IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DAVID K. KLOKOW,

Appellant/Cross-Appellee,

v. Case No. 5D19-2766

TONIA SUE KLOKOW,

Appellee/Cross-Appellant.
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Opinion filed July 2, 2021

Appeal from the Circuit Court
for Volusia County,
Steven C. Henderson, Circuit Judge.

Sheila M. Ennis, of Sheila M. Ennis, P.A.,
Edgewater, for Appellant/Cross-Appellee.

Douglas A. Kneller, Therese Misita Truelove, and
Mikaela M. Norman, of IFloridaDivorce.com, LLC,
Daytona Beach, for Appellee/Cross-Appellant.

NABERHAUS, M.L., Associate Judge.

The former husband, David K. Klokow, appeals an order denying his supplemental petition seeking to reduce or terminate his alimony obligation to the former wife, Tonia Sue Klokow, based on her cohabitation with another

man. The trial court, although finding that the former wife was in a supportive relationship, denied modification. The former wife cross-appeals, arguing that the trial court erred in finding that she was in a supportive relationship and further erred in finding that she was not entitled to a contribution towards her attorney's fees. We affirm the portion of the trial court's order finding the former wife is in a supportive relationship, but, because of errors in the trial court's analysis of the former wife's need for continued alimony and the former husband's ability to pay, we reverse and remand for further proceedings consistent herewith. The trial court's denial of the former wife's request for contribution towards her attorney's fees is affirmed.

BACKGROUND

The parties married in 1989. During the marriage, the former husband was a practicing dentist. The former wife worked occasionally for the dental practice but did not otherwise work outside of the home. In 2011, the former husband learned that the former wife was involved in an extramarital relationship with Scott Gutauckis. A year later, after almost 23 years of marriage, the parties sought to terminate their marriage.

On the morning of trial, they entered into a marital settlement agreement, which was subsequently incorporated into the final dissolution judgment in 2014. The agreement set forth a tiered schedule for payment of

permanent periodic alimony in recognition of the former husband's burden of meeting the carrying costs of the marital home and boat pending their sale and in acknowledgement of an anticipated decrease in his income. The final tier, calling for monthly alimony of $5,000, was in effect on the hearing date. Upon the sale of the marital assets, the parties each received approximately $71,000. Through equitable distribution, each party received approximately $78,000 in IRAs, and they equally divided stock totaling $420,000 and an account holding $50,000. The former husband also made an equalizing payment to the former wife of $68,750. The former wife thereafter purchased a home for $185,000. Gutauckis moved into the home with her shortly after the purchase and has resided in the home continuously with her since that time.

Less than three years after the final dissolution judgment was rendered, the former husband filed a supplemental petition for modification requesting that alimony be reduced or terminated because the former wife was in a supportive relationship with Gutauckis. After a final hearing, the trial court found that the former wife was in a supportive relationship, but it denied the request to modify alimony based on its finding that the former wife has a continued need for alimony in the amount of $5,000 and the former husband has the continued ability to pay that amount.

The former husband appeals on multiple grounds, which we will address in turn. The former wife cross-appeals, asserting that the trial court erred in finding that a supportive relationship exists and in denying her request for fees.

ANALYSIS

I. Supportive Relationship

We address an issue raised in former wife's cross-appeal first: whether the trial court erred in finding that a supportive relationship exists between the former wife and Gutauckis. We conclude that the trial court's factual findings are supported by competent, substantial evidence, and thus we review, de novo, its legal conclusion that a supportive relationship exists. *See Gregory v. Gregory*, 128 So. 3d 926, 927 (Fla. 5th DCA 2013) (observing mixed question of law and fact involved in review of determination of supportive relationship).

Here, the trial court conducted a thorough and careful analysis of the factors under section 61.14(1)(b), Florida Statutes (2019). The court specifically found, inter alia, that the former wife and Gutauckis have been in a relationship since 2011. Gutauckis moved into the former wife's home shortly after she purchased it in 2014. He made numerous improvements to the house, and he and the former wife have worked together to improve the

value of the home. Gutauckis contributes $900 of in-kind rent each month by paying for certain expenses, $600 to $700 of which goes to food and entertainment.[1] They support each other emotionally and are clearly involved in a serious relationship.

Despite these findings, the former wife highlights that she and Gutauckis have not co-mingled their bank accounts and do not jointly own property, but those facts alone are not necessarily determinative of whether a supportive relationship exists. *Bruce v. Bruce*, 243 So. 3d 461, 463-64 (Fla. 5th DCA 2018) (noting the length and nature of the live-in relationship are also significant factors to consider). Here, the evidence amply demonstrated that the former wife and Gutauckis were in the substantial equivalent of a marriage. All things considered, the trial courts findings support its conclusion that their relationship is the substantial equivalent to marriage even though some factors may weigh against it. *Id*. at 464. Accordingly, we affirm on this issue.

II. Reduction or Termination of Alimony

The next issue, as argued by the former husband, is whether the trial court abused its discretion in denying the former husband's petition to modify

[1] The former wife's July 2019 financial affidavit reflects her monthly mortgage payment is $1,874, exclusive of utilities, repairs and maintenance, and food.

or terminate his $5,000 monthly alimony obligation to the former wife. The former husband relies on *French v. French*, 4 So. 3d 5 (Fla. 4th DCA 2009), to argue that the court was required to modify alimony when it found that a supportive relationship exists between the former wife and Gutauckis. In *French*, the Fourth District Court concluded that, once a trial court makes a finding that a supportive relationship exists, it must by necessity reduce or terminate alimony because the obligee's need has changed. *Id.* at 7. This is inconsistent with the clear language of section 61.14(1)(b)3., Florida Statutes (2019), which provides only that the alimony "may" be reduced or terminated once a supportive relationship is demonstrated. *See Baumann v. Baumann*, 22 So. 3d 719, 721 (Fla. 2d DCA 2009) (certifying conflict with *French*).

A supportive relationship is "merely a change in circumstances that shifts the burden of proving continued need to the recipient spouse." *Id*. As this Court noted in *Gregory*, once a supportive relationship is found, "the burden of proof of the continued need for alimony shift[s] to the former wife." *Gregory*, 128 So. 3d at 927. Accordingly, it was the burden of the former wife to establish her financial need for continuation of the $5,000 monthly alimony amount and the former husband's ability to pay.

III. Need and Ability to Pay

A. Standard of Living.

Before reaching the parties' arguments as to need and ability to pay, we first address the former husband's argument relative to the trial court's finding as to the parties' marital standard of living. The standard of living enjoyed by the parties during marriage is one of the factors included in section 61.08(2), Florida Statutes, to be considered in determining need and ability to pay; its consideration is equally appropriate in modification proceedings. *Donoff v. Donoff*, 940 So. 2d 1221, 1223 (Fla. 4th DCA 2006) (holding "all applicable section 61.08(2) factors must be considered in modification proceedings under section 61.14"); *Mirsky v. Mirsky*, 474 So. 2d 9 (Fla. 5th DCA 1985) (holding it an abuse of discretion to fail to consider section 61.08(2) criteria in modification proceeding).

The trial court, in considering the section 61.08(2) factors, referenced the parties' marital standard of living as having allowed them "to live a very luxurious lifestyle" and to be able to buy "whatever they wanted whenever they wanted." The former husband asserts that the trial court erred in its finding because the parties' assets were largely encumbered.[2] He argues

[2] The marital home was valued at $1.1 million, but it was almost fully encumbered by a first mortgage of nearly $800,000 and a second mortgage

that the former wife's claimed marital lifestyle was sustained by creditors, which created an artificial yardstick that should not be used to measure modification of alimony.

Although the trial court references the parties' "very luxurious lifestyle" during the marriage when addressing the section 61.08(2) factors, this observation was not given undue weight in the analysis. The trial court did not impose an increase in the alimony to meet any perceived "luxurious" marital standard of living. Accordingly, we reject the former husband's arguments on this point.

B. Former Wife's Need for Alimony.

We turn now to the trial court's conclusion that the former wife has a continued need for alimony in the monthly amount of $5,000. The former husband argues this determination is not supported by competent substantial evidence because the trial court failed to consider the former wife's ability to help support Gutauckis, and it failed to include or consider Gutauckis's $900 in-kind contribution for rent and the value of non-economic services in the former wife's income. Lastly, he argues that the trial court should have considered the interest income and dividends the former wife

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of approximately $130,000. Although the former wife testified that she would regularly spend upwards of $10,000 per month during the marriage to live the lifestyle she was accustomed to living, much of it was on credit.

receives from her investment accounts and from her IRA. For the reasons set forth below, this Court largely agrees.

Generally, the need for alimony decreases when a former spouse is in a supportive relationship and is benefiting from the financial support of his or her paramour. *See, e.g., Bruce*, 243 So. 3d at 463. It is also true that alimony may be adjusted if the former spouse is supporting the live-in paramour to some extent. *Murphy v. Murphy*, 201 So. 3d 18 (Fla. 3d DCA 2013). Here, the record reflects that the former wife is supporting Gutauckis to a certain extent, as evidenced in part by the fact that his financial contribution to the household expenses is insufficient to cover half thereof.[3] Thus, the trial court erred by not addressing the extent to which permanent alimony paid to the former wife is being used by the former wife to support Gutauckis or to offset his expenses. *Gregory*, 128 So. 3d at 927 (observing that "former husband is under no obligation to help support the former wife's cohabitant"); *Schneider*, 467 So. 2d at 467 (noting that alimony should be deemed

[3] In fact, his contribution is used largely for dining out and entertainment. Gutauckis testified the couple eats out "frequently" and estimated he spends $600 to $700 per month on food and entertainment; his $900 monthly contribution includes that amount. We note that Gutauckis has been able to save money since moving in with the former wife and enjoys a "big jump" in his lifestyle, while the former wife is apparently not so benefitting from their arrangement.

excessive to the extent it is being used to support the recipient spouse's new partner).

The trial court also failed to address the effect of Gutauckis's contributions on the former wife's continued need. Without evidence to the contrary, it is apparent that her need was partially met by Gutauckis's $900 monthly contribution, or more depending on the value assigned to the extensive work performed by Gutauckis on her house.[4] Although the trial court noted the contributions, it concluded that her only monthly income was alimony. Because it is clear the trial court did not account for either the $900 received from Gutauckis in the former wife's monthly income or as an offset to her monthly expenses, and it did not assign a value to the "valuable services" Gutauckis provides to the former wife, we reverse. *See Bruce*, 243 So. 3d at 464 (noting that the trial court must determine how, and to what extent, a supportive relationship mitigates former wife's need for alimony); *see also Gregory*, 128 So. 3d at 927 (reversing for reconsideration where

[4] The former wife argues that there was no evidence that she actually receives any funds from her companion and asserts that Gutauckis contributes only the amount needed to cover the increase in her expenses due to his presence in her home. However, there was no testimony whatsoever to support that assertion. Rather, the testimony was consistent that the former wife and Gutauckis agreed to $900 because that is what he paid in rent prior to moving into her home.

trial court "failed to consider the cohabitant's valuable, non-economic services to the former wife").

Lastly, the trial court erred by refusing to consider the interest income and dividends the former wife receives from her investment portfolio when determining her need.[5] Relying on *Beal v. Beal*, 146 So. 3d 153 (Fla. 5th DCA 2014), the trial court concluded that it would be improper to consider the shares of stock as a source of income to the former wife because they were awarded to her as part of the equitable distribution of marital assets. While it is true that a spouse should not have to deplete capital to pay living expenses, the trial court failed to consider whether there was income available to the former wife from those assets without depleting them. *See* § 61.08(2)(d) & (i), Fla. Stat.; *Niederman v. Niederman*, 60 So. 3d 544, 550 (Fla. 4th DCA 2011) (holding that trial court may impute income from interest earned on retirement accounts if such interest income is available to former spouse without penalty and without reducing principal); *Donoff*, 940 So. 2d at 1223-24 (finding reversible error where trial court refused to consider former wife's investment portfolio and IRA income when determining amount of continuing alimony).

[5] The investment portfolio included $318,513 in a money market account and $101,843 in an IRA.

We therefore remand for determination of the former wife's interest income from her investment portfolio.

C. Former Husband's Ability to Pay Alimony.

As it relates to the former husband's ability to pay, the former husband argued that there has been an unanticipated decrease in his income since entry of the final judgment because his patient load and collections have decreased due in part to competition from corporate dental practices that have entered the area. The trial court concluded that it could not find any competent, substantial evidence to demonstrate a substantial, material change in the former husband's financial ability to pay the $5,000 that he agreed to pay at the time of the final judgment. This conclusion appears to have been influenced by two findings—the number of patients the former husband sees annually and the writing off of personal expenses as business expenses—that, we conclude, were not supported by the evidence. The trial court also made an unreliable comparison when finding that there were inconsistencies in the former husband's income records.

The former husband claims that his monthly gross income had decreased significantly in recent years due in part to a decreased patient load. The "day sheets" from his dental practice showed only the total number of patients that were seen at the practice, without specifying which were seen

by the former husband and which were seen by the two hygienists. The unrebutted testimony of the former husband was that his office did not track which patients were seen just by him. When his testimony is considered in its totality, it is clear that the former husband was not agreeing that he, personally, had seen the total number of patients reflected on the day sheets. Thus, the trial court's findings as to the number of patients seen annually by the former husband are not supported by competent evidence, and the trial court's reliance on those numbers to conclude that the former husband's patient load has not decreased since 2014 was error.

Also properly challenged by the former husband is the trial court's finding that the former husband paid personal expenses through his business account and wrote those expenses off on his taxes. Notably absent from the former husband's testimony is any reference to writing off anything on his taxes, let alone an admission that he wrote off personal expenses. The trial court improperly disregarded the testimony of the CPA and bookkeeper that the personal expenses were "segregated, questioned, and re-categorized" prior to filing the corporate tax returns. It also disregarded the CPA's uncontradicted testimony that the tax returns accurately reflected the former husband's income.

The testimony did not support the trial court's implicit finding that personal expenses were improperly written off. The trial court cannot properly reject unrebutted testimony absent a finding that the testimony was "essentially illegal, contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, or inconsistent with other circumstances in evidence." *Laragione v. Hagan*, 195 So. 2d 246, 249 (Fla. 2d DCA), *rev'd on other grounds*, 205 So. 2d 289 (Fla. 1967); *see also Brannen v. State*, 114 So. 429, 430-31 (Fla. 1927). The court made no such finding.

Lastly, the trial court found that the former husband's 2016 financial affidavit signed September 16, 2016, showing a gross monthly income of $13,589.92, does not comport with the amount of $16,675 reflected on his tax return. While this is technically accurate, the financial affidavit did not include a full twelve months of income, so an "apples-to-apples" comparison could not be made. The trial court improperly assumed that there was no possibility that there was an increase in income from September 15 through December 31. Thus, while the trial court was correct that the average monthly income number shown on the financial affidavit did not align with the average monthly income on the tax return, the fact that the financial affidavit

did not include a full twelve months of data renders the comparison unreliable.

We also note that implicit in the trial court's order is an acknowledgment of a decrease in the former husband's income since entry of the final judgment.[6] Despite this, the court declined to reduce his monthly alimony obligation. Instead, it concluded that it "cannot find any competent, substantial evidence to demonstrate that there has been a substantial, material change in the [former husband's] financial ability to pay the [former wife] the $5,000.00 monthly alimony he agreed to pay her at the time of the final judgment." No findings, other than those discussed above, were reflected in the court's order to support its conclusion. In the absence of additional findings, the trial court's conclusion appears to have been influenced by two findings not supported by the evidence and an unreliable comparison of income information in the former husband's 2016 financial affidavit and tax return. This is an abuse of discretion, and we therefore remand for reconsideration of the former husband's ability to pay.

[6] The trial court noted that the former husband claimed his gross monthly income was approximately $13,000, while his 2016 tax return reflected a gross monthly income of $16,675. Using the higher amount of $16,675, it is still less than the former husband's reported monthly gross income at the time of the final judgment.

IV. Attorney's Fees

The final issue on appeal is whether the trial court abused its discretion when it denied the former wife's request for attorney's fees. *See Kelly v. Kelly*, 925 So. 2d 364, 369 (Fla. 5th DCA 2006) (acknowledging that an order denying attorney's fees and costs is reviewed using the abuse of discretion standard). We conclude that because the former wife failed to substantively argue and demonstrate her need for fees, the trial correctly denied her motion for fees.

CONCLUSION

For the foregoing reasons, we reverse in part. On remand, the trial court should reconsider its finding as to the former wife's income in light of her ability to partially support Gutauckis and in light of Gutauckis's contributions to her. The trial court should also consider the former wife's interest income and dividends in determining her need and revisit the issue of the former husband's ability to pay. For the reasons set forth above, we affirm that portion of the order denying the former wife's motion for fees.

AFFIRMED in part; REVERSED in part; and REMANDED with instructions.

SASSO and TRAVER, JJ., concur.