Circuit Court for Montgomery County
Case No. 153063-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1978

September Term, 2019

MARTIN KATZ

v.

COLLEEN THERESE KILDALE

Arthur,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 7, 2021

Following a three-day trial in July 2019, the Circuit Court for Montgomery County granted appellant Martin Katz and appellee Colleen Kildale a judgment of absolute divorce.[1] Mr. Katz timely appealed and presents the following two questions for our review:

1. Did the trial court abuse its discretion in the amount of alimony awarded to [Ms. Kildale]?

2. Did the trial court err in awarding retroactive alimony to [Ms. Kildale]?

We answer both questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on March 28, 1982, and have two children who both reached the age of majority before litigation in this case commenced. In April 2018, Ms. Kildale filed a complaint for absolute divorce. In her complaint, she requested, among other things, an absolute divorce, *pendente lite* and permanent alimony, and attorney's fees. Mr. Katz answered and filed a counterclaim.

The parties appeared at a hearing on January 24, 2019, for Ms. Kildale's request for *pendente lite* alimony and attorney's fees. On February 26, 2019, the court entered a *pendente lite* order requiring Mr. Katz to pay Ms. Kildale $1,300 per month in *pendente lite* alimony starting February 1, 2019. The order stated, "there are no *pendente lite* alimony arrearages as of January 31, 2019[.]"

[1] In its judgment of absolute divorce, the court restored Ms. Katz to her former surname (Kildale). Accordingly, we shall refer to appellee as "Ms. Kildale" throughout this opinion, and modify the case caption to reflect the name change.

A three-day merits trial took place in July 2019, during which the parties presented evidence concerning the issues of absolute divorce, monetary award, alimony, and attorney's fees. On July 15, 2019, the court heard closing arguments, and issued an oral ruling. After concluding that the parties were entitled to an absolute divorce, the court granted Ms. Kildale a modest monetary award, $4,000 per month in indefinite alimony, and retroactive alimony dating back to May 2018, resulting in $42,000 in arrearages. The court denied Ms. Kildale's request for attorney's fees.

On November 4, 2019, the court denied Mr. Katz's motion to alter or amend the judgment of absolute divorce. Mr. Katz timely appealed. We shall provide additional facts as necessary.

DISCUSSION

As noted above, Mr. Katz presents two issues for our review: 1) whether the circuit court erred in the amount of alimony it awarded to Ms. Kildale, and 2) whether the court erred in awarding retroactive alimony. Regarding the appropriate standard of review, "After a bench trial such as this one, an appellate court 'will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.'" *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016) (citing Md. Rule 8-131(c)). We review a trial court's ultimate decision to award alimony for an abuse of discretion. *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (citing *Solomon v. Solomon*, 383 Md. 176, 196 (2004)). Against this backdrop, we turn to the issues presented.

I. THE ALIMONY AWARD

Mr. Katz challenges the court's $4,000 indefinite alimony award to Ms. Kildale. He first argues that the court failed to deduct certain ordinary and necessary business expenses when calculating his net business income.[2] Specifically, Mr. Katz claims that the court erred by failing to deduct the following amounts from his gross business income: $31,212 for his car and transportation expenses, $16,228 for office expenses, and $15,121 for meal and entertainment expenses. Secondly, Mr. Katz argues that the court erred by awarding alimony that exceeded Ms. Kildale's needs. We shall reject these arguments in turn.

A. Business Expense Deductions

At trial, Mr. Katz recounted his work history, explaining that he held numerous jobs throughout the parties' marriage. In 2002, Mr. Katz started his own business, "E-Z Track Solutions," wherein he provided consulting work for other companies. In 2015, Mr. Katz changed his company's name to "Sales Up," but continued to do "sales consulting" and "sales recruiting." He explained that he is essentially a salesperson, and that clients hire him to grow sales in challenging areas. The three business deductions noted above that Mr. Katz claims the court improperly failed to consider are derived from the Schedule C included in the 2017 joint tax return that he filed with Ms. Kildale.

i. Car Expenses

[2] Although there is no corresponding provision related to alimony, Md. Code (1984, 2019 Repl. Vol., 2020 Supp.) § 12-201(b)(2) of the Family Law Article provides that, in determining self-employed income in child support cases, the court may consider "gross receipts minus ordinary and necessary expenses required to produce income."

Regarding his expenses, Mr. Katz testified that he must "travel a lot for work." He explained, "Sometimes it's all month, sometimes it's not for a month, it's, it's sporadic, but I would say at least two weeks out of the month . . . if not more." Mr. Katz also testified that his clients do not reimburse him for his travel or meals.

On June 26, 2019, Mr. Katz submitted his third amended financial statement (the "financial statement"). The financial statement listed his monthly personal expenses, organized into various categories, including expenses for his primary residence, household necessities, recreation and entertainment, and transportation. Mr. Katz did not list any expenses for personal travel on his personal financial statement. Instead, at trial, Mr. Katz agreed during cross-examination that he claimed "100 percent" of his automobile expenses as business deductions on his tax returns, *including expenses for Ms. Kildale's two vehicles*. Although Mr. Katz had not yet prepared and filed his 2018 tax return at the time of trial, he testified that he intended to deduct "100 percent" of his vehicle expenses on his return, including gas and repairs. The parties' 2017 Joint Income Tax Return, which was admitted at trial, listed $31,212 as car expenses on Schedule C. Mr. Katz explained that he arrived at this number "based on mileage, not based on expenses." He further explained that he tracked mileage by taking "80 percent of the miles on all the vehicles, including [Ms. Kildale's]."

Because the most recent tax return was more than a year old at the time of trial, the court calculated Mr. Katz's 2019 income by reviewing deposits in Mr. Katz's bank account over the previous 16 months. The court averaged that monthly revenue, and then

annualized it to arrive at approximately $187,000, specifically stating $15,564 per month, in gross business income—an amount that neither party disputes.

Although the trial court did allow certain expense deductions from Mr. Katz's gross income such as costs for online advertising and contract labor, the trial court declined to deduct Mr. Katz's claim of $31,212 in vehicle expenses. The court explained,

> [I]n 2017, there's a number of items that appear on that Schedule C which would not apply any longer or they were non-cash deductions used for tax purposes but didn't really relate to cash flow. For example, on line no. 9, the car expense. The defendant testified that was a miles expense, so that's obviously a non-cash deduction.

Mr. Katz argues that because the evidence at trial showed that he continues to use his car for business purposes, the court should have deducted his car expenses as they appeared on the parties' 2017 joint tax return. We disagree. In issuing its oral ruling, the trial court stated,

> So, I guess I would make a couple observations is that it strikes me as a little unusual that there's such limited information here to use to determine [Mr. Katz's] actual income in that we have tax returns that go back to 2015, 2016, 2017, however, in those tax returns, [Mr. Katz] who prepared the taxes himself, combined multiple businesses[3] that were owned at the time on the Schedule C's and so, it's not that easy to determine what of those expenses are actually his and which are not.

Moreover, after calculating Mr. Katz's income, the court stated,

> So, in looking from that what represents actual income, on [Mr. Katz's] income statement, he indicates that his income from Sales Up is $2,670 out of 15,564 on average which I don't find to be credible. It doesn't make sense

[3] Indeed, Ms. Kildale testified that she was working in estate sales, and that she gave Mr. Katz an itemized list of expenses for her own business so that he could prepare the joint 2017 tax return. The itemized list included gas expenses for her two work vehicles.

to me that it would cost $13,000 in business expenses to generate $2,600 in income.

We conclude that the court did not err in declining to deduct Mr. Katz's reported car expenses from his gross business income. Mr. Katz himself testified that the $31,212 figure was based on his own calculation of 80% of the mileage both he and Ms. Kildale accrued on their vehicles in 2017. But Mr. Katz also testified that he and Ms. Kildale stopped living together on January 20, 2017. The court did not err in failing to consider Mr. Katz's claimed deduction of $31,212 for car expenses that included Ms. Kildale's two vehicles, which obviously overstated the expense as it related to his "Sales Up" business. Additionally, the court found that Mr. Katz's income and expense calculations were generally not credible in that Mr. Katz asserted that he was spending $13,000 per month to only generate $2,600 in income. We see no abuse of discretion in the court's decision to not deduct Mr. Katz's reported car expenses from his business income.

ii. Office Expenses

Mr. Katz next argues that the trial court erred by failing to deduct his reported office expenses. On the 2017 joint tax return, Mr. Katz listed $16,228 in office expenses. On cross-examination, Mr. Katz conceded that he did not know what those expenses included:

[MS. KILDALE'S COUNSEL]: Okay. Office expenses, $16,228, do you know what that is?

[MR. KATZ]: Sorry, I don't. I don't know.

[MS. KILDALE'S COUNSEL]: You don't know?

[MR. KATZ]: I don't know.

[MS. KILDALE'S COUNSEL]: All right.

[MR. KATZ]: I don't have it.

On appeal, Mr. Katz baldly asserts, "Evidence was presented by [Mr. Katz] at trial that he incurred regular business expenses, including approximately $800.00 per month in telephone expenses, and payment for other business-related or office items." The colloquy above belies that assertion. Although Mr. Katz did testify that he spent approximately $800 per month on phones for his business, and that he pays for "Triple A" and "AIG," he failed to produce sufficient evidence justifying his claim of $16,228 in office expenses. In light of the fact that Mr. Katz could not articulate a basis for the $16,228 claimed deduction, and the fact that the trial court generally found Mr. Katz not credible regarding his business operations, we perceive no error in the court's refusal to deduct these office expenses from Mr. Katz's business income.

iii. Meals and Entertainment

Finally on this point, Mr. Katz argues that the court erred by declining to deduct $15,121 from his income for meals and entertainment expenses. This figure also comes from the 2017 joint tax return, where Mr. Katz claimed $15,121 as an expense for meals and entertainment. On his personal financial statement, Mr. Katz listed $855 per month in expenses for "Dining Out." At trial, Mr. Katz explained the $855 figure as follows:

[MR. KATZ'S COUNSEL]: Let's focus on that large expense, 855. Explain to the [c]ourt your dining out expense.

[MR. KATZ]: Well, I have to travel a lot for work. I don't get paid. And also, this is, I don't get paid, reimbursed from clients for this, so this is basically all of my, in, when I travel, and I don't get reimbursed for my

meals, and so this would include the, my meals and the 50 percent that the, that I can't deduct for the taxes.

[MR. KATZ'S COUNSEL]: Okay. The other 50 percent, you run through the business?

[MR. KATZ]: The -- yes, correct.

[MR. KATZ'S COUNSEL]: Okay. This is your out of pocket?

[MR. KATZ]: That's my out of pocket.

On cross-examination, however, Mr. Katz muddied the waters in attempting to explain his dining expenses:

[MS. KILDALE'S COUNSEL]: All right. You have dining out in Section C of $855 per month, and in Section C, you have $428 per month for food, is that correct?

[MR. KATZ]: That's correct.

[MS. KILDALE'S COUNSEL]: Okay. Which of that is half of the household expense? Or is that just your individual expense?

[MR. KATZ]: That's my half.

[MS. KILDALE'S COUNSEL]: Okay. So, what your -- and I just want to make sure I'm clear -- so $428 for food and then 855 per month for dining out is your half of the expenses for the total household, correct?

[MR. KATZ]: No. 855 is my own expense, and the other one is half.

[MS. KILDALE'S COUNSEL]: Okay.

[MR. KATZ]: The grocery or the food is half.

[MS. KILDALE'S COUNSEL]: *All right. Now, the 855 for the dining out, is that in addition to, or separate from, the food items that you claim on your taxes*?

[MR. KATZ]: *I don't know*.

[MS. KILDALE'S COUNSEL]: *You don't know*?

[MR. KATZ]: *No, I don't know*.

[MS. KILDALE'S COUNSEL]: *I thought you - - well, okay. So, if you had deducted approximately $15,000 in food off of your taxes in tax year 2017 --*

[MR. KATZ]: *Uh-huh*.

[MS. KILDALE'S COUNSEL]: *-- is that, you don't know if that's inclusive of the additional $855 you're trying, you're deducting from your net income*?

[MR. KATZ]: *I, in calculating this number, I have, I don't know, I don't have the idea of what's what*.

[MS. KILDALE'S COUNSEL]: *You don't have any idea of what's what*?

[MR. KATZ]: I know --

[MS. KILDALE'S COUNSEL]: Okay.

[MR. KATZ]: -- that this is the food that is --

[MS. KILDALE'S COUNSEL]: That what?

[MR. KATZ]: This is the food that I'm eating when I'm in Atlanta --

[MS. KILDALE'S COUNSEL]: Okay.

[MR. KATZ]: -- and this is the food I'm eating, it's taking into account also food that I'm eating while I am traveling, and some

> percentage of that is, is a tax, for a tax calculation for the money that I am doing when I'm traveling that I'm not getting reimbursed for.

(Emphasis added).

First, Mr. Katz used the $15,121 meals and entertainment expense shown on the Schedule C of the 2017 tax return, a tax return for a period two years prior to the divorce. Additionally, other than his financial statement and Schedule C, Mr. Katz failed to produce any documentary evidence to substantiate his meals and entertainment expenses. In fact, Mr. Katz could not even verify that the $855 per month he claimed on his personal financial statement was separate from the $15,121 he deducted on his tax return. Finally, if $855 per month represented fifty percent of his overall meals and entertainment expenses, then the maximum business expense should have been, as Ms. Kildale's counsel pointed out on cross-examination, $10,260 per year ($855 times 12 months). Given Mr. Katz's own uncertainty regarding the dining expenses, coupled with the discrepancies in the claimed business expenses for vehicles and office expenses, we have no difficulty affirming the court's decision not to deduct $15,121 from Mr. Katz's business income for meals and entertainment expenses.[4]

[4] To the extent that Mr. Katz argues that, upon denying these business expense deductions, the court should have given him an allowance on his personal financial statement, we reject that argument. In short, there was insufficient evidence of his vehicle and office expenses, and the court did not deduct his $428 per month allowance for food or his $855 per month allowance for non-business meals and entertainment when it considered his expenses reflected on his personal financial statement.

B. Mr. Katz's Claim that the Alimony Award Exceeds Ms. Kildale's Needs

Mr. Katz also challenges the court's $4,000 alimony award because that amount exceeds Ms. Kildale's monthly needs. He correctly notes that, pursuant to her Amended Financial Statement dated July 3, 2019, Ms. Kildale's monthly expenses were $4,779 per month, and that the court calculated her monthly income to be $1,618 per month. Mr. Katz notes that this left Ms. Kildale with a monthly deficit of $3,161, and yet the trial court awarded her $4,000 in monthly alimony, $839 more than her monthly needs.

Md. Code (1984, 2019 Repl. Vol.), § 11-106 of the Family Law Article ("FL") governs a trial court's alimony award. The statute requires a trial court to consider numerous factors when determining the duration and amount of an alimony award. FL § 11-106(b). Although one factor requires the court to consider "the ability of the party seeking alimony to be wholly or partly self-supporting" and another requires the court to consider "the financial needs and financial resources of each party," there is nothing in the statute that limits a court's award to the needs of the party.

In fact, in *Boemio*, 414 Md. at 131, a case Mr. Katz cites in his brief, the Court of Appeals found that, "The Circuit Court acted within its discretion in declining to limit its award to the monthly expenses it found [wife] needed based on her current financial statement." There, a husband challenged the court's decision to award alimony that exceeded the wife's needs by $1,271. *Id*. at 129-30. The Court of Appeals recognized that, "In the vast majority of divorce cases, courts' awards will be capped in such a way by necessity—the increase in expenses when a couple lives apart rather than together is not matched by a correlating increase in income. But this is not always true." *Id*. at 130. The

Court continued, "Here, for example, in light of the pattern of savings demonstrated during the marriage, the Circuit Court was free to decide that it was fair and equitable to award [wife] an amount of alimony higher than what would suffice to pay her existing monthly bills." *Id*.

Although the finances of the parties in the instant case do not match those of the parties in *Boemio*, it was within the court's sound discretion to award Ms. Kildale "an amount of alimony higher than what would suffice to pay her existing monthly bills." *Id*. We note that the trial court found that, after deductions for other reasonable expenses, Mr. Katz earned $13,079 per month. The court recognized that, after paying the $4,000 per month alimony award to Ms. Kildale, Mr. Katz would still have $9,079 available per month, implicitly finding that he can afford to pay alimony that exceeds Ms. Kildale's needs. In a single sentence in his brief, Mr. Katz states, "the alimony award in this case of $4,000.00 per month, plus $500.00 per month toward alimony arrears to [Ms. Kildale] did not provide [Mr. Katz] with the ability to meet his needs." Mr. Katz's own financial statement belies that assertion. It shows that his total monthly expenses are only $5,774 per month.[5] With $13,079 in monthly income, Mr. Katz can easily meet his own needs despite paying Ms. Kildale $4,000 per month in alimony plus $500 for alimony arrears. Accordingly, we see no abuse of discretion in the court's alimony award.

[5] The court noted that Mr. Katz's financial statement showed that he paid $872 per month related to his tax liability and other debt. The court further noted that, absent these debts, the parties had comparable financial needs amounting to approximately $4,800 per month.

II. RETROACTIVE ALIMONY

Finally, Mr. Katz argues that the trial court erred when it awarded retroactive alimony to Ms. Kildale. Although Mr. Katz concedes that a court may award alimony retroactive to the date of filing, he argues that the court should not have awarded retroactive alimony here because the February 26, 2019 *Pendente Lite* Order contains the following phrase: "ORDERED, that there are no *pendente lite* alimony arrearages as of January 31, 2019[.]" Mr. Katz relies on the principle of *res judicata* to argue that the court's award of retroactive alimony violated the terms of the *Pendente Lite* Order.

We summarily reject this contention. Simply put, Mr. Katz fails to recognize the difference between "*pendente lite* alimony" and an alimony award issued pursuant to FL § 11-106. In *Guarino v. Guarino*, this Court explained the differences between *pendente lite* alimony and alimony that is awarded following a full merits hearing. 112 Md. App. 1, 7 (1996). There, an ex-husband argued that the court erred in awarding *pendente lite* alimony because the ex-wife's evidence "was totally insufficient to meet the requirements for 'a probable cause of action with reasonable probability of success.'" *Id*. We rejected this argument, noting that "an award of alimony *pendente lite* is made without an inquiry into the merits of the underlying action." *Id*. (citing *McCurley v. McCurley*, 60 Md. 185, 188-89 (1883)). We went on to distinguish "*pendente lite* alimony" from an alimony award under FL § 11-106:

> We have stated that the "purpose of alimony *pendente lite* is to maintain the status quo of the parties pending the final resolution of the divorce proceedings, [*Speropulos v. Speropulos*, 97 Md. App. 613, 617 (1993)], and that the award "is based solely upon need." [*Komorous v. Komorous*, 56 Md. App. 326, 337 (1983)].

> With the passage of what is now § 11-101 of the Family Law Article, the duty by either spouse to pay alimony became statutory. [*Hofmann v. Hofmann*, 50 Md. App. 240, 244 (1981)]. *Section 11-102 of that Article empowers the chancellor to award alimony* pendente lite *to either party, but provides no guidelines for making that award as found in § 11-106 which pertains to alimony*.

Guarino, 112 Md. App. at 10-11 (emphasis added) (footnote omitted).

As we made clear in *Guarino*, *pendente lite* alimony and alimony awarded under FL § 11-106 are two distinct awards governed by two distinct legal standards. That the *Pendente Lite* Order stated that there were no *pendente lite* alimony arrears as of January 31, 2019, had no bearing on whether the trial court could award retroactive alimony pursuant to FL § 11-106 following a hearing on the merits. Accordingly, we reject Mr. Katz's argument that the trial court was precluded from awarding retroactive alimony.[6]

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

[6] In their briefs, the parties debate the applicability of *Reuter v. Reuter*, 102 Md. App. 212 (1994) for purposes of *res judicata*. We reject any reliance on *Reuter* because that case concerned whether a party must demonstrate a material change in circumstances to modify *pendente lite* child support, and whether a final child support award terminates the *pendente lite* award. *Id*. at 240-41. Because a child support award is always governed by a single standard—the Maryland Child Support Guidelines—the holding in *Reuter* is inapposite.