NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

KATHERINE A. SINGER n/k/a KATHERINE A. EICHLER, Appellant, v. SCOTT J. SINGER, Appellees.	)	Case No. 2D18-1854

Opinion filed April 17, 2020.

Appeal from the Circuit Court for Pinellas County; Amy M. Williams, Judge.

Jane H. Grossman, St. Petersburg, and John S. Simms of Staack, Simms & Reighard, PLLC, Clearwater, for Appellant.

Jason Scott Coupal of Ayo & Iken PLC, New Port Richey, for Appellee.

LaROSE, Judge.

Katherine A. Eichler appeals the final judgment dissolving her marriage to Scott J. Singer. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). Ms. Eichler raises six issues on appeal. We find merit in her bookend challenges and reverse the portions of the final judgment pertaining to issues one and six; we affirm, without further comment, issues two through five.

Background

The parties married in 2001. They have a minor child. Mr. Singer filed for divorce in 2012. The case languished until October 2015, when Mr. Singer filed an amended dissolution petition. In November 2017, the trial court conducted a two-day trial. The trial court orally announced its ruling at a January 2018 hearing.

In pertinent part, the trial court found that Ms. Eichler was voluntarily underemployed and imputed to her an annual income of $35,360. Additionally, the trial court found that Ms. Eichler was in a supportive, long-term relationship with her live-in boyfriend, who contributed towards household expenses. The trial court calculated that these payments totalled $10,800 annually. Further, the trial court imputed an additional $10,000 annually to Ms. Eichler based upon recurring gifts from her father. In total, the trial court imputed $56,160 income to Ms. Eichler, $20,800 of which consisted of payments from her boyfriend and father.

Based upon these findings, the trial court declined to award Ms. Eichler any alimony. It further used her imputed income to calculate Mr. Singer's child support obligation. The trial court also ordered Mr. Singer to make an equalizing payment to Ms. Eichler totalling $56,006.46.

Following the January 2018 hearing, but before entry of a written final judgment, tragedy struck; Ms. Eichler's boyfriend and father died in short succession. Ms. Eichler promptly sought relief in the trial court. She filed a motion for rehearing under Florida Family Law Rule of Procedure 12.530(a), and, in the alternative, relief from judgment under Florida Family Law Rule of Procedure 12.540(b). The trial court did not rule on the motion. Instead, it entered the written final judgment, consistent with its oral pronouncement. Undeterred, Ms. Eichler filed a "Motion for new trial or in the

alternative motion for rehearing, to open judgment and to take additional testimony, or in the alternative motion for relief from judgment," again seeking relief under the same rules of procedure. The trial court denied the motion.

Analysis

We address, in order, Ms. Eichler's first and sixth issues.

I. Reopening the evidence & newly discovered evidence

Perhaps as a matter of strategy, Ms. Eichler sought relief under rules 12.530(a) and 12.540(b). Under either, the trial court erred in denying relief.

a. Motion for rehearing under rule 12.530(a)

"On a motion for a rehearing of matters heard without a jury . . . the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment." Fla. Fam. L. R. P. 12.530(a). The permissive "may" grants the trial court discretion in considering the motion. See Robinson v. Nationstar Mortg. LLC, 44 Fla. L. Weekly D2889 (Fla. 2d DCA Dec. 4, 2019) ("It is true that a trial court has discretion to reopen evidence and take additional testimony."); Grider-Garcia v. State Farm Mut. Auto., 73 So. 3d 847, 849 (Fla. 5th DCA 2011) ("As a general rule, a trial court has broad discretion to allow a party to reopen its case and present additional evidence, whether it does so after a party rests, after the close of all evidence, or even after having directed a verdict for one party."). Accordingly, in reviewing the trial court's decision under rule 12.530(a), we employ an abuse of discretion standard. See Loftis v. Loftis, 208 So. 3d 824, 826 (Fla. 5th DCA 2017).

"Generally, to reopen a case, a party must establish two evidentiary predicates. The first predicate is that the presentation of evidence will not unfairly prejudice the opposing party and, second, that reopening will serve the best interests of

justice." Gulf Eagle, LLC v. Park E. Dev., Ltd., 196 So. 3d 476, 479 (Fla. 2d DCA 2016). We also observe that when "exercising its discretion to reopen a case for additional evidence, the court should consider the timeliness of the motion, the character of the testimony, and the effect of granting the motion." Burk v. State, 497 So. 2d 731, 733 (Fla. 2d DCA 1986) (citing United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985)); see also Lovelass v. Hutchinson, 250 So. 3d 701, 705 (Fla. 4th DCA 2018) ("Factors to consider in deciding whether to reopen a case include: '(1) the timeliness of the request, (2) the character of the evidence sought to be introduced, (3) the effect of allowing the evidence to be admitted, and (4) the reasonableness of the excuse justifying the request to reopen.' " (quoting Grider-Garcia, 73 So. 3d at 849)).

The first criterion speaks to "unfair prejudice." Presumably, a movant seeking to reopen the evidence wishes to present evidence favorable to her. The flip side of the coin is that the evidence is necessarily detrimental to the opposing party. But, in assessing whether to reopen the case, the trial court must not ask whether the nonmovant is prejudiced, but whether he will be *unfairly* prejudiced by the additional evidence. Cf. Williams v. State, 621 So. 2d 413, 415 (Fla. 1993) ("[O]ther crime evidence that is probative of a material fact in issue is not inadmissible simply because it has a tendency to suggest the commission of another crime and thus necessarily is prejudicial to the defendant. . . . [E]vidence of other crimes that is relevant and therefore not barred by section 90.404(2)(a)[, Florida Statutes (1989),] may be excluded under section 90.403 if its probative value is substantially outweighed by undue prejudice." (citations omitted)).

On the record before us, we cannot say that Mr. Singer would be unfairly prejudiced. The deaths of Ms. Eichler's boyfriend and father followed the close of

evidence, but occurred before entry of the written judgment. See Byrne v. Byrne, 128 So. 3d 2, 7 (Fla. 3d DCA 2012) ("Florida Rule of Civil Procedure 1.530(a) enables a trial court to evaluate matters that it did not consider prior to judgment, and to correct any error if the trial court becomes convinced that it has erred."). Ms. Eichler's imputed income included the significant financial contributions of her boyfriend and father. And without question, she acted promptly to alert the trial court. See Adelberg v. Adelberg, 142 So. 3d 895, 899-900 (Fla. 4th DCA 2014) (Warner, J., concurring in part and dissenting in part) ("Although discretionary, where the party has been diligent in presenting the newly discovered evidence to the court, and it bears on a material issue in the case, a court abuses its discretion in not hearing such evidence." (citing Blue v. Blue, 66 So. 2d 228, 230 (Fla. 1953))); cf. Lovelass, 250 So. 3d at 705 ("Because of the husband's non-disclosure of these potential assets, the wife did not learn of their existence until after the close of the evidence. The husband cannot claim that he would be unfairly prejudiced by reopening the evidence when his own non-disclosure caused the wife's delay in seeking to introduce this exhibit.").

In any event, rule 12.530(a)'s language permitting a trial court to "open the judgment *if one has been entered*," specifically contemplates that a rehearing motion may be filed following a trial court's oral pronouncement, but preceding rendition of the written order. (Emphasis added.) In fact, the record reflects that shortly after the deaths, and before the trial court entered a written judgment, Ms. Eichler moved to reopen the evidence, evidence with a direct bearing on the trial court's financial calculations. Following rendition of the final judgment, Ms. Eichler filed a timely renewed motion. See Fla. Fam. L. R. P. 12.530(b) ("A motion . . . for rehearing must be served not later than 15 days after . . . the date of filing of the judgment in a non-jury

action."). Given the disappearance of more than $20,000 in imputed income, reopening the evidence would serve the best interests of justice as it would result in recalculations, and an outcome, commensurate with Ms. Eichler's newfound financial position. See, e.g., Oluwek v. Oluwek, 2 So. 3d 1038, 1039 (Fla. 2d DCA 2009) (holding that a trial court may not impute income based on gifts unless the gifts are continuing and not sporadic). The trial court should have granted Ms. Eichler's motion seeking to reopen the evidence. After all, the financial contributions made by her boyfriend and father accounted for thirty-seven percent of her total imputed income.

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

Rule 12.540(b)(2) includes "newly discovered evidence[,] which by due diligence could not have been discovered in time to move for a new trial or rehearing," as a basis to grant relief from a final judgment. Such a motion "must be filed within a reasonable time"; however, when premised upon newly discovered evidence, the motion must be filed "no[] more than 1 year after the judgment . . . was entered." Fla. Fam. L. R. P. 12.540(b); see Stevens v. Stevens, 666 So. 2d 227, 228 (Fla. 2d DCA 1995) ("The record shows that the husband failed to establish his entitlement to a rehearing by failing to demonstrate, among other things, that: (1) he was in possession of new evidence that could change the trial court's original disposition; (2) that such evidence was discovered since the trial; and (3) that such evidence could not have been discovered before trial by the exercise of due diligence."); see also Hess v. Hess, 44 Fla. L. Weekly D2518, D2520 (Fla. 2d DCA Oct. 11, 2019) ("Rule 12.540(b) allows a trial court to relieve a party from a final judgment on grounds of newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial or rehearing."). Ms. Eichler's motion and renewed motion were timely filed.

Our standard of review here, too, is abuse of discretion. Belk v. McKaveney, 903 So. 2d 337, 337 (Fla. 2d DCA 2005).

The deaths of Ms. Eichler's boyfriend and father soon after the trial court's oral pronouncement materially altered the trial court's findings relating to Ms. Eichler's imputed income. See Oluwek, 2 So. 3d at 1039; see also City of Winter Haven v. Tuttle/White Constructors, Inc., 370 So. 2d 829, 831-32 (Fla. 2d DCA 1979) ("Material evidence is evidence which is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case."). The trial court should have considered this new evidence. See Edrington v. Edrington, 945 So. 2d 608, 610 (Fla. 4th DCA 2006) ("A motion for rehearing based on newly discovered evidence should be granted when . . . it appears that new evidence is such that it will probably change the result of the proceedings . . . ."). At the very least, the trial court should have conducted a limited evidentiary hearing on Ms. Eichler's motion. See Minda v. Minda, 190 So. 3d 1126, 1128 (Fla. 2d DCA 2016) (holding that if a rule 1.540(b) motion alleges a colorable entitlement to relief and is not refuted by the record, the trial court should either hold an evidentiary hearing on the motion or grant relief (citing In re Guardianship of Schiavo, 800 So. 2d 640, 644 (Fla. 2d DCA 2001))); Chancey v. Chancey, 880 So. 2d 1281, 1282 (Fla. 2d DCA 2004) ("If a rule 1.540 motion alleges a colorable entitlement to relief, the circuit court should conduct a limited evidentiary hearing on the motion.").

Mr. Singer argues that Ms. Eichler should have sought relief through a postjudgment supplemental petition to modify final judgment. See Fla. Fam. L. R. P. 12.100(a), .110(h), .170(a) (requiring that for proceedings that may not be initiated by motion under the Florida Family Law Rules of Procedure, a party seeking postjudgment

relief must file a supplemental petition). He contends that the deaths of Ms. Eichler's boyfriend and father were not "newly discovered evidence" because "[i]mplicit in the calculus of what constitutes newly discovered evidence . . . is the concept that the evidence would have affected the outcome of the trial at the time it occurred, and thus must have been in existence." In support, he cites to our decision in Noor v. Continental Casualty Co., 508 So. 2d 363 (Fla. 2d DCA 1987).

Mr. Singer's reading of the rule is far too cramped. Rule 12.540(b)(2) provides only that to qualify as newly discovered evidence, the evidence simply could not have been discovered through due diligence in time to move for a new trial or rehearing.[1] Casteel v. Maddalena, 109 So. 3d 1252, 1258 (Fla. 2d DCA 2013) ("[T]o obtain relief from judgment based on newly discovered evidence, the movant must demonstrate that she could not have discovered the evidence through due diligence within the time to move for rehearing or a new trial."). This necessarily contemplates evidence that was in existence at the time but that could not have been discovered through the exercise of due diligence, as well as evidence that could not have been discovered, despite the exercise of due diligence, because the evidence was simply not extant. Cf. Murphy v. State, 24 So. 3d 1220, 1222 (Fla. 2d DCA 2009) (determining that

[1]Mr. Singer's argument places Ms. Eichler in an untenable position. Aside from the "heavy burden" imposed on a movant seeking postjudgment modification, Bachman v. McLinn, 65 So. 3d 71, 75 (Fla. 2d DCA 2011), Ms. Eichler's evidence was in existence at the time the written final judgment was entered. Thus, she might be precluded from seeking modification. See Ogilvie v. Ogilvie, 954 So. 2d 698, 699 (Fla. 1st DCA 2007) ("[T]he threshold question when modification is sought is whether there has been a substantial, material change in circumstances *since entry of the decree*." (emphasis added)); Cooper v. Gress, 854 So. 2d 262, 266,268 (Fla. 1st DCA 2003) (holding that where a party fails to prove the threshold ground that "an unanticipated substantial, material change in circumstances *since the entry of the final judgment*," there is no basis "to justify any modification of custody" (emphasis added)).

a 2004 report by the National Academy of Sciences discrediting the scientific underpinnings of comparative bullet-lead analysis may qualify as newly discovered evidence following Mr. Murphy's 1996 convictions for first-degree murder).

In Noor, 508 So. 2d at 364, we affirmed a judgment for the defendants in a medical malpractice case based upon their alleged failure to timely diagnose breast cancer. On appeal, the Noors argued that the trial court erred in denying their rehearing motion based upon newly discovered evidence. Id. at 365. However, the Noors newly discovered evidence, "a new expert in the field of oncology," was not newly discovered because they failed to exercise due diligence in uncovering the witness. Id. In contrast, Ms. Eichler would have been unable to discover this material evidence; i.e., the death of her loved ones. And the record discloses that Ms. Eichler promptly brought this new evidence to the trial court's attention before and following entry of the final judgment.

II. Statutory interest on equalizing payment

Ms. Eichler contends that the trial court erred in failing to award her statutory interest on the equalizing payment. See § 55.03(2), Fla. Stat. (2015) ("Any judgment for money damages or order for a judicial sale and any process or writ directed to a sheriff for execution shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment . . . accrues on the judgment until it is paid."). We agree. See Erp v. Erp, 976 So. 2d 1234, 1240 (Fla. 2d DCA 2008) (noting that the wife had a right to statutory interest on the equitable distribution equalizing payment that arose on the date of the judgment); Harper v. Harper, 586 So. 2d 1147, 1148 (Fla. 2d DCA 1991) ("We think the wife should be entitled to the benefit of the award at this time, or to the extent that her entitlement is deferred, the amount of her entitlement should bear interest at the statutory rate.").

Mr. Singer responds that "interest is not due when the awards are not liquidated and final." He argues that the equalizing payment was not liquidated, "as the language of the [judgment] suggests that the payment was subject to further set offs," including the proceeds from the sale of the marital properties. Mr. Singer urges us to consider a portion of the final judgment:

> Before any proceeds from the sale of any of the three (3) rental properties are disbursed to either party, the parties are ordered to account for the equalizing payment owed by the Husband to the Wife, property taxes owed by the Husband, together with monies due to the Wife for same, monies due to the Wife for any homeowner's association dues as set forth herein, monies due to the Wife for any HELOC payments paid as set forth herein, the money owed pursuant to temporary orders by the Husband to the Wife, monies owed to Husband pursuant to the Temporary Orders, reimbursement for overages paid by the Husband due to the perjured testimony, monies due to the Husband for HELOC payments made, monies due to Husband for the Child's cell phone, school meal account, insurance paid on former marital home, HOA invoices paid by Husband, and the charging liens of both attorneys. If counsel for the parties cannot agree on the amounts due, the Court will specifically reserve jurisdiction to determine same.

We are unpersuaded. The final judgment established a definite, fixed equalizing payment. Although the proceeds from the sale of the various properties are to be distributed with consideration toward credits, off-sets, and other assorted payments, the equalizing payment itself was not subject to modification. Cf. Shaver v. Shaver, 203 So. 3d 932, 937 n.3 (Fla. 2d DCA 2016) ("[O]nce the equitable distribution scheme is finalized and an equalizer payment ordered, it becomes a party's vested property." (citing § 61.075(2), Fla. Stat. (2015))).

Conclusion

We reverse and remand for the trial court to reopen the evidence to reconsider the effect that the deaths of the boyfriend and father have on Ms. Eichler's imputed income. Because such a reconsideration may bear upon other financial considerations, we further direct the trial court, on remand, to reconsider Ms. Eichler's requests for alimony, child support, and attorney's fees. See Freilich v. Freilich, 897 So. 2d 537, 539 n.1 (Fla. 1st DCA 2005) ("Because the foundation for the awards of child support and alimony is the amount of income erroneously imputed to the husband, the trial court may have to reconsider the amount of alimony and child support awarded after the amount of imputed income is recalculated."). Finally, the final judgment must be modified to reflect that the statutory rate of interest applies to the equalizing payment owed by Mr. Singer as of the date of the final judgment.

Affirmed, in part; reversed, in part; and remanded.

KELLY and SALARIO, JJ., Concur.