

Circuit Court for Montgomery County
Case No. FL 119743

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 419

September Term, 2021

JANET AUSTEN

v.

FRANKLIN HERMAN

Berger,
Wells,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 12, 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 2015, the Circuit Court for Montgomery County granted Janet Austen, appellant, a judgment of absolute divorce from Franklin E. Herman, appellee. The court ordered Herman to pay \$2,500 a month in indefinite alimony.

In 2020, Herman filed a motion to terminate alimony, which the court granted. Austen filed this timely appeal. For the following reasons, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Austen and Herman were married in 1990. They are the parents of two adult children.

At the time of the divorce, in 2015, Austen was employed as a nurse practitioner, earning approximately \$90,000 per year. Herman was employed as a managing director for Fraunhofer USA and earned approximately \$244,000 per year. In addition to that position, Herman earned approximately \$60,000 providing consulting services through Strategic Services, Inc.

As noted above, the court ordered Herman to pay \$2,500 in indefinite alimony. In addition, the court granted Austen a monetary award of \$405,251. Pursuant to the court's order, the monetary award was satisfied by transferring that amount from Herman's retirement account, which then had a total value of approximately \$552,000, to a retirement account in Austen's name. The court ordered that the marital home be sold, with the net proceeds to be split evenly between the parties. Austen was granted attorney's fees in the amount of \$20,000.

In 2016, Austen withdrew \$390,000 from the retirement account that held the monetary award so that she could refinance the marital home in her own name. She used \$300,000 of those funds for the down payment and closing costs, and the remaining \$90,000 to satisfy tax liabilities resulting from the withdrawal.

In October 2020, in anticipation of his upcoming retirement, in February 2021, Herman filed a motion to terminate alimony. As grounds for the motion, Herman asserted that his post-retirement income would be substantially reduced from what it had been at the time of the divorce, and the parties' standard of living would no longer be unconscionably disparate. In response to the motion to terminate, Austen requested that alimony be either increased or continued "in some form."

The court held a modification hearing on April 26, 2021, at which both parties testified and introduced evidence regarding their finances. At that time, Herman was 71 years old and Austen was 66 years old.

Herman stated that, as of April 16, 2021, he was fully retired and had no plans to return to work. He had received his last paycheck on April 23, 2021. Herman introduced documentation from the Social Security Administration showing that his monthly benefit was \$3,924.70, less a standard Medicare premium of \$148.50. In addition to that income, Herman had just started to receive \$2,975 per month in required minimum distributions from his three retirement accounts, which, as of April 7, 2021, had a total value of \$789,664.83.

Herman remarried in 2016 and lived with his wife in Arizona. They jointly owned two homes: their primary residence and a second home in the mountains. The primary

residence was purchased in 2019 for \$336,400, using “a good bit” of \$300,000 in funds that his wife received from the sale of a home that she owned before she married Herman. According to Herman, the primary residence was worth approximately \$400,000. Herman estimated that the second home, which was purchased in 2016 for \$212,000, was worth approximately \$286,000. Herman submitted a Quicken report showing a combined total of \$100,113 in checking and savings accounts.

Herman’s wife did not work. Joint tax returns from 2016 through 2019 listed her occupation as “homemaker.” Herman stated that his wife had been diagnosed with a serious medical condition two years prior to the hearing and had undergone four surgical procedures in that time, including a procedure the month prior to the hearing. Herman testified that, because of his wife’s surgeries, they were unable to travel to their home in the mountains for a year and a half. Herman’s attorney attempted to elicit information regarding the nature of the surgeries, but the court cut off the line of questioning, stating that it was “beyond” what was necessary for the court to consider.

Austen remained employed as a nurse practitioner. She worked full-time at one urgent care clinic and part-time at a second clinic. Austen testified that she earned \$94,000 at her full-time job, and approximately \$20,000 at her part-time job. On cross-examination, however, Austen conceded that her end-of-year paystubs for 2020 showed earnings of \$128,222 from her full-time job, and \$24,795 from her part-time job.¹ Austen further

¹ Austen stated that her income was greater in 2020 due to an increase in pay related to the COVID-19 pandemic.

conceded that her tax returns showed total income of \$151,000 in 2018; and \$150,000 in 2019, not including alimony.

Each party introduced a financial statement detailing their monthly expenses, assets, and liabilities. Herman’s financial statement included his wife’s share of joint household expenses, automobile and health insurance costs, and personal expenses such as haircuts and manicures.²

Following the evidentiary portion of the hearing, the court announced its findings and rulings from the bench. The court found that Herman’s monthly income consisted of \$3,775.50 per month in social security benefits (after a deduction for Medicare), plus \$2,975 in required minimum distributions from his tax-deferred retirement accounts, for a total monthly income of \$6,750.50. The court determined that Herman had reasonable monthly expenses of approximately \$6,800, which included \$2,800 of his wife’s expenses. The court found that it was not unreasonable for Herman to provide financial support for his wife, noting that she was “very ill” and “not wealthy,” and “not able to work.”

The court found that, according to paystubs, Austen earned \$153,017 in 2020, and therefore found that her gross monthly income was \$12,751.42. The court accepted as accurate the income tax deductions of \$600 per month that Austen reported in her financial statement. The court also accepted as reasonable and accurate all expenses that Austen claimed on her financial statement, and added health insurance premiums that Austen had

² Austen asserts that Herman’s expenses included tuition and health insurance for his stepson. The record is devoid of any support for this contention.

testified to but had not listed, for a total of \$8,100 per month in expenses. Based on those findings, the court determined that Austen had a net surplus of \$4,051 per month.

The court found that Austen had total assets of \$628,412.32, which included her home (which Austen valued at \$550,000); a bank account with a balance of \$39,519.04; and her retirement account balance of \$38,893.28. The court subtracted Austen’s mortgage balance of \$299,000, and the accrued taxes that Austen listed on her financial statement and found that Austen had a net worth of \$321,256.63.³

In announcing its decision, the court stated:

[A]gainst this background of the finances of the parties - - the Court has to consider whether the facts and circumstances of the case justify this Court’s exercising its discretion to grant a modification of the alimony award[.] . . . And I recognize fully that there is still - - and there will remain - - a disparity in the incomes of the parties. . . .

[Austen] has an income that exceeds \$12,000 a month. Her expenses, every single expense can be covered, and she still has a savings, money that is left over after every single thing - - not just a little bit of money, but in excess of \$4,000. The fact that she chose not to invest that money or she chose not to make different decisions is not currently an issue for the Court to say, well, maybe things were unfair in 2015. We don’t relitigate that case. That is over.

[Herman] certainly does have a large retirement, all monies that were earned after the divorce. And that money is the money that he is now going to [be] drawing down to live off of, because he no longer has any money coming in. And so even if I take Mr. Herman’s stated expenses - - because I actually do find that the expenses that he had itemized that would include costs associated with his current wife are his expenses. And if I have that at \$6,800, he is still going to be

³ The court made no express findings regarding Herman’s net worth. According to his financial statement, Herman assessed his net worth at approximately \$1.3 million.

shy if we have him just on the social security and the mandatory distribution - - he is still barely going to be able to cover that. He's got to take the money out of his retirement.

Under these circumstances, I just can't find that it would be reasonable for [Herman] to have to continue paying alimony. It was \$2,500, but [Austen's] financial situation is not at all a bleak one. She now makes significantly more money per month than [Herman] is making.

For those reasons, the Court will grant [Herman's] request to terminate alimony, and the Court will deny [Austen's] request to increase alimony in this case.

On May 5, 2021, the court issued a written order consistent with its oral ruling. Austen noted a timely appeal from that order.

DISCUSSION

In a case such as this, which has been tried without a jury, we “review the case on both the law and the evidence.” Md. Rule 8-131(c). We “give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” *Id.* See also *Keys v. Keys*, 93 Md. App. 677, 688 (1992) (“[E]specially in the arena of marital disputes where notoriously the parties are not in agreement as to the facts, . . . we must be cognizant of the [trial] court's position to assess the credibility and demeanor of each witness.”)

On appeal from a decision regarding alimony “we ‘defer[] to the findings and judgments of the trial court[.]’” *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383 (2006) (quoting *Simonds v. Simonds*, 165 Md. App. 591, 606 n. 4 (2005) (additional citation omitted)). “We will not disturb an alimony determination on appeal ‘unless the trial court's judgment is clearly wrong or an arbitrary use of discretion.’” *Id.* at 383-84 (quoting *Blaine v. Blaine*, 97 Md. App. 689, 698 (1993)). “A trial court's findings are ‘not clearly

erroneous if there is competent or material evidence in the record to support the court’s conclusion.” *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)).

“Upon a proper petition, the court may modify an order for alimony ‘at any time if there has been shown a material change in circumstances that justify the action.’” *Ridgeway*, 171 Md. App. at 384 (quoting *Lieberman v. Lieberman*, 81 Md. App. 575, 595, (1990)). *See also* Md. Code (1984, 2019 Repl. Vol), Family Law Article (“FL”) § 11-107(b) (modification of the amount of an alimony award is permitted on the petition of either party “as circumstances and justice require.”). The party requesting modification “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.” *Ridgeway*, 171 Md. App. at 384 (quoting *Langston v. Langston*, 366 Md. 490, 516 (2001)). Termination of alimony is permitted “if the court finds that termination is necessary to avoid a harsh and inequitable result.” FL § 11–108.

“The presence of a ‘harsh and inequitable result’ is not an objective, absolute standard; rather, it is a subjective classification, most appropriately determined by a trial court judge in whose judgment the exercise of sound discretion in such matters is reposed.” *Blaine v. Blaine*, 97 Md. App. 689, 706 (1993), *aff’d* 336 Md. 49 (1994). The court must “examine facts and circumstances to determine whether harsh and inequitable results exist.” *Bradley v. Bradley*, 214 Md. App. 229, 236-37 (2013).

We have carefully reviewed the supplement to Herman’s informal brief and discern the following issues.⁴ First, Austen contends that the amount of the 2015 alimony award was insufficient to address an unconscionable disparity in the parties’ incomes. She asserts that she has to work more than one job to cover monthly expenses and make repairs to her home, and that she has no money left over to save for retirement. Austen further claims that the 2015 monetary award was based on incorrect information regarding her assets. These contentions are not within the scope of our review, which, in the context of this appeal, is limited to the court’s decision to terminate alimony. Therefore, we do not address them. *See Ridgeway*, 171 Md. App. at 384 (“[t]he doctrine of res judicata applies in the modification of alimony . . . and the [appellate] court may not re-litigate matters that were or should have been considered at the time of the initial award.”) (quoting *Blaine*, 97 Md. App. at 702).

Next, Austen challenges the court’s factual findings regarding the parties’ respective incomes, expenses, and tax liabilities.⁵ Specifically, she contends that the court’s findings

⁴ Herman requests that we strike portions of Austen’s brief, pursuant to Maryland Rule 8-504(a)(1), because Austen includes assertions of fact that were not presented to the court at the 2021 modification hearing. We find it unnecessary to strike any portion of Austen’s brief, but note that, in addressing the issue on appeal, we rely solely on the transcript of the April 2021 modification hearing and the documents that the court admitted into evidence. Moreover, we do not consider any material in the record extract that was not admitted into evidence at the modification hearing. *See Cochran v. Griffith Energy Svc, Inc.*, 191 Md. App. 625, 663 (2010) (stating that “an appellate court must confine its review to the evidence actually before the trial court when it reached its decision.”), *cert. denied*, 415 Md. 115 (2010).

⁵ We address only those challenged findings that are material to the court’s decision to terminate alimony.

regarding Herman’s pre- and post-retirement income were erroneous. She further asserts that the court erred in finding that Herman’s monthly expenses were accurate and/or reasonable, including the amount he claimed for federal and state taxes, insurance premiums and deductibles, utilities, vacations, and gifts. Austen argues that the court erred in determining that it was reasonable for Herman to claim expenses for his wife, because it had not affirmatively been proven that she was not able to work. Finally, Austen maintains that the court’s finding regarding her gross monthly income was erroneous and that the court relied on incorrect tax information to determine her net monthly income.

We discern no clear error in the court’s factual findings. The findings regarding Herman’s income are consistent with Herman’s testimony and the documentation that was admitted into evidence.⁶ Austen did not introduce any evidence to the contrary. The court’s finding that Austen’s gross monthly income was \$12,751 is entirely consistent with her December 2020 paystubs, which, according to Austen’s own testimony, showed total earnings of \$153,017.

Despite Austen’s challenges to the accuracy of various monthly expenses that Herman claimed, the court expressly found the evidence presented by Herman to be credible.⁷ Our review of the record reveals no reason to disturb those findings. Moreover,

⁶ In her reply brief, Austen contends that the required minimum distribution from Herman’s retirement accounts is \$10,590 per month, and not \$2,975, as found by the court. Austen points to an IRA worksheet that was admitted into evidence as Defendant’s Exhibit 39. According to that document, however, the required minimum distribution from one of Herman’s three retirement accounts is \$10,590 per year, not per month.

⁷ We note that the court discounted Herman’s extraordinary medical expenses.

we discern no clear error in the court’s findings regarding the reasonableness of Herman’s expenses, including the finding that it was reasonable for Herman to pay his wife’s living expenses. Even without detailed testimony regarding the nature of his wife’s various surgeries, we cannot say that it was clearly erroneous or an arbitrary use of discretion for the court to consider Herman’s wife’s expenses in determining Herman’s financial situation, especially in light of joint tax returns showing that, since their marriage in 2016, Herman’s wife was not employed outside the home.

Austen asserts that the court erred in applying the income tax deductions that she claimed on her financial statement which, according to Austen, was a projection of her income, expenses, and tax liabilities at some unspecified date in the future, when she would be retired. Austen maintains that the evidence included a “pre-retirement” financial statement in which she claimed monthly income tax deductions of \$4,008. According to the record, however, Austen introduced only one financial statement, which the court noted was filed on February 19, 2021, at docket entry number 148, and shows \$600 per month in state and federal income tax deductions. Austen verbally confirmed that there were no changes or amendments to the information in the financial statement in evidence and did not explain to the court that the deductions or any other information on her financial statement was not current. We cannot conclude that the court erred in relying on that evidence to calculate Austen’s net monthly income.

Finally, Austen asserts that the court violated the Code of Judicial Conduct by failing to apply the law fairly and impartially. As this Court is not the proper forum to consider such claims, we do not address them.⁸

In sum, based on our review of the evidence presented to the court, we perceive no error in the findings upon which the court based its decision to terminate alimony. There was competent and material evidence in the record to support the court’s finding that, following his retirement, Herman’s monthly income was barely enough to cover his monthly expenses, while Austen’s monthly income exceeded her claimed expenses by thousands of dollars. We further conclude that, under these facts and circumstances, the termination of alimony was not an arbitrary use of the court’s discretion.

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

⁸ Austen also appears to argue that the court erred in denying her petition for an order holding Herman in contempt for an alleged discovery violation. We do not address this contention, because “a party that files a petition for constructive civil contempt does not have a right to appeal the trial court’s denial of that petition.” *Pack Shack, Inc. v. Howard Co.*, 371 Md. 243, 246 (2002).