

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2085

September Term, 2013

ALYSSA BAIYINA

v.

VARICK BAIYINA

Meredith,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 30, 2015

* 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.

In this appeal, Alyssa Baiyina, appellant (“Wife” or “appellant”), contends that the Circuit Court for Prince George’s County erred in concluding that her claim for alimony from Varick Baiyina, appellee (“Husband” or “appellee”), was barred by *res judicata*, and in denying her requests for a monetary award and attorneys’ fees.

QUESTIONS PRESENTED

Appellant presents three questions for our consideration:

1. Whether the court erred as a matter of law and abused its discretion when it ruled that Ms. Baiyina is precluded from proceeding with her claim for alimony filed in her Counter-Complaint for Absolute Divorce as a matter of *res judicata*.
2. Whether the Court erred as a matter of law and abused its discretion when the court denied Ms. Baiyina’s request for a monetary award.
3. Whether the Court erred as a matter of law and abused its discretion when the court denied Ms. Baiyina’s request for attorney fees.

We perceive neither error nor an abuse of discretion on the part of the Circuit Court for Prince George’s County, and, for the reasons that follow, affirm.

FACTS AND PROCEDURAL HISTORY

Wife and Husband were married on August 7, 1993. Two children were born during the parties’ marriage, but no issues related to custody or child support are before this Court. After Wife discovered evidence leading her to believe Husband was having an affair, the parties separated on November 19, 2009. Although there were subsequent incidents of sexual cohabitation, there was no resumption of the marital relationship. The last date on which the parties were intimate was March 11, 2011.

On February 7, 2011, Husband filed a complaint for absolute divorce on the basis of a one-year voluntary separation, contending that the parties had separated on November 19,

2009, and that there had been no cohabitation since that time. On or about June 8, 2011, Wife filed a counter-complaint for custody, child support, alimony, and other related relief; she did not request a divorce. On September 16, 2011, Husband filed an amended complaint for absolute divorce and other relief, in which he asked to be awarded alimony, both pendente lite and permanently, and a monetary award. He also filed a second amended complaint on November 3, 2011, which was later dismissed based upon Wife's motion. On November 14, 2011, and February 14, 2012, the court heard the merits of Husband's first amended complaint and Wife's counter-complaint. (Husband withdrew his request for alimony at the hearing on November 14, 2011.

On February 22, 2012, the Circuit Court for Prince George's County issued its ruling. The opinion and order reflected that, at the conclusion of Husband's case, Wife had moved for dismissal of Husband's prayer for divorce because of Husband's failure to provide proof and corroboration of the grounds. The court stated that Wife's motion in that regard had been granted, and Husband's prayer for divorce had been dismissed. The opinion noted that "[t]he matter then proceeded on [Wife's] Counter-Complaint for alimony, custody, child support and attorney's fees," and that "[m]uch of the trial time was spent on the [Wife's] prayer for alimony. The [Wife] seeks alimony or a reservation of alimony based on her Counter-Complaint for alimony." In this regard, the opinion set forth the following findings of fact and conclusions of law:

[Husband] asserts that alimony should be denied at the outset because the [Wife] did not prove and corroborate a ground for divorce. Considering the testimony of the parties as well as that of the [Husband's] Uncle and the [Wife's] Sister, the Court concludes that the [Wife] found evidence of an extra

marital relationship between [Husband] and another woman. [Wife] confronted [Husband] with that evidence and the [Husband] left the marital home and moved in with his paramour where he continues to reside. The Court finds that while the [Wife] at the outset wanted the [Husband] to leave in order to provide her with some space, the [Wife] did not at that time or for a subsequent period thereafter want the marriage to be terminated. The Court further finds that the [Wife's] willingness to engage in sexual relations with the [Husband] until March 2011 was in effect her attempt to lure the [Husband] back into the marital home.

The Court finds the [Wife] to be credible that since March of 2011 the parties have continuously [lived] separate and apart without sexual cohabitation. The Court finds that the totality of the evidence corroborates the fact that while the [Husband's] departure from the marital home in the first instance was at the [Wife's] request[,] his remaining separate, at least through March 2011, constituted desertion by him of the marriage. Further, the Court does not find the [Wife's] having had relations in an attempt to lure the [Husband] back into the marital home to have been condonation in light of the [Husband's] admitted continuation of this relationship with the paramour after that date. Accordingly, *the Court finds the [Husband's] contention that the [Wife] is not entitled to alimony on the basis of failure to sufficiently prove and corroborate a ground for divorce is without merit.*

In determining whether alimony is appropriate in any case the Court must consider all the following factors contained in Family Law Article 11-105:

1. **Ability of the Party Seeking Alimony to be Wholly or Partly Self-Supporting:** *The Court herein finds at the present time that the [Wife] is self-supporting[.]*
2. **The Time Necessary for the Party Seeking Alimony to Obtain Education or Training to Enable that Party to Find Suitable Employment:** The Court finds that the [Wife] has already found suitable employment.
3. **The Standard of Living that the Parties Established During Their Marriage:** Without question the parties established a lavish lifestyle during their marriage. That lifestyle which included numerous extensive vacations was based on the very substantial earnings of the

[Husband]. That lifestyle no longer exists for either party.

4. **The Duration of the Marriage:** The parties were married in 1993 and are still married.
5. **The Contributions Monetary and Non-Monetary of Each Party to the Well Being of the Family:** While the parties were together both made equal contributions to the wellbeing of the family. The [Husband's] contributions were principally monetary. The [Wife's] were principally non-monetary.
6. **The Circumstances that Contributed to the Estrangement of the Parties:** The parties separated due to the [Husband's] extra marital affair.
7. **The Age of Each Party:** The [Husband] is 41 and the [Wife] is 47 years of age.
8. **The Physical and Mental Condition of Each Party:** The [Husband] is in good physical and mental condition. The [Wife] has some minor health problems.
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:** This factor was a very major one in the testimony herein. The [Wife] contends that the [Husband] has tremendous earning capacity as demonstrated by prior earnings. The [Wife] suggests that the [Husband's] current income is only temporarily less awaiting the conclusion of this case. The Court finds that the evidence does not bear out her contention. It is true that the [Husband] earned a great deal of money until 2007. At that time he left a very lucrative sales position to enter into a business venture which the [Wife] referred to as the [Husband's] "dream". The uncontradicted testimony from the [Wife] and her sister was that the stress of the [Husband's] employment in 2007 had him to the breaking point. His leaving that employment was the result of his wanting to pursue the venture and to relieve himself of stress. But in addition,

the house had just been refinanced and there was enough cash to cover in the interim until the new business became profitable. The [Wife's] sister's testimony was that the venture ultimately failed because the funding was not obtained. All this took place two years prior to the parties' separation. The Court finds in no way could the [Husband's] leaving his lucrative employment be considered a stratagem to avoid paying alimony.

The Court finds that the [Husband's] future income potential at this time is highly speculative. Of significance is the fact that the [Husband] has been away from actively selling radio advertising for a period of almost five years. Further, the economy today is significantly different th[a]n it was five years ago and there is no evidence to suggest that the [Husband] is any[]more capable of enduring high stress now than he was in 2007. Accordingly, *the Court finds that at the present time there is little ability on the part of the [Husband] to meet his needs while also meeting the needs of the party seeking alimony.*

10. **Agreement Between the Parties:** None in this case.
11. **The Financial Needs and Financial Resources of Each Party:** Neither party has assets of any substance and both have substantial debt.

Considering all the above the Court concludes that rehabilitative alimony is not appropriate herein.

The Court may award alimony for an indefinite period if it finds that due to age, illness, infirm[ity] or disability the party seeking alimony cannot be reasonably expected to make substantial progress towards becoming self-supporting or even after the party seeking alimony will have made as much progress towards becoming self-supporting as can reasonably be expected the respective standards of living for the parties will be unconscionably disparate.

As indicated above the Court finds that the [Wife] is already self-supporting. Further, *the Court finds that there is no basis to conclude that the parties' standard of living will be unconscionably disparate.*

The [Wife] makes the alternative request of the Court that alimony be reserved. *The Court does have the jurisdiction to reserve alimony as is appropriate in certain circumstances. The Court does not find that this is such a case.* The Court herein cannot find from the evidence that the [Wife] in the reasonably foreseeable future will be in circumstances that would justify an award of rehabilitative or indefinite alimony. *There is no evidence to suggest that the [Wife] will be other than self-supporting in the reasonably foreseeable future. Nor is there sufficient evidence to demonstrate that in the near future the [Husband's] income will dramatically increase for the reasons stated above.*

Accordingly, the [Wife's] prayer for indefinite alimony will be denied.

(Italics added.)

The court went on to find that Husband's "actions in this litigation caused the [Wife] to incur attorney's fees far beyond that which would normally have been necessary," and awarded her \$10,000.00 in attorney's fees. The parties were awarded joint legal custody of the children. The court awarded physical custody to Wife, and Husband was awarded reasonable visitation and ordered to pay child support and arrears. The final provision of the court's opinion and order dated February 22, 2012, stated: "ORDERED, that this case be and hereby is considered closed for statistical purposes only."

Wife did not file an appeal from the court's order of February 22, 2012.

On December 20, 2012, Husband filed a complaint for absolute divorce on the grounds of a voluntary separation for more than one year. This complaint was assigned a new case number by the circuit court. On March 8, 2013, Wife filed a counter-complaint for absolute divorce and other related relief. She noted that, per the court's order of February 22, 2012, Husband had been ordered to pay child support, but alleged that a material change in circumstances had occurred justifying an increase in the child-support amount. She also

requested that she be granted an absolute divorce based on Husband's adultery, or, in the alternative, on grounds of a separation in excess of one year. Wife also alleged that she was not self-supporting; that Husband's income had increased and that he now earned "excessively more" than Wife; and that she was seeking alimony on the grounds of the "disparity in income" between the parties and Husband's ability to pay. Additionally, Wife requested that the court grant her a monetary award and counsel fees.

On October 3, 2013, the parties appeared for a merits hearing before a different judge than the one who had their previous claims that were resolved in the opinion and order of February 22, 2012. At the outset of the hearing, counsel for Husband stated that the issues to be heard by the court were the respective claims for divorce and Wife's motion to modify child support, but Wife's counsel insisted the hearing was for "all outstanding issues. So it's divorce, *alimony*, attorney's fees, modifications, support." (Emphasis added.) The trial court responded that, in its view, the February 22, 2012, decision denying Wife's alimony claim precluded, as *res judicata*, any further attempt by Wife to obtain alimony. Wife disagreed, arguing that she did not pursue an absolute divorce at the earlier proceeding and "the Court can't really award indefinite alimony when you don't have an absolute divorce proceeding. Today, we have an absolute divorce proceeding. So [Wife] has every right to come back to the Court to ask the Court to hear the case on indefinite alimony." Wife's counsel did concede that Wife was precluded from going forward on any claim for rehabilitative alimony "at this juncture," but argued that the same was not true as to indefinite alimony.

The court reserved on the issue of alimony, and took testimony from Husband and his corroborating witness on Husband’s complaint for absolute divorce. The court permitted the parties to submit supplemental memoranda addressing whether Wife was entitled to pursue an alimony claim despite the February 22, 2012, order denying her previous claim. The parties reconvened on October 25, 2013, for a hearing on the alimony issue. After entertaining argument, the court denied Wife’s alimony claim, citing two cases in support: *Cruz v. Silva*, 189 Md. App. 196 (2009), and *Hughes v. Hughes*, 216 Md. 374 (1958). The court proceeded to take testimony on financial issues, in light of Wife’s request for attorney’s fees and a monetary award, but the hearing ended before those issues were resolved.

A third hearing was conducted on December 2, 2013. In the end, the court denied Wife’s requests for a monetary award and attorney’s fees, finding that she had failed to meet her burden to show that Husband had any assets beyond those listed on his long-form financial statement, filed pursuant to Maryland Code (1984, 2006 Repl. Vol.), Family Law Article (“FL”), § 9-207. The court found that there were not sufficient marital assets on which to base a marital award, and it declined to award Wife attorney’s fees because it found that Husband did not have the ability to pay and that Wife lacked substantial justification to pursue the property issues in what was, essentially, a “no-asset case.” This appeal followed.¹

¹The court granted Husband an absolute divorce, in an order captioned “Judgment of Absolute Divorce,” dated October 25, 2013, and apparently docketed on October 31, 2013. There was an error in the order, however, and by order of court also dated October 25, 2013, but evidently docketed on November 21, 2013, an “Amended Judgment of Absolute Divorce” was entered. On December 16, 2013, an order of court was docketed vacating the amended judgment of absolute divorce from October 25, 2013, and denying Wife’s request
(continued...)

STANDARD OF REVIEW

Because this was an action tried without a jury, Maryland Rule 8-131(c) governs our review, and it provides:

When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It 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.

Here, Wife contends that the court both erred and abused its discretion in denying her claims for alimony on the basis of *res judicata*, and for a monetary award and attorney’s fees. We review, for legal error, the court’s legal conclusions regarding the effect of *res judicata*. *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass’n, Inc.*, 192 Md. App. 719, 734 (2010).

The decision whether or not to make a monetary award or an award of attorney’s fees is committed to the sound discretion of the trial court, and we review such decisions for abuse of discretion. *See, e.g., Flanagan v. Flanagan*, 181 Md. App. 492, 505 (2008) (while the ultimate determination of whether to grant a monetary award is discretionary, the court “must follow specific steps before granting a monetary award.”); *Collins v. Collins*, 144 Md. App. 395 (2002).

¹(...continued)

for alimony *nunc pro tunc* to October 25, 2013. The December 16 order also denied Wife’s request for marital award. In any event, the parties were divorced pursuant to the initial judgment of absolute divorce, docketed October 31, 2013. Wife noted her appeal of the October 31 order on November 1, 2013, and noted a second appeal as to the December 16 order — which was docketed on January 9, 2014 — on February 7, 2014.

DISCUSSION

I. Wife’s Alimony Claim

As noted above, the court denied Wife’s claim for alimony on the basis of its conclusion that the claim, having been previously denied after a hearing on the merits, was barred by *res judicata*. In *Gonsalves v. Bingel*, 194 Md. App. 695, 709-10 (2010), we described *res judicata* as follows:

Res judicata (“a thing adjudicated”) is “an affirmative defense [that] bar[s] the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit.” *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 106, 887 A.2d 1029 (2005) (quoting BLACK’S LAW DICTIONARY 1336-37 (8th ed. 2004)). See also *Anne Arundel County Ethics Comm’n v. Dvorak*, 189 Md. App. 46, 88, 983 A.2d 557 (2009) (same). By preventing parties from relitigating matters that “have been or could have been decided fully and fairly,” the doctrine of *res judicata* “avoids the expense and vexation attending multiple lawsuits, conserves the judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions.” *Norville*, 390 Md. at 107, 887 A.2d 1029 (quoting *Murray Int’l Freight Corp. v. Graham*, 315 Md. 543, 547, 555 A.2d 502 (1989)) (emphasis in original). The elements of *res judicata* are:

(1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits.

Id. at 107, 887 A.2d 1029 (citations omitted).

Here, there is no dispute that the parties to the instant appeal are the same as the parties in the litigation that resulted in the February 22, 2012, denial of Wife’s alimony claim.

Nor — despite Wife’s contention at oral argument that neither the second nor the third

element of *res judicata* was met here — is there any explanation of how Wife’s present alimony claim is different than the 2012 alimony claim. Wife argues in her brief that *res judicata* does not apply here because “there has been no finality of the issues in this case,” arguing that “[t]he parties in this matter were never awarded an Absolute Divorce at any time.”

Wife’s principal argument is that, because the February 22, 2012, order did not grant Husband’s claim for a divorce, it was not a final judgment on the merits as to alimony. As quoted above, however, the court’s February 22, 2012 order was a complete adjudication of Wife’s claim for alimony, and was embodied in a final judgment that disposed of all claims then pending before the court. “Because a ‘claim’ encompasses all rights the plaintiff has to remedies against the defendant respecting all or any part of the transaction or series of connected transactions out of which the claim arises, the doctrine of *res judicata* bars subsequent litigation not only of what was decided in the original litigation of the claim but also of what could have been decided in that original litigation.” *Boyd v. Bowen*, 145 Md. App. 635, 656 (2002) (citing *Gertz v. Anne Arundel County*, 339 Md. 261, 269 (1995)).

Wife further asserts in her brief that she “was denied alimony in the [February 2012] proceeding . . . solely because [Husband] did not have sufficient income to meet his needs and hers at the time.” But, as quoted above, when the trial court analyzed the claim for alimony in February 2012, the court considered all of the FL § 11-105 factors. In addition to the court’s finding that, “at the present time there is little ability on the part of [Husband] to meet his needs while also meeting the needs of [Wife],” the court also found that Wife was

self-supporting, had already found suitable employment, and that her claims about Husband’s “future potential income” were unsupported and “highly speculative.”

Wife also contends that *res judicata* is an affirmative defense and that Husband, who was given leave of court to belatedly file an answer to Wife’s counter-complaint in court on October 3, 2013, failed to raise it in his answer and has therefore waived the issue. Wife does not contend that the court properly could not raise *res judicata* as a bar to her alimony claim. Instead, Wife points to Rule 2-323(g), which deals with pleading affirmative defenses, including *res judicata*, in an answer. That rule provides, at subpart (13), that *res judicata* is an affirmative defense that shall be set forth in an answer. Until this appeal, however, Wife has never argued that *res judicata* cannot be validly raised in this case because it was not raised in Husband’s answer. *See* Rule 8-131(a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . .”). *See also Boyd v. Bowen, supra*, 145 Md. App. at 655.

Furthermore, we held in *Campbell v. Lake Hollowell Homeowners Ass'n*, 157 Md. App. 504, 527-29 (2004), that the failure of a defendant to specially plead the similar defense of collateral estoppel would not preclude a court from resolving a case on the basis of that principle if it was in the interest of judicial economy to do so. We observed:

The Supreme Court has held that in “special circumstances[,] [m]ost notably, ‘if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised.’” *Arizona v. California*, 530 U.S. 392, 412, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (quoting *United States v. Sioux Nation of Indians*, 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980) (Rehnquist, J.,

dissenting)). In so holding, the Court noted that “[t]his result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.” *Id.* (quoting *Sioux Nation*, 448 U.S. at 432, 100 S.Ct. 2716 (Rehnquist, J., dissenting)). The Court of Appeals reached a similar conclusion in *Johnston v. Johnston*, 297 Md. 48, 465 A.2d 436 (1983).

* * *

[In *Johnston*, the Court of Appeals reached an issue that had not been specially pleaded in an answer, and stated:] “[W]e believe that in the interests of judicial economy it is appropriate for us to address it as it is dispositive of the matter before us.” *Id.* at 59, 465 A.2d 436. The Court thus declared that, in the interests of judicial economy, it may *sua sponte* invoke *res judicata* or collateral estoppel to resolve a matter before it.

. . . To now permit appellant to relitigate this issue or to remand this case for the sole purpose of permitting the Association [the defendant] to raise this defense would constitute an unacceptable waste of the parties’ and the circuit court’s resources, particularly when appellant was not prejudiced by the Association’s belated assertion of that defense. Indeed, appellant was given the opportunity to present any argument he might have had in connection with this issue below. We therefore hold that the court did not commit reversible error in granting summary judgment in favor of the Association as to appellant's derivative action.

Similarly, in the present case, it would have been a waste of time for the circuit court to permit the parties to fully relitigate an issue that had previously been litigated. Given the fact that appellant did not bring to the circuit court’s attention the fact that Husband’s answer did not plead *res judicata*, we conclude that the circuit court did not err in raising the issue *sua sponte*.

On the merits of the issue, Wife also contends that both cases cited by the trial court in support of its *res judicata* ruling — *Hughes v. Hughes*, 216 Md. 374 (1958), and *Cruz v. Silva*, 189 Md. App. 196 (2009) — are inapplicable. We disagree.

In *Hughes*, the Court of Appeals clearly stated that “the right to alimony cannot ordinarily be relitigated, certainly not upon a motion for rehearing filed after the decree is enrolled.” *Id.* at 377. And in *Cruz*, we held that a party may pursue a claim for alimony even without a divorce being granted, provided that the party can prove that there are grounds upon which a divorce could be granted. We stated: “The failure of the trial judge in this case to issue a decree of divorce did not, *ipso facto*, invalidate [Ms. Silva’s] request for alimony. To prevail, however, [Ms. Silva] was still required to prove a case that would have entitled her to divorce, either limited or absolute.” 189 Md. App. at 225.

Here, the trial court did not err in finding that the question of Wife’s entitlement to alimony already had been litigated, and could not be further considered, due to *res judicata*. All the elements stated above were satisfied — the parties are the same, the question of Wife’s entitlement to alimony is the same issue as that raised and decided previously, and the February 22, 2012, order was an appealable final judgment on the merits of that issue that was never appealed. Moreover, in February 2012, the trial court did find that there were grounds for divorce present, namely desertion by Husband. Although the court did not grant a divorce at that time, due to the lack of corroboration, it fully considered the merits of Wife’s alimony claim, and would have been able to award her alimony, under the reasoning of *Cruz*, because a ground for divorce had been established. Because that ruling was not appealed, the court did not err in refusing to revisit the issue in the present case.

II. Monetary Award

At trial, Wife testified that Husband had greater earning potential than his financial statement revealed, and insisted that he was entitled to stock options as co-founder of The Real Hip Hop Network. She also argued that Husband had some interest in an entity called Caribbean Blue and Real Star Communications. Husband denied having any interest in either of these entities. He noted that he currently works for Radio One, and it would be a conflict of interest for him to work for a competing media venture. His payroll records from Radio One were admitted into evidence at trial. Although Husband did testify that he was a co-founder of The Real Hip Hop Network, he also testified that he left its employ in 2010, and that he neither had any ongoing interest in that business, nor did he have any expectation of realizing any money from it in the future. He denied having any stock options of any kind. Wife was unable to prove her claim that Husband was not being truthful about this, and her testimony on cross-examination demonstrated that she had no evidence to support her suspicions regarding this alleged financial resource:

[BY COUNSEL]: Ms. Baiyina, what is the basis of your belief that your husband is still in the business of consulting with [T]he Real Hip Hop Network?

[BY WIFE]: As I said, I believe that [Husband] would not invest that much time and energy for four years, based on the character that I once knew, to just walk away from that. He may not be actively involved on a daily basis, but I'm sure that he is brought in for specific events. And if there's an opportunity for him to tie himself into something from Radio One to help the network, he will do that.

Q. Other than your belief, do you have any proof that your husband works as a consultant for the Real Hip Hop Network?

A. My ex-husband.

Q. I'm sorry.

A. **I have no information in regards to that, specifically, that I can prove.**

Q. You also state that you believe that he has an ownership interest in not only the Real Hip Hop Network, but in the Caribbean Blue and Real Star Communication.

A. Yes.

Q. And other —

A. Yes, he told me that.

Q. And other than your belief, do you have anything that would prove that he actually does have an ownership interest in these entities?

A. All computers, equipment, file cabinets, [Husband] has all that information, so **I have no physical proof**. If they exist, he would have it, because those were the things that he took from the home.

(Emphasis added.)

The trial court dealt with the marital property issues, and denied Wife's requests for a monetary award and attorney's fees, rendering its opinion from the bench:

[THE COURT]: So, the parties have identified the marital property, which is set forth in Joint Exhibit Number 1.

The next step this Court has to do is value the property. There are factual discrepancies as to the value of certain assets, and I'll just go through them briefly, only the ones that are disputed.

There's a Southwest Airlines Retirement account. [Husband] values it at \$50,000, [Wife] values at a thousand forty-five forty-eight [\$1,045.48]. The Court finds credible her testimony as to the value of that asset.

Bank accounts. I guess there is no indication on the husband's side — I guess that's his bank account? But [Wife] sets it as [Husband's] bank account. He sets his bank account as \$1,270.00 at the time that he filed. [Wife] sets it at \$10,000. The Court finds credible the testimony of [Husband] that the value of that bank account is \$1,270.

Stocks and investments, again, the wife's assertion that they are titled in the husband's name. He and his counsel accept the assertion, I assume, if there were any, but he states there are no stocks or investments. She states that there are stocks and investments in the amount of \$2,478.84. As to that dispute, the Court finds credible [Husband's] testimony that he has no stocks or investments.

Personal property. The wife asserts that [Husband] has personal property in the amount of \$5,000. He asserts that he has personal property in the amount of \$2500. The Court finds credible [Husband's] testimony that the value of his personal property is \$2500. The parties have been separated for approximately four years, I think it is. As to the personal property of the wife, there's a minor discrepancy there, \$1,500.

Bank accounts, again, owned by the wife, [Husband] asserts that she has \$10,000 of money in that account, whatever account it is. There is no specification as to what the account is or where it is. She stated she only has \$1,000 in a savings account as a loan for her son's tuition. The Court finds credible the testimony of [Wife] that there is \$1,000 in that account.

As to the Hip-Hop Network, [Wife] asserts that [Husband] has an interest in the Hip-Hop Network, and it has stock and it's publicly traded, and he is, at some point, to get a distribution of that stock. [Husband] says he has no interest in The Hip-Hop Network. His interest in it ended when he joined Radio One. He has not received — or is not going to receive or has not received any stock from that. **The Court finds credible that testimony of [Husband] that he has no interest in Hip-Hop Network.** It ended when he joined Radio One. He has not and does not anticipate receiving any stock distribution from that company.

The same goes for Caribbean Blue and Real Star Communications. [Wife] says that [Husband] has an interest in those two entities. He says he does not. [Wife] asserts that [Husband's interest] is worth \$25,000. [Husband] asserts that he has no interest in it, not that they don't exist, just that he has no interest in it. **The Court credits [Husband's] testimony on that issue, that he has no interest in it.**

The Court did not find that [Wife] has met her burden, and it is her burden, to establish that [Husband] has anything other than what he listed on his 9-207 statement. The Court cannot and does not find it sufficient to go on her belief that he owns x, y, and z. So, to that end, the value is decided.

As to the third step the Court has to do is, if the Court finds that looking at the parties' assets as they are titled that it is an inequitable distribution, then the Court may award a monetary award and go through the factors to determine that.

Looking at the 9-207, which encompasses the marital assets in this case, **the Court does not find that the assets of the parties, as they are currently titled, create an inequity between the parties.** The testimony in this case, unfortunately, is that not only did this marriage dissolve, that the high lifestyle that the parties once enjoyed dissolved because [Husband] could not take the stress of where he was working and he left that employment.

This is somewhat detailed in [the February 22, 2012 order]. And as a result, the parties' life crumbled. They are now in the process of picking it back up again, but, unfortunately, **the Court agrees with [Husband's] counsel in that this is primarily a no asset case.**

There is no home. It was foreclosed upon. Any equity in that home was taken out by the parties I assume at the consent of [Wife] because you need to do that to refinance to get the equity out. Those funds w[ere] used to support their children and the family during the time that [Husband] was not working. I don't find any dissipation on the part of [Husband] and, so, therefore, **the Court's going to decline to award a marital award because there is [sic] no assets to award a marital award because there's no assets to award a marital award.**

As to the issue of attorney fees, the Court declines to award any attorney fees in this case also to [Wife]. First of all, I don't find that [Husband] at this point has the financial ability to pay.

Second of all, I don't really find that there was substantial justification for the division of marital assets. It came up at the last minute. There was no indication prior that there were any marital assets to be divided.

The parties hurriedly put together a 9-207 statement as they sat in court, and, so, therefore, the Court declines to award attorney fees.

(Emphasis added.)

In her brief, Wife argues that the

trial court failed to identify whether the Real Hip Hop Network Company was a marital or non-marital asset . . . the trial court erred as a matter of law and abused its discretion by failing to determine whether the Real Hip Hop Network Company was a marital or non-marital asset, by failing to value the asset, or by failing to divide the property on an ‘if, as and when’ basis.

We disagree that the trial court is obligated to characterize non-existent property as marital or non-marital. Here, the trial court found that there was no asset related to the Real Hip Hop Network. That finding was not clearly erroneous. Wife simply failed to persuade the court that Husband had any stock (or options to purchase stock, or any other sort of deferred compensation or interest whatsoever) in the Real Hip Hop Network.

Wife also complains, without citation to the record, that the court “abused its discretion” when it “did not consider [Husband’s] excess income of \$34,718.13 which was not included in his financial statement filed in the court record dated October 2, 2013,” alleging that Husband, at trial, “did not submit any evidence to support his testimony that he used the monies earned in September and October, 2013 to pay bills.” But testimony is evidence. Husband testified that he is a salesman who works on commission, “which means if I don’t sell anything, I don’t get anything. So, my commission varies from month to month. I don’t have a fixed wage. One month I could make two thousand dollars, the next month I can make 50,000. It’s based on whatever I sell.” The trial court was entitled to find, and did find, Husband’s testimony credible.

Husband testified that his paycheck is deposited into an account at Citibank, that he pays his bills out of that account, and the amount of funds in the account fluctuates. Wife was not able to overcome Husband's evidence with any evidence of her own; she merely argued its weight, as she continues to do on appeal. We reject the premise of Wife's assertion that the trial court "abused its discretion" by failing to consider what Wife terms to be excess income, but which Husband explained as the proceeds of an unusually profitable month, which then went into paying bills. The court did not abuse its discretion in refusing to make a marital award to Wife.

III. Attorney's Fees

Finally, Wife contends that the trial court both "erred as a matter of law and abused its discretion" in denying her request for attorney's fees. She cites FL § 11-110(b), which provides that a court **may** award "reasonable and necessary expenses," which may include attorney's fees, but it cannot do so without considering both the financial needs and financial resources of each party, and whether there was substantial justification for prosecuting or defending the proceeding. FL § 11-110(c). Wife does not dispute that the court considered both prongs of FL § 11-110(c). The court stated on the record that it was denying Wife attorney's fees, "[f]irst of all," because of its finding that Husband did not have the present ability to pay, and "[s]econd of all," because of its finding that there was no substantial justification for three days of hearings on what was essentially, as Husband argued from the beginning, a no-asset case. We "will not disturb an award [of counsel fees] unless the exercise of discretion was arbitrary or the judgment was clearly wrong." *Broseus v. Broseus*,

82 Md. App. 183, 200 (1990). Here, Wife has failed to demonstrate either clear error or an abuse of discretion as to any of the trial court's rulings in this case.

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S
COUNTY AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**