Circuit Court for Frederick County
Case No. 10-C-11-000126

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0872

September Term, 2016

NOLAN CLIFFORD

v.

LAURA CLIFFORD

Leahy,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: CNovember 20, 2017

*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 action for divorce was filed by the appellant, Nolan Clifford, against the appellee, Laura Clifford, on January 14, 2011, in the Circuit Court for Frederick County. A decree of absolute divorce was entered on February 27, 2012, based on appellee's counter-complaint. In the succeeding years issues of child custody, child access, marital property, and alimony have been resolved. As the case comes to us, the remaining issues involve support for the three children of the parties, a son, born August 3, 2005, a daughter, born November 7, 2007, and a daughter, born September 12, 2009. The issues are whether the circuit court abused its discretion by:

> I. Declining to apply appellant's reduced support payment retroactively to effect an elimination of arrearages; and
>
> II. Ordering appellant to pay fifty percent of the private school tuition for the three children.

General Background and Proceedings

When this action was instituted, the parties owned a successful business, Information Security Solutions, LLC (ISS), that was engaged in government contracting. The judgment of absolute divorce of February 2012 set child support payments by appellant at $5,258/month. The parties, on June 15, 2012, entered into a Property Settlement and Support Agreement (the PSSA) that increased appellant's child support payments to $6,265/month. At that time appellant was earning $420,000 a year. Contemporaneously, the parties entered into a Membership Interest Purchase Agreement under which appellant agreed to purchase appellee's membership interest in ISS. The purchase price was one million dollars, payable in ninety monthly installments of $12,500 each, including four percent interest. The first payment was due July 1, 2012. The Judgment of Absolute

Divorce was amended by agreement, per the PSSA, on August 3, 2015, *nunc pro tunc* to the date of entry of the divorce, to reflect the increase in child support to $6,265/month.

Meanwhile, appellant, on February 26, 2014, had moved to modify his child support payments. He submitted that, due to the federal government's sequestration, his business had diminished, resulting in a reduction in force from twenty-two employees to eight. He represented that his income was $12,500/month.

Appellant had been trying to sell ISS's assets. Apparently in anticipation of a sale closing in December 2014, he filed a second motion to modify child support in November 2014. He averred that his salary with the purchaser (new employer) would be $200,000 per year.

Beginning in December 2014, appellant stopped paying the full amount of child support, then ordered at $6,265/month. As of September 16, 2015, when a bench trial was held, appellant had paid $16,000 in support for the ten-month period from December 2014 to September 2015, producing an arrearage of $46,650. The record is unclear how much in support, if any, appellant paid for October, November, and December 2015.

By early Spring 2015, appellant consummated a sale of ISS's assets to an entity referred to by the parties as AIS. Appellant became an employee of AIS in April 2015 with an annual salary of $200,000.

The bench trial in September 2015 on support and alimony issues took two days. The court announced its findings on December 2, 2015. It found appellant in contempt for failing to pay alimony from December 2014 to appellee's remarriage on June 19, 2015, and ordered him to pay $36,483.27 in alimony arrearages. Child support was reduced,

prospectively, to $2,000 per month. The court, however, found appellant "in contempt for failing to pay child support … since … December of 2014." It concluded that appellant "will pay all of the back child support from the date he lowered it unilaterally to December 1st of 2015."[1]

At the December 2, 2015 court session, the court also ruled that "the parties are going to split the cost of Saint John's, and private school education, between them, 50 percent to 50 percent." Further, the court found that appellee had voluntarily impoverished herself.

Appellee moved to revise the support payment. At a hearing on March 29, 2016, the parties agreed that the court had computed child support on the erroneous basis that appellant's income was $120,000/year whereas his "annual base salary" was $200,000/year. The court revised child support to $2,300/month. It reiterated its prior ruling that the parties evenly split the cost of private education.

Appellee initiated en banc review.

While the en banc review was pending, the court partially clarified the child support arrearage order of December 2, 2015. It entered, on June 10, 2016, an order dated May 24, 2016, establishing that the child support arrearage for the seven-month period from December 2014 through June 2015 was $29,855. The arrearage for the period commencing July 1, 2015 "shall be addressed by separate Order of this Court." That appears not to have

[1]The docket entry reads: "[Appellant] is in contempt for not paying child support. Child support arrearage as stated on the record."

been done prior to the close of the record for this appeal. The order entered June 10, 2016, found appellant to be in contempt for failure to pay the child support "set forth above."

The en banc panel in early 2017 remanded for specific findings concerning appellee's voluntary impoverishment and imputed income, the children's needs, and appellant's income. Following a hearing in April 2017, the court, on May 11, 2017, entered an order dated May 8, 2017, complying with the remand. It explained its imputation of $4,900 per month of income to appellee. After a devastating review of appellee's claimed expenses of $7,116.28/month attributable to the children, the court concluded that those expenses "were so exaggerated that the Court cannot and will not speculate as to the actual costs, and opines that the [appellee] has not met her burden of proof in this regard."

Appellant's monthly income of $16,666 ($200,000/year), with appellee's imputed income of $4,900/month placed child support above the guidelines and rested the decision in the discretion of the court. *See* Maryland Code (1989, 2012 Repl. Vol.), § 12-204(d) of the Family Law Article (FL); *Voishan v. Palma*, 327 Md. 318, 327 (1992). The court concluded:

> "The top of the guidelines for 3 children is $3,379.00. The minimum allowed under the guidelines would be $2,611.75. As a result, the Court will award $2,611.97. The Court believes that given the parties' available resources, that this amount will not impact the children's standard of living. The Court believe[s] said amount is in the children's best interest at this time."

By a judgment entered May 11, 2017, the court ordered "that commencing 8 May 2017[,] and accounting from April 6, 2016, the [appellant] shall pay unto the [appellee] monthly" $2,611.75 in child support.[2]

Appellant's Compensation Package

In addition to his $200,000 per year base salary from AIS, appellant received or could receive other benefits from AIS.

Appellant was entitled to a bonus of $125,000 to $500,000 if he billed $2.5 million to $4 million during the year ending March 31, 2016.

There are also personal expenses that are paid by "ISS" for appellant.[3] "ISS" pays "the first $2400 in medical expenses" for the three children. "ISS" pays the premiums on appellant's three life insurance policies: United AGC - $504.85 per month; Banner Life - $608.12 per month; and MetLife - $299 per month. "ISS" pays the approximately $20,000 per year premiums for health insurance coverage for appellant and his children. "ISS" pays the $7,500 per quarter fees to a CPA for its and appellant's tax matters.

Additional facts, particularly with respect to the private school tuition issue, will be stated in the discussion.

[2]April 6, 2016, was the date on which the trial court had revised child support to $2,300/month.

[3]The questions and answers on this phase of case use the term "ISS." We have defined "ISS" to mean that LLC, the assets of which, presumably including goodwill, were sold to AIS. If that is the case, the buying entity likely took the name "ISS" and the selling entity was required to change its name. The material point, however, is that appellant was not paying these personal expenses; the buyer of the assets was. The benefits are in addition to the base salary earned by appellant.

Discussion

I

Appellant's position is that when the court on December 2, 2015, reduced child support to $2,000 per month, it should have made that reduction effective as of the date of filing of its motion to modify support, November 20, 2014, that was based on the anticipated sale of ISS's assets. Once the court found that appellant's child support contribution should be $2,000 per month, it was an abuse of discretion, argues appellant, not to apply that ruling retroactively because, appellant asserts, he had been paying $2,000 a month since December 2014.

> "The decision to make a child support award retroactive to the time of filing is one reserved for the trial court and will only be reversed upon a showing that the court abused its discretion. Maryland law does not require that modifications of child support be retroactive."

Holbrook v. Cummings, 132 Md. App. 60, 69-70 (2000) (citations omitted). *See also Dunlap v. Fiorenza*, 128 Md. App. 357, 371-72, *cert. denied*, 357 Md. 191 (1999).

Here, in addition to finding non-payment of support at the court-ordered level by appellant from December 2014 to December 2015, the court found appellant to be in contempt. One aspect of such a finding is that the obligor had the ability to pay. *Elzey v. Elzey*, 291 Md. 369, 374 (1981). Ordinarily, it is not an abuse of discretion for a court to decline retroactively to eliminate an arrearage for the benefit of an obligor who had the ability to pay support at the decreed level. *See, e.g.*, *Holbrook*, 132 Md. App. at 70.

Appellant submits that he was unable to pay, reasoning that, from his $16,666 monthly salary from AIS, he was required to pay $12,500 per month to appellee on the buyout, leaving less than $6,265 available for support, much less for school tuition and personal necessaries. After April 2015, the $12,500 per month that appellant owed to appellee for his purchase of her interest in ISS was not an out-of-pocket expenditure by appellant. It was paid by AIS under their compensation arrangement for the first year, April 2015 to April 2016. Appellant explained at the September 2015 hearing that AIS quarterly wired into an ISS account funds to cover the $12,500 per month payments to appellee. The arrangement assumed that AIS would have $2 million in sales by April 2016. If so, the arrangement would continue.[4]

Appellee also obtained through limited discovery gross receipts for ISS for 2014 and 2015. They were $1.56 million for twelve full months in 2014 and $1.4 million for the first seven months of 2015. Further, AIS paid $1 million in 2015 in the purchase of the ISS assets. From this appellant paid off a maxed out line of credit to Capital One of $600,000 and a broker's fee of $150,000. From the remaining $250,000 appellant paid assorted business and personal credit cards and a car loan, but did not pay full child support.

We find no abuse of discretion in the court's declining to make the December 2, 2015 reduction in support retroactive to November 20, 2014.

II

[4]Although final judgment in this case was not entered until May 2017, appellant has been content to let the record rest on the facts as of the September 2015 bench trial.

Appellant contends that the court abused its discretion when it ordered him to pay 50% of the children's private school tuition, then $11,000 toward the total bill of $22,000. The court acted under the authority of FL § 12-204(i) which provides in relevant part:

> "(i) *School and transportation expenses*. — By agreement of the parties or by order of court, the following expenses incurred on behalf of a child may be divided between the parents in proportion to their adjusted actual incomes:
> "(1) any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child[.]"

Appellant's principal argument is that the court "abrogated the parties' agreement *and its own Order in this case* with regard to private school tuition." Appellant's Brief at 10. On August 18, 2015, after eight hours of negotiation, the parties entered into the court record a lengthy agreement concerning, principally, child access. Appellant relies on a portion of the agreement which, as embodied in the resulting Consent Order, reads as follows:

> "[T]he parties agree that the children shall continue to attend Saint Johns Regional Catholic School (SJRCS). This agreement does not financially bind the Father."

This provision immediately follows a term of the Consent Order that the children will be raised in the Christian faith and that both parties shall support their children's Christian upbringing.

We construe the agreement embodied in the Consent Order in accord with its plain language. Appellant did not financially bind himself for any tuition payments by the agreement of August 18, 2015. But the court ordered appellant to contribute to tuition based on the court's power under FL § 12-204(i) and not in execution of any agreement between the parties. Nor can the agreement be construed as a promise by appellee that she

would not invoke the FL § 12-204(i) power. Indeed, we have grave doubts as to the validity of any agreement (not present here) that would attempt to restrict the power of the court to apply FL § 12-204(i) in a fashion that the court, in a proper exercise of discretion, believed to be in the best interest of the children.

Here, although not specifically argued by appellant, we have reviewed the record in relation to the factors enumerated in *Witt v. Ristaino*, 118 Md. App. 155, 169-71 (1997), for the application of FL § 12-204(i) and find that there was sufficient evidence to satisfy them.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.