Circuit Court for Frederick County
Case No. 10-C-14-000799

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 972

September Term, 2017

MATTHEW BRUNK

v.

JENNIFER BRUNK

Berger,
Friedman,
Shaw Geter,

JJ.

Opinion by Friedman, J.

Filed: August 15, 2019

Matthew and Jennifer Brunk were married in 1988 and granted an absolute divorce in 2015. By 2016, they were still disagreeing about the division of their financial assets and the circuit court tried to resolve the outstanding issues. In an order filed June 6, 2016 (the "June 2016 Order"), the circuit court entered several monetary judgments against Matthew and denied his motion to alter or amend the rehabilitative alimony award made to Jennifer. Matthew appealed. In February 2017, a panel of this Court concluded in an unreported opinion that the circuit court had abused its discretion because neither the alimony award nor the monetary judgments provided for in the June 2016 Order were supported by the record or the circuit court's own findings. *Brunk v. Brunk*, No. 2843, Sept. Term 2015 (Feb. 15, 2017).[1] This Court vacated the June 2016 Order and remanded the case to the circuit court for further proceedings.

Shortly after this Court's mandate issued, Jennifer's attorney submitted to the circuit court a "Proposed Findings of Fact and Conclusions of Law," which superficially responded to this Court's mandate while proposing nearly identical awards for nearly identical reasons. On July 3, 2017, the circuit court signed Jennifer's proposed findings of fact and conclusions of law and entered judgments in her favor (the "July 2017 Order"). Matthew again appealed.

Six months later, with Matthew's appeal pending, the circuit court issued another order. This order, entitled "Amended Judgment of Absolute Divorce," was drafted by the

[1] Although this Court's previous opinion is unreported, we cite to it under Maryland Rule 1-104 as law of the case. MD. RULE 1-104(b)(1).

circuit court itself and entered on January 22, 2018 (the "January 2018 Order"). After Jennifer's attorney pointed out to the circuit court that there was already a signed order after remand, the circuit court vacated the January 2018 Order, leaving the July 2017 Order intact. Matthew's appeal proceeded ,and he now argues that the July 2017 Order does not comply with this Court's mandate. We agree, and again vacate the judgment of the circuit court.

DISCUSSION

I. ALIMONY

We first address the circuit court's granting of rehabilitative alimony to Jennifer.

A. The June 2016 Order

In the June 2016 Order, the circuit court awarded Jennifer rehabilitative alimony of $2,500 per month for two years. On appeal, this Court held that the award was an abuse of the circuit court's discretion because the circuit court's own findings of fact did not support or explain how the amount and duration of the award would serve the purpose of rehabilitating Jennifer to be self-supporting. Slip op. at *3-4 (citing *St. Cyr v. St. Cyr*, 228 Md. App. 163, 184 (2016)). Moreover, we specifically noted that the award of alimony was inconsistent and inexplicable in light of the circuit court's determination that Jennifer had voluntarily impoverished herself. Slip op. at *4. The circuit court had noted that Jennifer was not precluded from working by any of her alleged physical ailments,[2] that she has a

[2] The circuit court listed Jennifer's health problems as "including high blood pressure, high cholesterol, migraines, and depression, for which she was taking several

master's degree in education but declined to pursue employment in that field, and that she had put little or no effort into entering a new field and finding employment. Slip op. at *2-3. We instructed the trial court to impute a potential income to Jennifer and reconsider the alimony award using the factors listed in section 11-106(b) of the Family Law Article ("FL") of the Maryland Code, and "at the very least, include an explanation for the amount and duration of any alimony award." Slip op. at *4.

B. The July 2017 Order

Upon remand, the July 2017 Order granted Jennifer the same award of rehabilitative alimony of $2,500 per month for two years. While the July 2017 Order does address the factors listed in FL § 11-106(b) as instructed, rather than imputing a potential income to Jennifer, the circuit court instead found that Jennifer is not voluntarily impoverished but could eventually be partially self-supporting and earn $30,000 per year. The court again found that it would take Jennifer "one to two years following the parties' divorce to find suitable employment" and that "[s]uch time would be necessary for [Jennifer] to address her health issues affecting her … ability to work, and to locate, prepare for with education and/or training, and obtain suitable employment in a new field for which she might not readily qualify." The court further observed that "it took [Matthew] (who is nearly the same age as [Jennifer]) two years to find employment in his field of expertise, and … he was not suffering from [Jennifer's] health issues."

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medications. She also had recurring bladder infections and was diagnosed with having scoliosis, which impacted her ability to sit and work."

While the July 2017 Order made some improvements, the alimony award still suffers from the same basic deficiencies as before. The record is still silent "as to what education or training the court contemplated and how it would allow Jennifer to find suitable employment." Slip op. at *4. Because there is no information about what sort of employment is contemplated, there is also no explanation as to how Jennifer's physical ailments limit her ability to work. Moreover, we fail to see how the length of time Matthew needed to find suitable employment is relevant to Jennifer's circumstances.

Because the findings and record still do not support or explain the amount and duration of the alimony award, the circuit court has again abused its discretion. *Boemio v. Boemio*, 414 Md. 118, 124-25 (2010). We note that on the next remand, if the court again chooses to award Jennifer alimony, it should be based on consideration of the factors in FL § 11-106(b), and that "[w]hile a court is not required to use a formal checklist when making its alimony determination, a sound decision in this case will, at the very least, include an explanation for the amount and duration of any alimony award." Slip op. at *4. That explanation should not rely on vague generalizations, but should "draw a solid line between the facts and the remedy, explaining fully how the former justifies the latter." *Long v. Long*, 129 Md. App. 554, 582-83 (2000).[3]

[3] We note that the January 2018 Order, which the circuit court rescinded, would have complied with our mandate and therefore may provide a useful starting point.

II. MONETARY AWARD

We next address the circuit court's calculation of a monetary award, in particular, the funds found to have been dissipated by Matthew.

A. The June 2016 Order

In the June 2016 Order, the circuit court found that Matthew dissipated $25,000 in marital assets. On appeal, this Court held that the finding was erroneous because, even viewed in the light most favorable to Jennifer, the evidence in the record did not substantiate a finding of $25,000 in dissipated assets. Slip op. at *7. We instructed that on remand, "the trial court should ascertain, based on the evidence, the value of assets dissipated by Matthew." Slip op. at *7.

B. The July 2017 Order

In the July 2017 Order, the circuit court made the same finding that Matthew had dissipated $25,000 in marital assets. In lieu of pointing to evidence in the record, however, the court explained that the reason the evidence did not substantiate the entire amount was because Matthew did not provide Jennifer with the records that she alleged would do so. The circuit court concluded that it could therefore make an "adverse inference" against Matthew to support Jennifer's allegations and substantiate the finding that Matthew had dissipated $25,000 in marital assets.

Contrary to the circuit court's reasoning, an adverse inference is not sufficient to fill in the evidentiary gaps in the record and justify the award of damages in a specific dollar amount. *Long v. Long*, 141 Md. App. 341, 349 (2001) (noting that an adverse inference may not be the basis for a finding of a specific amount of undisclosed income without

supporting evidence). During trial, Matthew admitted to having spent marital funds on his paramour but disputed the amount. The burden of production was on Jennifer to prove her claims. *See Omayaka v. Omayaka*, 417 Md. 643, 656 (2011); *Turner v. Turner*, 147 Md. App. 350, 409 (2002). While an adverse inference may be drawn when a party refuses to respond to probative evidence, *see Robinson v. Robinson*, 328 Md. 507, 516 (1992) (holding that a wife's assertion of a privilege regarding allegations of adultery can support an inference that she committed adultery), that inference is not substantive evidence that can independently support a finding. *Whitaker v. Prince George's County*, 307 Md. 368, 386 (1986) (citing *Larsen v. Romeo*, 254 Md. 220 (1969)). Matthew responded to the evidence Jennifer presented and admitted that many of the identified expenditures were indeed for his paramour. Without additional supporting evidence, however, Jennifer's allegations that Matthew made additional expenditures is pure speculation.

Because the circuit court's finding of $25,000 in dissipated assets is still not supported by evidence in the record, it is again clearly erroneous. We repeat that on remand, the circuit court "should ascertain, based on the evidence, the value of assets dissipated by Matthew and insert that amount in Matthew's column in its monetary award analysis." Slip op. at *7.[4]

III. COLLEGE FUND

Finally, the Brunks continue to dispute the division of their daughter's college fund.

[4] We again note that the January 2018 Order, which the circuit court rescinded, would have complied and therefore may provide a useful starting point.

A. The June 2016 Order

In the June 2016 Order, the circuit court awarded Jennifer the entire amount of their daughter's college fund plus prejudgment interest. The award was apparently based on the parties' Rule 9-207 property statement, which stated in footnote six to that statement that "the parties have agreed: (a) they will equally divide their daughter's … college fund such that they will each be custodian of 50%, and (b) they will be bound to each pay one-half of [her] college tuition." Slip op. at *6. At trial, however, Matthew argued that he and Jennifer had never reached an agreement about the college fund and the footnote should not be enforceable because it was based on a misunderstanding. Slip op. at *6.

On appeal, this Court concluded that there was no evidence in the record showing whether the circuit court had found the agreement to be enforceable or not. Slip op. at *6. On remand, the court was instructed to determine "whether the parties agreed to hold these funds for the benefit of [their daughter]; and whether there is an enforceable agreement for each party to pay one-half of [her] college tuition." Slip op. at *6. This Court further held that "[b]ecause the college fund is non-marital property, it cannot serve as a basis for a monetary award to adjust the equities of the parties concerning marital property," and directed that "in the absence of an agreement to the contrary, the college fund should be divided equally according to title." Slip op. at *6.

B. The July 2017 Order

In the July 2017 Order, the circuit court explicitly found that the agreement was enforceable and further found that Matthew had breached it. The court again awarded Jennifer the entire amount of the college fund plus prejudgment interest.

In granting an absolute divorce, a court "may resolve any dispute between the parties with respect to the ownership of personal property," but "may not transfer the ownership of personal or real property from one party to the other" except under limited circumstances.[5] FL § 8-202(a)(1), (3). The parties stipulated that the college fund is jointly-titled, non-marital property. Slip op. at *6. As such, the court cannot transfer Matthew's ownership interest in the college fund to Jennifer. *See Blake v. Blake*, 81 Md. App. 712, 721-23 (1990); *Thomasian v. Thomasian*, 79 Md. App. 188, 200-01 (1989). This award is therefore an abuse of the circuit court's discretion.[6]

IV. CONCLUSION

When an appellate court remands a case for further proceedings, "[t]he order of remand and the opinion upon which the order is based are conclusive as to the points decided." MD. RULE 8-604(d)(1).[7] The July 2017 Order does not comply with the opinion and mandate issued by this Court. We incorporate the previous opinion issued by this Court

[5] There are three statutorily defined exceptions to the rule prohibiting a court from transferring the ownership of personal property from one party to another incident to divorce. Under FL § 8-205(a)(2), a court may transfer ownership interests in: (i) a pension, retirement, profit sharing, or deferred compensation plan; (ii) family use personal property; and (iii) jointly owned real property that had been used as the parties' principle residence.

[6] We again note that the January 2018 Order, which the circuit court rescinded, would have complied and therefore may provide a useful starting point.

[7] Matthew also argues that because the matter was remanded "for further proceedings," the trial court was required to hold a hearing. A "proceeding" is any part of an action, which encompasses "all the steps by which a party seeks to enforce any right in a court." MD. RULE 1-202(a), (v). It was left to the discretion of the circuit court to decide whether it was necessary to hold a hearing on remand. We leave it the same discretion on this remand.

in this matter, and again vacate and remand the alimony and monetary awards to the circuit court to reevaluate in accordance with this Court's instructions.[8]

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[8] We note that the July 2017 Order vacated by this Opinion was not drafted by the circuit court but by Jennifer's attorney. The subsequent issuance of the January 2018 Order, which was drafted by the court itself (and which complied with this Court's mandate) suggests to us that the circuit court had not intended to adopt Jennifer's proposed findings of fact and conclusions of law and doing so was the result of some confusion. If so, the circuit court need only readopt the January 2018 Order. *See supra* notes 3, 4, and 6.