UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1057

September Term, 2014

ALICIA PENDLETON

v.

BRIAN PENDLETON

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: August 13, 2015

Appellee filed a motion in the Circuit Court for Prince George's County to modify his child support order, seeking a reduction in payments following a loss of employment. The court granted his motion. Two months later, he filed a second motion for modification and a petition for contempt after appellant denied him visitation. Following a hearing, the circuit court granted both motions and decreased appellee's child support obligation from $782 per month to $492 per month. Appellant appeals, presenting two questions for our review:

> [1] Did the [circuit] court err in not making a finding that appellee was not voluntarily impoverished?
>
> (2) Did the [circuit] court err in not imputing income to appellee?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

Appellant, Alicia Pendleton, and appellee, Brian Pendleton, were married and had one daughter during the course of the marriage, Bianca, born in October 2002. On December 26, 2007, appellee filed a petition for absolute divorce predicated on a 12 month separation. Following a hearing, the circuit court granted appellee an absolute divorce and awarded appellant sole legal and physical custody of their daughter. Appellee was granted visitation and ordered to pay $908 a month in child support.

On December 21, 2013, appellee filed a motion for modification of child support alleging that he had lost his job. Previously, he was a contractor for NASA making approximately $67,000 per year. At the filing of his motion, he was employed by a non-profit organization earning $12.50 per hour or approximately $26,000 per year. Appellant

opposed his motion, asserting that appellee had failed to comply with the previous child support order and was in arrears of approximately $8,000. The court held a hearing on July 19, 2013. Following the hearing, the court granted appellee's motion and decreased his child support obligation to $782 per month. It also assessed his arrearages at $4,096 and accordingly, ordered appellee to pay an extra $58 per month to cover the arrearage.

On September 9, 2013, appellee filed a petition for contempt against appellant for allegedly denying visitation on one of his weekends. The same day he also filed another motion for modification of child support, asserting that appellant's income had increased substantially. During a hearing held on June 27, 2012, appellee indicated that since losing his job in 2012, he was struggling financially and could not afford his payments. Appellant argued that appellee had been inconsistent with meeting his monthly obligations in the past and that therefore, the modification should be denied. The court granted appellee a "make-up" visitation for the weekend appellant denied him and granted his motion for modification, reducing his child support to $492 per month. Appellee was also ordered to pay $60 per month towards his arrearage. Appellant noted a timely appeal challenging the decrease in child support. Appellee did not file a response brief.

Additional facts shall be provided, *infra*, to the extent they prove relevant addressing the issues presented.

STANDARD OF REVIEW

Child support orders are generally within the sound discretion of the trial court. However, "where the order involves an interpretation and application of a Maryland statutory and case law, [the] Court must determine whether the trial court's conclusions are

'legally correct' under a de novo standard of review." *Knott v. Knott*, 146 Md. App. 232, 246 (2002) (citations omitted).

DISCUSSION

1. Voluntary Impoverishment

Appellant's first assignment of error is that the circuit court erred in failing to find that appellee was voluntarily impoverished. She asserts that appellee received a college degree and was currently underemployed by his own choice. She relies upon his failure to demonstrate sufficient efforts at finding a higher paying job, and contends that his "potential income and demonstrated earning capacity is far greater than what he was settled for."

This Court has announced that "a person shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate means." *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993).

In *Wills v. Jones*, 340 Md. 480 (1995), the father, who was incarcerated, filed a motion to stay enforcement of child support obligation. The Court concluded that, "[i]n determining whether a parent is voluntarily impoverished, the question is whether a parent's impoverishment is voluntary, not whether the parent has voluntarily avoided paying child support." *Id*. at 494 (emphasis omitted). The Court determined that there was no substantial evidence that the father had voluntarily committed a crime with the intention of becoming incarcerated to avoid paying child support. As a result, the Court ruled that

the parent's child support obligation should be "reduced only in proportion to the prisoner's reduced ability to pay." *Id*. at 496-97.

In *Stull v. Stull*, this Court held that a parent's conduct is important in determining whether he or she is voluntarily impoverished. 144 Md. App. 237 (2002). In *Stull*, the former husband was employed as a full-time general manager at Pizza Hut, and part-time at Blockbuster. *Id*. at 245. He was fired from Pizza Hut after it was revealed that he falsified documents, and lost his job at Blockbuster thereafter. *Id*. The circuit court deemed the former husband voluntarily impoverished, finding that his act of falsifying documents was a voluntary act, which caused his discharge. *Id*. at 248. The former husband only produced one employment application during his time of unemployment. However, this Court reversed the trial court's ruling, and stated, "there is simply no evidence that the appellant's conduct, which led to his discharge, was committed with the intention of becoming unemployed or otherwise impoverished." *Id*. at 249. The Court determined that the trial court stretched the meaning of the word "intentional" "beyond its acceptable boundaries" and that a parent's impoverishment can only be said to be "voluntary" if it was an "intended result of his conduct." *Id*. at 249.

Finally, in *Malin v. Mininberg*, this Court reaffirmed that a parent is "voluntarily impoverished" for child support purposes when a parent has "made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." 153 Md. App. 358, 395 (2003). In *Mininberg*, the former husband appealed a divorce ruling that found him to be voluntarily impoverished because he was no longer a practicing anesthesiologist. *Id*. at 382. The former husband contended

that he left the profession because it was not in his interest to continue his medical career after his relapse into drug abuse. He pursued a new career in business instead. *Id*. at 402. Considering the significant decrease in earnings, the circuit court determined that he was voluntarily impoverished, because he had many lucrative career alternatives. *Id*. at 404-05. However, the Court concluded that the circuit court erred in finding him to be voluntarily impoverished because there was no evidence that the former husband abandoned his medical career in an intentional effort to become impoverished. *Id*.

In considering appellee's intent and conduct, the circuit court did not err in finding that appellee was not voluntarily impoverished. Appellee was a college graduate, formerly employed at NASA with a salary of $67,000. He now works as a shift assistant at Coalition for the Homeless, making $12.50 an hour. Akin to *Wills*, we will examine the conduct and intent at the time of the material change. As the Court in *Wills* did not find evidence that the incarcerated father intended to commit a crime in order to impoverish himself, there is no evidence that appellee intentionally lost his job at NASA in order to impoverish himself. During the hearing, the following occurred:

> THE COURT: Anything else you want to tell me about it?
>
> [APPELLEE]: Yes sir. I got paperwork here, when I had a good-paying job, I paid sir, and paid handsomely. I paid almost $70,000 cash to [appellant] for our child over the last seven years. I [have fallen] on some hard times or whatever and everything and then I can't live right now what I'm making paying out this type of money.
>
> And, again, our relationship I think has gotten better in the last few months. Her and I have talked often about our child's well-being and so forth, and me, I hope it continues, but, again, I need some relief right now.

There is nothing in the record to indicate that appellee's loss of employment was an effort to avoid his child support obligations. To the contrary, he stated that he was actively looking for a new job, described a promising prospect he was pursuing, and at one point during cross examination, expressed dissatisfaction with his current position's income.

Appellant asserts that appellee's habitual status of being underemployed is self-elected in order to avoid his child support obligations. Though appellant argues appellee cannot produce evidence of finding a job well-suited to his education and experience, appellee has pursued some avenues for employment. But more importantly, this Court places considerable weight on the conduct at the time of the material change. The Court in *Stull* looked at the conduct of the former husband, and did not find that he intentionally falsified documents to get himself fired in order to avoid his child support obligations. In *Mininberg*, the Court did not find that the former physician voluntarily impoverished himself by choosing a new career for his own well-being. In order for a person to be considered voluntarily impoverished, he or she must have intended the result. There is no evidence on the record to establish this – he simply lost his job. Based on the above reasoning, we hold that the circuit court did not err in finding that appellee was not voluntarily impoverished.

2. Imputation of Income

Next, we turn to appellant's argument that the circuit court erred in its refusal to impute $600 to appellee's income. At the hearing, appellee testified that he paid his mother $200 in rent. Appellant responded during her direct examination that average apartment rentals in the same neighborhood were between $800 and $1600. Relying on *Petrini v.*

Petrini, 336 Md. 453, 462 (1994), she requested that the court impute $600 to appellee's income to account for the rental savings he was enjoying by living with his mother.

Maryland Code, (Repl. Vol. 2012), of the Family Law Article [Fam. Law] § 12-201(b)(4) provides the guidelines for imputing gifts in calculating a parent's actual income:

> Based on the circumstances of the case, the court may consider the following items as actual income:
>
> (i) severance pay;
> (ii) capital gains;
> (iii) gifts; or
> (iv) prizes.

In *Petrini*, *supra*, the Court of Appeals explained that a trial court has discretion to impute gifts into a parent's income and that an appellate court should only reverse this decision if the circuit court "acted arbitrarily in exercising its discretion or if the judgment on the matter was clearly wrong." 336 Md. at 462. There, the former husband appealed his divorce order, challenging the circuit court's finding that certain benefits he received were "gifts" and accordingly could be imputed to his income for child support determination. *Id*. at 457. The benefits were provided by the former husband's mother in the form of rent-free housing and payments for his health needs.[1] The Court of Appeals determined that the General Assembly enacted the statutory Child Support Guidelines to

[1] The former husband's take-home income was listed at $14,063.00 in 1991. 336 Md. at 458. With the rent-free housing, expenses to his ileostomy bag, and his health insurance premiums, the trial court imputed these gifts and thereby calculated the former husband's "actual income" to be $24,311.00 for child support purposes. *Id*.

afford latitude for the trial court "to consider all relevant circumstances" before determining what should be considered in calculating a parent's support obligation. *Id.* at 463. The nature of the guidelines allowed for the items to be considered "gifts" within the sound discretion of the trial court. Because neither the General Assembly, nor case law, at the time had defined "gifts," the Court of Appeals relied on the general usage of the term and extrapolated the meaning through Webster's International Dictionary and Black's Law Dictionary. Black's Law Dictionary defines "a 'gift' as a voluntary transfer of property to another made gratuitously or without consideration." *Id.* at 463. The benefits the former husband received were "gratuitous" in the sense that he did not have to maintain a full-time job in order to survive, as he lived off the assistance that his mother provided.[2] *Id.*

The Court stated, "essentially, [the husband's] mother paid for things that he would otherwise have been responsible for paying for himself out of his take-home salary," and these benefits were manifestly "gifts" in accordance with Fam. Law § 12-201(b)(4). *Id.* at 464. Thus, the Court of Appeals ruled that the circuit court properly considered the benefits as gifts toward the former husband's income, for child support considerations and justifiably increased the former husband's "actual income" as an equitable resolution.

In *Allred v. Allred*, this Court rejected the imputation of gifts to the "actual income" of Ms. Allred by using the general definition of the term "gift." 130 Md. App. 13 (2000). Ms. Allred lived with her boyfriend and Mr. Allred argued that the boyfriend's household contributions should be considered income. *Id*. at 16. Ms. Allred contended that her live-

[2] The former husband also admitted to receiving subsidies of $500.00 per week from his mother, while working part-time as a boatyard mechanic. 336 Md. at 465.

in boyfriend's contributions to the household expenses were not actual income to her and, therefore, could not properly be used to compute the combined adjusted actual income on which the custody payments are based. *Id.* at 17. This Court found no evidence that the live-in boyfriend provided day-to-day assistance with clothes, food, or other expenses for Ms. Allred. *Id.* at 19. It found that the live-in boyfriend was using the apartment and other utilities for the benefit of his son and himself, and that the benefits Ms. Allred were receiving were akin to having a roommate in order to afford adequate housing for her and her children according to her testimony. *Id.* at 18.

Unlike the circumstances in *Petrini*, although the mother was receiving assistance in the form of housing from her current boyfriend, this benefit was not considered "gratuitous" and could not be used as extra income for other expenses for children.[3] The Court reasoned that the boyfriend paid rent to the landlord, not Ms. Allred in which case she could have used that money for herself and her children. *Id.* at 18. In addition, the Court determined that the live-in boyfriend's contribution to the household was similar to what a new spouse would contribute. Ultimately, we reversed and remanded the case back to the circuit court. *Id.* at 21.

[3] The Honorable Marvin Smith disagreed with the majority's ruling and dissented, stating:

> The Court's opinion, in my judgment, ignores the fact that Ms. Allred was relieved of a part of her obligations. . . . I do not believe the learned trial judge who sat in this case below abused his discretion or acted arbitrarily in exercising his discretion. I likewise do not believe he was clearly wrong. Thus, I would affirm. *Allred v. Allred*, 130 Md. App. 13, 22 (2000).

Appellant contends that appellee received non-cash gifts from his mother in the form of reduced rent and other expenditures and that these non-cash gifts should be imputed into appellee's actual income. In deciding not to impute the non-cash gifts appellee received into appellee's actual income, the circuit court stated:

> THE COURT: I've considered the evidence, but I'm not going to add [the reduced rent] to [appellee's income]. And I do that, in part, recognizing that when appellee makes in actuality $2,100 a month, pays approximately a third of that to the tax man and then is ordered to pay $782 a month, another third or more, in child support, that leaves very little to survive upon, but that was the result of the existing order. But I don't find in this case the fact that he may be getting an under market rent, because he's renting from his mother, isn't sufficient to justify considering that as being income to him, certainly not income in the amount of $600. The reality is even if he doesn't, that's not cash in his pocket. That's just less coming out.

Although appellant contended that the facts of *Petrini* are similar, the circuit court observed that "the [Petrini] case stands for the proposition that the trial judge didn't abuse their discretion when they added those gifts in, but it doesn't say that they must be added in." *Id.*

Additionally, similar to the circumstances in *Allred,* appellee did not receive "gratuitous" benefits that could be used to cover other costs of living or increase child support. In this case, the trial court examined the circumstances and found that the benefit of reduced rent was not income to appellee in the amount of $600. The court considered that under the existing child support order, appellee was barely surviving after taxes and child support. Furthermore, unlike the husband in *Petrini*, appellee had a full-time job. We also note that unlike in *Petrini*, where the amount of benefits/gifts imputed was a substantial $10,000, here the difference was $600.

The circuit court committed no error in declining to impute the reduced rent "gift" appellee received from his mother. Though appellant proffers it is in the child's best interest for these benefits to be imputed into appellee's income, it is in the circuit court's discretion to impute gifts after considering all the relevant circumstances that a child support order may have on the parent as well as the child. Accordingly, we decline to reverse.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.