FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-0708

JOHN DOMINIC IARUSSI, Former Husband,

Appellant,

v.

SARAH MICHAEL IARUSSI, Former Wife, and JSI PROPERTIES, LLC,

Appellees.

On appeal from the Circuit Court for Jefferson County.
Dawn Caloca-Johnson, Judge.

October 12, 2022

PER CURIAM.

We review a final judgment for dissolution of marriage. Former Husband argues four issues in his brief. We affirm on the first two issues raised, and reverse and remand on the others. In reversing, we clarify the law as it relates to prejudgment interest.

I

Former Husband founded LobbyTools, a successful company. He met Former Wife while working for LobbyTools. They married, and both Former Husband and Wife served as CEO and in other executive positions within LobbyTools. During their marriage, the

parties' lifestyle was lavish. When the parties separated, Former Wife was forced out of LobbyTools and Former Husband retained ownership. Both parties have significant resources. However, Former Husband now earns several times more in salary than Former Wife.

The petition for dissolution was filed on April 13, 2018. Pending a final hearing, the parties settled all marital claims against each other except for those relating to the parties' shared marital interest in LobbyTools, Former Wife's claims to retroactive and prospective alimony, and Former Wife's claim for payment of attorneys' fees and costs. Only the first two claims are relevant to this appeal—the parties' marital interest in LobbyTools and retroactive and prospective alimony.

Former Husband holds more shares in LobbyTools than Former Wife by an order of magnitude. Most of them were acquired before the parties' marriage but significantly increased in value during the marriage. That appreciation needed to be calculated and added to the value of the shares the parties acquired during the marriage to ensure an equitable distribution of marital assets. The valuation of LobbyTools as a company would determine LobbyTools' per share price and the size of the equitable distribution Former Wife would receive.

At a hearing, valuation experts for both Former Husband and Former Wife testified. Former Husband's expert sought to value LobbyTools at millions of dollars less than Former Wife's. Former Husband also sought to exclude Former Wife's valuation expert's testimony as unreliable under section 90.702, Florida Statutes (2021), where Florida has codified the *Daubert*[1] test. After a hearing, the trial court found Former Wife's expert's analysis admissible. Later, Former Husband presented an investment expert who testified to the income Former Wife could be making with her current investments. As analyzed, Former Wife's potential investment income was substantial, surpassing her salary.

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The parties agreed to file proposed orders in lieu of closing arguments. A year after the conclusion of the trial, the trial court entered a final judgment. It adopted much of the Former Wife's proposed order verbatim. The trial court found Former Wife's valuation expert to be more credible which resulted in a higher assessed value for LobbyTools' stock. With Former Husband holding most of the marital interest in LobbyTools, Former Husband was ordered to make a cash payment of $1,709,141 to Former Wife. The trial court ordered prejudgment interest on that distribution, retroactive to the date of the petition.

The trial court also awarded Former Wife durational and retroactive alimony. In calculating that alimony, the trial court, after considering Former Wife's need and Former Husband's ability to pay, rejected the testimony of Former Husband's investment expert as not credible and imputed no investment income to Former Wife. The amount in durational alimony was set for monthly payments of $4,983 for six years. Former Husband was also ordered to pay a lump sum of retroactive alimony for a period spanning the date of the petition, April 13, 2018, to the date of judgment, January 15, 2021.

II

Former Husband raises four issues on appeal. First, he argues the trial court's judgment was not the product of independent judicial labor because it adopted too much of Former Wife's proposed order. Second, he argues the trial court abused its discretion in admitting the testimony of Former Wife's valuation expert because it did not comply with the reliability standards established for expert testimony in section 90.702. Third, he argues the trial court abused its discretion in awarding prejudgment interest on the equitable distribution. Fourth, he argues the trial court erred in awarding both retroactive and durational alimony because, among other arguments, the trial court failed to impute investment income.

We reject the first argument, finding the trial court's order was the product of independent judgment. Proposed orders are a useful and often necessary tool of the trial court. However, we caution, as many have before, that the appearance of impropriety is to be avoided. As stated in *Perlow v. Berg-Perlow*, 875 So. 2d

383, 389–90 (Fla. 2004), while proposed orders "can serve as a starting point," the final judgment should reflect, both in reality and in perception, "a thoughtful and independent analysis of the facts, issues, and law by the trial judge." This determination is made on a case-by-case basis, and we find the order here to sufficiently reflect the trial court's independent judgment.

We also reject the second argument, finding the trial court was within its discretion when it admitted Former Wife's valuation expert testimony. Much of Former Husband's argument, here and during the *Daubert* hearing below, is focused on the credibility of the expert's testimony and not whether it was based on "sufficient facts or data" or was "the product of reliable principles and methods." § 90.702, Fla. Stat. The ambiguities and omissions Former Husband alleges to exist in the expert's analysis go to the weight of the evidence, not its admissibility. The trial court, as the factfinder in this case, found this testimony credible, and we will not second-guess that determination on appellate review.

We address the third and fourth issues in greater length.

III

A

Section 61.075 governs the equitable distribution of marital assets in Florida. Many factors go into making such an award, all focused on fostering "equity and justice between the parties." *Id.* § 61.075(1)(j). Distribution of marital assets can take different forms, including a cash payment "to be paid in full or in installments." *Id.* § 61.075(2). If installment payments are ordered, "the court may require security and a reasonable rate of interest or may otherwise recognize the time value of the money to be paid in the judgment or order." *Id.* § 61.075(10)(b). The statute does not authorize prejudgment, or retroactive, interest.

Though prejudgment interest is not mentioned in the statute, some Florida courts have read it in. The only court to discuss it in depth is the Fourth District, first in *Catalfumo v. Catalfumo*, 704 So. 2d 1095 (Fla. 4th DCA 1997). In *Catalfumo*, the trial court declined to award prejudgment interest. The trial court wrote:

> No case cited by the wife allows for the assessment of interest prior to the entry of final judgment, the event which triggers her entitlement to a certain amount of assets. The cases requiring the assessment of prejudgment interest generally involve the occurrence of a wrong—such as a breach of contract or a tort—which causes a loss at a time certain in the past.

Id. at 1099. In rejecting this holding, the Fourth District cited an Alaska Supreme Court case which held that tort cases and marital dissolution cases should be treated similarly. The Alaska Supreme Court wrote:

> We find nothing in either prior case law or AS 45.45.010(a) that prohibits awarding prejudgment interest in certain divorce cases. We realize that there is no typical "cause of action" in a divorce proceeding like there is in a contract or tort action. Furthermore, we recognize that a divorce proceeding should not produce winners or losers and that a division of marital property generally is not viewed as a damage award for or against either party. However, the basic principles behind prejudgment interest remain applicable. In divorce cases, a judge has discretion in choosing a reasonable date to value the marital property. The court also should have discretion to award prejudgment interest from that date, if one partner in the marriage had use of money or other property for a period when the other partner was actually entitled to it.

Morris v. Morris, 724 P. 2d 527, 530 (Alaska 1986) (citation omitted). The Fourth District found the principle espoused in *Morris* to be persuasive, that

> awarding prejudgment interest is not to penalize the losing party, but rather to compensate the successful claimant for losing the use of the money between the date he or she was entitled to it and the date of judgment. A corollary purpose is to prevent the judgment debtor from being unjustly enriched by the use of that money.

Catalfumo, 704 So. 2d at 1100 (quoting *Morris*, 724 P. 2d at 529). This sort of theory for prejudgment interest has been approved by the Florida Supreme Court for tort cases, but not for equitable distribution. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985).

The Fourth District reaffirmed this holding in 2009. *Mathers v. Brown*, 21 So. 3d 834, 838 (Fla. 4th DCA 2009). It does not appear that any other district court has adopted the Fourth's approach.[2]

B

The purpose of equitable distribution is to distribute marital assets equitably, and does not deal in prior loss, entitlement, or unjust enrichment. There is no statutory authority to add prejudgment interest to an equitable distribution. The separation of married persons inevitably causes temporary distance between people and their property. But marital property, which is all that we deal with when discussing an equitable distribution, is owned by both parties. *Carroll v. Carroll*, 471 So. 2d 1358, 1361 (Fla. 3d DCA 1985) ("Assets which are acquired during marriage are to be deemed as jointly owned assets and are to be equitably distributed."); § 61.075(6), Fla. Stat. Because they both jointly owned all of the marital assets subject to distribution, it necessarily follows that neither could have suffered a deprivation of property warranting prejudgment interest prior to entry of final judgment.

Prejudgment interest here also flows against the principles supporting interest awards in tort cases as described in *Argonaut*:

> [N]either the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the

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[2] We previously cited *Catalfumo* in *Kearney v. Kearney*, 129 So. 3d 381, 391 (Fla. 1st DCA 2013). But in *Kearney*, the parties signed a dissolution agreement that attached prejudgment interest to an equitable distribution. The parties in this case did not include prejudgment interest in their settlement agreement.

> defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.

474 So. 2d at 215. Dissolution of marriage cases, by their nature, have no winners or losers, no losses or gains, because the distribution of marital assets is simply the separation of existing interests. Both Former Husband and Former Wife had an equal interest, possessory or otherwise, in *all* of the marital LobbyTools shares. It did not matter, for these purposes under the law, whose name they were in.

We cannot add words to a statute, and we can infer that because the legislature provided for interest in one circumstance, it intentionally did not provide for it in others. The statute allows the trial court to order "security and a reasonable rate of interest or may otherwise recognize the time value of the money to be paid in the judgment or order" when an equitable distribution is ordered in installments. § 61.075(10)(b), Fla. Stat. This reasonably secures payments and compensates for the time value lost when a party is unable to make the whole cash payment at the time of judgment. But that principle does not extend to payments made in full upfront. And in neither scenario is prejudgment interest authorized by section 61.075.

C

In this case, the trial court ordered prejudgment interest attached to the cash payment Former Husband was required to pay Former Wife. As we have explained, this was error. We reverse the award of prejudgment interest on the ordered equitable distribution.

IV

The trial court declined to consider Former Wife's investment income when calculating alimony. Former Wife defends the trial court's decision as a credibility determination. The trial court did not find Former Husband's investment expert credible and so did not accept his analysis on the expected rate-of-return for Former Wife's investments. We agree that the trial court was entitled to

find the expert's testimony not credible and reject it. "Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons." *Williams v. State*, 37 So. 3d 187, 204 (Fla. 2010). The trial court here provided several reasons why it found Former Husband's expert not credible—his inexperience, his failure to adequately answer certain questions, and his choices relating to his analysis. We review credibility determinations with great deference, and this decision cannot be fairly described as "arbitrary, fanciful, or unreasonable" indicating an abuse of discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

However, this does not mean it was reasonable for the trial court to impute *no* investment income. The law requires a court, when calculating alimony, to consider "*all 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)(i), Fla. Stat. (emphasis added). "It is well-settled that a court should impute income that could reasonably be earned on a former spouse's liquid assets." *Sherlock v. Sherlock*, 199 So. 3d 1039, 1043 (Fla. 4th DCA 2016). The trial court was not entitled to decline to consider a source of income without sufficient reason to do so. *See Fitzgerald v. Fitzgerald*, 912 So. 2d 363, 367 (Fla. 2d DCA 2005). Because it did not impute any investment income and did not give sufficient reason for its action, the trial court erred.

We reverse the trial court's award of durational and retroactive alimony.[3] On remand, the trial court may allow the parties to present evidence as to the rate-of-return that should be applied to Former Wife's investments, along with any other

[3] Judge Long's concurring opinion, with which all judges on the panel agree, concludes that retroactive alimony is not a legal form of alimony. Former Husband does not argue that a retroactive alimony award is unauthorized, and so we do not address it in the opinion of the Court. However, because we must reverse both the durational and retroactive alimony awards, the parties and the trial court are free to address the issue on remand.

considerations and proceedings necessary to recalculate a potential alimony award.

* * *

The trial court's award of prejudgment interest on the cash payment of $1,709,141 is REVERSED. The trial court's award of durational and retroactive alimony is REVERSED AND REMANDED for proceedings not inconsistent with this opinion. The trial court's final judgment for dissolution of marriage is otherwise AFFIRMED.

ROWE, C.J., and JAY and LONG, JJ., concur.

JAY, J., concurs with opinion.

LONG, J., concurs with opinion in which ROWE, C.J., and JAY, J., concur.

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

JAY, J., concurring.

I concur with the Court's well-reasoned opinion. I write separately to note that even if the equitable distribution statute authorized prejudgment interest, Former Wife was not entitled to it because the parties' Partial Marital Settlement Agreement barred any such claim.

Section 1.02 of the Agreement states that the Agreement resolves "all marital assets and issues . . . except the valuation and distribution of the parties' marital interest in LobbyTools, Inc., Wife's claims to retroactive and prospective alimony, and Wife's claim for payment of attorney's fees and costs by Husband, and Husband's defenses thereto []." Section 9.03 ("Mutual Release") of the Agreement further provides:

> The parties intend to settle all aspects of their marital relationship and rights related to the matters and assets addressed in this Agreement. Each party specifically reserves for later court determination, the valuation and distribution of the parties' marital interest in LobbyTools, Inc.; Wife's claims to retroactive and prospective alimony; and Wife's claim for payment of attorney's fees and costs and Husband's defenses thereto. ***Except as otherwise provided in this Agreement, the parties mutually release and forever discharge each other from any and all actions, liabilities, claims, demands and obligations of any kind or character, both in law and in equity, known or unknown, that either of them ever had, now has, or may have against the other upon or by reason of any matter, cause, or matter related to the matters and assets addressed in this Agreement.*** (Emphasis added).

Thus, the only equitable distribution task before the court was to value and apportion the parties' interests in LobbyTools. As to all other equitable distribution matters, the parties mutually released any "actions, liabilities, claims, demands and obligations of any kind or character" that they had or may have had against each other. Whatever else prejudgment interest might be, it is certainly a "liability" or "obligation." *See Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment."); *Obligation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality."). If the parties wanted to exclude prejudgment interest from the scope of their release, they certainly could have done so. *See Sedell v. Sedell*, 100 So. 2d 639, 642 (Fla. 1st DCA 1958) (courts respect separation agreements that are fairly negotiated); *Vinson v. Vinson*, 282 So. 3d 122, 135 (Fla. 1st DCA 2019) (same). Instead, their Agreement reserved three issues for the trial court's adjudication—and expressly discharged everything else. Accordingly, Former Wife

released Former Husband from all liability for prejudgment interest.

This conclusion is reinforced by Former Wife's pretrial statement and the parties' pretrial stipulation. In her pretrial statement, Former Wife proposed the following procedure for equitably distributing her share of LobbyTools:

> The equitable distribution should require Former Husband to pay one-half of the value to Former Wife, which is $1,826,108. If Former Husband is unable to pay this amount in a lump sum payment, Former Wife proposes he pay such amount at the rate of $500,000 per year until paid in full, with the first payment due sixty days after the date of trial, accruing statutory interest for all payments unpaid as of thirty days after the date of trial.

This proposal, which set forth a payment schedule that allowed for the possibility of *post-judgment* interest, makes no mention of prejudgment interest. Likewise, the parties' pretrial stipulation—which framed the trial court's equitable distribution task by identifying the number of marital and non-marital shares, the method for valuing those shares, the dates relevant to equitable distribution, and provided a credit for an earlier payment by Former Husband—gave no indication that prejudgment interest was part of the equitable distribution calculation.

It is a legal truism that pretrial stipulations "put the parties on notice of what is in dispute []." *Knight v. Walgreens*, 109 So. 3d 1224, 1228 (Fla. 1st DCA 2013). This means that a party can "rely upon the issues as framed in the pretrial statement." *Id.* It follows then that "[w]here [the] parties by stipulation prescribe the issues on which the case is to be tried, . . . [that stipulation] amounts to a binding waiver and elimination of all issues not included." *Esch v. Forster*, 168 So. 229, 231 (Fla. 1936); *see S & M Transp., Inc. v. Northland Ins. Co.*, 208 So. 3d 230, 232-33 (Fla. 5th DCA 2016) ("We find that the trial court erred when it included additional findings in the final judgment that exceeded the agreed upon issues to be tried by the parties in the pretrial stipulation."); *see*

also Mac Papers, Inc. v. Boyd, 304 So. 3d 406, 410 (Fla. 1st DCA 2020) (stipulations must be strictly enforced because not doing so is like "moving [the] goalposts" and "creates unfairness to litigants and spawns unintended consequences [].").

Here, if there were any doubts about whether the Partial Marital Settlement Agreement reserved a claim for prejudgment interest, the pretrial filings put those doubts to rest. Prejudgment interest was never mentioned. Instead, the first mention of prejudgment interest was in Former Wife's 97-page proposed final judgment—a document submitted long *after* the trial finished.

Accordingly, Former Wife did not preserve a claim for prejudgment interest.

LONG, J., concurring.

I concur in the Court's opinion but write to explain that retroactive alimony is a fiction of the courts and is not supported by any provision of Florida law.

I

Section 61.08 governs alimony. Subsection one authorizes a trial court to "grant alimony to either party, which alimony may be bridge-the-gap, rehabilitative, durational, or permanent in nature or any combination of these forms of alimony." § 61.08(1), Fla. Stat. All four types of alimony are either defined as post-marriage, meaning post-dissolution, or for a specific purpose, like bridge-the-gap or rehabilitative alimony. *Id.* § 61.08(5), (6), (7), (8). None allow a retroactive award.

Alimony during the pendency of the proceedings is authorized by a different provision, section 61.071. Section 61.071 allows for alimony to be awarded *pendente lite*, translated from Latin to mean "while the action is pending." This type of support is available only "during the actual progress of a suit," *DiGiacomo v. Mosquera*, 322 So. 3d 734, 739 (Fla. 3d DCA 2021), and section 61.071 provides no authority to award it retroactively. *Ogle v. Ogle*, 334 So. 3d 699, 705 (Fla. 1st DCA 2022) (explaining that "[t]he alimony statutes do not authorize a credit for temporary

spousal support . . . in its award of durational alimony"). A spouse can also receive support through "interim partial distribution[s]," or equitable distributions made "during the pendency of a dissolution action." § 61.075(5), Fla. Stat. Interim partial distributions can provide effectively the same relief as *pendente lite* alimony, but with wider reach to provide different types of support other than money.

Retroactive alimony* is a creation of the courts, first in 1982 by the Fourth District. In *Wright v. Wright*, 411 So. 2d 1334, 1336 (Fla. 4th DCA 1982), the court found that while "there is no such authority" in Florida law to award retroactive alimony, there is also "no Florida authority prohibiting such an award." The court in *Wright* found it persuasive that "courts of other states have spoken approvingly of awards of alimony that are retroactive to the date suit is filed." *Id.* at 1336. The Fifth District rejected the Fourth District's position on the same day *Wright* was issued:

> Alimony is generally awarded to provide support to a financially needy former spouse. If a spouse needs support prior to the dissolution the trial court can award temporary support. [Footnote to § 61.071] We recognize that a trial court has the discretion to make a modification in alimony retroactive to the time of filing the petition for modification. Absent a legislative mandate, we decline to extend that discretionary authority to the initial alimony award.

Blais v. Blais, 410 So. 2d 1365, 1367 (Fla. 5th DCA 1982) (citation omitted). Since these cases, no Florida court has analyzed this issue. Our Court, like the other district courts, has routinely entertained claims relating to retroactive alimony, but no decision has touched on its legality. *See, e.g., Askegard v. Askegard*, 584 So. 2d 47, 49 (Fla. 1st DCA 1991); *Abbott v. Abbott*, 187 So. 3d 326, 328 (Fla. 1st DCA 2016); *Tanner v. Tanner*, 46 Fla. L. Weekly D1564 (Fla. 1st DCA July 1, 2021). The Florida Supreme Court has never

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* Retroactive alimony as I refer to it in this opinion means awarding alimony in lump sum in a final judgment, for alimony purportedly owed from the date of the dissolution petition.

mentioned or approved of an award of retroactive alimony in the initial alimony determination.

II

I cannot agree with *Wright*'s reasoning. *Wright* was correct that there is no authority in Florida law for retroactive alimony. But wrong that nothing prohibits it. Article II, section 3 of the Florida Constitution states "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." We are not free to craft new bases for alimony not authorized by law.

Additionally, it is inappropriate, even for persuasive authority, to look to other state's decisions discussing retroactive alimony. Florida alimony is a unique creature of Florida state law. If the legislature finds another state's alimony law compelling, it can adopt it. We cannot.

III

While a marriage is pending dissolution, both spouses jointly own all the marital property, even while one spouse may temporarily hold most of the wealth and assets. When the parties are separated, a party can apply for *pendente lite* support or interim partial distributions of the marital assets. If there is a true need and ability to pay during the dissolution proceedings, it must be addressed within the parameters of the law.

This understanding is not changed by section 61.14 which governs "[e]nforcement and modification of support, maintenance, or alimony agreements or orders." Subsection one allows a trial court, upon "changed circumstances," to

> modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties or the child.

§ 61.14(1), Fla. Stat. Child support and alimony are commonly used terms with plain meanings. Maintenance can mean many things in common parlance, but in this context, is just another word for *pendente lite* alimony. *See Separate Maintenance*, BLACK'S LAW DICTIONARY (7th ed. 1999) ("Money paid by one married person to another if they are no longer living as husband and wife. This type of maintenance is often mandated by a court order.").

The point of section 61.14 is to give the trial court discretion to retroactively modify alimony awards "as equity requires." § 61.14(1)(a), Fla. Stat. This grant of authority, however, does not allow a trial court to award retroactive alimony in the first instance where the law does not provide for it. The law explicitly provides for retroactive child support in section 61.30. Section 61.30(17) allows the court not only to reach back to the petition for dissolution, but even further to the date "when the parents did not reside together in the same household with the child, not to exceed a period of 24 months preceding the filing of the petition." § 61.30(17), Fla. Stat. As applied to maintenance, the court can reach back to when the initial petition for dissolution was filed during the pendency of the litigation. And, as applied to alimony, any petition seeking to modify the initial determination of alimony would be filed after dissolution and could only reach back to the date of dissolution. *See Ogle*, 334 So. 3d at 705 (Fla. 1st DCA 2022) (explaining that all four types of alimony listed in section 61.08 "take[] effect only after dissolution"). This understanding is consistent with *Blais* where the Fifth District held that while "a trial court has the discretion to make a modification in alimony retroactive to the time of filing the petition for modification," there was no "legislative mandate" to "extend that discretionary authority to the initial alimony award." 410 So. 2d at 1367.

IV

No provision of Florida law allows for a retroactive alimony award at the initial alimony determination. The legislature has not provided statutory authority to award retroactive alimony, and courts cannot act without authority.

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