

Circuit Court for Prince George's County
Case No.: CAS1509572

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 456

September Term, 2021

JESSICA SHAW

v.

DAVEREN DURRELL ANTHONY

Reed,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 23, 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.

Appellant, Jessica Shaw (“Mother”), appeals the Circuit Court for Prince George’s County’s modification of Daveren Anthony’s (“Father”) child support obligation. Mother presents the following questions for our review:

1. Did the circuit court err in retroactively reducing child support arrears for payments that accrued during the three years prior to the filing of the motion to modify, contrary to the provisions of [Md. Code (1984, 2019 Repl. Vol.), § 12-104 of the Family Law Article (“FL”)]?
2. Did the circuit court abuse its discretion by awarding attorney fees to [Father]?

For the reasons that follow, we reverse and remand on both issues.

BACKGROUND

This appeal arises from the court’s second modification of Father’s child support obligation to Mother. The parties were never married and are parents to two minor children, born in 2010 and 2013. In 2015, Mother filed a complaint for child support, and the court ordered Father to pay \$1,070 per month in child support to Mother.

In July of 2016, Father filed two motions to modify child support, citing his substantial decrease in income and Mother’s substantial increase in income as grounds.¹ For reasons unclear from the record, no hearing was held at that time. In February of 2018, Mother filed a petition for contempt, wherein she alleged that Father had paid only \$437.48 in child support since the 2015 order. In April of 2018, the Prince George’s County Office of Child Support filed a motion to modify child support citing Father’s change of income

¹ Although Father filed two separate motions to modify child support on July 6 and July 7, 2016, it appears that the only difference between those motions is a revision to one child’s date of birth.

as a material change of circumstances warranting modification of the child support obligation.²

On September 20, 2018, the court held a hearing on the various motions for modification and on Mother’s motion for contempt. Father testified that he had filed his motion for modification because he “wasn’t making nearly as much as [he] was” when the court issued its 2015 child support order. Mother testified that she had no income and had been unemployed for “a year and some months, going on two years.” Mother had married by that time and testified that her husband was providing for her and the children.

In October of 2018, the court entered an order modifying the 2015 order. That order adjusted Father’s child support obligation downward to \$622 per month. Additionally, Father was ordered to pay \$150 per month towards arrearages, which the court determined to be \$32,108.75 at that time.

Nearly a year later, on September 5, 2019, Father filed another motion to further modify child support citing a “good faith belief that [Mother] is working a full time job without reporting income change.” Father thereafter filed a motion for contempt, and Mother and Father both filed motions to compel discovery responses, resulting, in part, in the court’s issuance of an order requiring Mother to produce her tax records.

The court held hearings on February 23, 2021, April 9, 2021, and April 23, 2021. The court determined that Mother was “not truthful” during the 2018 hearing and

² In 2021, the court explained that, “[Father] filed that [motion for] modification in 2016, and in 2018 the Office of Child Support Enforcement filed a modification, a motion for modification two years later because he still hadn’t had a hearing on his 2016 petition.”

retroactively modified Father’s child support obligation dating back to February of 2016.

Specifically, the court ordered that:

[T]he office of Child Support Enforcement (OCSE) shall recalculate the [Father’s] arrears based upon the child support guidelines for the following time periods reflected in the attached guidelines: (a) For February 1, 2016 to September 30, 2018, Father’s ongoing child support [for] the two minor children is \$900.00 per month. (b) For October 1, 2018 to September 30, 2019, Father[’]s ongoing child support for the two minor children is \$461.00 per month. (c) For October 1, 2019 onward, Father’s ongoing child support for the two minor children is \$410.00 per month, and it is further,

ORDERED, that Father shall pay the sum of one hundred dollars (\$100) per month towards the arrearages beginning June 1, 2021[. . .]

The court further ordered Mother to pay Father’s attorney’s fees associated with his motions for contempt and to compel. Mother timely appealed.

STANDARD OF REVIEW

The decision whether to modify an award of child support “is left to the sound discretion of the trial court, so long as the discretion was not arbitrarily used or based on incorrect legal principles.” *Walker v. Grow*, 170 Md. App. 255, 266 (2006) (quotation marks omitted) (quoting *Tucker v. Tucker*, 156 Md. App. 484, 492 (2004)). Moreover, “[d]ecisions concerning the award of counsel fees rest solely in the discretion of the trial judge.” *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citing *Jackson v. Jackson*, 272 Md. 107, 111-12 (1974)). Accordingly, “[a]n award of attorney’s fees will not be reversed unless a court’s discretion was exercised arbitrarily or the judgment was clearly wrong.” *Id.* (citing *Danzinger v. Danzinger*, 208 Md. 469, 475 (1955)).

DISCUSSION

Mother contends that the court erred when it retroactively modified Father’s child support obligation to February of 2016 because FL § 12-104 provides that “the Court may not retroactively modify a child support award prior to the date on which the motion for modification was filed.” Additionally, Mother asserts that attorneys’ fees were improperly awarded to Father because he spent significant “effort to obtain information concerning [] Mother’s income during 2016 through 2018, a period prior to the request for modification that was at issue in this suit.”

Father responds that the judgment should be affirmed, relying primarily on the court’s revisory power set forth in Md. Code (1973, 2020 Repl. Vol.), § 6-408 of the Courts and Judicial Proceedings Article (“CJP”). Further, Father maintains that attorneys’ fees associated with his motions for contempt and to compel were properly awarded to him given Mother’s failure to provide discovery prior to the court order.

Section § 12-104(a) of the Family Law Article provides that the court is permitted to “modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance.” A change is material when it is both “relevant to the level of support a child is actually receiving or entitled to receive” and “of sufficient magnitude to justify judicial modification of the support order.” *Wheeler v. State*, 160 Md. App. 363, 372 (2004) (quoting *Wills v. Jones*, 340 Md. 480, 488-89 (1995)). FL § 12-104(b), however, provides that the court “may not retroactively modify a child support award prior to the date of the filing of the motion for modification.”

As this Court has previously stated, “Maryland law does not permit a court to modify a child support award prior to the date of the filing of a motion for modification.” *Ley v. Forman*, 144 Md. App. 658, 677 (2002) (citing FL § 12-104). We have explained that FL § 12-104 “specifically limits retroactive modification of a child support award to the date of filing for a modification.” *Petitto v. Petitto*, 147 Md. App. 280, 309 (2002). It is therefore “within the discretion of the trial court to determine whether and how far retroactively to apply a modification of a party’s child support obligation up to the date of the filing of the petition for said modification.” *Ley*, 144 Md. App. at 677.

Here, Father’s relevant motion to modify child support was filed in September of 2019. Nonetheless, the court retroactively modified Father’s child support to February of 2016, over three years prior to the filing of his motion. Specifically, the court explained that, on “an equitable basis,” it was going to retroactively modify Father’s child support payments:

So, I agree with [Father] that on an equitable basis, the arrears should be adjusted because there was fraud in [Mother’s] reporting of her income and that the arrearages should reflect what the parties’ actual income was at that time.

And it should go back to his initial -- to [Father’s] initial filing on July 7th of 2016.

This Court, however, is not aware of any authority that permits the court to modify Father’s child support to a date preceding his pending motion for modification, and Father does not cite to any. Indeed, this Court has consistently made clear that the court’s authority to retroactively modify child support does not extend beyond the date that the

motion for modification is filed. *Petitto*, 147 Md. App. at 309 (holding, where a motion for modification had been filed a year prior to a then-current motion for modification, that “the court erred in making the modification retroactive to a date that preceded the filing of the current request for modification”); *Dunlap v. Fiorenza*, 128 Md. App. 357, 371 (1999) (holding that where the motion to modify child support was filed September 23, 1997, “[a]ccording to the plain language of the statute, the court could not modify support for the time period prior to September 23, 1997”); *Fainberg v. Rosen*, 12 Md. App. 359, 364 (1971) (holding that, “nothing in the statutes or in the cases, however, [] indicates that the equity court is empowered to modify a decree for child support by retroactively increasing the amounts due thereunder to cover a period of time prior to the date the petition for modification was filed”).

Because the court found that Mother was “not truthful” when she testified at the 2018 hearing, Father argues that the court properly modified the child support order due to fraud. Specifically, Father relies on the court’s revisory power, as set forth in CJP § 6-408, which permits a court to exercise its revisory power more than 30 days after a judgment is entered “only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk’s office to perform a duty required by statute or rule.” However, “it has long been black letter law in Maryland that the type of fraud which is required to authorize the reopening of an enrolled judgment is extrinsic fraud and not fraud which is intrinsic to the trial itself.” *Hresko v. Hresko*, 83 Md. App. 228, 231 (1990) (citing *Schneider v. Schneider*, 35 Md. App. 230, 238 (1977)). This Court has made clear that intrinsic fraud

is fraud that “occurs within the case itself . . . , for example, [when] a witness perjures himself or a party offers a forged instrument into evidence.” *Das v. Das*, 133 Md. App. 1, 18 (2000) (citing *Tandra S. v. Tyrone W.*, 336 Md. 303, 316 (1994)). Here, the court found that Mother committed fraud, specifically finding that she was “not truthful” about her income during the 2018 hearing. This type of intrinsic fraud does not form a basis for modification under the court’s revisory power. *Hresko*, 83 Md. App. at 231. Father’s reliance upon CJP § 6-408 is therefore misplaced.³

Further, we agree with Mother that to the extent Father’s attorneys’ fees award was based upon the incorrect legal premise that Father’s child support could be modified prior to September of 2019, that award was an abuse of discretion. *Guidash v. Tome*, 211 Md. App. 725, 735 (2013) (“A court can abuse its discretion when it makes a decision based on an incorrect legal premise[.]”) Although the court awarded Father attorneys’ fees associated only with his “Contempt Motion and related Motions to Compel on or before August 1, 2021[.]” the record indicates that these motions relied, at least in part, on discovering information prior to September of 2019. Among the various documents sought in Father’s motion to compel were tax returns “dating back to 2012[.]” employment records “dating back to 2012[.]” and paystubs “dating back to 2015.” Moreover, that motion was

³ Although the court did not specifically cite to CJP § 6-408 in reaching its decision to modify Father’s child support due to Mother’s fraud, this Court’s broad holding in *Hresko* makes clear that it prohibits reopening judgments due to intrinsic fraud generally, and is not limited to fraud under any given section. 83 Md. App. at 231.

eventually granted by the court, resulting in an order for Mother to produce tax records dating back to 2008.

In conclusion, the court erred in retroactively modifying Father’s child support obligation to a date preceding the filing of his September 5, 2019 motion for modification, and in awarding Father attorneys’ fees based in part on an incorrect legal premise. We shall therefore reverse the court’s judgment, and remand for further proceedings consistent with this opinion.

**JUDGMENT REVERSED AND REMANDED
TO THE CIRCUIT COURT FOR PRINCE
GEORGE’S COUNTY FOR FURTHER
PROCEEDINGS CONSISTENT WITH THIS
OPINION. COSTS TO BE PAID BY
APPELLEE.**