Circuit Court for Baltimore County
Case No. C-03-FM-19-005443

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 650

September Term, 2021

ERIC KING

v.

JEANNE KING

Kehoe,
Beachley,
Zic,

JJ.

Opinion by Kehoe, J.

Filed: June 2, 2022

Eric King appeals from a judgment of the Circuit Court for Baltimore County, the Honorable Michael J. Finifter, presiding, which granted an absolute divorce to his former spouse, Jeanne King. He raises five issues, which we have reordered and slightly reworded:

> 1. Did the trial court err in its marital property determinations and monetary award to Ms. King?
>
> 2. Did the trial court err in its determinations of the incomes of Mr. King and Ms. King?
>
> 3. Did the trial court err in its determinations of alimony, child support and related expenses?
>
> 4. Did the trial court err in awarding use and possession of the marital home and its contents to Ms. King?
>
> 5. Did the trial court err in making an award of custody without considering the testimony of Gina M. Santoro, Ph.D., one of Mr. King's designated expert witnesses?

We will affirm the judgment of the circuit court.

BACKGROUND

After the conclusion of a ten-day trial on the merits, the trial court issued a bench opinion, extending across 75 pages of transcript, setting out its findings of fact, conclusions of law, and the reasons for its disposition of the parties' requests for relief. The following summary is intended to give context to the parties' appellate contentions.

The parties were married in 2004. At the time of trial, they had two minor children, the first born in 2004 and the second in 2007. In 2018, they purchased and moved into a new home in Reisterstown (the "marital home"). William King, Mr. King's father, gave $100,000 towards the purchase price of the marital home. The evidence was conflicting as

to whether the gift was to Mr. King alone or to both Mr. and Ms. King. The parties separated in October 2019 when Mr. King moved out of the marital home. The circuit court found that Mr. King bore the responsibility for the deterioration of the marital relationship. He does not challenge this finding on appeal.

On November 6, 2019, Mr. King filed a complaint for child custody in the Circuit Court for Baltimore County. Ms. King filed an answer as well as a counterclaim for divorce and related relief. Mr. King filed an answer to the counterclaim.

At trial, and pertinent to the issues raised on appeal, the parties presented sharply conflicting evidence as to: (i) whether Mr. King's ownership interest in a family business was marital property; (ii) if it was, the value of that interest; and (iii) the total amount of Mr. King's annual income. Each party called an expert witness to testify on these issues. Mr. King's expert was Bruce O'Heir, and Ms. King's was Kristopher Hallengren. Both witnesses are certified public accountants with extensive experience in forensic accounting and business valuation. The trial court's findings as to these issues turned largely on its assessment of the expert testimony.

As part of his case in chief, Mr. King attempted to call Gina M. Santoro, Ph.D. as an expert witness. Ms. King's attorney objected and moved to exclude her testimony. After a hearing, the court granted the motion.

On May 11, 2021, the court issued its opinion from the bench. It granted a judgment of absolute divorce on the grounds of "no hope of reconciliation."

The court found that both parties were "fit and proper" persons to have custody of their children. With this as a premise, the court granted the parties joint legal custody of the children. The court ordered that Ms. King would have primary physical custody of the children during the school year and Mr. King would have visitation or access to the children every other weekend coupled with a "dinner or a meet up" every Wednesday after school. The court further ordered that, during the summer, Mr. King would have primary custody and Ms. King would have visitation every other weekend and every Wednesday. Relevant to the issues raised on appeal, the court granted the following economic relief:

> a. Ms. King was awarded "indefinite and modifiable" alimony in the amount of $3,365 per month.
>
> b. Mr. King was ordered to pay child support to Ms. King in the amount of $3,045 per month.[1]
>
> c. Mr. King was ordered to pay a monetary award to Ms. King in the amount of $139,500.
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> d. Ms. King was granted use and possession of the marital home for three years from May 11, 2021. Mr. King was ordered to continue to pay the mortgage, taxes, insurance, homeowners' association fees, and utilities bills. These payments were to be credited against his child support and alimony obligations. At the end of the three-year period, the marital home was to be sold, and the net proceeds were to be divided equally between the parties.

[1] As we will discuss in the main text, the parties filed motions to revise the judgment pursuant to Md. Rule 2-535(a). Among other contentions, both parties asserted that the monthly child support figure was wrong. The court eventually reduced Mr. King's monthly child support obligation from $3,045 to $2,552. Ms. King does not assert that the court erred in doing so.

> e. All of the personal property inside the marital home was declared to be family use personal property and ownership of that property was awarded to Ms. King. The parties were to retain personal property in their possession.

The judgment of absolute divorce was entered on July 7, 2021. Mr. King filed a notice of appeal on July 8, 2021.

The parties filed post-judgment motions to revise the judgment. We will briefly review the complicated post-judgment procedural history in order to address Mr. King's motion to supplement the record in this appeal.

THE STANDARDS OF REVIEW

Mr. King's appellate contentions implicate three modalities of appellate review. We review a trial court's legal reasoning *de novo*. We review factual findings for clear error, and in that process, we must defer to the trial court's ability to weigh the credibility of witnesses. Maryland Rule 8-131(c). A trial court's findings will be upheld "if there is competent or material evidence in the record to support the court's conclusion." *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)), *cert. denied*, 467 Md. 693 (2020).

Trial courts have discretion to grant requests for alimony, monetary awards, and use and possession orders. Appellate courts will affirm a discretionary decision unless it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Adoption/Guardianship of C.A. & D.A.*, 234 Md. App. 30, 45 (2017). This can occur when "no reasonable person

would take the view adopted by the trial court or when the court acts without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625–26 (2016) (cleaned up).

In this appeal, Mr. King challenges the trial court's monetary award, its alimony award, and its use and possession award. These forms of relief are based on Maryland statutes. Each statute sets out criteria which a trial court must consider before granting or denying the relief.[2] "Generally, even where the trial court must issue a statement explaining the reasons for its decision, the court need not articulate every step of the judicial thought process in order to show that it has conducted the appropriate analysis." *Gizzo v. Gerstman*, 245 Md. App. 168, 195–96 (2020).

Finally, Md. Rule 8–504(a)(6) requires appellate briefs to contain "argument in support of the party's position on each issue." "[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it." *DiPino v. Davis*, 354 Md. 18, 56 (1999). "A single sentence is insufficient to satisfy [Rule 8-504(a)(6)]'s requirement." *Silver v. Greater Balt. Med. Ctr.*, 248 Md. App. 666, 688 n.5 (2020). For these reasons, "Maryland courts have the discretion to decline to address issues that have not been adequately briefed by a party." *Tallant v. State*, ___ Md. App. ___, 2022 WL 1744189 at *10, Nos. 588 and 1253, September Term, 2020, slip. op. at 21 (filed May

[2] *See* Md. Code Fam. Law § 11-106 (alimony awards); Fam. Law § 8-205 (marital awards); Fam. Law § 8-208 (use and possession awards).

31, 2022). Additionally, a party's factual assertions in a brief must be supported by specific references to the record extract. Md. Rule 8-504(a)(4).

When parties fail to comply with these requirements, appellate courts will neither "rummage in a dark cellar for coal that [may or may not] be there [nor] fashion coherent legal theories to support [a litigant's] sweeping claims." *HNS Development, LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 459 (2012) (quoting *Konover Prop. Trust v. WHE* Assocs., 142 Md. App. 476, 494 (2002)).

ANALYSIS

1. The Marital Property Determinations and the Monetary Award

A. Marital Property

Mr. King contends that the trial court erred when it concluded that Mr. King's 75% ownership interest in Sea King VI, LLC ("Sea King"), was marital property and had a value of $226,000. Generally, whether an asset is marital or non-marital property and, if it is, the asset's value, are questions of fact. *Flanagan v. Flanagan*, 181 Md. App. 492, 521 (2008). A court's findings as to these issues are reviewed for clear error. *Id.*

Before delving into the details of the parties' contentions, some background information will be helpful.

Mr. King's father, William King, owns, or has ownership interests in, several business entities including the King Family Partnership and Plum Tree, LLC. William King is also a trustee of the King Family Trust. Mr. King is a beneficiary of that trust and received

substantial distributions from the trust in the years before the parties' separation. Additionally, among other enterprises, Mr. King owned a seafood market/carry-out and sit-down restaurant called "Sea King" in Ellicott City. The Sea King operation is located on property owned by Plum Tree, LLC, which is owned by William King.

Ms. King testified that, shortly after the birth of their first child in 2004, Mr. King told her that he wished to purchase his father's interest in the Ellicott City operation. She further testified that "in about 2006," Mr. King "really talked to me in depth about the buy-in—and the money and how much—[that] this was going to be a big deal."[3]

In 2005, William King and/or Mr. King formed a corporation called "Sea King VI, Inc.," that operates the Ellicott City market and restaurant. The organizational corporate documents show that William King purchased 75 shares in the enterprise for $750 and that Mr. King purchased the remaining 25 shares for $250.

On January 1, 2006, William King transferred 50 of his Sea King shares to Mr. King and the remaining 25 shares to Mr. King's sister, whose first name is Michelle but who is

[3] This was the substance of Ms. King's direct testimony on this issue. Mr. King's brief does not indicate that she was cross-examined on this issue. Nor does his brief suggest that he testified to the contrary.

not otherwise identified in the materials in the record extract.[4] There was no documentary evidence as to whether these transfers were gifts.

Mr. King's first contention is that his interest in Sea King was a gift from his father. He asserts:

> At trial, there was no evidence before the court which would have permitted the court to conclude that Eric's 75% interest in this asset was marital property. In fact, evidence of the opposite was presented. It was undisputed that Eric acquired his 75% interest in the business by way of gifts over time from his father (the other 25% having been gifted [sic] from his father to Eric's sister.) (E. 871-873). To have classified this business asset as a marital asset subject to equitable consideration was clearly erroneous and unsupported by the evidence presented.

These contentions are not persuasive. As a general rule, the burden of proof that an asset is marital property is borne by the party asserting that asset is marital, in this case, Ms. King. Cynthia Callahan and Thomas C. Ries, FADER'S MARYLAND FAMILY LAW 13-16 (7th ed. 2021) ("hereafter "FADER") (citing, among other cases, *Green v. Green*, 64 Md. App. 122, 139 (1985)). However, a party who asserts that what would otherwise be marital property was a gift "bears the burden to demonstrate '(1) donative intent [on the part of the donor]; (2) actual delivery by donor; and (3) acceptance by the donee.'" *Richards v.*

[4] In 2017, Sea King VI, Inc. was converted to a limited liability company, Sea King VI, LLC. Mr. King owned 75% of the outstanding stock in the corporation and he owns 75% of the membership interests in the limited liability company.

Richards, 166 Md. App. 263, 277 (2005) (quoting *Fantle v. Fantle*, 140 Md. App. 678, 689 (2001)).

We begin with the extract reference cited by Mr. King as support for his contention that it was "undisputed" that his interest in Sea King VI was given to him by his father. Mr. King mischaracterizes the record. The reference is to a portion of the testimony of Ms. King's expert witness, Mr. Hallengren, in which he described Sea King VI's corporate organizational documents. Contrary to Mr. King's appellate assertion, those documents show that Mr. King purchased his initial interest in the corporation. Additionally, Ms. King testified that Mr. King told her that he intended to purchase all of his father's interest in the Sea King restaurant and, in fact purchased 75% of the business. None of this evidence was rebutted. We conclude that the trial court was not clearly erroneous when it found that Mr. King's interest in Sea King VI was marital property.

Mr. King's second marital property contention relates to his father's gift of $100,000 which was used for the purchase of the marital home. He argues that the trial court erred when it concluded that he had "commingled" the $100,000 with other funds to purchase the house. This contention is unpersuasive.

Fam. Law § 8-201(e) states (emphasis added):

> (e)(1) "Marital property" means the property, however titled, acquired by 1 or both parties during the marriage.
>
> (2) "*Marital property" includes any interest in real property held by the parties as tenants by the entirety unless the real property is excluded by valid agreement*.

> (3) *Except as provided in paragraph (2)* of this subsection, "marital property" does not include property:
>
> (i) acquired before the marriage;
>
> (ii) acquired by inheritance or gift from a third party;
>
> (iii) excluded by valid agreement; or
>
> (iv) directly traceable to any of these sources.

The marital home was owned by the parties as tenants by the entireties. There was conflicting evidence on the issue but, assuming for purposes of analysis that the $100,000 was a gift to Mr. King alone, the $100,00 was unquestionably used to purchase the marital home. Fam. Law 8-201(e)(2) states that real property owned by spouses as tenants by the entireties is marital property unless the parties have agreed otherwise. Mr. King does not assert that there was any agreement between the parties relating to the marital property status of the $100,000. Therefore, by the plain language of the statute, the $100,000 is marital property. *See* FADER at 13-24:

> [T]he Source of Funds theory, to determine what part of a property is marital and what part is non-marital, is not applicable to real estate held as tenants by the entireties. Effective October 1, 1994 [i.e., the effective date of the current versions of Fam. Law § 8-201(e)], all real property owned as tenants by the entireties 'is' marital property.

The trial court's finding on this matter was correct.

B. The Value of Mr. King's Interest in Sea King VI

The trial court found that Mr. King's 75% interest in Sea King VI had a value of $226,000. Mr. King asserts that the court erred. According to him, the evidence

demonstrated that his interest had no value at all. We review this decision for clear error. *Long v. Long*, 129 Md. App. 554, 567 (2000).

The evidence as to value came entirely from the expert witnesses. Between them, the two experts testified that there are three generally-accepted methods for valuing an on-going business: book value, which focuses on the assets and liabilities of the company as shown on its books; income, which focuses on the cash flow generated by the business; and market value, which calculates the business's fair market value based on comparable transactions. Mr. King's expert, Mr. O'Heir, testified that the most appropriate valuation approach was book value. He explained to the court why this approach was the most appropriate means for valuing Mr. King's interest in Sea King VI. According to him, Sea King VI had a negative book value because its debts were more than the value of its assets. These debts were owed in large part, if not entirely, to William King or entities controlled by him.

Mr. Hallengren, Ms. King's expert, agreed with Mr. O'Heir that Sea King VI had a negative book value but explained that the most appropriate valuation method for restaurants was market value. Mr. Hallengren calculated the market value for Sea King VI based on comparable sales of nineteen restaurants, and then adjusted that figure by subtracting interest-bearing debt as shown on the company's books and adding cash on hand. He also reduced the market value of Mr. King's interest because he did not own 100%

of Sea King VI. Mr. Hallengren concluded that Mr. King's interest in Sea King VI had a value of $226,000.[5]

In summary, each expert provided well-reasoned testimony that, if credited by the fact-finder, would have supported his ultimate conclusion. In its bench opinion, the trial court stated that it found "Mr. Hallengren's opinion to be more reasonable than Mr. O'Heir." The court's finding was not clearly erroneous.

C. The Monetary Award

Mr. King asserts that the trial court committed a number of errors in making a monetary award to Ms. King.

First, Mr. King states that the trial court failed to explicitly address several of the statutory factors set out in Fam. Law § 8-205(b)[6] when it was discussing the monetary award. He is correct. However:

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[5] Mr. King asserts that, during cross-examination, "Mr. Hallengren was forced to admit, that his testimony on direct, that supported his valuation, was completely wrong." We read the record differently; when his testimony is read in its entirety, it is clear that Mr. Hallengren's conclusion was that Mr. King's interest in Sea King VI had a value of $226,000. To the extent that the probative weight of his testimony was challenged on cross-examination, it is the role of the trial court, and not an appellate court, to determine the credibility of witnesses and the weight to afford to evidence. Md. Rule 8-501(c).

[6] Section 8-205(b) states:

> The court shall determine the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in property described in subsection (a)(2) of this section, or both, after considering each of the following factors:

> Although consideration of the factors is mandatory, the trial court need not go through a detailed check list of the statutory factors, specifically referring to each, however beneficial such a procedure might be [for purposes of appellate review]. This is because a judge is presumed to know the law, and is not required to enunciate every factor he considered on the record, as long as he or she states that the statutory factors were considered.

Malin v. Mininberg, 153 Md. App. 358, 429 (2003) (cleaned up).

> (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (2) the value of all property interests of each party;
>
> (3) the economic circumstances of each party at the time the award is to be made;
>
> (4) the circumstances that contributed to the estrangement of the parties;
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> (5) the duration of the marriage;
>
> (6) the age of each party;
>
> (7) the physical and mental condition of each party;
>
> (8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;
>
> (9) the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;
>
> (10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
>
> (11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

In his brief, Mr. King also focuses on § 8-205(b)(9), which requires a court to consider:

> the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety[.]

Mr. King asserts that the trial court failed to consider this factor. We read the record differently. In its analysis of the § 8-205(b) factors, the court stated:

> Let me say a word about the gift that . . . Mr. King claims he received from his father.
>
> Whether or not the gift was intended by Mr. King's dad to be a gift just to him or not, I think the fact that Mr. King, the Plaintiff here, took those funds, put it into a marital asset, sort of commingled it in a marital asset category, I think is — I know it's for the family. It was for the kids. It was for the whole family unit.
>
> I think it's fair that it be viewed as marital property and because, I mean, Ms. King basically took care of the house and took care of the kids. I think it's only fair that she be entitled to an accounting that takes that into account. So that's why I come up with just split 50/50 the proceeds.

Although the court did not specifically reference subsection (b)(9), it is clear that the court was addressing "the contribution by either party of property . . . to the acquisition of real property held by the parties as tenants by the entirety." The court concluded that, assuming for the purposes of analysis that the $100,000 was intended to be a gift solely to Mr. King, it was appropriate under the circumstances to include it as marital property. Mr. King is free to disagree with the court's reasoning, but we will not pretend that the court failed to undertake the requisite analysis.

In the present case, the court addressed the substance of each of the § 8-205(b) factors at one point or another in its bench opinion. This is sufficient under *Malin v. Mininberg*.

Second, Mr. King asserts that the trial court "failed to address the obligation for past due income taxes" owed by him. He is correct but the court's failure to do so was not a matter of oversight. Instead, the court's decision not to address Mr. King's alleged tax liabilities was based on the extremely sketchy evidence[7] presented by Mr. King on this issue. After extensive discussion between the court and counsel as to the tax liability issue, the trial court concluded it "really [didn't] know what the taxes are for, what years they are for [and whether] the family benefited from the income[.]"

Finally, Mr. King asserts that the trial court "determined that [Ms. King] possessed $28,000.00 more in marital property than [he did], yet the judge failed to make any adjustments or explanations for this disparity." Mr. King's reading of the transcript is selective; the trial court next stated that, in the context of the assets of the parties, the $28,000 was insignificant in light of the total combined assets of the parties.[8]

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[7] As Ms. King points out in her brief (citations omitted):

> During the trial, [Mr. King] alleged that he owed past due taxes from 2017 forward but did not produce documentation demonstrating the money owed to the IRS and he admitted to not filing taxes for tax year 2020. [Mr.] O'Heir, testified that he had not seen anything from the IRS stating what [Mr. King's] tax liability was. The only document that came into evidence was an IRS document that claims taxes are only due for 2019.

[8] Mr. King made some additional assertions regarding marital property. The first is that the trial court erred "in awarding ownership of certain items of tangible personal property"

2. The Parties' Incomes

Mr. King argues that the trial court erred when it found that Mr. King's annual income was $285,996 and Ms. King was imputed with 20 hours per week at minimum wage, equaling $1,108 per month.

A. Mr. King's Income

For several years prior to the parties' separation, Mr. King received income from three sources. First, he received distributions from Sea King VI. Second, he was the property manager for King Family Partnership and Plum Tree, LLC, two entities owned by his father. The third source of income was annual distributions from the King Family Trust. The evidence as to specific amounts was developed through the testimony of Messrs. O'Heir and Hallengren.

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to Ms. King. He does not provide extract references that identify the items to which he is he is referring. Nor does he explain why the court erred. He has waived this contention. *HNS Development*, 425 Md. at 459.

The second is that the court erred when it concluded that a 401(k) retirement account was marital property. (We assume that this account was titled in Mr. King's name although he doesn't say so.) He provides nothing further in the way of factual or legal analysis. He has waived this argument. *DiPino*, 354 Md. at 56.

Finally, he argues that the court erred by including a "camo boat" as marital property. He claims that the boat was "no longer in existence" at the time the court entered its judgment. There was conflicting testimony as to this item and the court found Ms. King's testimony to be credible. We have no basis to disturb the trial court's credibility-based resolution of conflicting testimony. *See* Md. Rule 8-501(c).

Mr. O'Heir concluded that Mr. King's average annual income for 2017 through 2019 was $264,306. He testified that this total was comprised of $100,000 earned from Sea King VI, $104,000 for the properties he manages, and distributions of principal and interest that he received on an annual basis from the King Family Trust of approximately $38,000. These distributions were taxable to him. Mr. O'Heir testified that, in addition to the principal and interest distributions, Mr. King received further disbursements from the trust, averaging $33,072 annually. These were not taxable to him. Both of the parties' children attend private schools and the combined tuitions are approximately $72,000 annually, which is very close to the combined annual taxable and non-taxable distributions from the King Family Trust. It is not disputed that the non-taxable distributions were made to Mr. King to assist him with tuition payments. Mr. O'Heir did not include the non-taxable distributions as income.

Ms. King's expert, Mr. Hallengren, testified that Mr. King's annual income was $264,556. He treated as income the amounts Mr. King received from Sea King VI, the property management fees, and the trust disbursements as shown on Mr. King's tax returns. This figure did not include the nontaxable distributions that Mr. King received from the

trust. Mr. Hallengren found the average amount of non-taxable money Mr. King received per year to be approximately $22,000.[9]

The trial court did not entirely agree with either expert. The court accepted Mr. Hallengren's calculations but concluded that "the tuition payments that come from the trust are regular enough and have been ongoing for so long on a regular basis" that they should be treated as income to the father. The court concluded that Mr. King's annual income was $286,000 or $23,833 per month.

On appeal, and contrary to his own expert's trial testimony, Mr. King asserts that none of the trust distributions should have been included in his income. He asserts that this is so because doing so "increase[es] his actual income for financial considerations by $72,000 per year, even though he personally received no financial benefit from those trust distributions." Mr. King does not cite any authority for the proposition that a parent whose children attend private schools is not financially benefitted when someone else pays the tuition. He has therefore waived this contention. Moreover, setting waiver aside, Mr. King's focus on financial benefits alone is not consistent with Maryland law. As the Court of Appeals has explained:

> The family model of one parent serving as the primary caregiver and the other serving as the primary breadwinner can work well, with benefits to all, until divorce. But when divorce occurs, the primary breadwinner is likely to

[9] The two experts took very similar approaches to calculating Mr. King's income. The difference in their numbers results in part from the fact that Mr. King's expert based his conclusions on three years of financial records, while Ms. King's expert used four years.

> suffer less monetary loss than the caregiver parent, while both will share in the priceless benefit of having children. This asymmetry is certainly a legitimate consideration in determining [whether an award of permanent alimony is appropriate].

Boemio v. Boemio, 414 Md. 118, 145–46 (2010).

B. Ms. King's Income

Mr. King contends that the trial court erred in imputing a monthly income to Ms. King in the amount of $1,018 per month. He argues that it should be more.

The evidence showed that at the time of the trial, and for a number of years before then, Ms. King had been a full-time stay at home mother. She was primarily responsible for the care of the two children, including caring for the medical needs of one of the children who has had significant medical issues since infancy.[10] During the marriage, Ms. King handled the majority of the doctor appointments, made most of the medical decisions, and was in regular contact with their children's teachers.[11]

Based on the evidence, the trial court found that (1) Ms. King was capable of full-time employment; (2) she had an earning capacity of $50,000 per year; and (3) because she had been out of the work force for a number of years, it would take her three years to reach that capacity. The court also found that Ms. King had a current earning capacity of $11.75 per

[10] There is no purpose in our setting out the child's complex medical history in this opinion. The parties are well aware of it.

[11] In its bench opinion, the trial court characterized Ms. King's efforts to secure a suitable education environment for the child with health issues as "heroic."

hour, Maryland's minimum wage at the time of trial. However, the court found that, in light of the medical conditions of one of the parties' children, it would be in the best interests of that child for Ms. King to work no more than 20 hours per week. Therefore, the court imputed monthly income to her of $1,018 for purposes of calculating child support and alimony.

To this Court, Mr. King argues that the trial court erred. He concedes that one of his children "has some medical issues," but that "no evidence [showed] that the child needed either parent to stay home from work to care for him." This argument is not persuasive. The trial court did not find that it was necessary for a parent to stay at home to care for the child. The trial court found that it was in that child's best interest for Ms. King to be available to take him to medical appointments and treatments. This is why the court attributed 20 hours of employment per week for Ms. King.[12]

3. Alimony, Child Support and Expenses

Mr. King argues that if we determine the court erred in calculating the income of the parties then the circuit court needs to revisit the alimony, child support and the parties'

[12] Mr. King also asserts that:

> At a bare minimum, there was no reason why [Ms. King] should not have been imputed with 40 hours per week at $15.00 per hour, given her experience and prevailing labor market conditions.

Mr. King provides no reference to where in the extract we could find evidence as to prevailing market conditions in Maryland at the time of the trial or what Ms. King's prior work experiences might have been. He has waived this contention.

expenses. His statement of the law is correct but we have decided that the trial court did not err in calculating the parties' actual and imputed incomes.[13]

4. Use and Possession of the Marital Home

Mr. King contends that the court abused its discretion in awarding the use and possession of the marital home to Ms. King. At trial, the trial court found that it was in the minor children's best interest to stay in the marital home for three years, articulating that this decision would "give them stability." As the minor children have lived in the home since 2018, the court stated that "I do think the children will be better off staying there for three years." The court also characterized the marital home as "a big expense," a "luxury," and acknowledged that it was not "absolutely necessary" for the children to remain in the marital home.

[13] Mr. King asserts in passing that the trial court failed to explicitly address all of the factors set out in Maryland's alimony statute, Fam. Law § 11-106(b). He points to § 11-106(b)(9) ("the ability of the party from whom alimony is sought to meet that person's needs while meeting the needs of the person seeking alimony"), and to subsection (b)(6) (the circumstances that contributed to the estrangement of the parties"). (He makes the latter contention even though the trial court found that he was responsible for the deterioration of the parties' relationship and he does not challenge the court's finding on appeal.)

As we have explained, it was not necessary for the court to explicitly address each statutory criterion. *Malin v. Mininberg*, 153 Md. App. at 429. Additionally, Mr. King waived his argument that the alimony award left him unable to meet his own needs because he did not identify what his needs were or where in the extract that information can be found.

Finally, as we have noted, although Mr. King was ordered to continue to pay the mortgage, taxes, and insurance, homeowners' association fees, and utilities for the marital home during the use and occupancy period, the court also ordered that those payments were to be credited against his child support and alimony obligations.

Mr. King argues that the court's statements are inconsistent and that it was an abuse of discretion by the lower court to award use and possession of the marital home to Ms. King without considering whether the children had a need to reside in the exact house in question. He also contends that it is an undue hardship for him to continue to pay the mortgage and expenses of this particular home for the next three years, when the family could downsize to a more modest home.

We perceive no error. Whether to award use and possession to the parent with primary custody is a matter of the trial court's discretion. *St. Cyr v. St. Cyr*, 228 Md. App. 163, 199 (2016). In assessing whether use and possession should be awarded, the trial court must weigh: "(1) the best interests of any child; (2) the interest of each party in continuing (i) to use the family home or any part of it as a dwelling place; or (ii) to occupy or use the family home or any part of it for the production of income; and (3) any hardship imposed on the party whose interest in the family home is infringed by a use and possession order." *Id.* (quoting Fam. Law § 8–208(b) (cleaned up)).

As to the first statutory factor, the trial court considered the best interests of the children; as to the second factor, Mr. King does not assert that he has any interest in using or occupying family home; and as to the third factor, the court certainly accommodated any

hardship imposed upon Mr. King by giving him a credit for his expenses incurred in maintaining the house against his alimony and child support obligations. As we commented in *St. Cyr*, "[n]othing in this well-reasoned ruling can be described as anything remotely resembling an abuse of judicial discretion." *Id.* at 201.

5. The Exclusion of Dr. Santoro's Testimony

Mr. King argues that the trial court abused its discretion in refusing to permit him to call Gina M. Santoro, Ph. D. as an expert witness to testify regarding the parties' custody dispute. We do not agree.

On September 17, 2020, and pursuant to Md. Rule 2-504, the trial court entered an amended scheduling order which set February 15, 2021 as the date for "Designation of Experts (Md. Rule 2-402(g)(1)(A))." On January 4, 2021, Mr. King filed an expert witness designation for Dr. Santoro that stated in pertinent part:

> Dr. Santoro, a licensed psychologist, may be asked to offer expert testimony on the breakdown of the relationship between Father and the children, Mother's conduct/behavior and how it relates to the breakdown of Father's relationship with the children, and potential remedies that could be used to improve the children's relationship with Father. She will be qualified as an expert on factors contributing to parent child resist/refusal problems. . . . Dr. Santoro has not yet prepared any report or rendered any final opinion. She will be provided with the pleadings in this case, and the discovery materials and communications exchanged.

As this Court recently explained:

> A scheduling order must specify, among other things, a deadline for the designation of expert witnesses expected to be called at trial, Md. Rule 2-504(b)(1)(B). The expert-witness designations must include all information specified in Md. Rule 2-402(g)(1), including the anticipated subject matter

> of the expert's testimony, the substance of and grounds for the findings and opinions to which the expert will testify, and a copy of any written report made concerning those findings and opinions.

Asmussen v. CSX Transportation, Inc., 247 Md. App. 529, 546 (2020) (cleaned up).

Mr. King's designation of Dr. Santoro was clearly inadequate for the purposes of Md. Rule 2-504. The inadequacies were not irredeemable, and Mr. King had until February 15, 2021, which was the deadline for expert disclosures in the scheduling order, to correct them. However, he did nothing. Nor did Ms. King. The issue came to the trial court's attention when Ms. King objected to Mr. King's proposal to call Dr. Santoro as an expert witness and moved to exclude her testimony because Mr. King had not disclosed the substance of Dr. Santoro's opinions, their bases, and summaries of her findings.

Before ruling on the motion, the trial court held a hearing, which extended over forty pages of trial transcript, as to whether Dr. Santoro should be permitted to testify. A great deal of the hearing was taken up with efforts by counsel for the parties to blame one another for the problem. At length, and in an effort to get past finger-pointing, the court asked Mr. King's counsel for a proffer of Dr. Santoro's testimony:

> The Court: What is the substance of her findings and opinions?
>
> [Counsel]: She's going to tell you—she is going to tell you—what she is going to tell you, I think —she is going to tell you that she was asked to watch these videos[14] and to look at some of the

[14] This appears to be a reference to audio-video recordings made by Ms. King of some of her confrontations with Mr. King in the days leading up to his decision to leave the marital home.

communications and the significance of it and how it [a]ffects those two boys in those videos.

The Court: What is she going to say about it?

[Counsel]: She's going to say the same thing, quite frankly, if I was sitting in that chair that I would say and probably you would say if I ask you off the record what you thought of those videos.

* * *

I think she was going to say that—when I called her up, I said, I need you to watch these videos and tell me what you think.

The Court: Right.

[Counsel]: You know that—

The Court: So what is she going to say?

[Counsel]: What is she going to say, I mean, in layman's terms?

The Court: You know what she is going to say because you are calling her.

[Counsel]: She is going to say it's nuts. She is going to say what you saw is crazy. It's absolutely going to interfere with the children. She's going to say that [Mr. King] can't win an argument no matter what, that these boys were put in the middle of this nonsense, that it's absolutely outrageous to tell a child that your father is not paying child support, to whisper to another child, you need to get out of here it's not safe. Your father is dangerous. That's what she's going to testify to.

Later, in response to additional questioning from the Court, Mr. King's counsel stated that Dr. Santoro had not performed a custody evaluation. The court eventually ruled that Dr. Santoro would not be permitted to testify. The court concluded that the ultimate responsibility for non-disclosure lay with Mr. King's counsel and that the failure to disclose placed Ms. King at a significant disadvantage.

To this Court, Mr. King argues that the trial court abused its discretion. In support of his contention, he cites *A.A. v. Ab.D.*, 246 Md. App. 418, *cert. denied*, 471 Md. 75 (2020). We agree that *A.A. v. Ab.D.* is the controlling precedent, but its application points to the conclusion that the trial court did not abuse its discretion.

In *A.A.*, Ab.D., the father, had propounded discovery requests to A.A., the mother, in connection with his motion for modification of custody. *Id*. at 426. At the modification hearing, the father's counsel requested that the court exclude the testimony of witnesses for whom the mother had failed to provide contact information and certain documentary evidence. *Id*. at 427.The court granted the father's request, ruling that any witness for whom information was requested, and not disclosed, would not be permitted to testify. *Id.* at 429.

On appeal, we held that the trial court erred in failing to inquire as to the content of the testimony before excluding it. *Id*. at 447. Our analysis began with the principle that, in child custody cases, "[c]hildren have an indefeasible right to have their best interests fully considered." *Id.* at 422 (citing *Flynn v. May*, 157 Md. App. 389, 410 (2004)).

We explained that at an earlier hearing a custody evaluator referred to a protective order against Ab.D., as well as "domestic violence incidents, and potential episodes of abuse." *Id.* at 448. We noted that "[b]ecause the court did not explore what evidence Mother intended to offer, the court could not have known the significance of the proscribed evidence and its potential impact on its ability to determine the best interests of the children." *Id.* We further held that, had the trial court assessed the proposed testimony or

evidence, any discovery sanction that the trial court imposed would be reviewed for an abuse of discretion. *Id*. at 449.

The trial court in the present case did exactly what the court did not do in *A.A*.; that is, the court asked Mr. King's counsel for a proffer as to the anticipated testimony of the witness. Mr. King's counsel responded that Dr. Santoro had not conducted a custody evaluation, that her testimony would be based solely on her review of audio-video recordings of interactions between the parties in the presence of their children, and that the witness were testify that Ms. King's statements were inappropriate and harmful to the children. Although counsel was not explicit in identifying the recordings for purposes of his proffer, recordings of Ms. King's interactions with Mr. King in the presence of the child were in evidence and were discussed by the trial court in its bench opinion.[15] Dr. Santoro's

[15] The trial court stated:

> It appeared to me that, at times, mom was actually looking to create issues, looking to create fights with dad. Said things to the boys that were untrue, disparaging dad in front of the boys.
>
> And mom . . . testified [that the videos] didn't show the best side of her.
>
> [T]here were aspects of those videos that give the Court some concern . . . . And when mom said [to one of the children] that dad is dangerous and is taking all of our money, that's not good. [T]hat's just not a good thing to do with the children.
>
> * * *
>
> I think [the videos] clearly showed, at least at that moment, in that time, a loss of control and poor decision making. . . .

testimony would have been cumulative. We cannot say that the court abused its discretion in its ruling.

6. Mr. King's Motion to Supplement the Record

The judgment of absolute divorce was entered on July 7, 2021. Both parties filed motions to alter or amend the judgment. After a convoluted series of events, an in banc appellate panel remanded the case to the trial court for it to clarify one aspect of its disposition of the parties' motions.

None of this would have anything to do with this appeal but for the fact that Mr. King has filed a motion to supplement the record with the transcript of the in banc hearing. He asserts that, during the hearing, Ms. King's counsel "conceded" that Mr. King's income "included $72,000 of reimbursement for private school tuition."

We deny the motion. Counsel's "concession" is irrelevant because it is clear beyond cavil that the trial court included all of the distributions from the King Family Trust in its calculation of Mr. King's income. In exercising our appellate authority, our focus is on the evidence and the trial court's reasoning and not statements made by counsel months after the court entered its judgment.

> Having said that, I think [her] counsel made a good point that she was candid with the Court and saying this wasn't her best moment. I can second that.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.