

Circuit Court for Montgomery County
Case No. 142272

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 982

September Term, 2021

CHRISTIAN TISCHER

v.

REGINA LAMBECK

Wells,
Ripken,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: March 15, 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.

In 2018, Christian Tischer (“Husband”) and Regina Lambeck (“Wife”) were divorced by way of a judgment of absolute divorce entered in the Circuit Court for Montgomery County. Pursuant to that judgment, Husband was ordered to pay child support and alimony to Wife. Later, Husband filed a motion to modify child support and a motion to modify alimony. Following a hearing, the court granted, in part, Husband’s motion to modify child support but denied his motion to modify alimony.

Husband thereafter noted this timely appeal, in which he filed an informal brief raising three “issues.” For clarity, we have rephrased those issues and consolidated them into two questions:

1. Did the trial court err in failing to fully grant Husband’s motion to modify child support?
2. Did the trial court err in denying Husband’s motion to modify alimony?

For reasons to follow, we hold that the trial court did not err and affirm the judgment of the circuit court.

BACKGROUND

Husband and Wife were married in 2002. Two children were born as a result of the marriage. In 2015, the parties separated, and, shortly thereafter, divorce proceedings commenced in the circuit court.

In March 2018, the parties entered into a property settlement and separation agreement (the “Agreement”). Pursuant to the Agreement, Husband agreed to pay \$2,844.00 per month in child support to Wife. In addition, Husband agreed to pay Wife alimony of \$6,000.00 per month for 47 months (beginning in April 2018), followed by an

88-month period in which Husband would continue to pay monthly alimony at a reduced amount. The Agreement expressly stated that the amount of alimony was not subject to modification, except that Husband could file for a reduction in alimony in the event that he became “involuntarily unemployed” or his annual wages were reduced by more than 15 percent of his 2017 yearly wages.

In December 2018, the circuit court entered a judgment granting the parties an absolute divorce. The Agreement was incorporated but not merged into that judgment.

A few years later, Husband filed a motion to modify child support and a motion to modify alimony. He argued that the agreed-upon child support amount of \$2,844.00 per month should be reduced because, at the time that amount was calculated, Wife was earning no income. He maintained that Wife could work full-time and that an appropriate income should be imputed on her for the calculation of child support. As to the alimony, Husband argued that he had recently suffered a significant reduction in his yearly income that made the current alimony amount unduly burdensome.

Trial

At trial, Lianne Friedman, an expert in vocational rehabilitation, testified that she had been retained by Husband to conduct an assessment regarding Wife’s employability and earning capacity. According to Ms. Friedman, Wife had obtained a medical degree from a university in Germany “in either 1999 or 2000” and had attempted, but failed, to obtain a medical residency upon moving to the United States following her graduation. In 2005, Wife earned an associate degree in medical sonography and worked as a sonographer

until 2006. Wife did not work again until 2016, when she became a part-time maintenance manager for a property management company. Wife told Ms. Friedman in 2017 that “she was only looking for part-time jobs because her children were her main priority for her time.” Wife worked as a cafeteria assistant in 2019 and as a delivery driver in 2020. That same year, Wife started working part-time as an office assistant at a local school earning approximately \$19.00 per hour.

Ms. Friedman testified that, at the time, Wife could work full-time and that she could earn upwards of \$64,000.00 per year as a sonographer. Ms. Friedman testified that such a career path would require additional education lasting approximately one to two years and costing approximately \$6,000.00. Ms. Friedman testified that Wife was also qualified to work as a medical office administrative assistant earning approximately \$50,000.00 per year, provided that Wife made a good-faith effort at seeking out such employment. Finally, Ms. Friedman testified that Wife was qualified to work as an intraoperative neurophysiological monitor earning approximately \$64,000.00 per year. That career path, according to Ms. Friedman, would require additional education lasting approximately one year and costing approximately \$30,000.00.

Husband testified that he was 50 years old and that he had obtained a medical degree in 1999. Up until 2020, Husband had worked full-time as an anesthesiologist in a private medical practice. Husband was diagnosed with cancer in 2020 and had been on disability since that time. Husband claimed that his cancer diagnosis and subsequent treatment affected his ability to work full-time. Husband also claimed that, because of the COVID-

19 pandemic, elective surgeries had been reduced “by about 90 percent,” which had a significant impact on his income. Husband claimed that, prior to the COVID-19 pandemic, he had also seen a steady decrease in his income due to structural changes at the medical practice where he worked. Husband left the private practice in March 2020. Husband later attempted to rescind his resignation, but the medical practice refused to take him back. Husband testified that he had planned to work as an independent contractor when he left the private practice but that he was having difficulty due to his cancer diagnosis and other factors. Husband testified that he was currently receiving approximately \$14,000.00 per month in disability benefits. Husband testified that his total income in 2020 was approximately \$119,000.00, whereas his total income was approximately \$341,000.00 in 2017 and approximately \$258,000.00 in 2019.

During his testimony, Husband offered into evidence an amended financial statement, which he claimed was current as of May 2021. According to that statement, Husband had a total net worth of approximately \$3.5 million.

Patrick Mansky, an expert in oncology, testified that he began treating Husband following Husband’s cancer diagnosis in 2020. Dr. Mansky testified as to the severity of Husband’s cancer and the negative effects the cancer and subsequent treatment had on Husband’s health and ability to work. Dr. Mansky testified that Husband’s treatment left him immuno-compromised, which affected his ability to work with patients as an anesthesiologist, particularly given the threat COVID-19 posed to people with compromised immune systems.

On cross-examination, Dr. Mansky testified that Husband’s cancer was treatable and that, if detected early enough, most patients respond well to treatment. Dr. Mansky testified that Husband had responded well to treatment and that, in June of 2020, he was “fully active and able to carry on all pre-disease performance without restriction.” Dr. Mansky testified that, as of May 2021, Husband’s cancer was in remission. Dr. Mansky testified that Husband should be able to resume working as he had prior to falling ill sometime in the next six to 18 months.

Wife testified that she came to the United States from Germany in 2001 and eventually became a sonographer. Wife stopped working in 2006 after becoming pregnant with the parties’ first child. Wife remained at home to care for the children while Husband “continued with his career.” Wife began working again in 2016 following the parties’ separation. Wife testified that she had been making \$15.00 per hour working 40 hours per week but that she had difficulty with that schedule because of her responsibilities with the children.

Wife testified that she continued working on a part-time basis up until the end of 2017, at which point she was diagnosed with breast cancer and required major surgery. Wife testified that her cancer and subsequent treatment caused a variety of physical problems. Wife testified that she continued to suffer from those physical problems, which included joint pain, memory loss, fatigue, and lymphedema, or swelling, in her right arm. Wife testified that she was receiving physical therapy for the lymphedema and that the condition made being a sonographer difficult if not impossible.

At the conclusion of the testimony, Husband argued that he had suffered a substantial reduction in his income, which affected his ability to pay the agreed-upon alimony amount. Husband highlighted his cancer diagnosis and subsequent therapy, which left him immuno-compromised and negatively affected his ability to work as an anesthesiologist. Husband also highlighted the employment difficulties he faced after his involuntary departure from the medical practice he worked for until 2020. As for his child support obligation, Husband argued that Wife was voluntarily impoverished and that the trial court should impute a yearly income for a sonographer of \$64,630.00.

Trial Court's Ruling

In the end, the trial court denied Husband's motion to modify alimony. In so doing, the court recognized that Husband's income had decreased substantially from 2017 to the time he filed for modification. The court noted that Husband reported earning approximately \$341,200.00 per year in 2017, \$258,477.00 per year in 2019, and \$132,736.00 per year in 2020. The court reasoned that Husband's cancer diagnosis and the COVID-19 pandemic severely affected his ability to work and earn an income.

The court found, however, that those impediments appeared temporary because Husband seemed to have recovered from his cancer and subsequent treatment, albeit with a compromised immune system. The court highlighted Dr. Mansky's testimony regarding Husband's recovery and positive response to treatment and the fact that Husband was expected to resume working at his pre-illness capacity in six to 18 months. The court characterized Husband's situation "as more a temporary change in income, as [he] makes

his way back to his medical practice.” The court also noted that Husband was receiving, tax free, approximately \$169,000.00 per year in disability payments, which he had begun receiving in July 2020.

The trial court further noted that, although Husband “has less of an income stream, he is not without assets to meet his obligations.” The court explained that, according to Husband’s second financial statement filed in 2021, his net worth was approximately \$3.5 million, which was an increase of over \$2 million when compared to the amount contained in the financial statement he filed in 2018. The court also noted that Husband had included expenses on his 2021 financial statement that were “non-recurring,” such as certain medical expenses related to his cancer treatment, or that were “inflated” given his circumstances.

The trial court also discussed Wife’s financial situation, noting that, although Wife appeared “underemployed,” it was unlikely that she could resume her full-time radiology career “given the turn of events since the separation” and the long-term effects of her breast cancer and subsequent treatment. The court noted that Wife, unlike Husband, was “without the beneficial backstop of disability insurance.” The court did note that it was “not unmindful of the fact that [Wife] has assets as well.”

The trial court also highlighted the non-modification provision in the Agreement, which the court characterized as “a significant factor.” The court explained that Wife was without recourse to extend alimony despite the clear disparity in the parties’ standard of living. The court found that the non-modification provision was “an important lynchpin” in the Agreement.

Given those circumstances, the trial court found that a change in alimony was not warranted. The court reasoned that Husband’s decreased income was temporary and that, in the interim, he had substantial assets to cover any shortfall.

Regarding child support, the trial court found that Wife was voluntarily impoverished and that a yearly income of \$49,570.00 needed to be imputed. In reaching that figure, the court noted that Ms. Friedman, the vocational expert, had provided three viable career paths for Mother: a medical office administrative assistant earning \$49,570.00 per year; a sonogram technician earning approximately \$64,000.00 per year; and an intraoperative neurophysiological monitor earning approximately \$64,000.00 per year. The court noted that the latter two career paths required “additional education that would take at least one year to two years” and “would cost between \$6,000.00 and \$30,000.00.” The court noted that Wife had made “great efforts to remain a constant presence in [the children’s] lives” and that she was strongly opposed to going back to school as that would require time away from her role of raising the children. The court also noted Wife’s testimony that she was suffering from long-term effects of her breast cancer treatment, which included extreme fatigue, short-term memory loss, and lymphedema in her right arm. The court noted Wife’s testimony that her physical issues, particularly her lymphedema, made being a sonographer “a very difficult task.”

Ultimately, the trial court determined that it would be “equitable” to impute an annual income of \$49,570.00. The court found that imputing the higher salaries on Wife, as argued by Husband, was inappropriate “based on the evidence of [Wife’s] current

physical state.” The court also found that Wife’s “ability to juggle her family life with the prospects of further education is not in the best interests of the Children.” Using the parties’ updated salaries and financial situations, the court reduced Father’s child support payment to \$1,844.00 per month.

This timely appeal followed. Additional facts will be discussed below.

DISCUSSION

I.

Husband first contends that the trial court erred in only partially granting his motion to modify child support. He argues that the court’s decision to impute an income of \$49,570.00 to Wife was not justified by the evidence. He contends, rather, that the court should have granted his request to impute “a sonographer’s income of \$64,360.00.” Husband asserts that “testimony given during the trial by vocational expert witness Lianne Friedman showed [Wife] would be able to work as a sonographer with a minimum income of \$64,360.00.” Husband also asserts that, although Wife did claim to be suffering from “a number of medical ailments,” she provided “no evidence for any disability” that would prevent her from working as a sonographer.

Wife counters that she did provide evidence of her disability in the form of her testimony, which the trial court found credible. Wife asserts that the imputed income was reasonable given that it was much higher than her actual income.

“Title 12 of the Family Law [(“FL”)] Article of the Maryland Code sets forth a comprehensive scheme with regard to parental child support that considers the income of

each parent.” *Dillon v. Miller*, 234 Md. App. 309, 318 (2017) (citations and quotations omitted). The statutory scheme defines “income” as “(1) actual income of a parent, if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished.” FL § 12-201(i). A parent is “voluntarily impoverished” if he or she “has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources.” *Dillon*, 234 Md. App. at 319 (citations and quotations omitted).

“Once a court determines that a parent has become voluntarily impoverished, the court must determine the party’s potential income.” *Petitto v. Petitto*, 147 Md. App. 280, 317 (2002). “‘Potential income’ means income attributed to a parent determined by the parent’s employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.” FL § 12-201(m). In making that determination, a court should consider:

1. age
2. mental and physical condition
3. assets
4. educational background, special training or skills
5. prior earnings
6. efforts to find and retain employment
7. the status of the job market in the area where the parent lives

8. actual income from any source
9. any other factor bearing on the parent’s ability to obtain funds for child support

Petitto, 147 Md. App. at 317-18 (citations omitted).

“Nevertheless, a parent’s potential income is not the type of fact which is capable of being verified, through documentation or otherwise,” *Malin v. Mininberg*, 153 Md. App. 358, 406-07 (2003) (citations and quotations omitted), and “any determination of potential income must necessarily involve a degree of speculation.” *Petitto*, 147 Md. App. at 318 (citations and quotations omitted). “If the potential income amount calculated by the circuit court is realistic, and the figure is not so unreasonably high or low as to amount to [an] abuse of discretion, [then] the court’s ruling may not be disturbed.” *Dillon*, 234 Md. App. at 320 (citations and quotations omitted).

Here, the trial court determined Wife’s potential income to be \$49,540.00 per year. In reaching that figure, the court considered the testimony of Ms. Friedman, the vocational expert, who testified that Mother could earn approximately \$49,570.00 per year as a medical office administrative assistant or approximately \$64,000.00 per year as either a sonogram technician or an intraoperative neurophysiological monitor. The court found that it would be inequitable to impute the higher income associated with the latter two career paths. The court explained that those career paths required additional education and expenses that would negatively affect Wife’s “ability to juggle her family life” and would be contrary to the best interests of the children. The court also credited Wife’s testimony that she was suffering from long-term effects of her breast cancer treatment, including

lymphedema in her right arm, which made being a sonogram technician extremely difficult. The court determined that, based on Wife’s physical state, imputing an income of \$64,000.000 as a sonogram technician was inappropriate. The court found, however, that Wife was not disabled or unable to work full-time. The court found that Wife was currently underemployed and that her efforts at locating appropriate employment had been lackluster. The court determined that Wife was a highly educated and qualified individual who would “thrive” as a medical office assistant.

Given those facts, we hold that the trial court did not err in imputing a yearly income to Wife of \$49,540.00, as opposed to \$64,360.00, as requested by Husband. The amount imputed by the court was reasonable in light of the evidence and Wife’s circumstances. Moreover, the figure was not so unreasonably low as to amount to an abuse of discretion.

As noted, Husband claims that there was “no evidence” of Wife’s physical ailments. That claim is without merit, as Wife provided testimony on that very issue.

II.

Husband next claims that the trial court erred in denying his motion to modify alimony. He argues that the court relied on an outdated financial statement in making its determination. Additionally, he argues that the court’s determination was based on the unrealistic assumption that he would be able to regain his prior earning power.

Wife asserts that the trial court did not err. She maintains that the court properly considered Husband’s potential earning power and substantial assets in declining his request to modify alimony.

“[I]n reviewing an award of alimony we defer to the findings and judgments of the trial court.” *Ridgeway v. Ridgeway*, 171 Md. App. 173, 383 (2006) (citations and quotations omitted). “We will not disturb an alimony determination unless the trial court’s judgment is clearly wrong or an arbitrary use of discretion.” *Id.* at 383-84 (citations and quotations omitted).

Modifications of alimony are governed by FL § 11-107(b), which states that, “[s]ubject to § 8-103 of this article and on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require.”¹ When a party seeks modification of an alimony award, that party bears the burden of showing that modification is appropriate. *Walter v. Walter*, 181 Md. App. 273, 296 (2008). In other words, “[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), *abrogated on other grounds by Bienkowski v. Brooks*, 386 Md. 516 (2005).

“A substantial change in one party’s financial circumstances can, under appropriate circumstances, be legally sufficient to justify a change in spousal support.” *Campitelli v. Johnston*, 134 Md. App. 689, 699 (2000). Whether a particular change in a party’s financial

¹ FL § 8-103 prohibits a court from modifying a settlement agreement with respect to alimony if the agreement includes “a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to court modification.” FL § 8-103(c)(2). Although such a provision was included in the Agreement in the instant case, the Agreement also included a provision that allowed for modification of alimony under certain circumstances. It is undisputed that those circumstances were present and that, consequently, the trial court had the power to modify the alimony award.

circumstances is sufficient to justify a change in spousal support “is a matter to be determined in the sound discretion of [the court] for which there are not fixed formulas or statutory mandate.” *Id.* (citations and quotations omitted).

We hold that the trial court did not err in denying Husband’s request to modify alimony. In making that determination, the court recognized that Husband’s cancer diagnosis and the COVID-19 pandemic severely affected his ability to work and earn an income. The court also recognized that Husband’s income had dropped significantly since the adoption of the Agreement in 2018. The court determined that those circumstances satisfied the criteria set forth in the Agreement permitting Husband to file for a reduction in alimony.

The court ultimately found, however, that Husband had failed to demonstrate that the facts and circumstances of the case justified a reduction in alimony at that time. The court noted the testimony of Dr. Mansky, Husband’s oncologist, who testified that, while Husband was experiencing some ill-effects of his cancer treatment, he was at least close to becoming fully active and able to carry on all pre-disease performance without restriction. The court also found that Husband had made significant strides in “mak[ing] his way back to his medical practice.” The court noted Dr. Mansky’s testimony regarding the six-to-eighteen-month timetable in which Husband was expected to be able to resume working in his pre-illness capacity. The court determined that, given Husband’s age, work history, future prospects, and positive health report, the dip in Husband’s income at the time of trial

was likely temporary. *See Stansbury v. Stansbury*, 223 Md. 475, 478-79 (1960) (temporary decrease in income did not justify a revision of alimony).

The court also noted that, while Husband did suffer a significant reduction in his yearly income, which totaled \$341,000.00 in 2017, Husband was receiving, tax free, approximately \$169,000.00 per year in disability payments. The trial court noted further that, according to Husband’s second financial statement filed in 2021, his net worth was approximately \$3.5 million, which was an increase of over \$2 million when compared to the financial statement he filed in 2018. The court reasoned that Husband had substantial assets to cover any shortfall generated by his temporary decrease in income. Finally, the trial court highlighted Wife’s financial situation and the significance of the non-modification provision in the Agreement. The court noted the disparity in the parties’ net assets and earning potential. The court explained that, despite that disparity, Wife was without recourse to extend alimony as a result of the non-modification provision. The court characterized the non-modification provision as “an important lynchpin” in the Agreement.

From that, it is clear that the trial court engaged in a thoughtful and comprehensive examination of the evidence before denying Husband’s request for modification of alimony. The court’s findings based on that evidence were sound and not clearly erroneous. Husband has not persuaded us that the court’s decision was in any way clearly wrong or an arbitrary use of discretion.

Husband claims that the trial court erred because it found that he had \$355,000.00 in his savings account. Husband argues that that figure was derived from the financial

statement he filed in 2020, which was “outdated” given that he had filed an amended financial statement in 2021. Husband claims that, according to his 2021 statement, he had only \$86,322.00 in cash savings. Husband argues that the court, in “using outdated financial information and ignoring a current financial statement,” denied him a “fair and accurate determination of his request for modification of alimony.”

We remain unpersuaded. Husband’s 2020 financial statement was properly admitted into evidence, and, consequently, the court was permitted to consider it. Nevertheless, the record makes plain that the court did consider Husband’s 2021 financial statement in reaching its decision. Finally, even if the court somehow erred in relying on the 2020 statement, Husband has not presented any evidence to establish that he was prejudiced by that “error.” *See Shealer v. Straka*, 459 Md. 68, 102 (2018) (“The party complaining that an error has occurred has the burden of showing prejudicial error.”).

Husband also claims that the trial court was “biased” against him because the court did not take into account certain evidence when assessing Wife’s credibility. We disagree. There is nothing in the record to show that the court exhibited any bias against Husband or that the court failed to consider all the evidence when assessing Wife’s credibility. To the contrary, the record makes plain that the court conducted a fair and comprehensive review of the evidence and reached sound conclusions based on that evidence.

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