Circuit Court for Montgomery County
Case No.: 144742FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0535

September Term, 2019

MARILYN FELDMAN

v.

HOWARD FELDMAN

Reed,
Gould,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: April 13, 2021

Marilyn Feldman ("Appellant") brings this appeal, challenging the Circuit Court for Montgomery County's Judgment of Absolute Divorce. The Appellant petitioned the court seeking an absolute divorce from Howard Feldman ("Appellee"), indefinite alimony, child support based on sole physical custody guidelines, a monetary award, and attorney's fees. On April 12, 2019, the circuit court entered its Memorandum Order denying, in relevant part, Appellant's petition for child support based upon sole physical custody guidelines, indefinite alimony, and attorney's fees.

In bringing this appeal, Appellant presents three question for our review,[1] which we have rephrased:

I. Did the circuit court err by using the joint custody support guidelines to calculate child support?

II. Did the circuit court err by awarding Appellant rehabilitative alimony?

III. Did the circuit court err by denying Appellant's request for an award of attorney's fees?

For the following reasons, we answer in the negative and affirm the judgment of the Circuit Court.

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[1] Appellant presented the following questions *verbatim*:

A. Did the Lower Court err in utilizing the joint custody child support guidelines rather than the sole custody guidelines in determining child support. The Answer is Yes.

B. Did the Lower Court err in awarding alimony to [Appellant] for only two years and in an amount of only $3,000.00 a month. The Answer is Yes.

C. Did the Lower Court err in not awarding [Appellant] counsel fees. The Answer is Yes.

FACTUAL AND PROCEDURAL BACKGROUND

On January 17, 2007, Appellant and Appellee married and gave birth to son on August 12, 2007. After ten years of marriage, Appellant filed for a Limited Divorce and Other Relief on May 8, 2017. The parties amicably came to a custody agreement in February of 2018, which permitted Appellee to have Thursday overnight access with his son every other week. Appellee failed to avail himself of access to the son. The parties also entered an Interim Agreement concerning how Appellee would support Appellant and their minor son, however, the Interim Agreement was never filed or memorialized as an order of the court. Appellant subsequently amended her complaint, requesting an absolute divorce, indefinite alimony, child support based on sole physical custody guidelines, a monetary award, and attorney's fees.

On January 22 and January 23, 2019, the parties appeared before the Circuit Court for Montgomery County for a hearing on the merits of their requests. The evidence presented at the hearing showed that both parties are college graduates with high earning capacity. Appellee worked as an insurance salesperson and owned his own insurance agency. The Appellant held various jobs over the years until her marriage to Appellee. From 1986 until 2007, before her marriage, Appellant worked as a buyer/shopper for various local upscale department stores. She holds a real estate license and worked as a real estate agent in 2006 and 2007. Appellant testified at the hearing that the most she ever earned in a year was $25,000, however, the evidence showed that she earned $37,000 from January through July of 2007 from Long & Foster Real Estate, Inc.

Upon their marriage, the parties agreed that Appellant would not work. Both Appellant and the child suffer from Lyme disease. The parties agreed that she would stay at home to care for their minor child who is in an Individualized Education Program. At the time of separation, the parties were paying $7,000 in rent per month. They lived a lifestyle which "included a $1.9 million home, numerous luxury automobiles (Porsche, Mercedes-Benz, Ferrari), luxury travel, high-end shopping, dining out, entertaining at home and a country club membership." Nonetheless, they accumulated a significant amount of debt resulting in the foreclosure of their family home and two business condominiums, and a claim for bankruptcy in 2015. After losing their home, the parties rented a larger home for $7,200 per month, furnished with new, high-end furniture.

Following an argument, Appellee left the marital home in January 2017 and moved into a three-bedroom, two and one-half bathroom penthouse apartment, paying $4,400 per month in rent. After the separation, Appellant remained unemployed. She testified at the hearing that she "chooses to" be unemployed to "be home with my son" and had only sought out employment one time in the two years prior. Appellant expressed discontent about the suggestion that the child receive aftercare.

To provide some support for Appellant and their son, Appellee deposited money in a joint bank account, to which Appellant had unfettered access. Despite having been unemployed and incurring debt, Appellant's financial statements showed that she "spends hundreds of dollars" a month "on a weekly housekeeper, hairdressers, manicures and pedicures, gifts, dog grooming and boarding, food and dining out, videos and theater." Appellant lives in a two-bedroom, two-bathroom plus den apartment with her minor son.

The apartment is leased under Appellee's company name, and according to the August 2017 Interim Agreement, Appellee paid the rent. The court noted the following terms of the Interim Agreement:

> 1.) [Appellee] shall timely pay [Appellant]'s rent (which is currently $4,100.00/ month);
> 2.) [Appellee] shall pay for the minor child's needs;
> 3.) [Appellee] shall pay $3,000.00/month as maintenance to [Appellant];
> 4.) [Appellee] shall pay for [Appellant]'s cell phone, [Appellant]'s automobile, and health insurance for [Appellant] and child;
> 5.) [Appellee] shall pay base dues for Woodmont Country Club, leaving [Appellant] responsible for all her own charges at the club.

According to the agreement, Appellee's obligations totaled $7,100 per month plus club dues at the time of the hearing. Appellee alleged that he could no longer meet his own needs, as well as Appellant's under the Interim Agreement. According to Appellee's financial statements prior to the hearing, he incurred $22,072.59 per month in expenses, including but not limited to: "rent for penthouse condo ($4,500.00/month); telephone ($300.00/month); housekeeper ($150.00/month); household necessities ($850.00/month); vacations ($525.00/month); memberships ($150.00/month); transportation expenses ($1,173.42/month); pets/boarding ($300.00/month)." Moreover, Appellee "owes federal and state income taxes for 2015 and 2016, bank lines of credit, and debt on at least eight credit cards totaling over $90,000.00 and bank loans requiring minimum monthly payments of well over $9,000.00."

Upon these facts proven by evidence and testimony at the hearing, the court granted Appellant rehabilitative alimony in the amount of $3,000 per month for a period of two years and denied her request for indefinite alimony, finding that she was capable of

becoming self-supporting. On the child support issue, the court calculated Appellee's child support obligation using a shared physical custody formula given the amount of overnights Appellee shared with the child. Finally, the court denied both parties' request for attorney's fees.

DISCUSSION

I. Rule 8-504(a)(4)

As an initial matter, Appellee contends that Appellant failed to comply with Maryland Rule 8-504(a)(4) by not citing exact portions of the record that supports her arguments, thus Appellee asks this Court to affirm the court's ruling. Rule 8-504(a)(4), concerning the contents of appellate briefs, states that a brief shall include:

> A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Appellee contends that Appellant sporadically cites to particular pages of the record extract on pages 5 through 8 of her brief, then failed to cite any portion of the record extract for the statement of facts on pages 8 [sic] through 17. Appellee cites *Rollins v. Capital Plaza Assoc. L.P.*, 181 Md. App. 199 (2008) for the proposition that, "The Maryland Rules are not guides to the practice of law but precise rubrics established to promote the orderly and efficient administration of justice and...are to be read and followed." *Id*. at 197 (internal citation and marks and brackets omitted). Citing *Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 94 (2014), Appellee further reminds us that Appellant bears the burden of proof in her

appeal and must call this Court's attention to the relevant parts of the record. "As this Court has stated, we cannot be expected to delve through the record to unearth factual support favorable to the appellant." *Rollins*, 181 Md. App. at 201.

While the issue Appellee raised concerning the sufficiency of Appellant's factual assertions and references to the record extract has some merit, we also stated in *Rollins* that "[t]his Court will not ordinarily dismiss an appeal in the absence of prejudice to appellee or a deliberate violation of the rule." *Id.* at 202 (internal citation and marks omitted). Appellee has made no averments as to how he was prejudiced by Appellant's sporadic references to the record extract nor has he presented any evidence that Appellant deliberately violated Rule 8-504(a)(4). *See Rollins*, 181 Md. App. at 202. For this reason, we will address the merits of Appellant's argument despite her at times inadequate citation to the record extract.

II. Child Support

A. Parties' Contentions

Appellant contends that the court erred by using the joint custody child support guidelines when calculating the amount Appellee would be required to pay per month. She argues that the court should have used the sole custody guidelines because Appellee has made little effort to keep in contact with his son. Appellant cites *Rose v. Rose*, 236 Md. App. 117 (2018) to support her contention that the sole custody guidelines should be used because Appellee is not an active father and rarely takes custody of their child. Appellee argues that the court did not err by using the joint custody guidelines, rather exercised sound discretion in its calculation, as permitted by law. *See Rose*, 236 Md. App. at 117. On

this issue, we agree with Appellee.

B. Standard of Review

Appellee correctly notes the proper standard of review as found in *Rose*:

> In general, the denial of a motion to alter or amend a judgment is reviewed by appellate courts for abuse of discretion. The relevance of an asserted legal error, of substantive law, procedural requirements, or fact-finding unsupported by substantial evidence, lies in whether there has been such an abuse.

Id. at 129 (internal citations omitted). In other words, we review the court's utilization of the joint custody child support guidelines for abuse of discretion.

C. Analysis

Before addressing the merits of the issue, we note that Appellant, in arguing that the court erred by applying the joint custody child support guidelines, failed to adequately state the grounds on which she believes *Rose* is applicable. Appellant informs this Court that she directed the court to *Rose*, yet she does not refer this Court to the appropriate rule or language that is instructive on the issue as required by Rule 8-504(a)(8). Nonetheless we exercise our discretion to review the merits of her claim. *See Ubom v. SunTrust Bank*, 198 Md. App. 278, 285 (2011) ("although dismissal may be an appropriate sanction, whether to employ it is a matter left to the exercise of this Court's discretion." (internal citation and marks omitted)). We do so because the interest of the child is paramount.

Maryland Family Law Article § 12-201(n)(2) provides that "the court may base a child support award on shared physical custody: (i) solely on the amount of visitation awarded; and (ii) regardless of whether joint custody has been granted." We have analyzed this provision in *Rose*, explaining that:

> The plain meaning of this subsection makes two things clear. First, that FL § 12–201(n)(2) is subject to FL § 12–201(n)(1), meaning that a court cannot grant child support based on shared physical custody unless it first determines that the amount of visitation awarded in the extant order exceeds 35% of the overnights per year. Second, the word may, by its definition, generally connotes a discretionary act, i.e., one that is not required.
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> In other words, (n)(1) *requires* the court to use the shared physical custody formula for child support where a parent has actually kept the child for more than 35% of the overnights, while (n)(2) *permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than 35% of the overnights, but has actually kept the child for 35% (or fewer) of the overnights.

Rose, 236 Md. App. at 135–36 (emphasis added) (internal citation and marks omitted).

In the present case, the court found Appellant's reliance on *Rose* unavailing, stating:

> [Appellant]'s reliance on *Rose* is misplaced. In *Rose*, the evidence adduced at trial showed that for a period of five (5) years the father and payor had not availed himself for the overnight access awarded under a Consent Custody Order. *Rose*, 236 Md. App. at 234. The trial court had refused to permit the father to present evidence to explain why he had not availed himself of the awarded access. *Id.* at 236. The Court held that "if a court determines that there is good reason for a parent's failure to keep a child more than 35% of the overnights as awarded in an order, the court could, under subsection (n)(2), calculate child support based on shared physical custody." *Id*. at 237.
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> Unlike *Rose*, where there was a record of years of failure to visit with the child, here the same long and extensive record of failure to abide by the agreement simply does not exist.... [T]his case simply does not mirror the years of absence seen in *Rose*, and as such, this [c]ourt declines to calculate child support at the sole custody formula.

The court further determined that the child spends about 35.1% of time with Appellee and 64.9% with Appellant. As evidenced by the record, the court properly considered the amount of time Appellee spends with the child when determining the appropriate formula

to calculate his child support obligation, pursuant to § 12-201(n). We agree with the court that Appellant's reliance on *Rose* is misplaced. *Rose* stands for the proposition that the court has discretion to use the shared physical custody formula if it determines that there is good reason for a parent's failure to keep a child more than 35% of the overnights. Here, the court found that Appellee spends 35.1% of overnights with the child, thus, the court acted within its discretion to use the shared physical custody formula and was not required to use a sole custody guideline. Moreover, Appellant failed to sufficiently assert how the court abused its discretion by using the joint custody guideline or how our decision in *Rose* supports her averment that the court should have used a sole custody formula to calculate Appellee's child support obligation. We find no error with the court's ruling; thus, we affirm the court's judgment.

III. Alimony

A. Parties' Contentions

Appellant appeals the circuit court's rehabilitative alimony ruling, contending that she is entitled to indefinite alimony. Appellant contends that pursuant to Maryland Family Law Article § 11-106 and *Boemio v. Boemio*, 414 Md. 118 (2010), the court should have considered a number of factors when deciding whether to award indefinite alimony. She argues that the court's determination that she is "self-supporting" goes against the evidence presented at trial, and she asks this court to reverse the circuit court's ruling without citing any caselaw to support the relief she seeks. Appellee avers that the court carefully considered each and every one of the factors set forth in § 11-106(b) & (c), however Appellant failed to meet her burden of proving the need for indefinite alimony. We agree.

B. Standard of Review

"When reviewing a trial court's award as to alimony, an appellate court will not reverse the judgment unless it concludes that the trial court abused its discretion or rendered a judgment that was clearly wrong." *Malin v. Mininberg*, 153 Md. App. 358, 414–415 (2003) (internal citation and marks omitted). The court added, we "accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Id*. at 415.

C. Analysis

Before addressing Appellant's contentions, we first note that "the purpose of alimony is not to provide a lifetime pension. Rather, alimony is designed to provide the recipient spouse an opportunity to become self-supporting." *Goshorn v. Goshorn*, 154 Md. App. 194, 213 (2003) (internal citation and marks omitted). Maryland courts "favor rehabilitative alimony over indefinite alimony," thus indefinite alimony is "awarded only in exceptional circumstances." *Id*. Such circumstances are set forth in Maryland Family Law Article § 11-106(c):

> (c) The court may award alimony for an indefinite period, if the court finds that:
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> (1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or
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> (2) 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.

Appellee adeptly notes that Appellant "as the economically dependent spouse seeking indefinite alimony, bears the burden of proving the need for indefinite alimony."

Goshorn, 154 Md. App. at 214–15. Moreover, Appellant bears the burden of establishing her needs and her inability to meet them. See *Reynolds v. Reynolds*, 216 Md. App. 205, 221 (2014) ("Normally, the burden rests with the party seeking alimony, thus making it Wife's burden to establish her needs and inability to meet them." (internal citation and marks omitted)).

In its Opinion and Order, the circuit court ruled that Appellant "failed to establish that she is unable to be self-supporting," and instead the court noted the evidence shows that she simply chose not to work. The court noted:

> Testimony reveals after her graduation from college, [Appellant] held various types of jobs through the years until her marriage. From 1986 until 2007, she worked as a buyer/shopper for various local upscale department stores, including Neiman-Marcus, Sak's Fifth Avenue and Nordstrom. In addition, [Appellant] holds a real estate license and worked as a real estate agent in 2006 and 2007. [Appellant] testified the most she ever earned in a year was $25,000.00, however, evidence showed [Appellant] earned $37,000.00 from January 2007 through July 2007 from Long & Foster Real Estate, Inc. Since the separation, [Appellant] has remained unemployed saying she "chooses to" and testified she has looked for a job only once in the months since separation. When asked why she has only looked for employment one time in the past two years, [Appellant] said she simply wanted to "be home with my son."...Despite being unemployed, [Appellant]'s financial statement reveals she spends thousands of dollars monthly on a weekly housekeeper, hairdressers, manicures and pedicures, gifts, dog grooming and boarding, food and dining out, video and theater.
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> Initially, [Appellant] stated her financial statement represented her present expenses. On cross-examination, Plaintiff said the financial statement represented some of what she expected her expenses to be once she and the [Appellee] were divorced. It is clear to the [c]ourt [Appellant]'s current needs differ greatly from those she "predicts" she will have in the future. Moreover, it is clear some of her "needs" are extravagances she has become used to.

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> [T]he [c]ourt finds the relative income of the parties is not unconscionably disparate given their current respective standards of living and given their previous "standard of living" was one of bankruptcy, forecloses, loans, and indebtness. As the Court said in *Karmand*:
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> > A mere difference in earnings of spouses, even if it is substantial, and even if earnings are the primary means of assessing the parties post-divorce living standards, does not automatically establish an "unconscionable disparity" in standards of living. To constitute a "disparity," the standards of living must be fundamentally and entirely dissimilar. Moreover, as the statute makes clear, before such disparity of living will permit an award of indefinite alimony, it must be "unconscionable."
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> *Karmand* at 1117.
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> [T]he [c]ourt engaged in a careful analysis of the factors set forth in Md. Code Ann., FL § 11-106 [], especially the length of the marriage, any monetary award, Defendant's ability to pay, [Appellant's] needs and expenses, [Appellant's] ability to become employed and her opportunities for growth, and the [c]ourt's belief that based on all of the factors above, the [Appellant] can reasonably be expected to make substantial progress toward becoming entirely self-supporting with the award of a short period of rehabilitative alimony.

The circuit court clearly stated the facts on the record and the applicable law on which it rendered its judgment.[2] Accordingly, we find no abuse in the court's exercise of discretion.

III. Attorney's Fees

A. Parties' Contentions

[2] The court could not have considered the effect of the COVID 19 pandemic that started in February 2020 and has not concluded as of the filing of this opinion.

As a final plea, Appellant contends that the court failed to provide her any relief without providing an explanation as to why it denied her request for attorney's fees. She argues that "the Chancellor simply failed to provide any relief to Ms. Feldman without any reason for doing so. Ms. Feldman believes that pursuant to the Ann. Code of Maryland, Section 8-214, this was indeed an error on the part of the Chancellor."

Appellee counters that Appellant failed to identify the basis for her position that she would be entitled to attorney's fees under MD. Code Ann. § 8-214. Moreover, she cites no relevant legal authority to support her contentions of err. Again, we agree with Appellee on the issue.

B. Standard of Review

"The amount of the attorney's fees award is within the discretion of the chancellor. Although that discretion is subject to review by this Court, we will not disturb the award unless that discretion was exercised arbitrarily, or the judgment was clearly wrong." *Davis v. Davis*, 97 Md. App. 1, 25 (1993), *aff'd*, 335 Md. 699 (1994) (internal citation omitted).

C. Analysis

Maryland courts are permitted, but not required to award attorney's fees in an alimony proceeding. *Simonds v. Simonds*, 165 Md. App. 591, 616 (2005). The court's discretion to award attorney's fees "must be exercised in conformity with Family Law Article § 12–103" for child support proceedings, and § 11-110(c) for alimony proceedings. *Id*. In determining whether to award counsel fees in a proceeding involving child support, the court must 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." Md. Code Ann., Fam. Law § 12-103. In a proceeding for alimony, the court must consider "(1) the financial resources and financial needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the proceeding." Md. Code Ann., Fam. Law § 11-110(c). Trial courts must construe these statutes in harmony with one another in order to generate an equitable distribution of fees and awards. *See Henriquez v. Henriquez*, 413 Md. 287, 306 (2010).

In the matter before us, the court considered both parties' claim for attorney fees in light of § 11-110 and Maryland Rules of Professional Conduct Rule 1.5. Although "[b]oth parties argued that there was no substantial justification for either to pursue litigation," the court determined that both parties were "justified in pursuing the relief they sought in [the] matter." In considering § 11-110 and Rule 1.5, the court made the following findings:

> Md. Code Ann, Fam. Law Art. §§ 11-110:
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> l. The financial resources of each party: Neither party has substantial assets as discussed throughout this Opinion. However, Defendant has historically and presently earns well more than Plaintiff and admits his fees have been paid through his business.
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> 2. Each party's needs: Neither party has been living modestly since the parties' divorce. Neither party discussed cutting back on unnecessary expenses such as entertainment and vacations or other unnecessary expenses in order to pay for legal fees.
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> Whether there was substantial justification for bringing, maintaining, or defending the proceedings: As noted above, both parties were substantially justified in bringing these proceedings. Maryland Rules of Professional Conduct Rules 1.5 Fees:
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> l. Time and labor, novelty and difficulty of questions involved: Both attorneys spent a great deal of time, energy and effort researching and preparing a very thorough case, although none of the issues presented were novel.

2. Likelihood, if apparent to the client, that acceptance of particular employment will preclude other employment: Not likely any more than what would be normal in a private family law practice.

3. Fee customarily charged: Both counsel's fees well within the range of customary and reasonable. Some discounts were also applied.

4. Amount involved and results obtained: Significant time was spent on this litigation by both parties' attorneys. Both sides prevailed on some of their claims.

5. Time limitations imposed: Other than those inherent in a court scheduling process, none.

6. Nature and length of professional relationship with the client: Plaintiff has been consistently represented by her counsel, while Defendant has had more than one attorney during the course of the litigation.

7. Experience, reputation and ability of the lawyers: Lawyers on both sides are well respected and experienced.

8. Fixed or contingent fee: Does not apply.

Taking all of this into consideration, the [c]ourt will deny each parties' request for attorneys' fees. (**Appellee's Brief Apx. 27**)

As evidenced by the court's Memorandum Opinion, the court thoroughly considered the factors of § 11-110 and Rule 1.5 when denying attorney's fee awards for both parties.[3] The court's decision was based on the relevant evidence presented during the two-day hearing on the issues. Thus, we find no abuse in the court's exercise of discretion. We note that, contrary to Appellant's contention, § 8-214 is not applicable to the present matter as it concerns award of expenses in proceedings involving property disposition in annulment and divorce. Here, Appellant petitioned the court to modify Appellee's child support and

[3] *See* attached exhibit.

alimony obligations. As it pertains to considering § 12-103's child support fee shifting factors in congruency with § 11-110's alimony fee shifting factors, we presume the court exercised its discretion not to award attorney's fees on the child support issue. Both parties requested attorney's fees. Appellant requested fees under § 8-214 however, § 8-214 is not applicable to the present matter as it concerns award of expenses in proceedings involving property disposition in annulment and divorce. She did not request fees under the child support statute. Although the court decided to examine whether attorney's fees were appropriate on the alimony issue, it ultimately denied both parties' request after considering the requisite factors.

CONCLUSION

Accordingly, we find no error or abuse in the circuit court's judgment and affirm the court's ruling.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.