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

LORETTA BARRETT,

Appellant,

v.

Case No. 5D20-946

CORMAC BARRETT,

Appellee.

_____/

Opinion filed March 12, 2021

Appeal from the Circuit Court
for Seminole County,
Melissa Souto, Judge.

Marcia K. Lippincott, of Marcia K. Lippincott, P.A., Lake Mary, and Caryn M. Green, of Green Family Law, P.A., Orlando, for Appellant.

Brandon M. Tyson, of Tyson Law Firm, LLC, Winter Park, and William A. Greenberg, Winter Park, for Appellee.

TRAVER, J.

Loretta Barrett appeals the amended final judgment of dissolution in her divorce action against Cormac Barrett. We reverse for the trial to conduct

an evidentiary hearing on the former wife's motion to reopen her case due to the former husband's alleged fraudulent trial testimony. We separately note errors in the trial court's alimony and equitable distribution awards. We affirm in part, reverse in part, and remand for further proceedings.

## BACKGROUND

During the parties' long-term marriage, the former wife was a stay-at-home mother to the parties' three children,[1] while the former husband worked in medical sales. In 2014, the parties moved to Florida from New York, but the former husband continued to live and work in New York, visiting on weekends. In October 2017, the former wife filed for divorce. Shortly thereafter, the former husband changed jobs. He owns and operates Barr Medical, which sets up and services physician office laboratories.

The parties' primary asset is an unmortgaged $800,000 marital home. Most of this long, contentious, and expensive litigation, however, involved the former husband's income at Barr Medical. The former wife believed the former husband had more clients, and therefore, more income, than he claimed. Accordingly, the former wife issued several out-of-state, non-party

[1] At trial, two children were adults and the other was seventeen and lived at home. The youngest child is now an adult. Child support and timesharing are not at issue in the appeal.

subpoenas to obtain his financial information. The trial court twice continued the trial to allow the former wife to pursue this information, and properly declined her third request.[2]

The trial took place over two days on September 20, 2019, and October 18, 2019. At trial, the former wife sought to establish the former husband's income based on five clients. The former husband only acknowledged having three clients. One of the two disputed clients was Dr. Luis Glodowski. On the trial's second day, the former husband testified that he never did, or tried to do, any business with Dr. Glodowski. Therefore, Dr. Glodowski never paid him. In his closing argument, the former husband further argued that the former wife "create[d] two other revenue streams that did not exist."

In its original final judgment, the trial court found the former wife was voluntarily unemployed and imputed minimum wage to her. It further found the former husband earned a gross income of $173,275 annually, with a monthly net income of $9,365. In making this finding, the trial court implicitly found the former husband did not earn any income from Dr. Glodowski. It determined the former husband's financial affidavit revealed a "surplus" of $1,500, and that the former wife had "some need" for permanent alimony.

[2] This was not an abuse of discretion. *See Wash-Bowl, Inc. v. Wroton*, 432 So. 2d 766, 767 (Fla. 2d DCA 1983).

Perhaps as a result, the trial court awarded $1,500 in monthly permanent alimony to the former wife. The trial court, however, did not award the former wife retroactive alimony because it found the former husband already paid "at least what the alimony award is" by paying her bills and car loan. Although the former wife demanded the former husband procure a life insurance policy to secure her award, and former husband opposed it, the trial court did not address this issue.

The trial court awarded the marriage's liquid assets to the former husband and the marital home to the former wife, ordering that she would receive it as her "sole property."[3] Because the former wife received the parties' primary asset, the trial court ordered the former wife to make a $279,586 equalizing payment to the former husband within 180 days. It abated alimony until the former wife made the payment. The trial court awarded the former wife $40,000 in attorney's fees, ruling that they would be deducted from the equalizing payment. It declined to find any litigation misconduct by the former husband, which the former wife used to argue for reimbursement of nearly $200,000 in attorney's fees.

[3] Because neither party sought partition, the trial court could not force the marital home's sale. *See Hodges v. Hodges*, 128 So. 3d 190, 190–91 (Fla. 5th DCA 2013).

Following issuance of the final judgment, the former wife's counsel filed over eighty pages of motions, supplements, and attachments, asking the trial court to reconsider its judgment. Much of the former wife's arguments demanded the trial court reconsider clear credibility determinations made in the former husband's favor. Four months after the original final judgment's issuance, the former wife asked the trial court to reopen evidence to consider recently received documents, which showed a series of six payments, totaling over $13,000, that Dr. Glodowski paid Barr Medical around the time of the trial. One check memo specifically stated, "part pay Lab," and from the payment dates, it appears the former husband received half the payments before he testified under oath that he never did business with, or received any payment from, Dr. Glodowski. Although the trial court amended the final judgment, making some minor changes, it denied the former wife's motion for rehearing and declined to re-open the case to consider any additional evidence.

## LAW AND ANALYSIS

### I. Evidentiary Hearing Necessary Regarding Fraud Allegation

The former wife sought relief under Florida Family Law Rules of Procedure 12.530(a) and 12.540(b)(3), alleging the former husband committed fraud by hiding Dr. Glodowski's payments to Barr Medical. If true,

this income may have affected the trial court's alimony, equitable distribution, and attorney's fees awards. Under both rules, the former wife alleged a colorable fraud claim requiring an evidentiary hearing. *See Robinson v. Weiland*, 936 So. 2d 777, 781–82 (Fla. 5th DCA 2006).

a. *Motion for rehearing under rule 12.530(a)*

A rule 12.530(a) motion allows a trial court to open a judgment to take additional testimony and enter a new judgment following a non-jury trial. Fla. Fam. L. R. P. 12.530(a). We evaluate the denial of this motion for abuse of discretion. *See Loftis v. Loftis*, 208 So. 3d 824, 826 (Fla. 5th DCA 2017).

To reopen her case, the former wife must establish that the presentation of new evidence will not unfairly prejudice the former husband, and that reopening will serve the best interests of justice. *See Manko v. Manko*, 273 So. 3d 208, 209 (Fla. 5th DCA 2019). We consider four factors in evaluating the former wife's request: (1) its timeliness; (2) the character of evidence she seeks to introduce; (3) the effect of the evidence's admission; and (4) the reasonableness of her excuse justifying reopening. *See Grider-Garcia v. State Farm Mut. Auto.*, 73 So. 3d 847, 849 (Fla. 5th DCA 2011).

The former wife filed her request less than three weeks after receiving Dr. Glodowski's financial information. She did not have this information before trial, although she had secured the appointment of a commissioner

over the former husband's objection, subpoenaed the records, and initiated compliance proceedings through a New York attorney to obtain the documents.[4] The character and effect of the documents are apparent—although we do not know what an evidentiary hearing may reveal, the former husband's trial testimony appears false. To the extent Dr. Glodowski's payments affect the former husband's income, this, in turn, could affect the trial court's alimony, equitable distribution, and attorney's fees awards.[5] Each of these awards turned, at least in part, on the former husband's credibility. On remand, the trial court may wish to revisit its credibility assessments if the former husband perjured himself. And while any ensuing testimony may well prejudice the former husband, the prejudice is not unfair. *See Singer v. Singer*, 302 So. 3d 955, 959 (Fla. 2d DCA 2020).

b. *Motion for relief from judgment under rule 12.540(b)(3)*

Rule 12.540(b)(3) gives the trial court discretion to relieve the former wife from a final judgment procured by fraud, misrepresentation, or

[4] The former husband does not argue that the former wife failed to act with due diligence.

[5] Although the evidentiary hearing's results might cause the trial court to revisit the issue of former husband's litigation misconduct, we otherwise find no abuse of discretion in its refusal to award the former wife's attorney's fees on this basis. *See Henry v. Henry*, 191 So. 3d 995, 999 (Fla. 4th DCA 2016).

misconduct. *See Rowe-Lewis v. Lewis*, 267 So. 3d 1039, 1041 (Fla. 4th DCA 2019). We also review the denial of this motion for abuse of discretion. *Id*. Fraud allegations generally require a full explanation and exploration of the facts and circumstances of the alleged wrong. *Robinson v. Kalmanson*, 882 So. 2d 1086, 1088 (Fla. 5th DCA 2004). Where, as here, a party pleads fraud with specificity and particularity, the trial court must conduct an evidentiary hearing to determine whether the motion should be granted. *See Robinson*, 936 So. 2d at 781. Here, we do not make any determination about the veracity of the former wife's claims. She did, however, outline allegations of fraud with specificity, particularity, and supporting documentation. Therefore, the trial court erred by not holding an evidentiary hearing.

II. Alimony and Equitable Distribution

a. *Alimony*

The former wife separately raises three meritorious arguments relating to the trial court's alimony award. First, the trial court did not quantify the former wife's need for alimony, finding only that she had "some need." *See Matajek v. Skowronska*, 927 So. 2d 981, 987 (Fla. 5th DCA 2006) ("The court erred by simply designating the amount of alimony without finding the amount of the Former Wife's need."). Relatedly, the trial court neglected to

quantify the former wife's net income and the parties' respective expenses.[6] *See Woelk v. Woelk*, 251 So. 3d 359, 359 (Fla. 5th DCA 2018) (remanding for further findings on wife's need where her expenses were unclear); *Gilliard v. Gilliard*, 162 So. 3d 1147, 1154 (Fla. 5th DCA 2015) (directing trial court on remand to make specific finding on parties' net incomes).

The former husband argues that the former wife's exact need is "irrelevant" because the trial court could not award permanent alimony exceeding his ability to pay. *See Pirino v. Pirino*, 549 So. 2d 219, 220 (Fla. 5th DCA 1989). But the former husband's inability to pay does not excuse the court's obligation to quantify the former wife's need. *See Bateh v. Bateh*, 98 So. 3d 750, 753–54 (Fla. 1st DCA 2012) (reversing and remanding for necessary findings where trial court "declined to make a finding as to the amount of [the wife's] need" because husband "lacked the ability to pay more than nominal alimony"). Additionally, the trial court did not find the former husband's inability to pay as the basis for the $1,500 award. The trial court

[6] The trial court described the former wife's expenses as "over-inflated" and "more than would be reasonable" while characterizing the former husband's expenses as "bare minimum." However, the former husband's claimed monthly household expenses seemingly include costs attributable to the marital home, such as lawn care ($300) and electricity ($385). In certain other categories, the former wife and the former husband's expenses are comparable. And although the trial court is correct that the former wife has no rent or mortgage expense, she does have other significant household expenses.

did not explain its reasoning for this amount, other than finding the former husband had a "surplus" after all his needs were met.

The absence of these findings precludes meaningful review of the adequacy of the alimony award. We therefore reverse the permanent alimony award and remand for appropriate findings as well as further consideration, in light of those findings, of the monthly award's adequacy. If the trial court alters the equitable distribution award, it must consider how those adjustments impact the alimony award. *See* § 61.08(2)(d), Fla. Stat. (2017).

Second, the trial court abused its discretion by basing an award of retroactive alimony on the same grounds as it awarded permanent alimony. It excused the former husband from making any additional payment because he already paid "at least what the alimony award is" by paying the former wife's bills and car loan. Retroactive alimony requires the same analysis as permanent alimony—it must be based on payee-spouse's need for alimony and payor-spouse's ability to pay. *See Motie v. Motie*, 132 So. 3d 1210, 1214 (Fla. 5th DCA 2014). Absent the missing findings we previously referenced, we also cannot evaluate the adequacy of the retroactive alimony award. Accordingly, we reverse this award and remand for specific findings and further consideration, consistent with our preceding instructions.

Third, the trial court did not address, or make any factual findings on, the former wife's request for life insurance as security for the alimony award. *See Duffey v. Duffey*, 972 So. 2d 290, 291–92 (Fla. 5th DCA 2008) (affirming dissolution judgment but remanding for trial court to make finding on wife's request for life insurance). If the trial court grants the request, the court must include "specific evidentiary findings regarding the availability and cost of insurance, the obligor's ability to pay, and the special circumstances that warrant the requirement for security of the obligation." *Foster v. Foster*, 83 So. 3d 747, 748 (Fla. 5th DCA 2011). The former wife's remaining challenges to the trial court's alimony award are unavailing.

b. *Equitable distribution*

The former wife also identifies two reversible errors in the trial court's equitable distribution award. First, a lump-sum equalizing payment is proper only when the paying spouse can "make the payment without substantially endangering his or her economic status." *Abramovic v. Abramovic,* 188 So. 3d 61, 63–64 (Fla. 4th DCA 2016) (emphasis and quotation marks omitted). There is no evidence that the former wife can afford a $279,586 payment. The trial court awarded her no liquid assets, and she carries significant debt. The former wife correctly notes that the trial court could have protected the former husband's payment by ordering installment payments and requiring

security and a reasonable rate of interest. *See* § 61.075(10)(b), Fla. Stat. (2017).

Second, the amended final judgment does not account for $40,000 in "credit" for the former wife's attorney's fees against the lump sum payment. If on remand, the trial court does not order a lump sum payment, this issue is moot. If the trial court recalculates attorney's fees based on a revised alimony or equitable distribution award, a different fee award may be appropriate. *See Mattison v. Mattison*, 266 So. 3d 258, 263 (Fla. 5th DCA 2019). We reject without further discussion the former wife's other equitable distribution arguments.

## CONCLUSION

We agree with the former wife that the trial court erred when it failed to conduct an evidentiary hearing on her fraud claim. We therefore remand this matter for an evidentiary hearing. While we do not seek to limit the trial court's discretion in crafting an appropriate remedy following this hearing, we note that if it determines the former husband committed fraud, it may order a new trial. *See Robinson*, 936 So. 2d at 782. We separately reverse the trial court's alimony and equitable distribution awards. Regardless of the evidentiary hearing's outcome, any ensuing judgment should include appropriate findings on alimony, equitable distribution, and attorney's fees.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED with INSTRUCTIONS.

WALLIS and NARDELLA, JJ., concur.