

To: Judge Woodward
From: Phillip Imanlihen
Date: July 10, 2015
RE: Villarreal v. Villarreal, case No. 1042, Sept 2014 Term
Indefinite Alimony and Attorney's Fees.

Issues Presented

- (1) Did the Circuit Court err when it awarded Ms. Pilar indefinite alimony in the amount of \$1,200.00 per month, despite Mr. Villarreal's substantial decrease in income?
- (2) Did the Circuit Court err when it order[ed] Mr. Villarreal to pay Ms. Pilar's attorney's fees? **(Brief of Appellant at 2)**

Statement of Facts

Raul and Pilar Villarreal married on December 13, 1987, and have three children. At the time of trial, two of the children, Christopher and Cindy, were adults and one, David, was 16 years old, but has since reached the age of majority. On July 3, 2013, the Circuit Court granted the parties an absolute divorce on the grounds of a one-year separation. **(E.267)**. The court ordered a payment of child support and \$1,200 of indefinite alimony to Pilar. **(E. 268)**. Additionally, the Circuit Court awarded Pilar attorney's fees in the amount of \$25,000. **(E. 270)**.

During trial, Pilar testified that according to her 2012 tax return, her gross income was \$17,970. Pilar also testified that according to her 2011 tax return, her gross income was \$21,964 **(E.104-105)**. In his oral opinion, the trial judge concluded "the past three

years of income, an average of that that the defendant (Raul) made would be some \$73,000.” (**Tr. E. 252**). Using Pilar’s 2011 and 2012 incomes, Pilar averaged \$19,967, about 27.3% of what the judge believed Raul made in the last three years.

According to Pilar’s testimony, her adult son, Christopher, contributes \$400 “depending on [her] need . . . sometime he give[s] [her] \$500” monthly. (**E. 110**). Christopher is also responsible for car payments and insurance on a car that both Pilar and Christopher share. (**E. 117**). There is also testimony that the parties’ adult daughter, Cindy, contributes \$100-\$200 monthly. (**E. 139**). Additionally, testimony indicates that Pilar’s brother contributes to Pilar by means of loans although Pilar’s brother testified that he does not expect repayment. (**E. 150-151**). The testimony reveals that the contributions of the children are used for utilities.

Issue One- Indefinite Alimony.

Parties’ Contentions.

Raul argues that the trial judge erred when it determined that indefinite alimony in the amount of \$1,200 per month was appropriate. (**Appellant brief at 15**). Raul contends that the trial court “failed to find that Appellee was making more than she claimed.” (**Appellant brief at 16**). Raul also contends that “the imposed payment of \$1,790 for alimony and child support average[s] approximately 178% of [Raul’s] net [monthly] income. (**E. 79**). Additionally, Raul argues that “the Circuit Court’s determination that Appellant actually makes approximately \$73,000.00 per year [is] unsupported by the evidence and by the reality of Appellant’s circumstances.” (**Appellant Brief at 17**). Raul adds that if Pilar works 8-10 hours a day during the week and 4 hours during the

weekend, then the finding that Pilar's annual income in 2012 was \$14,873 (after deductions) is in error due to the "mathematical impossibility." Raul contends that if the court accepts this amount, the court is accepting that Pilar makes less than minimum wage, specifically, that Pilar makes \$5.40 an hour. Additionally, Raul argues that the contribution by their adult children, into Pilar's household, should be counted as income for Pilar. Finally, Raul argues that for the four years leading up to the absolute divorce, Pilar was self-supporting. "She has been making ends meet despite allegedly receiving no alimony from appellant." (**Appellant brief at 16**). Raul argues that he will not be able to sustain himself if he is obligated to pay indefinite alimony. Raul counters Pilar's argument of voluntary impoverishment with the fact that Pilar never brought up voluntary impoverishment at trial and thus failed to preserve the issue for the appellate courts' review. Raul also contends that he never sold his business, but rather he sold equipment from the business. Raul prays that the appellate court remand the issue of indefinite alimony.

Pilar argues that the trial court properly determined that indefinite alimony in the amount of \$1,200 per month was appropriate. (**Appellee brief at 16**). Pilar contends that the court properly determined that "she was not capable of rehabilitation." (**Appellee brief at 18**). Pilar indicates that she is not expected "to go above and beyond reasonable means" to become self-sufficient and having to gain "full command" of the English language is "above and beyond reasonable." *Id.* Additionally, Pilar argues that although she received a nutrition license in Peru, she has cleaned houses for twenty years, thus, it is unreasonable to suggest that Pilar, at 60 years of age, go back to school and get

recertified. Pilar also argues that the money received from her children and brothers are “not regular source[s] of money, it is charity.” (**Appellee brief at 19**). Pilar adds that if the appellate court finds that Raul is unable to be self-sufficient then it is due to his voluntary impoverishment. Pilar’s self-impoverishment argument is based on the fact that Raul sold his Maryland business to his accountant for “next to nothing.” (**Appellee brief at 4**). Pilar prays that the appellate court not remand the issue of indefinite alimony.

Standard of Review

An appellate court reviews indefinite alimony “at more than one level.” Bryant v. Bryant, 220 Md. App. 145, 160 (2014). “First, we review the trial court's findings of fact as to questions such as what a party's income is (referred to as "first-level" facts) and reverse them only if clearly erroneous. Second, while the question of whether the standards of living between spouses will be unconscionably disparate is a factual one as well, it is not a ‘first-level’ fact, [i]t is a second-level fact.” *Id.* “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.” Solomon v. Solomon, 383 Md. 176, 196, (2004). “Thus, absent evidence of an abuse of discretion, the trial court's judgment ordinarily will not be disturbed on appeal.” (*Id.* at 196).

Discussion

Governing Statue

(c) Award for indefinite period. – The court may award alimony for an indefinite period, if the court finds that:

(1) due to age, illness, infirmity or disability, the party seeking alimony cannot reasonably be expected to make substantial progress towards becoming self-supporting; 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 (1984, 2012 Repl. Vol.) §11-106 of the Family Law article (“FL”)

Case Law

The Maryland Alimony Act of 1980 changed the primary function of alimony from “maintenance of the recipient, dependent spouse’s standard of living” to “rehabilitation of the economically dependent spouse.” Karmand v. Karmand, 145 Md. App. 317, 327 (2002). Thus, “the statutory scheme [governing] alimony generally favors fixed-term or so called rehabilitative alimony, rather than indefinite alimony.” Simonds v. Simonds, 165 Md. App. 591, 605 (2005). Therefore, indefinite alimony should only be used in “exceptional circumstances” such as when there is an economic disparity between parties. Roginsky v. Blake-Roginsky, 129 Md. App. 132,142 (1999). “Whether or not economic disparity will exist in the future requires the trial court to ‘projec[t] forward in time to the point when the requesting spouse will have made maximum financial progress, and compar[e] the relative standards of living of the parties at that future time.’” Bryant v. Bryant, 220 Md. App. 145, 160 (2014).

A court awards indefinite alimony under either one of two prongs: “age, illness, infirmity, or disability” *or* an “unconscionably disparate” standard of living. (FL §11-

106). Most of the cases relating to indefinite alimony have primarily focused on the “unconscionably disparate” prong but it is unclear under which prong the trial judge in the instant case based his decision to award indefinite alimony. A disparity in income would go to the “unconscionably disparate” prong and, in the instant case, calls for an award of indefinite alimony.

In Goshorn, the Court of Special Appeals held that the trial court did not err in finding the income of the parties unconscionably disparate. Goshorn v. Goshorn, 154 Md. App. 194, 215 (2003). In Goshorn, the wife earned only 27.8% of the husband’s actual monthly salary. The court warned that the mathematical disparity “is only the starting point of an unconscionability analysis.” *Id.* at 214. But since the trial court “went beyond the mathematical disparity and adequately considered all of the relevant factors,” the court did not err in awarding indefinite alimony due to the unconscionable disparity in income. *Id.* at 215. Although the court remanded the issue of indefinite alimony to the lower court, the court states “[w]ere it not for the circuit court’s miscalculation of Mr. Goshorn’s income, there would be more than adequate basis upon which to affirm the court’s award of indefinite alimony.” *Id.* at 219. The court also noted that it is “worth mentioning that Maryland’s appellate courts have upheld indefinite alimony awards in cases with comparable, and even substantially smaller, disparities in the parties’ incomes.” (*Id.* at 215) Thus, with all other factors considered, a 27.8% disparity can merit an award of indefinite alimony under the “unconscionable disparate” prong of the indefinite alimony determination.

On the other hand, in Brewer, the Special Court of Appeals reversed the trial court's award of indefinite alimony. Brewer v. Brewer, 156 Md. App. 77, 105 (2004).

The court reasoned that because the "trial court failed to make any finding as to Mrs. Brewer's current income, or as to when she might become self-supporting, or, as to whether, once that occurred, there would be an unconscionable disparity in living standards," the award was made in error. *Id.* at 101. In Brewer, the wife's income was \$2,500 a month and the husband's income was \$3,130.89. The appellate court held that a wife earning 80% of the husband's income was "hardly a gross disparity." *Id.* at 103. The court added, "a 'great disparity' in the parties' assets is not a sufficient basis for awarding indefinite alimony." *Id.* at 104. Thus, even when assets may be disproportionate, earning 80% of what the supporting spouse earns does not automatically equate to an award for indefinite alimony.

Ruling of the trial Judge

The trial court has discretion when awarding alimony and "it is a legal error for a court, in making a discretionary decision, to fail to exercise discretion." Whittington v. Whittington, 172 Md. App. 317, 340 (2007). A court has erred in awarding indefinite alimony if the court believes that "given the length of the parties' marriage and their income percentage it was required to do so." *Id.* Thus, a court shall consider the factors of FL §11-106 then use its discretion when awarding indefinite alimony.

The trial court, in the instant case, considered the factors listed in FL §11-106 to determine "a fair and equitable award." After considering the required factors (**E. 248-**

252), the trial judge used his discretion and awarded Pilar alimony in the amount of \$1,200 per month. In the order granting the absolute divorce, the trial judge ordered:

“that upon full consideration of the factors set forth in Md. Code Ann. Family Law Section 11-106 as applied to the evidence presented at trial, commencing and accounting from July 1, 2013 Defendant shall pay the amount of One Thousand Two Hundred Dollars (\$1,200.00) per month as and for indefinite alimony to Plaintiff, to be paid directly to Plaintiff on the first of every month.”

Factors for Indefinite Alimony.

Counsel for Pilar informed the trial judge that her client was “seeking a continuation of the alimony that was awarded . . . in 2009.” (**E. 71**) The transcripts do not contain the proceedings that determined indefinite alimony in 2009, thus this trial judge considered Pilar’s age, her lack of “command” of the English language, her current job situation as a cleaning service provider, and the income disparity between Raul and Pilar when he decided the amount and duration of alimony. The trial judge mentions that Pilar is 59 while Raul is 49. The court determined that Pilar’s monthly income is \$1,239 before receiving alimony and Raul had a monthly income of \$6,133 before removing the amount due for alimony. (**E. 271**). Additionally, the trial court determined that Pilar “does not have a full command of the English language” also “she’s been doing work in her house cleaning business for over 20 years.” (**E. 252**).

Analysis

The trial court does not spend a lot of time, if any, discussing the duration of the alimony award. The written order provides the details, including duration, but it is unclear if the judge was following the order that was issued during the limited divorce

hearing, or whether, re-considering the factors, the judge was awarding indefinite alimony. It is also possible that the judge thought that Pilar's future standard of living would be "unconscionably disparate" from Raul's standard of living after he determined that Pilar would not be self-sufficient due to illness and lack of command on the English language. It seems that the trial court considered the age and illness of Pilar when making the determination the duration of alimony but that is not clear. It is also unclear whether the court considered the "unconscionably disparate" standard of living of the parties.

Pilar's counsel offered into evidence Pilar's 2011 and 2012 tax return showing that Pilar grossed \$21,964 in 2011 and \$17,970 in 2012. **(E.104-15)**. Pilar also testified that "everything in [her] fillings is true and accurate." **(E.105)**. There is also testimony from Raul that his individual income in 2011 was \$3,852 but the income from his sole proprietorship in Florida (Alpha Service LLC) was \$69, 213. **(E. 203)**. Evidence was presented that showed Raul's 2010 individual income as \$6,497 and Alpha Services LLC's gross income as \$91,591. **(E. 205)**. Additionally, evidence shows that in 2009, Raul's individual income was \$2,692 and Alpha Service LLC's income was \$13,511. Testimony also shows that in 2008, Raul's individual income was \$13,980 and the income of his Maryland business (Air Tech) was \$189,388. **(E. 207)**.

Case law indicates that the value of a business can be calculated as "marital property." For example, in Long, the Court of Special Appeals held that "because Husband's control over the company is absolute, the same funds could have just as easily flowed into Long family bank accounts in the form of increased salary and bonuses. Wife

contributed to Husband's success to the degree that she was able, so the funds must be considered marital property.” Long v. Long, 129 Md. App. 554, 571 (2000).

The Appellate Court should side with Pilar since the trial courts are the finders of facts and there is no evidence that the trial court abused its discretion. If the trial court considered the FL §11-106 factors and found that the income reported by Pilar on her taxes were accurate and believes that Pilar cannot become self-sufficient to avoid a unconscionably disparate standard of living, then the court properly awarded indefinite alimony. Also, if the court found that Raul’s business income counted towards his personal income, then the trial court again properly awarded indefinite alimony since Raul would remain self-sufficient even after meeting his alimony obligations. The trial court seemed to not find Raul very credible but found that Pilar was straightforward in answering the questions. The court does not seem to buy Raul’s argument that he does not have the income to be able to self-sustain while paying his alimony obligations.¹

It may become important to determine on what basis the trial court awarded indefinite alimony. If the trial court used the “unconscionably disparate” prong then there is clearly no error; but if the court used the “age, illness, infirmity, or disability” prong, then further investigation may be needed. The appellate court may also want to discuss the issue of voluntary impoverishment and whether that issue is preserved for the courts review.

¹ Raul can file for a modification of alimony if he can show a substantial change in circumstances. (see FL §§ 11-107).

Issue Two: Attorney's Fees.

Parties' Contentions.

Raul argues that the award of attorney's fees was incorrect, as appellant had a good faith basis for defending and maintaining the action and because he did not have the financial resources to make the payments of attorney's fees. **(Appellant brief 17)**. Raul first argues that "a major portion of these proceedings were with respect to the two petitions for contempt," thus, "awarding Appellee's entire attorney's fees was improper." **(Appellant brief 18)**. Additionally, Raul argues that the Circuit Court bases the award of attorney's fees on Raul's failure to "comply with rules" and that Raul did not provide discovery as requested; but "the Rules call for Sanctions associated with those violations, not an award of the entire attorney's fees." **(Appellant brief 18)**. Raul contends that the Circuit Court made "no finding . . . that Appellant was not justified in defending the actions." Raul adds that he "did not have the financial means to make alimony and child support payment, let alone pay for attorney's fees." **(Appellant brief 19)**. Raul prays that the appellate court reverse the ruling of the trial court, as it was an abuse of discretion to award attorney's fees.

Pilar counters that Raul's "argument . . . that the award of attorney's fees was incorrect is a legal conclusion that is unsupported." **(Appellee brief 18)**. Pilar argues that there is no evidence that shows that "the major portion of the attorney's fees is for two petitions for contempt filled by the appellee" rather, Pilar argues, "the additional fees incurred were a result of appellants restless motions which the appellee's attorney was required to respond to." Pilar argues that she was not awarded the *entire* attorney's fee

since the entire fee was \$46,000.00 and Raul was ordered to pay \$25,000.00. (**Appellee brief at 19**). Pilar contends that the Circuit Court did not find Raul credible and thus did not find that Raul was “not financially stable so as to make payments.” Finally, Pilar argues that Raul has “impoverished himself” because there is no evidence to the contrary. Pilar prays that the appellate court not remand the decision on attorney’s fees.

Standard of Review

A court's decision to award attorney's fees generally is reviewed under an abuse of discretion standard. Petrini v. Petrini, 336 Md. 453, 468 (1994). If the court gives proper consideration to the statutory factors and the circumstances of the case, an award of attorney's fees will not be reversed "unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." Collins v. Collins, 144 Md. App. 395, 447, (2002).

Discussion

Governing Statue

- (b) Authority of court. - - At any point in a proceeding under this title, the c may order either party to pay the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceedings.
- (c) Required considerations. - - Before ordering the payment, the court shall consider
 - (1) the financial resources and financial needs of both parties; and
 - (2) whether there was substantial justification for prosecuting or defending the proceeding.

(d) Absence of substantial justification. -- Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding.

F.L §12-103

Case Law

Maryland follows the “American Rule” which provides that generally, the prevailing party may not recover attorneys’ fees from the losing party. Lebac v. Lebac, 109 Md. App. 396, 409 (1996). The exception to the “American Rule” is covered under Maryland statute. Family Law article §12-103 permits a trial court to award attorney fees and cost in actions involving alimony. Reasonable and necessary expenses include suit money, counsel fees and cost. (Md. Code. Fam. Law. §7-107). “Before ordering the payment, the court shall consider, (1) the financial resources and financial needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the proceedings.” (Id). An award of attorney’s fees rest “solely at the discretion of the judge.” Collins v. Collins, 144 Md. App. 395, 447(2002).

Before a court awards attorney’s fees in a divorce proceeding, the court must first consider if the party seeking the award can afford counsel and if the party that would be required to pay the attorney’s fee has the resources to make such payment. The court must also consider if the party that attorney’s fees are sought from has a substantial

justification for defending the proceeding against him or her. If there is not a substantial justification, then attorney fees can be awarded. “In awarding attorney's fees, the court should consider and articulate the parties' resources and needs.” Ridgeway v. Ridgeway, 171 Md. App. 373, 386 (2006).

In Collins, the trial court made reference to the conduct of the parties, whether the parties' positions were justified, and their ability to pay. Collins v. Collins, 144 Md. App. 395, 445 (2002). The Court of Special Appeals still vacated the award and remanded for further proceedings as to whether the fees were reasonable. That court held that "some express discussion regarding the reasonableness of the fees in light of such factors as labor, skill, time, and benefit received is necessary." *Id.* at 449.

In Flanagan, the Court of Special Appeals, vacated the award of attorney's fees. The court held that “there was no discussion of the reasonableness of the attorney's fees charged. Moreover, the trial court made no express findings as to which, if any, of the legal actions of appellant were not substantially justified, and what proportion of the attorney's fees were attributable to those unjustified positions.” Flanagan v. Flanagan, 181 Md. App. 492, 513 (2008). The court concluded: “in evaluating the parties' financial positions, the court must take into account any monetary award.” Thus, a trial court must discuss the reasonableness of an award of attorney's fees and articulate which actions the party required to pay attorney's fees were not substantially justified in defending while taking into account any monetary awards.

Ruling of the trial Judge

The trial court found that Raul “did not comply” with the rules of litigation and discovery and thus caused “more litigation than necessary.” (E. 260). The trial court awarded Pilar with \$25,000 of attorney’s fees. The trial judge, in his oral opinion, does not mention the resources of either party when discussing attorney fees, rather the judge seems to rely on the fact that Raul did not have substantial justification for causing “more litigation than necessary.” *Id.* It is also clear that the judge considered resources of the parties’ when awarding alimony and thus could have used that same consideration when deciding on attorney’s fees.

Factors for Attorney’s fees

First, the financial resources and financial needs of both parties must be considered in awarding attorney fees. In the instant case, the trial court considered the resources of the parties when awarding alimony. Second, the trial court has to determine whether there was substantial justification for prosecuting or defending the proceedings. The trial court found that Raul “did not comply with the rules, did not provide discovery as requested, and did cause extended litigation to occur.” Thus, it is unclear if the trial judge felt that there was substantial justification for defending the proceeding, but what is clear, to the trial judge, is that Raul caused extended litigation.

Analysis

The trial court spent a lot of time articulating the parties’ income during the oral opinion. Raul had the income, based on the tax returns submitted into evidence, to pay the attorney’s fees. The fact that Raul represented himself in the proceedings may favor

Raul's contention that he is unable to pay his attorney's fees, yet alone opposing attorney's fees. All indications point to the fact that Raul had substantial justification in defending the case. Raul was defending against alimony, child support, attorney's fees and contempt of the court. "A contempt proceeding, even though it may grow out of or be associated with another proceeding, is ordinarily regarded as a . . . separate action from the underlying case. Blake v. Blake, 341 Md. 326, 332 (1996). Thus, "there is no statutory provision or rule authorizing the recovery of attorney's fees in contempt proceedings." Bahena v. Foster, 164 Md. App. 275, 282 (2005). In the instant case, the trial judge did not award the full attorney's fees possibly because he was attempting to separate the divorce proceeding from the contempt proceedings. It would therefore seem that the trial judge did not abuse its discretion by awarding attorney fees.

Conclusion

There is no clear indication that the trial court abused its discretion by awarding indefinite alimony or attorney's fees. If the award for indefinite alimony was based on an "unconscionable disparate" standard of living and Raul is able to self-sustain after meeting his alimony obligation, then the trial judge is well within his discretion. If attorney's fees were awarded for the proceedings excluding the contempt hearing, and the trial judge believed that Raul could pay them, then, there is also no abuse of discretion.