Circuit Court for Talbot County
Case No. 20–D–13–007893

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2035

September Term, 2016

DANIEL G. WILES

v.

PATRICIA G. WILES

Eyler, Deborah S.,
Berger,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: December 19, 2017

Appellee Patricia Wiles ("Ms. Wiles") and Appellant Daniel Wiles ("Mr. Wiles") obtained an absolute divorce in the Circuit Court for Talbot County on February 5, 2014. The court's order incorporated the parties' agreement, which, in part, granted Ms. Wiles monthly alimony of $750 for a specified term. On July 13, 2015, pursuant to Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 11–107, Ms. Wiles petitioned for an increase in the amount of alimony and an extension of the alimony period, claiming that circumstances had changed prior to expiration of the alimony period. The family magistrate issued findings after a two-day hearing and recommended that Mr. Wiles pay Ms. Wiles indefinite alimony at $750 per month. Mr. Wiles filed exceptions. In a detailed memorandum opinion, Judge Stephen Kehoe accepted the magistrate's findings and wholly ordered her recommendations. Mr. Wiles appealed, presenting three questions for our review:

1. "Whether the trial court erred or abused its discretion in extending, pursuant to Family Law Article § 11–107, the period of the alimony awarded to Mrs. Wiles."

2. "Whether the trial court erred or abused its discretion in awarding, pursuant to Family Law Article § 11–106(c), indefinite alimony to Mrs. Wiles."

3. "Whether the trial court erred by allowing Mrs. Wiles to submit a written Memorandum of Law in support of her position on exceptions after having failed to appear at the exceptions hearing."

We discern no error or abuse of discretion where both the magistrate and the circuit court clearly followed the prescribed statutory procedure outlined in FL § 11–107 in determining that circumstances arose that would lead to a harsh and inequitable result for Ms. Wiles if alimony was not extended. We also hold that the circuit court did not err in

awarding Ms. Wiles indefinite alimony, as opposed to rehabilitative alimony, because the judge made the requisite findings—financial and equitable—to support the conclusion that the parties' standards of living would remain unconscionably disparate. Finally, we see no error by the court in allowing Ms. Wiles to file a written memorandum opposing Mr. Wiles' exceptions because Maryland Rule 9–208 does not expressly prohibit it and Mr. Wiles did not demonstrate any prejudice arising from that decision.

BACKGROUND

The parties lived together as a married couple for over 21 years. They have two daughters—the oldest born in 1994 and the youngest born in 1997. Over the course of their marriage, Mr. Wiles was the primary earner for the family, and although she worked outside the home intermittently as needed, Ms. Wiles mostly worked in the home as a mother and homemaker. On June 15, 2012, the parties separated.

A. The Parties' Divorce

On March 29, 2013, several months after the parties' separation, Ms. Wiles filed a pro se "complaint" for alimony and child support for their youngest daughter who still was a minor at the time. Ms. Wiles alleged that her sole income came from collecting unemployment benefits and that Mr. Wiles, while able, had not supported their daughter. To bolster her claims, Ms. Wiles attached a financial statement, showing her monthly expenses at $1,693 and monthly income of $1,720. She also stated that the total value of marital assets, after deducting liabilities, was $650,000.[1]

[1] Ms. Wiles represented on her Financial Statement, filed on March 29, 2013, and

Mr. Wiles filed an answer on May 6, 2013, and claimed that, contrary to Ms. Wiles' contention, he had provided financially for the minor daughter. The same day, Mr. Wiles also filed a motion to dismiss the complaint, asserting that Ms. Wiles failed to state a claim upon which relief could be granted since a request for alimony is not a cause of action.

Three weeks later, on May 29, 2013, Ms. Wiles filed a supplemental complaint. She again claimed that she derived her sole income from unemployment benefits but could not cover her and the minor daughter's needs, and additionally, while making efforts toward self-sufficiency, she asserted that the parties' standards of living would be unconscionably disparate. She again requested alimony and child support. On June 16, 2013, Mr. Wiles submitted an answer nearly identical to his previous answer, adding that he had recently become unemployed.

On July 9, 2013, Ms. Wiles filed her complaint for absolute divorce. In addition to requesting alimony based on her current unemployment and the length of the parties' marriage, Ms. Wiles asked for sole physical and joint legal custody of their minor daughter, use of the family home, and her share of the property. Mr. Wiles denied those claims, including that alimony was appropriate for Ms. Wiles.

After participating in mediation on October 9, 2013 and November 15, 2013, the

contained in the record (but not the record extract), that the value of martial assets totaled $1,276,000. In arriving at this total, she assigned a value of $800,000 for their two homes and $20,000 for a boat slip. The record from the subsequent proceedings underlying this appeal establishes, however, that Ms. Wiles did not fully appreciate the couple's mortgage balances or the true value of the homes. At the time of the divorce, the marital home's mortgage was in default, and after the divorce, the second home and the boat slip together sold for only $380,000.

parties entered into a Memorandum of Understanding ("MOU") to settle child custody and marital property. The MOU, signed by Mr. Wiles on December 17, 2013 and Ms. Wiles on December 24, 2013, provided, in pertinent part, the following:

> 8. [Mr. Wiles] shall pay alimony to [Ms. Wiles] in the sum of $750 a month beginning January 1, 2014 and every month thereafter until the first of the following occurs: a) Daniel dies, b) Patricia dies, c) Patricia remarries, or d) December 31, 2015.

Among other provisions, the MOU awarded $440 per month in child support to Ms. Wiles; granted her income from one of the parties' three timeshare properties (which, as explained *infra*, amounted to approximately $117.50 per month); and divided equally $321,000 in combined marital retirement accounts. Also according to the MOU, Ms. Wiles was to receive the family 2009 Mercedes-Benz and half of the proceeds from the sale of parties' rental house and boat slip in Grasonville, Maryland. The parties agreed that Ms. Wiles could remain in the marital home, although the parties were in default on their mortgage, and that they would list the house after December 31, 2015, if Ms. Wiles was denied a loan modification.

At the time of the MOU, Mr. Wiles worked at U.S. Renal Care and Ms. Wiles continued collecting unemployment. Their incomes were $5,833 and $1,257 per month, respectively, before taxes. Adjusting those incomes in consideration of the alimony award, Mr. Wiles therefore earned 71.7% of the parties' shared income. The circuit court incorporated, but did not merge, the MOU into the judgment of absolute divorce entered on February 5, 2014.

B. The Motion to Modify Alimony

On July 13, 2015, roughly five and a half months before expiration of the alimony award period, Ms. Wiles moved to modify alimony. She alleged, in part:

> 2. Since th[e divorce], circumstances have changed:
>
> a) [Ms. Wiles'] income has not substantially increased.
>
> b) Since April 2015, [Ms. Wiles] has been employed with Royal Farms as an hourly, part-time customer service associate, with no benefits package.
>
> c) [Ms. Wiles] cannot afford health or dental insurance. A Bronze health plan on the Maryland exchange averages $335 per month.
>
> d) [Mr. Wiles'] current income is unconscio[nab]ly disparate compared to [Ms. Wiles'] income.
>
> e) [Mr. Wiles'] future earnings will continue to be unconscio[nab]ly disparate to [Ms. Wiles'] earnings.
>
> 3. [Mr. and Ms. Wiles] were married for 24 years.
>
> 4. There are two children of the parties: [Oldest daughter] (21 years old) and [Youngest daughter] (18 years old).
>
> 5. [Ms. Wiles] enjoyed a certain upper middle-class lifestyle during marriage.

Attached to the motion, Ms. Wiles included an exhibit showing her monthly expenses, which included $850 in rent in addition to cell phone service, car insurance, and EZ passes for herself and the two daughters, both of whom had become adults. The statement showed expenses totaling $33,180 per year, though she only earned roughly $12,000 per year (not including alimony payments). Mr. Wiles filed a response on August 18, 2015, in which he averred that Ms. Wiles did not claim a change in circumstance sufficient to alter the alimony award and that no other good cause existed to warrant modification.

After the parties completed discovery, Mr. Wiles filed a financial statement on March 24, 2016, in which he showed a net monthly income of $7,266.76 and expenses of $7,566.52, including $836.64 in payments for a loan taken while married to Ms. Wiles. His statement therefore reflected a net deficit of $299.76 each month. Ms. Wiles filed an updated financial statement on April 1, 2016, in which she represented that her monthly expenses were $4,517.50, including $1,300 for rent and $499 toward payments on the 2009 Mercedes-Benz. She neglected to include the $85 per month she claimed for a storage unit. Her income, meanwhile, totaled $1,532.61 based on her wages from Royal Farms and income from her timeshare property. Ms. Wiles thus claimed a monthly deficit of $2,984.89.

Both parties were present and testified at the hearing on April 6, 2016, before Family Magistrate Jamie Adkins. At the outset**,** Ms. Wiles' counsel pointed out that the language of the MOU's alimony provision did not preclude modification of the award and that the hearing was necessary because a change in circumstances since the divorce would cause a harsh result to Ms. Wiles if not remedied by indefinitely extending alimony.

Ms. Wiles testified that she had recently moved into a new apartment that rented for $1,300 per month—a $450 increase from her previous apartment—because the youngest daughter moved in after withdrawing from college. Prior to that, Ms. Wiles had, for a year, rented an apartment for $850 per month and located roughly one mile from Royal Farms. She explained that the reason she had rented it in April 2015, months before she actually moved into it, was because she feared that the bank would conduct a short sale on the home,

forcing her to move quickly. She remained in the family home until August 2015, however, when her youngest daughter left for college and when Ms. Wiles was supposed to finish training and begin her permanent position at Royal Farms.

Testimony then focused on Ms. Wiles' financial status. When she signed the MOU in December 2013, her unemployment benefits had recently terminated. Therefore, at that time, she had no other potential income apart from the sale of marital assets. Ms. Wiles testified that when she signed the MOU, she thought that she would receive enough money from the sale of other assets to enable her to work out a loan modification on the family home. After signing the MOU, however, the parties sold the rental property in Maryland, from which Ms. Wiles expected proceeds between $50,000 and $75,000 but received only $15,000.

Ms. Wiles also presented her employment history. From 2000 through 2008, Ms. Wiles worked part-time as a real estate agent, where she earned between $20,000 and $40,000 annually. During the marriage, Ms. Wiles also worked intermittently, including temporary assignments and one short employment with Walmart where she worked the 11:00 p.m. to 7:00 a.m. shift during the time Mr. Wiles had lost his job at Utiliquest. For two years, starting in August 2010, she was a receptionist at a local law firm and earned $8.25 per hour and then received unemployment until December 2013.

Ms. Wiles testified that her intention when signing the MOU was to work as a real estate agent again and hopefully earn "maybe 40 to 50,000 a year" based on her "[p]rior experience." Ms. Wiles became recertified in realty in July 2014. By January 2015, Ms.

Wiles affiliated with Exit Gold, a realty company, and tried, for several months after reactivating her license, to make her way back into the business. However, since she worked on commission and was unable to sell any realty, she did not generate any income.

While at Exit Gold, she met a representative from Royal Farms who encouraged her to apply, and Ms. Wiles initially believed she could work both jobs. Within a few weeks of working at Royal Farms, however, she realized that she could not because of the hours at Royal Farms and eventually transitioned to sole full-time employment there. By the date of the hearing, Ms. Wiles had worked at Royal Farms for a year, earning $10.50 an hour and working between 35 and 40 hours a week. She indicated that she would receive a $0.25 per hour raise and may be promoted.

Ms. Wiles noted a net monthly income from Royal Farms of $1,415.11 in addition to the $117.50 from her timeshare. To make up for the $2,984.89 shortfall between her monthly expenses and income, Ms. Wiles withdrew funds from her half of the retirement account received in the divorce. She initially received approximately $160,000 from the retirement accounts, and she had withdrawn roughly $50,000 in the intervening two and a half years. During her testimony, Ms. Wiles asked the court for $1,000 per month in indefinite alimony, and when questioned why she deserved that amount, Ms. Wiles stated the following:

> Because my income from Royal Farms only covers my rent. I can't make up the rest on, of the expenses. And if I don't get some sort of spousal support my retirement will be over in three years. And I am gasping for air. This is all I have. I have no other options. I was married for 24 years. We have two beautiful daughters. I was at home base. I was the stay at home mom. And there's no prospect I think for real estate at all for me at this point. So I did

the best thing I thought I could do.

* * *

> I feel I'm entitled to indefinite spousal support because I was married for 24 years. I have no marketable skills that's going to lead me to a 50 or 60,000 a year job. I'm 57 years old. And my prospects at Royals Farms are probably limited. . . . I'm glad to have that job and that's all I have. That's my anchor. I can't do it without spousal support.

Ms. Wiles was also asked on direct examination whether she had ever considered going back to school, in light of her testimony that she lacked any specialized training other than as a real estate agent, and she responded that she did, but she explained,

> [I would t]ry to obtain an associate's degree or a four year degree but I think, thinking about my age and the money I would have to invest in a degree would put me probably at 61 or 62 and I'm not sure the return on the investment for me would be worth it at my age. If I were 42 it might be different.

On cross-examination, Ms. Wiles gave the parties' disparity in income as another reason for her indefinite alimony request: "Mr. Wiles[']s gross monthly wages is [sic] $8,900 a month. Mine is $1,500." Mr. Wiles' counsel asked more regarding her expenses, pointing out that her cost for electric increased from $50 to $250 per month, that she rented her first apartment several months before actually needing it, and that she moved into a new place that cost an extra $450 per month but does not require the youngest daughter to contribute rent.

Mr. Wiles also testified that day. His salary was roughly $100,000, and he usually received a yearly bonus of up to $17,000. Additionally, he discussed his monthly expenses. He noted his car payment, food expenses, and payment on a loan taken when he and Ms.

Wiles were married. Mr. Wiles' housing expense totaled $1,000 per month because he and his current wife split a mortgage.

To finish the day, Mr. Wiles' counsel called as a witness Debbie Houck, Ms. Wiles' boss at Exit Gold, her first landlord, and the initial agent on the parties' marital home. Ms. Houck discussed Ms. Wiles' performance while in her employ and noted that Ms. Wiles was "very committed" when she began but "after a few months she just sort of disappeared." Ms. Houck further noted that for someone beginning or resuming their real estate career, it would generally take three to four months before the realtor received an income. Focusing on her efforts to sell the parties' home, Ms. Houck stated that both she and a junior agent had issues with Ms. Wiles that ended that business relationship.

Three weeks later, on April 27, 2016, the hearing resumed. The focus of the hearing centered on the status of Ms. Wiles' finances. Mr. Wiles' counsel tried to piece together her bank account activity, which included several accounts with Bank of America, in addition to parsing how Ms. Wiles transfers her mother's Social Security funds between various accounts. Through this compilation, counsel calculated that Ms. Wiles spent, on average, only $743.75 monthly on rent and had made only one payment on her storage unit.[2] Additionally, Ms. Wiles transferred roughly $5,000 total to both daughters for their personal use, though a fraction of that was to re-pay the oldest daughter for a vacation.

[2] At oral argument, counsel for Ms. Wiles admitted the paperwork involved was confusing to the court and the parties but explained, without correction on rebuttal, that the documents that were examined dated back to the time before Ms. Wiles had rented the new apartment with her daughter at $1,300 per month.

On June 15, 2016, Magistrate Adkins issued her report and recommendations. As an initial matter, she noted, "[T]he 'original award' was not made pursuant to a hearing or trial. The original award was the result of a comprehensive agreement reached by the parties [who] know their financial circumstances better than any court could." However, the magistrate characterized Ms. Wiles' expectations for the sale of marital properties as "unrealistic" and combined with Ms. Wiles' expectations for income from a revived real estate career, said, "The 'original award' was optimistic, unrealistic, or both, and was the voluntary decision of both parties." The magistrate noted that Ms. Wiles had conceded, during her testimony, that she did not "make herself aware of the mortgages on those properties, which allowed her expectations to be unrealistic."

The magistrate reviewed Ms. Wiles' employment history, finding that at the time of the hearing Ms. Wiles was earning $10.50 per hour. She credited Ms. Wiles' testimony that Ms. Wiles made an earnest effort to re-renter the real estate field, but failed. She added that "[i]n order to meet her monthly expenses, [Ms. Wiles] had to make monthly withdrawals from her IRA. This is [Ms. Wiles'] sole investment and retirement asset and, based on her current earnings, the funds will never be replaced by [Ms. Wiles]."

Based on the foregoing findings—which are only representative of the total findings that she made—Magistrate Adkins concluded that the totality of the circumstances were not what Ms. Wiles had anticipated at the time of the divorce. She determined that Ms. Wiles satisfied the statutory threshold of FL § 11–107(a)(1)-(2) and that an extension of alimony was warranted. She therefore turned to address what kind of alimony was

appropriate under the circumstances, including each factor delineated in FL § 11–106 in her analysis. Although Ms. Wiles had found employment, the magistrate concluded,

> [T]here has been 'a change in the respective circumstances of the parties since the date of the original award which bears a substantial relation to the factors which were considered at the time of the original award.' Said change is the unrealized expectation that [Ms. Wiles] would be fully self-supporting by the time alimony ended. Instead, she is earning approximately $19,459.92 per year. Including her net income from the timeshare property, she earns $20,869.92 annually. This is half of the amount she expected to be earning at the time of the divorce. She is also unable to meet her monthly living expenses without draining her sole retirement account.

(Internal citations omitted). Further, in considering that Mr. Wiles' income was $117,100 and Ms. Wiles' was $20,869.92, the magistrate noted that Ms. Wiles' income was only 17.8% of Mr. Wiles' earnings. Even if Mr. Wiles received only his base salary of $100,100, Ms. Wiles still would earn only 20.8% of what Mr. Wiles earned. The magistrate considered the disparity between incomes, applying the § 11–106 factors, to be unconscionable. Although she found the disparity in incomes was unconscionable, Magistrate Adkins noted that Ms. Wiles was unemployed at the time she signed the MOU and still voluntarily agreed to an alimony award of $750 per month. Moreover, she acknowledged that Ms. Wiles was making $20,000 more than she had been making at that time, and therefore, she determined that $750 per month in indefinite alimony, rather than $1,000, was appropriate.

C. Mr. Wiles' Exceptions and the Circuit Court's Decision

On June 24, 2016, Mr. Wiles filed exceptions to the magistrate's findings and recommendations on twelve grounds, some of which overlapped. Among Mr. Wiles'

contentions were that the magistrate erred in finding that Ms. Wiles actively tried to revive her real estate career and that Ms. Wiles only withdrew from her retirement account for her own monthly expenses. Mr. Wiles also claimed that the circumstances, to the extent they changed, only did so to Ms. Wiles' benefit as she was actually making more money than at the time of the divorce. He challenged the magistrate's finding that Ms. Wiles' earnings were less than half of that expected and that Ms. Wiles made efforts to work in the real estate field as clearly erroneous and an abuse of discretion.

At the exceptions hearing before Judge Kehoe, held on August 25, 2016, only Mr. Wiles and his counsel appeared. Mr. Wiles' argument focused on the magistrate's alleged failure to address how the change in circumstances would lead to a harsh and inequitable result for Ms. Wiles. He largely recounted his exceptions to the magistrate's conclusions regarding Ms. Wiles' efforts to gain employment that would support her and her expenses.

On August 27, 2016, the court received Ms. Wiles' motion for leave to file a memorandum. Her counsel stated that Mr. Wiles' counsel had requested rescheduling the exceptions hearing from August 23, 2016, to September 16, 2016, and counsel agreed. Ms. Wiles' counsel thus believed the hearing was rescheduled. Although the court sent a notice on August 16, 2016 that the hearing was reset for August 25, 2016, Ms. Wiles' counsel mistook that email as stating the hearing date was September 16, 2016. As a result, Ms. Wiles moved to submit a written memorandum in support of the magistrate's recommendations. Mr. Wiles opposed the motion, and in the alternative, requested the opportunity to submit a written rebuttal. On September 14, 2016, the circuit court granted

Ms. Wiles' motion, allowing her to file a written memorandum and also permitting Mr. Wiles to file a written reply. Both parties filed their memoranda accordingly.

Judge Kehoe issued his decision on October 25, 2016. He denied each of Mr. Wiles' exceptions, finding that the magistrate did not commit an abuse of discretion nor make any clearly erroneous findings. Judge Kehoe found that while the evidence of Ms. Wiles' efforts into rebuilding her real estate career was conflicting, the magistrate adequately evaluated the evidence and credited that which she found most convincing. He further noted that while Ms. Wiles may have been too optimistic regarding her future real estate career and earnings, she was moving toward that goal at the time of the award and did, in good faith, make the required steps to regain that career. As such, Judge Kehoe agreed with the magistrate's conclusion that there was a sufficient change in circumstances to support Ms. Wiles' request for modification of alimony under FL § 11–107.

Moving away from Ms. Wiles' real estate career, Judge Kehoe expressed dismay as to why Mr. Wiles excepted to the relatively modest expenses that Ms. Wiles claimed for the daughters. Additionally, regarding Mr. Wiles' exception to the magistrate's finding that no alimony agreement existed between the parties, Judge Kehoe found no error because the focus was that the MOU did not preclude modification of the award, not that one did not exist. Judge Kehoe also explained that there was no error in the finding that Ms. Wiles did not receive the expected proceeds from the sale of marital assets because while her expectations may have been unrealistic, he noted that the properties were sold via stress sales and could have received higher prices on the open market. Judge Kehoe

stated that "Mr. Wiles appears to be living a comfortable life in which he shares expenses with his current wife, and Ms. Wiles appears to live hand to mouth[]" and while $750 per month would not substantially bridge that disparity, it was not in error because Ms. Wiles had agreed to that in the MOU. Judge Kehoe concluded by denying the exception that the magistrate erred in retroactively awarding alimony to the date when the original award was supposed to terminate. Stemming from those determinations, the circuit court adopted the magistrate's report and recommendations.

Mr. Wiles moved to alter that judgment and for a new trial one week later, on November 1, 2016. He claimed that new evidence showed Ms. Wiles voluntarily quit her job at Royal Farms after the magistrate's report; that the court again did not find that a harsh and inequitable result would occur; and that the court erred in allowing Ms. Wiles to submit a written memorandum after failing to attend the exceptions hearing. On November 15, 2016, the circuit court denied Mr. Wiles' motion.

Mr. Wiles timely filed his appeal to this Court on December 2, 2016.

DISCUSSION

I.

Extension of Alimony under FL § 11–107(a)(1)

Maryland Rule 8–131(c) contains the standard of review in a case decided in the absence of a jury and in part, provides, "[T]he 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." Md. Rule 8–131(c). Our decisional law instructs that "[a] trial has broad discretion in making an award of alimony[.]" *Blaine v. Blaine*, 336 Md. 49, 74 (1994) (citing *Wallace v. Wallace*, 290 Md. 265, 282 (1981)). We therefore will not alter a trial court's "alimony determination unless the trial court's judgment is clearly wrong or an arbitrary use of discretion." *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383-84 (2006) (quotation omitted). That deference extends to a trial court's modification of an alimony award. *Cole v. Cole*, 44 Md. App. 435, 439 (1979).

a. Res Judicata Argument

As a threshold matter, we address Mr. Wiles' contention that Ms. Wiles' Motion to Modify Alimony should not have been considered by the magistrate and the circuit court below because it is barred by the doctrine of *res judicata***.** First, he points out that under FL § 11–107(a)(1), the court must make certain findings that circumstances have changed since the divorce order based on the factors delineated in FL § 11–106(b). It follows then, according to Mr. Wiles**,** that since the parties settled their divorce via an agreement, no court considered the parties' circumstances based on the factors at the time of the divorce, and therefore, the circuit court erred in finding a change in circumstances because they were *res judicata*. We need not decide whether Mr. Wiles presents a cognizable *res judicata* argument because he failed to preserve the issue before the magistrate and the circuit court.

Maryland Rule 8–131 governs an appellate court's scope of review. Section (a) of the Rule states, in pertinent part, "Ordinarily, the appellate court will not decide any other

issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8–131(a). Therefore, if a party does not raise an issue to the court so that the court can decide that issue, the party cannot obtain appellate review of that issue. *Hiltz v. Hiltz*, 213 Md. App. 317, 330 (2013). Properly raising the issue before the trial court "is a matter of basic fairness . . . as well as being fundamental to the proper administration of justice." *Id.* (internal citation omitted).

Here, Mr. Wiles did not preserve his argument that *res judicata* barred the magistrate's consideration of the factors delineated in FL § 11–106(b), described *infra*. Mr. Wiles did not raise the issue in response to the motion to modify filed by Ms. Wiles, nor does the record reflect that he made the argument during the proceeding before the magistrate or in his exceptions filed afterward.[3] We therefore hold that Mr. Wiles did not preserve the issue for appeal and that it is not properly before this Court.

b. Change in Circumstances Leading to Harsh and Inequitable Result

Mr. Wiles claims the court abused its discretion in determining that a change in circumstances occurred. According to him, Ms. Wiles' failure to obtain her expected income was neither unexpected or beyond her control because, *inter alia*, she did not engage in market research before trying to revive her real estate career and on her own volition, chose to leave the field. Mr. Wiles further argues that Ms. Wiles could not express any other relevant changed circumstance and that the one change that did occur—that she

[3] At oral argument, counsel for Mr. Wiles confirmed for this Court that the argument was not raised below.

is now employed—actually favors rather than harms her. He maintains the court failed in its duty to expressly find that a "harsh and inequitable result" would occur "without an extension" as required under FL § 11–107(a).

Ms. Wiles insists the court properly found the changed circumstances required to extend her alimony, including the difference between her actual current income and at the time of the divorce, the income she expected from future employment as a realtor. She avers that the court did make the determination that, pursuant to FL § 11–107(a)(1), her changed circumstances would result in a harsh and inequitable outcome.

The parties correctly acknowledge that FL § 11–107 governs the extension and modification of alimony awards. Its focus is on balancing the equities between former spouses, especially as "alimony is an economic concept and awards are based upon the need of the recipient spouse balanced against the other spouse's ability to provide support." *Blaine*, 336 Md. at 73 (internal citations omitted). Subsection (a) allows a trial court to extend an alimony award in the following instance: "circumstances arise during the period that would lead to a harsh and inequitable result without an extension [and] the recipient petitions for an extension during the period." FL § 11–107(a)(1)-(2). As a result, "for an extension of alimony to be appropriate, there must be a change in the respective circumstances of the parties since the date of the original award which bears a substantial relation to the factors which were considered at the time of the original award." *Blaine*, 336 Md. at 70.

The parties also agree, correctly, that *Blaine* is the leading authority on the issue

under consideration here. There, the Court of Appeals considered Ms. Blaine's motion for an indefinite extension of her alimony. *Id.* at 58. Ms. Blaine had recently completed her Master's degree in health promotion counseling, a field that encouraged employees' healthy living so as to defray medical and insurance costs for employers, and she expected to earn $40,000 annually in such a position. *Id.* at 58. She applied to over 100 jobs; however, given the reverberating effects of the 1980s recession, Ms. Blaine did not find a position that would pay more than the one full-time and two part-time jobs she was working. *Id.* at 59. The circuit court extended her alimony indefinitely, finding that Ms. Blaine's inability to obtain her expected income constituted a change in circumstances that would result in a harsh and inequitable outcome, a decision which both this Court and the Court of Appeals upheld. *Id.* at 60, 74-75. The Court of Appeals ruled that Ms. Blaine's change in circumstances would "lead to a harsh and inequitable result without an extension" as contemplated in FL § 11–107. *Id.* at 76.

Here, in line with *Blaine*, the magistrate made factual findings and legal conclusions regarding Ms. Wiles' alleged changes in circumstances and whether the impact, collectively, of those changes would be harsh and inequitable. The magistrate credited Ms. Wiles' testimony that, from 2000 through 2008, she worked part-time as a real estate agent, earning up to $40,000 annually, and then worked several jobs before collecting unemployment through December 2013. The magistrate noted that Ms. Wiles made "belated efforts" to revive her real estate career but made "virtually no income" and obtained hourly employment at Royal Farms. Ms. Wiles believed that she could earn

between "$40,000 and $50,000 annually" as a real estate agent, and the magistrate found this unrealistic as she left the field five years earlier given its downfall and had not kept abreast of developments. The magistrate noted that Ms. Wiles did not realize her expected proceeds from the sale of marital assets and was rapidly depleting her retirement account. On review, the circuit court adopted the magistrate's findings, elucidating that although overly optimistic, Ms. Wiles had, in good faith, endeavored to revive her real estate career. Judge Kehoe further clarified the magistrate's finding on the proceeds from the sale of marital assets, relating that while Ms. Wiles' expectations were unrealistic, the short timeframe in which the properties had to be sold negatively affected their sales.

The magistrate compared Ms. Wiles' situation to Ms. Blaine's situation, finding them similar in the failure to realize expected careers. Their situations were dissimilar, however, in that Ms. Blaine was pursuing a Master's degree and was employed while Ms. Wiles' was neither pursuing higher education nor attempted to find employment for several months after the divorce. Accordingly, the magistrate weighed the evidence and determined that although Ms. Wiles made "poorly informed decisions at the time of the divorce," Ms. Wiles' change in circumstances was her "unrealized expectation that [she] would be fully self-supporting by the time alimony ended." As Ms. Wiles timely filed her motion, the magistrate concluded, "Both sections (a)(1) and (a)(2) of Family Law Art. § 11–107 have been satisfied." The circuit court likewise agreed with the magistrate's comparison to *Blaine*, stating that Ms. Wiles' unrealized career expectation "is the kind of change that is consistent with the finding in *Blaine*." As a result, Judge Kehoe agreed with

the magistrate's finding that a sufficient change in circumstances occurred to support Ms. Wiles' petition to modify alimony.

We discern no clear error in the findings of fact and no abuse of discretion in the legal conclusion by the magistrate and the circuit court that FL § 11–107(a)'s requirements were satisfied. The magistrate weighed the evidence, including the parties' testimony, and analyzed it as necessary under FL § 11–107(a). Although the magistrate noted some of Ms. Wiles' shortcomings in calculating her expectations, the magistrate found that the changed circumstances still satisfied the statutory prerequisites. Admittedly, the magistrate did not state outright that the change in circumstances "would lead to a harsh and inequitable result without an extension[.]" Those words are unnecessary, however, as the court made that finding implicitly when it stated, "Both sections (a)(1) and (a)(2) . . . have been satisfied." Upon reviewing the magistrate's findings, the circuit court credited those determinations, concluding that the magistrate did not err because there was sufficient support in the record to conclude that a change in circumstances occurred and that such a change would lead to a harsh and inequitable result for Ms. Wiles.

II.

Award of Indefinite Alimony

Mr. Wiles next claims that, even if an extension of Ms. Wiles' alimony was merited under FL § 11–107, the court should have awarded rehabilitative alimony instead of indefinite alimony. While Mr. Wiles concedes that a trial court has considerable discretion in granting alimony, he maintains that the court must find that Ms. Wiles could not

reasonably become self-sufficient to overcome the statutory preference for rehabilitative alimony since the extension was based on the parties' "unconsciously disparate" respective incomes. Mr. Wiles therefore believes the court erred and should have granted rehabilitative alimony instead so that Ms. Wiles would seek, and maintain, higher paid employment.

In response, Ms. Wiles contends that the court did make the requisite findings pursuant to the factors in FL § 11–106(b). Given the court's analysis of these factors in light of the facts, Ms. Wiles asserts that the court properly concluded that the parties' "unconsciously disparate" incomes merited indefinite alimony. She further presses that the court's decision is afforded significant deference.

Under applicable law, once a court determines that a change in circumstances exists that would allow extending the alimony award pursuant to FL § 11–107(a), the court must then apply FL § 11–106(c) to decide "whether an indefinite extension would be necessary in order to avoid a harsh and inequitable result." *Blaine*, 336 Md. at 71. In an action brought under FL § 11–106(c)(2), indefinite alimony may be awarded upon a determination that "even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." FL § 11–106(c)(2).

To be unconscionably disparate, a substantial difference in living standards is insufficient; instead, after making that "mathematical comparison of the incomes[,]" the court must also consider "application of equitable considerations on a case-by-case

basis[.]" *Id.* at 71-72. "When the indefinite extension of alimony is based upon a judgment that the respective standards of living of the parties are unconscionably disparate, the court must be satisfied that the party seeking alimony cannot reasonably be expected to make further progress toward becoming self-supporting." *Id.* at 75. To that end, the court is to consider FL § 11–106(b)'s factors, *id.* at 72, which are listed as follows:

> (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.

FL § 11-106(b).

In determining whether to grant an indefinite extension of alimony, a court "may not allow the relitigation of the § 11–106(b) factors considered at the time of the award." *Blaine*, 336 Md. at 72. Analysis of those factors that existed at that time, however, is

necessary to determine whether an extension is appropriate. *Id.* Whether the circumstances are sufficient for an indefinite extension is largely in the trial court's discretion; however, the court must exercise that discretion with restraint. *Id.* at 75. This is because an award of rehabilitative alimony is preferred over one of indefinite length as it will serve as an incentive to seek gainful employment. *Id.*

Here, based on her finding that FL § 11–107(a)'s requirements were met, the magistrate turned to the factors delineated in FL § 11–106(b) to determine whether an indefinite extension of alimony was proper. To that end, the magistrate announced her findings on the relevant factors as follows:

> [Ms. Wiles] is not wholly self-supporting. Although she testified that she anticipates receiving a promotion at Royal Farms at some unspecified later date, there was no evidence as to what difference that would mean to her income. There was also no guarantee that any future promotion would definitely occur. [Ms. Wiles] has been meeting the difference between her monthly need and her monthly income by depleting her sole retirement asset.
>
> * * *
>
> [Ms. Wiles] testified that she intends to remain in her position at Royal Farms. . . . Her certification as an Associate Broker is valid through July 18, 2016.
>
> * * *
>
> The only evidence of [the parties' standard of living while married] was the number of assets in the parties' [MOU]. However, the martial home was in foreclosure proceedings and the mortgage on the [Maryland rental] property did not leave much profit after the property's sale.
>
> * * *
>
> The parties were married for twenty-four years.

* * *

[Ms. Wiles] was primarily a stay-at-home mother for the parties' two daughters[.] The evidence suggests that for the bulk of the parties' marriage, [Mr. Wiles] was the primary financial support for the family.

* * *

At the time of the hearing, [Ms. Wiles] was 57 years old. [Mr. Wiles'] age is unknown.

* * *

There was no evidence that either party is in other than good physical and mental health.

* * *

At the time of the divorce, [Mr. Wiles] was employed by US Renal Care; he remained employed there . . . [and] receives a base income of $100,100 annually. He receives an annual bonus, although the bonus is not guaranteed. . . . [Mr. Wiles] received a $17,000 bonus in 2016. [His] financial statement sets forth a monthly income of $8,344.27. Calculating [his] income based on his last bonus, his annual income of $117,100 calculates to $9,758.33 per month. [Mr. Wiles] lists monthly expenses . . . totaling $6,304.78 for himself and $1,261.74 for the parties children[.] . . . [He] has the ability to meet his own needs while providing alimony to [Ms. Wiles].

* * *

There is no agreement between the parties.

* * *

In addition to [Ms. Wiles'] income from Royal Farms, she receives average net proceeds of $117.50 per month from a timeshare property. . . . [Her] financial statement identifies assets totaling $120,500. The only income identified for [Mr. Wiles] is from his employment. His financial statement reflects assets totaling $135,600.

* * *

> The parties divided and disposed of assets as set forth in [the MOU]. [Ms. Wiles] did not receive the funds she anticipated from the sale of those assets because of the mortgages and debts that needed to be satisfied. The parties each realized half of [Mr. Wiles'] $320,000 401(k) and half of [Ms. Wiles'] $1,000 Vanguard account. [Mr. Wiles] received $15,000 from the sale of the [Maryland rental] property. [Ms. Wiles' assets are being actively depleted in an effort to meet [her] monthly obligations.
>
> * * *
>
> [Ms. Wiles] identifies liabilities of $25,200 on her financial statement. [Mr. Wiles] identifies total liabilities of $162,900 on his financial statement. [Ms. Wiles'] financial statement is not entirely supported by her bank records. In particular, the bank records submitted do not match [her] testimony regarding the amount of rent she pays monthly, nor does it support her claim that she pays a $85.00 monthly storage fee.
>
> * * *
>
> [Ms. Wiles] testified without contest that the only retirement asset she has is the one account she is currently depleting to meet her monthly needs. There was no evidence about any benefits available to [Mr. Wiles].

After making her findings as to Ms. Wiles' ability to become self-supporting pursuant to FL § 11–106, the magistrate determined that indefinite alimony was required. She looked at the income disparity between the parties, finding that in 2016, if their respective incomes remained the same, Ms. Wiles, at an income of $20,869.92, would earn 17.8% of the Mr. Wiles' income, calculated at $117,100. Even if Mr. Wiles only received his base salary of $100,100, Ms. Wiles would only earn 20.8% of his income. She concluded that the disparity was unconscionable not only due to the income proportions, but in light of the findings per the FL § 11–106(b) factors. On review, the circuit court found no error in the magistrate's determinations, agreeing that the starting point is a consideration of the parties' respective incomes. Judge Kehoe noted that Ms. Wiles

"appears to live hand to mouth[,]" and although $750 per month would not greatly close the parties' income disparity, Ms. Wiles had previously agreed to that amount.

We discern no error or abuse of discretion in the in-depth fact-finding and resulting legal analysis undertaken by both the magistrate and the circuit court in the underlying case. The magistrate's report and recommendations, as clarified by the circuit court in its opinion and order, followed the method prescribed under applicable law for considering an indefinite extension of an alimony award. The court clearly considered whether Ms. Wiles had progressed as far as reasonably expected toward self-sustainment. Specifically, in addition to the income disparity, the court noted how the various factors contributed to its ultimate determination. As a result, we cannot hold that the court's finding of an "unconscionable disparity" was an abuse of discretion, and therefore, there is no error in its award of indefinite alimony as opposed to rehabilitative alimony.

III.

Submission of Written Memorandum

Mr. Wiles' last argument focuses on the circuit court's order allowing Ms. Wiles to submit a written memorandum to his exceptions after she failed to appear at the scheduled hearing. He claims that the circuit court incorrectly authorized this when Maryland Rule 9–208 does not allow for such a submission for an exceptions argument and even if it was permitted, the court abused its discretion in allowing Ms. Wiles to do so because she did not appear at the hearing.

Ms. Wiles contends that granting relief to Mr. Wiles on this basis would be

incorrect. She notes that Mr. Wiles benefitted from being unchallenged at oral argument, and that the court granted him leave to rebut her written submission.

Maryland Rule 9–208 regards the referral of family law matters and Section (i) addresses the hearing on a parties' exceptions to a magistrate's report and recommendations. Md. Rule 9–208(i). Subsection (i)(1) allows a court to "decide exceptions without a hearing, unless a request for a hearing[.]" Subsection (i)(2) states, in part, "A hearing on exceptions, if timely requested, shall be held within 60 days after the filing of the exceptions unless the parties otherwise agree in writing."

Here, the court held a hearing on Mr. Wiles' exceptions, per his request. Ms. Wiles did not attend the hearing and later filed a motion to submit a written memorandum**.** Mr. Wiles opposed that motion. Two weeks later, the court allowed Ms. Wiles to file a written memorandum and Mr. Wiles to reply to that memorandum, and both parties complied. The circuit court issued its decision the following month, on October 25, 2016. As his exceptions were unsuccessful, Mr. Wiles moved to alter judgment and for a new trial in part because Ms. Wiles filed a written submission. That motion was denied summarily.

We disagree with Mr. Wiles and hold that the circuit court did not act outside of its authority by granting Ms. Wiles the ability to file a written submission. Ms. Wiles did not appear at the exceptions hearing because her counsel, though notified by the court, confused the date of the hearing. Stemming from that error, Ms. Wiles moved to file a memorandum in support of the Magistrate's findings two days after the exceptions hearing, on August 27, 2016.First, nothing in Maryland Rule 9–208 expressly precludes a party's

ability to file a written memorandum to support its position. The rule, in pertinent part, contemplates only that a hearing will be heard on the matter if a party timely requests it. Second, and likely most important, Mr. Wiles did not demonstrate any prejudice potentially caused by allowing Ms. Wiles to file this written memorandum. He was able to have an unopposed oral argument and to submit a written reply to Ms. Wiles' memorandum. We conclude the circuit court did not abuse its discretion by permitting Ms. Wiles to file a written response to Mr. Wiles' exceptions.

JUDGMENTS OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.