IN THE DISTRICT COURT OF APPEAL FOR THE FIFTH DISTRICT
STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

LAURA DAVIS, F/K/A
LAURA MALOCH

Appellant,

CASE NO. 5D18-2490

v.

ROGER MALOCH,

Appellee.
_____/

Opinion filed December 20, 2019

Appeal from the Circuit Court
for St. Johns County, Florida,
John Alexander, Judge.

Rebecca Bowen Creed, of Creed
& Gowdy, P.A., Jacksonville, for Appellant.

Roger Maloch, Atlanta, GA, pro se.

DUBOIS, E., Associate Judge.

Laura Davis, f/k/a Laura Maloch ("Former Wife") appeals the final order setting aside the magistrate's report and denying her petition to modify alimony. We reverse and remand with instructions to the trial court.

Former Wife and Roger Maloch ("Former Husband") married in 1980 and finalized their dissolution of marriage in 2008. At the time of dissolution, Former Wife worked as a nutritionist and Former Husband worked as a chief financial officer. In the final judgment of dissolution, the trial court imputed $43,000 of annual income to Former Wife. It noted that Former Husband's annual salary was $225,000, with eligibility for a

yearly bonus of up to half his salary. Additionally, it found that Former Husband had stock options valued in excess of $100,000. The trial court awarded Former Wife $2500 per month in permanent periodic alimony. Former Wife appealed, and prior to the finalization of that appeal, the parties entered into a consent agreement ("Consent Agreement"), modifying Former Wife's permanent periodic alimony award to $5500 per month.

In 2010, Former Husband became unemployed. He filed a supplemental petition for modification of alimony, and the trial court granted that relief in 2011 ("2011 Modification Order"), reducing his required monthly alimony payment to $1. In 2012, Former Wife petitioned to modify alimony based on Former Husband's reemployment, and in 2014, the trial court entered an order ("2014 Modification Order") awarding Former Wife $1100 in monthly alimony. The trial court continued to impute $43,000 of income to Former Wife.

In 2016, Former Wife filed another petition for modification of alimony. The trial court denied the petition ("2016 Modification Order"), finding that Former Wife did not prove that modification was warranted. It also noted that Former Wife had a $76,000 annuity from which she previously withdrew funds. Accordingly, Former Wife's alimony remained at $1100 per month. Former Wife appealed the 2016 Modification Order, which this Court affirmed. Davis v. Maloch, 221 So. 3d 630 (Fla. 5th DCA 2016) (per curiam).

That brings us to the petition that forms the basis for this appeal—Former Wife's amended petition to modify alimony, filed in 2017 ("2017 Petition"). In this petition, Former Wife alleged that after the entry of the 2016 Modification Order, four substantial

changes occurred that warranted an upward modification: (1) Former Husband found new, full-time employment, earning more than he did previously; (2) Former Wife dissipated her annuity and savings to pay debts; (3) Former Wife had to discontinue health and dental insurance due to her inability to afford such coverage; and (4) Hurricanes Matthew and Irma caused $25,000 of damage to the marital home that Former Wife could not afford to repair. Former Wife sought an upward modification to $5500 per month. The trial court referred the 2017 Petition to the magistrate without objection.

The magistrate recommended that the trial court increase Former Wife's monthly alimony to $2500, finding that Former Wife proved a substantial change of circumstances because she dissipated her annuity. In determining Former Wife's monthly need, the magistrate included expenses that Former Wife enjoyed during the marriage, but could no longer afford, such as vacations, country club dues, and certain grooming expenses. The magistrate rejected Former Wife's first, third, and fourth claims. Finally, it found that Former Husband had the ability to pay $2500 in monthly alimony.

Former Husband subsequently moved for exceptions, which the trial court granted. In its order setting aside the magistrate's findings, the trial court held that Former Wife's dissipation of her annuity was voluntary based on her decision to work part time, such that it was not a valid basis for granting modification. The trial court also ruled that the parties' marital lifestyle was not a factor to be considered in the modification proceeding because the marital lifestyle was already discussed in prior proceedings, and thus, its consideration was barred by res judicata.

On appeal, Former Wife argues that the trial court: (1) erroneously granted Former Husband's exceptions; (2) erroneously found that consideration of the marital lifestyle was barred by res judicata; and (3) improperly imputed additional income in its order by finding that she was voluntarily underemployed.[1] We discuss her claims seriatim.

"The standard for an appellate court's review of a trial court's decision to modify alimony is abuse of discretion." Dunn v. Dunn, 277 So. 3d 1081, 1085 (Fla. 5th DCA 2019) (quoting Jarrard v. Jarrard, 157 So. 3d 332, 336 (Fla. 2d DCA 2015)). A trial court reviews the magistrate's findings for competent substantial evidence and determines whether the magistrate's conclusions pass the Canakaris[2] test:

> It is clear that if one objects to a master's report, the trial court has an obligation not merely to consider the findings and recommendation of the master but also to review the entire file. But the review is not intended to permit the trial court to make its independent finding of facts or to reach its independent conclusion as to the legal effect of such facts. The review of the entire record is to ascertain whether the master's finding is supported by competent evidence and to see if the master's conclusions pass the Canakaris test.

Anderson v. Anderson, 736 So. 2d 49, 50—51 (Fla. 5th DCA 1999). "If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (quoting Delno v. Mkt. St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942)). Accordingly, the trial court was to review the magistrate's report to determine only "whether the magistrate's legal conclusions [were] clearly erroneous or whether the

[1] Former Wife does not challenge the magistrate's findings that she failed to prove her first, third, and fourth claims as bases for modification.

[2] Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

magistrate misconceived the legal effect of the evidence." Cerase v. Dewhurst, 935 So. 2d 575, 578 (Fla. 3d DCA 2006). If a magistrate fails to make a required finding, and the record is conflicting, the trial court should remand the case to the magistrate to make the necessary findings. See Calahan v. Calahan, 979 So. 2d 358, 359 (Fla. 5th DCA 2008).

In order to modify alimony, the moving party must show that: (1) there was a substantial change in circumstances; (2) the change was not contemplated at the time of the final judgment of dissolution; and (3) the change is sufficient, material, involuntary, and permanent in nature. Pimm v. Pimm, 601 So. 2d 534, 536 (Fla. 1992). Here, the magistrate found that Former Wife proved prong one of Pimm but did not make findings regarding the other two prongs. The trial court made an independent voluntariness finding, but did not otherwise address the second and third prongs of Pimm. Accordingly, we must determine whether competent substantial evidence supported the magistrate's finding related to prong one, and, because the trial court made an independent finding that Former Wife's dissipation of her annuity was voluntary, we must determine whether there was conflicting evidence on that point. See Calahan, 979 So. 2d at 359.

At the magistrate's hearing, Former Wife's unrebutted testimony was that between the entry of the 2014 Modification Order and the time she filed the 2017 Petition, she used her $76,000 annuity as collateral for loans. It was also unrebutted that shortly after the entry of the 2016 Modification Order, Former Wife liquidated most of her annuity to pay debts, bills, and her mortgage. Despite the magistrate's finding that significant portions of Former Wife's testimony were unreliable, the magistrate was

convinced of Former Wife's dissipation of her annuity. Accordingly, we find that competent substantial evidence established a substantial change of circumstances, such that the magistrate did not abuse its discretion in concluding that Former Wife proved prong one of Pimm. See Anderson, 736 So. 2d at 50—51.

Regarding the trial court's independent finding that Former Wife's dissipation of her annuity was voluntary, we find that the evidence on that point was conflicting. Former Wife's monthly expenses were $5700, but her income, including monthly alimony and imputed income, was only $5100 per month from 2014 until the magistrate's hearing. In between the entry of the 2011 Modification Order and the entry of the 2014 Modification Order, Former Wife received only $1 per month in alimony. Even when Former Wife was receiving $1100 per month in alimony, if she earned the income imputed to her, she still would have been $600 short per month of meeting her need. This shortage required Former Wife to borrow against her annuity to maintain a lifestyle commensurate with what she enjoyed during the marriage. Accordingly, the evidence reasonably supported that Former Wife's dissipation of her annuity was involuntary.

Conversely, the evidence also reasonably supported that Former Wife's dissipation of her annuity was voluntary because Former Wife earned only between $13,000 and $24,000 per year from 2015 to 2017, yet was imputed to earn $43,000. The trial court adopted this argument when it stated that the dissipation was a consequence of Former Wife failing to work more than two days a week.

Therefore, because the record supported findings both that Former Wife's dissipation of her annuity was voluntary and involuntary, the trial court improperly

reweighed the evidence from the magistrate hearing and substituting its judgment for that of the magistrate. See Calahan, 979 So. 2d at 359. The trial court should have remanded the case to the magistrate to make a voluntariness finding. Id. (remanding case to magistrate to determine whether appellant's reduction of income was contemplated where evidence was conflicting, magistrate failed to make finding, and trial court made independent finding). We reverse and remand to the trial court with instructions to remand to the magistrate to make a voluntariness finding. Additionally, because the magistrate failed to make findings related to the second and third prongs of Pimm, we also remand for the magistrate to make such findings. See Granell v. Granell, 940 So. 2d 513, 514–15 (Fla. 2d DCA 2006) (remanding for further proceedings where magistrate failed to make necessary findings and trial court failed to address issue).

Next, we address Former Wife's second argument—that the magistrate properly considered the parties' standard of living during the marriage. "Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage." § 61.08(8), Fla. Stat. (2016). Section 61.08(2)(a) specifically authorizes the consideration of the parties' marital lifestyle in determining a spouse's need for alimony, and section 61.14 provides broad discretion to the trial court to enter an order modifying alimony as equity requires. §§ 61.08(2)(a), 61.14, Fla. Stat. (2016). In making an alimony modification, the court must look at all relevant factors in section 61.08. Albu v. Albu, 150 So. 3d 1226, 1228 (Fla. 4th DCA 2014). A court may consider the parties' marital lifestyle in determining a

spouse's need for a modification of alimony or the amount thereof. Dunn, 277 So. 3d at 1085–86.

Here, the magistrate considered the parties' marital lifestyle in calculating Former Wife's need for alimony; it noted Former Wife's decreased assets since the marriage and detailed the lifestyle the parties shared during the marriage. It used the marital lifestyle to provide a context for the calculation of Former Wife's current need—not to justify the modification. The trial court appeared to have misunderstood this application. Given the context in which the magistrate made the findings, and the way in which it relied on the parties' marital lifestyle, the trial court erred in finding that consideration of the lifestyle enjoyed by the parties during the marriage was barred by res judicata. Id.

Finally, we dispense with Former Wife's third argument—that the trial court erred by implicitly imputing additional income to her—because Former Wife did not preserve this issue for appeal. LaCoste v. LaCoste, 58 So. 3d 404, 405 (Fla. 1st DCA 2011).

Accordingly, we reverse and remand to the trial court with instructions for the trial court to remand to the magistrate to make findings as to whether Former Wife's dissipation of her annuity met the second and third requirements of Pimm. Additionally, the trial court shall order a retroactive award consistent with Former Wife's modified alimony amount, if any.

REVERSED and REMANDED to the trial court with instructions to remand to the magistrate to make findings related to Pimm.

EDWARDS and GROSSHANS, JJ., concur.