DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

HALA LEWIS HARBY,

Appellant,

v.

MOHAMED WANIS HARBY,

Appellee.

No. 2D20-2602

November 17, 2021

Appeal from the Circuit Court for Pasco County; Alicia Polk, Judge.

Mark F. Baseman of Felix, Felix & Baseman, Tampa, for Appellant.

Heather A. Harwell of Law Office of Heather A. Harwell, P.A., Wesley Chapel, for Appellee.

LaROSE, Judge.

Hala Lewis Harby (Former Wife) and Mohamad Wanis Harby (Former Husband) are divorced. Former Wife appeals the second

amended final judgment of dissolution of marriage.[1] We write to address three issues. First, although the record shows that the sale of Former Husband's house was "fairly certain," the record fails to support the claimed purchase price and expenses associated with Former Husband's expected new house. Thus, we reverse the future alimony and future child support awards, and we remand for further proceedings. Second, we highlight and remand for correction of several apparent mathematical errors in the second amended final judgment. Third, we affirm the trial court's distribution of the family dogs to Former Husband. We affirm as to all other issues without further comment.

I. Background

Former Wife and Former Husband married in December 2001; they separated in June 2017. They have two minor children. In November 2017, Former Wife petitioned for dissolution of marriage and relocation to North Carolina. The parties owned a house in Pasco County.

[1] We have jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A).

The parties entered a marital settlement agreement (MSA) in June 2020. The MSA provided, in part, that "[s]hould the Husband desire to sell the Florida [h]ome to satisfy the mortgage, he is not under an obligation to close within 60 days to remove the Wife's name, but must be in contract for sale of the [house] within 90 days from entry of this Agreement." Having resolved most of their disputes in the MSA, the parties reserved three issues for the trial court to decide: (1) Former Husband's claim for alimony; (2) Former Husband's claim for child support; and (3) the distribution of two dogs.

Former Husband's financial affidavit listed monthly expenses of $7359. The children's expenses were $440, his life insurance premium was $353, his credit card payments were $2350, and his automobile expenses were $660. He testified that health insurance was $600.

Former Husband testified that he planned to sell his house and use the proceeds to buy a smaller house in Plantation Palms. This action would eliminate his monthly mortgage payment. He planned to buy a house ranging in price from $230,000 to $250,000. He introduced printouts of online listings for two houses

for sale in Plantation Palms; one for $214,000 and one for $259,900. Former Husband then testified about his future monthly expenses, assuming that he would purchase a new house for $235,000, with an estimated $15,000 for closing costs. He did not describe how he calculated those costs.

Former Husband testified that the monthly homeowner association (HOA) fee for a house in Plantation Palms would be $400, house insurance would be $75, and property taxes would be about $230. The HOA fee included lawn care, pool maintenance, and outside maintenance. Former Husband also testified that utilities and other expenses currently cost $1700; that amount would decrease to $1500 after he purchases the new house. He testified that $320 of the $1700 was for electricity and water; he did not explain the remaining $1380.

He then testified that the $1500 expenses included electricity, water, TV service, internet, house telephone, three cell phones, and pest control. These same expenses listed on Former Husband's financial affidavit only added up to $680. The financial affidavit did not list the cost of internet. Former Husband testified that the only difference between the $1700 and $1500 was the cost of electricity.

Former Wife testified that the family had two dogs, Liberty and Nico. Apparently, the dogs were bonded to each other. She also testified that the family adopted Liberty "to be an emotional support dog." She testified that Liberty provided her with emotional support, was her constant companion, and "was the little girl [she] didn't have."

Former Wife testified that she took care of the dogs from the time the family adopted them in 2013 and 2014, respectively, to the time the parties separated in 2017. The dogs had been in Former Husband's possession and care since then. Former Wife explained that the dogs briefly visited her in June 2018 when they accompanied the children to visit at Former Wife's house. She returned the dogs with the children to Former Husband, but she wanted the dogs to stay with her.

Former Wife testified that she never asked the children how they would feel losing the family dogs. When asked whether the children were close to the dogs, the trial court sustained a relevancy objection. The trial court believed it could not consider the children's attachment to the dogs to distribute them.

After trial, the trial court entered its second amended final judgment. The trial court found Former Husband's financial affidavit to be fair and accurate. The trial court found that Former Husband needs $1735.89 a month in alimony until he sells his house. It then determined that Former Husband's needs would grow upon the sale of his house. Consequently, the trial court awarded him $2439.89 a month in alimony once he sells the house and purchases a new house. The trial court calculated the change by (1) adding the future HOA fees, health insurance, future home insurance, and future property taxes; and (2) replacing the fees for the lawn care, the mortgage, pest control, utilities, telephone "with $1500, which is what [Former] Husband testified would be the total amount for all utilities, and all other expenses previously deducted." The trial court also provided that Former Wife's child support obligation would increase from $1558.87 to $1708.72 once Former Husband sells the house.

The trial court determined that the family dogs were marital property. The trial court observed that Former Wife was in good health; it did not note any physical or mental disabilities. The trial court noted that the parties agreed the dogs should not be

separated and that "[t]he dogs have been in [Former Husband's] possession since the [p]arties' separation." It distributed the dogs to Former Husband.

II. Discussion

A. Future Alimony

Former Wife argues that the trial court abused its discretion in providing that her alimony obligation would increase to $2439.89 when Former Husband sells his house and buys a new house. She contends that (1) the award "is based on an uncertain future contingency" and (2) "the amount of the award appears to be mathematically incorrect." Former Husband contends that the alimony modification was appropriately based on "the specifically identified occurrence of Former Husband's sale of his [house] and the anticipated expenses to which Former Husband testified."

We review alimony awards for an abuse of discretion. *See Lin v. Lin*, 37 So. 3d 941, 942 (Fla. 2d DCA 2010).

1. Future Event

"Judgments providing for automatic changes in alimony and support payments upon the occurrence of future events have not usually found favor in Florida." *Kangas v. Kangas*, 420 So. 2d 115,

116 (Fla. 2d DCA 1982) (first citing *Stoler v. Stoler*, 376 So. 2d 253 (Fla. 3d DCA 1979); then citing *Reid v. Reid*, 365 So. 2d 1050 (Fla. 4th DCA 1978); then citing *Richter v. Richter*, 344 So. 2d 889 (Fla. 4th DCA 1977); and then citing *McNaughton v. McNaughton*, 332 So. 2d 673 (Fla. 3d DCA 1976)); *see also Jimenez v. Jimenez*, 211 So. 3d 76, 79 (Fla. 4th DCA 2017) ("Generally, 'it is error to provide for an automatic, future change or termination of alimony based upon the anticipated occurrence of a future event.' " (quoting *Hitt v. Hitt*, 571 So. 2d 79, 80 (Fla. 4th DCA 1990))).

We have reasoned that such judgments are unfavorable because "[t]here is no evidentiary basis for the determination of future events, and there is an adequate procedure for modification when changes in the circumstances of the parties do occur." *Kangas*, 420 So. 2d at 116 (citing *Stoler*, 376 So. 2d at 253).

Nevertheless, Florida courts have upheld prospective modifications when "they are carefully conditioned upon specifically articulated changes in circumstances which would virtually preclude the possibility of unfairness to either party." *Umstead v. Umstead*, 620 So. 2d 1074, 1075 (Fla. 2d DCA 1993) (citing *Kangas*, 420 So. 2d at 116); *see also Rao v. Rao*, 501 So. 2d 38, 39 (Fla. 2d

DCA 1986) ("The prospective modification of a final judgment of dissolution, however, may be upheld when precisely drawn and conditioned upon a specifically identified occurrence."). "Before prospectively increasing alimony the court must 'mak[e] specific factual findings of extenuating circumstances that would support the automatic increase in alimony.' " *Jimenez*, 211 So. 3d at 79 (alteration in original) (quoting *Swanston v. Swanston*, 746 So. 2d 566, 568 (Fla. 1st DCA 1999)); *see, e.g.*, *Weiser v. Weiser*, 782 So. 2d 986, 987-88 (Fla. 4th DCA 2001) (reversing automatic modification where there was "no evidence before the court to determine whether the wife will, in fact, be employed or the husband will continue to have earnings at the current level in five years when the youngest child reaches the age of majority").

Here, the specified event is Former Husband's sale of the house and purchase of a new house. Former Husband testified that he will sell his house and use the sale proceeds to buy a smaller house in Plantation Palms. The MSA reflected Former Husband's desire to sell the house to pay off the mortgage and provided a ninety-day deadline to enter a sales contract and remove Former Wife's name from the note and mortgage. The evidence supports

the conclusion that the sale of the existing house is fairly certain. *Cf. Spenceley v. Spenceley*, 746 So. 2d 505, 506 (Fla. 4th DCA 1999) (upholding the automatic changes in support payments based on the specific future event of the wife becoming a certified mammographer because the wife was "underemployed and the trial court merely imputed income that the wife should be expected to make once certification is accomplished," and there was evidence that "the prospect of obtaining certification and subsequent employment was fairly certain").

Alas, the purchase of a new house and its related expenses are not. Former Husband showed that two houses in Plantation Palms were listed for $214,000 and $259,900. But he based his future expenses on the purchase of a $235,000 house, exclusive of an estimated $15,000 for closing costs. Former Husband did not provide a basis for his estimated closing costs. Nor did he submit any evidence of a purchase agreement or that he submitted an offer to a seller for the price he desired.

We must conclude, therefore, that the evidence did not support Former Husband's plan to buy a new house for $235,000 and with the specific expenses that he and the trial court used to

calculate his future need for alimony. *Cf. Jones v. Jones*, 28 So. 3d 229, 232 (Fla. 2d DCA 2010) ("Likewise, it was theorized that Mr. Jones could afford these payments because he would no longer be obligated to pay the mortgage and other expenses of owning the home. The house was not on the market and the parties had no agreement to sell this home when they went to the final hearing. There was no evidence presented to establish that the home could be sold in the manner essential to allow compliance with this judgment."). The articulated changes suggested by Former Husband do not "virtually preclude the possibility of unfairness to either party." *See generally Umstead*, 620 So. 2d at 1075 (providing that prospective modifications must be "carefully conditioned upon specifically articulated changes in circumstances which would virtually preclude the possibility of unfairness to either party" (citing *Kangas*, 420 So. 2d at 115)).

2. Calculation Errors

Even if it were "fairly certain" that Former Husband will buy a new $235,000 house in Plantation Palms, with $15,000 in closing

costs, the evidence still did not support the $704 future monthly increase in Former Wife's alimony obligation.

Based on Former Husband's financial affidavit, his monthly expenses totaled $3090 after (1) adding health insurance, the future HOA fee, the future home insurance, and the future property taxes; and (2) subtracting the children's expenses, life insurance, credit card payments, automobile expenses, the mortgage payment, and the lawn and pool maintenance ($105) that was included in the future HOA fee. Apparently, the trial court then replaced various expenses—i.e., the lawn care, mortgage, pest control, utilities, and telephone—"with $1500, which is what [Former] Husband testified would be the total amount for all utilities, and all other expenses previously deducted." Former Husband's testimony and financial affidavit did not actually support that the $1500 was "the total amount for all utilities, and all other expenses previously deducted." In fact, the evidence was unclear as to what the $1500 included.

Competent, substantial evidence does not support the $1500 amount.[2] *See Suit v. Suit*, 48 So. 3d 195, 197 (Fla. 2d DCA 2010)

[2] Assuming the trial court could make findings that support the $1500, Former Husband's total monthly expenses seemingly

("The trial court's award of alimony is based on a schedule of need that includes $3529 per month to pay a mortgage loan, when the Wife has no such loan. There was also a payment of $288 per month for membership in a homeowners' association when it is unclear that the Wife currently is or will be a member of such an association. We conclude that these portions of the award are not currently supported by competent, substantial evidence.").

Consequently, on remand, the trial court may take additional evidence and make additional findings on the issue, as necessary, to determine Former Husband's expenses after buying a new house. *See Suit*, 48 So. 3d at 197 ("On remand, the trial court is free to take additional evidence on these issues and would be well-advised to make more specific findings about the Wife's housing, including the true costs that the court finds will be associated with the housing and the effect it will have on her investment assets."); *Jones*, 28 So. 3d at 232 n.3 ("On remand, the recent economic

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would be $4170 (i.e., $3090 minus $420 in pest control, utilities, and telephone; and plus $1500 in new expenses), and Former Husband's need would be $1749.89. This would be a $14 increase in his need, not the $704 increase that the trial court calculated.

changes may require the trial court to take additional evidence and adjust the final judgment.").

B. Future Child Support

Former Wife argues that the trial court abused its discretion in awarding $1708.72 in future child support conditioned on Former Husband selling his house. She argues that the automatic increase was based on speculative facts and, alternatively, was mathematically incorrect. As to calculation, Former Wife contends that the trial court omitted Former Husband's $1300 monthly income from investable assets when it calculated the future child support modification. Former Husband contends that the trial court acted within its discretion to award reasonable future child support subject to the sale of the house and that the amount included imputed monthly minimum wage of $1483.75.

The trial court based its calculation of future child support[3] on the future alimony award that, as we have calculated, was

[3] There is one award for both children, and there is another award for one child, after the oldest child emancipates in June 2022.

unsupported by the evidence. Thus, we likewise reverse these support awards.

If, on remand, the trial court recalculates and imposes a similar future child support award, it shall consider whether it should include Former Husband's $1300 monthly income from investable assets, as it did when it calculated proposed child support awards that were based on the condition that Former Husband did not buy a new house. The trial court did not list a reason for excluding the investment income.

Additionally, we note that the trial court listed spousal support for the new house scenario as $1369.89, even though the corresponding—albeit incorrect—alimony award listed in the second amended final judgment was $2439.89. This fact may impact the trial court's calculations on remand. *Cf. Murphy v. Murphy*, 313 So. 3d 237, 240 n.3 (Fla. 2d DCA 2021) ("We note that at least one of the children has reached the age of majority, a fact that may impact the trial court's calculations on remand."); *Pearson v. Pearson*, 268 So. 3d 863, 867 (Fla. 2d DCA 2019) (mentioning a harmless numerical error in the Equitable Distribution Worksheet because

we "remand[ed] due to other issues with the equitable distribution" and "to avoid any potential issues in the future").

C. Family Dogs

Former Wife argues that the trial court's distribution of the family dogs to Former Husband was arbitrary, capricious, and unsupported by the record. She maintains that Liberty is her emotional support animal, the dogs are bonded, and Former Husband did not testify otherwise or claim a desire for the dogs. She acknowledges, however, that the dogs have been in Former Husband's possession since sometime in 2017. Former Husband points out that "the parties agreed the dogs should not be separated" and "Former Wife did not attempt to retain the dogs when temporarily in her possession."

We review the trial "court's findings regarding equitable distribution for an abuse of discretion." *Witt v. Witt*, 74 So. 3d 1127, 1129 (Fla. 2d DCA 2011). "[A] trial court has broad discretion to fashion an equitable distribution scheme," as long as it supports its distribution with specific factual findings that are supported by competent, substantial evidence. *Id.*

The trial court's discretion may not be "exercised in accordance with whim or caprice of the judge nor in an inconsistent manner." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980); *see, e.g.*, *Noah v. Noah*, 491 So. 2d 1124, 1128 (Fla. 1986) (concluding that the trial court's distribution "of the marital assets, in part because of respondent's adultery, makes this distributional scheme appear to be inequitable, contrary to . . . *Canakaris*, 382 So. 2d at 1204, and also smacks of punishment"). After all, "equitable distribution contemplates fair and equal distribution of marital assets in the absence of special equities, special needs or special circumstances." *Ziemba v. Ziemba*, 519 So. 2d 752, 753 (Fla. 4th DCA 1988).

In several states, pets have a special property status that the trial court must consider for fair and equal distribution of the marital assets. *See* Margherita Downey & Sherry Andrews, *Pets Should Receive Special Consideration in F.S. Ch. 61, Dissolution and F.S. Ch. 741, Domestic Violence*, 94 Fla. B.J. 38, 39 (Mar./Apr. 2020) (discussing several states that have "recogniz[ed] that people dearly love their pets" and that Alaska's law specifically allowed the trial court "to determine the well-being and fate of the family pet

when that is an issue in a dissolution action"). Florida is not one of those states. *See Bennett v. Bennett*, 655 So. 2d 109, 110 (Fla. 1st DCA 1995) ("There is no authority which provides for a trial court to grant custody or visitation pertaining to personal property." (citing § 61.075, Fla. Stat. (1993))).

Rather, "under Florida law, animals are considered to be personal property." *Id.* (first citing *County of Pasco v. Riehl*, 620 So. 2d 229 (Fla. 2d DCA 1993), and then citing *Levine v. Knowles*, 197 So. 2d 329 (Fla. 3d DCA 1967)); *see also Springer v. Springer*, 322 So. 3d 172, 173 n.1 (Fla. 2d DCA 2021) ("While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property." (quoting *Bennett*, 655 So. 2d at 110)).

Section 61.075(1), Florida Statutes (2019), requires the trial court to "set apart to each spouse that spouse's nonmarital assets" and then distribute the marital assets with the beginning premise that the distribution should be equal.[4] The trial court shall

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[4] The trial court, without dispute, determined that the dogs were marital assets. Former Wife testified that she and Former Husband adopted Liberty "to be an emotional support dog." Yet, she does not assert that Liberty was adopted for a claimed

distribute the marital assets "based on competent substantial evidence with reference to the factors enumerated in subsection (1)." § 61.075(3). Section 61.075 does not explicitly address the distribution of pets in dissolution proceedings; Florida courts must consider the factors enumerated in section 61.075(1), as is, along with any special needs or special circumstances to distribute pets. *See Ziemba*, 519 So. 2d at 753.

Each party wanted the family dogs and left the issue for the trial court to determine. *See* § 61.075(1)(f). The trial court did not find that Former Wife was required to or failed to keep the dogs when they were temporarily in her possession in June 2018, nor did it use such a finding to penalize her or determine that she did not desire the dogs.

Each party has cared for the dogs, albeit, at different times. *See* § 61.075(1)(g). Former Wife took care of the dogs for several years until the parties separated in 2017. Former Husband cared for the dogs thereafter.

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disability. *Cf. Gibbons v. Gibbons*, 10 So. 3d 127, 130-32 (Fla. 2d DCA 2009) (explaining that benefits payable to a disabled spouse are treated as nonmarital assets if they are characterized as disability benefits, rather than as retirement benefits).

Principally, Former Wife claims that justice requires the trial court to award the dogs to her because Liberty was an emotional support animal. Emotional support animals are typically given special considerations under the law, such as being "permitted as a reasonable accommodation for a person with a disability in housing" or permitted in an airplane's cabin.[5] Matthew W. Dietz, *Assistance Animals in Foster Care*, 91 Fla. B.J. 40, 40 (Sept./Oct. 2017) (footnotes omitted); *see also* 14 C.F.R. § 382.117 (2020); 24 C.F.R. § 100.204 (2020); 42 U.S.C. § 3604(f)(3)(A) (2020); § 760.27, Fla. Stat. (2020).

Emotional support animals "provide[] emotional support that alleviates one or more identified symptoms or effects of a person's disability." Dietz, *supra*; *see also* 24 C.F.R. § 5.303; Americans with Disabilities Act, 42 U.S.C. § 12101 (2020); Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-19; § 760.27(1)(a) (" 'Emotional support animal' means an animal that does not

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[5] Claiming an animal is an emotional support animal is a serious matter. Shortly after the trial in this case concluded, a statute went into effect that criminalizes a person's fraudulent proof of need for an emotional support animal. *See* § 817.265, Fla. Stat. (2020).

require training to do work, perform tasks, provide assistance, or provide therapeutic emotional support by virtue of its presence which alleviates one or more identified symptoms or effects of a person's disability.").

The evidence before us may indicate that Liberty was emotionally comforting, but it did not show that Former Wife had a disability or that Liberty provided emotional support to alleviate an effect thereof. Conversely, the trial court observed that Former Wife was in good health and did not note any physical or mental disabilities. Former Wife only proved that Liberty provided emotional comfort, as would any ordinary pet. *Cf. In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787, 800 (W. Va. 2001) ("The evidence indicates that the dogs provide comfort and companionship to the Jessups. However, the same can be said of most household pets. Palliative care and the ordinary comfort of a pet are not sufficient to justify a request for a service animal under the [federal and state law].").

The trial court may consider a party's sentimental interest in property, such as the ordinary attachment to pets, alongside the other factors of section 61.075. *See* § 61.075(1)(j) (permitting the

trial court to consider "[a]ny other factors necessary to do equity and justice between the parties"); *cf. Thomas-Nance v. Nance*, 189 So. 3d 1040, 1042 (Fla. 2d DCA 2016) ("[T]he sentimental interest of one party in marital property cannot take priority over financial fairness to the other party."). But Former Wife's argument rests on her apparent misconception that she is the only family member with an attachment to the dogs. The evidence reflected that the parties used the dogs to comfort the children throughout the dissolution proceedings, and the children resided a majority of the time with Former Husband. Further, Former Husband had been taking care of the dogs for the past three years. Liberty and Nico were family dogs, not Former Wife's personal dogs. We cannot conclude that the trial court abused its discretion in awarding the dogs to Former Husband. *See Witt*, 74 So. 3d at 1129.

III. Conclusion

We reverse and remand the future alimony and future child support awards. Former Husband's purchase of a new house was not fairly certain, and the evidence does not support the claimed expenses of the new house. *See Umstead*, 620 So. 2d at 1075; *Kangas*, 420 So. 2d at 116. On remand, the trial court may take additional evidence and additional findings on these issues. *See Suit*, 48 So. 3d at 197. The trial court shall consider and correct the mathematical errors pointed out in this opinion. The trial court acted within its discretion by awarding the family dogs to Former Husband. We affirm as to the remainder of the trial court's final judgment.

Affirmed in part, reversed in part, and remanded for further proceedings.

KHOUZAM, J., Concurs.

LUCAS, J., Concurs with separate statement.

LUCAS, J., Concurring with separate statement.

I concur fully with the court's opinion with the exception of part II.C, in which I concur in result only.

Opinion subject to revision prior to official publication.