court proceedings.

Certainly, it was possible for Mr. Johnson to have accomplished his stated goals without misleading Ms. Johnson. Doing so in 2015 would have required him to make it clear to Ms. Johnson that he wished to reserve the right to seek termination of his

alimony obligation if she remarried. Doing so in 2019 would have involved making it clear to his former spouse that, although he was willing to address his past-due alimony obligations, he wished to pursue his arbitration efforts to terminate his obligation to pay alimony. For whatever reason, he chose not to do so on either occasion.

We hold that the circuit court did not err when it ruled that application of the doctrine of judicial estoppel bars Mr. Johnson from seeking to terminate his alimony obligations.[4]

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

[4] We express no views as to (1) whether, and if so, how, the analysis of the Court in *Moore v. Jacobsen* would apply to the consent judgments; or (2) whether Md. Rule 2-535(b) provides the exclusive mechanism to modify the terms of those judgments. *See Kent Island v. Napoli*, 430 Md. at 366 (A consent judgment that is a final judgment "may be reversed or vacated only on appeal or revised pursuant to Maryland Rule 2–535 or § 6–408 of the Courts and Judicial Proceedings Article.")