

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ROYSON FABIEN,)	S. Ct. Civ. No. 2015-0064
Appellant/Plaintiff,)	Re: Super. Ct. DI. No. 115/2014 (STT)
)	
v.)	
)	
ANGELICA FABIEN,)	
Appellee/Defendant.)	
_____)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Debra S. Watlington

Considered: February 16, 2016
Filed: September 21, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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Attorney for Appellant,

Angelica Fabien
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Pro se.

OPINION OF THE COURT

SWAN, Associate Justice.

Appellant, Royson Fabien, appeals the Superior Court's July 14, 2015 divorce decree, which dissolved his 5-year marriage to Appellee, Angelica Fabien,¹ and, *inter alia*, required him to pay her alimony of \$600 monthly for ten years, commencing August 1, 2015, with payments to terminate earlier if she remarries. Royson also challenges the Superior Court's adjudication of the issue involving the funds the parties held in their joint Banco Popular savings account. Overall, we find merit in Royson's claims. Accordingly, we reverse and remand this case to the Superior Court for further adjudication consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Royson and Angelica were married on October 16, 2009 in St. Thomas, U.S. Virgin Islands, where they resided for the duration of their marriage. The parties' marriage produced two children, both of whom are minors. For his employment, Royson operated A&R Transportation with co-owner, Addie Richards, prior to managing and operating his business, Fabien's Trucking, LLC, for approximately seven years. Angelica, on the other hand, derived her income from her employment with St. Thomas Marriott Vacation Club as a housekeeping supervisor. The parties lived together with their two minor children in a two-bedroom apartment in St. Thomas until April 2014, when their marriage began to deteriorate.

In April 2014, a domestic disagreement between the parties resulted in Angelica obtaining a temporary restraining order against Royson. Royson vacated the parties' apartment in compliance

¹ Appellee, Angelica Fabien, attempted to participate in this appeal by filing a response brief and a proposed supplemental joint appendix on November 20, 2015. However, Royson filed a motion to strike those filings from the record, on the ground that Angelica's proposed supplemental joint appendix consisted of documents that were not filed with the Superior Court or made part of the Superior Court proceedings, and because her response brief relied on those documents. This Court granted Royson's motion to strike on December 16, 2015, and provided Angelica 14 days in which to file a response brief that did not rely on any of the documents in her proposed supplemental appendix. Angelica, however, did not file such a brief.

with the restraining order, and, together with Angelica, executed a *pendente lite* agreement on May 9, 2014 to temporarily resolve the issues involving their minor children.²

While the parties were separated, Royson filed an action for divorce on July 30, 2014. On August 18, 2014, Angelica filed an answer and counterclaim seeking alimony of \$700 to \$800 monthly to assist her with rent payments, among other requests. The Superior Court referred the parties to mediation, and after mediation resulted in an impasse, scheduled a trial on May 14, 2015 to decide the issues of child custody, alimony, and the distribution of personal property.

At trial, Angelica appeared *pro se* with a court-appointed Spanish interpreter. Royson appeared with counsel. Both parties testified and presented evidence, which the Superior Court examined in consideration of the issues raised.

After the trial, the Superior Court issued its findings of fact and conclusions of law and entered a decree of divorce on July 14, 2015, granting Royson a divorce absolute from Angelica based on the complete breakdown of their marital relationship. The decree granted the parties joint legal custody of their minor children but provided Angelica sole physical custody and extended liberal visitation rights to Royson. The court further adjudged that Royson pays the outstanding balance on the 2009 Toyota Corolla of \$2,226 as of May 14, 2015; that Angelica be awarded sole ownership of the 2009 Toyota Corolla; and that Royson pays any outstanding rent owed as of June 30, 2015 on the apartment they had leased. The Superior Court also equitably divided the parties' joint debt of \$6,850. On the issue of the funds the parties held in their joint Banco Popular savings account, the Superior Court concluded that because no funds were available in the account the court could not resolve the matter. Finally, the court resolved the issue of alimony by ordering Royson

² The record reveals that the Magistrate Division of the Superior Court of the Virgin Islands dismissed with prejudice the action for domestic violence that Angelica filed against Royson.

to pay Angelica \$600 monthly for ten years, commencing August 1, 2015, with payments to terminate earlier, if she remarries. This timely appeal ensued.

II. JURISDICTION AND STANDARD OF REVIEW

Title 4, section 32(a) of the Virgin Islands Code provides, in pertinent part, that “[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law.” Since the Superior Court’s July 14, 2015 divorce decree constitutes a final judgment, this Court possesses jurisdiction over this appeal. *See Bradford v. Cramer*, 54 V.I. 669, 671 (V.I. 2011) (final order in a divorce case is a final appealable judgment); *see also Etienne v. Etienne*, 56 V.I. 686, 691 (V.I. 2012).

The standard of review in examining the Superior Court’s application of law is plenary, while findings of fact are only reviewed for clear error. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). Additionally, we review the Superior Court’s award of alimony and distribution of property in divorce for abuse of discretion. *See Browne v. Browne*, 45 V.I. 625, 627 (V.I. 2004) (citing *Feddersen v. Feddersen*, 68 F.Supp.2d 585, 590 (D.V.I. App. Div. 1999)); *see also Inniss v. Inniss*, 65 V.I. 270, 275 (V.I. 2016).

III. DISCUSSION

A. Principles governing alimony inquiry.

On appeal, Royson impugns the Superior Court’s order requiring him to pay \$600 monthly in alimony to Angelica for ten years commencing August 1, 2015, with payments to terminate earlier upon her remarriage. Royson argues that the Superior Court erred because it relied on erroneous factual findings to determine that Angelica is entitled to an award of alimony. Alternatively, he argues that even if an award of alimony to Angelica were appropriate, the court abused its discretion in awarding her \$600 monthly. We agree.

Alimony is statutorily authorized by title 16 section 109(3) of the Virgin Islands Code, which provides that:

Whenever a marriage is declared void or dissolved the court may, without regard to any determination that the breakdown of the marriage was the fault of one party or the other, further decree . . . for the recovery for a party determined to be in need thereof an amount of money, in gross or in installments, as may be *necessary for the support and maintenance of such party* . . .

16 V.I.C. § 109(a)(3) (emphasis added).³ More succinctly, “a party determined to be in need may receive, from the other party, money in gross or in installments, as may be necessary for the support and maintenance of such party.” *Berrios-Rodriguez v. Berrios*, 58 V.I. 477, 485 (V.I. 2013).

In setting an alimony award, the first inquiry is whether the parties will be “similarly situated after the divorce.” *Id.* at 485. If the Superior Court finds that the parties’ resources will be generally comparable after the divorce, the inquiry ends there. *Id.* If, however, the court finds that that the divorce causes an economic disparity between the parties, it must strike “the appropriate balance between the party in need for support . . . and the other party’s ability to pay.” *Id.*; *see also* 16 V.I.C. § 345(a) (“The amount provided . . . shall be proportioned to the resources of the person giving such support and to the necessities of the party receiving it, and shall be reduced or increased in proportion to the resources or the necessities of the latter.”). Notably, “[i]t is a reality of divorce that economic difficulty often ensues for both parties because the same income cannot support two households to the same standard of living as one household was able

³ “Since the 1973 amendment of the [statute], the law of alimony has shifted from a fault based system to a more contemporary need-of-the-spouse scheme, effectively rendering the amended 16 V.I.C. § 109 a need-based rule.” *Berrios-Rodriguez v. Berrios*, 58 V.I. 477, 482 (V.I. 2013) (quoting *Hamilton v. Hamilton*, 38 V.I. 3, 7 (V.I. Super. Ct. 1996)).

to enjoy.” *Berrios-Rodriguez*, 58 V.I. at 486 (quoting *Anderson v. Anderson*, 2007 WL 957186, at *7 (Tenn. Ct. App. Mar. 29, 2007)).

Moreover, we also emphasized that in applying the test for alimony “the Superior Court should not simply look to the parties’ current finances, but may consider their potential for future earnings based on their educational background, employment history, and other relevant factors.” *Id.* at 485. As a reminder, “[a]limony is neither a punishment for the payor nor a reward for the payee. Nor should it be a windfall for any party.” *Aronson v. Aronson*, 585 A.2d 956, 961 (N.J. Super. Ct. App. Div. 1991). “[R]egardless of the payor spouse’s ability to pay more, the recipient spouse’s demonstrated need must . . . constitute the maximum permissible alimony award.” *Roberts v. Roberts*, 335 P.3d 378, 384 (Utah Ct. App. 2014) (quoting *Jensen v. Jensen*, 197 P.3d 117 (Utah Ct. App. 2008)). Distinctly, “[w]hether an award of alimony shall be made as well as the amount to be awarded, is within the discretion of the court, having regard to . . . all . . . circumstances of the case.” *Burch v. Burch*, 2 V.I. 596, 598 (V.I. 1953). Consequently, “this Court will not disturb the Superior Court’s ruling absent an abuse of discretion.” *Rivera v. People*, 64 V.I. 540, 551-52 (V.I. 2016) (quoting *Percival v. People*, 62 V.I. 477, 490-91 (V.I. 2015)).

B. The Superior Court relied on erroneous factual findings to determine that Angelica is entitled to an award of alimony.

Because Angelica requested alimony, she bore the burden of substantiating her claim that she has the need for alimony and that Royson has the financial ability to pay for her purported living expenses. *See Berrios-Rodriguez*, 58 V.I. at 490 (noting that a plaintiff seeking an award of alimony has “the burden of proving all the elements of [t]he[] claim for alimony”) To prove her need for alimony, Angelica offered into evidence her monthly budget, which listed the following expenses: \$257 monthly for a 2009 Toyota Corolla; \$200 monthly for gasoline for her

car; \$51 monthly for telephone; \$240 monthly for CIGNA healthcare insurance; \$150 monthly for cable and internet; \$72 monthly for powdered milk; \$100 monthly for diapers; \$350 monthly for food; \$400 monthly for child care for one of the minors; \$70 monthly for child care for the other minor; \$40-\$100 monthly for hospital payments; and \$135 monthly for utilities. Accordingly, Angelica's combined monthly expenses, as accepted by the Superior Court, are approximately \$2,065 to \$2,125.

On the other hand, the Superior Court found that Angelica's gross income bi-weekly is approximately \$1,000 to \$1,200. This finding is supported by Angelica's testimony that she was employed full-time at St. Thomas Marriot Vacation Club as a housekeeping supervisor earning \$14.10 per hour. Accordingly, in any given month, Angelica would earn a monthly income of approximately \$2,000 to \$2,400 while her combined monthly expenses would be approximately \$2,065 to \$2,125. The Superior Court, however, excluded the \$650 monthly rent payments from Angelica's monthly expenses because it found that Royson paid the rent on past occasions. Nevertheless, because Angelica will now pay the rental payments that Royson previously paid, the Superior Court granted her \$600 monthly in alimony.

A thorough review of the manner in which the Superior Court computed Angelica's monthly expenses demonstrates that it is amiss and clearly flawed. Numerous considerations lead to this inescapable conclusion. We note at the outset that the Superior Court concluded as a matter of law that "[Angelica] is entitled to an award of alimony to assist *her with housing and other expenses related to the maintenance of the family*" (J.A. 14) (emphasis added), which illustrates that the Superior Court understood alimony as payment from one spouse to a former spouse and the family. This definition of alimony is incorrect and confounds the purpose of alimony.

It is well-established that alimony is “[a] court-ordered allowance that *one spouse pays to the other spouse for maintenance and support while they are separated*, while they are involved in a matrimonial lawsuit, or after they are divorced, esp., money that a court orders someone to pay regularly to his or her former spouse after the marriage has ended.” BLACK’S LAW DICTIONARY 1047 (10th ed. 2014) (emphasis added). “The purpose of alimony is to provide for the further sustenance or support of *a former spouse*.” *Harvey v. Christopher*, 55 V.I. 565, 579 n.8 (V.I. 2011) (emphasis added) (quoting *Browne v. Browne*, 45 V.I. 625, 630-31 (D.V.I. App. Div. 2004)); *Myers v. Myers*, 231 P.3d 815, 817 (Utah Ct. App. 2010) (quoting *Ostermiller v. Ostermiller*, 190 P.3d 13, 15 (Utah Ct. App. 2008) (noting that “the principal purpose of alimony is economic to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge”)). Essentially, alimony constitutes payment for the support of a former spouse and an award of alimony is solely for the “provision of food, clothing, habitation, and other necessities for the support of a spouse.” *Fausch v. Fausch*, 697 N.W. 2d 748, 755 (S.D. 2005) (quoting *Urban v. Urban*, 576 N.W. 2d 873, 875 (S.D. 1998)). Its objective is to support and maintain a spouse as commensurate as possible to the standard of living the spouse seeking alimony enjoyed during the marriage, primarily to prevent the spouse from becoming a public charge. *See, e.g., Dahl v. Dahl*, No. 20100683, 2015 WL 5098249, at *5 (Utah Ct. App. Aug. 27, 2015); *see also Rule v. Rule*, 402 P.3d 153, 164 (Utah Ct. App. 2017) (noting that alimony should advance the three primary purposes of alimony namely: “(1) to get the parties as close as possible to the same standard of living that existed during the marriage; (2) to equalize the standard of living of each party; and (3) to prevent the recipient spouse from becoming a public charge”).

1. The Superior Court’s inclusion of Angelica’s and Royson’s children’s monthly expenses in determining her combined monthly expenses for an award of alimony was an abuse of discretion.

The Superior Court considered “*other expenses related to the maintenance of the family*” when it determined that Angelica’s monthly expenses exceed her monthly income and therefore demonstrated a need of alimony. (J.A. 14.) (emphasis added.) Specifically, the Superior Court conflated child support and alimony by injecting approximately \$500 in monthly expenses relating to Angelica’s and Royson’s children into her overall combined expenses to determine the amount she requires in alimony or substantiates in need. It is noteworthy that in this case the Superior Court also consigned the issue of child support to the Virgin Islands Department of Justice, Division of Paternity and Child Support (“DPCS”) for adjudication when it ordered that “[a]ll issues of child support, including arrearage, shall be transferred to the Department of Justice, Division of Paternity and Child Support.” (J.A. 14.) Statutorily, DPCS is vested with the authority to determine a parent’s financial support to children under its jurisdiction via the establishment of paternity and the enforcement of child support.

This Court recognizes the general rule that alimony and child support must be kept separately. *See Wolfburg v. Wolfburg*, 606 A.2d 48, 52 (Conn. App. Ct. 1992) (recognizing the importance of keeping alimony and child support separate in the court’s determination of the appropriate award as to each and that “all the distinction between the two types of payments is easily blurred particularly when the child for whom the support is needed resides primarily with the recipient of the alimony”) *see also Schabauer v. Schabauer*, 673 N.W.2d 274, 278 (S.D. 2010) (observing that alimony and child support are separate and should not be combined.); *Dobson v. Dobson*, 294 P.3d 591, 594 (Utah Ct. App. 2012) (noting that “[i]t is typically the best practice for trial courts to analyze alimony without factoring in child support obligations.”) (emphasis added);

Dewbrew v. Dewbrew, 849 N.E.2d 636, 643 (Ind. Ct. App. 2006) (noting that the general rule that child support payments and spousal maintenance in divorce and separation of the parties are treated differently in the Internal Revenue Code); *Williamson v. Williamson*, 983 P.2d 1103, 1106 (Utah Ct. App. 1999) (noting that “child support paid by [the payor] to the [payee] is earmarked for the parties’ minor child and should not be considered as income to [the payee] for purposes of calculating alimony”); *Fink v. Fink*, 462 S.E.2d 844, 857 (N.C. Ct. App. 1995).

While the considerations determining child support and alimony sometimes are parallel, they are very separate and distinct subjects. The Virgin Islands’ Legislature has enacted separate statutory provisions to govern alimony and child support and in doing so has treated both matters separately.⁴ We already noted that alimony is the financial contribution from a former spouse to another former spouse for support and maintenance. Child support, on the other hand, is payment by a parent for the support of a minor child and “the entire purpose of the Virgin Islands’ child support statutes is to ensure that children of parents who are divorced are cared for with both parents bearing their proportionate share of the cost.” *Dupigny v. Tyson*, 66 V.I. 434, 442 (V.I. 2017); *see also* 16 V.I.C. §§ 344(a), 345(c). In other words, the inalienable responsibility for child support is a paramount duty shared by both parents. The Virgin Islands’ child support guidelines, accordingly, are “based on a cost-sharing approach in that the child’s (children’s) needs are divided proportionally between the parents/ custodians based upon their relative incomes.” 16 V.I.C. § 345(c). Thus, when the Superior Court included the parties’ minor children’s expenses in determining Angelica’s need for alimony and subsequently transferred the issue of child support to DPCS, the transfer to DPCS had the conclusive effect of decreeing two child support orders.

⁴ *See* 16 V.I.C. § 109(a)(3) (governing alimony) and 16 V.I.C. §§ 344 and 345 (governing child support).

First, the Superior Court awarded Angelica alimony that includes an amount for their minor children's expenses. Second, transferring the issue of child support to DCPS will authorize DCPS to determine the amount Royson needs to pay in child support by dividing their minor children's need proportionally between Angelica and Royson as the non-custodial parent. Essentially, a transfer of the issue of child support to DPCS, in this matter, has the conclusive effect of ordering child support in accordance with the Virgin Islands child support guidelines and child support payments will be collected from Royson. Angelica's enumerated expenses inclusive of the parties' minor children's expenses as accepted by the Superior Court resulted in an increase in the amount of child support that Royson should pay, though disguised in the award of alimony. The result is a double counting towards alimony that is impermissible as a matter of law.

Our holding to exclude a parent's child support expenses in the court's determination of an alimony award finds support in this jurisdiction. In the Virgin Islands, DPCS is vested with the authority to determine child support.⁵ Here, because the child support matters were transferred to DPCS, the Superior Court incorrectly assessed the equities when the alimony seeking spouse included her share of the parties' children's expenses in her combined monthly expenditure in an effort to prove need. Specifically, such a practice will skew the amount in child support to be determined and frustrate DPCS's objective to fairly and properly perform the statutory function of applying the "cost-sharing approach" of "divid[ing the children's needs] proportionally between the parents/custodian based upon their relative income." 16 V.I.C. § 345(c).

The Superior Court's determination that Angelica demonstrated a need for alimony does not withstand further scrutiny. We have already stated that title 16 section 109(a)(3) of the Virgin

⁵ Although DPCS is vested with the authority to determine child support, the Superior Court retains jurisdiction over child support. *See* 16 V.I.C. §§ 109(2) and 345(b).

Islands Code establishes that the Superior Court must determine the need of the party seeking alimony and the ability of the payer to pay alimony. *See* 16 V.I.C. § 109(a)(3). The Superior Court is further required to analyze the alimony factors and make findings on those factors to determine Angelica's need for alimony. It is obvious from a complete examination of the record that the Superior Court appears to only have considered the parties' income and expenses to award Angelica alimony. Admittedly, the Superior Court identified the alimony factors it must consider in its alimony determination and made findings of fact based on the evidence presented. Nevertheless, the Superior Court failed to explain how its findings of fact regarding those alimony factors are supported by the evidence presented and necessitate an award of alimony to Angelica for her maintenance and support. For example, the Superior Court failed to provide any explanation for how evidence that Angelica was a 32-year-old woman with no health issues factored into its assessment of alimony needs or, for that matter, did not factor into its determination. Additionally, there is evidence in the record in the form of Angelica's testimony at trial that she completed high school in Santo Domingo, Dominica Republic and matriculated at a "university in Santo Domingo [for] a year and a half." (J.A. 231.) Moreover, Angelica testified that she was going to Miami, Florida to continue school and obtain a higher paying job. From the record it appears that the Superior Court made findings of fact but focused solely on the current finances of the parties to determine alimony. Because the Superior Court failed to explain and articulate how its findings of fact, relative to the alimony factors, led to an award of alimony to Angelica, "meaningful review is not possible" and the Superior Court accordingly abused its discretion. *See In Matter of Q.G.*, 60 V.I. 654, 660 (V.I. 2014).

We also conclude that the Superior Court's inclusion of the \$257 monthly payment for the 2009 Toyota Corolla in determining Angelica's alimony is an abuse of discretion. Angelica

testified that the parties jointly owned a 2009 Toyota Corolla, which she primarily operated. She testified that Royson paid the car loan from the inception of its purchase until May 2014. When he ceased making the payments, she commenced paying the car loan for the period from May 2014 to the present. She further testified that the 2009 Toyota Corolla cost \$13,500 and that there was approximately a \$3,000 balance outstanding on the car loan as of May 2015.

A review of the complete record reveals that at a rate of \$257 per month the parties would liquidate the remaining \$3,000 balance on the 2009 Toyota Corolla within a year. Irrespective of this irrefutable fact, the Superior Court included the monthly car loan payment of \$257 in determining that Angelica has a need that warrants an award of \$600 per month in alimony “to assist her with housing and other expenses related to the maintenance of the family.” (J.A. 14.) The shortcoming with the Superior Court’s computation in using the \$257 is that this amount is not a recurring payment or expense over the ten-year duration of the alimony awarded. Significantly, the \$3,000 outstanding balance on the 2009 Toyota Corolla will be paid within one year after imposition of the alimony award. Because the Superior Court neither provided an explanation nor addressed this issue in its findings of fact, the Superior Court’s methodology in determining the need for alimony and establishing the amount of alimony to be awarded to Angelica is clearly erroneous and accordingly constitutes an abuse of discretion.

C. Royson’s ability to pay for Angelica’s need is unsubstantiated by the evidence presented and accordingly the award at issue was an abuse of discretion.

We also conclude that the Superior Court’s finding that Royson had the ability to pay is not sufficiently substantiated by the evidence. Royson submitted into evidence his 2013 joint income tax return and his 2014 individual income tax return. To determine Royson’s income, the Superior Court took into consideration the parties’ 2013 joint income tax return which reported an

income of \$23,143 and an adjusted gross income of \$36,183. Royson's 2014 individual income tax return, however, failed to include his income but reported an adjusted gross income of \$13,794. Additionally, at trial, Royson testified that his best recollection is that the company's gross revenue varies and that his company grossed approximately \$300,000 before deductions in 2014 but that he was uncertain. Further, at trial in response to a question regarding how much Fabien Trucking LLC generates annually, Royson provided the following response:

THE WITNESS: I estimate about \$300,000. The last year we maybe did thirty, \$300,000 or something like that. I don't know to be exact.

THE COURT: Approximately \$30,000 per year?

THE WITNESS: Yes. Before the deductions.

THE COURT: That's gross?

THE WITNESS: Gross, yes ma'am.

(J.A. 129-30). Based on this evidence, the Superior Court concluded that "it is unclear how much Plaintiff/Husband earns as his gross income." (J.A. 11).

On the other hand, the Superior Court found that Royson's monthly expenses included approximately \$1,400 to \$1,500 per month for rent including utilities; \$400 per month for health insurance for himself and the minor children; \$400 per month for private school tuition for one of the minor children and \$400 monthly for food. Based on this evidence, the Superior Court found that Royson had combined monthly expenses of \$2,600 to \$2,700. Despite the lack of clarity on Royson's income, the Superior Court determined that he could afford to pay Angelica \$600 monthly in alimony.

As a threshold matter, we do not know how the Superior Court determined Royson's income and how much it ascertained his income to be, such that it could conclude that he can pay

Angelica alimony of \$600 monthly. We are left to speculate whether the Superior Court used the \$300,000 or \$564 that Royson testified to earning weekly to determine his income. If the court used \$300,000 as Royson's income, then the findings with respect to that conclusion are absent from the record. If the court determined that Royson earns \$564 per week, then Royson's monthly living expenses are at least approximately \$350 more than his monthly income. Significantly, Royson's claimed expenses are essentially based on his testimony, which included the assertion that he pays the mother of his out of wedlock daughter, \$250 monthly in child support. The Superior Court's determination of Royson's income must be supported by competent and substantial evidence. *See Lin v. Lin*, 37 So.3d 941, 943 (Fla. Dist. Ct. App. 2010); *McCants v. McCants*, 984 S.2d 687, 682 (Fla. Dist. Ct. App. 2008); *Matias v. Matias*, 948 So.2d 1021, 1023 (Fla. Dist. Ct. App. 2007). Moreover, when the Superior Court is presented with "conflicting evidence concerning a party's income, it is within the [] [court's] purview to determine what evidence is most credible." *Lin*, 37 So.3d at 943. Additionally, because Royson's monthly expenses exceeded his income, Angelica failed to prove that Royson has the financial ability to pay the amount of alimony awarded. Moreover, the Superior Court abused its discretion by concluding that Royson had the ability to pay because the court's findings of facts are insufficient to support its conclusion that Royson had the ability to pay Angelica \$600 monthly in alimony.

D. The Superior Court abused its discretion in its adjudication of the marital funds in the parties' joint Banco Popular savings account.

Royson contends that the Superior Court improperly adjudicated the issue of the parties' joint Banco Popular savings account. Specifically, Royson argues that the parties' joint Banco Popular savings account is marital property subject to equitable distribution and requested that the Superior Court use his equitable portion of the funds to offset any judgments against him. At trial,

Royson testified that the parties jointly opened a savings account at Banco Popular after they were married to facilitate Angelica's application for permanent resident status in the United States Virgin Islands. Royson further testified that he deposited approximately one thousand dollars every two to three months into the savings account whenever feasible.

However, while admitting that the Banco Popular savings account was a joint account held by both Royson and her, Angelica testified that all the funds in the parties' joint saving account was her personal property, and denied that Royson gave her money to save in the parties' savings account. Angelica also testified that while she was married and living with Royson, she withdrew \$9,000 and \$1,200 from the parties' joint Banco Popular savings account on April 2 and 23, 2014 respectively and loaned the sum of \$10,200 to her aunt, Maritza Griffin ("Griffin"). Angelica further informed the court that Griffin failed to repay the loan, and she has not inquired of Griffin when she will repay the loan. During the trial when opposing counsel inquired of Angelica whether she needed the money that she loaned to her aunt, she responded that she had the money in her savings for any emergency. Being mindful of this evidence obtained at trial, the Superior Court resolved the issue of the parties' joint Banco Popular savings account by concluding that "[t]here is no evidence of any current balance in the joint savings account." (J.A. 13.)

Title 16 Section 109(a)(7) of the Virgin Islands Code governs the Superior Court's authority to identify, classify, and equitably distribute marital property, which it defines as:

- [A]ll real and personal property acquired by either spouse subsequent to the marriage except;
- (A) Property acquired by gift, bequest, devise, or descent;
- (B) Property acquired in exchange for property acquired prior to the marriage, or in exchange for property acquired by gift, bequest, devise, or descent;
- (C) Property acquired by a spouse after a decree of legal separation;
- (D) Any judgment or property obtained by judgement awarded to a spouse from the other spouse;

- (E) Property excluded by valid, written agreement of the parties; and
- (F) Income from property acquired by a method listed in subparagraphs (A) through (E), if the income is not attributable to the personal effort of a spouse.

See also Drayton v. Drayton, 65 V.I. 325, 342-43 (V.I. 2016); *Innis v. Innis*, 65 V.I. 270, 288 (V.I. 2016). The parties' joint Banco Popular savings account and the fund deposited therein indubitably is marital property subject to equitable distribution. Both parties testified that the joint Banco Popular savings account bore the parties' names and was established and funded during the marriage to facilitate Angelica's application for permanent resident status in the United States Virgin Islands. Because the parties' joint Banco Popular savings account is marital property, it is subject to equitable distribution, pursuant to 16 V.I.C. § 109(a)(7).

The fact that Angelica withdrew, and then loaned Griffin the money in the parties' joint Banco Popular savings account makes the Superior Court finding that "[t]here is no evidence of any current balance in the joint savings account" factually correct but inaccurate with respect to the court's power to equitably distribute marital property between the parties. Admittedly, Angelica did not have actual possession of the marital funds because she testified that she withdrew the monies from the parties' joint Banco Popular savings account and loaned it to Griffin. But, although Angelica does not have actual possession of the monies previously held in the parties' joint Banco Popular savings account, Griffin is expected to repay Angelica the full amount of the loan. Angelica has an equitable interest in Griffin repaying the money because it's an account receivable. Angelica is also in privity of contract with Griffin regarding the payment of the loan. *See Campbell v. Parkway Surgery Ctr., LLC*, 354 P.3d 1172, 1178 (Idaho 2015) (noting that "[a] party need only show either privity or third-party beneficiary status in order to have standing to sue for breach of contract") (citing *Wing v. Martin*, 688 P.2d 1172, 1177 (Idaho 1984)) *see also*

RESTATEMENT (SECOND) OF CONTRACTS § 305 cmt. a (1981) (promisee of promise for benefit of beneficiary has same right to performance as any other promise); *Thomas Wilson & Co. v. Smith*, 44 U.S. 763, 765 (1845) (noting “[w]here one has received the money of another, and has not the right to retain it, the law will imply privity of contract”). “Privity refers to [parties] who exchange the contractual promissory words or those to whom the promissory words are directed.” *Campbell*, 354 P.3d at 1178 (citing *Wing*, 688 P.2d at 1177). A loan is a sum of money that is lent to a borrower with the expectation to be repaid. The reasoning implicit in the Superior Court’s resolution of this issue is that the absence of the funds in the parties’ joint Banco Popular savings account deprives the court of its authority to resolve the issue. Angelica possesses an equitable interest in the repayment of the marital funds by Griffin. Accordingly, it was well within the authority of the Superior Court to equitably resolve the issue of the parties’ joint Banco Popular savings account in which Royson had an equitable interest and its failure to adjudicate the funds was irrefutably an abuse of discretion. To hold otherwise would confer upon either Angelica or Griffin or on both unjust enrichment to the extent of Royson’s equitable share of the joint Banco Popular savings account.

IV. CONCLUSION

The Superior Court abused its discretion in awarding Angelica alimony because the evidence is insufficient to prove that Angelica has financial need, the double-counting of child support needs was erroneous, and the evidence was insufficient to support a finding concerning Royson’s ability to pay alimony. Additionally, because the parties’ money in their joint savings account at Banco Popular is marital property, the Superior Court erred when it failed to resolve the matter of the parties’ interests in the proceeds of that account equitably. Accordingly, this case is remanded for further proceedings consistent with this opinion.

DATED this 21st day of September, 2018.

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST
VERONICA J. HANDY, ESQ.
Clerk of the Court