

Circuit Court for Talbot County
Case No.: 20-D-08-006505

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1438

September Term, 2016

MICHAEL J. MULLEN

v.

NANCY C. ROBBINS

Wright,
Nazarian,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: October 18, 2017

*This is an unreported opinion, and 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 is an appeal from an order of the Circuit Court for Talbot County, granting indefinite alimony. Divorced in 2010, the Mullens subsequently entered into a court-mediated agreement, whereby Nancy C. Robbins, f/k/a Nancy C.R. Mullen (appellee) would receive monthly rehabilitative alimony from Michael J. Mullen, (appellant) for a period of six years. In 2015, appellee filed a motion to modify alimony, seeking an indefinite term. Appellant opposed the motion and the matter was heard by a Family Magistrate, who recommended that the modification be granted. Appellant filed exceptions to the Magistrate's Report, and following a hearing, the court adopted the Recommendations. Appellant was ordered to pay indefinite alimony in the amount of \$4,000 per month. He filed this timely appeal and presents the following questions for our review:

- I. Did the trial court have the authority, pursuant to Family Law Article § 8-103, to modify the parties' Mediation Agreement regarding alimony for appellee?
- II. Did the trial court err or abuse its discretion in extending, pursuant to Family Law Article § 11-107, the period of the alimony award to appellee?
- III. Did the trial court err or abuse its discretion in awarding, pursuant to Family Law § 11-106(c), indefinite alimony to appellee?
- IV. Did the trial court err or abuse its discretion in failing to treat the mortgage listed on appellant's financial statement as a liability?

For reasons to follow, we affirm the judgment of the circuit court.

BACKGROUND

Michael J. Mullen (appellant) and Nancy C. Robbins (appellee) were married on August 11, 1990, in Rochester, New York. They have three children born of the marriage. On September 25, 2008, appellee initiated divorce proceedings in the Circuit Court for Talbot County. She sought primary physical custody of the parties' children, use and possession of the marital home, a marital award, payment of alimony and child support, and the provision of medical insurance. Appellant filed a counter complaint for divorce, wherein he requested joint physical custody of the children, sale of the family home, and an equal division of the net proceeds. A merits hearing was held on January 27, 2010.

At the time of the hearing, appellant was 41 years old and appellee was 42 years old. Appellant was employed as a physician specializing in obstetrics and gynecology, earning \$24,000 per month. Appellee held a bachelor's degree in psychology and was employed part-time at a local non-profit music society, earning \$975 per month. Further, appellee, a long term cancer patient, had endured persistent medical problems related to her treatment throughout the marriage. In addition, the parties had incurred significant debt including mortgages on the marital home, loans for living expenses while appellant attended medical school, as well as federal and state tax liabilities.

On April 13, 2010, the court issued a Memorandum Opinion and Order. Relevant to this proceeding, the court: 1) granted an absolute divorce on the grounds of statutory separation; 2) ordered appellant pay appellee rehabilitative alimony for a period of six years in the amount of \$5,500, per month; and 3) ordered appellant to maintain, at his sole cost, health insurance for appellee for a period of six years.

On July 8, 2011, appellee filed a Petition for Civil Contempt alleging appellant failed to pay alimony. The parties participated in court ordered mediation and they entered into a Mediation Agreement, which was ratified by the court on June 6, 2012. In Paragraph 3(A) titled “Alimony,” the parties agreed that appellant would pay alimony to appellee in the amount of \$5,000 per month for a period of four years commencing February 29, 2010. The Agreement also contained provisions entitled “Mutual General Release,” “Incorporation of Agreement Without Merger,” and “Integration And Future Modification.” Appellant, thereafter, complied with all terms of the Agreement.

On October 16, 2015, appellee filed a Motion for Modification of Alimony alleging that, since the divorce, she “made every possible effort to become fully self-supporting but notwithstanding these efforts, [appellee] is not self-supporting.” She requested alimony be extended indefinitely and adjusted to account for payment of her medical insurance. Appellant filed a response requesting that the court deny the motion.

On April 13, 2016, appellant filed a Motion for Summary Judgment, arguing that the parties’ rights and obligations were defined by the Agreement, and thus, could not be modified without the consent of both parties. Appellee filed an opposition and on May 9, 2016, the Motion for Summary Judgment was denied.

The parties appeared before a Magistrate, on May 23, 2016, to address the Motion for Modification. Both parties presented evidence and testified. Appellee testified regarding the sale of the marital property, her employment since the divorce, current efforts to find employment and become self-supporting, her health status, and the cost of health insurance. Since April 2010, appellee has held eight different jobs, including working as

a mediator and paralegal. She was unemployed at the time of the hearing, but testified that she was pursuing a job as a benefits counselor. Appellee obtained her mediation certification in 2011, paralegal certification in 2013, and passed national and state certifications to provide benefits counseling for disability clients after completing about 250 hours of training since March 2016. With a partner, she planned to “set up an LLC” to provide benefits counseling and related services. Through this venture, appellee estimated that she could possibly earn \$30,000 to \$40,000 per year within two to three years.

Appellee stated she left her most recent employment opportunity as a paralegal in September 2015 due to holding “different opinions about how you treat people” than her employer. Appellee explained that she was experiencing health issues related to her cancer history including “increasing severity and more often bouts of pain.” On cross examination, she offered that her health issues would “not totally” prevent her from serving as a benefits counselor. Since appellant was no longer obligated to pay for her health insurance coverage, appellee incurred the additional expense of her health insurance at a cost of \$630 per month.

Following the divorce, appellant moved to Pennsylvania, where he continued to practice medicine, specializing in obstetrics and gynecology. He also remarried. Appellant testified regarding his employment and earnings since the divorce, and the status of tax liabilities addressed in the 2010 Memorandum Opinion and Order. Appellant earned approximately \$24,000 per month in 2015 and 2016, the same amount he was earning at the time of the divorce in 2010. He further testified that he had a “moral obligation” to pay

off a mortgage on his new wife's house that was taken out to assist him with paying off his tax liabilities, even though he is not a title holder on the house or listed on the mortgage.

On May 27, 2016, the Magistrate issued her Report and Recommendations. The Magistrate first addressed whether a change in circumstances had occurred in accordance with §11-107(a) of the Family Law Article. The Magistrate found that appellee "certainly has not made Herculean efforts" to become wholly self-supporting, but "has made a fair effort to become employed[.]" The Magistrate also determined that the inability of appellee to maintain employment "directly [impacted] her ability to obtain health insurance at a reasonable cost" which was "particularly important" in light of her medical history.

As a result, the Magistrate held there had been a change in circumstances and that the factors in Section 11-107(a) had been satisfied. She then examined the factors of Section 11-106, finding that "even after the [appellee] 'will have made as much progress toward becoming self-supporting as can be reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.'" The Magistrate recommended indefinite alimony of \$4,000 per month, effective May 1, 2016.

Appellant filed exceptions to the Magistrate's Report and Recommendations on June 6, 2016. The circuit court, on July 27, 2016, held a hearing where both parties presented argument. On August 23, 2016, the court issued an order denying the exceptions and adopting the Recommendations of the Magistrate. The court found that the Magistrate did not err in finding a change in circumstances since the original award of alimony, "based on the [appellant's] continued high earnings, [appellee's] inability to become self-supporting, and [appellee's] inability to obtain reasonably priced health insurance (as a

result of not obtaining adequate full-time employment).” The court held that the Magistrate fully considered and properly addressed the prongs of §11-107(a) and §11-106 in extending the alimony award. Appellant timely filed this appeal.

ANALYSIS

I. Did the trial court lack the authority, pursuant to Family Law Article §8-103, to modify the parties’ Mediation Agreement regarding alimony?

Appellant argues the court erred in considering appellee’s Motion for Modification because she “accepted the benefits of the (Mediation) Agreement as consideration” for a “waiver of her right to seek a determination by a court of her rights to alimony, marital property, and monetary award.” He avers that the Agreement entered into by the parties, is “nothing more than a contract and, accordingly, is subject to the same general rules that govern all contracts.” Therefore, he contends appellee is precluded from obtaining judicial modification. To support this proposition, appellant cites the following provisions of the Agreement:

11. MUTUAL GENERAL RELEASE: Except as otherwise provided in this Agreement:

A. Each party absolutely and unconditionally releases the other and the estate of the other from any and all rights, causes of action, claims and obligations which either may have, whether arising out of the marriage or otherwise, including, but not limited to, any claim arising under Sections 8-201 through 8-214 of the Family Law Article of the Annotated Code of Maryland, and any claim arising out of contract or tort. This release shall include, but not be limited to, a release and waiver of all claims to possession and use of the family home, possession and use of the family use personal property, marital property, monetary award as an adjustment of the equities and rights of the parties concerning marital property, and to have a court transfer ownership of an interest in a pension, retirement, profit sharing, or deferred compensation plan from one party to either or both parties.

B. Each party absolutely and unconditionally releases the other and his or her heirs, personal representatives and estate from any claims arising by virtue of the marital relationship of the parties. This release shall be effective whether such claims arise by way of dower or curtesy, statutory thirds, halves or legal shares, widow's or widower's rights, or under intestate laws, or the right to take against the spouse's Will, or the right to treat a lifetime conveyance by the other party as testamentary, or the right to participate in any way in the enjoyment or distribution of any real or personal estate of which the other party may be possessed at the time of his or her death, or all other rights of a surviving spouse to participate in or administer a deceased spouse's estate, whether arising under the laws of Maryland or any State, Commonwealth or Territory of the United States or any other country. Except as otherwise expressly provided in this Agreement, each party waives and releases any and all right to receive insurance proceeds at the death of the other, whether named as beneficiary or otherwise.

18. INTEGRATION AND FUTURE MODIFICATION: This Agreement contains the entire understanding between the parties. There are no representations, warranties, covenants or undertakings other than those expressly set forth in this Agreement. No modification or waiver of any of the terms of this Agreement by the parties shall be valid unless made in writing, and signed by the parties.

(emphasis added). Appellant maintains these provisions constitute an express waiver of any future modification of the duration or amount of alimony.

Conversely, appellee argues she did not waive her right to judicial modification, and the agreement lacks any express language to the contrary. She contends that Paragraph 12 of the Agreement, which states “[t]his Agreement is not intended in any way to affect or prejudice the rights of either party to bring suit for or to amend any pending suit,” supports her position.

To be sure, marital agreements, such as the one involved in the case at bar, are considered contracts and subject to general contract law. *Cannon v. Cannon*, 348 Md. 537,

553 (2005) (“[F]rom the earliest reported cases of this Court on the subject to the present time, we review antenuptial agreements under the objective law of contract interpretation.”); *Wilson v. Wilson*, 223 Md. App. 599, 610–11 (2015) (internal citations omitted). As such, Section 8-103(c) of the Family Law Article provides a court may only modify alimony stemming from a marital settlement agreement, where the agreement does not provide:

- (1) an express waiver of alimony or spousal support; or
- (2) a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification.

In the present case, the Agreement, on its face, does not include an express waiver, nor does it include a provision specifying that spousal support is not subject to judicial modification. Appellant, nevertheless, points to Paragraph 11 of the Agreement, to support his position. In our view, Paragraph 11 constitutes a general release and waiver of liability that enumerates several types of claims that can be waived. Most notably, it does not include judicial modification of alimony. Further, Paragraph 18 specifies, “This Agreement contains the entire understanding between the parties...No modification or waiver of any of the terms of this Agreement by the parties shall be valid unless made in writing, and signed by the parties.”

Because there is no language in the mediated agreement specifying a waiver, judicial modification of alimony was not prohibited and the court, thus, had the authority to address and grant the motion for modification.

II. Did the trial court err or abuse its discretion in extending, pursuant to Family Law Article § 11-107, the period of the alimony award to appellee and awarding her indefinite alimony?¹

Section 11-107(a) of the Maryland Code, Family Law Article provides:

[T]he court may extend the period for which alimony is awarded, if:

- (1) circumstances arise during the period that would lead to a harsh and inequitable result without an extension; and
- (2) the recipient petitions for an extension during the period.

It is undisputed that appellee timely filed a motion for modification during the period of alimony. Thus, the first issue presented is whether an extension was necessary in light of circumstances that would lead to a harsh and inequitable result. Appellant asserts no such circumstances exist. Further, he contends that, even if this court finds that circumstances changed, the circuit court erred by not “[enlisting] the proper legal analysis” and “utterly [failing] to determine whether the change would ‘lead to a harsh and inequitable result without an extension.’” Finally, he asserts that appellee “failed to establish that an unconscionable disparity in the parties’ standard of living will exist once she becomes self-supporting.”

Appellee responds that the court properly considered the factors set forth in Family Law § 11-106, in extending alimony; she demonstrated that she was “an economically dependent former spouse who has made *reasonable* efforts...to obtain and maintain steady employment,” fulfilling the requirement for a change in circumstance. Appellee also presented evidence that she required continued medical treatment stemming from cancer

¹ Appellant’s second and third questions presented have been consolidated.

and would be unable to obtain health insurance without spousal support. She argues the circuit court was not required to “utter the specific language” of the statute, regarding whether there was a harsh and inequitable result; and the court did not err in finding an unconscionable disparity. We agree.

It is well established that alimony, originally awarded for rehabilitative purposes may be extended, indefinitely. *See Blaine v. Blaine*, 336 Md. 49, 70 (1994). In determining whether to grant indefinite alimony, the court examines whether “a combination of facts [have come] into being to create a situation in which an extension is necessary[.]” 336 Md. at 74–75. The court must then evaluate whether the circumstances “would lead to a harsh and inequitable result without an extension.” Md. Code, Fam. Law § 11-107(a)(1).

Upon such a finding, the court next considers whether the alimony extension should be indefinite. The court analyzes, first, if “due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting”; or second, at issue in the present case, “even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, (whether) the respective standards of living of the parties will be unconscionably disparate.” Md. Code, Family Law, § 11-106(c)(2); *see also Blaine*, 336 Md. at 64–68. In considering whether there is an unconscionable disparity, the court uses the alimony factors enumerated in F.L. § 11-106(b). On review, an award of alimony is not disturbed “unless the trial court’s judgment is clearly wrong or an arbitrary use of discretion.” *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383–84 (2006) (internal citations omitted).

In *Blaine v. Blaine*, the Court of Appeals considered an issue similar to the case at bar. 336 Md. 49. There, a former wife who was awarded rehabilitative alimony sought to have her alimony extended indefinitely. *Id.* at 58. The circuit court granted her motion and husband appealed, arguing that the court lacked the authority to extend alimony and that the former wife did not undergo a change of circumstances sufficient to trigger F.L. § 11-107(a). *Id.* at 60. The Court of Appeals found that the trial court had the requisite authority to make the award and the wife had experienced a change of circumstances that would “lead to a harsh and inequitable result without an extension.” *Id.* at 72–74. In making the latter determination, the Court found “Ms. Blaine’s completion of her degree program...combined with her failure to gain employment in her new field” constituted a “combination of facts” sufficient as a basis for review of alimony under § 11-107. *Id.* at 75.

Appellant argues the case at bar is distinguishable from *Blaine*. He claims Ms. Blaine’s “*inability* to start a new career due to changes in the economy” is distinguishable from appellee’s “*failure* to become self-supporting.” We disagree. The evidence in the present case is quite similar to the “combination of facts” found by the *Blaine* court to constitute a change in circumstances under Section 11-107 (a). Both parties successfully obtained further education; both attempted to gain employment in their desired field; and both failed to obtain long-term employment in their respective fields. The economic circumstances found in *Blaine* is no more compelling than the long term illness and effects thereof in the present case. In both cases, circumstances arose that would lead to a harsh and inequitable result, thus an extension was necessary.

In the case *sub judice*, appellee testified that since the divorce she has earned multiple certifications, including a mediation certificate, a paralegal certificate from Chesapeake College, and that she “recently passed [her] national and state certifications to provide benefits counseling for disability clients and social security.” She has had a series of short-term jobs since the divorce, but nevertheless has been unable to obtain stable employment.

Appellee, additionally, testified about her declining health and inability to obtain reasonably priced health insurance:

[Appellee’s counsel]: Okay. What was the status or state of your physical health at the date of divorce?

[Appellee]: When we, around that time I had continuing pain issues relating to my cancer history. I had a lot of headaches. I had four years earlier, three and a half years earlier, had major eye surgery and the issues relating to my eye always have caused me difficulty so at that time I was having some of those issues.

[Appellee’s counsel]: Okay. Let’s update that now. How is the current state of your physical condition?

[Appellee]: Things have gotten a lot worse.

[Appellee’s counsel]: In what sense?

[Appellee]: Since that point, I have had increasing severity and more often bouts of pain. I have increasing sensitivity to light. I sometimes have pain, they ask me to put it on a scale of one to ten and I have days when I have nine and ten pain that makes me unable to leave the house. I have spent a lot of time trying to track down the source of the pain. I’ve seen many specialists, I’ve had lots of tests and I continue to have issues relating to the treatments relating to the cancer in my eye.

* * *

[Appellee’s counsel]: And a couple questions about your financial issues and then we’ll get ready to close it up. How, oh I’m sorry, not how. Who was

responsible or did you pay your health insurance from the time of the divorce forward?

[Appellee]: Dr. Mullen did until last month.

* * *

[Appellee's counsel]: Okay. Can you continue to be covered by Care First?

[Appellee]: Yes.

[Appellee's counsel]: Even with your preexisting cancer condition?

[Appellee]: Yes.

[Appellee's counsel]: And what is the future cost of that now that Dr. Mullen is no longer obligated to pay?

[Appellee]: It is \$630 a month.

Thereafter, the Magistrate found:

Based on the [appellant's] continued level of income, [appellee's] failure to become self-supporting, and [appellee's] resulting inability to obtain reasonably priced health insurance, there has been "a change in the respective circumstances of the parties since the date of the original award which bears a substantial relation to the factors which were considered at the time of the original award." *Id.*

Both sections (a)(1) and (a)(2) of the Family Law Art. § 11-107 have been satisfied. As such, the Court must consider [appellee's] request for a modification of alimony by applying the factors set forth in Fam. Law Art. § 11-106. *Id.* at 72.

After reviewing the evidence and Section 11-106 factors, the Magistrate determined that "An award of indefinite alimony in the amount of \$4,000 per month will address the unconscionable disparity between the parties' standards of living without creating a disincentive for the Plaintiff to become self-supporting."

We assess the circuit court’s findings under an abuse of discretion standard. Moreover, we give “due regard to the opportunity of the trial court to judge the credibility of the witnesses.” *City of Bowie v. Mie Properties, Inc.*, 398 Md. 657, 676 (2007). Here, the court carefully analyzed the testimony and evidence presented, as well as the relevant statutes, and found sufficient circumstances warranted its determination that alimony should be extended. Under the facts of this case, we do not view this decision as clearly wrong, nor an abuse of discretion. Further, the court’s failure to state that the change in circumstances “would lead to a harsh and inequitable result without an extension” was not error. While the court did not use the specific wording, the court held that “both sections of 11-107 (a)(1) and (a)(2) of the Family Law [Article]” had been satisfied.²

Appellant finally asserts that even if we find there has been a change of circumstances, the court nonetheless erred in awarding appellee indefinite alimony because appellee did not prove the parties’ respective standards of living would be “unconscionably disparate” without the award. He argues that rehabilitative, not indefinite, alimony is more appropriate because it would leave appellee with an incentive to “seek employment that will afford a higher standard of living” and “remain gainfully employed.”

The Magistrate found:

History and evidence supports finding that the Defendant will continue to earn at his current range of more than \$24,000 per month. At such time as she has reached her intended goal, the Plaintiff will be earning

² Section 11-107(a) of the Family Law Article of the Maryland Code, entitled “Extension of Period,” states “(a) Subject to § 8-103 of this article, the court may extend the period for which alimony is awarded, if: (1) circumstances arise during the period that would lead to a harsh and inequitable result without an extension; and (2) the recipient petitions for an extension during the period.”

12% of the Defendant's income; the Defendant will earn more in two months more than the Plaintiff earns annually. The numeric difference is not exclusively a reason to award alimony to the formerly dependent spouse. *Rock v. Rock*, 86 Md. App. 598 (1991). However, in consideration of all of the facts and factors set forth above, even after the Plaintiff "will have made as much progress toward self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." Family Law Art. §11-106(c).

The decision, as adopted by the circuit court, was based on appellee's inability to maintain stable employment in her desired field; appellee's plan of making \$30,000 to \$40,000 annually; and the continuing stark financial contrast between the parties. In light of this analysis, we cannot find the court abused its discretion in finding an "unconscionable disparity" between the parties and awarding appellee an indefinite extension of alimony.

III. Did the trial court err or abuse its discretion in failing to treat the mortgage listed on appellant's financial statement as a liability?

Appellant concedes that he has no legal obligation to pay the mortgage he is paying. The house is titled solely in his current wife's name. However, he maintains the court should treat this obligation as a quasi-contract, because "by using his current wife's home as collateral for a loan that enabled him to pay back [federal and state back taxes], [he] changed the form of the liability but money remained owed."

Appellee asserts that, even if this Court finds error, the exclusion of the mortgage payments "really makes no practical difference and would be harmless error at best." She states "the Magistrate heard an abundance of testimony and made findings consistent with the fact that Appellant could afford \$4,000.00 per month" in alimony.

The Magistrate's Report found:

Per the [appellant's] financial statement, the [appellant] holds assets totaling \$18,500 and liabilities totaling \$88,500. The [appellant] included as a liability a mortgage in the amount of \$111,000. The [appellant] identified the mortgage on the financial statement and explained that the mortgage was taken out against the home owned by his wife for the purpose of paying off the tax debt he carried from prior to the divorce. The home and mortgage are solely in his wife's name. While the [appellant] testified and the Court credits that the [appellant] feels a moral obligation to pay off the mortgage, it is also recognized that he has no legal obligations to do so. It is therefore not included in his liabilities.

In making this determination, the court carefully considered the testimony and in the exercise of its broad discretion, denied appellant's contention. We find no abuse of discretion. Even if, assuming *arguendo*, the determination was error, we agree that the error is harmless. Appellant listed his monthly mortgage as \$994.00. When this amount is added to appellant's liabilities, appellee still makes a slim fraction of appellant's monthly income.

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