UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2601

September Term, 2013

RANDY LEE STEWART

v.

BARBARA STEWART

Kehoe,
Arthur,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: September 30, 2015

In this appeal, we consider whether the Circuit Court for Montgomery County, the Honorable Michael J. Algeo presiding, erred when it reduced Randy Lee Stewart's alimony obligation to his former wife, Barbara Stewart, by half, instead of eliminating it altogether. Mr. Stewart raises two issues, which we have reworded:

> I. Did the trial court err in reducing the alimony to be paid by Mr. Stewart to $1,715 per month, rather than terminating his obligation altogether?
>
> II. Did the trial court err in awarding Ms. Stewart $10,000 in attorneys' fees?

We will affirm the judgment of the trial court.

Background

Mr. and Ms. Stewart were married in 1984. Throughout their marriage, Ms. Stewart was a homemaker. Mr. Stewart began working for the federal government in 1992. The couple resided in Montgomery County, Maryland, from 1994 until the break-up of their marriage. After 25 years of marriage, a judgment of absolute divorce was entered in the Circuit Court for Montgomery County in February 2010.

In granting the parties' divorce, the trial court incorporated a settlement agreement, which was placed on the record in open court. The agreement provided Ms. Stewart with indefinite alimony and resolved the division of the parties' financial assets. The relevant provisions were:

(1) Mr. Stewart agreed to continue to pay the mortgage on the marital home until it was sold.

(2) He agreed to pay $2,500 a month in alimony to Ms. Stewart until the marital home was sold and, after the sale, her alimony increased to $3,250 a month.

(3) Mr. Stewart could seek modification or termination of alimony two years after the date of divorce.

(4) The proceeds from the sale of the house were to be divided equally and Ms. Stewart was to receive half of Mr. Stewart's Thrift Savings Plan, as well as a portion of Mr. Stewart's FERS pension, upon his retirement.

(5) The parties also accounted for attorneys' fees. This provision of the agreement appears in the record as follows: "Each party's going to pay their own attorney's fees, except in the case of a breach or a default. And in that case, the breaching or defaulting party would pay the non-breaching party, or the non-defaulting party, reasonable attorney's fees."

After the break-up of the marriage, Ms. Stewart returned to the work force, securing a position as a receptionist and office manager, and Mr. Stewart continued to work for the federal government. Ms. Stewart has continued to reside in Montgomery County since the divorce. Mr. Stewart now resides in the State of Washington, where he has remarried.

In December 2012, Mr. Stewart contacted Ms. Stewart, informing her that he planned to retire and that upon retirement he would no longer be able to afford to pay alimony. This proposal did not meet with Ms. Stewart's approval. In February 2013,

Mr. Stewart filed a complaint to eliminate, or, in the alternative, to modify, alimony payments. Mr. Stewart stopped paying alimony altogether when he retired in May 2013. In her responsive pleadings, Ms. Stewart requested that the court enter judgment against Mr. Stewart for unpaid alimony.

After a two day hearing, the court granted Mr. Stewart's request to modify his alimony payments, reducing Mr. Stewart's obligation to Ms. Stewart from $3,250 per month to $1,715 per month. The court also ordered Mr. Stewart to pay Ms. Stewart $13,720 in alimony arrears for the period from June 2013 through January 2014, during which he stopped paying alimony, and entered judgment accordingly. Pursuant to the attorneys' fees provision in the parties' settlement agreement, the court ordered Mr. Stewart to pay Ms. Stewart $10,000 in attorneys' fees, entering a judgment against Mr. Stewart for attorneys' fees as well.

Analysis

I. Alimony Modification

An appellate court may disturb a trial court's decision establishing or modifying alimony only upon clear error or abuse of discretion. *Blaine v. Blaine*, 336 Md. 49, 74 (1994); *Ridgeway v. Ridgeway,* 171 Md. App. 373, 383-84 (2006). In this context, a court can abuse its discretion "when it makes a decision based on an incorrect legal premise[.]" *Guidash v. Tome*, 211 Md. App. 725, 735 (2013). We provide *de novo* review to contentions that the trial court misunderstood the law.

(A)

Mr. Stewart's first contention is that the trial court erred as a matter of law by failing to make the findings required by Family Law (FL) Article § 11-106(b) and (c)[1]

[1] **§ 11-106. Award — Determination of amount and duration.**

(a) *Court to make determination*. — (1) The court shall determine the amount of and the period for an award of alimony.
(2) The court may award alimony for a period beginning from the filing of the pleading that requests alimony.
(3) At the conclusion of the period of the award of alimony, no further alimony shall accrue.
(b) *Required considerations*. — In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:
(1) the ability of the party seeking alimony to be wholly or partly self-supporting;
(2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
(3) the standard of living that the parties established during their marriage;
(4) the duration of the marriage;
(5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
(6) the circumstances that contributed to the estrangement of the parties;
(7) the age of each party;
(8) the physical and mental condition of each party;
(9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
(10) any agreement between the parties;
(11) the financial needs and financial resources of each party, including:
(i) all income and assets, including property that does not produce income;
(ii) any award made under §§ 8-205 and 8-208 of this article;
(iii) the nature and amount of the financial obligations of each party; and
(iv) the right of each party to receive retirement benefits; and
(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.
(c) *Award for indefinite period.* — The court may award alimony for an indefinite period,

(continued...)

before, in his words, the court "awarded Barbara indefinite alimony." This contention is not persuasive.

First, Judge Algeo did not award alimony to anyone in this case. Ms. Stewart's right to receive indefinite alimony was established by the parties' judgment of divorce which was entered, with the mutual consent of the parties, in 2010. Even though the judgment was entered by consent, it was nonetheless a final judgment and, as such, "'should normally be given the same force and effect as any other judgment, including judgments rendered after litigation.'" *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 359 (2013) (quoting *Jones v. Hubbard*, 356 Md. 513, 532 (1999)).

A settlement agreement entered and acknowledged by the parties in open court, as was the parties' agreement in this case, is "comprehensive with respect to the issues in the case and effectively end[s] the litigation." *Smith v. Luber*, 165 Md. App. 458, 468 (2005). Absent circumstances not present in this case, a party does not have the right to appeal from a consent judgment. *Id.* To put it another way, by consenting to the 2010 judgment, Mr. Stewart waived any right that he would otherwise have had to challenge the existence

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[1](...continued)
if the court finds that:
(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or
(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

of any of the factual or legal requisites for an award of indefinite alimony, as of the date the judgment was entered.

In deciding whether to grant a petition to modify alimony, a trial court's focus is limited to the grounds set out in FL § 11-107(b), which authorizes a court to modify "the amount of alimony awarded as circumstances and justice require."[2] The doctrine of res judicata applies in alimony modification proceedings. *Ridgeway v. Ridgeway*, 171 Md. App. 373, 384 (2006). As a result, in a proceeding on a petition to modify alimony, parties "may not re-litigate matters that were or should have been considered at the time of the initial award." *Id.* (quoting *Blaine v. Blaine*, 97 Md. App. 689, 698 (1993), *aff'd*, 336 Md. 49 (1994)).

Because the parties entered into the settlement agreement in open court, an evidentiary hearing was not held before the judgment of divorce was entered in 2010. If Mr. Stewart wished to litigate all of the § 11-106 factors, the time to do so would have been in the divorce action and not the modification proceeding. Consistent with *Blaine* and *Ridgeway*, we conclude that Ms. Stewart's entitlement to indefinite alimony was

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[2] **§ 11-107. Extension of period; modification of amount.**

*** * ***

(b) *Modification of amount*. — Subject 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.

conclusively resolved by the 2010 judgment of divorce and that Judge Algeo did not err when he refused to address all of the § 11-106 factors before ruling on Mr. Stewart's petition.[3]

(B)

Mr. Stewart also asserts that the trial court erred when it declined to terminate his indefinite alimony obligation altogether. In support of this contention, Mr. Stewart argues:

> [T]he facts as found by the Trial Court and supported by the record inescapably lead to a conclusion that no disparity in income exists [between the parties]. If anything, the Trial Court found that [Ms. Stewart] had more income than [Mr. Stewart], and arguably she enjoyed a higher standard of

[3]Assuming, of course, that Judge Algeo was asked to do so in the first place. This assumption might be a bit generous.

Mr. Stewart did not raise this contention in either opening or closing argument. Additionally, the trial court requested that the parties submit proposed findings of fact and conclusions of law. If Mr. Stewart wished for the trial court to address the § 11-106 factors, it follows that Mr. Stewart's submission would include proposed findings of fact for each of the factors. Mr. Stewart's submission contains no such proposed findings. It states in pertinent part:

> In determining to terminate or modify Defendant's alimony obligation, the Court must turn to [FL] sections 11-107 and 11-108. Pursuant to section 11-108, alimony is terminable upon three factors: death, remarriage of the recipient, or when necessary to avoid a harsh or inequitable result. Family Law Article section 11-107 provides that the Court may modify alimony as circumstances and justice require.

Subject to a few, very narrow exceptions, trial courts do not err when they don't do something that neither party asks them to do.

> living. Indefinite alimony, therefore, is unauthorized. The Trial Court's award to the contrary constitutes an abuse of discretion that requires reversal.

(emphasis omitted).

The argument begs the issue. As we have explained, the judgment of divorce established the factual predicate necessary to support an award of indefinite alimony, namely, that, even after Ms. Stewart made as much progress towards self-sufficiency as could reasonably be expected, the standard of living enjoyed by the parties "w[ould] be unconscionably disparate." FL § 11-106(c)(2). The issue before the trial court, therefore, was whether a modification of the alimony amount was appropriate in light of the interests of justice and the circumstances of the parties. *Ridgeway*, 171 Md. App. at 384. Mr. Stewart bears this burden of proof. *Langston v. Langston*, 366 Md. 490, 516 (2001).

In concluding that the evidence established that a modification of the amount of alimony was appropriate, the trial court considered the relevant FL § 11-106(b) factors. After reviewing each party's current financial situation, including monthly income, cash and real property assets, and monthly living expenses, and the terms of the settlement agreement relating to alimony, the court noted that it was obligated to consider "the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony," as well as "the financial needs and financial resources of each party." FL § 11-106(b)(9) and (11). In granting Mr.

Stewart's motion in part, the court made the following findings, all of which were supported by substantial evidence in the record:

> The court is satisfied that some modification of the defendant's monthly alimony payment is appropriate and necessary. The court finds further that the defendant's retirement in May of 2013 was, in fact, and indeed reasonable. Currently, the defendant has a monthly income of $5,430. The plaintiff has an income of $5,034 per month. Both parties ha[ve] savings and or cash assets that they can draw upon.
>
> The plaintiff was receiving $3,250 per month in alimony from the defendant. The plaintiff will now receive $1,535 per month from the defendant's retirement payments first. Thus, the plaintiff is now receiving $1,715 less a month from the retirement plan than she was from the alimony prior to the defendant's retirement. The court finds that the plaintiff's expenses were not decreased in proportion to her decreased income.
>
> Therefore, the court orders the defendant to pay to the plaintiff alimony in the amount of $1,715 per month beginning and commencing February, 2014.

The facts of this case are similar to those in *Ridgeway*, which also involved a former spouse's contention that his retirement should relieve him of the obligation to pay alimony altogether. Upholding the trial court's modifying, but not terminating, alimony, we stated:

> The court determined that, although appellant was properly entitled to a reduction in the amount of his monthly alimony payments, "some alimony continues to be due." Appellant has not persuaded us that the court's decision to reduce but not terminate alimony was an arbitrary exercise of discretion. We therefore affirm that decision.

171 Md. App. at 385. We reach the same conclusion.

II. The Award of Attorneys' Fees

At the conclusion of the hearing, the trial court awarded Ms. Stewart $10,000 for attorneys' fees and entered judgment in her favor in that amount. Specifically, the court stated:

> While this court is generally not inclined to award attorney's fees to either party, the court does find that the defendant, by failing to pay alimony since June, 2013, simpl[y] is in breach of the party-settlement agreement. As stated in the settlement agreement, the breaching party is to pay the non-breaching party's reasonable attorney's fees.
>
> * * * *
>
> [T]he court . . . finds that because the agreement was breached by the defendant, the plaintiff is entitled to an award of . . . attorney's fees. Therefore, the court will order the defendant to pay the plaintiff $10,000 in attorney's fees. That amount will also be reduced to a judgment against the defendant in favor of the plaintiff.

Mr. Stewart contends that the trial court erred when it awarded Ms. Stewart attorneys' fees. He asserts that the court failed to consider all of the factors required by FL § 11-110, which permits trial courts to award attorneys' fees in alimony proceedings.[4]

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[4]Section 11-110 states in pertinent part:

> (b) *Authority of court*. — At any point in a proceeding under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
> (c) *Required considerations*. — Before ordering the payment, the court shall consider:
> (1) the financial resources and financial needs of both parties; and

(continued...)

In particular, Mr. Stewart argues that the court failed to review his needs, along with other "key financial considerations."

FL § 11-110(c) certainly requires a court to consider the parties' resources and needs before awarding attorneys' fees. But Mr. Stewart's argument is unconvincing because the trial court based its decision on the fee-shifting provision in the parties' separation agreement, and not FL § 11-110.

A fee award based upon a contractual fee-shifting provision is "subject to a trial court's examination of the prevailing party's fee request for reasonableness." *Weichert Co. v. Faust*, 419 Md. 306, 317 (2011). Trial courts are given broad discretion in awarding attorneys' fees. *Malin v. Mininberg*, 153 Md. App. 358, 435 (2003). As this Court explained in *Malin v. Mininberg*, "we will not disturb an award [of attorneys' fees] unless the exercise of discretion was arbitrary or the judgment was clearly wrong." *Id*. at 436.

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[4](...continued)
(2) whether there was substantial justification for prosecuting or defending the proceeding.
(d) *Absence of substantial justification*. — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding.

* * * *

Returning to the case before us, the trial court's award was significantly less than what was requested by Ms. Stewart. The court also correctly noted that Mr. Stewart had no legal right whatsoever to unilaterally stop paying alimony. We see no error or abuse of discretion on the trial court's part.[5]

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

[5]Mr. Stewart argues that the court failed to take into account the fact that he prevailed, at least in part, on his petition to modify alimony. The argument is not convincing. The fee-shifting provision in the agreement pertains to actions to *enforce* the provisions of the agreement, not actions to *modify* those provisions.