

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1666

September Term, 2014

OVIDIU MIHAI

v.

ELIEANA MIHAI

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: May 27, 2016

This appeal emanates from divorce proceedings in the Circuit Court for Montgomery County between Ovidiu Mihai, Appellant, and Eliana Mihai, Appellee.¹ The circuit court granted the parties an absolute divorce in December 2012. The present action commenced the following year when Ms. Mihai filed a motion to modify, increase, and extend alimony along with a supplemental motion to modify judgment for absolute divorce to award her the child tax deduction for the couple’s youngest child.² The circuit court had previously awarded the child tax deduction to Mr. Mihai.

Following three days of hearings, the circuit court denied Ms. Mihai’s motion to modify, increase, and extend alimony but ordered that Appellant transfer the child tax exemption to the custodial parent, Ms. Mihai. In addition, the circuit court ordered Mr. Mihai to pay \$20,000.00 for attorneys’ fees incurred by Ms. Mihai. On appeal, Mr. Mihai

¹ This Court previously addressed the parties’ divorce proceedings in an unreported opinion dated August 21, 2014. *See Mihai v. Mihai*, No. 45, September Term 2014 (August 21, 2014) (“*Mihai I*”). In our prior decision, this Court noted that the parties “were married in 1994 and had two children during their marriage.” *Mihai I* at 2. This Court also noted the Ms. Mihai’s testimony indicating that the parties’ marriage “had been bad for several years, culminating in a domestic violence incident on September 24, 2011 where, during an argument, Mr. Mihai pushed Ms. Mihai down the stairs.” *Mihai I* at 4. Following the incident, Ms. Mihai called the police and took her children to a shelter for abused women. *Mihai I* at 4.

² Out of respect for the child’s privacy, this opinion does not include the child’s name or gender. However, we note that the parties’ youngest child is autistic and has known behavioral difficulties. In *Mihai I*, we explained that due to the child’s behavioral difficulties, Ms. Mihai was asked to leave the shelter for abused women. *Mihai I* at 4.

proceeds *pro se*. Ms. Mihai did not file a responsive brief in this Court.³ Mr. Mihai presents three questions for our review:

1. “Whether the Circuit Court erred in awarding Attorney Fees in favor of the Appellee?”
2. “Whether the Circuit Court erred in not awarding Attorney Fees in favor of Appellant?”
3. “Whether the Circuit Court erred in awarding the child tax exemption to Appellee?”

We hold that the circuit court did not abuse its discretion by awarding attorneys’ fees and the child tax exemption to Ms. Mihai. We affirm.

BACKGROUND

On December 27, 2012, the circuit court entered an order granting an absolute divorce to Mr. Mihai and Ms. Mihai.⁴ The December 2012 order, *inter alia*, awarded Ms.

³ On June 22, 2015, Ms. Mihai filed a motion to dismiss the case in this Court. On June 29, 2015, Mr. Mihai filed a motion to deny Ms. Mihai’s motion to dismiss and award default judgment. This court denied both motions on July 7, 2015. That same day, this Court ordered Ms. Mihai to file any responsive brief by July 31, 2015. None was filed.

⁴ In *Mihai I*, we considered whether, in the course of the parties’ original divorce proceedings, the circuit court: (1) erred in determining that Mr. Mihai dissipated marital assets; (2) erred in granting Ms. Mihai a monetary award; (3) erred in awarding Ms. Mihai attorney’s fees; and (4) erred in calculating child support arrearages that Mr. Mihai owed Ms. Mihai. *Mihai I* at 2. We affirmed the circuit court’s judgment. *Mihai I* at 2. Regarding the first issue, we held that, because Mr. Mihai’s argument that he had not dissipated marital assets rested on documents that were not before the circuit court, he was unable to show this Court that the circuit court erred in its findings. *Mihai I* at 14-15. This Court refused to address Mr. Mihai’s second argument, finding that he failed to provide any legal support for his averment and that he again relied on documents that were not before the circuit court. *Mihai I* at 18. In analyzing whether the circuit court erred in awarding Ms. Mihai attorneys’ fees, this court noted that the circuit court properly considered the statutory requirements for assessing attorneys’ fees in its decision and held that the circuit court did not abuse its discretion. *Mihai I* at 20-21. (continued...) We

Mihai the sum of \$3,000 per month for temporary alimony for one year and \$1,500 per month for the five years thereafter. Previously, the circuit court had awarded Ms. Mihai “sole legal and physical custody of the parties’ children” and “\$2,522 per month in child support” and granted Mr. Mihai visitation rights following a merits trial on custody issues held on August 14, 2012. *Mihai I* at 3. Notwithstanding the custody award, and for reasons that are not clear in the record in this case, the December 2012 order granted Mr. Mihai the right to claim the parties’ youngest child income tax deduction provided that Mr. Mihai remained current on child support payments.

On December 19, 2013, Ms. Mihai filed the underlying motion to modify, increase, and extend alimony. The motion requested that the circuit court increase the amount of alimony that Mr. Mihai had to pay to Ms. Mihai; and that it either extend the length of time that Mr. Mihai had to pay alimony, or that the alimony be modified to an indefinite alimony. To support her motion, Ms. Mihai presented three facts that had changed since the December 2012 divorce order: (1) that Mr. Mihai’s debts had been discharged in bankruptcy;⁵ (2) that, after the divorce, Mr. Mihai abandoned the parties’ youngest child, preventing Ms. Mihai from working weekends and thereby denying her the opportunity to

again rejected a portion of Mr. Mihai’s attorneys’ fees argument, noting that it was not properly raised before the circuit court. *Mihai I* at 20-21. Finally, we did not consider Mr. Mihai’s arrearages argument because the documents supporting his alternative calculation were not in the record before the circuit court. *Mihai I* at 22-23.

⁵ The United States Bankruptcy Court for the District of Maryland discharged Mr. Mihai’s debts pursuant to 11 U.S.C. § 727 on May 1, 2013. In support of her motion, Ms. Mihai averred that, since Mr. Mihai’s discharge, his “only remaining debts are the judgments against him for unpaid support, monetary award, and attorneys’ fees.”

earn her projected income;⁶ and (3) that Mr. Mihai was no longer paying \$2,500 a month in rent.

In response, Mr. Mihai argued: (1) that Ms. Mihai failed to state a claim on which relief could be granted; (2) that there were no material changes in circumstances to justify a modification; (3) that Ms. Mihai failed to seek employment, as contemplated by the divorce order, and (4) that Ms. Mihai's action lacked merit. Mr. Mihai asked that the circuit court dismiss the motion and enter an order requiring that Ms. Mihai pay for Mr. Mihai's attorneys' fees.

On February 12, 2014, Ms. Mihai presented an amended and supplemental motion to modify judgment for absolute divorce requesting that she be awarded the tax deduction for the couple's youngest child, arguing that she was incurring additional out-of-pocket medical expenses for their youngest daughter without Mr. Mihai's assistance. Mr. Mihai responded to the supplemental motion, arguing that the divorce order granted the child tax exemption so long as he remained current on child support payments and, because he was current on child support payments, there was no reason to modify the order. Accordingly, the response requested that the circuit court dismiss the supplemental motion to modify judgment for absolute divorce or deny Ms. Mihai's requested relief.

The circuit court considered Mr. Mihai's original and supplemental motions during hearings on September 16, 17, and 19, 2014. Regarding the requests to modify alimony,

⁶ Ms. Mihai's motion states that Mr. Mihai filed and later withdrew a motion to reduce his visitation rights. The motion also avers that Mr. Mihai "often cancelled his visitation at the last minute thereby further preventing [Ms. Mihai] from working."

the court stated: “in order to increase the alimony, I would have to consider [Ms. Mihai’s] expenses then, as compared to now, to determine need, and I can’t re-examine the record before [the divorce court] and make my own conclusions [.]” The court noted that the judge who granted the original divorce order did not “make findings on the party’s [sic] expenses” and that, as a result, it could not find there was a change in circumstances because had no way to compare the parties’ expenses at the time of the December 2012 order with those then before the court. The circuit court concluded that it would not “be appropriate to grant Ms. Mihai’s request” and denied Ms. Mihai’s request to increase and extend alimony.

Regarding the child tax exemptions, the circuit court then found that the

evidence demonstrates . . . that [Mr. Mihai] has shown little regard for his former wife and children to the point where at this juncture he barely sees [his youngest child], and I know he has issues with the other child as well. Alimony and child support are paid regularly, but they’re paid by the employer, and from what I understand, not a penny more is paid. Substantial sums . . . have been paid by [Ms. Mihai] for extraordinary medical expenses, an educational consultant, which is of value to the child, an attorney, or attorneys and others to help [the youngest child], and I don’t see any just reason for the dependency exemption to remain with [Mr. Mihai.]

The circuit court accordingly ordered Mr. Mihai to execute all necessary documents so that Ms. Mihai could claim the child’s tax deduction beginning the following tax year.

Finally, the circuit court found that:

This action was brought in good faith by [Ms. Mihai]. Now what is true, that I’ve held that her proof fell short in part because of factual findings from the first action which I did not have. There is no doubt in my mind that [Ms. Mihai] is having a tough time, and that she essentially bears the sole responsibility for [the youngest child].

The circuit court also found that Mr. Mihai was “in a much better position to pay attorney’s fees than [Ms. Mihai].” Based on these findings, the circuit court ordered Mr. Mihai to pay \$20,000.00 in attorneys’ fees, which includes the cost both of a prior appeal and of the current proceedings. The circuit court entered its order on October 10, 2014, and Mr. Mihai appealed to this Court that same day.

DISCUSSION

I.

Attorneys’ Fees

We address Mr. Mihai’s first and second questions regarding attorneys’ fees together. Mr. Mihai argues that the circuit court erred in awarding attorneys’ fees in Ms. Mihai’s favor because: (1) it did not properly consider the financial resources and needs of both parties; (2) it awarded attorneys’ fees unrelated to the motions before the circuit court; (3) it erred in its finding that the proceeding was justified; (4) the award encouraged Ms. Mihai to continue a baseless litigation; (5) Ms. Mihai acted in bad faith during discovery; and (6) Ms. Mihai attorneys’ billing was improper. Mr. Mihai also notes that the circuit court’s award of attorneys’ fees to the Ms. Mihai in this case is unusual because Ms. Mihai succeeded only partially in her claim.

“Decisions concerning the award of counsel fees rest solely in the discretion of the trial judge.” *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citing *Jackson v. Jackson*, 272 Md. 107, 111-12 (1974)). We determine whether the trial court properly exercised its discretion “by evaluating the judge’s application of the statutory criteria set forth above as well as the consideration of the facts of the particular case.” *Id.* (citing *Jackson*, 272 Md.

at 111-12). “If the court gives proper consideration to the statutory factors and the circumstances of the case, an award of attorneys’ fees will not be reversed ‘unless a court’s discretion was exercised arbitrarily or the judgment was clearly wrong.’” *Henriquez v. Henriquez*, 185 Md. App. 465, 476 (2009) (quoting *Collins v. Collins*, 144 Md. App. 395, 447 (2002)).

When assessing attorneys’ fees, Maryland generally adheres to the American Rule, under which “each party to a case is responsible for the fees of its own attorneys, regardless of the outcome.” *Friolo v. Frankel*, 403 Md. 443, 456 (2008). However, when a statute allows for the imposition of attorneys’ fees, Maryland courts can deviate from the general rule. *See Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445 (2008). These statutes allow “a trial court, *in its discretion*, to award attorneys’ fees.” *Friolo*, 403 Md. at 456 (emphasis in original). When awarded, attorneys’ fees “must be reasonable, taking into account such factors as labor, skill, time, and benefit afforded to the client, as well as the financial resources and needs of each party.” *Petrini*, 336 Md. at 467.

A.

Statutory Arguments

In this case, the circuit court awarded attorneys’ fees to Ms. Mihai pursuant to Maryland Code (1984, 2012 Repl. Vol.), Family Law (“FL”), § 7-107. Under FL § 7-107(b), in divorce proceedings, a circuit court may “order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.” To award these expenses, FL § 7-107(c) requires that the trial court 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 circuit court reviewed both parties’ financial statements. Regarding Ms. Mihai’s financial statement, the circuit court stated: “I find it to be somewhat exaggerated But be that as it may, she’s undoubtedly in over her head and I don’t find any ability on her part to pay the attorney’s fees that were incurred.” Examining Mr. Mihai’s financial statement, the circuit court stated “I’m not sure what part of those financial representations I can believe, sir As I understand it, you got at least \$135,000 in an IRA, according to your financial statement, and you may have to liquidate some of that to pay attorney’s fees that I’m going to award in this case.” Although it acknowledged that there remain some difficulties in discerning the parties’ ability to pay, the circuit court found that Mr. Mihai was “in a much better position to pay attorney’s fees” than Ms. Mihai. The circuit court also found that Ms. Mihai’s “proof fell short in part because of factual findings from the first action which [the court] did not have,” but concluded that Ms. Mihai brought the action in good faith. In making that finding, the circuit court noted that: “[t]here is no doubt . . . that [Ms. Mihai] is having a tough time, and that she essentially bears the sole responsibility for [the youngest child].” Finally, the circuit court found the attorneys’ fees in this case to be “fair, reasonable and necessary,” and noted that the fees were “under market value,” explaining that the court had seen “much more expensive bills

than [Ms. Mihai’s counsel’s].” Therefore, the circuit court properly considered the statutory factors and the circumstances in this case. *See Henriquez*, 185 Md. App. at 476.⁷

B.

Additional Arguments

As noted *supra*, Mr. Mihai avers that the circuit court erred in granting the fees award because the award encouraged Ms. Mihai to continue a baseless litigation, and because Ms. Mihai acted in bad faith during discovery. Given the circuit court’s finding that Ms. Mihai sought the modification in good faith and its consideration of the appropriate statutory factors, we cannot say the circuit court abused its discretion in this case.

Mr. Mihai also contends that the circuit court erred when it awarded attorneys’ fees that embraced both the proceedings on motions before the circuit court, as well as a prior appeal to this Court. The underlying case to modify the prior judgment is, however, a continuation of the same proceeding on which the prior appeal was taken. The applicable statute, FL § 7-107(b), provides that “[a]t any point in a proceeding under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.” (Emphasis added). An award of attorneys’ fees may also include the costs of an appeal. *See Friolo*, 403 Md. at 458 (observing that “[i]t is as important to compensate counsel for ensuring that the trial

⁷ *See also Mihai I* at 19-22 (upholding the circuit court’s award of \$38,000.00 in attorneys’ fees in Ms. Mihai’s favor when the circuit court considered the financial resources of both parties and determined that Mr. Mihai did not have substantial justification for defending the extant property, as required by FL § 7-107(c)).

court gets it right, even if to do so requires counsel to appeal, as it is to ensure that counsel is compensated for services rendered at trial.”); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 714 (1997) (citing *Nolt v. U.S. Fid. & Guar Co.*, 329 Md. 52, 68 (1993)) (clarifying that there is no “distinction between litigation at the trial level and litigation at the appellate level.”).

Considering Ms. Mihai’s request for attorney fees, the circuit court reviewed Ms. Mihai’s counsel’s bill⁸ and found it to be “fair, reasonable, and necessary.” Just prior to the close of the hearing, the circuit court then stated:

Family Law Article 7[-107] permits reimbursement of any amount expended in prosecuting or defending and that includes attorney’s fees for an appeal. The case came back after an appeal, and based on the factors I’ve just described, I’m awarding attorney’s fees in the amount of \$20,000, and I enter a judgment in that amount in the favor of the [Ms. Mihai].

The circuit court then clarified:

I think you are entitled to come back to the trial court afterwards and ask for an award of attorney’s fees . . . [Family Law Article 7-107] says to me that you’re permitted reimbursement of any amount expended in prosecuting or defending. And so, I’m awarding attorney’s fees in the amount of \$20,000, which contemplates . . . all of the fees that you asked for in this case as well as a portion of the appellate fees.

The record shows that the circuit court carefully reviewed and considered the grounds for the attorneys’ fee award as well as the court’s own statutory authority to make the award.

⁸ The record before this Court does not contain Ms. Mihai’s counsel’s bill. However, we note that “[t]rial judges are in the best position to know, from their experience on and off the bench, what constitutes a reasonable hourly rate for attorneys in their jurisdiction.” *Mullaney v. Aude*, 126 Md. App. 639, 663 (1999) (citing *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316, 337 (1992)). Therefore, we have no reason to disturb the circuit court’s finding.

We perceive no abuse of discretion in the court’s decision to award attorneys’ fees to Ms. Mihai’s. *Petrini, supra*, 468 (1994).

II.

Child Tax Exemption

Mr. Mihai also argues that the circuit court erred by awarding the child tax exemption to Ms. Mihai. Specifically, Mr. Mihai avers that the circuit court acted “arbitrarily” when it modified the divorce order, which entitled him to the child tax exemption, based on its finding that the prior decision was unclear and without seeking any clarification.

As we do for decisions concerning the award of attorneys’ fees, we review a circuit court’s award of a child tax credit for abuse of discretion. *See, e.g., Reichert v. Hornbeck*, 210 Md. App. 282, 303-04, 344 (2013). Under this standard, “so long as the Circuit Court applies the proper legal standards and reaches a reasonable conclusion based on the facts before it, an appellate court should not reverse a decision vested in the trial court’s discretion merely because the appellate court reaches a different conclusion.” *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 436 (2007).

In *Wassif v. Wassif*, 77 Md. App. 750, 759 (1989), we noted that, under I.R.C. § 152(e), a custodial parent is “always entitled to the exemption unless he or she executes a signed waiver disclaiming the child as an exemption for a given year.” However, we held that the Internal Revenue Code did not prevent a trial court from exercising its equitable powers to order a custodial parent “to execute the necessary waiver of a

dependency exemption in favor of a non-custodial parent who is paying child support.”

Id. at 761.

More recently, in *Reichert v. Hornbeck*, we considered whether a trial court could order parties that share custody of a child to share the child tax exemption by alternating the party that claimed the exemption every year. 210 Md. App. at 328, 331-32. Reasoning that the child tax exemption is “an element of the parties’ child support calculus, we concluded that “any allocation of the tax dependency exemption must be evaluated based on a child’s best interest.” *Id.* at 341 (citations omitted). We explained that “the allocation of the tax dependency exemption may be allocated to a *non-custodial* parent only if it enhances the child's best interest” and stated that

[r]equiring the trial court to consider both the comparative actual incomes of a child's parents and whether the non-custodial parent is, in fact, within a higher tax bracket to warrant a tax dependency exemption allocation to the non-custodial parent is in accordance with the General Assembly’s adoption of the Income Shares Model, which rests upon a child’s ability to “receive the same proportion of parental income, and thereby enjoy the same standard of living, he or she would have experienced had the child’s parents remained together.”

Id. at 344 (emphasis added) (quoting *Voishan v Palma*, 327 Md. 318, 322-23 (1992)). We also clarified that

“it would be an abuse of discretion for a divorce court to order a *custodial parent* to sign the declaration in the absence of appropriately supported findings that [the allocation would result in an increase in after-tax spendable income of the family as a whole] or demonstrating other exceptional circumstances making it in the best interest of the parties and their child[] that the [exemption] be” waived to the non-custodial parent.

Id. at 344 (bracketed alteration in original) (italic emphasis added) (quoting *Motes v. Motes*, 782 P.2d 232, 239 (Utah Ct. App. 1989)). Finally, we held that, under the particular

circumstances in *Reichert*—where the parties share joint custody—the circuit court should have allocated the tax credit to the parent with the adjusted highest gross income, and channel any after-tax spendable income increase into an increase in child support payments. *Id.* at 348

In this case, the circuit court stated that *Wassif* “stands for the proposition that the primary residential parent is entitled to this exemption, unless he or she executes a signed waiver disclaiming the child as an exemption in any given year.” The circuit court then ordered Mr. Mihai, the non-custodial parent, to execute any and all documents required to transfer the child tax exemption to Ms. Mihai, the custodial parent. As a result, the circuit court’s order follows I.R.C. § 152(e)’s general principle that the custodial parent is “always entitled to the exemption unless he or she executes a signed waiver disclaiming the child as an exemption for a given year.” *Wassif*, 77 Md. App. at 759.

Reichert requires that the circuit court consider the best interest of the child in allocating the tax exemption. *See Reichert*, 210 Md. App. at 341 (explaining that “any allocation of the tax dependency exemption must be evaluated based on a child’s best interest.”). In making its tax exemption determination, the circuit court considered that Mr. Mihai rarely sees his youngest child, found that Mr. Mihai did spend not “a penny more” over the court-required amount, and concluded that Ms. Mihai has paid for extraordinary legal, educational, and medical expenses that were “of value to the child.” *Cf. Scott v. Scott*, 103 Md. App. 500, 522 (1995) (reviewing the allocation of the child tax exemption to a non-custodial parent and stating that “[t]he best interests of the children are . . . affected only indirectly, to the extent the dependency tax exemption affects the income

of the respective parties. It is to this extent that the best interests of the children may be involved.”). Indeed, unlike the case in *Reichert*, here Ms. Mihai has sole custody of the parties’ children.

It is clear from the record that the circuit court considered the best interest of the child in its decision to transfer the exemption back to the custodial parent, Ms. Mihai. We hold that the circuit court did not abuse its discretion when it ordered Mr. Mihai to transfer the child tax exemption to Ms. Mihai.

JUDGMENTS AFFIRMED.

**COSTS TO BE PAID BY
APPELLANT.**