Circuit Court for Washington County
Case No. C-21-FM-18-000916

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1497

September Term, 2020

MATTHEW SHUBERT

v.

KATHLEEN SHUBERT

Fader, C.J.,
Wells,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: January 28, 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.

Kathleen Shubert ("Appellee") filed for divorce from Matthew Shubert ("Appellant") in the Circuit Court for Washington County. Despite having been served, Appellant never responded to Appellee's Complaint for Absolute Divorce. A notice for default and information regarding a hearing on the default was issued to Appellant. Because Appellant failed to appear before the circuit court for the hearing on his default, the circuit court entered a Judgment of Divorce in his absence. The Judgment of Divorce granted the parties an absolute divorce and granted Appellee a monetary award, and half the marital portion of Appellant's retirement benefits, to be effectuated by a Qualified Domestic Relations Order, as well as an award for attorney's fees. Appellant never appealed the judgment but, 132 days later, Appellant filed a Motion to Revise Based on Fraud, Mistake or Irregularity. After the circuit court denied Appellant's motion, Appellant appealed.

Appellant submits the following questions presented:

1. Did the Court err in granting Plaintiff a judgment against Defendant for Plaintiff's debt?
2. Did the Court err in granting attorneys' fees in favor of Plaintiff against Defendant owing to his default?
3. Did the Court err in granting Plaintiff an interest in Defendant's pension when Plaintiff's pleading did not request such relief?
4. Did the Court err in granting Plaintiff an interest in Defendant's pension without accounting for the value of the marital property portion of Plaintiff's retirement assets?

For the foregoing reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 29, 2018, Appellee filed a complaint against Appellant seeking an absolute divorce, alimony, and a determination of the value of property and retirement assets. She also sought a monetary award in her favor, as well as a sale in lieu of partition of property and a division of the proceeds thereof. A summons was issued the same day the complaint was filed in order to serve Appellant. Upon request of Appellee, a summons was re-issued on July 30, 2018 to serve Appellant. On September 12, 2018, an affidavit of service was filed with the circuit court stating that Appellant had been served on September 11, 2018. Given that Appellant had not responded to the complaint, on December 11, 2018, Appellee requested the circuit court enter an Order of Default. The circuit court entered an Order of Default and a Notice of Default Order was issued to Appellant on December 17, 2018, with a hearing on the default to be held on February 8, 2019.

Only Appellee and her counsel were present at the hearing on the default; Appellant was not present. The circuit court found that Appellant was on notice that the proceedings were occurring and that he did not notify the court of his absence. At the hearing, Appellee testified about the parties' separation, Appellant's retirement assets, loans taken out during their marriage, and the attorney's fees she had incurred. Appellee was seeking her marital share of Appellant's pension and 401(k), a monetary award for half of the $125,655.05 parent PLUS loan taken out in Appellee's name to pay for the parties' daughter's college education, a monetary award of $10,869.73 to cover a bank loan in which Appellant was

the primary signer, a monetary award of $7,641.99 to cover a car loan, and an award of $2,500 for attorney's fees. Appellee forewent her opportunity to seek alimony.

The circuit court found—based upon the court's file and Appellee's testimony—that the parties were eligible for absolute divorce. The court also found that Appellee was entitled to receive half the marital portion—the amount accrued during the marriage—of Appellant's pension and 401(k). Having found that all the debts were acquired during the marriage, the circuit court determined that it was equitable to grant Appellee a monetary award for half the amount of the parent PLUS loan and the entire amount of the other two loans—totaling $81,339.25. Applying the statutory factors, the circuit court also ordered Appellant to pay Appellee's attorney's fees in the amount of $2,500 in addition to the costs of the court proceedings. The foregoing was outlined in the Judgment of Divorce entered on February 19, 2019.

On May 20, 2019, Appellee filed a Petition for Contempt asserting that Appellant had failed to pay any amount of the monetary award, attorney's fees, or half of his pension and 401(k). A Show Cause Order and Writ of Summons were issued to Appellant. Appellant filed an answer to the Petition for Contempt and Show Cause Order on July 1, 2019. That same day, Appellant also filed a Motion to Revise Based on Fraud, Mistake or Irregularity. This motion asserted that the circuit court had no jurisdiction over Appellant due to improper service, that the court did not have subject matter jurisdiction to transfer debt created by one party during marriage, that the court was mistaken in granting one half of Appellant's pension and 401(k) without considering Appellee's pension and 401(k), and that Appellee "practiced a fraud" on the court by misleading the court to think it had

authority to grant the monetary award, half of the pension and 401(k), and attorney's fees. The circuit court denied the motion on July 17, 2019 stating that the "[a]ffidavit of service, filed September 12, 2018 (not 2019) clearly provides that Defendant was served after several attempts to evade." Appellant filed a Notice of Appeal on July 29, 2019.

DISCUSSION

Timely Appeal

For an appeal to be timely, unless otherwise provided, an appellant must file a notice of appeal within 30 days after entry of judgment. Md. Rule 8-202(a). As Appellee argues, Appellant did not timely appeal the Judgment of Divorce because he did not appeal within 30 days after entry of judgment. Therefore, we do not review the questions presented by Appellant.

Appellant only timely appealed the denial of the Motion to Revise Based on Fraud, Mistake or Irregularity. *See Pickett v. Noba, Inc.*, 114 Md. App. 552, 559 (1997) (holding that denial of a motion to revise is considered a final judgment and is therefore appealable). Our review is limited to whether the circuit court abused its discretion in refusing to revise the judgment. *See Pelletier v. Burson*, 213 Md. App. 284, 289 (2013). To determine whether the circuit court abused its discretion, we consider whether Appellant presented clear and convincing evidence of fraud, mistake, or irregularity. *See Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008).

Typically, a motion to alter or amend a judgment must be filed within ten days after entry of judgment, but a motion to revise based on fraud, mistake, or irregularity may be filed at any time. Md. Rule 2-534; Md. Rule 2-535(b). Appellant filed his Motion to

Revise Based on Fraud, Mistake or Irregularity on July 1, 2019, which was 132 days after the Judgment of Divorce was entered on February 19, 2019. The circuit court denied Appellant's motion on July 17, 2019, and Appellant timely appealed the denial. *See* Md. Rule 8-202(a); *see also Pickett*, 114 Md. App. at 559.

"The timely filing of a motion under Rule 2-535 does not automatically stay [the time for filing] an appeal. If the motion is filed within ten days of judgment, it stays the time for filing the appeal; if it is filed more than ten days after judgment, it does not stay the time for filing the appeal." *Pickett*, 114 Md. App. at 557 (citing *Unnamed Att'y v. Att'y Grievance Comm'n*, 303 Md. 473, 486 (1985)). When the party does not file its motion to revise within ten days of final judgment, the motion to revise is recognized as a substitute for an appeal. *Pickett*, 114 Md. App. at 557. Appellant filed his motion to revise well after both the ten-day and thirty-day periods had passed. "Because the thirty-day period in which he could have noted an appeal had expired, the judgment could have been revised only upon a clear and convincing showing of fraud, mistake, or irregularity[.]" *Id.* (citing Md. Code, § 6-408 of the Courts and Judicial Proceedings Article).

Motion to Revise

"We review the circuit court's decision to deny a request to revise its final judgment under the abuse of discretion standard." *Pelletier*, 213 Md. App. at 289 (quoting *Jones*, 178 Md. App. at 72). "The existence of fraud, mistake, or irregularity must be shown by clear and convincing evidence." *Pelletier*, 213 Md. at 290 (internal quotations omitted) (quoting *Davis v. Att'y Gen.*, 187 Md. App. 110, 123–24 (2009)).

a. Jurisdictional Mistake and Irregularity

Mistake as it pertains to Maryland Rule 2-535(b) means jurisdictional mistake, "such as where the court lacks the power to enter the judgment because it does not have jurisdiction over the person or jurisdiction over the subject matter." *Facey v. Facey*, 249 Md. App. 584, 639 (2021) (citing *Claibourne v. Willis*, 347 Md. 684, 692 (1997)). "When a court lacks jurisdiction to enter a judicial decree or judgment, that judgment is void." *Facey*, 249 Md. App. at 606 (internal quotations omitted) (quoting *LVNV Funding LLC v. Finch*, 463 Md. 586, 608 (2019)). Subject matter jurisdiction can be broken down into two categories: "power" and "propriety." *Thacker v. Hale*, 146 Md. App. 203, 224 (2002).

> "The term jurisdiction can have different meanings depending on the context in which it is used. It can refer to either the *power* of the court to render a valid decree, or the *propriety* of granting the relief sought."
>
> "It is only when the court lacks the first kind of jurisdiction which this Court termed 'fundamental jurisdiction' that its judgment is void."

Facey, 249 Md. App. at 606–07 (cleaned up) (quoting *Finch*, 463 Md. at 608–09).

Applying these distinctions, the *Thacker* court gave some examples which are instructive.

> It is only when the court lacks the power to render a decree, for example because the parties are not before the court, as being improperly served with process, or because the court is without authority to pass upon the subject matter involved in the dispute, that its decree is void. On the other hand, the question of whether it was appropriate to grant the relief merges into the final decree and cannot thereafter be successfully assailed for that reason once enrolled . . . . If by that law which defines the authority of the court, a judicial body is given the power to render a judgment over that class of cases within which a particular one falls, then its action cannot be assailed for want of subject matter jurisdiction.

Thacker, 146 Md. App. at 225 (quoting *First Federated Commodity Trust Corp. v. Comm'r of Sec.*, 272 Md. 329, 334–35 (1974)).

Appellant asserts that the circuit court did not have subject matter jurisdiction to transfer debt created by one party during marriage to the other party. This argument misses the mark—the circuit court did not transfer debt from one party to another party. Rather, it granted Appellee a monetary award for half the amount of a loan balance for a loan taken out by her (in her name) to provide for the college education of the parties' daughter. As Appellee properly asserts, the circuit court has fundamental jurisdiction to grant a monetary award upon dissolution of marriage. *See* Md. Code, §8-205 of the Family Law ("FL") Article; *Flanagan v. Flanagan*, 181 Md. App. 492, 519 (2008) (noting that the court "may adjust the equities by granting a monetary award").

Nonetheless, insists Appellant, the court does not have jurisdiction to split debt between the parties, even by means of a monetary award. We are not so persuaded. At its core Appellant's theory is only that the circuit court made a legal mistake in how it granted and determined the monetary award. Such theory will not prevail in this limited appeal:

> Where a statute authorizes a court to do a particular thing, and the power of the court to act is subject to certain limitations named, then a judgment of the court rendered contrary to the limitations named is not void for want of jurisdiction nor subject to collateral attack, but is voidable only.

Thacker, 146 Md. App. at 227 (cleaned up) (quoting *McCarty v. McCarty*, 453 U.S. 210, 372 (1981)). Importantly, when a judgment is voidable for legal mistake, it can be voided on direct appeal, but not on a motion to revise for jurisdictional mistake. *See Thacker*, 146 Md. App. at 227–28. Thus, the court granting a monetary award here—even one that takes

into account debt assumed by one spouse—is not void for lack of jurisdiction. Appellant's challenge to the monetary award for legal mistake could only be brought on a timely appeal of the Judgment of Divorce—which it was not.

Appellant also raises two issues regarding the circuit court's order granting Appellee half of his pension and 401(k): (1) the court erred because Appellee failed to request such relief in her pleadings; and (2) the court erred in failing to consider Appellee's pension and 401(k).

A party's failure to request specific relief in her pleadings generally is not a sufficient basis for revising a judgment based on fraud, mistake, or irregularity under Rule 2-535(b). *See id.* at 219 (quoting *Early v. Early*, 338 Md. 639, 652 (1995)) (noting that irregularity under Rule 2-535(b) means "a failure to follow required process or procedure"). "[I]rregularity, in the contemplation of the Rule, usually means irregularity of process or procedure, and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Thacker*, 146 Md. App. at 219 (quoting *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975)). The Thacker court further explained:

> Irregularities warranting the exercise of revisory powers most often involve a judgment that resulted from a failure of process or procedure by the clerk of a court, including, for example, failures to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication.

Thacker, 146 Md. App. at 219–20 (citing *Early*, 338 Md. at 652).

The circumstances here are far removed from the examples offered in *Thacker* and Appellant was fully apprised of all legal proceedings. Appellee's complaint asked the

circuit court to "determine the marital portion of the parties' investments including pensions, 401k plans and bank accounts." The complaint also requested that "she be awarded such other and further relief as the nature of her cause may require." Under settled law, relief may be granted through a general prayer for relief if a complaint fairly apprised the defendant that the relief granted by the court was "within the range of reasonable possibility." *See Terry v. Terry*, 50 Md. App. 53, 61 (1981); *see also Lasko v. Lasko*, 245 Md. App. 70, 82–83 (2020) (holding that relief was properly requested when the party requested the court to "determine and value the marital property" and requested the court grant "all relief to which she may be entitled pursuant to the Family Law Article"). As in *Lasko*, Appellee's pleadings in this divorce case undoubtedly were sufficient to put Appellant on notice that Appellee sought whatever relief the court was authorized to give concerning her rights to marital property. The Circuit Court's decision to grant Appellee fifty percent of the marital portion of her spouse's retirement assets was certainly a "reasonable possibility" under these circumstances. *Terry,* 50 Md. App. at 61; *see also* FL § 8-205 (authorizing the court to transfer interest in retirement assets under certain terms and conditions).

Nor does Appellant prevail with his second assertion—that the circuit court was mistaken in failing to consider Appellee's retirement assets. We bear in mind that our review is limited, under Rule 2-535(b), to only considering *jurisdictional* mistakes on a motion to revise based upon fraud, mistake, or irregularity. *Facey*, 249 Md. App. at 639 (emphasis added) (citing *Claibourne*, 347 Md. at 692). The court's alleged failure to consider Appellee's retirement assets does not fall into this category. It is simply an

argument addressing the merits of the circuit court's decision. There can be no doubt that the circuit court had subject matter jurisdiction and acted pursuant to statutory authority in granting Appellee half of her spouse's retirement assets. *See* FL § 8-205. Thus, the circuit court did not err in denying the motion to revise for jurisdictional mistake.

b. Fraud

"To establish fraud under Rule 2-535(b), a movant must show extrinsic fraud, not intrinsic fraud." *Jones*, 178 Md. App. at 72 (citing *Manigan v. Burson*, 160 Md. App. 114, 120 (2004)). The *Jones* court quoted *Billingsley v. Lawson*, 43 Md. App. 713 (1979) to explain the distinction between intrinsic and extrinsic fraud:

> [A]n enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are "intrinsic" to the trial of the case itself. Underlying this long settled rule is the principle that, once parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public policy of this State demands that there be an end to that litigation[.] This policy favoring finality and conclusiveness can be outweighed only by a showing that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.

Jones, 178 Md. App. at 72–73 (cleaned up) (quoting *Billingsley*, 43 Md. App. at 719). Extrinsic fraud prohibits an adversarial trial, while intrinsic fraud is fraud occurring during the hearing or trial. *Jones*, 178 Md. App. at 73 (quoting *Manigan*, 160 Md. App. at 121).

Appellant asserts that Appellee "practiced a fraud" on the court by misleading the court to think it had jurisdiction to grant the relief of attorney's fees, half of Appellant's retirement assets, and a monetary award. We do not determine whether this is indeed fraudulent behavior because, as Appellee notes, Appellant only alleges fraud through

actions that took place during the trial and not outside the trial. Appellant alleges no extrinsic fraud that prevented an adversarial trial. Therefore, there is no fraud alleged that could have voided the judgment on a motion to revise based upon fraud. In order for the judgment to be voidable for intrinsic fraud, Appellant must have timely appealed the Judgment of Divorce.

CONCLUSION

Appellant did not present evidence that clearly established extrinsic fraud, jurisdictional mistake, or irregularity. Thus, the circuit court did not abuse its discretion in denying Appellant's Motion to Revise Based on Fraud, Mistake or Irregularity. The circuit court's judgment denying the motion is therefore affirmed.

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