Circuit Court for Prince George's County Case No. CAD 15-29999 Case No. CAD 15-29839

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1140

September Term, 2017

TERESA Y. NEAL

v.

EARNEST J. NEAL

Eyler, Deborah S. Fader, Wilner, Alan M. (Senior Judge, Specially Assigned

JJ.

Opinion by Wilner, J.

Filed: April 20, 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.

This appeal is from a judgment of absolute divorce entered by the Circuit Court for Prince George's County and from that court's denial of appellant's motion to alter or amend the judgment. Appellant makes no complaint about the divorce, which was granted on the ground of a voluntary separation for more than one year, or about the joint legal custody and shared physical custody of the parties' minor child ordered by the court. The only issues raised concern the court's denial of appellant's requests for indefinite or rehabilitative alimony, attorneys' fees, and a larger monetary award based on marital property.

The parties agree, and we concur, that the standard of review of the trial court's decisions regarding alimony and attorneys' fees is whether that court abused its discretion regarding those issues. The issues regarding the monetary award are (1) whether the trial court erred in its valuation of appellee's 49 percent interest in his business corporation by deducting part of the amount of a loan made by the company to appellee, and (2) whether appellant should have been awarded a larger share of the value of that interest. The first of those issues is a legal one that we must resolve on our own; the second is subject to an abuse of discretion standard.

The actual decisions of the court on these matters are found in the Order and Judgment of Absolute Divorce entered by the court on July 27, 2017. With one exception, the basis for those decisions was announced *extemporaneously* from the bench three months earlier, on April 4, 2017, and, in large part, it is to those oral pronouncements that we must turn in considering appellant's complaints.

The parties had been married for eighteen years at the time of divorce. They had one child who, at the time of the divorce, was nearly 17 years old. The parties both are high school graduates in their mid-forties and in good health. Appellant had worked at various times during the marriage but mostly relied on appellee, who was the principal earner. In 2004, she became licensed to operate a day care center and began such an operation from which she earned \$40,000 a year. That continued until 2011.

During 2014, she worked for an organization identified only as "Evergreen," from which she earned \$60,000 a year. She quit that job a month before filing for divorce. She testified that, as of November 2015 – a month after she filed for divorce – she believed that she could earn \$70,000 as a "tech writer." She began working as a part-time driver for Uber in April 2016, but quit in June, just before an exceptions hearing, and remained unemployed thereafter. On her amended financial statement, appellant showed no income and \$9,424 in monthly expenses. She listed assets of \$417,267, all but \$10,000 of which (a car) was the market value of their house and furniture, and \$10,351 in liabilities.

Based on appellant's work experience, the court "guess[ed] she could make \$70,000, maybe even more, depending on what job," but imputed income to her, for child support purposes, of only \$40,000. The court accepted her claimed expenses of \$9,424 though noting that appellant's two adult children from a prior relationship were living in the house. There was no finding as to whether they contributed anything to the expenses, but the implication was that they did not.

Since 2004, appellee's income came principally from his 49 percent interest in a cyber security company known as Atlantic Systems Group (ASG). Upon a joint motion of the parties, the court appointed Andrew Runge, a business consultant and certified public accountant, to render an expert opinion on the fair market value of appellee's share of ASG and on the compensation he received from that company. According to Mr. Runge, appellee's compensation varied widely, from \$204,635 in 2013, \$152,356 in 2014, \$249,600 in 2015, and \$306,354 projected for 2016. The amounts depended on the contracts ASG had during those periods. On his financial statement filed in this action (current as of January 15, 2017), appellee claimed gross monthly income of \$21,278 less \$10,139 in payroll deductions, for a net of \$11,138, and monthly expenses of \$17,879, resulting in a monthly deficit of \$6,740. The court found that he was the principal earner.

Mr. Runge concluded that (1) the value of appellee's 49 percent interest in the company, before consideration of personal goodwill and outstanding loans was \$256,000; (2) the value of his interest after consideration of personal goodwill, but without consideration of the loan balance, was \$203,500; (3) there was an outstanding loan balance owed by appellee to ASG of \$132,415; and (4) after deducting appellee's 49 percent interest in the loan, the loan balance – that part that would inure to the benefit of appellee's co-owner – would be \$67,532.

Mr. Runge explained that the two co-owners each had a capital account, the amounts of which varied as the proportionate share of profits were added and money was drawn by them. When more was drawn than was in the account, the excess would be

treated as a loan from the company. At the time of his report, the deficit in appellee's capital account amounted to \$132,415. Mr. Runge determined that 49 percent of the loan – \$64,883 – if repaid by appellee, would, in effect, be payable to himself and that 51 percent – \$67,532 – would be payable to appellee's co-owner. Accordingly, Mr. Runge determined that the value of appellee's share in the company should be reduced by the latter amount.

On these basic facts, the court dealt with the three issues now before us.

Alimony

The award of alimony is governed principally by Md. Code, §§ 11-101 and 11-106 of the Family Law Article, with the gloss of case law interpreting those sections. Section 11-101 provides that the court *may* award alimony as part of a judgment of divorce. Section 11-106(b) sets forth 12 factors the court must consider in determining whether to award alimony, how much to award, and for how long. In its remarks from the bench, the court did consider those factors and made findings with respect to them.

As a preface to its discussion regarding alimony, the court announced in its April 2017 rulings that it would (1) award \$1,118 in child support to appellant, and (2) grant to her the use and possession of the family home for a period of one year, until the end of April 2018, at which time she was to convey her interest in the property to appellee.

Appellee would thereafter be solely responsible for payment of the mortgage and tax

liens against the property.¹ Pursuant to a domestic violence protective order, appellee had been making the \$4,200 monthly mortgage payment, and the court ordered that he continue to do so until the use and possession period ended. In its remarks from the bench, the court declared the \$4,200 monthly payment to be in the nature of alimony. Appellant does not complain about those rulings.²

The court accepted that appellant had no income and showed a monthly deficit of \$9,424. It concluded, due to a lack of evidence, that it was unable to determine how long it might take for appellant to become self-sufficient, but it did find that she did not need any further education or training to become eligible for gainful employment. The court acknowledged that appellant would need to have some income in order to be able to find an apartment when the use and possession of the family home ended, which was a year away. The court also accepted that appellee was showing a monthly deficit of \$6,740.

Piecing together the court's statements from the bench, it *appears* that the court was intending to award appellant \$4,200 per month in rehabilitative alimony for a period

¹ The court found that there was no actual equity in the house, and there seems to be no dispute about that finding. In their Joint Statement Concerning Marital and Non-Marital Property, the parties valued the property at approximately \$450,000 and agreed that there were liens against the property totaling \$469,819. The mortgage was in appellee's name only, and he alone was liable for that debt. The parties were jointly liable for the tax liens amounting to approximately \$150,000, although the court directed that appellee be solely responsible for both of those debts once appellant's interest in the property was conveyed to him. Whether IRS or the State Comptroller, the holders of the tax liens, would acquiesce in that ruling is unclear.

² There was some discrepancy regarding the amount. There was evidence that it was \$4,200 per month and other evidence that it was \$4,305. In its ruling, the court used the \$4,200 figure.

of one year, in the form of appellee's payment of the monthly mortgage debt service during the use and possession period. The court used that device so that the \$4,200 per month would not constitute taxable income to appellant. It would allow appellant to live rent-free for a year, by the end of which she would be able to find, and would be expected to find, employment, earn at least \$40,000 a year and possibly up to \$70,000 and thus be able to support herself. In its July 27 judgment, however, the court denied that intent. It said:

"At the case conclusion on April 4, the Court rendered an oral Opinion on the record setting forth the facts and reasoning for the Court's decision based on the evidence presented and the parties' agreement regarding certain marital property. Before the Court issued a written judgment of absolute divorce, it came to the Court's attention that there was a need to clarify its decision of April 4 regarding whether the Court, by ordering Defendant to pay the mortgage for one (1) year, intended the payment to be an award of alimony. On April 28, 2017, the parties appeared for a disposition hearing and in response to Plaintiff's counsel's inquiry about alimony, the Court stated that it did not intend to award Ms. Neal alimony (i.e., income for tax purposes). For clarity, the Court strikes any reference to the mortgage payments being considered 'alimony."

With that explanation, the court's judgment expressly denied appellant's request for alimony. Because of that, the court increased the amount of monthly child support from \$1,118 – the amount it announced in April – to \$1,952, retroactive to May 1, 2017.

Taking the court's oral findings at face value, appellant urges that they simply do not justify a total denial of alimony, either rehabilitative or indefinite. Although imputing \$40,000 of income to her for child support purposes, the court found that, in fact, appellant had no income and a deficit of \$9,424 a month, and stated an inability to determine how long it would take appellee to find employment and become self-

sufficient. It speculated that she may be able to earn \$70,000 or more, but made no clear finding in that regard. It found that the parties had been married for 18 years and had enjoyed a "pretty high standard of living." It made no finding as to how the division of assets and liabilities affected its decision regarding alimony. Appellant's complaint is that the court found this need but improperly denied alimony because it was allowing her to live rent-free for a year.³

Beyond that, she complains further that the court erred in denying indefinite alimony. Citing *Roginsky v. Blake-Roginsky*, 129 Md. App. 132 (1999), appellant argues that indefinite alimony may, and in her view should, be awarded when "the economically dependent spouse reaches the limits of his or her earning capacity and is at an 'unconscionably disparate' economic level from that of the economically dominant spouse." Claiming that appellee earns over \$252,000 annually whereas her annual income was imputed to be only \$40,000, she argues that her income is only 15 percent of his which, according to the case law, constitutes an unconscionable disparity. For that proposition, she cites *Lee v. Lee*, 148 Md. App. 432, 449 (2002). She complains about the court's remark that "Maryland courts [do] not favor indefinite alimony."

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³ Although it certainly is permissible for a court to announce findings *extemporaneously* from the bench immediately following a hearing or trial, this case illustrates the need for caution in doing that when a series of specific and inter-related findings and an explanation of the basis for those findings are necessary. The court's oral recitation of its findings, which rambled at times, consumed 38 pages of transcript without a break. A cold record can look very different from what a judge intends to be saying. Taking a reasonable amount of time to compose a coherent statement of what is intended is usually worth the effort.

The court's remark regarding the law not favoring indefinite alimony is correct. *See Blaine v. Blaine*, 336 Md. 49, 69 (1994):

"[W]e are mindful of the important principle underlying the alimony statute, namely, that the prior concept of alimony as lifelong support enabling the dependent spouse to maintain the standard of living enjoyed during the marriage has largely been superseded by the modern view that the dependent spouse should be required to become self-supporting, even if that results in a reduced standard of living."

See also Solomon v. Solomon, 383 Md. 176, 194 (2004) ("It is well settled in Maryland that the 'statutory scheme generally favors fixed-term or so-called rehabilitative alimony," rather than indefinite alimony").

As noted in *Solomon*, at 196, §11-106 of the Family Law Article puts conditions on an award of indefinite alimony. The court may award such alimony if it finds that "due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting" or "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." The court made neither finding in this case, and there clearly was no evidence upon which the first finding could be made; quite the opposite. Appellant's complaint rests on her view that her income, and thus her standard of living, will never approach that of appellee.

The court recognized that, at the time of divorce, appellant was unemployed and had no actual income and that a disparity did then exist but pointed out that appellant had proved herself to be "a very capable, smart person," physically fit and young, and

possibly capable of earning up to \$70,000 a year. As noted, appellee's income fluctuated widely from year to year, from \$152,000 to \$306,000, depending on contracts obtained by ASG. Evidence was presented that the company had only one contract in effect as of January 2017, and that was due to expire in April of that year. The ultimate determination of whether permanent alimony should be awarded is a discretionary one that we review on an abuse of discretion standard. *Benkin v. Benkin*, 71 Md. App. 191, 195 (1987). We are unable to conclude, on this record, that the court abused its discretion in denying indefinite alimony.⁴

The court's denial of rehabilitative alimony is a much closer call. Although the court backtracked on whether requiring appellee to make the monthly mortgage payment during the term of appellant's use and possession of the family home was intended as alimony, that requirement clearly was intended to reduce appellant's need for alimony to that extent. Without saying so directly, which would have been preferable, the court seemed to anticipate that appellant could become self-sufficient at some point within a year, and the evidence supported that expectation. In the meanwhile – until she could find gainful employment – appellant would have expenses of more than \$5,000 a month and no income other than the \$1,952 in child support.

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⁴ In reaching this conclusion, we have not ignored *Lee v. Lee, supra*, on which appellant relies. We simply find that case distinguishable on its facts. Ms. Lee, who was 50, had minimal skills; her sporadic employment was with low-paying jobs without health or other fringe benefits; and she suffered from depression and anxiety as a result of her husband's philandering. At the time of divorce, she was earning eight dollars an hour. Mr. Lee was earning \$78,000 a year plus employer contributions to a 401K pension plan and a variety of other fringe benefits.

Given that need, the fact that appellant's gross earnings at the time were over \$21,000 per month and net earnings, after payroll deductions were over \$11,000 per month, and the other findings by the court, we conclude that the trial court erred in simply denying rehabilitative alimony without making clear findings as to whether the \$40,000 imputed income for child support purposes should apply as well to the alimony issue (and if not, why not) or a clearer statement of when appellant would be able to find suitable employment and become self-sufficient and in no need of alimony. We shall remand this aspect of the case to the trial court to determine, based on the evidence previously presented what appellant's need was at the time and reconsider whether an award of rehabilitative alimony was indicated.

We are not holding that appellant was entitled to alimony or, if so, in what amount or for how long – only that the flat-out denial was inappropriate in light of the predicate findings that were made.

Monetary Award

The court identified three categories of marital property for purposes of determining whether, and how much of, a monetary award pursuant to Md. Code, § 8-205 of the Family Law Article was appropriate – the family home and furnishings, which were owned jointly by the parties; appellant's cars; and appellee's 49 percent interest in ASG. As noted, the court found that there was no equity in the family home, which was to be transferred to appellee's sole ownership upon the expiration of the use and possession order, and the parties apparently agreed on the distribution of the furnishings.

Appellant was awarded the cars. The monetary award issue thus hinges on the value of appellee's interest in ASG, which the parties agree is marital property.

As noted, Mr. Runge gave two values for appellee's interest. The highest value was \$256,000, but that excluded consideration of personal goodwill and an outstanding loan from ASG to appellee with a balance of \$132,415. The second value was \$203,500, which considered personal goodwill but not the outstanding loan balance. Taking into account that, if appellee repaid the \$132,415 loan, he would, in effect, be paying himself 49 percent of that amount, the net loan balance for marital property purposes was \$67,532. Deducting that amount from \$203,500 should have produced a net value of appellee's share of \$135,968. The court, however, found the value of his interest to be only \$69,000 and awarded half of that – \$34,500 – to appellant, to be paid by appellee in 12 monthly installments of \$2,875.

Appellant makes two complaints about that decision. First, she claims that the court never satisfactorily explained the basis for its \$69,000 valuation in light of Mr. Runge's valuations of \$256,000 and \$203,500, specifically whether the court reduced either valuation by the amount of the outstanding loan, or any part of it. Second, she argues that, if the court did reduce the value by the amount of the loan, or any part of it, that was error because no part of the loan constituted marital debt – none of it was used to acquire or enhance appellee's interest in the company.

The court's discussion of this issue really is unclear. It first said that "[t]here is Atlantic System Group where we have a report of Mr. Runge *which I accepted* and the

value finding of the company is \$49,000 and that's attributable to Mr. Neal" (Emphasis added). The court later admitted that it meant \$69,000 rather than \$49,000, and, when challenged as to how its valuation squared with that of Mr. Runge's, it said "I do not have to accept what Mr. Runge said." At oral argument, neither side could explain how the court arrived at its valuation; nor can we. It *appears* that what the court did, in reaching its figure of \$69,000, was to follow Mr. Runge's analysis up to the point of deducting \$67,500 of the net loan balance from \$203,500, which brought the net value to approximately \$136,000, and then deducted another \$67,000 from *that* number to arrive at \$69,000. If so, it deducted the \$67,500 (or \$67,000) twice.

Admittedly, this involves some speculation on our part, but one thing is clear: in valuing appellee's interest, the court did deduct a significant part of the loan balance from the \$203,500 net value (after accounting for goodwill), which brings into play appellant's second argument of whether that was proper – whether any part of the \$132,415 loan should have been deducted.

Appellant correctly notes that, when the court values marital property for purposes of determining a monetary award, it should deduct from the gross value any "marital debt," but not any non-marital debt. The Court of Appeals has defined a marital debt as "a debt which is directly traceable to the acquisition of marital property." *Schweitzer v. Schweitzer*, 301 Md. 626, 636-37 (1984); *Zandford v. Wiens*, 314 Md. 102, 108 (1988). *See also Lee v. Andochick*, 182 Md. App. 268, 299 (2008).

Appellee testified that much, though perhaps not all, of the \$132,415 that he borrowed from ASG against his capital account was to finance appellant's purchase of a separate business – a bowling league she named the T Neal Bowling League. The purchase was made in 2008. Appellant was the sole owner; appellee had no interest in it. Although appellant said that she earned approximately \$500 a week, and as much as \$2,400 on holiday weekends, from the business, she abandoned it in 2013. It did not exist at the time of divorce and therefore could not, itself, be regarded as marital property.

In appellee's mind, that was a basis for not giving appellant any part of his interest in ASG – she already got that benefit. Appellant, on the other hand, seeks to turn that to her advantage, arguing that, because much of the loan, or maybe even all of it, was made for that purpose, it had no connection with the acquisition of appellee's interest in ASG and therefore is not a marital debt that can serve to reduce the value of appellee's share. She argues that the value of that interest should be the \$203,500 determined by Mr. Runge.

Appellant is correct that, on the evidence, at least some major portion of the \$132,415 loan, and perhaps the entire loan balance, does not constitute a marital debt and that the court erred in deducting that amount from the value of appellee's share of ASG. That does not necessarily mean that appellant is entitled to half of \$203,500, however, or that portions of the loan from which she received the benefit may not be considered in determining the amount of a monetary award.

As appellant acknowledges, the purpose of a monetary award is to adjust fairly and equitably the property interests of the parties. It involves a three-step process — determining what is marital property, valuing that property, and determining whether and how much of a monetary award should be made as an adjustment of the respective property interests after considering the factors set forth in Md. Code, § 8-205 of the Family Law Article. We shall remand this issue as well for the court to reconsider the value of appellant's interest in the company at the time of the divorce and, based on whatever value is ultimately determined, decide, as Step 3, how much of a monetary award, if any, is appropriate.

Attorneys' Fees

There are several statutes that permit an award of attorneys' fees in family law cases. *See* Md. Code, § 7-107 (action for divorce), § 11-110 (action for alimony), and § 12-103 (action for custody, visitation, or support of a child). They each require that, in determining whether to make an award or the amount of an award, the 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 decision whether to award attorneys' fees and in what amount is largely within the discretion of the trial judge but must be based on the statutory conditions. Although the exercise of that discretion is subject to appellate review, the appellate court will not disturb the discretionary ruling unless that discretion was exercised arbitrarily or the judgment was clearly wrong. *Broseus v. Broseus*, 82 Md. App. 183, 200 (1990).

This was a hard-fought case, nearly all of it over money. There were 12 days of hearings producing 13 volumes of transcript. Both parties incurred substantial fees – \$102,972 for appellant and \$120,392 for appellee – and each sought a fee award against the other. The trial court found that both parties had a substantial justification for bringing and defending the actions but also found that neither had the ability to pay the other's fees and, for that reason, denied an award to either one. Appellant makes the curious argument that, because appellee was ordered to make the monthly mortgage payment of \$4,200 as well as assume full responsibility for the entire mortgage and tax liens, to pay a monetary award of \$34,500 in monthly installments, and because he was paying \$3,000 a month rent on his apartment, he must have the ability to pay \$5,800 a month toward her attorneys' fees, notwithstanding his monthly deficit of \$6,740.

Unquestionably, appellant had a present need. Even with a monetary award, until such time as she became gainfully employed, she would have great difficulty in discharging her debt, but need alone does not suffice. The statute requires consideration of appellee's resources as well. We find no abuse of discretion or other legal error in the denial of her request.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS WITH RESPECT TO REHABILITATIVE ALIMONY AND MONETARY AWARD; COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.