Circuit Court for Montgomery County
Case No. 70998-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 343

September Term, 2016

DENNIS O'CONNELL

v.

SHERI O'CONNELL

Meredith,
Friedman,
Beachley,

JJ.

Opinion by Friedman, J.

Filed: August 25, 2017

Dennis and Sheri O'Connell divorced seven years ago but continue to fight about monetary issues.

PROCEDURAL HISTORY

The parties were divorced in 2010. The financial issues were resolved without a hearing but the parties were unable to agree on a formal settlement agreement and, as a result, the Settlement Term Sheet became their final Settlement Agreement. Five years later, Mr. O'Connell filed a motion to reduce the amount he was paying in alimony. Ms. O'Connell responded with a petition for contempt alleging non-payment of alimony and other monies owed. The matters were consolidated and, after a hearing that spanned 3 days, the circuit court denied Mr. O'Connell's motion to reduce and granted Ms. O'Connell's petition for contempt in part. Mr. O'Connell noted an appeal and Ms. O'Connell noted a cross-appeal.

ANALYSIS

We have reorganized the parties' respective questions on appeal into the following four categories: (1) questions related to alimony; (2) questions related to the distribution of investment income as part of their marital property division; (3) questions related to the award of attorney's fees; and (4) questions related to the cross-appeal.

I. Alimony

The parties' Settlement Agreement required Mr. O'Connell to pay Ms. O'Connell alimony in the amount of $9,000 per month. The Settlement Agreement also contained an

escalation provision that required him also to pay her 20% of any amount of "gross income" that he earned above $300,000 annually.

Ms. O'Connell sought to hold Mr. O'Connell in contempt for failing to pay her the correct amount owed in alimony, and thus creating an arrearage of $178,917.80. In response, Mr. O'Connell's position was two-fold: first, in opposing Ms. O'Connell's contempt petition, he wanted to contest her calculation of his alimony arrearages, and second, he argued that due to diminished financial circumstances, he should receive a downward adjustment in the alimony amount. Ms. O'Connell was opposed to any downward adjustment. The trial court found for Ms. O'Connell across the board, finding Mr. O'Connell in contempt for having failed to pay alimony, finding that Ms. O'Connell had correctly calculated the arrearages, and finding that Mr. O'Connell had failed to prove that his alimony should be reduced in the future. On appeal, Mr. O'Connell asks us to revisit each of these findings.

As to the arrearages, Mr. O'Connell's principal claim is that the trial court erred by including his investment income in its calculation of gross income as the court determined whether and to what extent the escalation provision had kicked in. It is Mr. O'Connell's view that investment income should not have been included in gross income. Mr. O'Connell also points out that including investment income as part of gross income would be unfair as it would allow Ms. O'Connell to "double-dip," that is, she already received half of their investments in the marital property division and would then also receive credit for the income attributable to his half of the investments in the alimony calculation.

The trial court found, and we agree, that the language of the Settlement Agreement, which defines "gross income" to "include salary, bonuses, wages, commission[s,] and director fees" was intended to include investment income. We base this conclusion on the ordinary meaning of the word "include," which the Maryland Court of Appeals has explained "ordinarily means comprising by illustration and not by way of limitation." *Towson Univ. v. Conte*, 384 Md. 68, 93 (2004) (citations omitted). Moreover, courts enforce even bad bargains. *Baltrotsky v. Kugler*, 395 Md. 468, 483 (2006) ("[E]xpress contract terms are [generally] enforced as written"); *Calomiris v. Woods*, 353 Md. 425, 445 (1995) ("It is a fundamental principle of contract law that it is improper for the court to rewrite the terms of a contract or draw a new contract for the parties, when the terms thereof are clear and unambiguous, simply to avoid hardships."). If Mr. O'Connell made a bad deal (and we don't know that he did), we cannot fix it for him.

Finally, Mr. O'Connell argues that the trial court erred by declining to reduce his alimony obligation going forward, due to his diminished earning capacity. The circuit court rejected Mr. O'Connell's claim that his earning capacity had diminished. The circuit court instead concluded that he had impoverished himself voluntarily, imputed to him an income of over $300,000 and, therefore, found that there had not been a "material change of circumstances" sufficient to warrant a decrease in alimony. He challenges each of these findings.

A. Voluntary Impoverishment

In its Memorandum Opinion, the circuit court made the following findings regarding Mr. O'Connell's income:

> During the time that [Mr. O'Connell] ceased paying [Ms. O'Connell] any alimony, he entered into a lease in the amount of $4,950 for a 5 bedroom home in Arlington[, Virginia]. … Prior to that time, [Mr. O'Connell] was paying the rent on his girlfriend's townhouse. … [Mr. O'Connell] has two adult children and his girlfriend has three adult children, none of whom live with the couple, but [Mr. O'Connell] testified that he leased such a big house so that all of the children could have their own bedrooms. The girlfriend's children lived in Colorado, New York[,] and in College Park[, Maryland]. [Mr. O'Connell's] daughter attends George Washington University and has her own apartment, which her father pays for, as well as for her car. [Mr. O'Connell's] son is a graduate student in England.
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> Despite a lower salary, [Mr. O'Connell] has continued to spend lavishly on travel, dining out, entertainment, and other non-essential items, while not paying [Ms. O'Connell] any alimony. … The timing of [Mr. O'Connell's] resignation from June Media and Six Sense Media and the low salary that he accepted from Zippy Shell is suspect. [Mr. O'Connell] resigned his previous employment to take the position at Zippy Shell for a salary lower than what he has previously commanded. Moreover, while [Mr. O'Connell's] employment contract with Zippy Shell provides for a bonus program where [he] can attain a salary of at least $200,000, he did not attempt to obtain such a bonus.
>
> Based on the evidence presented, the Court finds that [Mr. O'Connell] made the free and conscious choice, not compelled by factors beyond his control, to render himself without adequate resources.
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> * * *

> In this case, where [Mr. O'Connell] has deliberately acted in such a way as to render himself with a salary that is much less than he is capable of earning, while continuing to live a lavish lifestyle and support his girlfriend, the Court finds that he has voluntarily impoverished himself.

In considering voluntary impoverishment, courts look to the following factors:

1. his or her current physical condition;

2. his or her respective level of education;

3. the timing of any change in employment or other financial circumstances relative to the divorce proceedings;

4. the relationship between the parties prior to the initiation of divorce proceedings;

5. his or her efforts to find and retain employment;

6. his or her efforts to secure retraining if that is needed;

7. whether he or she has ever withheld support;

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.

Reynolds v. Reynolds, 216 Md. App. 205, 220 (2014). "The trial court's factual findings on the issue of voluntary impoverishment are reviewed under a clearly erroneous standard." *Long v. Long*, 141 Md. App. 341, 351-52 (2001) (citations omitted). A trial court's finding of voluntary impoverishment will be upheld if, after viewing the record in the light most

favorable to the prevailing party, it is supported by any competent, material evidence in the record. *Sieglein v. Schmidt*, 224 Md. App. 222, 252 (2015) (citation omitted).

Here, we do not think the circuit court was clearly erroneous in determining that Mr. O'Connell was voluntarily impoverished. As the circuit court explained in great detail, Mr. O'Connell has made the clear and conscious choice to spend lavishly on everything but his alimony payments. He paid rent on his girlfriend's townhouse, leased a 5-bedroom house that only he and his girlfriend lived in, and continued to spend what the circuit court found to be an extraordinary amount on leisure. He also paid his 22-year-old daughter's housing, education, and vehicle costs. Further, he intentionally took a lower paying job, declined to pursue a bonus, and made no credible attempts to find a higher paying job. In sum, there was ample evidence on which to base the circuit court's finding that Mr. O'Connell was voluntarily impoverished.

B. Imputed Income

After finding that Mr. O'Connell was voluntarily impoverished, the circuit court made the following finding regarding his potential income:

> The Court, therefore, will consider [Mr. O'Connell's] earnings history and impute gross income to him based on that history for purposes of determining whether alimony should be modified… . [Mr. O'Connell's] gross income for the past three years has been above $300,000.00.

Thus, the circuit court looked at Mr. O'Connell's income history for the past three years, and determined his potential annual income was "above $300,000." It, therefore, found no material change in circumstances and denied his motion to modify his alimony payments.

Once a trial court makes a finding that a party is voluntarily impoverished, it then determines an amount of potential income to impute to that party. *Shenk v. Shenk*, 159 Md. App. 548, 551 (2004). Factors that courts consider 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) (citations omitted). If the potential income amount calculated by the trial court is "realistic," "and the figure is not so unreasonably high or low as to amount to abuse of discretion, the court's ruling may not be disturbed." *Id*. (citations omitted). Courts frequently use historic earnings information to impute future income. *Petitto*, 147 Md. App. at 318-19 (holding that trial court did not err or abuse its discretion in determining potential income based on income earned in previous tax year); *Dunlap v. Fiorenza*, 128 Md. App. 357, 365-66 (1999) (holding that

trial court was not "clearly erroneous in determining that [past average income] was an adequate reflection of potential earning capacity").

We hold the circuit court did not abuse its discretion in calculating Mr. O'Connell's potential income as being "above $300,000." The circuit court used Mr. O'Connell's earning history to calculate his potential income. Specifically, the court found that Mr. O'Connell earned $449,580 in 2012; $351,307 in 2013; and $318,702 in 2014, and that, therefore, his income averaged "above $300,000." Although the circuit court did not explicitly discuss each of the *Petitto* factors, Mr. O'Connell makes no argument that the circuit court abused its discretion in imputing "above $300,000" of income to him. Moreover, the court had considerable leeway in selecting the income it chose to impute because the purpose was not the mathematically-precise calculation of alimony, but rather the rough determination of whether there existed a material change in circumstances that warranted modification. *Compare Smith v. Freeman*, 149 Md. App. 1, 21 (2002) ("A material change in circumstances does not necessarily compel a modification.") *with Durkee v. Durkee*, 144 Md. App. 161, 187 (2002) (explaining that "any determination of 'potential income' must necessarily involve a degree of speculation").

We are persuaded that the circuit court's number was "realistic" and "not so unreasonably high or low as to amount to abuse of discretion." *Petitto*, 147 Md. App. at 318. Thus, we hold the circuit court did not abuse its discretion in calculating Mr. O'Connell's potential income.

C. Material Change in Circumstances

It is worth reiterating that the need to calculate Mr. O'Connell's annual income arises solely in the context of determining whether he had experienced a "material change of circumstances" sufficient to merit a reduction in the amount of alimony that he is required to pay. We have little doubt that the parties, by using the "material change of circumstances" language in their Settlement Agreement, intended to adopt the same standard that courts use to determine whether to modify child support awards under §12-104 of the Family Law Article ("FL"), and the cases applying that standard. *See, e.g.*, *Leineweber v. Leineweber*, 220 Md. App. 50, 62 (2014). And, at the hearing and in this Court, the parties seem to assume that the same standard applies. Given that we have already found that the trial court did not err in finding Mr. O'Connell voluntarily impoverished, and given that we have already found that the trial court did not err in imputing to him an income of "over $300,000" annually, there cannot be an error, let alone an abuse of discretion, in finding that there had been no material change in circumstances. Therefore, we affirm the denial of Mr. O'Connell's motion to reduce alimony.

II. Investment Distributions

Mr. O'Connell was a partner in Dolphin Equity Partners, a venture capital firm. During the marriage, the O'Connells invested in Dolphin. Under the terms of the Dolphin shareholders' agreement, which is described but not included in the record, Dolphin pays dividends, but also periodically demands further investment. Failure to provide this additional investment results in a dilution of ownership. When the O'Connells divorced,

their Separation Agreement made special provision for the Dolphin shares. The shares were not divided as marital property, and remained in Mr. O'Connell's hands. Mr. O'Connell, however, is required to pay ½ of all dividends to Ms. O'Connell "as, if, and when" they are received.

In the court below and here, there are two disputes regarding the Dolphin distributions. First, the parties disagree about how the distributions are to be calculated. Second, while Mr. O'Connell admits that he did not pay Ms. O'Connell for Dolphin distributions in 2010, 2011, 2012, 2013, and 2014, he nevertheless claims that he did pay her share of the 2009 Dolphin distribution. Ms. O'Connell disagrees and says that he didn't pay her for 2009 either. The circuit court agreed with Ms. O'Connell. We will address these contentions in turn.

Mr. O'Connell argues that the language that requires him to pay Ms. O'Connell ½ of the Dolphin distribution "as, if, and when" he receives the distribution allows him to pay her ½ of the net after subtracting the amount he has reinvested.[1] He argues that it would be unfair to make him pay the whole amount of the reinvestment himself but require him to share the benefit of that reinvestment with Ms. O'Connell. Ms. O'Connell argues that her share of the dividend should be calculated based on the gross distribution and that reinvestments are Mr. O'Connell's sole responsibility. The circuit court determined that

[1] Mr. O'Connell relies on our "as, if, and when" cases, *Potts v. Potts*, 142 Md. App. 448 (2002) and *Otley v. Otley*, 147 Md. App. 540 (2002), to suggest an interpretation of this phrase. We find these cases, which concern future payment from uncertain revenue streams, and which do not provide a definition for the phrase, to be unhelpful here.

the Settlement Agreement was silent as to the obligation to reinvest and that, therefore, it was Mr. O'Connell's responsibility. We see nothing wrong with this analysis and remind Mr. O'Connell, as we did before, that we are not guarantors of a fair bargain. We also note, however, that nothing in the Settlement Agreement requires him to reinvest.

Mr. O'Connell also claims that despite not paying her the Dolphin distributions for the last 6 years, he did pay Ms. O'Connell her share of the Dolphin distribution in 2009. Mr. O'Connell did not testify about the 2009 payment or introduce documentary evidence to show payment. Ms. O'Connell testified that she hadn't received the payment. She had no documentary evidence to show the absence of the payment. The trial court credited Ms. O'Connell's testimony and ordered Mr. O'Connell to pay her for 2009, too. In this Court, Mr. O'Connell claims that Ms. O'Connell failed to carry her burden of proving non-payment, both because she admitted to having "memory problems" and because she could not provide documentary evidence. The answer here is that the trial court saw what evidence there was and determined that, despite Ms. O'Connell's memory problems, she was capable of recalling and did, in fact recall, his non-payment in 2009. Appellate courts rarely overturn such credibility determinations and we will not here.

III. Attorney's Fees

The parties' Settlement Agreement provides that "[i]f either party breaches the above terms, the enforcing party shall be entitled to attorney's fees." Ms. O'Connell submitted an invoice to the circuit court showing that she had incurred $56,306.84 in attorney's fees. The circuit court found that Ms. O'Connell had "partially prevailed on her petition for contempt for breach of the Agreement," determined that "she [was] entitled to

reasonable fees," and awarded her $30,000. Mr. O'Connell argues the attorney's fees were unreasonable because Ms. O'Connell's claimed fees were excessive and because she did not prevail on all issues. Mr. O'Connell contends that Ms. O'Connell "spent significant funds pursuing [claims on which] she was unsuccessful" and payment for such issues "should have been explicitly excluded by the circuit court." As a result, he argues, the circuit court abused its discretion by awarding Ms. O'Connell "too much" in attorney's fees.

"We review a trial court's award of attorney[']s fees under an abuse of discretion standard." *Monmouth Meadows Homeowners Ass'n., Inc. v. Hamilton*, 416 Md. 325, 333, (2010); *see also Myers v. Kayhoe*, 391 Md. 188, 207 (2006) (explaining that an award of attorney's fees under a contract's fee-shifting provision is "within the sound discretion of the trial court"). Even if we assume that Mr. O'Connell's contentions are correct—that Ms. O'Connell's fees were excessive and that she did not prevail on all issues—we do not think that the circuit court abused its discretion in awarding $30,000 in attorney's fees. Rather, it appears to us that the trial court took Mr. O'Connell's concerns into consideration as it deducted $26,306.84 from Ms. O'Connell's fee petition. We see no abuse of discretion here.

IV. Cross-Appeal

Ms. O'Connell also noted a cross-appeal, in which she argued that the circuit court erred in denying a part of her contempt petition. The right to appeal contempt cases is reserved "to persons adjudged [to be] in contempt." *Pack Shack, Inc. v. Howard Cnty*., 371

Md. 243, 254 (2002); *see also* Md. Code Ann., Cts. & Jud. Proc. § 12-304 (explaining that a person held in contempt is entitled to an appeal). A party who is unsuccessful in having another party held in contempt "[has] no right to appeal the circuit court's denial of its petition for contempt." *Pack Shack, Inc.*, 371 Md. at 254. Here, because Ms. O'Connell seeks to cross-appeal from the denial of a part of her petition for contempt, we have no jurisdiction. *See id*. at 251 (explaining that Maryland appellate courts have no jurisdiction over appeals that result from the denial of a contempt petition). We, therefore, dismiss Ms. O'Connell's cross-appeal.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID 5/6ths BY APPELLANT, AND 1/6th BY APPELLEE.