FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1709

CHRISTOPHER J. OGLE,

Appellant/Cross-Appellee,

v.

JULIE BAGG OGLE,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Walton County.
Jeffrey E. Lewis, Judge.

February 23, 2022

TANENBAUM, J.

In his dissolution appeal, the former husband contends that the trial court erred in roughly three ways: by failing to make specific findings of fact to support its award of alimony, by improperly awarding bridge-the-gap alimony, and by miscalculating the amounts of both alimony and child support. The former wife cross-appeals the trial court's designation of the alimony as taxable and deductible. We reverse and remand as to the errors raised by the former husband. We technically affirm as to the error raised by the former wife because, as she concedes, the issue was not preserved in the trial court. However, because we are reversing and remanding for other (but related) reasons, we instead direct that the trial court address and incorporate the tax consequences of the alimony in its findings.

We begin with a look at whether the trial court erred by failing to make requisite findings to support its alimony award to the former wife. By statute, the trial court has four types of alimony from which to choose when deciding on a final award: "bridge-the-gap, rehabilitative, durational, or permanent." § 61.08(1), Fla. Stat. (2015). The trial court can award one "or any combination of these forms of alimony." *Id.* In determining the alimony award, the trial court must "first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance." § 61.08(2), Fla. Stat. If the court concludes one spouse has a need and the other an ability to pay, it must consider all the factors enumerated in section 61.08(2)(a)–(j).

Among those enumerated factors are "[t]he financial resources of each party" and "[a]ll sources of income *available* to either party, including income available to either party through investments of any asset held by that party." § 61.08(2)(d), (i), Fla. Stat. (emphasis supplied). These factors point to gross income's lack of relevance when determining a party's ability to pay. Gross income, almost by definition, is *not* what a party actually has in the way of resources to pay to the other party. *See Zold v. Zold*, 911 So. 2d 1222, 1230 (Fla. 2005) (explaining that in calculating alimony, child support, and attorney fees, trial courts must "consider only that portion of a spouse's income that is available to the spouse"). To determine a party's ability to pay, *net* income (after expenses), not gross, must be considered. *See Vanzant v. Vanzant*, 82 So. 3d 991, 993 (Fla. 1st DCA 2011) (reversing alimony and child support award because trial court's finding as to spouse's income was "not supported by the record because these figures reflect the *gross* income shown on the former husband's amended financial affidavit, not his *net* income"); *cf. Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) ("A spouse's ability to pay may be determined not only from net income, but also net worth, past earnings, and the value of the parties' capital assets."); *see also* § 61.30(6), Fla. Stat. (requiring determination of child support obligation based on net income).

"In determining actual income for purposes of awarding alimony, the trial court must set forth factual findings regarding a spouse's probable and potential level of earnings, the source of

actual and imputed income, and any adjustments to income." *Smith v. Smith*, 737 So. 2d 641, 643 (Fla. 1st DCA 1999); *cf.* § 61.08(1), (2), Fla. Stat. (requiring specific factual findings in connection with award of alimony). The trial court failed to do this. In its order, the trial court makes general references to the former wife's need and the former husband's ability to pay, but it does not make any *specific* findings as to how it calculated their respective net income or how it otherwise reached its conclusion about the award of alimony to the former wife.

Indeed, there are no findings at all regarding each spouse's available financial resources, after accounting for their respective expenses. The trial court may have relied on the stipulated gross income of the former husband ($29,000 per month) and the stipulated imputed gross income of the former wife ($2,000 per month) in calculating alimony and child support, without fully accounting for the spouses' respective expenses. However, we cannot tell for sure one way or the other because the trial court's order does not spell any of this out. Remand is necessary so that the trial court can set out specifically its calculations of net income for the parties and demonstrate how that net income is utilized to determine the amount of alimony and child support. *See Walker v. Walker*, 85 So. 3d 553, 554–55 (Fla. 1st DCA 2012) (reversing alimony award because the trial court failed to make sufficient fact findings, which inhibited the appellate court from determining whether alimony award was supported by the record); *Broemer v. Broemer*, 109 So. 3d 284, 288 (Fla. 1st DCA 2013) (noting that trial court must "make specific factual findings regarding these factors [pertaining to need and ability to pay]"); *id.* at 289 (stating that "remand is necessary because the lack of required findings of fact renders [the court] unable to review the alimony issue in a meaningful way").

Next, we turn to the former husband's contention that bridge-the-gap alimony should not have been awarded. The trial court awarded two years of bridge-the-gap alimony to the former wife so she could "obtain the training that she needs to enter the workforce." Bridge-the-gap alimony, though, is authorized "to assist a party by providing support to allow the party to make a transition from being married to being single." § 61.08(5), Fla. Stat. It is "to assist a party with legitimate, *identifiable* short-term

needs." *Id.* (emphasis supplied). The trial court does not make findings regarding any such "need" to be covered, and there is no evidence in the record to that effect.

Vocational experts did testify that based on her education and lack of recent work experience, the former wife would need job training to help her secure a job and be self-supporting. This evidence, however, is relevant to rehabilitative alimony, not bridge-the-gap alimony. *See* § 61.08(6)(a), Fla. Stat. (providing for award of rehabilitative alimony "to assist a party in establishing the capacity for self-support," through development or redevelopment of "skills or credentials"). If the trial court intended to award rehabilitative alimony, it should address this in its order on remand and include in that order a description of the statutorily required "specific and defined rehabilitative plan." § 61.08(6)(b), Fla. Stat.

We also need to address the trial court's award of durational alimony. Durational alimony is different than permanent alimony. Permanent alimony is intended "to provide for the needs and necessities of life as they were established during the marriage" for the benefit of the former spouse "who lacks the financial ability to meet [those] needs and necessities of life following" the dissolution. § 61.08(8), Fla. Stat. By contrast, the "purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of . . . moderate duration," like the marriage here. *Id.* (7); *see also id.* (4) (establishing a rebuttable presumption that "a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years"). Durational alimony is available "when permanent periodic alimony is inappropriate," and the duration of this type of alimony "may not exceed the length of the marriage." *Id.* (7). Without specific factual findings to support its award of durational alimony, we cannot engage in any meaningful appellate review on this question.

For instance, the trial court does not address why it concluded that $7,000 is the right amount to provide the former wife the needed "economic assistance." Moreover, the parties agree that the duration of their marriage was roughly sixteen years—which then is just the cap for durational alimony and not a duration

presumptively to be awarded—but we do not know the specifics of how the trial concluded that sixteen years was the amount of time that the former wife would need economic assistance. This impedes our ability to assess the correctness of the trial court's award of durational alimony. In turn, we must remand for the court to address this as appropriate.

There is also concern about the dates selected for the durational alimony. The trial court ordered the former husband to pay durational alimony for "sixteen (16) years, beginning on January 1, 2019 and terminating on December 31, 2035." That start date likely is not correct because the marriage was dissolved in a prior judgment rendered March 6, 2018 (a point which we will come back to in a moment). In any event, the parties agree that the time frame comes out to be seventeen years, not the sixteen years that the marriage lasted. This period, of course, will need to be adjusted on remand. The trial court must make specific findings, based on record evidence, regarding why it determined durational alimony to be appropriate, the length of time that the former wife is projected to need economic assistance, and the amount of that alimony in terms of the former wife's need for assistance and the former husband's ability to pay. As noted earlier, those findings must include calculations of the former spouses' net incomes and specification of the former wife's need of economic assistance for the duration of the award.

The insufficiency of the trial court's written factual findings, especially regarding the calculation of net income, impacts the correctness of the child support award as well. Section 61.30, Florida Statutes, provides guidelines for the minimum amount of child support to be ordered. This amount is determined based on the parties' combined *net* income and number of minor children. § 61.30(6), Fla. Stat. If the parties' combined net income exceeds the upper limit of the guidelines, there is a multiplier that must be applied. *See id.* (6)(b). The amount indicated is "presumptively" correct. *Id.* (1)(a). A child support award may vary by more than five percent from the amount specified by the guidelines "only upon a written finding explaining why ordering payment of such guideline amount would be unjust or inappropriate." *Id.* Because of the issues with the order we already have addressed, we also cannot adequately review whether the trial court's calculation of

child support comports with the guidelines or whether there was a variance based on a specific determination by the trial court. On remand, the trial court should recalculate the child support award using the parties' combined net income, the statutory guidelines, and any applicable multiplier; and any variance should be supported by findings of fact and the record.

Next is the former husband's contention that the trial court should have given him a set-off against the durational alimony to account for the forty months of temporary support he was ordered to pay prior to rendition of the final order setting alimony and child support. On this issue, we affirm in part. Temporary alimony and durational alimony are distinct statutory creatures, each serving its own inherent purpose. The former is based on an obligation of the spouse with financial means to support the spouse without such means, *while they remain married* and the dissolution proceeding continues; the latter is a statutory financial obligation separately awarded *after* dissolution, when the two no longer are married. *Cf. Floyd v. Floyd*, 108 So. 896, 898 (Fla. 1926) (noting difference between temporary alimony ("alimony pendente lite") and permanent alimony and explaining that temporary alimony "is an allowance made to the [spouse] for [his or her] maintenance during the pendency of the [divorce] action as provided by [the statutory predecessor to section 61.071]"); *Duss v. Duss*, 111 So. 382, 385 (Fla. 1926) (explaining how temporary alimony is awarded while "the parties stand before the court in the continued relation to each other of husband and wife," and permanent alimony is "allowed and to be paid after" dissolution, when the spouse's "legal liability" to pay alimony "is in the nature of an obligation or duty to a stranger"); § 61.08(1), (7), Fla. Stat. (providing for various defined categories of alimony, including "durational alimony," which is "to provide a party with economic assistance for a set period of time *following a marriage*" (emphasis supplied)).

The trial court was correct to refuse a credit for the temporary alimony awarded up to the date of the dissolution (which, as promised earlier, we get to in the next paragraph). The alimony statutes do not authorize a credit for temporary spousal support paid by the payor spouse—a distinct, common-law type of alimony intended only for maintenance of a spouse during litigation—in its

award of durational alimony, which, by contrast, is a statutory creation intended to assist the spouse following dissolution. In other words, there is no overlap (read: no double-counting) between the two types of support that could justify a credit: Common-law temporary support comes before dissolution, *i.e.*, while the parties are still married; durational alimony, like the other three listed in section 61.08, takes effect only after dissolution. However, support that is ordered *after* dissolution but *before* a final order determining alimony is a different story, which we now address.

In its initial judgment, rendered March 6, 2018, the trial court found that the marriage was irretrievably broken and adjudicated it "hereby ***DISSOLVED***." *See* § 61.052(2), Fla. Stat. (requiring that the trial court "enter a judgment of dissolution of the marriage" upon a finding "that the marriage is irretrievably broken"). In that judgment, the trial court also addressed the equitable distribution of marital property, but it reserved jurisdiction as to final alimony and child support. It ordered the former husband to continue paying the former wife support temporarily, as previously ordered. Even though the trial court reserved jurisdiction to address additional collateral matters, including alimony, the marriage was dissolved as of the date the judgment was rendered—March 6, 2018. *See Fernandez v. Fernandez*, 648 So. 2d 712 (Fla. 1995) (holding that a final judgment of dissolution conclusively and finally dissolves the marriage, even if the trial court retains jurisdiction to deal with property distribution in a subsequent order); *Berkenfield v. Jacobs*, 83 So. 2d 265 (Fla. 1955) (holding that a marriage is dissolved upon signing divorce decree, even if one of the parties dies before the decree is recorded); *see also Klarish v. Klarish*, 296 So. 2d 497, 498 (Fla. 3d DCA 1974) (rejecting argument that the trial court could not enter judgment dissolving marriage prior to and separate from a final disposition on the questions of alimony and child support, to be addressed at a later hearing).

That means that the parties became strangers upon rendition of this initial judgment. *See* § 61.052(4), Fla. Stat. ("A judgment of dissolution of marriage shall result in each spouse having the status of being single and unmarried."). As we just discussed, because temporary alimony of the type historically allowed at

common law and under section 61.071 is for support between existing spouses, this alimony became unavailable at the time of dissolution. This is not to say the trial court erred when it awarded continued support pending the determination of alimony and child support. *See* § 61.052(3), Fla. Stat. (allowing for "appropriate orders for the support and alimony of the parties" for the duration of any continuances). With the marriage dissolved in the same order, however, the interim support necessarily was *post-marriage* support and must have been one of the forms of alimony authorized by section 61.08(1).

At all events, the interim support ordered *post-marriage* was the equivalent of an advance on one or more of those statutorily authorized forms of alimony. On remand, then, the trial court must make specific findings that explain why the interim support ordered after dissolution on March 6, 2018, was warranted, and it also must identify on what form of alimony the support was an advance. For example, was the interim support essentially an advance on bridge-the-gap alimony, or durational alimony, or both? If there is some overlap between the interim support and the alimony finally ordered (say the interim support was essentially bridge-the-gap alimony, or the start of durational alimony, and the final alimony includes the same form or forms), then the former husband will be entitled to a credit to the extent of that overlap, dating back to the date of dissolution—which, we note, typically would be the start date for any period of durational alimony that is ordered.

Finally, there is the former wife's cross-appeal. The former husband agrees (mostly, it seems) with her assertion that the trial court erred in how it determined the tax consequences of the alimony award following a repeal of an applicable provision of the Internal Revenue Code. *See* Pub. L. No. 115-97, § 11051(b)(1)(B) (2017) (repealing 26 U.S.C. § 71, which had addressed special tax treatment for alimony and maintenance payments); *see also id.* (c) (addressing repeal effective date based on dates of "divorce or separation instrument" and modifications). The former wife acknowledges, though, that she did not preserve it as an issue before the trial court, and the former husband did not mention it in his rehearing motion or his initial brief. However, because we are reversing and remanding for better fact findings and a

recalculation of alimony anyway, the trial court is free to further evaluate the effect of the repeal as it applies to its calculations of net income, and make specific findings to this effect, where appropriate. *See* § 61.08(2)(h), Fla. Stat. (requiring the trial court to consider "tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment"); *cf. Vanzant*, 82 So. 3d at 993 n.6 ("Because we are remanding for reconsideration of the alimony award, we need not reach the former wife's argument on cross-appeal that the alimony amount awarded in the amended final judgment was inadequate. The trial court is free to consider this issue on remand.").

With our remand, we caution about the use of *nunc pro tunc* in orders. The designation should not be used unless the order corrects a mistake or omission in a prior order. *See Nichols v. Walton*, 90 So. 157, 158 (Fla. 1921) ("An order can be entered nunc pro tunc to make a record of what was previously done by the court, although not then entered; but where the court has wholly omitted an order, which it might or ought to have made, it cannot afterward be entered nunc pro tunc."). The trial court should specify whether it intends to make any form of alimony award retroactive to the dissolution date (and assign the appropriate credits, as we discussed), or to some other, later date, and it should make the necessary findings to support the retroactivity and the date selected. The designation, however, likely would have no effect regarding the tax consequences of the alimony payments under the 2017 repeal of section 71 of the Internal Revenue Code, and the trial court must take this possibility into consideration in its net income calculations.

REVERSED and REMANDED with instructions.

ROWE, C.J., concurs; MAKAR, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring in result.

I concur in result only to allow for this appeal, filed in this Court in 2019, to come to an end without further delay.

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