

Circuit Court for Anne Arundel County
Case No. C-02-FM-15-003184

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0007

September Term, 2017

RICHARD MALCOLM

v.

REBECCA MALCOLM

Graeff,
Fader,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, J.

Filed: March 7, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant, Richard Malcolm, appeals from an order of the Circuit Court for Anne Arundel County that annulled his marriage to the appellee, Rebecca Malcolm, and made awards of indefinite alimony and child support in favor of Rebecca. Richard argues that the circuit court erred in: (1) awarding alimony of any kind to Rebecca; (2) making that award indefinite; and (3) calculating Richard’s child support obligations. We disagree with Richard on the first point, but agree on the second and third.¹ As such, we will vacate the circuit court’s decision as to the award of indefinite alimony and child support, and remand for further proceedings. We will leave in place the circuit court’s awards of alimony and child support, as *pendente lite* awards, until further order of the circuit court.

BACKGROUND

Richard and Rebecca Malcolm were married in 2006 in Laurel, Maryland. They had two children together, one born in 2003 and the other in 2007. Richard has two other children, a son who has been an adult throughout these proceedings and a daughter who turned 18 in May 2017.

Richard and Rebecca separated on April 1, 2015, when Richard was arrested for stealing Civil War-era memorabilia worth hundreds of thousands of dollars from Rebecca’s

¹ Richard identifies four questions presented:

1. Whether the trial court erred in awarding appellee alimony, of any nature, without the requisite consideration of statutory factors.
2. Whether the trial court erred in awarding appellee indefinite alimony.
3. Whether the trial court erred in finding a material change in circumstances which would justify alimony under Maryland law.
4. Whether the trial court erred in calculating child support without including the alimony award.

family.² Richard filed a complaint for divorce and Rebecca filed a counter-complaint. They eventually agreed to the terms of a Voluntary Separation, Custody and Property Settlement Agreement, effective April 4, 2016 (“Settlement Agreement”), pursuant to which, among other terms:

- Richard was to pay \$772 per month in child support;
- Richard was to assign Rebecca, “by way of a Qualified Domestic Relations Order . . . her marital property portion of [Richard’s] disposable retirement pay under” his pension plan from his prior service as a Howard County Police Officer;
- Neither Richard nor Rebecca would receive alimony. However, the court awarding them a divorce “shall reserve jurisdiction to award alimony to [Rebecca] at a future time,” but “such alimony shall be awarded in the future only if there is a material change in circumstance which would justify alimony under Maryland law”;
- Rebecca and Richard were to have joint legal custody of the children. However, “[s]hould [Richard] be incarcerated, [Rebecca] shall have sole legal custody during that period of incarceration.” The Settlement Agreement gave Rebecca tie-breaking authority and primary physical custody of the children; and
- Both parties waived any monetary award.

The parties’ path toward a smooth, uncontested divorce took a sharp turn when, one day before their scheduled May 2016 uncontested divorce hearing, Rebecca learned that Richard’s divorce from his previous marriage was not completed until six days after his marriage to Rebecca. The parties postponed the hearing and Rebecca amended her counter-complaint to seek an annulment, as well as the other relief provided by the Settlement Agreement. Richard, however, now sought to have the Settlement Agreement

² Rebecca’s great-great-grandfather, George K. Leet, was an aide to Ulysses S. Grant.

set aside on the ground that it contemplated a divorce, not an annulment. Although the Circuit Court for Anne Arundel County ultimately rejected Richard's effort, holding that the Settlement Agreement was a valid and enforceable contract regardless of how the marriage dissolved, the proceedings delayed resolution—and Rebecca's receipt of her marital share of Richard's monthly pension benefits (worth more than \$800 per month)—by several months.

While the parties were litigating this dispute, Richard's criminal case was also moving forward. Richard, who pleaded guilty to two counts of fraud and conspiracy to commit wire fraud, started serving a multi-year sentence at a federal prison in South Carolina.³ The federal court also fined Richard \$1 million and ordered him to pay restitution of \$411,000 to Rebecca's family, which will be collected as a percentage of his earnings upon being released from prison.

In November 2016, Richard filed a motion to modify child support. He argued that his loss of income due to his incarceration constituted a material change in circumstances that warranted both a complete suspension of those payments for the duration of his incarceration and a permanent reduction in the amount thereafter. On February 8, 2017 the Circuit Court for Anne Arundel County held a hearing on: (1) the request for an annulment,

³ The record contains conflicting information about the terms of Richard's sentence. In his motion for modification of child support filed in the circuit court, Richard asserted in one paragraph that his sentence was 33 months, and in another that it was 30 months. He also stated in that document that he had been incarcerated since June 2016, but testified in February 2017 that he had been incarcerated since July. He also testified in February 2017 that he was scheduled to be released in October 2018, but expected to be released earlier. Fortunately, the precise terms of his sentence are not relevant to our determination, but they will be relevant on remand.

which was uncontested; (2) Rebecca's uncontested request for the Court to sign the Qualified Domestic Relations Order to provide her with a marital share of Richard's pension; (3) Richard's motion to modify child support; and (4) Rebecca's request for alimony.

In announcing its decision, the court addressed child support before alimony. In calculating income for the purpose of applying the child support guidelines, the court: (1) included Rebecca's marital share of Richard's pension in her income, and deducted it from his; (2) declined to include Rebecca's commissions, which the court found unreliable; and (3) did not consider alimony, which it had not yet awarded. Following the guidelines, the court ordered Richard to pay \$333 per month in child support through May 2017, when his \$350 monthly support obligation for another child (from a different marriage) ended, and \$425 per month thereafter.

Turning to alimony, the court reviewed in turn each of the factors listed in § 11-106(b) of the Family Law Article. The court found that some of those factors favored an award of alimony, others did not, and there was insufficient evidence presented to reach a conclusion as to others. The court concluded that an award of alimony was appropriate, giving particular weight to Rebecca's testimony that she was unable to make ends meet and to the substantial reduction in Richard's expenses during his incarceration. Although Richard's income had decreased from \$4,122 per month to \$3,690 per month as a result of his incarceration, his expenses had also decreased because, among other reasons, his food

and lodging were now provided by the federal government.⁴ In analyzing Richard’s claimed expenses, the court removed or discounted certain items, including for gifts, tax and student loan payments he had not actually been making, and commissary expenses, but credited others. Based on a detailed assessment of Richard’s income and expenses, including crediting Richard with payment of the new child support amounts, the court found that he had a surplus of nearly \$400 a month, and awarded alimony in that amount.

As to the term of the alimony award, the court stated that, in the absence of any evidence about how long it would take Rebecca to put herself in position to earn more money, “the only choice I have is to make it indefinitely.” In rejecting Richard’s contention that Rebecca bore, but failed to carry, the burden of proving an unconscionable future disparity to support an award of indefinite alimony, the court stated that there was an existing disparity between Richard and Rebecca that would likely increase after Richard’s release from prison, and that either party could move for a future modification of alimony.

In a written order, the court granted the annulment, signed the Qualified Domestic Relations Order, incorporated but did not merge the terms of the Settlement Agreement into the judgment, reduced Richard’s child support obligation as described, and awarded \$400 per month “for indefinite spousal support . . . , which is subject to modification by this Court in the event of a material change in circumstance.” Richard challenges the awards of child support and alimony.

⁴ Richard also asked the court to consider as a change in circumstance that his pension payment would be reduced by Rebecca’s marital share. That, however, was always contemplated by the Settlement Agreement.

DISCUSSION

For alimony and child support awards, “we review the trial court’s factual findings for clear error, while each ultimate award is reviewed for abuse of discretion.” *Reynolds v. Reynolds*, 216 Md. App. 205, 218-19 (2014). “An alimony award will not be disturbed upon appellate review unless the trial judge’s discretion was arbitrarily used or the judgment below was clearly wrong.” *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (quoting *Solomon v. Solomon*, 383 Md. 176, 196 (2004)). For the purpose of awarding indefinite alimony, “[t]he determination of whether an unconscionable disparity exists . . . is a finding of fact, reviewed under a clearly erroneous standard.” *Id.* at 139 (quoting *Solomon*, 383 Md. at 196). We “accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings.” *Id.* at 124 (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)) (alteration in original).

I. THE CIRCUIT COURT DID NOT ERR IN DETERMINING TO MAKE AN AWARD OF ALIMONY, BUT ERRED IN MAKING ITS AWARD INDEFINITE.

Richard argues that the circuit court erred in three ways with respect to its award of indefinite alimony: (1) the court failed to consider all 12 required statutory factors; (2) Rebecca did not demonstrate a material change in circumstances so as to make her eligible for alimony under the Settlement Agreement; and (3) Rebecca did not prove eligibility for indefinite, as opposed to rehabilitative, alimony. We hold that although the circuit court had a sufficient basis for awarding alimony for a definite term, it abused its discretion in awarding indefinite alimony.

A. The Circuit Court Did Not Fail to Consider the Required Statutory Factors for an Award of Alimony.

“[W]ith the passage in 1980 of Maryland’s alimony act, the principal function of alimony shifted from maintenance of the recipient spouse’s standard of living to rehabilitation.” *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 147 (1999). “[T]he purpose of alimony is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently.” *Tracey*, 328 Md. at 391. “[T]he ‘statutory scheme generally favors fixed-term or so-called rehabilitative alimony,’ rather than indefinite alimony.” *Solomon*, 383 Md. at 194 (quoting *Tracey*, 328 Md. at 391).

Section 11-106 of the Family Law Article “guides courts when crafting the amount and duration of an alimony award.” *Boemio*, 414 Md. at 125. Under § 11-106(b), the trial court “shall consider all the factors necessary for a fair and equitable award, including” 12 factors specifically enumerated in the statute.⁵ The 12 statutory factors are not exclusive,

⁵ Section 11-106(b) provides, in full:

(b) in making the determination [to award alimony], the court shall consider all the factors necessary for a fair and equitable award, including:

- (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
- (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
- (3) the standard of living that the parties established during their marriage;
- (4) the duration of the marriage;
- (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

however, and trial courts may consider any other relevant factor as well. *Boemio*, 414 Md. at 132. “Generally speaking, alimony awards, though authorized by statute, are founded upon notions of equity,” which “requires sensitivity to the merits of each individual case without the imposition of bright-line tests.” *Tracey*, 328 Md. at 393. “[A] fundamental principle underlying the alimony statute is that a court must be vested with the discretion necessary to make a singularly appropriate award in each situation.” *Blaine v. Blaine*, 336 Md. 49, 75 (1994).

That the 12 statutory factors are “not all-inclusive does not relieve the court from examining the relevant ones.” *Roginsky*, 129 Md. App. at 143. A trial court need not “use a formal checklist,” but it still “must demonstrate consideration of all necessary factors.”

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- (6) the circumstances that contributed to the estrangement of the parties;
 - (7) the age of each party;
 - (8) the physical and mental condition of each party;
 - (9) the ability of the party from whom alimony is sought to meet that party’s needs while meeting the needs of the party seeking alimony;
 - (10) any agreement between the parties;
 - (11) the financial needs and financial resources of each party, including:
 - (i) all income and assets, including property that does not produce income;
 - (ii) any award made under §§ 8-205 and 8-208 of this article;
 - (iii) the nature and amount of the financial obligations of each party; and
 - (iv) the right of each party to receive retirement benefits; and
 - (12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Id. Thus, every § 11-106(b) factor will not necessarily be relevant or necessary in every case.

Richard argues that the circuit court failed to “consider” six of the § 11-106(b) factors. He acknowledges that the court discussed each factor in the course of rendering its decision, but he contends that a court can only “consider” a factor, as required by the statute, if sufficient affirmative evidence is presented for the court to make a determination as to that factor. Because insufficient (or no) evidence was provided as to six factors, he asserts, the court was incapable of considering those factors. For example, he contends that the court failed to consider the age of the parties or the physical and mental condition of each party, largely because Rebecca failed to introduce any evidence for the court to reach any conclusion on those issues. The court’s review of these factors was thus essentially limited to recognizing the absence of evidence and so declining to accord any weight to them in its analysis.

Richard contends that the absence of affirmative evidence as to even one of the factors precludes an award of alimony. Pressed at oral argument, Richard’s counsel was unable to identify any authority that supported that position, and we are aware of none. The transcript of the hearing reflects that the circuit court gave consideration to each of the statutory factors. Where relevant evidence was provided, the circuit court discussed that evidence and whether it weighed for or against an award of alimony. Where the court lacked sufficient evidence to reach a conclusion, it noted that and assigned no weight to that factor. The court thus satisfied the statutory command to consider each factor.

Richard’s argument with respect to the first statutory factor, the ability of the party seeking alimony to be wholly or partly self-supporting, is slightly different. As to that factor, he alleges that the circuit court lacked sufficient information to really consider it because Rebecca testified that she had reduced her expenses from those listed in her financial statement, but she could not say by precisely how much. We decline Richard’s invitation to reweigh the evidence with respect to the parties’ relative financial circumstances at the time of the hearing or for the duration of Richard’s less-than-three-year confinement. In light of the deference owed to the circuit court’s factual findings, *Boemio*, 414 Md. at 124, the evidence was more than sufficient to support the court’s findings that: (1) Rebecca was still unable to make ends meet as she attempted to support a household and the couple’s children on markedly reduced income; and (2) Richard had excess disposable income in light of the ongoing receipt of his pension and his significantly reduced expenses while incarcerated. It was also not lost on the court that Richard’s theft from Rebecca’s family was the reason for his incarceration and for the financial difficulties facing both parties. We cannot say that the circuit court abused its discretion in finding an award of alimony appropriate or in its calculation of the amount of that award.

B. The Circuit Court Did Not Err in Finding a Material Change in Circumstances That Justified the Award of Alimony.

Richard also claims that Rebecca was not entitled to an award of alimony under the terms of the Settlement Agreement. In that agreement, Rebecca reserved the right to seek alimony “in the future only if there is a material change in circumstance which would justify alimony under Maryland law.” Although Richard concedes that his incarceration

constituted a material change in circumstances—indeed, he relied on that material change in seeking a reduction of his child support obligation—he claims it is not a change that justifies an award of alimony because his income is actually reduced, and Rebecca’s had increased, from when they entered the Settlement Agreement.

The circuit court did not err in finding a material change in circumstances that justified the award of alimony. Although Richard’s income decreased slightly as a result of his incarceration, his expenses also went down. Moreover, after signing the Settlement Agreement in April 2016: (1) it came to light that Richard was not yet divorced when he married Rebecca, but had withheld that information from her; (2) Richard used that information, and the consequent need to seek an annulment rather than a divorce, to attempt to set aside the Settlement Agreement, ultimately postponing resolution of the case and Rebecca’s receipt of the marital share of his pension by approximately nine months; and (3) Richard sought, ultimately successfully, to make use of the consequences of his incarceration to reduce his child support obligation from \$772 to \$425 per month. The circuit court did not err in concluding that there was a material change in the relative financial positions of Richard and Rebecca from when they had entered the Settlement Agreement, to Rebecca’s detriment.

C. The Circuit Court Erred by Awarding Indefinite Alimony on the Evidence Presented.

“It is well settled in Maryland that the ‘statutory scheme generally favors fixed-term or so-called rehabilitative alimony,’ rather than indefinite alimony.” *Solomon*, 383 Md. at 195 (quoting *Tracey*, 328 Md. at 391). A court may only award indefinite alimony if it

finds that: (1) “the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting” as a result of “age, illness, infirmity, or disability;” or (2) “even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.” Md. Code Ann., Fam. Law § 11-106(c). As Rebecca does not allege any limitations based on age, illness, infirmity, or disability, we are concerned only with the second situation.

“[T]o constitute a ‘disparity’” for the purposes of § 11-106(c)(2), “the standards of living must be fundamentally and entirely dissimilar.” *Whittington v. Whittington*, 172 Md. App. 317, 338 (2007) (quoting *Karmand v. Karmand*, 145 Md. App. 317, 336 (2002)). “To be unconscionable, the disparity . . . must work a gross inequity or create a situation in which one spouse’s standard of living is so inferior, qualitatively or quantitatively, to the standard of living of the other as to be morally unacceptable and shocking to the court.” *Whittington*, 172 Md. App. at 339 (internal quotations and citations omitted). “The statute places strict limits on a trial court’s ability to grant indefinite alimony” *Solomon*, 383 Md. at 196. An award of indefinite alimony thus must be based on “a comprehensive case-by-case analysis.” *Id.*; see also *Whittington*, 172 Md. App. at 339.

To satisfy these requirements, a trial court must make a comparison between the more-affluent spouse’s post-divorce standard of living and the requesting spouse’s standard of living at the projected point in time when the requesting spouse will have made “as much progress toward becoming self-supporting as reasonably can be expected.” *Francz v. Francz*, 157 Md. App. 676, 701 (2004). That is to say, the trial court must make

“a projection into the future, based on the evidence, beyond the point in time when a party may be expected to become self-supporting[,] . . . to the point when maximum progress can reasonably be expected.” *Ronginsky*, 129 Md. App. at 146.

The circuit court here made no findings regarding when Rebecca would reach maximum progress toward becoming self-supporting or what disparity would exist at that point. The court can hardly be faulted for not doing so, as neither party produced any evidence on those topics. Instead, the evidence presented by both parties was generally limited to the state of affairs that existed at that moment and that was expected to continue only through Richard’s release from incarceration.

Where the circuit court erred, however, is in concluding that the absence of any such evidence meant that its “only choice” was to award indefinite alimony. To the contrary, the absence of any such evidence rendered indefinite alimony unavailable. *Id.* at 148. At the time of the hearing, Richard was incarcerated for the near term, his future job prospects were presumably uncertain, and a substantial fine and restitution obligation awaited him upon release. It is questionable whether any evidence could have placed the court in a position to render a sound conclusion about Richard’s financial status at any post-incarceration date that would be sufficient to justify an award of indefinite alimony. It is certain that the evidence presented in this case did not do so.

But that does not mean that the court was incapable of entering any alimony award. To the contrary, “if alimony were to be awarded, it should have been rehabilitative alimony, *i.e.*, for a definite term, subject to review at a future point in time on petition of a party and a showing of a change in circumstances.” *Id.* If, at such future date, Rebecca is able to

produce “sufficient evidence to justify an award of indefinite alimony, a court may award it.” *Id.*

Accordingly, we vacate the indefinite alimony award. Upon remand, the circuit court should exercise its discretion to consider an award of alimony for a definite term based on its consideration of the factors set forth in § 11-106(b) of the Family Law Article and any other factors the court finds relevant. Until the circuit court has the opportunity to do so, the indefinite alimony award that we vacate “shall be given the force and effect of a *pendente lite* award.” *Simonds v. Simonds*, 165 Md. App. 591, 613 (2005).

II. THE CIRCUIT COURT ERRED IN DETERMINING CHILD SUPPORT BEFORE DETERMINING ALIMONY.

Richard also claims that the circuit court erred in calculating his child support obligation before determining alimony. As Richard correctly argues, that was backwards. Section 12-204(a)(2)(i) of the Family Law Article requires that “the court shall decide the issue and amount of alimony . . . before determining the child support obligation under these guidelines.” If the court awards alimony, the amount of it must then be considered income to the recipient, and subtracted from the income of the payor, “before the court determines the amount of a child support award.” Fam. Law § 12-204(a)(2)(ii). The circuit court neither decided the issue of alimony before determining Richard’s child support obligation nor adjusted the parties’ incomes to reflect payment of that alimony when determining child support.

Richard also argues, again correctly, that the circuit court erred in refusing to include Rebecca’s commissions when calculating her income for the purposes of determining child

support. Commissions are “actual income” for the purposes of calculating child support, and so must be included. Fam. Law § 12-201(b)(3)(iii); *Walker v. Grow*, 170 Md. App. 255, 286 (2006).

We vacate the child support award. Upon remand, the circuit court must first decide whether to award rehabilitative alimony and, if so, in what amount. Once alimony is decided, the court should determine child support. In doing so, it must account for any alimony award in the income of the parties as required by § 12-204(a)(2)(ii), and include commissions, if any, in calculating income. Until the circuit court has the opportunity to consider such an award, the child support award that we vacate “shall be given the force and effect of a *pendente lite* award.” *Simonds*, 165 Md. App. at 613.

In making its determinations on remand, the circuit court may, in its discretion, receive any additional evidence it considers appropriate.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED IN PART AND VACATED IN
PART; CASE REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION; ALIMONY AND CHILD
SUPPORT PROVISIONS TO REMAIN IN
FORCE AND EFFECT AS *PENDENTE
LITE* ORDERS PENDING FURTHER
ORDER OF THE CIRCUIT COURT.
COSTS TO BE SPLIT EVENLY.**