Circuit Court for Montgomery County
Case No. 135214FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 226

September Term, 2018

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MICHAEL WAYNE ROARK

v.

NICOLE LEE-LASSITER ROARK

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Meredith,
Leahy,
Beachley,

JJ.

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Opinion by Beachley, J.

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Filed: September 25, 2019

*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.

Michael Roark ("Michael") appeals from a judgment of the Circuit Court for Montgomery County that awarded his former wife, Nicole Lee-Lassiter Roark ("Nicole"), rehabilitative alimony of $3,000 per month for a period of five years. Michael also appeals the circuit court's attorney's fees award against him of $13,029.75. Michael presents the following issues on appeal:

> 1. Whether the trial court erred from both a legal and arithmetic perspective in ordering [Michael] to pay alimony in an amount that exceeds his ability to pay based upon the trial court's factual findings as to his income and expenses.
>
> 2. Whether the trial court erred in ordering [Michael] to pay alimony where the court found that the amount of [Nicole's] current income and child support exceeded her reasonable monthly expenses, thereby rendering her self-sufficient.
>
> 3. Whether the court erred in granting [Nicole] an award of attorney['s] fees where [Michael] had substantial justification for defending the proceeding and does not have the financial resources to pay an award of attorney['s] fees.

Perceiving no error, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

The parties were divorced by a judgment entered on March 2, 2018. On that same date, the court issued a sixteen-page opinion, which, *inter alia*, 1) denied Nicole's request for a monetary award, 2) granted Nicole rehabilitative alimony of $3,000 per month for five years, and 3) ordered Michael to pay Nicole's attorney's fees of $13,029.75.

In its alimony analysis, the court addressed the factors enumerated in Md. Code

(1984, 2012 Repl. Vol.), § 11-106(b) of the Family Law Article ("FL").[1] The court found that Michael earned $90,000 per year as the sole owner of a termite and pest control business known as "M.R. Bugs." As to Nicole, the court found that "[she] has the ability to be self-supporting after she returns to the workforce." The court recognized Nicole's desire to "go back to school" to obtain a certification required to be a veterinary technician.

[1] FL § 11-106(b) provides:

> (b) *Required considerations.* — (1) In making the determination, 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;
>
> (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.

Obtaining that certification would require two years of education at a total cost of $40,000, after which Nicole could earn between $33,000 and $40,000 annually. The court further noted that Nicole testified that she could potentially earn $28,000 per year as a veterinary assistant without the certification.

Regarding "the nature and amount of the financial obligations of each party," FL § 11-106(b)(11)(iii), the court determined that Michael had $4,610 in monthly expenses while Nicole's monthly expenses amounted to $3,575.30. The court also found that the couple had been married for seventeen years; that Nicole and Michael were 47 and 51 years old, respectively; that both were healthy and capable of working; and that the parties maintained a comfortable standard of living during their marriage.

As previously noted, after considering the FL § 11-106(b) factors, the court awarded Nicole rehabilitative alimony of $3,000 per month for five years. On appeal, Michael lodges two separate challenges to the alimony award and argues that he has insufficient funds to pay the attorney's fee award.

## STANDARD OF REVIEW

"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)). We review the trial court's factual findings under the clearly erroneous standard. *Malin v. Mininberg*, 153 Md. App. 358, 415 (2003). "Thus, absent evidence of an abuse of discretion, the trial court's judgment ordinarily will not be disturbed on appeal." *Boemio*, 414 Md. at 125 (quoting *Solomon*, 383 Md. at 196). Similarly,

> We review an award of attorney's fees in family law cases under an abuse of discretion standard. *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487, 798 A.2d 1195 (2002). We will not disturb a circuit court's award of attorney's fees "unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468, 648 A.2d 1016 (1994).

*Sang Ho Na v. Gillespie*, 234 Md. App. 742, 756 (2017).

## DISCUSSION

### I.

Relying on *Walter v. Walter*, 181 Md. App. 273 (2008), Michael argues that the court was clearly erroneous in determining that he had the ability to meet his own financial needs after paying Nicole $3,000 per month in alimony. FL § 11-106(b)(9). In *Walter*, this Court agreed that the circuit court clearly erred in determining that the husband could meet his own financial needs after paying his wife $1,500 per month in alimony. *Id.* at 285-86. There, the husband earned $4,667 per month, from which he was paying approximately $2,500 per month to maintain the family home "during the period of limited divorce." *Id.* at 283. Of the husband's remaining "$2,167 in gross monthly income, the court ordered him to pay $1,500 per month in alimony" to his wife, leaving husband a balance of $667 per month to provide for his own expenses. *Id.* at 285. We held that the "court's finding that [husband] can pay $1,500 in alimony to [wife] per month and still meet his needs [was] clearly erroneous." *Id.* at 285-86. We specifically noted that "the alimony award as fashioned by the court produced a $38,004 yearly gross income for [husband] and a $39,576 yearly gross income for [wife]," an inequitable result given that

the husband continued "to bear full responsibility for paying $30,000+ per year to maintain the marital home." *Id*. at 285.

In his brief, Michael attempts to mimic the *Walter* analysis. Michael does not challenge the court's finding that he earns $90,000 per year (or $7,500 per month), nor does he challenge the court's finding that his reasonable monthly needs amounted to $4,610 per month. He points out that the court recognized that, in addition to his monthly expenses of $4,610, he pays $200 per month toward tax liens. Michael's sole disagreement with the trial court in this section of his brief relates to the court's failure to consider his child support obligation of $1,650 per month as contained in a consent order pre-dating the divorce and dated November 22, 2016. In Michael's view, he only has $1,040 dollars per month available to pay the court-ordered alimony,[2] which he summarizes as follows:

| | |
|---|---|
| $7,500 | (gross monthly income) |
| -$4,610 | (reasonable monthly expenses) |
| -$ 200 | (monthly tax liens payments) |
| -$1,650 | (child support per 11/22/16 Order) |
| $1,040 | (balance available for alimony) |

Thus, according to Michael, the court's alimony award suffers from the same error as the alimony award in *Walter*.

Our review of the record points to several discrepancies in Michael's financial

[2] Michael further asserts that, after considering income taxes, he has no funds to pay alimony. The record is devoid of any evidence concerning income taxes that either party may be required to pay. Accordingly, we disregard this assertion. *See Birdsall v. Birdsall*, 23 Md. App. 502, 514 (1974) ("We do not, however, consider it within the proper scope of appellate review to undertake income tax analyses on the basis of computations presented for the first time in appellate briefs.").

analysis. First, in footnote 12 of the court's opinion, the court deducted specific claimed expenses on Michael's financial statement (children's cell phone, food, entertainment, and clothing, as well as Michael's transportation costs). After deducting those costs, the court concluded that Michael had monthly expenses of $4,610. In doing so, the court made an arithmetical error, demonstrated by the following calculation:

| Husband's total claimed expenses: $6,790.00 | |
|---|---|
| Cell phone (children) | - 200.00 |
| Food (children) | - 1,000.00 |
| Entertainment (children) | - 330.00 |
| Clothing (children) | - 150.00 |
| Transportation (Michael) | - 700.00 |
| Michael's Monthly Expenses (as reduced by footnote 12) | $4,410.00 |

The court's arithmetical error resulted in Michael being credited with $200.00 more per month in expenses than the court intended. Moreover, because it found that "the children do not spend time with [Michael]," the court deducted the phone, food, entertainment, and clothing expenses related to the children, but it inexplicably failed to deduct Michael's claims for the children's drug store items ($50.00), tutoring ($140.00), and haircuts ($10.00). These expenses, amounting to another $200.00, should have also been deducted from Michael's claimed monthly expenses, particularly because Nicole, as the custodial parent, would be obligated to pay those expenses from any child support award. Subtracting this additional $200.00 from Michael's claimed monthly expenses

produces an adjusted monthly expense of $4,210.00.[3]

We also take issue with Michael's inclusion of child support of $1,650.00 per month in his analysis. Under the Maryland Child Support Guidelines (FL § 12-201 *et seq.*), the parents' child support obligations cannot be calculated until the parents' respective incomes are established. Because alimony constitutes income under the guidelines (FL § 12-201(b)(3)(xv)), the amount of child support is directly related to any alimony award.[4] *See Scott v. Scott*, 103 Md. App. 500, 521 (1995) (holding that, in calculating child support, trial court erred in not placing the alimony award into child support guidelines worksheet).

In short, in view of the alimony award in this case and the parties' income as found by the court, we are confident that Michael would be entitled under the guidelines to a reduction in child support. Removing Michael's child support obligation of $1,650 per month from our analysis, and using the template set forth in *Walter*, we recalculate Michael's financial situation:

| | |
|---|---|
| $7,500 | (gross monthly income) |
| -$3,000 | (monthly alimony payment) |
| $4,500 | (balance available for monthly expenses) |

[3] This analysis is consistent with Michael's financial statement, wherein he claimed that his monthly expenses exclusive of the children amounted to $4,910.00; after the court's elimination of Michael's transportation costs, his adjusted monthly expense totaled $4,210.00.

[4] In his opening statement, Michael's counsel apparently understood that alimony must be determined before calculating child support when he stated that "the [c]ourt will have a determination of whether or not any amount of alimony is appropriate in light of the child support, *which will obviously be ordered*." (Emphasis added).

In our view, the $4,500 per month available to Michael for his expenses is vastly different from the $667 per month available to the husband in *Walter*.[5] Deducting Michael's adjusted monthly expenses of $4,210 (an amount that includes expenses related to Michael's exclusive occupancy of the marital home) from $4,500 provides Michael an excess of $290 per month after the payment of alimony, and a surplus of $90 per month after the tax lien payments noted by the court. We further note that the alimony award fashioned by the court provides Michael with $54,000 in annual gross income and Nicole with $36,000 in annual gross income, an income allocation significantly more favorable to Michael than the husband in *Walter*.

Of course, we recognize that Michael will have an obligation to pay child support,[6] but the financial circumstances of the parties will require both Michael and Nicole to tighten their personal and household expenses, a situation not uncommon in single-parent

[5] In *Walter*, the Court noted that the husband was paying $2,500 per month "for the debt, taxes, and upkeep for the family home and will continue to do so during the period of limited divorce." *Walter*, 181 Md. App. at 283. Here the parties are absolutely divorced, yet Michael continues to reside in the marital home. We were advised at oral argument that no effort has been made to sell the marital home despite the fact that Nicole is the only obligor on the mortgage note.

[6] We note that the parties' oldest child turned eighteen in July 2018, an event that will also reduce Michael's child support obligation. We also note that, if Michael obtained primary physical custody of the minor children, Nicole would then owe Michael child support pursuant to the Guidelines.

households.[7] The court implicitly recognized that the parties would need to curtail their expenses because the court found that the parties' reasonable expenses in maintaining separate households amounted to approximately $8,000 per month, but they only had combined gross income of $7,500 per month.[8] In sum, we disagree with Michael's assertion that the court was clearly erroneous in determining that he had the ability to pay $3,000 per month in alimony to Nicole.

**II.**

Michael next argues that the court erred in awarding any alimony because Nicole has the ability to be self-supporting. In constructing his argument, Michael correctly asserts that the court found that Nicole and the children had reasonable monthly needs of $3,575.30. Michael contends that the court found that Nicole had the present ability to earn $28,000 per year, or $2,333 per month, as a veterinary assistant. As Michael sees it, adding his monthly child support payment of $1,650 to Nicole's projected monthly income of $2,333 would provide Nicole and the children $3,983 per month, an amount sufficient to meet the family's $3,575.30 monthly expenses.

Although Michael's argument is superficially appealing, it completely ignores the

[7] For instance, we note that Michael could potentially reduce his monthly costs by $460 by not paying the mortgage on the unimproved lot in West Virginia. We also note that the parties will likely have to pay income taxes, but there is no evidence of the amount of income tax that would be required for either party.

[8] The court found Nicole's income to be zero at the time of trial and, as we discuss in Part II., *infra*, accepted Nicole's vocational plan to obtain a veterinary technician certificate.

court's acceptance of Nicole's plan to become a veterinary technician, a plan that requires a two-year degree at a total cost of $40,000. According to Nicole, it would take her "two years, two and a half years" as a full-time student to obtain a veterinary technician license. She testified that she could take classes as a part-time student, but the veterinary technician program mandates completion of all program requirements within five years. In considering FL § 11-106(b)(2) ("the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment"), the court accepted the testimony "that it would take [Nicole] two years to obtain the proper education and training to be employed as a veterinary technician." The court further found that, after obtaining the veterinary technician certificate, Nicole could earn $33,000 to $40,000 per year, leading the court to conclude that "[Nicole] has the ability to be self-supporting *after she returns to the workforce*." (Emphasis added). Michael's argument that Nicole can presently earn $28,000 per year ignores the court's acceptance of Nicole's vocational plan to become a licensed veterinary technician, a plan that will require two to two and a half years as a full-time student, or a maximum of five years as a part-time student. Michael's argument further ignores the $40,000 cost of the veterinary technician program. Moreover, Michael's argument assumes that Nicole will continue to receive $1,650 per month in child support for three children, an unlikely premise given that the parties' oldest child turned eighteen in July 2018. In any event, we doubt the soundness of considering child support, which is always modifiable, in determining whether a spouse is self-supporting. Although it is possible that Nicole could work part-time while attending the veterinary technician program, there is no evidence as to how much she could

reasonably earn from such part-time employment. In short, we see no error or abuse of discretion in the court's alimony award of $3,000 per month to allow Nicole to pursue and pay for her education to obtain a veterinary technician certificate. *See Tracey v. Tracey*, 328 Md. 380, 385 (1992) ("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.").

**III.**

Finally, Michael contends that the circuit court erred in awarding Nicole attorney's fees in the amount of $13,029.75. The governing statute in this regard is FL § 11-110(c):

> (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.

The court has the discretion to award fees to either party provided that it has considered the factors enumerated in FL § 11-110. *See generally* Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law*, § 15-4 (6th ed. 2016).

Michael does not contest the court's finding pursuant to FL § 11-110(c)(2) that both parties were justified in prosecuting their cases. Instead, Michael contends that he does not have the financial ability to pay the court-ordered fees. Michael correctly asserts that his only liquid assets were the funds in bank accounts valued at $4,151 at the time of trial. Michael further points out that the court, in its marital property analysis, valued the M.R. Bugs business at $90,000, which he contends was clearly erroneous because there was no competent evidence concerning the value of the business. Conversely, Nicole contends

that the court properly assigned a value of $90,000 to M.R. Bugs because the court could rely on Nicole's asserted value of the business as reflected on the Joint Statement as to Marital and Non-Marital Property.

We agree with Michael that the court was clearly erroneous in its valuation of M.R. Bugs. Neither party testified to the value of the business, nor was any expert testimony on the issue presented. Relying on *Beck v. Beck*, 112 Md. App. 197 (1996), Nicole argues that the court could rely on her valuation of the business as reflected on the Joint Statement of Marital and Non-Marital Property. On the Joint Statement, Nicole valued the business at $110,000 with indebtedness of $18,000, while Michael valued the business at zero with indebtedness of $59,000. Nicole misreads *Beck*. That case stands for the proposition that property valuations by an adverse party contained in a Joint Statement constitute judicial admissions that may be used as evidence and relied upon by the trial court. *Id.* at 205. *Beck* does not support Nicole's contention that a party's *own* valuation in a Joint Statement is admissible; it is not admissible because it does not qualify as an opponent's judicial admission.

Nevertheless, although Michael is correct that the court clearly erred in valuing M.R. Bugs, we do not see any reference to the value of the business—or any marital property—in the court's attorney's fees analysis. The court made the following findings pursuant to FL § 11-110(c):

> (1) *The financial resources of each party*.
>
> While [Michael] is not well-off, he is far more financially stable than [Nicole] due to his ability to rely on the income of M.R. Bugs. In contrast,

> [Nicole] has been unemployed for approximately two years and has largely relied on family and friends for assistance.
>
> (2) *Each party's needs.*
>
> Both parties have a significant amount of debt. However, [Michael] can rely on the income of M.R. Bugs; whereas, [Nicole] cannot. At the age of 47, [Nicole] now finds herself embarking on a new career.
>
> (3) *Whether there was substantial justification for bringing, maintaining or defending the proceedings.*
>
> As noted above, each party was substantially justified in bringing these proceedings even if they were not successful.

The court concluded that "[Michael's] income far exceeds [Nicole's] income, which at this point is zero. . . . As such, the [c]ourt finds [Michael] has the ability to pay [Nicole's] attorney's fees in whole." Thus, the court did not rely on the valuation of M.R. Bugs (or any other marital property) in its assessment of attorney's fees. The court simply concluded that Michael's income from M.R. Bugs put him in a substantially better financial position than Nicole, who had no income. Had the court relied on its erroneous valuation of M.R. Bugs as a basis for the attorney's fee award, Michael's argument would be well taken. However, the court did not so rely, and we therefore see no abuse of discretion in the court's attorney's fee award.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**