Circuit Court for Harford County
Case No. C-12-FM-19-0095

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 483

September Term, 2020

KENNETH MARK SMITHSON

v.

PATRICIA A. SMITHSON

Reed,
Beachley,
Ripken,

JJ.

Opinion by Reed, J.

Filed: March 23, 2022

Kenneth Mark Smithson ("Appellant") filed this appeal from an amended judgment of absolute divorce issued by the Circuit Court for Harford County. Appellant presents the following seven (7) issues on appeal:

1. Did the trustee sale of [the marital home] fail to adhere to the strict requirements of the Maryland Rules?

2. Did the entr[y] of the September 20, 2019 pendente lite order lack procedural due process?

3. Did the court err or abuse its discretion in appointing a trustee at the pendente lite stage of this matter, and did it err or abuse its discretion in failing to adjust the marital property division due to the increased costs and fees related to that appointment?

4. Did the court err or abuse its discretion in failing to apply the coverture fraction related to the marital portion of [Appellant's] Tier II Railroad Retirement Benefits?

5. Did the court err or abuse its discretion in ordering the sale of tangible personal property titled solely to [Appellant]?

6. Did the court err or abuse its discretion in failing to provide [Appellant] for payments made to maintain property and/or for the assets that were dissipated?

7. Did the court err or abuse its discretion in awarding conditional attorney's fees, and attorney's fee related to an alleged contempt?

For the following reasons, we shall vacate the award of attorney's fees, the order to sell Appellant's excavation equipment, and the monetary award. On remand, the circuit court shall reconsider its orders relating to the excavation equipment and attorney's fees, and recalculate the monetary award in a manner consistent with this opinion. We shall otherwise affirm the judgment of the circuit court.

FACTUAL & PROCEDURAL BACKGROUND

Appellant married Patricia A. Simpson ("Appellee") in 1999. The parties had one child ("Son"), who was born in 2001. Son was still a minor at the time the divorce proceedings were initiated but reached his eighteenth birthday prior to trial.

In January 2019, Appellant and Appellee each filed a petition for protective order against the other. Later that same month, Appellant filed a complaint for limited divorce, and Appellee filed a counter-complaint for limited or absolute divorce.

Consent Agreement and Order

On January 23, 2019, a consolidated hearing was held in the protective order cases. Both parties were represented by counsel. The parties agreed, on the record, to dismiss their respective requests for a final protective order in exchange for a temporary settlement agreement in the divorce case, which the parties intended to be entered as a consent order. The terms of the agreement were placed on the record by Appellant's attorney:

> So within that consent order[,] the parties shall not abuse, threaten to abuse . . . harass, etc. the other. . . . [T]here shall remain no contact between [Appellant] and [Son]. . . . [Appellee] shall retain use and possession of the marital home . . . with the exception that [Appellant] shall have . . . access to the outside garage for purposes of use and obtaining and returning tools. . . . [Appellant] shall be allowed to reenter the marital home on a day or a time period as agreed upon by the parties and between counsel for the focus of obtaining personal property[,] [Appellee] and [Son] will not be present during that time period. . . . Any additional personal property that [Appellant] needs to obtain shall be done so [sic] after prior communication and confirmation between counsel. . . . [A]ll communication between the parties shall be through counsel. . . . [Appellee] and [Appellant] shall cooperate through counsel in obtaining a real estate agent for the purposes of listing and selling the marital home.

The parties were then placed under oath and affirmed their consent to the terms as stated on the record. Appellant answered questions from his attorney as follows:

> Q. [Y]ou've heard the terms that I placed on the record this morning, correct?
>
> A. Yes, ma'am.
>
> Q. And you understand those terms; correct?
>
> A. Yes, ma'am.
>
> Q. And are they accurate with [ ] your understanding as far as [what] the agreement moving forward is going to be?
>
> A. Yes, ma'am.
>
> Q. And you were not forced, coerced, or placed under duress in any way, shape, or form to be bound by these terms, is that correct?
>
> A. No, ma'am.
>
> * * *
>
> Q. And you and I have had a chance both in this past week and this morning to discuss different options, different terms and everything that we've now come to an agreement on, correct?
>
> A. Yes.
>
> Q. And you're satisfied with the representation I and my office have provided to you?
>
> A. Yes.

Counsel for Appellant prepared and signed a proposed consent order that was consistent with the terms placed on the record. The order was signed also by Appellee and Appellee's attorney. For reasons that are not clear from the record, the proposed order was not forwarded to the court for approval until September 2019, as we shall explain shortly.

On June 9, 2019, consistent with their agreement, the parties entered into a contract with a realtor selected by counsel for Appellant. The parties agreed to list the marital home for sale for $179,990.

On August 29, 2019, Appellant, no longer represented by counsel, filed a pleading captioned "Contempt of Temporary Property Settlement."[1] The pleading alleged no specific facts other than that the agreement that had been put on the record at the hearing on the protective order permitted Appellant access to the driveway and garage, as well as access to the house "to allow for preparation for showing and sale." Appellant requested the court to order that "personal property, not considered marital property, that has been removed from the premises, be returned[;]" that "remaining property, not considered marital property, be left untouched;" "that all personal property belonging to [Appellee] be removed from the property[:]" and that "all bills that were agreed to be paid by [Appellee] . . . be paid as agreed at the time of the protective order that was placed in writing but not filed with the court."

The court denied the requested relief, stating that, although a docket entry reflected that a temporary agreement was placed on the record, neither party had submitted an order for the court to sign. The court advised Appellant to obtain a transcript to verify the terms of the agreement that was placed on the record or, alternatively, to contact his former attorney to ascertain the status of the order.

[1] Appellant appeared as an unrepresented litigant throughout the remainder of the proceedings before the circuit court. Appellant is represented by counsel on appeal.

On September 10, 2019, Appellant filed an "Amended Petition for Contempt of Temporary Property Settlement," to which he attached a copy of the proposed consent order bearing the signatures of his former attorney, Appellee, and Appellee's attorney. He asked the court to reconsider his request for an order of contempt.[2]

The proposed consent order that was attached to Appellant's Amended Petition for Contempt was consistent with the terms placed on the record at the hearing on the protective order. In pertinent part, the proposed consent order provided:

> that the Protective Orders [against Appellant and against Appellee] are hereby dismissed . . .
>
> that [Appellant] shall have no contact with [Son] …
>
> that [Son] shall continue to reside solely with [Appellee] …
>
> that [Appellee] shall maintain Use and Possession of the marital home …
>
> that [Appellant] shall be permitted Use and Possession of the outside buildings and area associated with the marital home …
>
> that the parties and their counsel shall cooperate in determining dates and times for [Appellant] to enter the marital home for the purposes of obtaining personal belongings and property from the marital home with [Appellee and Son] to remain away from the marital home during the agreed upon time periods; and …
>
> that the parties shall cooperate in the process of obtaining a real estate agent for the purposes of listing and selling the marital home[.]

[2] On November 14, 2019, after the consent order was eventually signed and entered on the docket, the court denied Appellant's Amended Petition for Contempt, stating that the consent order accurately reflected the agreement that was placed on the record, and that "[n]either the hearing nor the consent order contain the requirements that [Appellant] contends were violated by [Appellee]."

On September 16, 2019, Counsel for Appellee forwarded the same proposed order to the court, stating that he had signed it and sent it back to Appellant's former attorney in February. Appellee's Counsel represented that the proposed order was drafted by Appellant's former counsel and that it accurately reflected the agreement of the parties.

On September 20, 2019, the parties appeared before the court for a status conference. The court asked about the status of the sale of the marital home and was advised that an offer of $155,000 had been made. The mortgage was in default and the lender had sent out a loss mitigation package.

Appellant told the court that he would not accept the offer on the marital home because the parties originally agreed to sell the home for $179,990. He asked for the agreement to be revised to give him possession of the home. Appellant asserted that, since the agreement was reached, Son turned 18 years-old and was no longer in school and, therefore, Appellee no longer required use and possession of the marital home.

Appellee asked the court to sign the proposed consent order, explaining that there was a history of domestic violence, that the order prevented the parties from being in presence of one another, and that Appellant had stated his intent to show up at the marital home that evening. The court signed the order, finding that the parties had previously agreed to its terms.

Appointment of Trustee

On September 24, 2019, Appellee filed a Motion for Appointment of a Trustee to sell the marital home. Appellee asserted that, on August 8, 2019, a fair and reasonable offer had been made for the sale of the marital home, but that Appellant had failed to comply

with attempts to sell the house as previously agreed. Appellant did not oppose the motion. On October 22, 2019, the court granted Appellee's motion.

On November 22, 2019, the appointed trustee entered into a contract of sale for the marital home for $160,000. On the same date, the trustee filed a motion to approve the sale. The motion provided that the sale would close on November 29, 2019 or as soon as possible following the court's approval of the sale.

On December 2, 2019, Appellant filed an opposition to the trustee's motion, stating that there had been no appraisal and the sales contract was "untrue."[3] On the same date, the court signed an order ratifying the sale. The settlement on the property took place on December 31, 2019. Pursuant to the court's order, the net proceeds from the sale, which amounted to $11,326, were held in escrow pending further order of the court.

Trial

A two-day trial on the merits began on February 13, 2020. Appellant and Appellee were the only witnesses. At the time of trial, the parties were 62 years-old and 57 years-old, respectively.

During the marriage, Appellant was self-employed and ran an excavation business. Appellant ceased operation of that business sometime in 2018. He began working as a truck driver in April 2019 and earned $19,763 that year.

[3] On November 25, 2019, pursuant to a motion filed by the trustee, the court issued an order shortening the time the parties had to respond to the motion to approve the trustee sale, and giving the parties two days from the date of the order, or until November 27, 2019, to file a response. Appellant does not challenge that ruling on appeal.

At the time of trial, Appellee was employed in the banking industry and earned $50,000 a year. Appellee stated her belief that Appellant had the potential to earn $70,000 a year as a truck driver.

Appellee testified that she and Appellant began experiencing marital problems in 2006. Appellant was not working, due to a downturn in the economy, and money was "tight." The marital home had been "catastrophically struck" by lightning and the parties had to hire an attorney to represent them in a claim against their homeowner's insurance company. Appellant became verbally, emotionally, and physically abusive toward Appellee and Son. Appellee explained that, when Appellant "had money and things were good, things were great for us as a family. But when money short or he got angry about something, he would just go off in rages, and [ ] just scream[] and . . call us names, throw things, kick things." Appellee stated that she filed for a protective order against Appellant in January 2019 because Appellant "had been getting more and more violent" and was "wrecking things in the house."

Much of the evidence at trial focused on the issue of marital property. The parties submitted a joint statement of property that included two pieces of real property; the marital home and an unimproved lot. In addition to the proceeds from the sale of the marital home, the parties had received a 2018 tax refund in the amount of $10,024 that was being held by Appellee.

The property statement included numerous vehicles and pieces of construction equipment that Appellant had used in his excavation business. The evidence showed that most of the vehicles and equipment had been purchased during the marriage. Appellee

testified regarding the purchase price of each item as well as her belief as to their value, which she based on internet research and talking to other people.

Appellee had two retirement accounts, each holding approximately $1,000. Appellant had been employed by the railroad from 1976 to 2001 and would begin to receive Tier II retirement benefits when he reached the age of 66 and five months. The railroad retirement benefit could not be valued because it was subject to change. Appellant testified that Appellee was entitled to 45% of his Tier II benefits, and Appellee stipulated to that figure.

Appellant's case focused primarily on arguing that the temporary consent order did not contain the parties' full agreement and challenging the appointment of a trustee and the ratification of the sale of the marital home. He maintained that the parties had agreed that Appellee was responsible for paying the mortgage, and that the trustee sale was necessitated solely by Appellee's failure to keep the payments current. He blamed Appellee for the deteriorated condition of the marital home and argued that it would have been sold sooner and for a better price if Appellee had maintained the property.

Appellant testified that, immediately after the parties reached the temporary consent agreement in January 2019, Appellee began "distributing" marital property. In November 2019, Appellant filed a police report which resulted in Son being charged with theft. At the time of the divorce trial, the criminal charges were still pending. Appellant also claimed that he was unable to retrieve non-marital personal property including diplomas, family pictures, furniture, and rings from the marital home before it was sold because Appellee had exclusive possession of the home.

Appellant asked that the sale of the marital home be reversed, or, in the alternative, that he be "compensated" for the "actual value" of the property, without deductions for a realtor commission or trustee fees. Appellant requested that any property "removed" by Appellee or Son be "inventoried," and that any of his personal property that remained in the marital home following the trustee sale be returned.

Appellee requested that she be granted indefinite alimony and a monetary judgment for 60 percent of the total value of marital property. Both parties requested an award of attorney's fees.

Court's Opinion and Order

On April 30, 2020, the court issued a memorandum opinion, finding that Appellee was entitled to a judgment of absolute divorce on the grounds of a one-year separation.[4] The court ordered the sale of the unimproved lot and all marital personal property, including all equipment related to the excavation business. The court ordered that the net proceeds from the sale of marital property be equally distributed to the parties.

The court found that Appellee was entitled to "the marital share of [Appellant's] U.S. Railroad pension which the parties stipulated is 45% of the Tier II benefits." Finding that the parties' standards of living were not unconscionably disparate and that Appellee's financial needs were temporary in nature, the court declined to award indefinite alimony and instead ordered Appellant to pay $200 in alimony for a period of 30 months.

[4] In the amended judgment of divorce, however, the court granted Appellant an absolute divorce from Appellee.

The court noted that the parties had liquidated assets of $21,350, comprised of the proceeds from the sale of the marital home and 2018 tax refund, but found that "it would be unconscionable to release an equal share" of those funds to Appellant "while he is prosecuting the parties' son for the theft of marital property." The court ordered that, if the criminal charges against Son were not nol prossed within 60 days of the judgment of absolute divorce, Appellant would pay $4,675 in attorney's fees to Appellee, to be subtracted from his share of the liquidated assets. In the alternative, the court ordered that if the charges were nol prossed within 60 days of the judgment, Appellant would pay $1,000 in attorney's fees from his share of assets.

On June 9, 2020, the court entered an order consistent with its written opinion. On June 17, 2020, upon the parties' joint motion, the court entered an amended judgment of divorce that appears to be identical to the June 9th order except for the addition of a paragraph granting Appellant a judgment of absolute divorce from Appellee. This appeal followed.

Additional facts will be introduced in the discussion as they become relevant.

STANDARD OF REVIEW

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." Md. Rule 8-131(c). The appellate court "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." *Id.*

"A circuit court's classification of property as marital or non-marital is subject to review under the clearly erroneous standard[.]" *Huntley v. Huntley*, 229 Md. App. 484, 489 (2016). Factual findings are not clearly erroneous if they are supported by substantial evidence. *Id.*

"[A] discretionary standard of review applies to the decision of whether to grant a monetary award and the amount of that award." *Id.* A ruling reviewed for abuse of discretion 'will not be reversed simply because the appellate court would not have made the same ruling.'" *McAllister v. McAllister,* 218 Md. App. 386, 400 (2014) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)). "Instead, '[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id.* (quoting *North*, 102 Md. App. at 14).

"We review an award of attorney's fees in family law cases under an abuse of discretion standard." *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 756 (2017) (citing *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002)). "We will not disturb a circuit court's award of attorney's fees 'unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong.'" *Id.* (quoting *Petrini v. Petrini*, 336 Md. 453, 468 (1994)).

DISCUSSION

I. Trustee Sale

Appellant maintains that the sale of the marital home did not comply with the procedural rules that apply to a judicial sale of property.[5] Appellant contends that he was, therefore, deprived of the opportunity to bring these procedural deficiencies to the court's attention by filing exceptions before the sale was ratified. Appellant further asserts that the court lacked authority to order a sale of the marital home prior to granting a judgment of divorce.[6] We decline to address these contentions because any issues related to the judicial sale of the marital home are moot.

Generally, an issue is moot if "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Powell v. Md. Dep't of Health*, 455 Md. 520, 539–40 (2017) (quoting *Mercy Hosp. Inc. v. Jackson*, 306 Md. 556, 561 (1986)). Appellate courts generally do not entertain moot controversies. *Bradford v. State*, 199 Md. App. 175, 190 (2011).

An appeal from an order related to real property is moot "where the relief has become impossible, as where the property in question has been sold[.]" *Silver v. Benson*, 227 Md. 553, 559 (1962). *See also Maddox v. District Supply, Inc.*, 222 Md. 31, 36 (1960) (noting that relief from judicial sale of property is not available where the property has been transferred to a *bona fide* purchaser); *Baltrotsky v. Kugler*, 395 Md. 468, 474 (2006)

[5] Specifically, appellant asserts that (1) the trustee did not file an appraisal before making the sale, as required by Maryland Rule 14-303(c); (2) the purchaser did not file an affidavit as required by Rule 14-305(b); and (3) no notice of sale was issued and published as required by Rule 14-305(c).

[6] Appellee did not file a brief.

("an appeal becomes moot if the property is sold to a bona fide purchaser in the absence of a supersedeas bond because a reversal on appeal would have no effect.") [7]

We note that Appellant was not without a remedy. Md. Code (1973, 2020 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 12-303(v) permits an appeal from an interlocutory order for the sale of property. Appellant did not exercise that right of appeal. Consequently, the court's order ratifying the sale of the marital home was not stayed, and title to the property was transferred to the contract purchaser on December 31, 2019. Accordingly, because no relief is available, the issue is moot and we decline to address it.

II. Temporary Consent Order

Appellant contends that the court's entry of the temporary consent order on September 20, 2019 "lacked procedural due process" because (1) there was no motion before the court requesting that the order be entered, (2) the court did not hold a hearing, and (3) the court did not review the transcript of the hearing at which the parties' agreement was placed on the record. Appellant further asserts that the court erred in entering the consent order because, according to Appellant, it did not contain provisions that he thought were part of the agreement. We decline to address these contentions.

[7] Maryland Rule 8-422(a)(1) provides: "an appellant may stay the enforcement of any other civil judgment from which an appeal is taken by filing with the clerk of the lower court a supersedeas bond under Rule 8-423, alternative security as prescribed by Rule 1-402 (e), or other security as provided in Rule 8-424."

"It is well-settled that a party in the trial court is not entitled to appeal from a judgment or order if that party consented to or acquiesced in that judgment or order." *In re Nicole B.*, 410 Md. 33, 64 (2009).[8] It is the contractual nature of a consent order that precludes appeal. *Suter v. Stuckey*, 402 Md. 211, 225 (2007). As the Court of Appeals has explained, "[c]onsent judgments 'are essentially agreements entered into by the parties which must be endorsed by the court.'" *Id.* Accordingly, "when there was uncoerced 'bargaining for the reciprocal promises made to one another[,]' the end product should not be disturbed." *Id.* (quoting *Chernick v. Chernick*, 327 Md. 470, 480 (1992)). Furthermore, "[t]he fact that one of the parties may have changed his or her mind shortly before or after the submitted consent order was signed by the court does not invalidate the signed consent judgment." *Id.* (quoting *Chernick*, 327 Md. at 484).

One narrow exception to this rule provides a right to appeal "[i]f there was no actual consent because the judgment was coerced, exceeded the scope of consent, or was not within the jurisdiction of the court, or for any other reason consent was not effective[.]" *Id.* at 224 n.10). Appellant does not contend, however, that his consent was invalid. Indeed, it is clear from the record that the terms of the consent order are consistent with what was placed on the record by Appellant's former attorney, and Appellant affirmed that he entered into the agreement both knowingly and voluntarily. Accordingly, Appellant has no right to an appeal from the temporary consent order.

[8] Appellate courts will decline to address the merits of an appeal from a consent judgment even where the right to appeal is not raised by another party. *In re Nicole B.*, 410 Md. 33, 64 (2009).

III. Appointment of Trustee

Appellant contends that the court erred in appointing a trustee to sell the marital home because (1) the parties never agreed to conditions under which a trustee would be appointed, (2) the marital home was titled solely in Appellant's name, and (3) the court lacked authority to order the sale of the home prior to the entry of the judgment of divorce. Appellant further asserts that the court erred in "not factoring in the diminishment of the marital estate" associated with the trustee sale in fashioning a monetary award. As we have already concluded, because the marital home has been sold, any issues regarding the trustee sale, including the appointment of the trustee, are moot.[9]

IV. Railroad Retirement Benefits

Appellant contends that the court erred or abused its discretion in awarding Appellee 45% of his Tier II railroad retirement benefits without determining what portion of those benefits constituted marital property. Appellant argues that the Circuit Court erred by awarding Appellee 45% of his Tier II benefits, rather than awarding 45% of the marital portion of the Tier II benefits. Appellant contends that this was problematic because Appellant worked for the railroad from 1976 until 2001, but the parties were not married

[9] Even if not moot, Appellant failed to preserve any claim of error for appellate review because he did not file an opposition to Appellee's motion to appoint a trustee or otherwise raise these arguments in the trial court. *See Baltimore Cty., Maryland v. Aecom Servs., Inc.*, 200 Md. App. 380, 421 (2011) ("A contention not raised below either in the pleadings or in the evidence and not directly passed upon by the trial court is not preserved for appellate review."); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]")

until 1999. While Appellant's argument appears sound on its face, Appellant neglects to mention that the Circuit Court's order on the railroad retirement benefits accurately reflects a stipulation agreed to by the parties.

In its memorandum opinion, the Circuit Court noted that "during the course of trial [Appellant] admitted that [Appellee] is entitled to 45% of Tier II benefits if, as and when these benefits begin." In that same opinion, the Circuit Court also noted that "[t]he parties stipulated that [Appellee] will be entitled to 45% of Tier II Benefits." The stipulation referred to in the Circuit Court's memorandum opinion stems, in part, from the following testimony from Appellant:

> [APPELLANT]: I worked for the railroad 18 months while I was married. Even though that was a short period of time, according to the rules of the railroad retirement which I'm sure you don't want to go look up right now, but they have a book and on page 57 it goes into what happens with a divorced spouse on the railroad. The rule basically is the Tier 1 amount that she would receive will be the same as what she would be entitled to Social Security. She'll receive 45 percent of the employee's unreduced Tier 2 amount. Now, that's the rule. So if she never worked a day in her life, that's what she would get.
> . . . .
> So she's entitled to 45 percent of whatever I get from Tier 2 when everybody meets the eligibility. I have to be 66 years and eight months.
> . . . .
>
> THE COURT: You have to wait until you're 66 and eight months.
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: And at 66 and eight months she's entitled to 45 percent of what you get in retirement.
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: If, as, and when. Right?
> . . . .

[APPELLANT]: Yes, sir. Not before. . . .

Following Appellant's testimony, during closing arguments, Appellee's counsel stated: "I would like to apply the Bangs theory if I could, in the division of Tier II, but if [Appellant] is comfortable with 45 percent, we'll take 45 percent of the Tier II." During his own closing argument, Appellant discussed his railroad retirement benefits in an exchange with the Circuit Court:

> THE COURT: your argument to the Court is as a spouse, she's entitled to her own payout –
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: -- and it's set at 45 percent of what yours is.
>
> [APPELLANT]: That's only for the Tier II. . . .
> . . . .
> But, yes, if I was 66 and 8 months old tomorrow and I started drawing it, then, she would get -- and she wasn't drawing Social Security, wasn't of age or whatever, she would get the Tier I and 45 percent of the Tier II.

After reviewing the statements on the record, the Circuit Court entered the Amended order of divorce, along with the memorandum opinion which stated:

> The testimony was that [Appellant], who was sixty-two at trial, worked for the railroad from 1976 to 2001. With the marriage in 1999, this would make the marital portion relatively small, **however, during the course of trial [Appellant] admitted that [Appellee] is entitled to 45% of Tier II benefits if, as and when these benefits begin**.

(emphasis added). Thus, it is clear from the record that the Circuit Court's order, with respect to the Tier II retirement benefits, was the result of a stipulation between the parties at trial. Appellant failed to rebut, or even address, this crucial point in his brief. In fact, the Circuit Court used Appellant's suggested method in calculating Appellee's award from

Appellant's Tier II retirement benefits. Regardless, Appellant urges that the "Court did not explain why such a drastic departure was appropriate under the circumstances." As stated in the Circuit Court's memorandum opinion, the reason for such a "drastic departure" was the fact that Appellant agreed at trial – multiple times – that Appellee should receive 45% of his full Tier II benefits on an if, as and when basis.

The fact that both parties agreed at trial to the appropriate distribution of Appellant's Tier II benefits operates in a similar fashion to a stipulation reached under the parties' Rule 9-207 (Joint Statement of Property) filing. *See*, *e.g.*, *Flanagan v. Flanagan*, 181 Md. App. 492, 532 (2008) ("[A]n agreement reflected in a joint statement under Rule 9-207, to the effect that the parties have resolved the disposition of certain marital property, serves to render that property non-marital, pursuant to F.L. § 8-201(e)(3)(iii)). Appellant has not identified any portion of the record in which he requested that his Tier II benefits be distributed in a different manner, nor did he ever request that a portion of his Tier II benefits be considered non-marital in calculating the monetary award. Indeed, in the parties' joint statement of property, Appellant's Tier II retirement account was listed as marital property.

Accordingly, having failed to request the award calculation he now seeks, and having consented to the calculation method employed, Appellant may not now complain that the Circuit Court erred in reaching the award. *See Rocks v. Brosius*, 241 Md. 612, 630 (1966) ("The right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal."). We hold that the Circuit Court did not err or abuse its discretion in its award of Appellant's Tier II benefits.

V. Sale of Personal Property

Appellant contends that the court erred in ordering a sale of tangible personal property that was titled solely in his name, or that was still titled in the name of the party from whom the property had been purchased. Appellant further contends that the court erred in ordering the sale of personal property without an appraisal to determine the value of the property.[10]

In a divorce action, the trial court must follow a three-step process in disposing of marital property: "(1) determine which of a divorcing couple's property is marital property, (2) value such property, and then (3) determine whether to grant a monetary award 'as an adjustment of the equities and rights of the parties[.]'" *Hart v. Hart*, 169 Md. App. 151, 158 (2006) (quoting FL § 8-205(a)(2)). As in this case, "after completing the first step of this analysis, a court may, 'as to any property owned by both of the parties, order a ... sale instead of partition and a division of the proceeds.'" *Id.* (quoting FL § 8–202(b)(2)). With limited exceptions,[11] "the court may not transfer the ownership of personal or real property

[10] In passing, Appellant suggests that the court abused its discretion because the amended judgment of divorce did not include contingency provisions in the event that the parties were unable to sell personal property or incurred expenses to maintain or store the property pending the sale. Appellant sets forth no argument in support of this contention, however, and it does not appear that either party asked the court to provide for such contingencies.

[11] The court may transfer ownership of an interest in:

> (i) a pension, retirement, profit sharing, or deferred compensation plan, from one party to either or both parties;
> (ii) subject to the consent of any lienholders, family use personal property, from one or both parties to either or both parties; and

from one party to the other." FL § 8-202(a)(3). Accordingly, *absent consent of the parties*, the court has authority only to order the sale of *jointly* owned property. *See Fox v. Fox*, 85 Md. App. 448, 454 n.2 (1991) ("Absent consent of the parties, ordering the sale of property owned solely by the husband and the transfer of the husband's property to the wife, instead of increasing the monetary award *pro tanto*, was improper."); *Jandorf v. Jandorf*, 100 Md. App. 429, 438 (1994). If dividing property according to title would produce an inequitable result, the court may grant a monetary award as an adjustment of the equities and rights of the parties concerning marital property. FL § 8-205. However, as we have previously noted, FL § 8–205 "does not carry with it a right in the court to determine the assets that will be transferred or utilized to fund that award." *Blake v. Blake*, 81 Md. App. 712, 726 (1990).

Notably, the fact that certain property is considered marital has no bearing on the ownership status of that property. *See Kline v. Kline*, 85 Md. App. 28, 42-3 (1990) ("When . . . we designate property as marital or nonmarital, we are using words which have no relationship to traditional concepts of property. Whether property is marital or nonmarital has nothing whatsoever to do with who owns it, possesses it, or uses it.").

In the present case, the trial court noted the following regarding the equipment for Appellant's excavation company:

> (iii) subject to the terms of any lien, real property jointly owned by the parties and used as the principal residence of the parties when they lived together

FL § 8-205(a)(2).

Following his retirement, [Appellant] began an excavation company which he ran as a sole proprietorship. He ran this business from the Prospect Road property.

. . . .

Eventually, the excavation business dwindled . . . as the sole proprietorship became completely defunct due to his inability to run business while ordered away from the base of operations.

. . . .

The marital home on Prospect Road was initially solely owned by [Appellant]. Both parties contributed to its upkeep during the marriage. Joint consumer debt was secured by this property and its equity was used to acquire equipment for the company. All that is left from the sale of the property is $11,326.00.
. . . .

According to the parties' statement, four of the pieces of equipment were sold to third parties by the [Appellant]. [Appellee] seeks portion of the proceeds of the sale. All of the remaining items remain with [Appellant]. All except item number two were acquired during the marriage with marital funds. Other than item number two, these pieces of personal property are marital and shall be considered by the Court in making an equitable distribution.

. . . .

As far as the parties' jointly titled property, the Court finds that the value of the Prospect Road parcel is $85,000.00. This property shall be sold, and the net proceeds split evenly between the parties. Either party has the option to buy out the other based. on the value listed above in advance of the sale.

All of the equipment related to the excavation business and marital personal property shall likewise be sold with the net proceeds split evenly between the parties. This is subject to the Court's treatment of the additional seven items and the pending claim by [Appellant] against the parties' son. The Court finds that the value of the personal property is $94,400.00 minus the $8,800.00 business loan and $21,000.00 Kubota loan, for a net value of $64,600.00. The loans shall be satisfied from the sale. Either party has the option to buy out the other based on the values and loan balances listed above in advance of the sale.

It is clear from the trial court's findings that the excavation equipment was considered marital property, owing to the jointly owned debt used to acquire the equipment. Regardless, Appellant argues that because he was listed as the owner of the equipment in the parties 9-207 joint statement of ownership, the court erred by ordering the sale of personal property not jointly owned by the parties. We agree.

According to the parties 9-207 joint statement of ownership, the disputed excavation equipment was titled in Appellant's name. Because the excavation equipment was not jointly owned by the parties, the trial court should not have ordered that the equipment be sold. *See Jandorf*, 100 Md. App at 438 ("[T]he court has authority only to order the sale of jointly owned property"); *see*, *e.g.*, *Fox v. Fox*, 85 Md. App. 448, 454 n.2 (1991) ("Absent consent of the parties, ordering the sale of property owned solely by the husband and the transfer of the husband's property to the wife, instead of increasing the monetary award *pro tanto*, was improper.").[12] We hold that the trial court erred in ordering the sale of the

[12] It is possible that the trial court believed that Appellant consented to the sale of the excavation equipment based on comments Appellant made during trial. For example, when discussing the agreement to sell the marital home through a trustee, Appellant stated:

> I asked at that time if we could have a public auction, sell both pieces of property, whatever was in the business, whatever the personal property was, if you want it, you buy it, if I want it, I buy it, if somebody else wants it more than I do, they buy it.

Moreover, when asked whether he was trying to sell the equipment before the parties' consent order was reached, Appellant stated: "I was trying to sell everything. My lawyer told me to sell what I could because I was making the payments on the excavator." Although Appellant's comments seemed to be expressing his past intentions to sell the equipment, the trial court may have concluded that Appellant consented to the sale of the equipment. However, because the trial court did not include any such finding in its

excavation equipment titled in Appellant's name. Accordingly, we vacate the portion of the circuit court's order relating to the sale of excavation equipment titled in Appellant's name. Additionally, because an adjustment of the monetary award is the proper method for balancing any inequities resulting from division of property according to title, we vacate the monetary award. On remand the circuit court shall reconsider its order relating to the excavation equipment in a manner consistent with this opinion. Any inequity that results from the way in which the property is titled shall be balanced through an adjustment of the monetary award.[13]

Property Maintenance/Dissipation of Property

Appellant contends that the court abused its discretion by failing to consider expenses he incurred for taxes, storage, maintenance, and insurance related to marital property. Appellant further contends that the court abused its discretion in not considering the value of marital property that he alleged was sold by Appellee and/or Son.[14] We disagree.

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memorandum opinion, we must assume that the trial court did not order the sale of equipment based on joint consent.

[13] On remand, the court should issue only one monetary award (in addition to the Qualified Domestic Relations Order).

[14] In addition to these arguments, Appellant asserts that court abused its discretion in failing to consider that he "was unable to obtain his tangible personal property" in fashioning a monetary award. Appellant apparently did not understand that, pursuant to the September 20, 2019 consent order, he had legal means to enter the marital home to obtain personal belongings. In any event, Appellant did not place a value on the property or request that it be factored into a monetary award, nor did he introduce evidence to demonstrate that Appellee had possession of any of his belongings. The only relief requested by Appellant was that the property be returned to him.

Although contribution for payments made to maintain or preserve marital property is "a factor that may be considered in making a monetary award . . . a trial judge is 'not obligated to award such contribution between husband and wife at the time of a divorce.'" *Gordon v. Gordon*, 174 Md. App. 583, 641 (2007) (citations omitted). "Rather, the award of contribution is an equitable remedy within the discretion of the court." *Id.* at 642.

It is not an abuse of discretion for the court to decline an award of contribution for expenses associated with the maintenance of jointly held property when marital funds are used. In *Prahinski v. Prahinski*, 75 Md. App. 113 (1988), we held that it was not error for the court to equally distribute proceeds from the sale of the parties' rental properties without reimbursing the husband for expenditures he made to maintain the properties. *Id.* at 141. We reasoned that the funds expended by husband to maintain the properties after the parties separated was acquired during the marriage and, therefore, those funds "were as much marital property as the real estate upon which those funds were expended." *Id.* *See also Wassif v. Wassif,* 77 Md. App. 750, 766 (1989) (finding it proper to award credits to the husband for mortgage payments made after the divorce, but not for such payments during parties' separation because those payments were made from marital property); *Broseus v. Broseus*, 82 Md. App. 183, 193–94 (1990) (finding contribution for one spouse's payments on the family home not mandated where payments were made from marital funds); *Caccamise v. Caccamise*, 130 Md. App. 505, 525 (2000) (identifying "payment from marital property" as one of four exceptions that "preclude contribution" for maintenance of joint property).

Appellant did not claim that he used non-marital funds to pay for maintenance of marital property. Accordingly, there is no basis upon which to conclude that the court abused its discretion by not ordering contribution.

Furthermore, we perceive no abuse of discretion in not factoring into the monetary award for the value of property allegedly stolen or sold by Appellee and/or Son. "As a general rule, property disposed of before trial cannot be marital property[,]" except "where one spouse claims that the property was improperly dissipated by the other spouse." *Choate v. Choate*, 97 Md. App. 347, 366 (1993). *Accord Heger v. Heger*, 184 Md. App. 83, 95 (2009). The burden is on the spouse alleging improper dissipation to prove "that the other spouse used the marital property during the marriage to prevent inclusion of the assets for any consideration of a monetary award." *Id.*

The record does not support Appellant's claim of improper dissipation. Although Appellant claimed that a trailer and a tractor had been removed from the property, there was no evidence of what had happened to them. The only evidence Appellant offered were receipts from a scrap metal dealer showing that Son received a total of $473.10 for three loads of what Appellant claimed were truck parts. [15] The court, however, credited

[15] Included in the record extract filed by Appellant is a list with the heading "Items Removed from [Marital Property]." This document was improperly included in the record extract as it was never offered into evidence. *See* Md. Rule 8-501(c) ("The record extract shall contain all parts *of the record* that are reasonably necessary for the determination of the questions presented by the appeal ....") (emphasis added). Accordingly, we do not consider that document in deciding this appeal. *See Cochran v. Griffith Energy Svc, Inc.*, 191 Md. App. 625, 663 (2010) (an appellate Court "must confine its review to the evidence actually before the trial court when it reached its decision.").

Appellee's testimony that Son was merely helping her to clean up the property in preparation for the transfer of ownership.

VI. Attorney's Fees

Appellant's final contention is that the court lacked statutory authority to award attorney's fees. Alternatively, Appellant asserts that the court abused its discretion in awarding attorney's fees conditioned upon the criminal charges against Son being nol prossed. We conclude that the court had discretionary authority to award attorney's fees, but that the award was an abuse of discretion.

"Abuse of discretion 'occurs when a trial judge . . . acts beyond the letter or reason of the law.'" *David A. v. Karen S.*, 242 Md. App. 1, 23 (2019) (quoting *Garg v. Garg*, 393 Md. 225, 238 (2006)). To determine whether a court abused its discretion in awarding attorney's fees, "we examine the court's application of the statutory factors to the unique facts of the case." *Sang Ho Na*, *supra,* 234 Md. App at 756 (citing *Petrini,* 336 Md. at 468).

A court is authorized to award attorney's fees to a party in a divorce action or in an action for alimony after considering (1) the financial resources and financial needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the action. *See* FL § 7-107 and § 11-110. Additionally, in any case in which a person applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties, a court may award to either party the costs and counsel fees that are just and proper under all the circumstances. *See* FL § 12-103(a). However, before a court may award such costs and fees under FL § 12-103(a), the court must first consider: "(1)

the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b). An award of attorney's fees in a family law case "must be based upon the statutory criteria and the facts of the case." *Broseus*, 82 Md. App at 199.

In the present case, the Circuit Court explained its conditional award of attorney's fees as follows:

> In light of the past serious dynamics of the parties' relationship and that the Wife stated a desire to have her son reside with her and assist her, this Court finds that it would be unconscionable to release an equal share of funds from the sale of the marital home or the tax refund to the Husband, while he is prosecuting the parties' son for theft of marital property. Any amount the Husband would potentially recover in restitution from the son in the criminal case would have been marital property and the Wife would be entitled to half of that sum in any event. Should the Husband's Criminal charge against the son for theft be nolle prossed within sixty (60) days of the judgment of absolute divorce, then the Court directs the $21,350.00 to be split as follows, 50% to Wife or $10,675.00 to Wife and $10,675.00 to Husband. The Court will grant counsel fees as requested by Wife for the contempt proceedings. The amount awarded is $ 1,000.00. Thus, the distribution of the tax refund and the proceeds of sale of the marital home are $11,675.00 to Wife and 9,675.00 to Husband. While the Husband may have believed he was acting in good faith when he brought the charge against his son, he was clearly upset and/or unclear why he was unable to be more involved in the sale of the marital home or obtaining his personal property therefrom prior to the sale. He was not thinking clearly. That is no basis for unilaterally charging his own son with theft of what ultimately was marital property. Personal property that is marital does not solely belong to either party. Should the charge against the parties' son not be nolle prossed within sixty (60) days of the judgment of absolute of divorce, the Court will grant additional counsel fees against the Husband. The total amount assessed in fees allowed shall be $4,675.00. This would make the alternate distribution of the tax refund and proceeds of sale of the marital home $16,350.00 to Wife and $5,000.00 to Husband.

We have held that, in awarding attorney's fees, a Circuit Court abuses its discretion where there is no indication that the Court expressly considered the statutory factors in

reaching the award. *See Gillespie v. Gillespie*, 206 Md. App. 146, 179 (2012) (Remanding attorney's fees award where there was "no indication that the court expressly considered any of the statutory factors listed in FL § 12–103(b)," the court did not explain the basis for its award, and there were no findings of fact in the record to justify the award.); *see also Frankel v. Frankel*, 165 Md. App. 553, 589 (2005) (In making a decision to award attorney's fees, "the court is bound to *consider and balance* the considerations contained in FL 12–103.") (emphasis added); *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (Proper exercise of discretion under FL 12-103 "is determined by evaluating the judge's application of the statutory criteria . . . as well as the consideration of the facts of the particular case.").

Here, the court did not expressly consider or balance each of the required statutory considerations, and instead, based the largest portion of attorney's fees on the outcome of the separate criminal case against Son. We note that the Circuit Court *did* address the needs of the parties in its analysis of attorney's fees, noting that Appellee would like to have Son live with her. However, the Circuit Court's discussion of the "substantial justification" factor seemed to be focused only on whether Appellant was substantially justified in bringing the separate criminal action against Son. Instead, the Circuit Court's analysis should have focused on Appellant's justification in bringing or defending the divorce action.

Moreover, although the criminal case against Son was instigated by Appellant, Appellant does not have the power to unilaterally nol pros the case once the State decides to bring charges. *See State v. Ferguson*, 218 Md. App. 670, 680 (2014) ("Decisions about whether to dismiss charges and whether to re-file charges are uniquely within the State's

broad prosecutorial authority. Under Maryland Rule 4–247(a), '[t]he State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court.' Entry of a nol pros 'is generally within the sole discretion of the prosecuting attorney, free from judicial control and not dependent upon the defendant's consent.'"). Thus, the Circuit Court essentially conditioned the award of attorney's fees on whether Appellant could impact a prosecutorial decision, over which Appellant had no control.

In sum, by conditioning the award of attorney's fees on the outcome of Son's criminal case and failing to consider and balance the required statutory considerations, the Circuit Court abused its discretion. Accordingly, we shall vacate the order for attorney's fees. On remand, the Circuit Court shall recalculate the award of attorney's fees based on the appropriate statutory considerations.

CONCLUSION

Appellant's contentions that the court erred in appointing a trustee to sell the marital home and in issuing an order ratifying the sale of the home are moot, consequently, we do not address the merits of these issues. Because Appellant consented to the terms of the temporary consent order that was entered on September 20, 2019, he is precluded from appealing that order.

We hold that the Circuit Court did not err or abuse its discretion in its award of Appellant's Tier II benefits. Further, the court did not abuse its discretion in ordering the sale of marital personal property, nor did the court abuse its discretion by not adjusting the

monetary award to account for alleged improper dissipation of property or for pretrial expenditures relating to the maintenance of marital property.

We hold that the trial court erred in ordering the sale of the excavation equipment titled in Appellant's name. Accordingly, we vacate the portion of the circuit court's order relating to the sale of excavation equipment titled in Appellant's name. Additionally, we vacate the monetary award. On remand the circuit court shall reconsider its order relating to the excavation equipment in a manner consistent with this opinion. Any inequity that results from the way in which the property is titled shall be balanced through an adjustment of the monetary award.

Further, we hold that it was an abuse of the court's discretion to condition the award of attorney's fees on Appellant's ability to impact the outcome of Son's criminal case, while failing to consider and balance the required statutory considerations. Accordingly, we vacate the award of attorney's fees. On remand the court shall recalculate the fees under the appropriate statutory criteria.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY WITH RESPECT TO THE ORDER TO SELL EQUIPMENT AND ATTORNEY'S FEES VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0483s20cn.pdf