Circuit Court for Montgomery County
Case No. 35216FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 669

September Term, 2018

ISHTIAQ MALIK

v.

ZAHIRA MALIK

Wright,
Friedman,
Beachley,

JJ.

Opinion by Friedman, J.

Filed: November 7, 2019

In 2006, the Circuit Court for Montgomery County entered a judgment of absolute divorce in favor of appellant, Ishtiaq Malik ("Husband"), and ordered him to pay appellee, Zahira Malik ("Wife"), indefinite alimony in the amount of $2,500 per month and child support in the amount of $3,016 per month. In 2016, Husband moved to modify his alimony and child support obligations, citing a material change of circumstances. Following a hearing, the circuit court declined to terminate Husband's alimony obligation but reduced it to $1,300 per month. The court also reduced his child support obligation to $1,550 per month.

Husband, pro se, appealed the circuit court's order and raises the following questions for our consideration, which we have rephrased and consolidated:

> 1. Did the circuit court err in determining that Husband was voluntarily impoverished and imputing to him an annual income of $125,000?
>
> 2. Did the circuit court err by conducting the hearing in Husband's absence using video equipment that was not fully functional, so he was unable to participate fully in the hearing?

For the reasons that follow, we affirm.

BACKGROUND

Husband and Wife, both originally from Pakistan, were married in Maryland in 1997. Their one child, S., was born in 2002.

Husband and Wife divorced in May 2006. In its divorce decree, the circuit court ordered Husband, who was then earning approximately $300,000 a year, to pay Wife, who was then earning approximately $45,000 a year, indefinite alimony in the amount of $2,500 per month. The court reasoned that Wife, who had dropped out of college to support

Husband after they married, would never reach the level of income Husband had already attained as a nuclear cardiologist. The court also granted Wife sole physical and legal custody of S. and awarded her child support in the amount of $3,016 per month. From that date until December 2014, Husband paid his child support and alimony obligation.

After becoming unemployed, however, Husband ceased making alimony payments in December 2014 and child support payments in early 2015. In 2016, Husband moved to modify the awards of child support and alimony, asserting that "a material change of circumstances has arisen such that a modification ... has become necessary."

The court scheduled a hearing on the motions, but Husband, who was then living in Pakistan, was unable to return to the U.S. because his right to renew his passport had been revoked as a result of his child support arrearage. He requested to appear at the hearing by telephone. The court granted that request and heard the matter on March 28, 2018. Husband, represented by counsel, appeared at the hearing by two-way video conference. Wife appeared pro se.

Husband testified that he had trained in the field of nuclear cardiology and had practiced as a physician in the U.S. In 2010, the U.S. Department of Justice (DOJ) opened an investigation into his Medicare and Medicaid billing practices and found that he knowingly submitted false claims for medical services between 2006 and 2010.

Facing a $17 million judgment, Husband entered into a settlement agreement with the DOJ in 2015, which required him to abandon all Medicare payments accrued but not yet received and to pay to the government: $200,000; the net proceeds of the sale of certain real property; and yearly payments of between 33.33 and 50% of his total gross income

through 2019. The U.S. Department of Health and Human Services also imposed a sanction excluding Husband from participating in federal health care programs, such as Medicare and Medicaid, for 17 years.

The day after signing the settlement agreement, Husband notified Wife he could no longer pay alimony and child support.

Unable to accept patients with insurance, Husband left the U.S. for Pakistan in February 2015. His U.S. medical licenses, which had been suspended in Maryland and Washington, D.C., expired. Once in Pakistan, he set up a cardiology practice, funded by his savings and contributions from his second wife's family. That business failed, so he moved to a hospital-based practice. After a key piece of his medical equipment was damaged, which prevented him from performing necessary procedures, that endeavor failed as well.

After applying for numerous medical positions, Husband obtained employment at an organ transportation company in 2016. But when the Pakistani equivalent of the Department of Health and Human Services discovered he had been sanctioned in the U.S., he was asked to resign after only two months' employment. He was then unable to procure any employment in the medical field, despite maintaining an active license to practice in Pakistan. He acknowledged that he could open his own private practice as an internist but stated he did not have the requisite start-up money.

Husband moved to the United Arab Emirates in 2016, but, unable to work there, returned to Pakistan in 2017 to attempt to re-take his board examinations and become re-certified in his field. If successful, he was confident he could find work in the medical field

in Canada, Europe, or the Middle East. His exam was scheduled for April 27, 2018, in Annapolis, Maryland, as there was nowhere in Pakistan he could take the exam. Unable to renew his U.S. passport, however, he could not travel to the U.S. on his Pakistani passport.

Husband submitted a bank statement showing a March 2018 final balance of $0. He claimed he had been meeting expenses in Pakistan by selling his retirement plan for $40,000 and receiving significant help from his in-laws. His 2014 U.S. tax return showed an adjusted gross income of $196,328, and his tax returns for 2015 and 2016 each showed losses of $1.2 million.

Wife testified that she was employed by Bank of America as a quality assurance specialist, earning $82,500 per year, a promotion she had received in October 2017.[1] Although the statement from her joint checking/savings account showed a February 7, 2018 balance of $6,693.55, Wife stated that she "probably ha[d] about $25" in her checking and savings accounts. She also had a little over $22,000 in an investment account and approximately $130,000 in a 401(k).

After Husband left the country and ceased alimony and child support payments in 2015, Wife was unable to pay the mortgage on the townhouse she had bought in 2011. Wife therefore rented out the house and moved with S. into a one-bedroom apartment. Wife also had to remove S. from her private school, and S. was unable to attend summer camp or engage in other extracurricular activities. Wife said that she and S. were limited in their activities because they were "living not even paycheck to paycheck." She detailed that

[1] Prior to the promotion, she earned approximately $65,000 per year.

"[w]e put everything on hold completely unless it's an extreme need, emergency or anything, that's the only time we actually go out and spend money." Husband's behavior, she said, had "taken a very serious toll" on her and S.

In closing, Husband asked the court to modify his child support obligation based on his complete lack of income. He further requested that the court terminate alimony or modify it to $1 per month, which would permit Wife to ask for a further modification if Husband "digs himself out of this hole" and begins to earn a salary.

The court entered a written opinion and order on April 27, 2018. The court found termination of alimony to be inappropriate because Wife's monthly expenses had increased since the divorce, and she "continues to run at a deficit." The court was "not persuaded" by, and "suspect of," Husband's claims of inability to pay, as his 2016 financial statement showed assets of $573,342.83 and monthly expenses of only $1,122. In addition, the court found that Husband had at least one undisclosed bank account in Pakistan into which he was depositing large sums of money withdrawn from the single account disclosed to the court, which showed a near $0 balance just prior to the hearing. Although it had an "incomplete picture" of Husband's finances, the court found that he had "considerable resources at his disposal," none of which were being used to pay alimony or child support to Wife.

In determining whether Husband was entitled to a reduction in alimony, the court was persuaded that Husband had suffered a financial setback and that Wife's income had increased by a considerable amount since the imposition of the alimony award. Based on that material change, the court found that a modification of alimony was appropriate and

reduced Husband's alimony obligation to $1,300 per month, retroactive to August 3, 2016. The court calculated Husband's alimony arrearage to be $79,700.

As to child support, the court determined that Husband's acts that resulted in his liability to the U.S. government were not committed with the intent of becoming un- or under-employed. Nonetheless, in light of his good health, high level of education and experience, and lack of any evidence documenting a job search, the court found that he had voluntarily impoverished himself. Despite his stated "inability to obtain a specific desired job position to generate income to pay child support," he was "not in any way absolve[d] from obtaining any position to support his child."

The court went on to determine the amount of potential annual income to impute to Husband and settled on $125,000, based on his education, training, and ability to leave Pakistan to find employment. Husband's assertion that he could not find "employment *somewhere* doing *something* [did] not resonate with the Court."[2]

The court reduced Husband's monthly child support obligation to $1,550, retroactive to July 7, 2016. The court found Husband was $88,304 in arrears on his child support payments. In total, the court found Husband owed Wife $168,004.

[2] Indeed, at the hearing, the court asked Husband's attorney, "Can you also tell me why he couldn't do something else in Pakistan that doesn't relate, some, so that he has some income because he's not disabled that I can tell and he has advanced degrees. He could tutor at a local university, right? He would work, maybe not as, as a doctor, but certainly at some other level, correct? Is there anything stopping him from that?" Counsel acknowledged there was not.

DISCUSSION

I. VOLUNTARY IMPOVERISHMENT AND IMPUTATION OF INCOME

Husband contends that the circuit court erred in finding that he was voluntarily impoverished and imputing an annual income of $125,000 to him when modifying his child support and alimony obligations. In his view, the court had before it "ample evidence" that he continued to make reasonable efforts to obtain employment, but, despite those efforts, he was unable to generate income. Therefore, he had not made a conscious choice to render himself without resources, and the court should not have found him to be voluntarily impoverished. He further contends that the amount the court imputed to him as income was based on "pure speculation" and drawn "out of thin air."

A. Child Support

We review for clear error the circuit court's factual findings on the issue of a parent's voluntary impoverishment for child support purposes and its ultimate ruling for an abuse of discretion. *Sieglein v. Schmidt*, 224 Md. App. 222, 249 (2015). If competent evidence supports the court's factual findings, they are not clearly erroneous. *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016). And, "the amount of a child support award is governed by the circumstances of the case and is entrusted to the sound discretion of the trial [court], whose determination should not be disturbed unless [it] has acted arbitrarily in administering [its] discretion or was clearly wrong." *Gates v. Gates*, 83 Md. App. 661, 663 (1990).

"Title 12 of the Family Law Article of the Maryland Code [("FL")] sets forth a comprehensive scheme with regard to parental child support[,]" and considers the income of each parent. *Durkee v. Durkee*, 144 Md. App. 161, 182 (2002). "Income" is defined as:

> (1) actual income of a parent, if the parent is employed to full capacity; or
>
> (2) potential income of a parent, if the parent is voluntarily impoverished.

FL § 12-201(i).

Although "voluntarily impoverished" is not statutorily defined, "for purposes of the child support guidelines, a parent shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993). "[A] parent who has become impoverished by choice is 'voluntarily impoverished' regardless of the parent's intent regarding his or her child support obligations." *Wills v. Jones*, 340 Md. 480, 494 (1995).

The factors for a circuit court to consider when determining whether a parent is voluntarily impoverished include:

> (1) his or her current physical condition;
>
> (2) his or her respective level of education;
>
> (3) the timing of any change in employment or financial circumstances relative to the divorce proceedings;
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> (4) the relationship of the parties prior to the divorce proceedings;
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> (5) his or her efforts to find and retain employment;

> (6) his or her efforts to secure retraining if that is needed;
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> (7) whether he or she has ever withheld support;
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> (8) his or her past work history;
>
> (9) the area in which the parties live and the status of the job market there; and
>
> (10) any other considerations presented by either party.

Sieglein v. Schmidt, 447 Md. 647, 671-72 (2016).

After the court finds that a parent is voluntarily impoverished, it must determine the amount of potential income to impute to the parent. *Dillon v. Miller*, 234 Md. App. 309, 319-20 (2017). The potential income is then used to calculate how much child support the voluntarily impoverished parent must pay. *Id*. at 320; *see also* FL § 12-204(b)(1) ("[I]f a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income.").

Potential income is defined as "income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." FL § 12-201(m). Factors the court should consider in calculating a parent's potential income include:

> (1) age[;]
>
> (2) mental and physical condition[;]
>
> (3) assets[;]
>
> (4) educational background, special training, or skills[;]

> (5) prior earnings[;]
>
> (6) efforts to find and retain employment[;]
>
> (7) the status of the job market in the area where the parent lives[;]
>
> (8) actual income from any source[; and]
>
> (9) any other factor bearing on the parent's ability to obtain funds for child support.

Petitto v. Petitto, 147 Md. App. 280, 317-18 (2002). Although "any determination of 'potential income' must necessarily involve a degree of speculation," *Reuter v. Reuter*, 102 Md. App. 212, 223 (1994), if the potential income amount calculated by the circuit court is "realistic, and the figure is not so unreasonably high or low as to amount to an abuse of discretion, the court's ruling may not be disturbed." *Petitto*, 147 Md. App. at 318 (cleaned up).

Here, the record reflects that the circuit court carefully considered the evidence and each factor relevant to the issue of Husband's voluntary impoverishment. Weighing in favor of voluntary impoverishment, the court observed that Husband: appeared healthy; is highly educated, skilled, and intelligent, with extensive experience in medicine that can be applied in a variety of settings; had moved on to another relationship prior to his divorce from Wife and had had little to no interaction with Wife or S. since moving to Pakistan; had made little to no effort to seek employment in any capacity; had made no effort to secure retraining or certification to enable him to practice medicine; had not completed the requirements to remove himself from probation imposed by the State of Maryland; had not

paid child support or alimony and had no intention to do so until he believed he could; had not even made a partial payment when he was employed; had not parlayed his education into another successful business; and admitted he could work in Pakistan as an internist if he can access the start-up funds, which he appeared to have. The court also noted that Husband's apparent inability to obtain a specific desired job "does not in any way absolve him from obtaining any position to support his child." We are satisfied that the court's finding of voluntary impoverishment was adequately supported in the record.

The court then moved on to determinate Husband's potential income, again setting forth its findings by reference to the required factors. The testimony showed that Husband, who was 55 years old at the time of the hearing, is healthy, highly educated, and capable. His documented salary of $300,000 in 2006 had "precipitously risen" between then and 2010, when Wife believed he was earning $5 million per year.[3] His 2016 financial statement showed assets over $573,000, including $455,235 in investments, and his monthly expenses were limited to less than $2,000, due, in part, to his in-laws providing almost all support for his current wife and other two children. Despite his claim of a $0 balance in his one documented bank account, large amounts of cash had flowed into and out of that account, and the court found that Husband had "substantial assets" that he had not disclosed. Finally, the court considered Husband's admission that he could practice as a physician even without seeking re-certification in his specialized field. Based on the

[3] The court was entitled to consider Husband's prior employment, income, and education in calculating his potential income. *Sczudlo v. Berry*, 129 Md. App. 529, 544 (1999).

evidence, the circuit court's projection that Husband had the capacity to earn $125,000 per year was realistic despite his recent setbacks. Husband's prior high salary, continued ability to practice medicine, and possibility of re-certification in his specialty further supported the court's finding. Because ample evidence supported the circuit court's income determination, we conclude that the imputed figure was reasonable. Thus, we will not disturb the court's decision.

B. Alimony

Husband appears to make the same arguments about the court's findings of voluntary impoverishment and imputation of income when challenging the court's modification of his alimony obligation. Unlike the child support statute, FL § 12-204(b), which instructs a circuit court to consider the potential income of a voluntarily impoverished parent in calculating the amount of support, the alimony modification statute more broadly directs the court to "modify the amount of alimony awarded as circumstances and justice require." FL § 11-107(b). "In considering a petition for modification, a trial court has discretion to determine the extent and amount of alimony, . . . and must consider specific factors in exercising its discretion." *Baer v. Baer*, 128 Md. App. 469, 484 (1999) (citing FL § 11–106). Section 11–106(b) lists "all the factors" a court is required to consider for "a fair and equitable award," including "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," FL § 11-106(b)(9), and "the financial needs and financial resources of each party, including … all income and assets[.]" FL § 11-106(b)(11)(i). Therefore, when a court finds that a party is voluntarily impoverished, the court should consider that party's potential income

in determining an alimony award. *Digges v. Digges,* 126 Md. App. 361, 381-82 (1999); *see also Reynolds v. Reynolds,* 216 Md. App. 205, 220 (2014) ("Most, if not all, of the voluntary impoverishment factors will be relevant to alimony.").

Because we leave undisturbed the circuit court's findings that Husband was voluntarily impoverished and had a potential income of $125,000 per year as pertinent to his child support obligation, we hold that the court did not abuse its discretion when it used those findings to evaluate the amount of his alimony obligation.[4]

II. VIDEO CONFERENCING

Husband also asserts that the circuit court erred in conducting the modification hearing by two-way video conference with equipment that was not fully functional. He argues that the court's procedure was contrary to the Maryland Rules and did not afford him full participation in the hearing. Husband's concerns are not borne out by the record.

In January 2018, Husband filed a motion to appear at the hearing by telephone or for the court to allow him to renew his U.S. passport so he could attend in person.[5] The

[4] Husband assigns "gross error" to the court's finding that Wife's "checking account usually carries a $25.00 balance until she receives the next paycheck." He claims this is "simply not true" based on Wife's testimony. Wife testified that at the time of the hearing, she "probably ha[d] about $25" in her checking and savings account. She also said that she and S. were "living not even paycheck to paycheck," as her "checking account probably has $25 and … I'm not going to get paid for another two, three days." Thus, the court's statement was supported by the record. But even if the court's finding was inaccurate, it would not constitute "gross error." The statement was only a small part of the totality of the court's reasoning when it determined that a termination of alimony was not appropriate and that Wife "continues to run at a deficit considering her monthly income and expenses" as "the sole financial provider of the Parties' minor child."

[5] Maryland Rule 2-513 (now deleted) governed testimony taken by telephone when the court conducted the modification hearing. While that rule only applied to telephonic

motion requested that his testimony "be transmitted either through a speaker phone or video phone, depending on the Court's availability of electronic communication." The court granted his motion, and Husband appeared at the hearing by two-way video conferencing.

As the Court of Appeals noted in *Attorney Grievance Comm'n of Md. v. Agbaje*, 438 Md. 695, 719 (2014), "to the extent [the witness] was unwilling or unable to appear personally, allowing her to testify over real-time video conference constituted a reasonable alternative." Given Husband's inability to travel to the U.S. to appear in person, we similarly find that the two-way video conference used here was a reasonable alternative. There is no merit to Husband's claim that the court's grant of his own request to appear by video conference was improper or prevented him from fully participating in the hearing.

We also find no support for Husband's claim that the "trial was replete with technical difficulties and multiple disconnections" such that the court could not understand his full testimony. At the start of the hearing, the video equipment was tested, and Husband stated he could see and hear his attorney. Except for the unintelligibility of words here and there, the court reporter appears to have had no trouble transcribing Husband's testimony. The video call dropped on two occasions, was intentionally discontinued during the lunch break, was muted during a court recess, and resumed shortly thereafter with no apparent difficulty. We see nothing to suggest that Husband was not afforded a full and fair hearing.

testimony, it did "not preclude testimony by other remote means allowed by law or, with the approval of the court, agreed to by the parties." MD. RULE 2-513(a). As of July 2018, Rule 2-803 permits a participant in an evidentiary proceeding to participate by "means of remote electronic participation," so long as it does not cause "substantial prejudice to any party or adversely affect the fairness of the proceeding." MD. RULE 2-803(a), (c)(2)(B). Under Rule 2-804(d), video conferencing is preferable to "mere audio."

Accordingly, we affirm the circuit court's challenged findings and orders.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.