2010 WL 8697430 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

Glenn C. ALBRECHT, Appellant,
v.
Deborah L. WILKES, Appellee.

No. 02303.
September Term, 2009.
July 15, 2010.

Appeal from the Circuit Court for Talbot County (The Honorable Broughton M. Earnest, Judge)

**Brief of Appellee**

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***1 STATEMENT OF THE CASE**

On April 18, 2005, Appellee was awarded an absolute divorce from Appellant by the Circuit Court for Talbot County. (E. 9). The Judgment of Absolute Divorce incorporated, but did not merge, a Marital Settlement Agreement (the Agreement) executed by the parties the same day. The Agreement provided, inter alia, that the Appellant pay to Appellee rehabilitative alimony in the amount of $1,700.00 per month until November 16, 2008. The Agreement provided that alimony was subject to modification. As a prerequisite to modification of the alimony, the parties were to attempt mediation and the request to mediate had to be made before November 16, 2008. (E. 47-48).

Appellee made verbal requests and an email request to mediate issues in April and October, 2008. She made a request, through counsel, by a letter dated November 12, 2008 to mediate issues including alimony. (E. 203) On November 13, 2008, the Appellee filed a **COMPLAINT TO MODIFY JUDGMENT OF DIVORCE BY EXTENDING ALIMONY OR GRANTING INDEFINITE ALIMONY. (E. 10). On December 10, 2008 Appellant filed a MOTION TO STRIKE OR IN THE ALTERNATIVE ANSWER TO COMPLAINT TO MODIFY JUDGMENT OF DIVORCE BY EXTENDING ALIMONY OR GRANTING INDEFINITE ALIMONY. (E. 10).**

A hearing on Appellant's motion to strike was held on February 11, 2009 before Master Jamie E. Adkins and Master JoAnn Asparagus. (E. 11). Master ***2** Atkins notified the parties of her recommendation at the conclusion of the hearing. She recommended that Appellee's Complaint be dismissed. (E. 11) The Appellee noted timely exceptions. (E. 11). Subsequently, on February 17, 2009, the Master prepared a written Report and Recommendation. (E. 32-35)

A hearing on Appellee's Exceptions was held on March 27, 2009, the Hon. Broughton M. Earnest presiding. (E. 11-12). Following argument of counsel, Judge Earnest sustained Appellee's Exceptions, ruling that she had made a timely request to mediate modification of alimony. (E. 105-07). The trial court entered a written Order to that effect on March 30, 2009. (E. 12). The Appellant noted an appeal to this Court on April 12, 2009. The appeal was dismissed on July 7, 2009, upon Appellee's Motion to Dismiss, because Appellant appealed from an interlocutory order and not a final judgment. (E. 13) See also: Albrecht v Wilkes, CSA No. 00244, September, 2009 Term.

The case proceeded to trial on Plaintiffs Complaint on September 18 and 28, 2009. (E. 15-16). The trial court took the matter sub curia. On November 20, 2009, the trial court issued an Opinion And Order extending Appellant's obligation to continue to pay alimony to the Appellee, in amount of $1,700.00 per month, until the Appellee's 62nd birthday. (E. 23-31).

The Appellant noted his appeal to this Court on December 16, 2009.

***3 QUESTIONS PRESENTED**

1. Did the trial court err as a matter of law in ruling that the Marital Settlement Agreement did not require that the Appellant actually receive notice of a request to extend alimony from the Appellee prior to November 16, 2008?

2. Did the trial court err as a matter of law by extending the Appellant's obligation to pay rehabilitative alimony until the Appellee's 62nd birthday?

**STATEMENT OF FACTS**

The Judgment of Absolute Divorce entered by the Circuit Court for Talbot County on April 18, 2005, incorporated, but did not merge, a Marital Settlement Agreement entered into between the parties on the same date. The Judgment provided that

Appellant pay directly to Appellee, alimony in the amount of $1,700.00 per month, "in accordance with and as more fully appears in the parties' Agreement and subject to the reservation set forth therein."

The parties' Agreement provided, in pertinent part:

**5. Mr. Albrecht shall pay to Ms. Wilkes rehabilitative alimony in the amount of $1,700.00 per month until the youngest child turns eighteen (November 16, 2008), subject to the offset referred to in paragraph two (2).** [1] **Subject to the following prerequisite, Ms. Wilkes shall not be precluded from requesting a modification of the alimony prior to its expiration or seeking a conversion into permanent *4 alimony or an extension of the rehabilitative alimony term. The parties agree that before a request for modification of alimony is brought before the Court, they shall enter into formal mediation regarding any modification or extension of alimony. A request for mediation by Ms. Wilkes must occur before the youngest child turns eighteen. Such request will preserve her right to seek a modification or extension of alimony in the event mediation should continue past the November 16, 2008 deadline. Any requests for modification or extension of the rehabilitative alimony shall be brought only after an unsuccessful attempt at formal mediation lasting no longer than one (1) month after mediation begins. Subject to the above, Ms. Wilkes may not bring a request for mediation or modification/extension of alimony after November 16, 2008.**

At the time of the parties divorce, Plaintiff was not self-supporting. She had been a stay-at-home Mom throughout the marriage, operating a greenhouse business (at the marital home) on a part-time basis and assisting Defendant in his business, on an as needed basis, without compensation. (E. 109A; 152) 2005 was the last year of operation of the greenhouse business. (App. 2) Post divorce she was the primary custodian of the parties three minor children; at the time of the divorce the eldest was 16 and the twins were 15.

Appended to the Marital Settlement Agreement was a Child Support Guideline Worksheet which disclosed that at the time of the entry of the divorce, Appellee's actual monthly income was $137.17 and Appellant's was $7,083.33. (App. 3)

Due to the chronic illness of one of the parties' daughters, Plaintiff had to ***5** be available to transport the child to and from school or otherwise tend to her needs. (E. 109B; App. 4) The child's health problems worsened during her last year in high school (2008) and in January, 2009 she was diagnosed with Crohn's disease. (App. 4) She turned 18 on November 16, 2008. Plaintiff obtained employment which allowed her the flexibility to meet her daughter's needs. (E.109B) Subsequently in 2006, Plaintiffs **elderly** mother became terminally ill with cancer and Plaintiff, an only child, was required to provide care for both her parents, who resided in Bowie [2], Maryland. (E. 112) After her mother died in May, 2009, Appellee still had **elder** care responsibilities for her father who suffered two strokes. (E. 113-114)

Plaintiffs earnings, post divorce, were as follows [3]:

**2005: Wages, salaries, tips, etc. $10,386**

**2006: Wages, salaries, tips, etc. $12,649**

**2007: Wages, salaries, tips, etc. $18,029**

**2008: Wages, salaries, tips, etc. $18,042**

**2009 (YTD): Wages, salaries, tips, etc.: $12,324**

In April of 2008 the parties met to discuss the disposition of the family home (E. 119) and they agreed to delay listing the home for sale until after November 16[4]. In October Appellee emailed Appellant to suggest mediation on ***6** several issues. (App. 13) There were also telephone conversations (E. 121-2). Since Appellant was stonewalling Appellee's entreaties to mediate financial issues, by letter dated November 12, 2008, Appellee's counsel made a written request to mediate issues, including alimony. (E. 203) The request was a prerequisite to an extension of alimony for Appellee. Appellee testified that she received the letter the next day, November 13, 2008. Appellant testified that he did not receive the letter until November 24. Appellee resides in Wittman and Appellant in St. Michaels; the towns are in close proximity to each other. Coincidentally, Appellant called his legal counsel on November 13, 2008 (E.188-189) but he claimed that he did so "because things were winding down as regards child support. And I wanted to sort of develop a game plan as to how we were going to sell the house". (E. 190-191) Appellant filed a **COMPLAINT TO MODIFY JUDGMENT OF DIVORCE BY EXTENDING ALIMONY OR GRANTING INDEFINITE ALIMONY** on November 13, 2008.

Appellant was, at the time of the divorce, and continued to be at all relevant times subsequent thereto, the owner operator of a home inspection/construction and house renovation business, operating under the trade name Sun & Sons, Inc. (E. 109A) He also owned several rental properties. (E. 170-175) Those endeavors were the primary sources of his income. Evidence was presented of his Corporation Five Year Tax History. (App. 14) Appellant never filed nor introduced into evidence a current Maryland Rule 9-203(a) Financial Statement. ***7** His testimony regarding his post divorce earnings was in conflict with his tax filings. (App. 15) By way of example, he testified that his W-2 income, from Suns & Sons, for 2007 was $101,140. (E. 175) He then stated that he did not cash some of his pay checks toward the end of the year[5] . The total number of checks not cashed was 8 and the total gross income and net income, held until after the first of the year 2008 was $31,120.00 and $20,215.04, respectively. (E. 48-52) When added to the W-2 income he reported in 2008, $15,685, and the $9,992 income tax refund for the 2007 tax year which he received in 2008 (App. 16-17), his resources for the year 2008, exclusive of any rental income, was $57,797. His testimony that his income, in 2008, was only $15,685 was misleading and not an accurate reflection of his economic position in 2008. He also gave himself a $10,000 bonus in 2008, but did not cash the check until after the first of the year, 2009. (E. 54) Based upon Appellant's testimony (see for example, E. 183-5) the trial court found that Appellant's "conduct is simply not consistent with his claim of hardship" and that he had not accurately portrayed his economic position. (E. 27) Though not cited by the trial court, it could not have escaped the trial court, in its consideration of Appellant's economic position that from 2005 through November, 2008 he had paid $3,200.00 per month combined alimony and child support[6] and ***8** that effective November 16, 2008 he no longer had the child support obligation of $,500.00 per month, thus effectively improving his economic position.

## I. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED, AS A MATTER OF LAW, THAT APPELLEE HAD COMPLIED WITH THE REQUIREMENTS OF PARAGRAPH 5.A. OF THE PARTIES MARITAL SETTLEMENT AGREEMENT.

The parties Agreement provided that Appellee had to make a "request" for the parties to participate in mediation as a prerequisite to her request to extend alimony beyond November 16, 2008. She was required to make the "request" prior to that date. Once the "request" was made, the parties were obligated to participate in mediation. Appellee's request was timely.

It should first be observed that Appellant cites no authority in support of his central argument that a request requires "receipt" in order to be a valid request.[7] Indeed there is none. The Agreement, on it's face, does not require "receipt" for the request to be valid. It only requires that the request be made.

Indulging Appellant his resort to the dictionary, it should be noted that "request" means: "1. the act of asking for something to be given or done... 3. A written statement of petition ... 7. to ask for". *Webster's Encyclopedic Unabridged Dictionary of the English Language*, 1989 edition, at p. 1219.

The trial court determined, correctly, that the Appellant did not have to ***9** receive the request by November 16, 2008 and that the Agreement "just says that the request has to be made". (E. 106) The trial court was correct when it reasoned, consistent with pleading and contract law, that a request for something is complete upon mailing. See e.g. Maryland Rule 1-321(a) which provides that service is made by "mailing". In *Lee v State*, 332 Md 654 (1993) the Court of Appeals noted that Maryland Rule 1-321(a) is a statement of the "mailbox rule" or "postal acceptance rule" *Id.* at 664-5.

Moreover, adopting the reasoning of the Court in Lee, if the parties had intended that Appellant had to actually receive the request, the Agreement should have provided "personal service and a defining point from which to measure time". Since the parties Agreement did not contain such a provision, "receipt" was not the benchmark for a timely "request", the mailing of the request satisfied the prerequisite. Accordingly, the trial court did not err in sustaining Appellee's Exceptions to the Master's Report and Recommendation and finding "that there was compliance with the terms of the contract that the parties entered into, there was proper notice". (E. 108)

**II. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW WHEN IT EXTENDED APPELLANT'S OBLIGATION TO PAY REHABILITATIVE ALIMONY UNTIL APPELLEE'S 62nd BIRTHDAY.**

It is well established that a trial court has broad discretion in making an award of alimony, *Wallace v. Wallace* 290 Md. 265; 429 A.2d 232 (1981) and that ***10** an alimony award will not be disturbed on appeal unless the trial court **abused** its discretion or was clearly wrong in making the award. *Brodak v Brodak*, 294 Md. 10; 447 A.2d 847 (1982). Indeed, it has been said that appellate courts "accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings. *Long v Long*, 129 Md. App. 554, 581 (2000), citing with approval *Tracey v Tracey*, 328 Md. 380, 385 (1992). The aforegoing standard for appellate review applies to cases involving a request for an extension of alimony under §11-107, Family Law Article, Annotated Code of Maryland. *Blaine v. Blaine*, 336 Md. 49; 646 A.2d 413 (1993) In Blaine the Court of Appeals noted that "considerable discretion" is vested in the trial courts "to provide for an appropriate degree of spousal support in the form of alimony after the dissolution of marriage." *Id.* at 65.

In this case, the trial court could visit the issue of modification of alimony because the right for the court to do so was not waived by agreement. §8-103, **Family Law Article,** Annotated Code of Maryland. Appellee could petition the court for a modification under §11-107, **Family Law Article,** Annotated Code of Maryland. §11-107 permits the court to extend the period of alimony. In doing so, it need only find (1) that circumstances arose during the period which (2) would lead to a harsh and inequitable result without an extension of alimony. Once the Court makes that factual determination it then must determine the duration of the extension. It can extend the period of rehabilitative alimony or convert the ***11** rehabilitative alimony to alimony for an indefinite period. As the Court of Appeals noted in **Blaine** "[w]hether these facts [circumstances that arose during the post divorce period] appropriately form the basis for an award of indefinite alimony is, of course, a separate issue." *Id.* at 75. This is the distinction Appellant fails to make in his argument. The issue in **Blaine** was "the proper application and interrelationship of §§11-106 and 11-107 with regard to awarding indefinite alimony under §11-106(c) pursuant to an extension of alimony under §11-107(a)." *Id.* at 69. Appellee asserts that if a trial court merely extends rehabilitative alimony the analysis suggested by Appellant, relative to consideration of the §11-106(b) factors, is not mandatory.

As in **Blaine,** in this case there was sufficient evidence for the trial court to find that "circumstances arose during the period [of rehabilitative alimony] which would lead to a harsh and inequitable result without an extension of alimony". In **Blaine,** the trial court determined that failure to make progress toward self support, during the rehabilitative period, was sufficient to support the alimony recipient's request for an extension of alimony. In **Blaine,** the recipient of alimony was earning $10,000 at the time of the parties divorce. Although she had improved her employment and was earning $25,000 per year, she had not met her rehabilitative goals, due to circumstances beyond her control (employment opportunities were static and because

of an economic recession). **Blaine** at 58-59. The Court of Appeals found that such circumstances constituted a "'change in circumstances' ***12** subsequent to the original alimony award justifying the extension of the award." 336 Md. at 60, citing *Blaine v Blaine*, 97 Md. App 689, 706, 632 A.2d 191 (1993).

In this case, Appellee at the time of the divorce had just started working as a fine dining server; in the year the divorce was awarded, she earned $10,386. Unlike Mrs. Blaine, though, Appellee's earned income did not more than double during the post divorce period. (App. 5-12) Appellee's highest earning year was 2008 when her gross earnings were $18,042.

Contrary to Appellant's assertions, there was sufficient evidence that events after the divorce impeded Appellee's progress towards self support. There was evidence that the parties daughter, Eliza, had medical problems which had worsened post divorce. (E. 109 B) Appellee testified to Eliza's new diagnosis of Crohn's disease in 2009. (App. 4) The testimony was uncontroverted. The trial court was not as Appellant argues "left to speculate that the Appellee's time with her parents increased between 2005 and 2008". Appellee testified that the need for her to take care of her parents arose in 2006. (E. 112-114) Her testimony in these aspects was not only uncontroverted, it was corroborated by her best friend, Lorrie Yates. (E. 149-152; 113). There was, therefore, as in **Blaine,** sufficient evidence before the trial court for it to conclude that "circumstances" arose during the period which would lead to a harsh and inequitable result without an extension. Unrealized expectations, despite best efforts constitutes a change in circumstances under **Family Law Article** §11-107. **Blaine** at 706.

***13** Appellee proved that termination of her alimony would be harsh and inequitable. "The presence of a 'harsh and inequitable' result is not an objective, absolute standard; rather it is a subjective standard, most appropriately determined by a trial court in whose judgment the exercise of sound discretion in such matter is reposed". *Blaine v. Blaine*, 97 Md. App. 689, 706. At trial, Appellee argued that at age 56, with a mere high school education [8] and no formal job training, despite her best efforts, she had not achieved self-support. Her financial statement disclosed that without continuation of alimony she would operate at a monthly deficit of $2,901.15 (E.44). If the appellate court cannot conclusively determine that the trial court's judgment was clearly wrong or an **abuse** of discretion, it must defer to its fact finding. *See Blaine*, 97 Md. App 689, 707 citing *Brodak*, 294 Md. 10, 28-29 (1982). The trial court in this case determined that Appellee was unable to make as much progress toward self support due to the intervention of family illnesses (her daughter's Crohn's disease and her mother's cancer) and **elder** care issues. It did not err in that determination and there was ample evidence to support the trial court's finding in that regard.

The separate question which the trial court then needed to determine was the nature and duration of the extension: (a) extension of the rehabilitative term or ***14** (b) convert the rehabilitative alimony to indefinite alimony.

The trial court is not required to consider the §11-106(b) factors unless it determines to convert the rehabilitative alimony to indefinite alimony. The trial court found that Appellee could continue to make progress to be self-supporting if it extended the alimony. It no doubt considered that the parties continued to own the family home and would be marketing same in a very slow real estate market. The continued joint ownership of the family home meant continued joint obligations for the mortgage and real estate taxes until the home was sold at some unknown time in the future.

There is no authority for the proposition that a trial court must consider the §11-106(b) factors when extending rehabilitative alimony beyond the original rehabilitative term. Even if it were required to consider the factors, the trial court in this case had sufficient evidence before it for each factor.

Preliminarily it should be noted that a trial court is not required to "treat section 11-106(b) as a checklist and list every factor in his opinion". *Long v. Long*, 129 Md. App. 554, 582; citing *Crabill v Crabill*, 119 Md. App. 249,261 (1998).

The trial court had before it evidence that Appellee was only partly self-supporting (E. 36-44); (§11-106(b)(1)) ,**Family Law Article,** Annotated Code of Maryland); Appellee has found suitable employment; she was just not able to work as many hours as she needed to be self supporting; (E. 37) (§11-106(b)(2)); (3) the ***15** parties had established a standard of living during

the marriage which enabled Appellee to be a stay at home mom and she was not required to work outside the home; (E.109A); (§11-106(b)(3)); (4) the parties had been married for 20 years when they divorced (E. 23); (§11-106(b)(4)); the circumstances that contributed to the estrangement of the parties; (E. 4[9] ); (§11-106(b)(5); the age of each party[10]; (E. 166); (§11-106(b)(6)) The remaining factors, §11-106(b) 7, 8, and 9 may, but need not, be considered. **Blaine** at 74. The current financial circumstances of the parties, as discussed in the **STATEMENT OF FACTS,** infra, was before the trial court for it's consideration §11-06(b) (9) and (11). Furthermore, the adage, of unknown origin: "a picture is worth a thousand words"[11], was probably persuasive to the Court. The trial court needed only to view the picture of Appellant's three story residence (App. 23) and the marital home (Appellee's residence) (App. 24-25) for a graphic depiction of the disparity in the post divorce standards of living ***16** of the parties. (See also App. 18-22)

Finally, the trial court was not required to explain why it extended the rehabilitative alimony for a period of six years. The cases cited by Appellant for that proposition emanated from appeals by the recipient spouse who was challenging the lower court's failure to award indefinite alimony and are inapposite to the instant case. Appellee does not challenge the duration of the award.

## CONCLUSION

For the reasons stated the judgment of the Circuit Court for Talbot County should be affirmed, with costs of the appeal to be paid by Appellant.

**Appendix not available.**

Footnotes

1 "Mr. Albrecht will continue to pay the mortgage, real estate taxes and home owner's insurance. The mortgage payment will be a set-off against the alimony payment listed in paragraph four (4) of this Agreement for the duration of the use and possession period, i.e., $1,700 (rehabilitative alimony payment) - mortgage payment =amount to Ms. Wilkes per month."

2 Not Crofton as stated by Appellant's brief at page 6.

3 Trial Exhibits 2-5; (App. 5-12).

4 The parties Agreement provided that Appellee would have use and possession of the family home until April, 2008 and at the expiration of that time it would be listed for sale. [E.46] The parties agreed, verbally, to extend the use and possession period.

5 Left unasked and unanswered was why he drew the pay checks and reported the income if he had no funds in the company bank account.

6 Which amounts, Appellant testified, he paid "very faithfully". (E. 67)

7 Other than an English philosopher and the dictionary. *Langston* which he cites only serves to affirm that the trial court's ruling on Appellee's Exceptions was correct when he stated that the interpretation of the agreement was a matter of law and was subject to his de novo review. *Id.* at 506.

8 Plaintiff had obtained a certification as a nursing assistant but the certification lapsed in 2004, when she was 51 years old. She testified that she would have to return to school to be re-certified.

9 The original Complaint for Divorce alleges Appellant's adultery and desertion. 10

10 Appellee is particularly baffled that Appellant represents to this Court that Appellee's age was not revealed in the record (Appellant's brief at 16) Not only did Appellee testify that her age was 55 (App. 1-2), but Appellant testified to their respective ages as well. (E.166)

11 It is believed that the modern use of the phrase stems from an article by Fred R. Barnard in the advertising trade journal Printers' Ink, promoting the use of images in advertisements that appeared on the sides of streetcars.[1] The December 8, 1921 issue carries an ad entitled, "One Look is Worth A Thousand Words."
Another ad by Barnard appears in the March 10, 1927 issue with the phrase "One Picture is Worth Ten Thousand Words", where it is labeled a Chinese proverb. The Home Book of Proverbs, Maxims, and Familiar Phrases quotes Barnard as saying he called it "a Chinese proverb, so that people would take it seriously." Soon after, the proverb would become popularly attributed to Confucius. Wikipedia
Then, of course there is the 1971 song by David Gates ("Bread") : "If a picture paints a thousand words..."

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