

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2564

September Term, 2013

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JOHN E. CAREY

v.

KAREN P. ROSENBAUER

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Nazarian,  
Leahy,  
Thieme, Raymond G., Jr.  
(Retired, Specially Assigned),

JJ.

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Opinion by Leahy, J.

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Filed: December 4, 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.

Appellant John E. Carey and Appellee Karen P. Rosenbauer were married on December 6, 1991, in a civil ceremony in Ellicott City, Howard County, Maryland. They have two children together who have both now reached the age of majority.<sup>1</sup> Following the parties' voluntary separation in 1998, Ms. Rosenbauer filed a complaint for limited divorce on October 27, 1998. However, that complaint was later voluntarily dismissed, and the parties continued under the incorrect assumption that they were divorced. In 2007, Mr. Carey, who suffers from Familial (Hereditary) Spastic Paraplegia with cognitive decline and memory loss, was unable to continue to work due to his disability. After discovering, sometime in 2009, that they were not actually divorced, Ms. Rosenbauer again filed for divorce on January 31, 2013. Thereafter, Mr. Carey filed an answer and counter-claim requesting, *inter alia*, indefinite alimony. The Circuit Court for Howard County denied Mr. Carey's request for indefinite alimony.

Mr. Carey presents the following questions:

- 1) Did the circuit court err in denying the appellant indefinite alimony by failing to find that due to his age, illness and/or disability he cannot reasonably be expected to make substantial progress towards becoming self-supporting?
- 2) Did the circuit court err in denying the appellant indefinite alimony [where] based on him making as much progress towards becoming self-supporting as can reasonably be expected, the respective standard of living of the parties will be unconscionably disparate?
- 3) Did the circuit court err in finding that the appellant's lying and cheating contributed to the estrangement of the parties?

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<sup>1</sup> Their first child, S. Carey, was born of the marriage on December 31, 1992. The second child, B. Carey, was born October 30, 1994.

- 4) Did the circuit court err in finding that the appellant did not support the appellee?
- 5) Did the circuit court err in denying the appellant's attorneys' fees, court costs, and experts' fees?

It is clear from the record that the circuit court considered the required factors in determining not to award indefinite alimony, and we perceive no clear error in the court's fact-finding. Despite the numerical disparity in income, the circuit court did not commit clear error when it found that the parties' standards of living were not unconscionably disparate, nor did it abuse its discretion in denying Mr. Carey's request for indefinite alimony.

The circuit court found that Mr. Carey was justified in seeking an award of alimony, but found the attorneys' fees to be excessive. Because we cannot glean from the record any consideration by the court of the parties' ability to pay the attorneys' fees and costs, we cannot properly assess the court's exercise of discretion in denying Mr. Carey's request. We therefore remand for the circuit court to reconsider the issue of attorney's fees and costs.

### **BACKGROUND**

On October 27, 1998, Ms. Rosenbauer filed a complaint for limited divorce asserting that the parties separated on June 1, 1998. Mr. Carey responded with a *pro se* answer and counter-complaint on November 30, 1998, and followed that with a supplemental complaint, submitted by counsel on July 6, 1999, for absolute divorce on grounds of constructive abandonment, one-year separation, and adultery.

Before the first divorce complaint made it to trial, the parties contacted mediator Stanley Rodbell. Ms. Rosenbauer indicated in her testimony before the circuit court that it was her understanding that Mr. Rodbell filed a letter with the court stating that the parties had decided to proceed through mediation. On February 26, 1999, the circuit court entered an order of referral to mediation and parenting seminars. The parties filed a joint stipulation of voluntary dismissal to dismiss Wife’s complaint for limited divorce and Husband’s supplemental complaint for absolute divorce on November 19, 1999. That case was closed without any order from the court dissolving the marriage. Nonetheless, at the 2013 merits hearing, Ms. Rosenbauer testified that she believed the parties were divorced following the 1999 proceedings, and only learned that they were not in 2009. Following the voluntary dismissal of the parties’ complaints, Mr. Carey and Ms. Rosenbauer lived separately (holding themselves out as a divorced couple), abiding the terms of an agreement regarding custody and support they had reached during mediation. Ms. Rosenbauer also testified that both parties waived their right to alimony as part of that agreement.

Mr. Carey, who suffers from Hereditary Spastic Paraplegia, a degenerative condition with which he was diagnosed at the age of 12, was placed on short-term disability by his employer in 2007. However, his condition did not improve and he was terminated on November 26, 2007. Mr. Carey testified that he suffers from cognitive decline, memory loss, spasticity and stiffness, and urinary urgency. Since 2007, Mr. Carey has been unable to find employment but has been receiving social security disability benefits.

According to Ms. Rosenbauer's testimony at the December 18, 2013, proceeding, she was contacted by Mr. Carey in 2009. In anticipation of marrying his new girlfriend, Mr. Carey had discovered that he and Ms. Rosenbauer were never actually divorced. However, the parties took no further action at that time.

In December of 2012, Ms. Rosenbauer contacted Mr. Carey to attempt to finalize their divorce. On January 31, 2013, Ms. Rosenbauer filed a complaint for absolute divorce based on one-year separation grounds asserting that the parties separated on May 17, 1997. Mr. Carey filed his *pro se* answer and counter-complaint for Absolute Divorce on April 3, 2013, seeking absolute divorce, property division, monetary award, and indefinite alimony. He also averred that the parties separated on May 17, 1997.

On December 18-20, 2013, the circuit court held a merits hearing on the contested issues of alimony, marital award or equitable division of property, and attorney's fees. Both parties testified as to their respective financial and health situations, as well as their current standards of living.

Ms. Rosenbauer testified that the initial separation of the parties was a result of discovering that Mr. Carey engaged in adulterous behavior in the marital home. Additionally, on cross-examination, counsel for Mr. Carey read a portion of Ms. Rosenbauer's deposition testimony into the record:

In fact, [Ms. Rosenbauer] said, 'I believe I was lied to at the beginning. Prior to being married I did not know that he had tax return issues. I did not know he had not filed taxes for five years. I did not know that he had bad credit. I did not know that he was not employed as he had said he was employed. I did not realize he did not have insurance although he said he did. I did not realize he did not have car insurance even though he said he did. I believe

that those coupled with an inability for us to communicate in what I thought was an honest way is probably the crux of it.’

### **Ms. Rosenbauer’s Income and Expenses**

At trial, Ms. Rosenbauer produced her social security statement showing her income through 2009. From 1997 to 1999, her taxed social security earnings were \$0.00. The statement also indicates that, prior to the parties’ separation, Ms. Rosenbauer’s annual income fluctuated from a low of \$0.00 to a high of \$51,822.00. At no time prior to 2006 did Ms. Rosenbauer earn more than \$100,000.00 in a single year.

Ms. Rosenbauer testified that, since May of 2008, she has been employed as Senior Vice President of Business Operations for QSSI, Inc. According to her testimony, Ms. Rosenbauer earned approximately \$125,000.00 in 2009, approximately \$167,000.00 in 2010, and approximately \$197,000.00 in 2011. After completing her college degree in 2012, Ms. Rosenbauer’s annual income rose to approximately \$303,000.00. However, her long form financial statement dated December 17, 2013, indicates gross monthly wages in the amount of \$14,908.34 and a net monthly income of \$7,905.17. The form also lists Ms. Rosenbauer’s total monthly expenses as \$13,853.62, resulting in a monthly deficit of \$5,948.45. In addition to her work with QSSI, Inc., in 2010 Ms. Rosenbauer started her own consulting business, Tribeth Consulting, LLC. Her 2010 tax return shows a \$23,064.00 business loss for Tribeth Consulting and she is no longer pursuing that business. Ms. Rosenbauer also acknowledged that she had received a \$100,000.00 bonus from QSSI (approximately \$66,000.00 after taxes) which accounted for the bulk of the money in her bank account, but was unlikely to receive another bonus in the future.

Ms. Rosenbauer also testified that for the approximately thirteen and-a-half years, she has lived with Mr. Brian Gorecki and that the two share household expenses. However, she testified that the expenses reflected on her financial statement were paid by her alone, and included loans taken out to pay college tuition for her daughters and for three vehicles, two of which were used by her daughters. Mr. Carey does not contribute to the cost of his children's college education. In 2010, Ms. Rosenbauer rented an apartment and established residency in California where her daughter was attending college. Thereafter, she split time between California and Maryland. Ms. Rosenbauer does not own a home. She further testified that, in the sixteen years from their separation to the merits hearing, Mr. Carey had never contacted her regarding the need for financial assistance.

#### **Mr. Carey's Income and Expenses**

Mr. Carey's social security statement indicates that prior to the parties' separation his annual income fluctuated from a low of \$5,848.00 to a high of \$48,076.00. Although his income continued to fluctuate, the statement reveals that Mr. Carey's average income from 1998 through 2007 (after which he was no longer working) was \$39,337.50.

Mr. Carey's 2013 amended financial statement indicated a total monthly income of \$2,683.19, primarily from social security disability insurance, and total monthly expenses in the amount of \$3,306.02 (for a deficit of \$622.83 per month). Mr. Carey also filed a "future financial statement" reflecting additional expenses for domestic expenses and extraordinary medical expenses, and reflecting a monthly short-fall of \$5,517.81. Both of Mr. Carey's financial statements indicate a liability of \$100,734.00 in attorney's fees as

of December 18, 2013. Mr. Carey also testified that his fiancé provides him with limited support when necessary.

According to his testimony, Mr. Carey lives in a one-bedroom handicapped accessible apartment in Columbia, Maryland, which he rents for \$1,275.00 per month. Prior to the parties' separation Mr. Carey was employed with several different companies at a rate of approximately \$35,000.00 per year.<sup>2</sup> During that time, Ms. Rosenbauer was employed intermittently as a realtor. However, Mr. Carey was the primary wage earner and the parties' lived, first, in a leased townhome and then in a two-bedroom and den condominium unit. Mr. Carey's last employment, with Kelly FedSecure, was terminated on November 26, 2007. At the time of the hearing Mr. Carey was receiving \$1,932.60 monthly in social security disability benefits. He also receives \$1,191.33 from long-term disability insurance plans obtained through prior employers. Mr. Carey's gross monthly income at the time of trial was \$3,123.93 (\$37,487.16 gross annually).

Regarding his infirmity, Mr. Carey testified that at the time of the hearing he had short-term memory problems and severe gait impairment—which required the use of either two canes or a wheelchair. He also testified that he has difficulty sleeping, experiences consistent back pain, and that he suffers from depression.

The circuit court accepted Dr. Scott Brown as an expert in the area of rehabilitative medicine and the course of treatment for Hereditary Spastic Paraplegia. On December 19,

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<sup>2</sup> From 1991 to 1995, Mr. Carey was employed by CompuCAD. From 1995 to 1998, he was employed by the National Association of Manufacturers. From that point until his inability to continue working in 2007, Mr. Carey was employed at various times with CompUSA, Artemis, Wachovia Bank, and Kelly FedSecure.



2013, Dr. Brown testified that he had been treating Mr. Carey for approximately two years and indicated that he had previously executed a form certifying Mr. Carey's inability to work. Regarding the progression of Mr. Carey's impairments, Dr. Brown testified:

When I first saw Mr. Carey he told me that he was able to ambulate, to some degree, using canes and that has progressively deteriorated in course of the two years that I've been seeing him, despite the treatments that we've been using to try to preserve his capability of walking.

\* \* \*

As a result of the paraplegia it affects other systems, aside from just the muscles, so bowel and bladder functions are also affected and [] leg spasms are a component of the paraplegia with spasticity.

As to Mr. Carey's prognosis, Dr. Brown opined that "[i]t's difficult to know, of course, how much worse it might get. In general, the condition tends to either be very slowly progressive or static."

Notably, Dr. Brown was, upon objection, prohibited to opine specifically regarding Mr. Carey's ability to work. However, Vocational Rehabilitation Counselor Lianne Friedman testified that she evaluated Mr. Carey and, after being accepted as an expert by the circuit court, she opined: "Mr. Carey's physical and cognitive issues, the combination of those, do not make him employable to any employer."

### **Reasonable Attorney's Fees**

At the merits hearing, Mr. Carey also sought an award of attorney's fees. As indicated above, by the time of the December 19, 2013, hearing, his financial statement indicated that he had incurred \$100,734.00 in attorney's fees. In support of Mr. Carey's claim for attorney's fees the court accepted into evidence a bill reflecting the \$100,734.00

in fees charged for Mr. Carey’s legal representation up to that point. Mr. Carey testified that he believed those fees to be fair and reasonable. In addition to Mr. Carey’s testimony, his counsel hired Thomas A. Burns, Esq., to review the bills rendered to Mr. Carey and prepare an affidavit. That affidavit, however, was not admitted into evidence.

Ms. Rosenbauer’s financial statement indicated her attorney’s fees at that time were \$25,000.00. At the start of trial, she testified that, as of December 18, 2013, she had incurred approximately \$19,000.00 in attorney’s fees. On December 20, she testified that she had made a payment of \$30,000.00 to her attorneys to pay off her outstanding balance and provide a retainer for the rest of the trial.

### **Findings of the Circuit Court**

At the conclusion of the three-day trial the circuit court made some findings on the record. The circuit court stated:

What we have here is – you have a twenty-two year marriage, where the parties have been separate for sixteen years. There was an initial attempt at a divorce, which was dismissed . . . on November 9th of 1999. And the parties moved on with their lives as if they were divorced, but they were legally married; and it shows, by the evidence that’s been presented, their intent to live separate lives.

Now, the Court is going to be reviewing the evidence and the testimony, because the Court has to make a credibility determination, because it’s all about the money, meaning alimony. And just on its face, when you look at -- the fact is, you have one spouse earning [t]hirty [t]housand [d]ollars on Disability, and another spouse making either [t]wo [h]undred and [s]eventy-[e]ight [t]housand, or [t]hree [h]undred and [t]hree, whatever year you use. On its face it slaps to say, “[t]his is an alimony case.” But the Court has twelve, if not thirteen, factors under Family Law 11-106 that it must consider, as well as eleven factors under . . . Family Law 8-205.

On January 31, 2014, the circuit court signed an order of absolute divorce. Mr. Carey’s counter-claims for alimony, equitable distribution of property, monetary award,

and counsel fees were denied. The Judgment of Absolute Divorce was entered on February 5, 2014. The accompanying memorandum opinion by the circuit court stated, in part:

In applying the best evidence rule the Court cannot find by a preponderance of evidence that there was a written agreement that resolved property issues or a waiver of alimony in 1999 and the issues are appropriately before the court.

\* \* \*

The parties have been separate and apart for at least one-year before the filing of the Complaint for Divorce even though their prior filing lists a different date for their separation. . . . [T]he Court finds that absolute divorce is appropriate on the ground of a one-year separation.

\* \* \*

[Mr. Carey] has a genetic medical condition called Hereditary Spastic Paraplegia, which is also known as Familial Spastic Paraplegia or FSP, with cognitive decline and memory loss. . . . [T]he condition affects the spinal cord and central nervous system and [Mr. Carey] has several impairments. They include sever spasticity and muscle spasms, muscle weakness, difficulty ambulating, fatigue, difficulty sleeping, and bladder problems that require catheterizations.

\* \* \*

[Mr. Carey's treating physician] also testified that [Mr. Carey's] condition may or may not get worse, and on cross examination testified that [Mr. Carey's] condition may actually be stable and may not worsen.

\* \* \*

Today [Mr. Carey] receives approximately \$35,000.00 a year in disability benefits and only has himself to support. Even though [he] is currently not employed he has the ability to be self-supporting since he has been self-supporting for the past 16 years from his years of employment and years of receiving financial disability benefits.

\* \* \*

[Mr. Carey's] medical condition and cognitive problems prevent him from obtaining suitable employment even with additional education or training.

\* \* \*

[Mr. Carey] also testified that the condo in Columbia was a luxury condo and that he believed they actually purchased the unit. When questioned about the difference between a land installment contract and a deed, [Mr. Carey] testified that even though he was a licensed real estate agent at the time, as well as a banker, that he did not know the difference from a land installment contract and a deed. The Court finds this testimony to be not credible, and that the parties rented the condo they had lived in and the unit was never purchased.

The parties never owned a home, lived paycheck to paycheck, took 3 vacations during the years they lived together, and did not acquire substantial property. Their lifestyle and standard of living was very modest.

Since the separation [Mr. Carey] has maintained a similar standard of living. . . . Additionally, [Mr. Carey] has very little, if any, debt, and is able to maintain his lifestyle.

\* \* \*

It is noted that [Mr. Carey's] list of [family] expenses ends in 2006. . . . [He] asserts that he paid [family] expenses after 2006 and that he has not had the time to calculate those expenses. This case has been in litigation for approximately one-year, and [Mr. Carey] has had ample time to prepare a list of [family] expenses after 2006. There is no credible evidence of payment of expenses after 2006, and therefore, the Court finds that [Mr. Carey] has not contributed to the well-being of the family since 2006.

\* \* \*

There was testimony by [Ms. Rosenbauer] that [Mr. Carey's] lying, cheating and adultery . . . was the cause for the breakup and estrangement of the parties, and the Court has made such finding. . . . [T]he court finds that [Mr. Carey's] lying and cheating contributed to the estrangement of the parties.

\* \* \*

[Ms. Rosenbauer] is currently 49 years old, and [Mr. Carey] is 52 years old.

\* \* \*

There was no testimony presented by either [Ms. Rosenbauer's] counsel or [Mr. Carey's] counsel of [Ms. Rosenbauer's] physical and mental health.

\* \* \*

[Ms. Rosenbauer's] monthly expenses are listed as \$10,805.62 per month and expenses listed for the children are \$3,048.00 per month. [Ms. Rosenbauer's] monthly expenses are determined to be fair and reasonable. The Court recognizes that [Ms. Rosenbauer] has no legal obligation to support her adult children, however, she has taken on the responsibility to pay their tuition and costs which are approximately \$3,048.00 per month. . . . [Ms. Rosenbauer] lists her gross monthly income as \$14,908.34 per month. . . . [Ms. Rosenbauer] would be able to meet her needs if she had to pay or contribute towards [Mr. Carey's] needs.

\* \* \*

[Ms. Rosenbauer] has the financial resources to meet her needs. . . . As previously stated, [Mr. Carey] has the financial resources to meet his monthly needs.

\* \* \*

Having considered each of the statutory factors, in addition to the record, testimony, and exhibits, the Court finds that Husband is not entitled to alimony. The Court finds that the Husband is self-supporting and has been so far for the past 16 years. The Husband is seeking a lifetime pension from the Wife which is not the purpose of alimony.

On February 20, 2014, Mr. Carey filed a timely notice of appeal from the circuit court's denial of his requests for alimony, monetary award, and attorney's fees.

Additional facts will be introduced as they pertain to the issues discussed.

## **DISCUSSION**

When this court examines factual findings, the clearly erroneous standard of Maryland Rule 8-131(c) is applied:

*Action tried without a jury.* 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.

If the reviewing court concludes that “the factual findings of the trial court are not clearly erroneous and that sound principles of law were applied, the trial court's decision will not be disturbed unless there has been a clear abuse of discretion.” *Boswell v. Boswell*, 352 Md. 204, 224-25 (1998) (citing *Davis v. Davis*, 280 Md. 119, 125-26 (1977)).

## I.

### **Indefinite Alimony**

Mr. Carey argues that his inability to work due to ill health contradicts the circuit court’s finding that “he has the ability to be self-supporting since he has been self-supporting for the past 16 years from his years of employment and years of receiving financial disability benefits.” Mr. Carey contends that the circuit court erred by not awarding him indefinite alimony because, due to his hereditary medical condition, he cannot reasonably be expected to make substantial progress toward becoming self-supporting. Further, Mr. Carey maintains that, even after he has made as much progress toward becoming self-supporting as reasonably possible, the parties’ respective standards of living will remain unconscionably disparate.

Ms. Rosenbauer counters that the circuit court correctly found that Mr. Carey is self-supporting and has been for 16 years. She contends that the court was correct to determine

that—based on Mr. Carey’s disability income, his monthly expenses, and the fact that he “has very little debt, if any”—the evidence reflects Mr. Carey’s ability to meet his own needs and maintain his standard of living. Ms. Rosenbauer argues that Mr. Carey presented no evidence at trial to indicate that his social security disability or long-term disability benefits would decrease or that the expenses listed on Mr. Carey’s future financial statement were actual, necessary expenses that would prevent him from maintaining his ability to be self-supporting.

The principal purpose of alimony is rehabilitative, and it is generally employed only to support the recipient spouse until he or she became self-supporting. *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 141 (1999). Indefinite alimony, therefore, should be awarded only in exceptional circumstances. *Id.* at 142 (stating that an alimony award should reflect the desirability of each spouse becoming self-supporting and the undesirability of alimony as a lifetime pension); *see also Turrisi v. Sanzaro*, 308 Md. 515, 527 (1987). However, where it is either impractical for a dependent spouse to become self-supporting, or where a gross inequity will exist even if the dependent spouse is self-supporting, a court may award alimony for an indefinite period pursuant to Maryland Code (1984, 2012 Repl. Vol., 2014 Supp.), Family Law Article (“FL”), § 11–106(c);<sup>3</sup> *Bryant v. Bryant*, 220 Md. App. 145, 159 (2014).

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<sup>3</sup> FL § 11-106(c) provides:

(continued...)

*Award of indefinite period.*—The court may award alimony for an indefinite period, if the court finds that:

In *Bryant v. Bryant*, we set out the multi-level review of a decision regarding indefinite alimony:

We review indefinite alimony awards at more than one level. *First*, we review the trial court's findings of fact as to questions such as *what* a party's income is (referred to as “first-level” facts) and reverse them only if clearly erroneous. *Wenger v. Wenger*, 42 Md. App. 596, 607, 402 A.2d 94 (1979). *Second*, while the question of whether the standards of living between spouses will be unconscionably disparate is a factual one as well, *Whittington v. Whittington*, 172 Md. App. 317, 337, 914 A.2d 212 (2007), it is not a “first-level” fact:

It is a second-level fact ... that necessarily rests upon the court's first-level factual findings on the factors [in FL § 11–106(b) ] that ... are relevant to all alimony determinations, and “all the factors ... necessary for a fair and equitable award”; and upon how much weight the court chooses to give to its various first-level factual findings.

*Id.* at 337–38, 914 A.2d 212 (quoting FL § 11–106(b)).

\* \* \*

A mathematical disparity, standing alone, does not mandate indefinite alimony—the FL § 11–106(b) factors drive the analysis. *Ware v. Ware*, 131 Md. App. 207, 232, 748 A.2d 1031 (2000). “The interplay of those factors may frequently have a strong bearing on whether a particular disparity can fairly be found to be an unconscionable disparity.” *Id.* at 232–33, 748 A.2d 1031; *see also Innerbichler v. Innerbichler*, 132 Md. App. 207, 248, 752 A.2d 291 (2000) (affirming indefinite alimony award, noting that “unconscionable equitable disparity is more than a numerical calculation”

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- (1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress towards becoming self-supporting; or
  - (2) even after the party seeking alimony would have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of the parties would be unconscionably disparate.



(citing *Ware*, 131 Md. App. at 229, 748 A.2d 1031), and affirming trial court's “careful analysis of the various equitable considerations”).

220 Md. App. at 160-61 (emphasis in original).

The factors enumerated in FL § 11-106(b) are:

- (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.

A court must demonstrate consideration of all necessary factors, *Roginsky*, 129 Md. App. at 143 (citation omitted); however, “[t]he burden of proof as to the existence of the prerequisites to entitlement is upon the economically dependent spouse who seeks alimony for an indefinite period.” *Thomasian v. Thomasian*, 79 Md. App. 188, 195 (1989). We

review the trial court's findings of fact under FL § 11-106 under the clearly erroneous standard and the trial court's decision whether to award alimony will not be disturbed unless the court abused its discretion. *Roginsky*, 129 Md. App. at 143.

Here, the court, both on the record in open court and in its memorandum opinion, conducted a step-by-step analysis of each of the factors enumerated in FL § 11-106(b). The court's findings, reproduce in large part *supra*, also included that the parties' lifestyle and standard of living during the six-year period of cohabitation was very modest and they both have continued to live a modest lifestyle, and that Mr. Carey listed expenses of \$8,201.00 per month, however, \$5,000.00 of that is not currently being incurred. Moreover, contrary to Mr. Carey's argument that the circuit court erred in failing to find that he could not reasonably be expected to progress towards being self-supporting, the circuit court unequivocally found that Mr. Carey has the financial resources to meet his monthly needs and maintain his standard of living, and that he *is* self-supporting.

Regarding the parties' assets, the circuit court noted that “there is very little property in the Husband's name.” Mr. Carey had approximately \$1000.00 in his name. Ms. Rosenbauer had \$144,449.94 in assets titled in her name. However, the majority of that sum (\$130,000.00) is in her 401(k) plan. Attempting to balance the equities in this case, the court looked to Wife's major asset, the 401(k) and stated:

Th[e] [401(k)] asset was acquired solely by the Wife, and the Husband did not contribute in any way towards the acquisition of this asset, and it was acquired during a time when the parties intended on being separate and apart and not connected to one another.

\* \* \*

The Court notes that an equitable distribution does not mean an equal division of property. The Court in making this decision recognizes that the Wife has approximately \$145,000.00 in assets compared to the Husband's assets of \$1,000.00. The Wife has made significant non-monetary contributions to the family, and the Husband took affirmative steps to exclude the Wife from any of his property or towards the well-being of the family. The Husband had the ability to contribute towards the Wife and well-being of the family and chose to contribute towards the well-being of his girlfriend's family and her child. Moreover, the Husband did not participate in any way in the acquisition of the Wife's assets during the 16 year separation.

When making an equitable monetary award based on marital property, FL § 8-205(b)(8) requires the court to consider, among other factors,

how and when specific marital property or interest in [a pension, retirement, profit sharing, or deferred compensation plan], was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both.

Accordingly, the circuit court, making a judgment in equity, was entitled to consider the source of those retirement assets. Nothing in the record compels this Court to disturb the first-level factual findings of the circuit court.

### **Factors Contributing to the Estrangement of the Parties**

Mr. Carey contends that the circuit court erred in determining that “[Mr. Carey’s] lying and cheating contributed to the estrangement of the parties,” where the absolute divorce was granted on the ground of a one-year separation. However, the considerations before the court in making an alimony determination are not limited to the grounds for the divorce. It is clear that the court was, not merely permitted, but obligated to consider evidence concerning the “circumstances that contributed to the estrangement of the parties” pursuant to FL § 11-106(b)(6).

Ms. Rosenbauer’s testified on December 18, 2013, that she was certain that the date of her separation from her husband was May 17, 1997, “[b]ecause [she] came home and found [Mr. Carey] in [her] bed with someone else.” Moreover, on cross-examination, when asked why her marriage to Mr. Carey ended, Ms. Rosenbauer answered “[i]t was a multitude of reasons but there was a breakdown in the marriage between some [sic] what I perceived as lying and cheating.” Thus, there was testimony before the court that, if deemed credible, supports the court’s finding. Because FL § 11-106(b)(6) requires the court to examine the “circumstances that contributed to the estrangement of the parties,” the court’s consideration of allegations of dishonesty and infidelity was not error.

### **Self-support and Disability**

In support of his argument that the court erred in failing to award alimony based on his inability to work due to ill health, Mr. Carey relies on *Hughes v. Hughes*, 213 Md. 452, 456 (1957)—primarily dealing with whether the parties were entitled to a divorce on the grounds of voluntary separation. In *Hughes*, the Court of Appeals concluded:

Here, there was proof that, although the wife has supported herself for 30 years, her health is impaired to the point where she should not continue to work, and she has a prospect of heavy medical expenses. Under the circumstances, we are disposed to . . . affirm the Chancellor's award of alimony to the appellee.

*Id.* Significantly, however, the Court began its opinion in *Hughes* by noting that “[this] case is somewhat unusual, in that the husband seeks a reversal on the ground that he is entitled to a divorce on the evidence presented, but **does not contest the allowance or amount of alimony.**” *Id.* at 453 (emphasis added). Thus, the *Hughes* Court simply found no need to reverse a decision of the trial court that was not disputed by the appellant.

Mr. Carey’s argument also mischaracterizes *Berman v. Berman*, 191 Md. 699, 704 (1948), asserting that the circuit court awarded Ms. Berman alimony after a finding that she was not in good condition. Mr. Carey fails to acknowledge, however, that Ms. Berman had originally been awarded alimony of \$15.00 per week as part of her divorce judgment in 1929 when her physical condition was not a factor. *Id.* at 701. After 18 years, intervening periods of employment, attempts by Dr. Berman to have alimony reduced, the parties’ child reaching the age of majority, and the onset of Ms. Berman’s health problems, the court revisited the amount of alimony and set it at \$10.00 per week. *See id.* at 701-04. Thus, Ms. Berman was not awarded alimony because she was in poor health; rather, the alimony amount was being lowered despite her poor health. *Berman* fails to lend support to Mr. Carey’s contentions.

Mr. Carey also cites to *Hiltz v. Hiltz*, 213 Md. App 317 (2013), to assert that the circuit court erred in failing to find that his disability caused him “not to be self-supporting” where Mr. Carey had “put forth testimony from both his treating physician and a vocational expert regarding his disability and his inability to work.” In doing so, however, Mr. Carey commits the error of false equivalence. *Hiltz* does not stand for the proposition that evidence sufficient to establish that a party is disabled also requires a finding that the party is not self-supporting. Rather, in *Hiltz*—where a spouse requested indefinite alimony by virtue of her status as a recipient of social security disability benefits—we noted that “no rational basis exists to support an automatic finding that every social security disability recipient completely lacks the capacity to work or earn any income.” *Id.* at 342-43. We

vacated the circuit court’s award of indefinite alimony and remanded the case with the following instructions:

On remand, the circuit court should permit both parties to present additional evidence to support and/or refute [appellee's] claim of total and permanent disability. If after reviewing all the propounded evidence the court determines that [appellee] has met her burden of proof, and is, in fact, completely unable to work in any capacity (even below the substantial gainful activity threshold permitted by the SSA), *see* Md. Code (1984, 2012 Repl. Vol.), § 11–106(c)(1) of the Family Law Article, or determines that even after she makes “as much progress toward becoming self-supporting as can reasonably be expected [and] the respective standards of living [between] the parties will be unconscionably disparate,” *see id.* § 11–106(c)(2), **then the court may exercise its sound discretion** in awarding indefinite alimony.

*Id.* at 346 (emphasis added). Thus, in *Hiltz*, even were the circuit court to determine on remand that the appellee’s disability rendered her unable to work, the decision to award indefinite alimony would still be within the discretion of the court. Thus, as in the matter *sub judice*, a circuit court may reasonably conclude that, although unable to work, the party requesting alimony remains self-supporting through other means. Here, the court found that Mr. Carey had demonstrated his ability to remain self-supporting and independent since 2007 when he lost his job. Accordingly, the circuit court was not required to award indefinite alimony solely based on Mr. Carey’s status as disabled and unable to work, and the court did not err.

Because it is clear from the record that the circuit court considered each of the enumerated factors in § 11-106(b), and we perceive no clear error in the court’s first-level fact-finding, we turn to the second-level question of whether the standards of living between spouses will be unconscionably disparate. *See Bryant*, 220 Md. App. at 160-61 (citing *Whittington*, 172 Md. App. at 337).

### **Future Earnings and Standard of Living**

The presence of a difference in earnings of the spouses, even if it is substantial, does not automatically establish an unconscionable disparity in the standards of living to support an award of indefinite alimony. *Karmand v. Karmand*, 145 Md. App. 317, 336 (2002). We have recognized that “no hard and fast rule can be laid down, and . . . each case must depend upon its own circumstances to insure that equity be accomplished.”<sup>4</sup> *Alston v. Alston*, 331 Md. 496, 507 (1993).

In the case before us, there is ample evidence in the record establishing the parties’ standard of living during the marriage. As noted above, there was no credible evidence presented that the parties ever owned the condo they lived in for a period during their cohabitation, and the parties never owned a home. They lived paycheck to paycheck, primarily on Mr. Carey’s wages, and did not acquire substantial property. As the circuit court stated, “[t]heir lifestyle and standard of living was very modest.”

Currently, Ms. Rosenbauer’s reasonable monthly expenses, including support for the college education of the parties’ children, amount to \$13,853.62. With her gross

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<sup>4</sup> Although we have never adopted a standard that unconscionable disparity exists based purely on a particular percentage comparison of gross or net income, there are several cases in which Maryland appellate courts found unconscionable disparity based on the relative percentage of the spouses’ incomes. See *Tracey*, 328 Md. at 393 (stating Wife had realized her potential in the labor market and earned 28 percent of what Husband earned); *Caldwell v. Caldwell*, 103 Md. App. 452, 464 (1995) (Wife earned 43 percent of what Husband earned); *Blaine v. Blaine*, 97 Md. App. 689, 708 (1993) (Wife earned 23 percent of what Husband earned), *aff’d on other grounds*, 336 Md. 49 (1994); *Rock v. Rock*, 86 Md. App. 598, 613 (1991) (Wife earned 20-30 percent); *Broseus v. Broseus*, 82 Md. App. 183, 196 (1990) (34.9 percent); *Bricker v. Bricker* 78 Md. App. 570, 577 (1989) (35 percent).

monthly income of \$14,908.34, Ms. Rosenbauer is able to meet her needs. However, Ms. Rosenbauer owns no real property and has more than \$100,000.00 in loan debt.

Mr. Carey receives a gross monthly income of \$3,132.93 from disability benefits and only has himself to support. There is no credible evidence that he has contributed to the well-being of the family or his children’s education since 2006. Mr. Carey also does not own real property, but, unlike Ms. Rosenbauer, he carries very little debt outside of his steep attorney’s fees. Examining Mr. Carey’s testimony and financial statement, the trial court determined that Mr. Carey’s reasonable monthly expenses amount to \$2,964.00. Accordingly, the record contains sufficient evidence to support the court’s finding that, even though he is not currently employed, Mr. Carey continues to be self-supporting.

As the circuit court noted, despite the numerical disparity in income, the parties have continued to maintain a modest standard of living which they are both capable of sustaining without support. In *Karmand*, we stated that, “when both spouses either are self-supporting or are capable of becoming self-supporting, indefinite alimony is warranted if the standard of living of one spouse will be **so inferior**, qualitatively or quantitatively, to the standard of living of the other **as to be morally unacceptable and shocking to the court.**” 145 Md. App. at 338 (emphasis added). In part, because the parties have been separated for nearly two decades that is not the case here. We perceive no clear error in the circuit court’s second-level factual finding that the parties’ standards of living were (and are) not unconscionably disparate, and we hold that the circuit court did not abuse its discretion in denying Mr. Carey alimony.

## II.



### **Attorney’s Fees**

Next, Mr. Carey contends that the circuit court erred in denying his requests for attorney’s fees, court costs, and expert fees. Mr. Carey maintains that the court erred in determining that the legal fees he had incurred were excessive and that the court improperly relied on its determination that Mr. Carey “was satisfied with the status quo until he realized that [Ms. Rosenbauer] earned almost \$300,000.00 a year, while he was earning \$35,000.00 a year.” Ms. Rosenbauer, however, argues that the court was presented with significant evidence supporting its conclusion that “although [Mr. Carey] was justified in seeking an award of alimony, his legal fees are ‘without substantial justification.’”

Pursuant to FL § 11-110, in an alimony proceeding the circuit court “may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding,” including: (1) suit money; (2) counsel fees; and (3) costs. FL 11-110(c) requires that, before ordering such payment, the court must consider “(1) the financial resources and financial needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the proceeding.” “In awarding attorney's fees, the court should consider and articulate the parties' resources and needs.” *Ridgeway v. Ridgeway*, 171 Md. App. 373, 386 (2006) (citing *Blake v. Blake*, 81 Md. App. 712, 730 (1990)).

In addition to the two statutory factors, the Maryland courts have routinely stated that “[w]hen the case permits attorney's fees to be awarded, they must be reasonable, taking into account such factors as labor, skill, time, and benefit afforded to the client, as well as

the financial resources and needs of each party.” *Collins v. Collins*, 144 Md. App. 395, 447 (2002) (quoting *Petrini v. Petrini*, 336 Md. 453, 467 (1994)). We have recognized that the “evaluation of the reasonableness of the fees is required.” *Sczudlo v. Berry*, 129 Md. App. 529, 550 (1999) (citing *Petrini*, 336 Md. at 467; *Lieberman v. Lieberman*, 81 Md. App. 575, 601-02 (1990)). The party seeking an award of attorney’s fees bears the burden to present evidence of their reasonableness. *Sczudlo*, 129 Md. App. at 550 (citing *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 703 (1997)). In making its determination as to the reasonableness of the fees, the court should consider “(1) whether the [award] was supported by adequate testimony or records; (2) whether the work was reasonably necessary; (3) whether the fee was reasonable for the work that was done; and (4) how much can reasonably be afforded by each of the parties.” *Id.* (quoting *Lieberman*, 81 Md. App. at 601-02).

In the present case, the circuit court found that Mr. Carey “has much less in terms of financial resources, when compared to [Ms. Rosenbauer],” and that “[Mr. Carey] was justified in seeking an award of alimony.” Nonetheless, the court, without much discussion, concluded that Mr. Carey’s “fees in excess of \$100,000.00 are excessive.” Then, taking into account that Ms. Rosenbauer had already contributed \$12,500.00 towards Mr. Carey’s legal fees, the court denied Mr. Carey’s request for fees and costs.

Although the circuit court considered the parties’ relative financial positions and Mr. Carey’s disability in the context of reaching an equitable result regarding indefinite alimony, it is unclear whether adequate consideration was given to those facts in the court’s ruling on attorney’s fees. Evidence in the record reveals that Mr. Carey’s medical

condition prevents him from working, and a vocational rehabilitation expert testified that Mr. Carey is not employable due to his medical condition. Additionally, the record reveals that Mr. Carey's gross income totals \$3,123.93 per month, and the circuit court found that he incurred reasonable expenses of \$2,964.00 per month. That leaves only \$159.93 each month for discretionary or emergency expenses. The court, however, did not address Mr. Carey's ability to pay his own fees. Rather, the court determined that Mr. Carey's "legal fees are 'without substantial justification.'"

In regard to the reasonableness of the legal fees incurred by Mr. Carey, the court was presented with itemized invoices from counsel totaling \$100,734.00.<sup>5</sup> Mr. Carey testified that he believed the charges to be reasonable. In support, counsel also offered an affidavit from a second attorney who was engaged for the purpose of reviewing the bills submitted to Mr. Carey; however, that affidavit was excluded from evidence following a hearsay objection. The court, however, failed to thoroughly address whether the fees reflected in the invoices are reasonable. The court stated:

In this case, there is evidence that [Mr. Carey's] counsel fees are in excess of \$100,000.00. He retained counsel in May 2013 and by January 2014 his legal fees were over \$100,000.00. Counsel for [Ms. Rosenbauer] represented to the Court that there was not a lot of discovery conducted in this matter, and most of the fees were incurred in [Mr. Carey's] attempt to obtain an award of indefinite alimony. Counsel admitted the attorney fee invoices in to evidence, (Def. Ex. #13) and the Court notes the \$21,000.00 in fees were incurred in May 2013, which is the month counsel was retained, and most of those fees are for meetings including [Mr. Carey] and Ms. Beecher, review of documents, preparation of motions for counsel fees, subpoena[s], and financial statements and other reports from doctors. [Mr.

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<sup>5</sup> For comparison, Ms. Rosenbauer's legal invoices totaled approximately \$30,000.00.

Carey's] counsel attempted to admit an affidavit by another local attorney to justify his counsel fees.

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[Mr. Carey] may have been justified in seeking an award of alimony[;] however, fees in excess of \$100,000.00 are excessive. The Court recognizes that [Mr. Carey] has a serious medical condition that affects his ability to be gainfully employed, however counsel for [Ms. Rosenbauer] was willing to agree to [Mr. Carey's] medical condition. [Ms. Rosenbauer's] main contention was that even though [Mr. Carey] has these medical issues [he] has the ability to work and be gainfully employed. [Ms. Rosenbauer's] counsel also advised the Court that she is willing to stipulate to much of the expert testimony[;] however[,] [Mr. Carey's] counsel was unwilling to stipulate or agree to a proffer.

On this record, we are not convinced that the court adequately addressed the four questions articulated in *Lieberman, supra*, 81 Md. App. at 601-02. Although the court found, perhaps rightly, that the amount of Mr. Carey's legal fees was excessive, that does not mean that all fees were excessive, nor should that preclude a partial award. Specifically, the court here failed to address how much could reasonably be afforded by each of the parties. This may be of particular concern where, as here, one party receives limited income in the form of disability benefits. Because the circuit court found Mr. Carey's claim to be justified, but we cannot glean from the record any consideration of the parties' ability to pay the related fees, we cannot properly assess the court's exercise of discretion. *See id.* at 601. We therefore remand for the circuit court to reconsider the issue of attorney's fees and costs.

**JUDGMENT OF THE CIRCUIT COURT  
FOR HOWARD COUNTY AFFIRMED IN  
PART; JUDGMENT REMANDED IN PART  
AS IT RELATES TO ATTORNEY'S FEES**

**FOR FURTHER PROCEEDINGS  
CONSISTENT WITH THIS OPINION.**

**APPELLEE TO PAY COSTS.**