Circuit Court for Harford County
Case No. 12-C-13-000935

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2113

September Term, 2018

BRENDAN G. DELACY

v.

MARIA R. DELACY

Fader, C.J.,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: January 24, 2020

The appellant, Brendan DeLacy, has appealed a judgment of divorce from the Circuit Court for Harford County that, among other things, granted the appellee, Maria DeLacy, an award of indefinite alimony of $1,500 per month. Mr. DeLacy argues that the circuit court committed two errors with respect to its award of alimony: (1) imputing only $55,000 of income to Ms. DeLacy; and (2) making its award indefinite. We find no abuse of discretion in connection with the circuit court's imputation of income, but we agree that the court erred in awarding indefinite alimony without expressly finding an unconscionable disparity in the parties' post-divorce living standards. As a result, we will vacate the award of indefinite alimony, as well as the interrelated monetary award, and remand for further proceedings.

BACKGROUND

Mr. and Ms. DeLacy were married in Harford County in October 2008 and had two children together. Mr. DeLacy, a research scientist, was employed by the United States Department of Defense at the time of the divorce proceedings. Ms. DeLacy, an attorney, worked for three different law firms during the marriage, the last of which was the Law Offices of Anthony J. DiPaula, P.A. (the "DiPaula Firm"). She left the DiPaula Firm at the end of 2016 and began pursuing a teaching career in early January 2017. At the time of the divorce proceedings, she was employed as a substitute teacher and was working toward becoming a full-time teacher.

According to both parties, the marriage was fraught with significant problems, which led the parties to separate in March 2013.

The Divorce Proceedings

In May 2014, Mr. DeLacy filed a complaint for absolute divorce in the Circuit Court for Harford County in which he requested, among other things, alimony, a monetary award, sole custody of the children, and child support. Ms. DeLacy filed an answer as well as a counter-complaint for absolute divorce in which she requested, among other things, child support, a monetary award, and "temporary, permanent and/or indefinite alimony."

The trial spanned 14 court days over the course of nearly a year from April 2017 through March 2018, during which the court received evidence and heard testimony from Mr. and Ms. DeLacy and two siblings of Mr. DeLacy. As relevant to the issues in this appeal, the evidence included the following:

- Mr. DeLacy's salary was approximately $131,000 per year.
- Ms. DeLacy's income fluctuated during the course of the marriage. In 2008, she earned $81,010.16 as counsel at a captive law firm for an insurance company. From 2009 through 2011, working at a different law firm, she earned between $4,195 and $20,265 each year. During 2012, Ms. DeLacy was employed as a student teacher and earned only $919. From May 2013 until the end of 2016, Ms. DeLacy worked at the DiPaula Firm. Her income in those years was $33,869.90 (2013); $64,238.80 (2014); $78,765.92 (2015); and $55,667.53 (2016).
- In the summer of 2016, apparently as a result of a complaint made by Mr. DeLacy regarding alleged hacking into his electronic accounts, police executed a search and seizure warrant at the DiPaula Firm, during which they seized a hard drive from Ms. DeLacy's computer.
- In January 2017, Ms. DeLacy resigned from the DiPaula Firm. She testified that she "voluntarily left his office" because she "was afraid [she] was going to get fired" as a result of the search and seizure incident. Ms. DeLacy testified that she sought employment as a lawyer after that, but with little success.

- At the time of her testimony, Ms. DeLacy was about to begin working as a full-time substitute teacher for the 2017-2018 school year, earning an annual income of $16,200. She testified that she was awaiting the results of a certification test that would allow her to obtain a full-time teaching position, in which, she predicted, she would earn approximately $50,000 annually.

The Circuit Court's Ruling

In March 2018, the court issued an oral ruling in which it granted the parties an absolute divorce and, as relevant here, ordered Mr. DeLacy to pay a monetary award of $75,000 and $1,500 per month in indefinite alimony. In considering those two issues in tandem, the court reviewed the relevant statutory factors and made findings of fact, including as to each party's income. The court determined that Mr. DeLacy's salary was $131,000, and was expected to remain stable. As to Ms. DeLacy, the court concluded that she had left her employment with the DiPaula Firm voluntarily and, as a result, imputed income to her in the approximate amount of her annual income during her last year in that position: $55,000. Using those figures and the information on the parties' respective financial statements, the court concluded that Mr. DeLacy had a net monthly income of $2,970, while Ms. DeLacy ran a monthly deficit of approximately $1,700. The court calculated both figures without deducting any housing expenses, based on its finding that the parties had stopped paying the mortgage on the marital home.

In July 2018, the court issued a written Judgment of Absolute Divorce consistent with its oral rulings.[1] Mr. DeLacy timely appealed.

[1] In addition to alimony and the monetary award, the written judgment also addressed the division of the parties' retirement assets, child support, health insurance for

DISCUSSION

In divorce proceedings involving alimony, "we review the trial court's factual findings for clear error, while [the court's] ultimate award is reviewed for abuse of discretion." *Reynolds v. Reynolds*, 216 Md. App. 205, 218-19 (2014). We "accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)).

We review the circuit court's determination of imputed income for abuse of discretion. *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994) ("[F]indings regarding the factors related to potential income . . . are left to the sound discretion of the trial judge."). "An appellate court will uphold a trial court's determination of potential income as long as the underlying factual findings are not clearly wrong, and 'the amount calculated is realistic' and not 'so unreasonably high or low as to amount to an abuse of discretion[.]'" *St. Cyr v. St. Cyr*, 228 Md. App. 163, 183-84 (2016) (quoting *Sieglein v. Schmidt*, 224 Md. App. 222, 249 (2015)).

I. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN IMPUTING INCOME OF $55,000 TO MS. DELACY FOR ALIMONY PURPOSES.

Mr. DeLacy contends that the court erred in imputing an annual income of $55,000 to Ms. DeLacy because that figure "does not comport with any of the evidence" and is "well below what she was capable of making." In essence, he argues that because Ms.

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the children, and counsel fees. Because none of those aspects of the judgment are raised on appeal, we do not discuss them here.

DeLacy earned more than that amount in the past, including in two of the last three years she worked at the DiPaula Firm, the court abused its discretion in not imputing a higher income. He further asserts that the court erred in failing to "make an on the record consideration of the factors . . . [for] determining [Ms. DeLacy's] potential income." We disagree on both points.

A. The Circuit Court Did Not Commit Reversible Error by Failing to Consider Expressly Each of the *Goldberger* Factors.

"In awarding alimony, the court may impute income to a party if that party is capable of earning more income than he or she is earning at the time of the divorce." *Brewer v. Brewer*, 156 Md. App. 77, 121 (2004); *see also Crabill v. Crabill*, 119 Md. App. 249, 262-63 (1998) (in calculating alimony, a trial court "acted within its discretion" to attribute income to a retiree based on his "experience and ability" working a separate part-time job). The court is "not expressly require[d]" by statute to "consider a spouse's . . . potential income for alimony purposes," but it has discretion to ascertain "the potential income of a voluntarily impoverished spouse when it considers an alimony request."[2] *St. Cyr*, 228 Md. App. at 179-80. "Potential income 'is not the type of fact which is capable of being verified through documentation or otherwise[,]' and indeed 'any determination of potential income

[2] A parent is "'voluntarily impoverished' whenever the parent has made the free and conscious choice . . . to render himself or herself without adequate resources." *Digges v. Digges*, 126 Md. App. 361, 381 (1999) (quoting *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993)). Ms. DeLacy did not cross-appeal the trial court's determination that she was voluntarily impoverished, so we do not consider that issue here.

must necessarily involve a degree of speculation.'" *Id.* at 183 (quoting *Malin v. Mininberg*, 153 Md. App. 358, 406-07 (2003)).

We turn first to Mr. DeLacy's contention that the trial court erred in failing to consider expressly each of the factors set forth in *Goldberger v. Goldberger*, 96 Md. App. 313 (1993). There, this Court set forth the following non-exhaustive list of factors that a trial court "should consider in determining the amount of potential income" to attribute to a voluntarily impoverished parent when calculating child support:

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
9. any other factor bearing on the parent's ability to obtain funds for child support.

Id. at 327-28.

For several reasons, Mr. DeLacy is incorrect that the trial court committed reversible error by failing to identify and discuss each of the *Goldberger* factors in arriving at its determination of imputed income for alimony purposes. First, *Goldberger* involved a court's determination of imputed income for purposes of calculating child support. Here, we are concerned with alimony, not child support. We have not previously mandated that

a trial court consider each of the *Goldberger* factors in connection with an alimony award, and we decline to do so now.

Second, even when a trial court is required to consider a mandatory list of factors, it is not required "to articulate on the record its consideration of each and every factor." *Long v. Long*, 141 Md. App. 341, 351 (2001) (quoting *Dunlap v. Fiorenza*, 128 Md. App. 357, 364 (1999)). Therefore, the "mere lack of an explicit discussion of each of the factors on the record by the trial court does not necessarily mean that the trial court erred." *Long*, 141 Md. App. at 351; *see Lee v. Andochick*, 182 Md. App. 268, 287 (2008) ("The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal." (quoting *John O. v. Jane O.*, 90 Md. App. 406, 429 (1992))).

Third, the trial court here actually did discuss all of the *Goldberger* factors at some point in its analysis, and discussed most of them in connection with a determination of Ms. DeLacy's imputed income. In its analysis of the issues, the trial court addressed alimony and whether to make a monetary award first, before turning to child support. When it turned to child support, the court took up the issue of imputed income again in that context. At that point, Mr. DeLacy's counsel contended that the court was required to consider the factors for determining voluntary impoverishment, as set forth in *John O. v. Jane O.*, 90 Md. App. 406 (1992),[3] and discussed each of them. Those factors are:

[3] In *Wills v. Jones*, 340 Md. 480 (1995), the Court of Appeals disapproved of *John O.* insofar as that decision considered not only whether a parent's impoverishment was voluntary, but also on whether it was intended to interfere with the ability to pay child support. *Id.* at 493-94. Instead, agreeing with the broader formulation of the inquiry in *Goldberger*, the Court held that the focus should be exclusively on whether the

(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.

Id. at 422. Notably, the *John O.* factors, which are broader than the *Goldberger* factors, generally cover the same topics.[4] In determining the amount of Ms. DeLacy's imputed income for child support purposes after hearing from Mr. DeLacy's counsel, the trial court expressly identified and considered each of these factors, and then reached the identical conclusion that her imputed income should be $55,000.

impoverishment was voluntary. *Id.* That partial disapproval does not affect our analysis here.

[4] We do not perceive Mr. DeLacy to argue that the trial court erred in using the *John O.* factors—at his urging—rather than the *Goldberger* factors. We would reject that argument in any case because if the court erred in using the wrong set of factors, the error was invited by Mr. DeLacy. *Cf. State v. Rich*, 415 Md. 567, 575 (2010) ("[W]here a party invites the trial court to commit error, he cannot later cry foul on appeal."). Any such error was also harmless in light of the substantial overlap between the *Goldberger* factors and the *John O.* factors. Indeed, the only *Goldberger* factors that are not expressly subsumed within the *John O.* factors are age, mental condition, assets, and "actual income from any source." The trial court expressly or implicitly considered each of those factors in its analysis.

B. The Circuit Court Did Not Abuse Its Discretion in Determining the Amount of Income to Impute to Ms. DeLacy.

Mr. DeLacy also contends that the trial court abused its discretion in determining that Ms. DeLacy's imputed income was $55,000. He argues that the trial court abused its discretion because $55,000 was the lowest salary Ms. DeLacy earned during her three full years with the DiPaula Firm, and she had earned substantially more than that several years earlier at a different law firm.

In making this argument, Mr. DeLacy is essentially asking us to reweigh the evidence, which is not our role. *See White v. State*, 363 Md. 150, 162 (2001) ("[I]t is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case." (quoting *McDonald v. State*, 347 Md. 452, 474 (1997)). The amount of income the circuit court imputed to Ms. DeLacy clearly "had support in the record," *see Dunlap*, 128 Md. App. at 365, as it was nearly the same income she earned during 2016, her last full year employed as a lawyer. Moreover, as the circuit court explained, her income during 2015 had been boosted by a bonus, which the court apparently concluded was not likely to be duplicated. Although it appears that even Ms. DeLacy's base income was higher in 2015 than in 2016, we have no basis on which to conclude that the trial court abused its discretion in deciding to use a particular figure with support in the record rather than a different figure that the record also would have supported. Whether we would have reached the same determination as the trial court is irrelevant. The amount that the court found "'is realistic' and not 'so unreasonably . . . low

as to amount to an abuse of discretion[.]'" *St. Cyr*, 228 Md. App. at 183-84 (quoting *Sieglein*, 224 Md. App. at 249).

II. THE CIRCUIT COURT ERRED IN GRANTING THE AWARD OF INDEFINITE ALIMONY.

Mr. DeLacy next challenges the trial court's award of indefinite alimony to Ms. DeLacy, contending that "[t]he trial court announced its alimony without explaining . . . why the income disparity was unconscionable." We agree.

The "trial court has broad discretion in making an award of alimony," *Ware v. Ware*, 131 Md. App. 207, 228 (2000) (emphasis removed) (quoting *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999)), and its award "will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong," *Boemio*, 414 Md. at 124 (quoting *Solomon v. Solomon*, 383 Md. 176, 196 (2004)). Notably, as he confirmed at oral argument, Mr. DeLacy does not take the position that the court lacked a basis for an award of rehabilitative alimony in this case, nor does the record suggest a basis for such a challenge. The trial court made findings of fact based on the evidence, expressly considered all of the required factors for an award of rehabilitative alimony listed in § 11-106(b) of the Family Law Article, and arrived at an ultimate conclusion consistent with its factual findings and legal conclusions.

However, Maryland's "'statutory scheme generally favors fixed-term or so-called rehabilitative alimony,' rather than indefinite alimony." *Solomon*, 383 Md. at 195 (quoting *Tracey*, 328 Md. at 391). Thus, "[t]he statute places strict limits on a trial court's ability to grant indefinite alimony." *Solomon*, 383 Md. at 196. Even after considering all of the

§ 11-106(b) factors and determining that an award of rehabilitative alimony is appropriate, a court still may award indefinite alimony only if it finds that: "(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or (2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." Md. Code Ann., Fam. Law § 11-106(c) (2019 Repl.).

Here, we are concerned only with the second § 11-106(c) factor, unconscionable disparity. "[T]o constitute a 'disparity'" for the purposes of § 11-106(c)(2), the parties' "standards of living must be fundamentally and entirely dissimilar." *Whittington v. Whittington*, 172 Md. App. 317, 338 (2007) (quoting *Karmand v. Karmand*, 145 Md. App. 317, 336 (2002)). "To be unconscionable, the disparity in the post-divorce standards of living of the parties must work a 'gross inequity,'" *Whittington*, 172 Md. App. at 339 (quoting *Brewer*, 156 Md. App. at 100), "or create a situation in which one spouse's standard of living is 'so inferior, qualitatively or quantitatively, to the standard of living of the other as to be morally unacceptable and shocking to the court,'" *Whittington*, 172 Md. App. at 339 (quoting *Karmand*, 145 Md. App. at 337).

"The determination of unconscionable disparity" requires the court to take into account "equitable considerations on a case-by-case basis." *Innerbichler v. Innerbichler*, 132 Md. App. 207, 248 (2000) (quoting *Roginsky*, 129 Md. App. at 146-47) (internal quotation marks omitted). In deciding whether an "unconscionable disparity" in standards

of living exists, the circuit court must compare the more-affluent spouse's post-divorce standard of living with the requesting spouse's standard of living at a projected point in time when the requesting spouse will have made "as much progress toward becoming self-supporting as reasonably can be expected." *Francz v. Francz*, 157 Md. App. 676, 701 (2004). In other words, the court must make "a projection into the future, based on the evidence, beyond the point in time when a party may be expected to become self-supporting[,] . . . to the point when maximum progress can reasonably be expected." *Roginsky*, 129 Md. App. at 146. Notably, although it is not required to specifically "use the term 'unconscionable'" when weighing "the equities of the case," *see Goshorn v. Goshorn*, 154 Md. App. 194, 216 (2003), the circuit court must "explicitly discuss the [unconscionable] disparity issue" when either denying or granting a request for indefinite alimony, *Hart v. Hart*, 169 Md. App. 151, 170 (2006).

Here, the record does not demonstrate that the trial court performed the required analysis. Specifically, it does not appear that the court considered expressly whether Ms. DeLacy's and Mr. DeLacy's "respective standards of living . . . will be unconscionably disparate" at the point in time when Ms. DeLacy "will have made as much progress toward becoming self-supporting as can reasonably be expected." Fam. Law § 11-106(c). Nor may we assume that the court conducted this analysis without placing it on the record. *See Andochick*, 182 Md. App. at 287-88 ("[K]nowledge of the law does not obviate the requirements . . . that the court discuss how, in the court's opinion, the living standards

would be unconscionably disparate absent an award of indefinite alimony."). We must, therefore, vacate the award of indefinite alimony and remand for further consideration.

For clarity, we observe that the requirement that the court project into the future to the point where Ms. DeLacy has made "as much progress toward becoming self-supporting as reasonably can be expected," *Francz*, 157 Md. App. at 701, does not necessarily require a projection far into the future. For example, if the court were to determine, based on Ms. DeLacy's imputed income, that she had already reached that point, the appropriate time to consider the parties' respective standards of living for purposes of assessing whether there is an unconscionable disparity would be the present. In that case, however, the court must (1) state that conclusion expressly and (2) conduct the appropriate analysis to determine explicitly whether an unconscionable disparity presently exists that would support an award of indefinite alimony under § 11-106(c)(2).

For guidance on remand, we will also address briefly Mr. DeLacy's related argument that "the trial court relied too much on the parties' respective percentage of the household income," and erred in granting indefinite alimony on that basis alone. Although Mr. DeLacy is correct that a difference in income is not alone sufficient to result in an unconscionable disparity, "a disparity in income is necessarily going to play a highly significant role" in that analysis. *Boemio*, 414 Md. at 118. Indeed, "gross disparities in income levels frequently have been found unconscionable, and have supported the award of indefinite alimony." *Innerbichler*, 132 Md. App. at 248 (quoting *Crabill*, 119 Md. App. at 266); *see Kelly v. Kelly*, 153 Md. App. 260, 279 (2003) (identifying cases in which this

Court "found that the [trial court] did not err in granting indefinite alimony to a spouse whose potential income" was less than half of the other spouse's income (quoting *Lee v. Lee*, 148 Md. App. 432, 448-49 (2002))); *Digges*, 126 Md. App. at 389-90 (same).

However, "a mathematical comparison of the incomes of the parties . . . is never conclusive," though it may be "the starting point of an analysis of unconscionable disparity." *Roginsky*, 129 Md. App. at 147 (quoting *Blaine v. Blaine*, 336 Md. 49, 71-72 (1994)). In other words, "a mere difference in earnings of spouses, even if it is substantial, and even if earnings are the primary means of assessing the parties' post-divorce living standards, does not automatically establish an 'unconscionable disparity' in standards of living." *Karmand*, 145 Md. App. at 336 (emphasis removed); *see Andochick*, 182 Md. App. at 288 ("[P]roof of a disparity in gross income is not enough to show a disparity in standard of living."); *see also Brewer*, 156 Md. App. at 104-05 (vacating indefinite alimony award where court considered disparity in assets but not disparity in standard of living). On remand, therefore, the trial court may certainly consider the disparity in the parties' incomes, but may not premise an award of indefinite alimony exclusively on that factor.

Because of the interrelationship between alimony and monetary awards, we must also vacate the court's monetary award. *See Whittington*, 172 Md. App. at 342 ("When an alimony award is vacated, any monetary award also must be vacated, as the two are interrelated."); *St. Cyr*, 228 Md. App. at 198 ("The factors underlying [alimony and monetary] awards 'are so interrelated that, . . . when this Court vacates one such award, we often vacate the remaining award[] for reevaluation.'" (quoting *Turner v.*

Turner, 147 Md. App. 350, 400-01 (2002))). Until the trial court has the opportunity to address these issues on remand, its award of $1,500 per month in alimony "shall be given the force and effect of a *pendente lite* award." *Simonds v. Simonds*, 165 Md. App. 591, 613 (2005). In other words, Mr. DeLacy must continue to pay that amount, but as a *pendente lite* alimony award, not as indefinite alimony.

In light of the uncertain status of the parties' housing expenses at the time of the court's judgment, it will be appropriate for the court to receive updated information about those expenses on remand before reaching a final conclusion as to alimony and a monetary award.[5] The court may also receive any additional information it considers appropriate.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY VACATED AS TO THE AWARD OF INDEFINITE ALIMONY AND THE MONETARY AWARD, AND AFFIRMED IN ALL OTHER RESPECTS. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BY THE APPELLANT AND THE APPELLEE.

[5] In light of our conclusion that it will be appropriate to receive additional information about housing expenses on remand, we need not address Mr. DeLacy's contention that the court erred in failing to include mortgage expenses the parties were not paying when determining its alimony award.