Circuit Court for Wicomico County
Case No. 22-C-11-001162

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 686

September Term, 2018

CLAYTON H. EVANS

v.

PATRICIA L. EVANS

Meredith
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: June 26, 2020

*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.

This appeal involves a dispute between appellant, Clayton H. Evans, and his former wife, Patricia L. Evans ("Ms. Evans"). Litigation between the two commenced on August 5, 2011, when, after a long marriage,[1] Ms. Evans filed a complaint for absolute divorce against Mr. Evans in the Circuit Court for Wicomico County. Because Ms. Evans requested alimony and a monetary award, the major issues presented to the court were: (1) what property was owned by Mr. Evans; (2) what were Mr. Evans's annual earnings; (3) whether Mr. Evans actually owned a fifty-percent interest in Stan Evans Seafood, LLC ("Stan Evans Seafood") or, as Mr. Evans contended, that property was transferred in 2005 to an irrevocable trust in which Mr. Evans had no interest, and; (4) the amount and value of marital property.

At a hearing that lasted five days, both parties called expert witnesses to testify, *inter alia*, in regard to the issue of how much Mr. Evans earned annually. All the issues that separated the parties were resolved on December 10, 2013, when the Honorable Leah J. Seaton filed a 16-page revised decision in which she made numerous findings of fact and conclusions of law concerning indefinite alimony, marital property, marital award and counsel fees.

[1] The parties married in 1982 when both were 20.

The court concluded that Mr. Evans earned $450,000.00 annually.[2] Judge Seaton also found that Stan Evans Seafood was owned by appellant and his brother, R. Stanley Evans, in a 50-50 partnership. She rejected evidence that appellant and his brother gave up their interest in Stan Evans Seafood in 2005 by transferring that interest to an irrevocable trust. The judge credited testimony by Ms. Evans's expert that the transfer was "in form

[2] The judge, regarding income said:

> The [c]ourt finds the testimony of the Plaintiff's [Ms. Evans's] expert, Ms. Assadi, to be credible as to the Defendant's income. Ms. Assadi opined that the Defendant has an actual income of $450,000.00 per year. Further, the [c]ourt finds, based on that income, that the Defendant has the ability to meet his needs, while paying alimony. The [c]ourt does not find the evidence from the Defendant's expert as to the Defendant's income to be credible. Mr. Estep testified that the Defendant's taxable income for 2012 was $114,000.00 and that his projected income for 2013 would be $147,611.00. Ms. Assadi presented a more thorough, better reasoned opinion, that took into account all the income that would accrue from the various businesses, and credibly analyzed the income that results from the cash flow of the seafood business. The [c]ourt finds that the witnesses who testified about the unreported cash income of the seafood businesses were credible. Moreover, the [c]ourt does not find the Defendant's testimony as to the amount of his income to be credible. He was able to take a vacation to Las Vegas, and has continued to live in the style to which he has historically been accustomed.
>
> To be sure, the marital home was sold at a greatly reduced price, and the [c]ourt finds that the economic downturn beginning in 2007 impacted the economic status of both parties. The real estate downturn rendered the real property business of the parties worthless. That said, the [c]ourt also finds that the seafood businesses, Fat Boys, Stan Evans Seafood and Evans Brothers Seafood, continue to thrive and produce substantial income, as articulated by the Plaintiff's expert. The [c]ourt finds the testimony of the Plaintiff's expert to be credible and finds the testimony of the Defendant and his witnesses to lack credibility with regard to income and the value of assets.

(Emphasis added.)

only" and that since 2005, appellant "carried on in all respects as owner, receiving all of the salary and draws and benefits as he always has as owner and continued in his active management." The judge opined that Mr. Evans's interest in Stan Evans Seafood was non-marital property and was worth over 2.8 million dollars.

The value of all marital property was $638,624.00. The judge, in reaching her decision, made the blunt determination that Mr. Evans had not been "forthright" about his income or assets and, accordingly, she did not "credit" his testimony in that regard.

In accordance with her revised opinion, Judge Seaton ordered that Mr. Evans indefinitely pay Ms. Evans's health insurance, plus indefinite alimony in the amount of $5,000.00 per month. The court also granted Ms. Evans a monetary award equal to the value of all marital property, i.e., $638,624.00. Additionally, after granting Ms. Evans an absolute divorce on the grounds of separation for more than twelve months, the court ordered Mr. Evans to pay his former spouse $53,106.12 to cover a portion of the attorney's fees and costs that she had incurred. The order signed by Judge Seaton required Mr. Evans to pay the attorney's fees and costs plus $100,000.00 of the monetary award within 90 days and the remaining portion of the monetary award ($538,624.00) within one year. Also, the court's order provided that in the event that $153,106.12, representing a portion of the monetary award plus attorney's fees and costs, was not paid on time, that amount would be reduced to judgment after 90 days; likewise, if the $538,624.00 amount was not paid within one year of the date of the judgment, that sum would also be reduced to judgment.

Mr. Evans did not file an appeal from the judgment entered on December 10, 2013.

On December 28, 2013, Mr. Evans married for a second time. His new wife's name is Mia E. Evans ("Mia"). Post marriage, the two commenced living together in a riverfront condominium apartment owned by Mr. Evans's older brother, R. Stanley Evans. Currently, the couple pays rent of $18,000.00 per year plus (approximately) $2,000.00 per year in condominium fees to live at that apartment.

Because payments were not made for attorney's fees, costs, or the monetary award within 90 days, the court, on July 21, 2014, entered a judgment against Mr. Evans and in favor of Ms. Evans for $153,106.12. Thereafter, Mr. Evans paid nothing toward the monetary award and, accordingly, on April 16, 2015, a judgment in the amount of $538,624.00 was entered against appellant and in favor of Ms. Evans.

Between December 2013, when the judgment of absolute divorce was filed, and September of 2017, Mr. Evans paid his former spouse alimony in the amount of $5,000.00 per month. When the October 1, 2017 alimony payment was due, however, Mr. Evans started paying his ex-spouse only $2,000.00 monthly.

On October 28, 2017, Mr. Evans filed a motion to modify alimony payments downward. According to Mr. Evans's motion, his income had decreased because his employer, Evans Brothers Management, Inc., had a substantial decrease in income due to extensive renovations to the building leased by that employer; as a result of that decrease in income, movant's "financial condition has changed" since the prior court order.

We note, parenthetically, that Evans Brothers Management, Inc. is an S. Corporation owned by Mr. Evans (50%) and his brother, R. Stanley Evans (50%). That corporation derives all of its income from fees it charges for managing Stan Evans Seafood.

Ms. Evans filed a counter-complaint for upward modification of alimony. She gave two reasons for her request. First, she claimed "[u]pon information and belief, [that Mr. Evans's] income has increased substantially" since the last court order. Second, she had been unable to collect any of the $638,624.00 monetary award.

The two motions came on for hearing before Judge Seaton on May 17, 2018. At the hearing, some of the same issues resurfaced that had been contested in 2013. Notably, Mr. Evans claimed, as he had in the first hearing, that he had no ownership interest in Stan Evans Seafood. That contention was made despite Judge Seaton's 2013 ruling that he had an interest worth $2,814,500.00 in that enterprise.[3]

Because Mr. Evans filed his motion for modification first, he presented his evidence first, and, of course, had the burden of proving that his income had been substantially reduced since December 2013. In an attempt to prove such a decrease, Mr. Evans called as his first witness, Ralph Estep, the accountant who had prepared his tax returns for the last two decades. Mr. Evans also testified as did his brother, R. Stanley Evans.

After presenting the aforementioned three witnesses, appellant rested. The trial judge ruled at that stage that appellant had not met his burden of showing that his income had decreased since the December 10, 2013 order. In making that finding, the judge pointed out, accurately, that there were serious discrepancies between Mr. Evans's

[3] Judge Seaton, in 2013, also ruled that appellant owned a one-fourth interest (worth $134,000.00) in a company called "Evans Brothers Seafood," which apparently runs a "cook boat" in the same vicinity as the business run by Stan Evans Seafood on the waterfront in Washington, D.C. According to tax returns that were introduced, Evans Brothers Seafood grosses about one million dollars annually.

testimony and various exhibits that were introduced including interrogatory answers, financial statements and tax returns. Additionally, exhibits presented by Ms. Evans showed that the federal and state tax returns Mr. Evans had filed for 2015 and 2016 were seriously flawed inasmuch as it was clear that Mr. Evans earned more money than the amount reported in those returns. Judge Seaton concluded her ruling by saying that the evidence presented by Mr. Evans was so confusing and contradictory, that she could not envision any way that she could find that appellant had met his burden of showing that his income had decreased. Accordingly, the trial judge dismissed Mr. Evans's motion to modify alimony.

Ms. Evans then presented her case. She testified that since the monetary award was granted, she had not received one cent from her former husband to pay any part of the $638,624.00 monetary award. Because the monetary award judgments accumulated interest at the rate of 10% annually, there was presently close to one million dollars owed on the monetary award.

Ms. Evans did not prove, or even attempt to prove, that since December 2013, her former husband's income had increased from $450,000.00 per year.

Judge Seaton increased the alimony award from $5,000.00 to $7,500.00 per month. The sole reason for this increase was that Mr. Evans had made himself judgment proof by seeing to it that his bank accounts and other assets were no longer in his name and, as a consequence, there was no realistic likelihood that Ms. Evans would ever recover any of the monetary award.

Judge Seaton explained:

> Now, the modification of alimony, the law provides – I read my finding from the original [o]rder about why I gave – because I gave a hundred percent of the money available for a marital property award, I gave a modest . . . award of indefinite alimony. And the law provides . . . that the [c]ourt may modify the amount of alimony awarded as circumstances and justice require.
>
> I don't think I can conclude anything other than that Ms. Evans is never, and I mean, never going to get a dollar of that money. I mean, just not – if any of it had been paid, it might have been persuasive but zero? And it's been – what has it been five or six years?[4]
>
> So I think circumstances and justice require that now the modest [$]5,000 isn't sufficient. So I am going to grant the request of the Plaintiff to increase her alimony – I'm not going to make it retroactive because I don't want to add any arrearage, I'm going to make it effective June 1st [2018].

The judge next addressed Ms. Evans's petition for contempt for failure to pay the alimony in the amount of $5,000.00 per month. At the time of the hearing, Mr. Evans, for eight straight months, had paid $2,000.00 per month in alimony rather than the $5,000.00 per month that had been previously ordered. Judge Seaton found that appellant had the

[4] Judge Seaton evidently believed Ms. Evans's testimony that no payment of the monetary award had been collected. Appellant contends that the court erred in this regard because exhibits introduced into evidence showed that Ms. Evans had garnished Mr. Evans's wages and recovered by garnishment at least some of the monetary award. The exhibits to which Mr. Evans points were paystubs issued by Stan Evans Seafood showing that by May of 2018, appellee had garnished—that year—$1,128.81, plus a letter from Ms. Evans's attorney to appellant's accountant, dated September 19, 2017, complaining that Stan Evans Seafood had, without explanation, reduced the amount withheld from $189.85 per pay period to $125.18. There was no evidence, however, that the garnishment was to pay off the monetary award as opposed to the $53,106.12 judgment covering attorney's fees and costs or an earlier judgment against Mr. Evans for failure to pay the full amounts of *pendente lite* alimony. In fact, the only explanation of the garnishment was provided by Ms. Evans's trial attorney who, without contradiction, represented to the court that Mr. Evans didn't pay *pendente lite* alimony starting back in December 2011, and the garnishment she (appellee's trial counsel) filed was to cover that *pendente lite* arrearage. For the above reasons, it is clear that Judge Seaton did not err in believing Ms. Evans's testimony that not one cent of the monetary award had been paid.

ability to pay $5,000.00 per month alimony but had failed to do so; she therefore held him in contempt. The judge also ruled that appellant could purge the contempt finding by paying $24,000.00 in alimony arrears plus $7,500.00 due on June 1, 2018, within 30 days of the order. The court's order also stated that if Mr. Evans failed to pay the amount ordered for past due alimony on time, he would be incarcerated for 90 days. Additionally, the court ruled that Mr. Evans would be incarcerated for an additional 15 consecutive days if he did not pay $8,029.16 (Ms. Evans's attorney's fees for the contempt litigation) by June 30, 2018. No provision was contained in the order of contempt for a hearing at which appellant would have an opportunity to show that he had no ability to pay the purge amounts.

Within 30 days of the court's order, Mr. Evans paid the alimony due plus $8,029.16 for attorney's fees. This timely appeal followed.

I.

QUESTIONS PRESENTED

As phrased by appellant, the questions presented are:

1. Did the [c]ircuit [c]ourt Abuse Its Discretion in Granting [a]ppellee's Counter-Complaint for Upward Modification of Alimony and Increasing [a]ppellee's [alimony] to $7,500.00 Per Month?

2. Was the [c]ircuit [c]ourt Clearly Erroneous or did it Abuse Its Discretion When Ordering Sanctions in Response to a Finding of Constructive Civil Contempt?

II.

A. Standard of Review as to Question One

Maryland Code (2001, 2019 Repl. Vol.), Family Law Article, § 11-107(b) provides that "[s]ubject to § 8-103 of this article,[5] and on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require."

In Maryland, the decision concerning whether alimony should be modified is left to the sound discretion of the trial judge and will not be disturbed unless that discretion was arbitrarily used, or the judgment was clearly wrong. *Cole v. Cole*, 44 Md. App. 435, 439 (1979). To disturb a trial court's decision concerning a decision to modify alimony, appellant must show clear error or abuse of discretion by the trial judge. *Blaine v. Blaine*, 336 Md. 49, 74 (1994). Put another way, for an abuse of discretion to exist, the trial judge's ruling must be "clearly against the logic and effect of facts and inferences before the court[.]" *North v. North*, 102 Md. App. 1, 13 (1994) (quotation marks and citation omitted). As the Court of Appeals said in *Powell v. Breslin*, 430 Md. 52, 62 (2013), an abuse of discretion will be found when the decision of the trial judge is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result" or, when the ruling is "violative of fact and logic" or, when a ruling constitutes an "untenable judicial act that defies reason and works an injustice." (quotation marks and citation omitted).

[5] Section 8-103 deals with modification of "deed, agreement or settlement" and is not here relevant.

B. Court's Ruling That Appellant Had Not Proven That His Income Had Declined

In his brief, appellant advances two main reasons and several subsidiary ones to support his contention that Judge Seaton abused her discretion by increasing alimony. One of his main reasons is expressed as follows:

> [T]he court abused its discretion in increasing the alimony payment in light of the decrease in the appellant's income. In 2013, it was found that appellant's income was $450,000.00 per year. Although the trial judge found that appellant's income had not decreased, the evidence was to the contrary. No evidence supported a finding by the [c]ourt that at the time of the hearing the appellant had yearly income of $450,000.00 as he did at the time of the divorce. In 2016 and through September, 2017 appellant was current in his alimony. In late 2017, the appellant's income was cut by $2,000.00 per month. Moreover, Evans Brothers Management ceased paying the appellant $5,000.00 to cover the appellee's alimony payment and reduced that amount to $2,000.00.

(Emphasis added.) (Footnote and references to record extract omitted.)

Before discussing in detail, the merits, *vel non*, of the above argument, it is useful to bear in mind the principle that, when litigating a motion to modify alimony, the parties "may not relitigate matters that were or should have been considered at the time of the initial award." *Lott v. Lott*, 17 Md. App. 440, 444 (1973). That principle, as applied to this case, means that the finding that Mr. Evans earned $450,000.00 per year as of 2013, was the law of the case. It was appellant's burden to show that his income, since December 2013, had substantially decreased.

The evidence at the May 17, 2018 modification hearing showed that Stan Evans Seafood, doing business as Jessie Taylor Seafood, runs a seafood business located at "The Wharf," which is on the waterfront in the downtown section of the District of Columbia.

Mr. Evans and his brother testified that Stan Evans Seafood pays each of them $1,000.00 every two weeks ($26,000.00 per year) in salary. Additionally, both Mr. Evans and his brother, testified that Evans Brothers Management is paid fees that vary each year for managing Stan Evans Seafood. The income from Evans Brothers Management is split 50-50 by appellant and his brother.

In October 2017, when appellant filed for a decrease in alimony, he filed a financial statement, under oath, in which he said his total gross monthly income was $2,167.00 ($26,004.00 per year). This was, to say the least, unlikely, because he was then paying $2,000.00 per month in alimony and $2,042.00 per month in rent and condo fees. Those two items alone would add up to more than $48,000.00 per year. Then, on May 8, 2018, which was ten days before the date that the hearing concerning an alimony adjustment was set to commence, appellant filed an amended financial statement showing that his total gross monthly income was $3,116.28 or ($37,395.76 annually).

In his interrogatory answers, however, Mr. Evans swore, under oath, that he receives $2,000.00 every two weeks ($52,000.00 per year) from Stan Evans Seafood and $2,000.00 every two weeks from Evans Brothers Management ($52,000.00 per year), which, if true, would mean he earned $104,000.00 per year.

When Mr. Evans testified, however, he said that he received $26,000.00 per year from Stan Evans Seafood and four thousand dollars a month from Evans Brothers Management. Of that latter figure, $2,000.00 per month was paid to his ex-wife in alimony. If that testimony were true, he earned $74,000.00 annually ($4,000.00 x 12 = $48,000.00 plus $26,000.00). He testified that up until October 2017, Evans Brothers Management

also paid him $5,000.00 per month, which was used to pay alimony. If that were true, he previously earned $26,000.00 from Stan Evans Seafood; $5,000.00 per month from Evan Brothers Management used to pay alimony ($60,000.00 per year) and $2,000.00 per month ($24,000.00 per year) from Evans Brothers Management for a total of $110,000.00 ($26,000.00 + $60,000.00 + $24,000.00).

At trial, Mr. Evans called Ralph Estep, the accountant for Stan Evans Seafood, Evans Brothers Management and Mr. Evans. Mr. Estep prepared the tax returns filed by Mr. Evans for 2015 and 2016 that were introduced into evidence.

Mr. Evans's 2015 tax return showed wages from Stan Evans Seafood of $26,000.00 annually and adjusted gross income from Evans Brothers Management of $80,162.00 annually plus an additional $17,459.00 from an irrevocable trust. After numerous deductions, he reported a negative $22,444.00 income and he paid no federal or state income tax. According to Mr. Evans's testimony, $60,000.00 of the money paid by Evans Brothers Management was used to pay alimony.

Mr. Evans testified that he gives one-tenth of his income to his church. His 2015 tax returns showed that in 2015, he contributed $14,100.00 to that church, which would support an inference that he earned about $140,000.00 annually.

Mr. Evans's 2016 tax return showed that he earned $78,454.00 from Evans Brothers Management and no wages or other income from Stan Evans Seafood even though he undisputedly earned $26,000.00 (before payroll and other deductions) that year from wages paid to him by Stan Evans Seafood. The tax returns show he took a $60,000.00 deduction

for payment of alimony plus a $14,931.00 deduction for a contribution to his church. He paid no federal or state income tax in 2016.[6]

Appellee put into evidence checks paid by one of the banks used by Stan Evans Seafood that showed that Stan Evans Seafood paid Mr. Evans $120,666.00 that year plus a salary of $26,000.00, less payroll deductions. An almost identical amount was paid by Stan Evans Seafood to Mr. Evans's brother, R. Stanley Evans. These figures indicated that in 2016, Mr. Evans underreported income from Stan Evans Seafood by $146,000.00 ($120,000.00 + $26,000.00). One half of the $120,000.00 was used to pay alimony.

When Mr. Estep was asked why the $26,000.00 salary from Stan Evans Seafood was not reported for 2016, he said that this was a "mistake." When asked why the five thousand dollars per month ($60,000.00 annually) that Stan Evans Seafood paid to appellant (to cover alimony) was not reported as income, Mr. Estep said that this was a "loan" from his employer. But no loans of any kind are listed on the financial statements appellant filed. Moreover, each month in 2016 that appellant received a $5,000.00 check from Stan Evans Seafood, R. Stanley Evans received one in the same amount. Thus, the $5,000.00 payment appeared to be unreported income to appellant. And, even if the $5,000.00 checks to appellant were "loans" from Stan Evans Seafood, this would not account for the fact that appellant received an additional $60,000.00 per year in 2016 from

[6] The 2016 income tax return showed that either Mr. Evans or Mia earned $17,459.00 from gambling together with Mr. Evans's earnings of $1,612.00 from another company in which appellant apparently had an interest.

Stan Evans Seafood (according to checks introduced by appellee) that was not reported as income.

Mr. Evans had not yet filed his tax returns for 2017 at the time of the May 2018 hearing, but checks introduced by appellee showed that in 2017, $49,375.00 was paid to appellant from Stan Evans Seafood, which was far more than appellant said that he received from that company on his financial statement. The checks, from one bank alone, also showed that Evans Brothers Management paid appellant $79,500.00 that year, which meant he received annual income of at least $128,875.00 ($79,500.00 + $49,375.00) from payments made through that bank.

Mr. Evans testified that the reason he decreased payments of alimony from $5,000.00 per month to $2,000.00 was due to a decrease in his income. When his counsel asked him why his income decreased, he made no mention of the "extensive renovations" to the building that Evans Brothers Management leased—which was the reason he gave in his motion to modify alimony. Instead, Mr. Evans answered:

> Well, we [apparently Stan Evans Seafood] have an illegal wholesale crab business right on the - - on the dock. Captain White's - - it's against our lease, and they started doing that probably eight years ago. They sell crabs for the same thing we pay for them. So we are not making no money on crabs. Our sales are up - - .

He then clarified that statement by saying that Stan Evans Seafood sells crabs after steaming them, for $39.00 a half bushel, even though they pay $75.00 a bushel for those crabs and that is basically a "push." The following exchange then occurred:

> [Counsel for Appellant]: Not counting any expenses?
>
> A. Yeah.

. . .

THE COURT: . . .Why in the world would you sell it for less?

THE WITNESS: You got to compete with the next-door, Miss.

If he's selling $80 a bushel, you either compete with him. He's a wholesaler.

At that point, Judge Seaton interjected to say that she did not believe that testimony.

Other evidence introduced by appellant indicated that in 2014, a developer came into the area where Stan Evans Seafood does business and undertook extensive, and very expensive renovations to property close to where Stan Evans Seafood operates. According to Mr. Estep, the renovations led to a downturn in business for Stan Evans Seafood because it interfered with access to Stan Evans Seafood's property. But appellee put on evidence that Stan Evans Seafood had gross revenues in 2012 of $5,783,755.00 annually but, sales were more than that for every year thereafter.

By 2016, gross sales were up to $6,852,048.00 annually and, for the first nine months of 2017 gross sales were $6,536,157.00. The evidence put in doubt appellant's contention that since 2014, Stan Evans Seafood had suffered a substantial loss of business.

Judge Seaton found, when denying appellant's motion to reduce alimony, that the tax returns that appellant introduced into evidence did not accurately show his income. In his brief, appellant makes no effort to show that the trial judge was wrong in this regard. In fact, appellant does not even mention that finding nor does appellant make any effort to explain the variance between checks and other exhibits introduced by Ms. Evans showing that appellant earned a lot more than he claimed.

When appellant rested his case concerning his motion to decrease alimony, Judge Seaton was placed in a position familiar to every trial judge or trial magistrate who is asked to estimate what a self-employed individual earns when the credibility of that individual has been seriously undermined by other evidence. It is true, as appellant points out, that appellee never proved that he still earned $450,000.00 per year.[7] But because appellant was the party that brought the original motion to modify, it was his burden to prove that he earned substantially less than $450,000.00 annually.

Judge Seaton did not believe appellant, or his witnesses, regarding Mr. Evans's annual income and, for the reasons outlined above, she had good reasons to support her disbelief. Because the testimony concerning income was found not to be credible, the trial judge did not err in disregarding it.

C. Monies Held in Accounts in the Name of Mia

Testimony at trial showed that Mia, appellant's current wife, earned no income. The evidence also showed that Mr. Evans, in effect, had made himself judgment proof. He testified that he had no assets whatsoever, except for the value of the furniture in his house, worth $15,000.00 according to his financial statement.

Testimony developed at trial showed that appellant's current wife has two bank accounts – both of them in her name alone. All the deposits in those accounts were from appellant. One of those accounts was in Farmers Bank of Willards and the other was in a

[7] Judge Seaton found in her 2013 decision, that appellant and his brother received "unreported" cash income [from] the seafood business (see note 2, *supra*). If that were still the case (as trial counsel for Ms. Evans suggested at the hearing) it would have been impossible for Ms. Evans to have proven exactly what income appellant received.

PNC bank account. Appellant claims that Judge Seaton misconstrued the facts when she found that, on average, "$10,000.00 to $12,000.00 was being deposited into each of these accounts on a monthly basis." Appellant's argument continues, "those kinds of deposits were not being made, and the actual deposits certainly do not reflect income in the range of $450,000 per year." In support of that argument, appellant includes in his brief a chart showing the deposits that were made in the Farmers account for 2016 and what was put in the PNC account for 2017. Appellant's brief does not indicate what deposits were made in the Farmers account for 2017 or what was put in the PNC account for 2016 even though that information is in the record.

The trial judge never made a "finding" that between $10,000.00 and $12,000.00 was put into each account. For starters, in the excerpt relied upon by appellant, what the judge said was not a "finding," but was instead simply a comment she made prior to her decision during a colloquy with appellant's trial counsel. The relevant comments by Judge Seaton were as follows:

> His wife who has no income has deposits of between $10,000 and $12,000 a month into her bank account who when she was asked by [Ms. Evans's attorney], she clearly said, she got her hundred percent support from her husband.
>
> And he puts the cars in her name. . . . He lives in a house, a residence he rents from his brother. The only reasonable inference I can draw from that is that he is trying to avoid having – he is trying to make sure he is [j]udgment proof so that nobody can come after him and get anything.
>
> I mean, it's very disturbing to me.

(Emphasis added.)

The combined amount in both accounts often exceeded $10,000.00 to $12,000.00 per month. Read in context, that is evidently what the trial judge was referring to in the just quoted excerpt, even though she did use the words "bank account." During that colloquy, appellant's trial counsel apparently understood the judge to be referring to accounts, plural, because he did not take issue with the judge's statement. And, in any event, the point that the trial judge was making was that each month quite a bit of money was going into the accounts in Mia's name, which appellee could not attach. For the above reasons, we are persuaded that the trial judge did not misconstrue the facts when she made the remarks at issue.

D. Alleged Failure of Trial Judge to Recognize a Decrease in Appellant's Standard of Living

Appellant next argues:

> The appellant provided un-controverted evidence that due to his reduction of income,[8] he sustained a material and substantial change in circumstances in his lifestyle as well. Appellant no longer enjoyed the lavish lifestyle he once did during the marriage. He no longer took vacations or an annual cruise, he no longer played cards weekly, his memberships in the Moose and Elks lodges had lapsed, and he no longer got weekly massages. Appellant owns no vehicles and the vehicles owned by his wife are a 1993 Crown Victoria and a 2003 Mercury Grand Marquis. The Mercury was purchased by the appellant's current wife prior to the marriage.

Impliedly, although appellant does not say so explicitly, he appears to contend that the trial judge committed reversible error in not crediting the evidence just summarized.

[8] It, of course, was not uncontroverted that appellant had a decrease in income. Because appellant failed to prove that his income had decreased, the court denied appellant's motion to reduce alimony; appellant has not appealed from that denial.

It is true that appellant testified that he no longer takes vacations or an annual cruise. On cross-examination, however, he admitted that he still went to Atlantic City for vacation and admitted that shortly before he had reduced his alimony payment, he had paid for his wife's trip to South Korea, which is her native country. Moreover, the evidence was far from clear that appellant, as he contends, lives a frugal lifestyle. In 2016, he and Mia reported gambling winnings of over $17,000.00 and he admitted that a Hummer motor vehicle that he keeps in his garage at his residence is owned by Stan Evans Seafood but is provided to him for his use. And, according to the evidence, he is able to pay rent, condo fees and special assessments for his apartment that total over $20,000.00 per year and receives no financial help from his spouse. Moreover, when appellant was cross-examined by counsel for appellee regarding the fact that in 2016, he had reported over $17,000.00 in gambling winnings, he testified, implausibly, that he could not recall the source of those winnings.

The trial judge was entitled to believe all, some, or none of appellant's testimony and, from reading her opinion, it is clear that she did not consider appellant to be a credible witness. Under these circumstances, the trial judge did not err in failing to accept appellant's testimony that his lifestyle had been significantly diminished post-divorce. *See Urban Site v. Levering*, 340 Md. 223, 230 (1995) (when reviewing the decision of a trial judge, after a bench trial, we must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses" and we must "consider the evidence in the light most favorable to the prevailing party[.]") (quotation marks and citations omitted).

Appellant next complains that it was unjust to increase alimony when Ms. Evans failed to show that her needs had increased since the divorce. It is true that appellee did not show any such increase; but that lack of proof does not demonstrate that the trial judge abused her discretion in increasing the alimony award. As discussed below, the court had a separate and well-founded basis for the increase.

E. The Validity of the Trial Judge's Reason for Increasing the Alimony Award

The sole reason that the trial judge gave for increasing the alimony award, was that in 2013, when the trial judge considered the amount of alimony to be awarded, she gave a "modest" award of indefinite alimony because she had awarded 100% of the money available for marital property distribution to Ms. Evans. But, since the monetary award had been granted, appellant had not paid any part of the monetary award. That was the change in circumstance to which the trial judge pointed when she concluded that "circumstances and justice require" that "the modest [$]5,000" alimony needed to be increased to $7,500.00 per month effective June 1, 2018.

Appellant argues: "[t]he [c]ircuit [c]ourt failed to find that either party had experienced a material change in circumstance since the divorce trial, and thus, without such a finding, the [c]ourt was clearly erroneous and/or abused its discretion in increasing the [a]ppellee's monthly alimony." We disagree. There was no such failure. In 2013, it was anticipated that appellant would pay Ms. Evans the monetary award in the amount of $638,624.00. That anticipation was warranted inasmuch as appellant owned, among other things, a share in a successful restaurant that was worth more than 2.8 million dollars. But, as the trial judge found, appellant had made himself judgment proof and had failed to pay

any of the monies awarded. That failure, on appellant's part, of course, adversely affected Ms. Evans's financial position.

The possibility that a decrease in the amount of money that a spouse would receive as a marital award could be a valid reason to increase alimony was recognized in *Hurt v. Jones-Hurt*, 233 Md. App. 610, 630 (2017). That recognition, however, was in *dicta*.

To understand that *dicta*, the facts in *Hurt* must be understood. Those facts, insofar as here relevant, were summarized by Judge Nazarian, speaking for this Court, as follows:

> When Verdena Jones-Hurt ("Wife") and Walter Hurt ("Husband"), a veteran, divorced, the Circuit Court for Baltimore City included one-third of Husband's military pension in the marital property award it ordered in Wife's favor. Years after the divorce, Husband was reevaluated for a military service disability benefit and his disability rating increased, which made him eligible for more disability benefits and allowed him to waive a portion of his pension (which is taxable and may be considered marital property) in favor of disability benefits (which are not taxable and may not, as a matter of federal law, be considered marital property). The result was that the federal government paid Husband the same amount of money each month, but Husband retained a greater share of it than the circuit court had awarded him: Wife received one-third of a smaller pension benefit, and Husband kept two-thirds of the smaller pension and all of the disability benefits.
>
> Wife sought a declaratory judgment seeking, in effect, a ruling that Husband's election had circumvented the divorce judgment and that awarded her the same amount she previously had been receiving. Over the course of three different orders, the court ruled that Wife was entitled to the same overall dollar amount from Husband's total military benefits, notwithstanding the reduction in his pension payout. That result was consistent with three reported decisions of this Court and the greater weight of cases across the country. Husband challenges these decisions and argues, among other things, that our cases were wrongly decided. We need not revisit our earlier decisions ourselves, though, because the Supreme Court of the United States's opinion in *Howell v. Howell*, — U.S. — , 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), issued after argument in this case, effectively overrules our precedents and compels us to reverse the judgment of the circuit court.

Id. at 613-14.

Judge Nazarian concluded the *Hurt* opinion, 233 Md. App. at 629-30, with the following statement:

> *Howell* now has redefined (or maybe re-redefined) the federal retirement and disability benefits that may be considered "marital property." But a Maryland trial court's equitable division of marital property only truly begins "once property [i]s determined to be 'marital" in the first place. *See* [*Alston v. Alston*, 331 Md. 496,] 508, 629 A.2d 70 [(1993)]. In other words, the Supreme Court may have shrunk the size of a slice (*i.e.*, military pension benefits) in the marital award pie, but it is still up to our trial courts to determine the size of the pie under state law, then divide it equitably under the totality of the circumstances, and, alongside that process, to make other decisions about the parties' post-marital financial future. To posit one other example, the impact of *Howell* may in a particular case constitute a change in circumstances entitling a court to revisit an alimony award, which is "always subject to reconsideration and modification in the light of changed circumstances," *Heinmuller v. Heinmuller*, 257 Md. 672, 676-77, 264 A.2d 847 (1970), whether or not the parties or the court were aware *ex ante* that a spouse could elect to waive pension payments for disability benefits. We don't have any of these questions before us in this case, and *Howell* leaves them to be decided by trial courts—our State's trial courts—in the first instance.

(Emphasis added.)

As can be seen, the *Hurt* opinion suggested, but did not hold, that a post-judgment change in the amount of the marital property that was collectable, could be a change in circumstance that might merit a change in the alimony award. That suggestion appears to be sound and has relevance in this case where the trial judge found that appellant had manipulated his finances so that he was, in effect, judgment proof, which meant that in the future, Ms. Evans would not be able to collect the amount of the monetary award that was anticipated. There was ample evidence to support those findings. We hold that a significant post-judgment decrease in the amount of the monetary award that a spouse can

collect may, standing alone, be a change in circumstances, that might justify an increase in alimony.

In this regard, it is significant that when a trial judge, in the first instance, decides what amount of alimony should be awarded and the duration of that award, that judge must consider what marital property award, if any, a spouse will receive. *See* Family Law Article § 11-106(b)(11)(ii). In increasing the alimony in this case, Judge Seaton stressed that when granting the "modest" award of alimony in 2013, she considered the fact that Ms. Evans would be receiving a monetary award worth more than $600,000.00. Judge Seaton reasoned that because she now knew that none of the monetary award would ever be received, that non-receipt constituted a change in circumstances. We cannot find fault with that conclusion or the reasoning that led to it.

Appellant takes the position that whether a spouse actually pays the amount of a monetary award is irrelevant and that the trial judge, in concluding otherwise committed reversible error because such a conclusion is "at odds with the General Assembly's intent to separately adjudicate alimony and the division of property (*see McAlear v. McAlear*, 298 Md. 330, 348 . . . (1984)) and is out-of-line with Maryland precedent requiring the trial court to find 'a material change in circumstances that justify the action.'" (quoting *Lieberman v. Lieberman*, 81 Md. App. 575, 595 (1990)).

The *McAlear* case dealt with the question of whether a monetary award is a form of alimony and, therefore, not a debt within the meaning of the Maryland Constitution, which prohibits a person from being imprisoned for failure to pay a debt. *McAlear*, 298 Md. at 324. In *McAlear*, the trial judge ruled that a monetary award was "a form of alimony and

not a debt" and therefore the failure to pay the monetary award in a timely manner subjected appellant to contempt. *Id*. at 326. The Court of Appeals rejected that contention and held, 298 Md. at 351, that "a monetary award . . . constitutes a property disposition award that adjusts the marital property interests of the spouses. It does not constitute a form of alimony." Earlier in the opinion, the *McAlear* Court said "the interrelationship between a monetary award and an award of alimony does not transform a monetary award into a form of alimony or a substitute for alimony." *Id*. at 348.

The portion of the *Lieberman* case cited by appellant stands for the unremarkable proposition that before a modification of alimony may be granted, the court must, first, determine that there is a material change in circumstances. Neither *McAlear* nor *Lieberman* undermine the appellee's argument that a failure on the part of a spouse to pay any part of a monetary award, can, under certain circumstances, amount to a substantial change in circumstances.

Appellant next argues that the increase in alimony due to appellant's failure to pay any part of the monetary award was "punitive." According to appellant:

> This is particularly so [in] light of the [c]ircuit [c]ourt's original finding that the marital property in appellant's name consisted of partial interests in certain businesses . . .[,] which are not [that] liquid and available to pay the monetary award.

That argument is not persuasive in view of the fact that at trial, appellant made no attempt to show that his failure (over a period of more than four years) to pay even a part of the monetary award was justified.

Appellant also argues that:

> by re-framing the monetary award as alimony, the court effectively created a[n] unauthorized legal fiction to hold appellant in contempt and potentially incarcerate him. Thus, assuming the court found a change in circumstance because the appellant ha[d] not paid the monetary award, increasing the alimony award on this ground was an abuse of discretion.

There is no indication in the record that the trial judge intended to, or did in fact, create a "legal fiction" by increasing the alimony award. The monetary award remained in full effect. If appellant were ever to pay the monetary award, or any substantial portion of it, he could, in the future, point to that payment as a substantial change in circumstance that would justify a decrease in alimony.[9]

Appellant next stresses that the trial judge's determination in 2013, that alimony should be $5,000.00 per month, "was not contingent upon receipt of the monetary award" and, as a consequence, "the failure to pay the monetary award did not constitute a change in circumstance." The trial judge had no reason to warn that the amount of the alimony might increase if appellant simply ignored the monetary award. After all, appellant and his counsel knew, or should have known, that the trial judge was statutorily empowered to increase alimony if "circumstances and justice" required.

[9] Appellant's claim that he has no assets ignores the court's 2013 finding that appellant has a one-half interest in Stan Evans Seafood. The one-half interest in 2013 was worth over 2.8 million dollars. The judge's determination in 2013 that appellant and his brother had not transferred their interest into a trust was, at least circumstantially, shown to be true by evidence developed at the 2018 hearing in this case. In 2016, without any legitimate explanation, Stan Evans Seafood paid both appellant and his brother over $120,000.00 each, not including their annual salary. Quite obviously, if they did not have an ownership interest in Stan Evans Seafood, the unexplained $120,000.00 payments would have been improper.

Lastly, appellant contends that the court erred in increasing the amount of alimony because Ms. Evans did not allege in her counter-complaint that her own income, expenses or other needs had changed from 2013 in any material respect nor was there any "judicial finding that her income or expenses had materially changed." This is true. But what Ms. Evans did allege, and later prove, is that her financial situation had changed, from what was anticipated at the time of the 2013 judgment, because she was unable to collect any of the $638,624.00 monetary award. That, as already stated, constituted a material change in circumstances.

For all of the above reasons, we hold that the trial judge did not abuse her discretion in increasing the amount of appellant's alimony obligation.

III.

QUESTION TWO

Constructive Civil Contempt

The trial judge's order holding appellant in contempt, imposing a purge provision and sanctions read:

> ORDERED that the Defendant, Clayton Evans, is hereby found and adjudged to be in constructive civil contempt of the Judgment of Absolute Divorce dated December 20 [sic], 2013, for failure to pay alimony, subject to the following sanctions:
>
> A. Serving Ninety (90) days active incarceration at the Wicomico County Detention Center, commencing with the Defendant reporting to the jail by 9:00 a.m. on Sunday, June 17, 2018, which may be purged by the Defendant's complete compliance with all of the following provisions:
>
> 1. Tendering payment in full satisfaction of the total alimony arrearage owed to Plaintiff in the amount of Twenty-Four Thousand Dollars ($24,000.00) on or before Saturday, June 16, 2018.

2. Tendering the timely payment of the newly adjusted alimony to Plaintiff in the amount of Seven Thousand Five Hundred Dollars ($7,500) monthly effective June 1, 2018 and continuing each month thereafter until further order of court.

3. Tendering payment for attorney's fees incurred by the Plaintiff associated with these proceedings in the amount of Eight Thousand Twenty-Nine Dollars and Sixteen cents ($8,029.16) on or before June 30, 2018. In the event that the Defendant fails to pay said $8,029.16 in full on or before June 30, 2018[,] then he shall be required to serve an additional fifteen (15) days of active incarceration *consecutive* to the 90 days as hereinabove set forth . . . .

As previously mentioned, appellant dutifully paid $5,000.00 per month alimony up until October 2017 when he reduced payments to $2,000.00 per month. By the time the order of contempt was signed, he had been delinquent for eight months and owed $24,000.00.

In this appeal, Mr. Evans does not contend that the court erred in holding him in contempt. Instead, he makes the following argument:

> The [c]ircuit [c]ourt was clearly erroneous or abused its discretion in ordering unreasonable and unlawful sanctions as a result of the finding of contempt. The appellant does not dispute the finding that by paying only $2,000.00 per month in alimony he did not comply with the [c]ircuit [c]ourt's [o]rder to pay the appellee $5,000.00 per month in alimony, and that this caused a $24,000 arrearage. . . . Appellant contends that the purge portion of the [o]rder was neither reasonable nor authorized by law.

Appellant gives several reasons why he contends that the purge amount was unreasonable and/or unauthorized. First, he contends that requiring Mr. Evans to pay "$24,000.00 in thirty days to avoid incarceration and then approximately $8,000.00 two weeks later" was unreasonable "given the reduction in [Mr. Evans's] income in 2017." Second, appellant contends that the purge provision was "fatally defective" because it gave

Mr. Evans no opportunity "to establish that he did not have the present ability to pay the purge amounts prior" to the date of his incarceration. Third, the circuit court "abused its discretion" when it ordered [Mr. Evans] to pay the "attorney's fees" incurred by Ms. Evans in the contempt proceedings under "threat of incarceration."[10]

Appellant never was incarcerated because he paid the purge amounts, including the payment of Ms. Evans's attorney's fees, prior to the date he was to be incarcerated.

Payment of the purge amounts raises the question as to whether the issue appellant now raises is moot. "A case is moot when there is 'no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant.'" *Bradford v. State*, 199 Md. App. 175, 190 (2011) (quoting *Suter v. Stuckey*, 402 Md. 211, 219-20 (2007)).

In *Arrington v. Department of Human Resources*, 402 Md. 79, 90 (2007) the Court said:

> The State is correct that Arrington's appeal has become moot. The only status of which he complains no longer exists. As noted, he does not challenge the finding of contempt; nor does he complain about the requirement that he obtain employment to which an earnings lien may be attached. His attack is directed solely to the order that he be incarcerated until such time as he obtains that employment or posts $2,000 bail, but that order has been vacated and, in light of the court's finding that the contempt for which that sanction was imposed has been purged, it may not be reinstated.

[10] Appellant points out, accurately, that the Maryland Constitution prohibits imprisonment for debt with the exception of debt for delinquent alimony or child support payments and that the court had no power to order him, under threat of incarceration, to pay attorney's fees.

(Emphasis added.) *See also Young v. Fauth*, 158 Md. App. 105, 113 (2004) ("[a]bsent a challenge to the contempt finding itself, there is nothing for this Court to consider."). And, with exceptions not here relevant "[c]ourts do not entertain moot controversies." *Bradford*, 199 Md. App. at 190-91.

Appellant contends that the issues raised in Question Two of this appeal are not moot. For that proposition, he cites *Droney v. Droney*, 102 Md. App. 672, 681-82 (1995). The *Droney* case is inapposite because in that case, the appellant, although she paid the purge amount, contested the trial judge's decision to hold her in contempt. The Court explained: "With contempt, however, even if the purge cannot be undone, and thus the party held in contempt cannot be made 'whole,' the party remains entitled to seek exoneration." (citing *Jones v. State*, 61 Md. App. 94, 96 (1984)).

Because appellant in this case does not contend that the trial judge erred in holding him in contempt for failure to pay alimony, but only complains about the purge provisions, this case is moot, inasmuch as the purge amounts have already been paid; thus, there is no relief we can provide.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.