Circuit Court for Garrett County
Case No.: 11-P-14-001375

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2296

September Term, 2018

PATRICK W. FRIEND

v.

GARRETT COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.

Berger,
Gould,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: January 8, 2020

Patrick W. Friend ("Mr. Friend"), appellant, is the father of Tayah R. Friend, born May 4, 2013, and Tyson Wade Stanton, born April 13, 2010. The mother of the two children is Ashley Renee Stanton, one of the appellees in this case.

On March 24, 2014, the Garrett County Department of Social Services, Bureau of Support Enforcement ("the Department"), filed suit in the Circuit Court for Garrett County on behalf of Ashley Renee Stanton, against Mr. Friend. The Department asked the court, *inter alia*, to order Mr. Friend to contribute to the support of his children. Paragraph seven of the complaint read: "It is believed the [d]efendant is capable of providing toward the support and maintenance of his minor dependent(s) including insurance coverage." Mr. Friend, acting *pro se*, filed an answer to the complaint in which he admitted the truth of all the substantive allegations set forth in the Department's complaint.

Approximately four and one-half years passed before this child support action was tried. The main reason for this long delay was because Mr. Friend was awaiting disposition of a disability claim he had filed with the Social Security Administration.

The trial in this matter took place in the Circuit Court for Garrett County on August 24, 2018. Mr. Friend appeared without counsel at this hearing. The trial judge found that Mr. Friend had voluntarily impoverished himself and ordered him to pay $445.00 per month as child support. Those monthly child support obligations, according to the court's order, were to be calculated as starting on March 1, 2014.

Mr. Friend, by counsel, filed this timely appeal in which he raises four questions:

> 1. Did the trial court err in failing to apply established factors to determine "voluntarily impoverishment[?]"

2. Did the trial court err in failing to apply the established factors to determine "potential income[?]"

3. Did the trial court err in failing to use child support standardized Worksheet B, [which concerns child support where the parents have] shared physical custody of the children[?]

4. Did the trial court err in calculating the arrearage twenty-three days prior to the date of filing [the complaint?]

We shall answer the first question presented in the affirmative, vacate the judgment and remand the case for a new trial. It is unnecessary to answer the remaining three questions.

I.

Evidence Produced at the August 24, 2018 Hearing

At the child support hearing, the trial judge heard from three witnesses: Mr. Friend, Mr. Friend's mother, Diana Rhodes, and Ashley Stanton.

A. Testimony of Appellant, Patrick W. Friend When Called as a Witness for the Appellees

Prior to questions being asked of Mr. Friend, the trial judge asked counsel for the Department whether Mr. Friend had provided the Department with "financial records that you've requested" or "[t]ax returns and paystubs . . . [a]nything like that?" Counsel for the Department answered in the negative. Mr. Friend, at that point, interjected: "I don't have nothing."

On direct testimony, Mr. Friend testified that he was unemployed and had been so for "[s]everal years[.]" He then attempted to clarify that statement by testifying that he

was last employed when he and Ms. Stanton had lived together. He did not say, nor was he asked, when he and Ms. Stanton stopped cohabitating.

The attorney for the Department next asked Mr. Friend if he could give a "month and a year" in which he was last employed. Appellant replied, "not exactly I can't." Counsel for the Department then segued to the issue of why Mr. Friend was not currently working. Mr. Friend answered that he had a "spinal disease" that caused the deterioration of the muscles in his legs. Shortly after that answer, counsel for the Department essentially repeated the earlier question by inquiring: "[w]hat prevents you from working?" Mr. Friend answered, "I have a spinal disease that is giving me muscle dystrophy and opathy that's taken my legs out from under me." When asked what type of activities he was unable to do, Mr. Friend replied "I can't stand for very long. I can't sit for very long. Just - - that's just - - it's awful." Responding to additional questions, Mr. Friend said that being "jarred around" affected his condition and that he "live[d] with pain every day of my life," which "[p]retty much" prevented him from working. Mr. Friend added that he had to keep many doctor's appointments, not just for his leg problems, but for "head problems." Despite these ailments Mr. Friend admitted that he had a Maryland driver's license and owned a 2002 Chevy Trailblazer.

Mr. Friend also admitted that within the last two years, he had driven a motorcycle. When asked by counsel for the Department whether riding a motorcycle would cause "a lot of stress" on his back and muscles, Mr. Friend did not answer directly. He first said that he didn't get to ride a motorcycle as much as he wished and that "[y]ou'd be mighty

surprised how comfortable a cruisin' motorcycle is." The judge then asked Mr. Friend what kind of motorcycle he owned, to which Mr. Friend replied that he did not currently own a motorcycle because he could not afford one. Upon further questioning, Mr. Friend said that his father had given him a 1997 Vulcan Classic 1500 motorcycle "[t]hree years ago" and that he, appellant, had sold the motorcycle for $500 eight months previously. He admitted that the motorcycle sale proceeds were not used to provide any direct child support to the mother of his children, but he did spend a portion of the proceeds to buy his children a PlayStation.

Next, Mr. Friend was asked if at the present time he owned any other vehicles. After he replied in the negative, he was then asked by counsel for the Department: "how about a tow truck . . . .?" Mr. Friend denied owning such a vehicle but when he was next asked if he was aware of anybody else who had a vehicle of that type, appellant stated that his fiancée did own a "2000 or 2001 International" tow truck.

At this point in the proceedings, the following exchange occurred:

> THE COURT: [Counsel for the Department] we don't need to go into de - - I can see very clearly what's going on here with this gentleman.
>
> [Counsel for the Department]: I just wanted to show that he has the ability to work and is choosing not to.
>
> THE COURT: - - and I'm - - he's provided no documentation of a medical disability. He's also indicated that he has assets, an '02 Trail Blazer. He had a motorcycle that he sold at a profit. You've amply - -
>
> [Counsel for the Department]: Okay.

> THE COURT: - -satisfied the Court's concern in this case. I'm satisfied this gentleman has assets and income that are available for the support of his children.[1]

After that last comment, Mr. Friend interjected: "I only own a car that's worth - -" The Court then admonished: "[d]on't argue with me." Mr. Friend then said that the vehicle he owned was worth about "$1,500." The trial judge next said to the counsel for the Department:

> We can dispense - - we can dispense with these games because that's what he's going to do is play games with us all day. I don't have the time or the concern for somebody that doesn't even care about feeding their kids to do this. So, I'm satisfied at this point. You've met your burden.

Mr. Friend was then excused as a witness.

B. Testimony of Ashley Stanton

Ashley Stanton testified that for the last two years she had worked for a company known as Railey Mountain Lake Vacations. She works 80 hours every two weeks and is paid $14.25 per hour. She has not incurred any extraordinary medical expenses on behalf of her two children. Ms. Stanton further testified that since March 24, 2014, (the date the child support complaint was filed), Mr. Friend had provided her with no child support.

Regarding the issue of whether Mr. Friend had been employed in the past, counsel for the Department inquired: "[h]ave you received text messages from the [d]efendant, in the past, during this four year period of time that indicated that he was working?" Ms. Stanton replied to that question in the affirmative. Next she was asked "[w]hat was the

[1] At that point in the proceedings, there was no evidence whatsoever that Mr. Friend had "income" available to make child support payments.

context of" the text messages. She answered, "just basically saying, hey, what are you doing, on days that I had to work, and he'd come back with, I'm working." She added that she had received no child support during "those times that he said he was working." She was not asked how often Mr. Friend worked, or precisely when he last said he "was working," or whether she knew the type of work appellant did. Counsel for the Department did inquire as to whether she had seen Mr. Friend "riding motorcycles and four-wheelers[.]" She testified that she had seen him driving vehicles of that type within the last four years, although she was not asked, nor did she volunteer, how often she had seen Mr. Friend engage in such activities.

At that point, counsel for the Department stated that he had no further witnesses but that he did need time to prepare a child support guidelines worksheet. Mr. Friend elected not to cross-examine the witness.

C. Testimony of Diana Rhodes

Diana Rhodes, Mr. Friend's mother, was called as a defense witness. She testified that on the days that Ms. Stanton worked, Mr. Friend "watche[d] the kids." Mr. Friend then asked his mother how many nights a week the children stayed with him. Ms. Rhodes replied "[a] lot."

Ms. Rhodes further testified that "the family" provided clothing and shoes for the children and that appellant went on school trips with his children and provided for their needs while on such trips. Ms. Rhodes also testified that "we take the kids all we can," including when Ms. Stanton "has an emergency" or "wants to go play bingo." Ms. Rhodes

also said that she took care of the children five days a week when their mother was working and during the summer, she took care of the children "day and night." Ms. Rhodes concluded her direct testimony by saying "we try everything we can to provide everything. We love the kids, and we keep them all we can."

On cross-examination by counsel for the Department, Ms. Rhodes clarified that it was the family that "gets together" and pays for the children's expenses on school field trips. When Ms. Rhodes was asked whether appellant was providing support for the children, Ms. Rhodes said that her son was not able to work because "[h]is legs broke three times." She then admitted that appellant provided no financial support for the children although she and her family did provide such support.

On re-direct examination, the following, somewhat confusing, colloquy occurred:

> Q. [Mr. Friend]: I have sold property that I've owned over the years for - -
>
> A. [Ms. Rhodes]: Everything Patrick had when him and Ashley split up, Ashley knows, she came to the house, she actually got in our pool in the yard to catch the fish to sell so she could have the money. She come, and they pulled a Jeep out that he had. She got the money. Everything he had, she sold and got the money and go.
>
> THE COURT: Ma'am, no remarks from up there, please. Any other questions?
>
> [Mr. Friend]: That's all.
>
> THE COURT: [Counsel for the Department]?
>
> [Counsel for the Department]: No, Your Honor.

Appellant then rested his case.

D. Testimony of Ashley Stanton as a Rebuttal Witness

After the Department called Ms. Stanton as a rebuttal witness, the court asked her whether there was anything she would like "to tell us." She then gave the following answer:

> Your Honor, there are several dates that, um, it is court ordered that he is to get my children while I work, and there are several times where I even missed work and had put my job at jeopardy because I could not find Mr. Friend. I would drive to where his residence was in town. I would go to Crellin before my clock-in time at work, would run me late. So, on numerous accounts and numerous dates, I do have it typed up where I had to send a certified letter stating he would be for contempt of court because he failed to be there to get his children. So, I was made to write that certified letter. Yes, his grandmother does buy my children things, but that's still not him providing for his children. There are many times where I've asked him to go half on several things where he did not.
>
> Um, riding motorcycles, buying Jeeps, buying trucks, buying this and buying that, you know, it's really nice when I'm providing for your children. Yes, my fiancé has walked in my life and has taken care of my two kids that aren't even his. He takes my little girl to cheer practice every night. You know, um, my kids have played ball the past three years, and he's probably made five games in those three years. So, I thank Jason for being in my life to be there for my kids to look up to as a father and to help support us and what we need.

(Emphasis added.)

Ms. Stanton was not asked when appellant bought a jeep or a truck or any other item, and the Department rested. Appellant did not cross-examine Ms. Stanton.

E. Exhibit Introduced by Appellant

After the "rebuttal" testimony of Ms. Stanton, appellant handed the trial judge a letter from a law firm indicating that one T. Lee Beeman, Jr., Esquire, represented Mr. Friend in a case pending before the Social Security Administration in which Mr. Friend

made a claim for Social Security disability payments. According to the letter, appellant had not received any disability benefits so far from the Social Security Administration, but Mr. Beeman anticipated that appellant would receive a disability hearing sometime between March and May of 2019. Mr. Beeman conceded in the letter that he was not certain whether appellant would or would not receive any disability benefits.

F. Closing Argument

In closing argument, counsel for the Department claimed that the Department had put on sufficient evidence to show that appellant had voluntarily impoverished himself. He asserted that voluntary impoverishment was shown "through purchases and [appellant's] lifestyle . . . ."[2] Counsel for the Department also argued that it would be appropriate to find that appellant had the ability to obtain a minimum wage job; that the minimum wage in Maryland was currently $10.50 per hour; and that if appellant worked 40 hours per week, his earnings would amount to $1,750 per month. Attributing a monthly income of $1,750 to appellant, after taking into consideration Ms. Stanton's earnings, would, under the child support guidelines, require appellant to pay $445 per month as child support.

[2] There was no proof that appellant made any "purchase" during the four and one-half years before the hearing and no evidence as to what "lifestyle" Mr. Friend might enjoy, other than testimony that at some unknown time or times, Mr. Friend rode a motorcycle and, on at least one occasion, was seen driving a "four-wheeler."

II.

The Trial Judge's Oral Opinion

The trial judge started off his opinion by complimenting appellant's mother for helping to raise Mr. Friend's two children. He then said that unfortunately appellant did not appear to understand that the children needed his support. The judge next voiced his conclusion that appellant had voluntarily impoverished himself and gave two reasons in support of that conclusion. The first reason was based on "the way he titles different property so that he doesn't own anything, specifically." The second reason was that appellant

> has not had any governmental agency determine that he has a disability at this point. That may be something that happens in the future, but there's been no conclusory [sic] evidence from any governmental agency that this man is either temporarily or permanently disabled. It's clear he's voluntarily impoverished himself.

After giving those reasons for finding voluntary impoverishment, the court announced that he would sign an order providing that appellant would be obligated to pay $445 per month as child support and that the child support payments would have a March 1, 2014 start date "for arrearage purposes." Payments by appellant were to be made through the State of Maryland.

III.

Discussion of Issue One

In *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993), the Court said:

> [W]e now hold that, for purposes of the child support guidelines, a parent shall be considered "voluntarily impoverished" whenever the parent

> has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources. To determine whether a parent has freely been made poor or deprived of resources the trial court should look to the factors enunciated in *John O. v. Jane O.*, 90 Md. App. 406, at 422, 601 A.2d 149 [(1992)]:
>
> 1. his or her current physical condition;
> 2. his or her respective level of education;
> 3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
> 4. the relationship of the parties prior to the 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.

Appellant contends that as to many of the *Goldberger* factors, no evidence was produced and, in any event, the trial judge, rather than considering the *Goldberger* factors, "established [his] own factor[s] for determining voluntary impoverishment[.]"

Appellees contend that although the court did not "explicitly verbalize its analysis, the record reveals that the court considered the appropriate factors." We disagree with appellees in this regard. But before explaining in detail the reasons for our disagreement, it is useful to review what evidence, if any, was produced regarding each of the *Goldberger* factors.

In this case, one of the most important *Goldberger* factors is the first: physical condition of the parent. As mentioned, Mr. Friend testified that he had a spinal disease that resulted in "muscle dystrophy and opathy" and that these medical problems had "taken [his] legs out from under [him]." Appellant also testified that he "live[s] with pain" every

day and that the pain "pretty much" prevents him from working. Appellant's mother testified that she knew that Mr. Friend was "not able to work."[3]

In regard to the first factor, appellees argue:

> Mr. Friend failed to produce any evidence in support of his contention that he was disabled. His most recent Social Security disability claim remained pending, and his previous claim had been denied.[4]

[3] Her testimony in regard to Mr. Friend's physical condition came out on cross-examination by counsel for the Department:

> [Counsel for the Department]: Okay. So he still hasn't been providing any financial support for the children; is that correct?
>
> [Ms. Rhodes]: I know myself with the trips I have to Morgantown, Patrick and his records, that he's not able to work.

[4] It is not clear from the record that Mr. Friend's prior Social Security claim was denied—as opposed to being dismissed by the Social Security Administration. The relevant testimony in this regard took place when Mr. Friend was being examined by counsel for the Department:

> Q. You said you filed a Social Security claim. How long ago have you filed a Social Security claim?
>
> A. I filed - - once it was - - it took two years. My lawyer messed it up.
>
> Q. Okay. I didn't ask - - didn't ask that. I asked - -
>
> A. So then - -
>
> Q. - - how long ago did you file?
>
> A. - - I refiled.
>
> Q. I asked, when was the first time you filed for a Social Security claim based on your condition?
>
> A. It's been close [to] four years.

We disagree with appellees' argument that appellant "failed to produce any evidence in support of his contention that he was disabled." His testimony, and that of his mother, if believed, constituted evidence that he was disabled. What appellant failed to produce was medical records to corroborate that evidence.

Appellees also stress that Mr. Friend admitted that he was able to ride a motorcycle and, according to Ms. Stanton's testimony, within the last four years, she had seen appellant riding "four-wheelers[.]" Moreover, according to appellees, the trial judge failed to accept appellant's testimony regarding his inability to work. Lastly, appellees stress that appellant did not bring to the hearing any medical records that would corroborate his testimony that he was disabled.

The burden of proving that appellant was voluntarily impoverished was upon appellees, not appellant. The Department did not subpoena appellant's health records. Moreover, appellees did not file a request for production of the medical records or otherwise request, prior to the hearing, that appellant bring such records with him.

Arguably, the trial judge may have disbelieved appellant's testimony concerning his ability to work. But, as the Court of Appeals said in *Hayette v. State*, 199 Md. 140, 145 (1952), "[o]rdinarily disbelieving evidence is not the same thing as finding evidence to the contrary." *See also In re Appeal No. 504, September Term 1974*, 24 Md. App. 715, 726 (1975). Here, the trial judge made no finding as to appellant's actual physical condition. And from the language used, it is at least possible that the judge thought that appellant might be disabled but would only be able to prove it in the future. The language of the

judge that created this ambiguity was: "[Appellant] has not had any governmental agency determine that he has a disability at this point. That may be something that happens in the future, but there's been no conclusory [sic] evidence from any governmental agency that this man is either temporarily or permanently disabled." (emphasis added).

No testimony was produced as to factor two: Mr. Friend's level of education.

Goldberger factors three and four are not directly relevant here because there were no divorce proceedings, and, in any event, there was no evidence concerning any change in appellant's employment or financial circumstances nor was there any evidence in regard to the relationship of Ms. Stanton and appellant.

In regard to factors five and six, there was testimony that at some unknown point in time during the four and one-half years after the complaint for child support was filed, appellant had worked. There was no evidence as to how long he had held a job or, as to whether he had made any effort to find or retain employment or secure retraining.

Concerning the seventh factor, appellees did prove that appellant had not made any support payments in the four and one-half years prior to the child support hearing. But, there was no evidence, whatsoever, as to factor eight: appellant's past work history.

As to *Goldberger* factor number nine, there was no evidence as to the status of the job market in Garrett County, where appellant lives. Appellees point out, citing Md. Rule 5-201(b), (c), and (f), that the court had discretion to take judicial notice of any fact "generally known within the territorial jurisdiction of the trial court." According to appellees, this meant that the trial judge could take judicial notice of the job market in

Garrett County. It is far from clear that a judge is allowed to take judicial notice of job market conditions in the county where the judge sits, but we will assume, *arguendo*, that the trial judge could have taken notice of such a fact. Such an assumption does not, however, help appellees because if a judge takes judicial notice of a fact, the judge must alert the parties that he or she has done so. *See* Maryland Rule 5-201(e). No such notification was given in this case.

In regard to factor ten, appellees contend that the fact that appellant failed to produce evidence as to some of the *Goldberger* factors supports an inference that if he had produced such evidence it would have been unfavorable to him. For the last-mentioned proposition appellees cite *DiLeo v. Nugent*, 88 Md. App. 59, 69-70 (1991). In *DiLeo*, the appellee, Catherine D. Nugent, a certified clinical practitioner of group psychotherapy and group psychodrama, began treatment with Dr. Francisco B. DiLeo, a psychiatrist. *Id*. at 65. During the course of treatment, Dr. DiLeo suggested that Ms. Nugent should take an illegal psychedelic drug, MDMA or "ecstasy." *Id*. at 66. According to Ms. Nugent's testimony, on one occasion, after arriving at Dr. DiLeo's home, Ms. Nugent, at Dr. DiLeo's suggestion, ingested MDMA along with another drug and then the two had sexual contact; such contact between the two also occurred on other occasions.

At trial, despite the testimony of Ms. Nugent about Dr. DiLeo's highly improper conduct toward his patient, Dr. DiLeo failed to contradict Ms. Nugent's version of events. Under those circumstances, we held that "[w]hen a party in a civil case refuses to take the stand to testify as to facts peculiarly within his knowledge, the . . . trial court or jury may

infer that the testimony not produced would have been unfavorable." *Id.* at 69. The unfavorable inference applies, however, only when "it would be natural under the circumstances for a party to speak, call witnesses or present evidence." *Id*. The holding in *DiLeo* is not here applicable. Appellant did not have the burden of proof, appellees did, and this is not a situation, as in *DiLeo*, where one side produced evidence as to a fact, and the other side was silent. In fact, in regard to perhaps the most important fact (physical condition of appellant), it was appellees "who remained silent." As for the other factors, it cannot be said that this was a situation where it would be natural for Mr. Friend to speak, call witnesses or present evidence regarding the *Goldberger* factors that were not touched upon by the opposing parties when they presented their evidence.

To summarize, there was very little meaningful evidence produced as to most of the *Goldberger* factors. And, in any event, we agree with appellant's contention that the trial judge, rather than evaluate and weigh the *Goldberger* factors, "established [his] own factor[s] for determining voluntary impoverishment[.]" We arrive at this conclusion based upon what the trial judge said before appellant even had a chance to call witnesses or argue his case. As previously mentioned, while appellant was on the stand as the first witness in the trial, the court said that the Department had satisfied it's concerns that Mr. Friend "has assets and income that are available for the support of his children." The court had no reason to be satisfied in that regard. At that point, the only proof was that appellant had one asset, a 2002 Chevrolet Trail Blazer. And, there was no evidence that appellant had

any "income" that was available for the support of his children.[5] Secondly, the trial judge, at the end of all the evidence, stated explicitly why he was finding that the appellant had voluntarily impoverished himself. Those reasons showed that the court ignored the *Goldberger* factors.

The first reason that the trial judge gave for his finding that the Department had met its burden of proving that Mr. Friend had voluntarily impoverished himself was, according to the court, "through the way [appellant] titles different property so that he doesn't own anything, specifically." That first reason was not supported by the evidence. There was no evidence produced that Mr. Friend titled property in such a way as to make it appear that he did not have assets. The evidence, even if taken in the light most favorable to the appellees, showed that at the time that Mr. Friend and Ms. Stanton separated, which was presumably prior to the date that the complaint for child support was filed, he owned a jeep but, according to Ms. Rhodes's testimony, the jeep was given to Ms. Stanton at the time of separation. In this regard, Ms. Rhodes's testimony is admittedly rather muddled, but no matter how that testimony is interpreted, it cannot support the contention that the jeep was ever titled in such a way as to avoid paying child support. There was testimony that appellant's fiancée owned a tow truck, but no direct or circumstantial evidence that appellant had bought the truck, had anything to do with its purchase, or used the truck.

[5] Even if there was evidence as to income or assets at that point, it was highly improper, perhaps even structural error, for the court to announce a decision before appellant could even call a witness or argue.

The second reason for finding voluntary impoverishment was that no governmental agency had concluded that appellant was either temporarily or permanently disabled–although, as the trial judge acknowledged, this might be something that will happen in the future. As appellant stresses, to avoid a finding of voluntary impoverishment, or to avoid a finding that a parent has the ability to work, a parent is not required to prove that a governmental agency found either temporary or total disability.

In this case, appellant asks us to vacate, rather than reverse, the judgment entered below. We shall grant that request. At a new trial, the court, and counsel, should focus on the *Goldberger* factors. If the right questions are asked, Mr. Friend and/or Ms. Stanton can most likely supply information relevant to many of those factors. In regard to appellant's medical records, the Department could propound interrogatories to obtain the names of appellant's doctor(s) along with a request for production of those documents. Also, if necessary, appellees could subpoena the appellant's medical records from his healthcare providers and/or ask for an independent medical examination.

JUDGMENT VACATED; COSTS TO BE PAID BY APPELLEES.