Circuit Court for Frederick County
Case No.: C-10-FM-20-001068

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1081

September Term, 2022

HELEN MUELLER

v.

STEVE MUELLER

Leahy,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 2, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The parties to this appeal, Helen Mueller ("Wife"), and Steve Mueller ("Husband"), appeared before the Circuit Court for Frederick County to litigate issues related to the dissolution of their marriage, including divorce and division of property. Following a two-day trial, the court entered a judgment of absolute divorce, which, in relevant part, granted Wife a monetary award from the sale of the marital home, awarded Wife a portion of Husband's retirement account, awarded possession of a family dog to Husband, and denied Wife's requests for attorney's fees and alimony. Both parties appealed.

On appeal, Wife presents four questions for our review:

1. Did the trial court err in denying an award of indefinite alimony to [Wife]?
2. Did the trial court err by awarding Yogi, the dog, to [Husband]?
3. Did the trial court err in failing to make an award of counsel fees to [Wife]?
4. Did the trial court err in its calculations of the LPL IRA?

In his cross-appeal, Husband presents one additional question for our consideration:

1. Did the trial court clearly err in its calculation of the amount of the monetary award it granted Wife?

For the reasons discussed below, we answer each question in the negative, and we affirm the judgment of the circuit court in all respects.

BACKGROUND

The facts in the matter before us are largely undisputed. Prior to the parties' marriage in September of 2001, they signed a prenuptial agreement designating certain property as non-marital property, including Wife's pre-marital home and Husband's

pension with Verizon. Not long into their marriage, Wife became ill and filed for Social Security Disability benefits.[1] Accordingly, for the duration of the marriage, Husband worked, and Wife stayed at home. The parties have one daughter who is now an adult.

The circumstances leading to the demise of the marriage are not entirely clear. Wife testified that Husband was physically abusive, and Husband testified that Wife was spending significant portions of time living at her beach property. Nonetheless, in 2019, Wife told Husband that she wanted a divorce, and in June of 2020, the parties separated. Two months later, Husband filed for divorce.

In May and June of 2022, the court held a two-day merits trial, where it heard testimony regarding the parties' property. Husband testified that after he retired from Verizon in 2017, he placed his pension into an IRA account with LPL Financial (herein referred to as the "LPL IRA"). Husband testified that at the time of trial, the balance of that account was $788,734. Additionally, Wife testified that she had sold her pre-marital home and used the proceeds for the down-payment towards the parties' marital home.

Husband asserted that the LPL IRA was partially non-marital property; that under the prenuptial agreement, the portion of the pension earned prior to the marriage was his separate property. In support, he introduced an expert witness who, using a coverture fraction prescribed in *Bangs v. Bangs*, 59 Md. App. 350, 356 (1984), calculated the marital

[1] At trial, Husband introduced evidence indicating that Wife was diagnosed with schizophrenia and other anxiety related disorders at that time. Wife did not recall those diagnoses and stated that she was experiencing "a multitude of infections" causing her to file for disability benefits.

share of the LPL IRA to be 51.12%.[2] Husband requested that the marital portion of the account be divided evenly, and that the non-marital 48.88% remain his separate property. Wife did not dispute that the pension was partially non-marital property but disagreed with Husband's approach of calculating the marital share, and ultimately requested that the LPL IRA be divided evenly.[3]

The parties did not dispute certain amounts owed to the other. Husband did not dispute that Wife was owed $169,373.74 for the down-payment of the marital home. Wife did not dispute that she owed Husband $25,500 for amounts he contributed towards her beach property and her Mercedes.[4]

Lastly, at the time of trial, the parties had two dogs, Yogi and Lotus. Husband testified that he was the primary caretaker of the dogs during the marriage; that he purchased their food, took them to the veterinarian, and watched them while Wife went to the beach in the summers. Accordingly, Husband asserted that both dogs were "family-use items" and sought possession of Yogi. Wife disagreed and asserted that both dogs were purchased with funds that she inherited, and thus were her non-marital property.

[2] In so doing, the expert divided the number of days which Husband participated in the pension plan during the marriage (5,627) by his total days of participation in the pension (11,008).

[3] Wife maintained that Husband should have "identified the stocks that were in the pension at the time" of the marriage and "follow[ed] those stocks forward" to determine the non-marital value of the pension at the time of Husband's retirement.

[4] Although the evidence indicated that Wife purchased the beach property during the marriage, Husband did not claim an ownership interest in it beyond the $23,000 that the parties agreed that he contributed to it.

On July 25, 2022, the court entered a judgment of absolute divorce. In relevant part, the court ordered the sale of the marital home and granted Wife a monetary award of $143,873.74 from Husband's half of the proceeds. Further, the court determined that 51.12% of Husband's LPL IRA was marital property and awarded half of the marital portion to Wife. The court also ordered that Husband maintain possession of Yogi, and that Lotus would remain with Wife. Finally, Wife's requests for attorney's fees and alimony were denied.

On August 4, 2022, Husband filed a motion to alter or amend the divorce judgment asserting that it "purports to divide a property interest (namely, a Mandatory Motorola Pension and the Survivor Benefit associated therewith) which does not exist[.]" Husband did not raise any other objections to the court's judgment of absolute divorce. On January 4, 2023, the court held a hearing on, and granted, Husband's motion. Accordingly, on January 5, 2023, the court entered an amended judgment of absolute divorce removing references thereto.

Both parties timely appealed. Additional facts will be supplied as necessary.

STANDARD OF REVIEW

It is beyond dispute that, in Maryland jurisprudence, a court sitting in equity has broad discretionary authority. Hence, as a general matter, "appellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Tracey v. Tracey*, 328 Md. 380, 385 (1992). We review a court's determination of whether to award alimony under the abuse of discretion standard. *Karmand v. Karmand*, 145 Md. App. 317, 326 (2002). Further, the

decision whether to award attorney's fees "rest[s] solely in the discretion of the trial judge." *Petrini v. Petrini*, 336 Md. 453, 468 (1994). In other words, decisions regarding alimony and attorney fee awards "will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Tracey*, 328 Md. at 385.

The question of whether an asset is marital property is one of fact. *Flanagan v. Flanagan*, 181 Md. App. 492, 521 (2008). Accordingly, "[f]indings of this type are subject to review under the clearly erroneous standard embodied by Md. Rule 8-131(c); we will not disturb a factual finding unless it is clearly erroneous." *Innerbichler v. Innerbichler*, 132 Md. App. 207, 229 (2000). This Court has stated that a finding "is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). Indeed, "[t]he clearly-erroneous standard is a deferential one, giving great weight to the trial court's findings." *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (quotation marks and citation omitted).

Finally, as with any matter tried without a jury, we shall "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). This Court has noted that "it is the role of a judge in a case tried to the court to make such credibility determinations, and we will not disturb such determinations unless clearly erroneous." *Qun Lin v. Cruz*, 247 Md. App. 606, 615 (2020); *see also Omayaka v. Omayaka*, 417 Md. 643, 659 (2011) ("In its assessment of the credibility of witnesses, the [c]ircuit [c]ourt [i]s entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness[.]").

DISCUSSION

I. THE COURT DID NOT ERR IN DENYING ALIMONY.

Wife asserts that the court erred in denying her request for indefinite alimony and maintains that "[t]he court seemed to over rely on [Md. Code Ann., Family Law] §11-106(b)(11)(ii) in making its decision" to deny her request. Husband responds that the court properly denied Wife's request for alimony given Wife's income and assets and Husband's inability to pay alimony.

This Court has noted that "the principal function" of alimony is to rehabilitate an economically dependent spouse. *St. Cyr v. St. Cyr*, 228 Md. App. 163, 184 (2016). Furthermore, "[i]t is well settled" that "fixed-term or so-called rehabilitative alimony" is favored over an award of indefinite alimony. *Solomon v. Solomon*, 383 Md. 176, 194 (2004) (quotation marks and citation omitted). In other words, the court's goal in awarding alimony "is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently." *Tracey*, 328 Md. at 391.

However, the trial court has discretion to "award no alimony, rehabilitative alimony, or, upon a proper finding of unconscionable disparity, indefinite alimony."[5] *Whittington v. Whittington*, 172 Md. App. 317, 339-40 (2007); *see also Wallace v. Wallace*, 290 Md. 265, 282 (1981) (noting that the trial judge "is vested with wide discretion in his decision whether to award alimony and if so, in what amount"). In other words, the court is "not

[5] Appellant argued only for an award of indefinite alimony.

required" to award alimony – indeed, "[i]t is legal error for a court, in making a discretionary decision, to fail to exercise discretion." *Whittington*, 172 Md. App. at 339-40.

The following factors guide the court's alimony decision:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (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;
>
> (10) any agreement between the parties;
>
> (11) the financial needs and financial resources of each party, including:
>
> > (i) all income and assets, including property that does not produce income;
> >
> > (ii) any award made under §§ 8-205 and 8-208 of this article;
> >
> > (iii) the nature and amount of the financial obligations of each party; and
> >
> > (iv) the right of each party to receive retirement benefits; and

> (12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Md. Code Ann., Family Law ("FL") § 11-106(b).

In determining whether alimony is appropriate, the court must consider each of these factors and conduct "a comprehensive case-by-case analysis." *Solomon*, 383 Md. at 196. Indeed, "[t]he decision whether to award alimony and, if so, for what period of time, is fact-intensive and not subject to a formulaic resolution." *Whittington*, 172 Md. App. at 341.

Here, the court considered each of the factors set forth in FL § 11-106(b) and found several determinative in denying Wife's request for indefinite alimony, including the circumstances that contributed to the estrangement of the parties, the ability of Husband to meet his needs while meeting Wife's, the agreement of the parties, and the financial needs and financial resources of each party.

Of the circumstances that contributed to the estrangement of the parties, the court pointed to the fact that Husband "provided for the family financially almost exclusively, except for disability payments, which it sounds like from the testimony [Wife] kind of used for her own personal needs." Further, the court noted that Husband "cooked, he clean[ed], he cared for the child[,]" and that he "sought help for [Wife] throughout the marriage[,]" and yet, that "[h]er money was hers, and his money was theirs." Moreover, the court was unpersuaded by Wife's claims of abuse from Husband, noting that:

> The Court does not find the testimony of [Wife] to be credible regarding abuse and mistreatment, and I note that, in the midst of this time

> period where he was supposed to be so horrific, he rescued her two times financially, both with the purchase of the car and the extra money to purchase the Delaware home. Early on in the marriage -- or prior to the marriage, he signed a prenup that, essentially, benefited her exclusively, and set up what's mine is mine, and what's yours is mine scenario. He took her, by his testimony, all over the country seeking medical treatment. These are not the behaviors of a controlling, abusive individual. And, so, therefore, it defies credibility -- the story that [Wife] asserts to the [c]ourt defies credibility.

Further, of the ability of Husband to meet his needs while meeting the needs of Wife, the court found that Husband "doesn't have extra money to give[.]" The court explained that:

> By [Husband's] Exhibit 2, his income biweekly is $3,555.80. If you take that over 26 pay periods, divide it by a year, 12 months, he has a gross monthly income of $7,704.41.
>
> There were bonuses in three of the last five years. I didn't include that, because given that they're not every year, I don't think it's appropriate to determine that he's going to actually ever receive that again; they're not every year going forward.
>
> [Husband's] Exhibit 3, which is his financial statement, he shows his expenses at $7,000.13. I took off a few things, the $65 pool expense, because that property's being sold; $500 rent, because he won't have rent and the mortgage payment at the same time any longer; $195 for the storage unit, presumably once he settles into his own place he won't need that anymore. That gets to $6,240 a month in expenses. I will say that's very modest. Excuse me. His financial statement is missing many normal expenses, but if you take the $7,700 income, less the $6,240 in expenses, that gives him $1,460 left per month.
>
> If you look at his pay stub, really that difference is eaten up by taxes, mandatory pension contribution -- I think that's about $500 a month in and of itself -- so he really doesn't have extra in the [c]ourt's mind to give while meeting his own needs.

The court also noted that Wife's alimony request would result in her "hav[ing] more than he does per month because of her disability income."

Of any agreements between the parties, the court noted that the parties had a prenuptial agreement, and that "that agreement appeared quite one-sided" in favor of Wife. Further, of the financial needs and financial resources of each party, the court found that Wife "is going to have, roughly, $300,000 from the sale of the house," that the court was awarding her "half of the marital share of his [LPL] retirement[,]" and that she receives "disability income of $2,000 a month." The court noted that both parties "leave this marriage with about $500,000 in assets, not including non-marital sources, which are also substantial."[6]

Finally, the court noted significant challenges to Wife's credibility:

> I don't find her claims of abuse to be credible. I don't find her claims of him secreting assets to be credible, none of that. Both of them leave this marriage with about $500,000 in assets, not including non-marital sources, which are also substantial. He doesn't have extra money to give, and she has a shortage.
>
> She comes to court seeking alimony after spending $140,000 on keen.com and other psychic-type businesses from January of 2018 to February of 2022. I do not find credible that someone stole her credit card, and, you know, did this, because it went on for all of '18, all of '19, all of '20, all of '21, and into 2022. By that point, if someone had stolen your identity or your card, it would have stopped. And it certainly couldn't have gotten to $140,000 of expenditures.[7]

[6] The court also found Wife's testimony that she had to drive a Mercedes because of her health issues not credible, explaining that "I didn't find it credible that she has to drive a more expensive car because she's allergic to plastic. I've never heard of such a thing. My mother has a Mercedes. It's got plastic all through the thing. So, [Wife] has substantial assets for sure."

[7] Noting that Wife asserted that she had a $3,397 monthly shortage in her alimony request, the court responded that of these expenditures, "if you took $140,000 and you supplemented her income with that based on the $3,397 shortage, that would have taken her 41 months" to spend that amount.

In sum, we disagree that the court "over[-]rel[ied]" on any one factor in denying Wife's request for indefinite alimony. The court properly considered each of the factors set forth in FL § 11-106(b), as well as the facts and testimony before it, and determined that alimony was not appropriate. We are unpersuaded that the court's decision was arbitrary or "clearly wrong." *Tracey*, 328 Md. at 385.

II. THE COURT DID NOT ERR IN AWARDING YOGI TO HUSBAND.

Wife asserts that the court erred in awarding Yogi to Husband because Yogi was purchased with funds she received through an inheritance, and thus that Yogi was her non-marital property under FL § 8-201(e)(3). Husband responds that the court's decision regarding Yogi should be affirmed because Wife offered no evidence in support of her assertion that Yogi was paid for with Wife's inheritance, and because Yogi was family use personal property under FL § 8-201(d)(1).

The court may transfer ownership of "family use personal property[] from one or both parties to either or both parties[.]" FL § 8-205(a)(2)(ii). Family use personal property includes property: "(i) acquired during the marriage; (ii) owned by 1 or both of the parties; and (iii) used primarily for family purposes." FL § 8-201(d)(1). It does not include property "acquired by inheritance or gift from a third party[.]" FL § 8-201(d)(3)(i).

Here, we agree that the facts indicate that Yogi was family use personal property under FL § 8-201(d)(1). Yogi was acquired during the parties' marriage in 2018. Further, he was owned by one or both of the parties; Wife testified that she owned Yogi. Finally, he was used primarily for family purposes. Indeed, the whole family testified to contributing to Yogi's welfare – Husband testified that he was the primary caretaker of

both dogs, Wife testified that she trained them, and the parties' adult daughter testified that she cared for the dogs and, together with Husband, walked them. Thus, the court did not err in awarding Yogi to Husband.[8]

Although Wife asserts that the court erred in transferring ownership of Yogi because he was "directly traceable to a non-marital source of funds[,]" we disagree. As Husband points out, Wife failed to provide any details regarding the account she used to purchase the dogs or present any evidence in support of her assertion that it included inherited funds. Indeed, the trial court declined to find that the account was non-marital property and ordered that the account, "if there's anything in it, is to be divided and closed." Accordingly, we find no clear error in the court's decision.

III. THE COURT DID NOT ERR IN DENYING AN AWARD OF ATTORNEY'S FEES TO WIFE.

Wife asserts that the court erred in failing to grant her an attorney's fee award because Husband "filed numerous motions throughout the litigation, many of which were denied[,]" and because Husband used marital money to pay his attorney's fees, while Wife

[8] In the court's oral ruling from the bench, it characterized the dogs as "gift[s] to the family." Although the support for that conclusion is not clear from the record before us, we nonetheless find no error in the court's conclusion. Wife does not address or dispute Husband's assertion that Yogi was family use personal property under FL § 8-201(d)(1), and as discussed *infra*, we agree that the facts support Husband's assertion. As the Supreme Court of Maryland has stated, "a trial court's decision may be correct although for a different reason than relied on by that court." *Robeson v. State*, 285 Md. 498, 502 (1979); *see also Leineweber v. Leineweber*, 220 Md. App. 50, 64 (2014) (affirming and noting that "[w]e and the circuit court get to the same result by a slightly different pathway").

used her pre-marital money.[9] Husband responds that both parties have "ample" assets to pay their own attorney's fees, and thus that the court did not abuse its discretion in denying Wife's request for attorney's fees.

The court may make an award of attorney's fees after considering "the financial resources and financial needs of both parties[,]" as well as "whether there was substantial justification for prosecuting or defending the proceeding." FL §§ 7-107(c), 8-214(c), 11-110(c). In so doing, the court must consider the statutory criteria and the facts of a particular case. *Petrini*, 336 Md. at 468. Unless the court's decision was arbitrary or clearly wrong, "[a]n award of attorney's fees will not be reversed[.]" *Id*.

Here, we cannot say that the court's decision was arbitrary or clearly wrong. The court considered the financial resources of the parties and determined that both Husband and Wife were able to pay their attorney's fees. This finding was supported by the record and the court's determination that "[b]oth of them leave this marriage with about $500,000 in assets, not including non-marital sources, which are also substantial." Further, the court determined that both parties had substantial justification for maintaining the action, noting that the case was "not frivolous" and that "[o]ne side's not more to blame than the other." Accordingly, we disagree that the court erred in declining Wife's request for an award of attorney's fees.

[9] Wife also asserts that the court erred in denying a fee award because it had already previously granted Wife's request for attorney's fees but reserved on the amount. However, as Husband correctly points out, Wife failed to raise this issue before the circuit court. Accordingly, it is not preserved for our review on appeal. *See* Md. Rule 8-131(a) ("[A]n 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[.]").

IV. THE COURT DID NOT ERR IN ITS DISTRIBUTION OF HUSBAND'S LPL IRA.

Wife asserts that the court erred in determining that Husband's LPL IRA was partially non-marital property, asserting that "[o]nce [Husband]'s pension from Verizon was 'rolled over' into the LPL IRA, during the course of his marriage to [Wife], the funds were then commingled[,]" and accordingly, that the funds became "fully marital property subject to equitable distribution." Husband responds that the court's determination regarding the non-marital portion of the account was correct, and further, that by accepting the remaining benefits of the judgment, Wife has "'lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken[,]'" quoting *Chimes v. Michael*, 131 Md. App. 271, 280 (2000). However, because we find that Wife's assertion has not been preserved for our review, we decline to consider it.

This Court "will not consider any point or question 'unless it plainly appears by the record to have been raised in or decided by the trial court[.]'" *Maryland State Bd. of Elections v. Libertarian Party of Maryland*, 426 Md. 488, 517 (2012) (quoting Md. Rule 8-131(a)).

> The purpose of this Rule is two-fold: (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

Id. (quotation marks and citation omitted); *see also Elliott v. State*, 417 Md. 413, 434 (2010) (noting that a goal of Md. Rule 8-131(a) is to "ensure fairness for all parties in a case and to promote the orderly administration of law" (quotation marks and citation omitted)).

Here, Wife did not assert that the LPL IRA funds were fully or partially commingled at any point before the circuit court. Instead, Wife's position was that the court should take an alternative approach to calculating the non-marital funds and that Husband's pre-marital stocks should have been "pulled out, rather than just doing a straight coverture fraction." Specifically, Wife's position at trial was that:

> The LPL IRA that is partially marital and partially nonmarital, my issue with that, Your Honor, is that the way that it was valued and calculated by [Husband's expert witness], it's our position -- and I have the case law, which I'll give to you in a second -- is that it was a pension, and that is okay to use the Bangs formula. But when it was transferred over as a lump sum into a -- sorry, an IRA, to correctly value the IRA from the time of the rollover, what she should have done was valued those stocks and determined what if anything those did over the course of the time.
>
> I understood Your Honor heard my argument, and had a different position, but my position is, and my client's position is, that what should've happened is that those stocks should've been valued at that time, so that they could be pulled out, rather than just doing a straight coverture fraction.

At no point did Wife maintain that "any nonmarital portion was fully commingled" or that "the entire 100% of the LPL IRA should have been treated as marital property" as she now does on appeal. Accordingly, Wife's contention has not been preserved for our review. *See Starr v. State*, 405 Md. 293, 304 (2008) (noting that the trial court is not required "to imagine all reasonable offshoots of the argument actually presented to them").

V. THE COURT DID NOT ERR IN CALCULATING THE MONETARY AWARD.

In his cross-appeal, Husband asserts that the court clearly erred in awarding Wife a monetary award "out of *his* portion of the net proceeds of the home[.]" He asserts that the monetary award should have been subtracted "from the net equity" of the home, and that "[r]eimbursing her the full amount from Husband's share of the proceeds overcompensates

her." Wife disagrees and responds that Husband's position "attempts to argue that [Wife] should have been awarded only half of her pre-marital contribution to the marital home[.]" However, as noted *infra*, Husband failed to raise this issue in his motion to alter or amend the judgment before the circuit court. Accordingly, it is not preserved for our review.[10]

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE SPLIT EVENLY BY BOTH PARTIES.

[10] Even had Husband properly preserved his assertion, we see no abuse of discretion under these facts. Husband does not dispute that Wife paid the full down payment for the marital home from her non-marital funds, or that she was due that amount (less $25,500 for amounts she owed Husband) from the sale of the home. We are thus unpersuaded that reimbursing Wife from Husband's share of the proceeds was outside of the court's "broad discretion to reach an equitable result" in granting a monetary award. *Hart v. Hart*, 169 Md. App. 151, 160-61 (2006).