Circuit Court for Howard County
Case No. 13-C-16-107349

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00807

September Term, 2017

LAI NGUYEN OLIVER
n/k/a LAI THI NGUYEN

v.

CHESTER OLIVER

Nazarian,
Fader,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, J.

Filed: October 29, 2018

Appellant/cross-appellee Lai Thi Nguyen, formerly Lai Nguyen Oliver, and appellee/cross-appellant Chester Oliver each appeal from a judgment of divorce entered by the Circuit Court for Howard County. The circuit court awarded the parties joint legal custody of their two minor children and awarded Mr. Oliver primary physical custody. As relevant here, the court also granted Ms. Nguyen a monetary award, ordered her to pay child support, and authorized her to claim their elder child as a dependent on her tax returns for two years. In a post-trial ruling, the circuit court further awarded Ms. Nguyen a marital share of a pension that Mr. Oliver had not previously disclosed and awarded her attorney's fees incurred in proving the existence of the pension.

Ms. Nguyen challenges the circuit court's determinations regarding custody and certain components of the calculation of the monetary award. Mr. Oliver challenges (1) other components of the monetary award, (2) the court's failure to order Ms. Nguyen to pay child support arrears, (3) its decision to allow Ms. Nguyen to claim the tax dependency exemption, and (4) its award of attorney's fees to Ms. Nguyen. We affirm the circuit court's judgment as to child custody, child support arrears, attorney's fees, and certain issues related to the monetary award and vacate and remand as to the tax dependency exemption and other aspects of the monetary award.

BACKGROUND

The parties were married in 1997 in Vietnam at a time when Ms. Nguyen resided there and Mr. Oliver resided in Maryland. Ms. Nguyen emigrated to the United States the following year. The parties resided together in Ellicott City from 1998 until their separation in March 2016.

Mr. Oliver and Ms. Nguyen had two children together, born in 2003 and 2009. Both parents participated in their children's upbringing. Due to her late work schedule, Ms. Nguyen generally cared for the children in the morning before school. Mr. Oliver generally did so after school, although Ms. Nguyen prepared meals in the evening. Both parties cared for the children on the weekends. Given what Ms. Nguyen describes as Mr. Oliver's "status as a native English speaker and Ms. [Nguyen's] lower educational attainment," Mr. Oliver was primarily responsible for assisting the children with their education.

Cross-allegations of infidelity culminated in an altercation on March 16, 2016 during which Ms. Nguyen struck Mr. Oliver on the side of his face in the presence of their younger child. Mr. Oliver called the police and eventually obtained a protective order against Ms. Nguyen that caused her to leave the home. At the final protective order hearing, the parties entered into a shared custody agreement in which Mr. Oliver had the children during the school week and Ms. Nguyen had them every weekend from Friday evening through Sunday evening. Ms. Nguyen also agreed to pay Mr. Oliver $133 every two weeks in support.

Mr. Oliver initiated this litigation in April 2016 by filing a complaint seeking an absolute or limited divorce, custody, child support, a monetary award, primary physical custody of the children, and other relief. In a *pendente lite* order entered on February 10, 2017, the circuit court (1) increased Ms. Nguyen's access to the children by extending the children's time with her into Monday mornings and (2) ordered Mr. Oliver to pay Ms. Nguyen $100 per month in child support retroactive to December 1, 2016.

Shortly before trial, Ms. Nguyen filed her own complaint in which she sought an absolute divorce, alimony, joint legal custody, continuation of the then-existing physical custody schedule, child support, a monetary award, a share of Mr. Oliver's 401(k) plan, a marital interest in any pension plan of Mr. Oliver, the right to claim the dependent exemption for the parties' younger child, attorney's fees, and other relief.

At the conclusion of a four-day bench trial in March 2017, the court rendered an oral ruling as to custody. The court found that "the best interest of the children would be served by an award of joint legal custody and shared physical custody." Although the court concluded that the existing custody schedule had generally been working, it found that it was in the children's best interest to spend weekend time with both parents. The court therefore established a new custody arrangement: "shared physical custody of the two minor children with [Ms. Nguyen] having access with the minor children on alternate weekends[,]" and Mr. Oliver having weekdays and alternate weekends during the school year. During the summer, the parties would have custody on alternating weeks.

A written judgment and memorandum opinion followed on May 9. As relevant to this appeal, the court:

- Granted an absolute divorce;
- Awarded Ms. Nguyen and Mr. Oliver joint legal custody and Mr. Oliver primary physical custody with Ms. Nguyen having the children on alternate weekends during the schoolyear;
- Awarded each parent access to the children alternating every seven days between July 1 and August 31 each year and established a shared schedule for major holidays and birthdays;

- Ordered Ms. Nguyen to pay Mr. Oliver child support in the amount of $637 per month;
- Authorized Ms. Nguyen to claim her elder child as a dependent on her state and federal tax returns for the 2017 and 2018 tax years;
- Awarded Mr. Oliver exclusive use and possession of the family home until July 1, 2018;
- Made findings as to marital property and awarded Ms. Nguyen a monetary award of $88,886.50, which the court determined to be 50% of the difference in value between the marital property each party then held; and
- Denied both parties' requests for counsel fees.

The parties each filed motions to alter or amend, which the court denied except as to Ms. Nguyen's claim to a share of a pension Mr. Oliver denied existed. After an evidentiary hearing, the court found that Mr. Oliver did have a pension, awarded Ms. Nguyen a 50% share of the marital portion of the pension on an "if, as, and when received" basis, and ordered Mr. Oliver to pay Ms. Nguyen's counsel fees incurred in litigating the pension issue in the amount of $9,021. This appeal followed.

DISCUSSION

In an action tried without a jury, we "will review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). In reviewing divorce proceedings, we "accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity . . . ." *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)).

I. THE CIRCUIT COURT DID NOT ERR IN AWARDING PRIMARY PHYSICAL CUSTODY TO MR. OLIVER.

Ms. Nguyen contends that the circuit court abused its discretion in deviating from the custody arrangement under the *pendente lite* order to give her access only on alternating weekends. If the court wanted to give Mr. Oliver weekend time with the children, she argues, it should have given him one weekend a month rather than two. Mr. Oliver counters that the court was not bound by the temporary custody determination and that the court adequately considered the access schedule that was in the best interest of the children.

We review a circuit court's child custody determination for abuse of discretion. *Petrini v. Petrini*, 336 Md. 453, 470 (1994); *In re Yve S.*, 373 Md. 551, 586 (2003). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons[,]" *Levitas v. Christian*, 454 Md. 233, 243 (2017) (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011)) (emphasis removed), or when it acts "without reference to any guiding rules or principles," *Santo v. Santo*, 448 Md. 620, 626 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

The trial court must make custody determinations "on a case-by-case basis," "predicated on the best interest of the child." *Petrini*, 336 Md. at 468-69. The best interest standard varies with each individual case; it requires the court to predict a custody arrangement best suited to the children's needs. *Karanikas v. Cartwright*, 209 Md. App. 571, 589-90 (2013) (citing *Montgomery County Dept. of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419 (1977)). When applying the best interest standard "[c]ourts are not limited

or bound to consideration of any exhaustive list of factors . . . ." *Reichert v. Hornbeck*, 210 Md. App. 282, 305 (2013) (quoting *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503 (1992)). Some of the factors we have identified that trial courts may consider are:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Sanders, 38 Md. App. at 420 (internal citations omitted).

Here, the court properly applied the evidence to determine the best interests of the parties' minor children. The court discussed the parties' respective abilities to provide and care for the children and the effectiveness of the previous custody arrangement. It found both parents fit and expressed its intent to enter a shared physical custody arrangement so that each parent would have significant, though not equal, time with the children.

The one aspect of the previous custody arrangement that the court found was "not in the children's best interest is the fact that they don't have the opportunity to spend time with their father on weekends." Mr. Oliver had sought time with the children on weekends, when they were not consumed by school events and activities and when they could participate in activities with his family. The court agreed that it would be in the children's best interest to give each parent custody on alternating weekends.

According to Ms. Nguyen, the trial court abused its discretion in entering this new custody arrangement by (1) "wholly ignor[ing]" the custody evaluator's conclusions,

(2) deviating from the prior custody schedule that it had found was working, and (3) ignoring its own conclusion that shared custody was in the children's best interest. In considering whether the court abused its substantial discretion, we note that Ms. Nguyen did not seek weekday custody during the school year, presumably based on her late work schedule and her recognition that Mr. Oliver was better able to assist the children with their educational needs. Regardless of the reason, the court's custody decision must be viewed in that context.

As to Ms. Nguyen's first contention, we disagree that the circuit court "wholly ignored" the custody evaluator's conclusions. Indeed, the custody evaluator too found that the children should reside with Mr. Oliver during the week throughout the school year and should spend weekend time with him as well. The evaluator did not conclude that the parties should have equal time with the children. More importantly, however, the court is not required to adopt the evaluator's recommendation, but is instead charged with weighing the evaluator's testimony along with other evidence to come to its own custody determination, as the court did here. Thus, deviating from the custody evaluator's recommendation is not itself an abuse of discretion. *See Pastore v. Sharp*, 81 Md. App. 314, 322 (1989) ("a court in a custody case 'is entitled to weigh [evidence offered by social workers, psychologists, and psychiatrists] along with contradictory testimony and its own observations.' Thus, the trial judge did not abuse his discretion by choosing not to follow the recommendations of the psychologist and the social worker . . . .") (quoting *Sanders*, 38 Md. App. at 423).

Ms. Nguyen is also simply wrong in arguing that the trial court "disregard[ed] or fail[ed] to account for the evidence on the record that the children were doing well" under the previous custody agreement. To the contrary, the court found that the previous arrangement "worked well and the children have benefitted from it" and, therefore, that aspects of that arrangement should continue. However, the court also found that the children's best interests would be served by spending weekend time with their father and so established a schedule to accomplish that. The court was not required to adopt the temporary custody arrangement set out in the pre-trial order or to justify any departure from it based on changed circumstances.[1] *See Frase v. Barnhart*, 379 Md. 100, 111 (2003) (noting that a *pendente lite* order "does not bind the court when it comes to fashioning the ultimate judgment."). Rather, the trial court "has the authority to determine custody, regardless of whether 'joint custody has existed in the past.'" *Leary v. Leary*, 97 Md. App. 26, 36 (1993) (quoting *Taylor v. Taylor*, 306 Md. 290, 296 (1956)); *see also Frase*, 379 Md. at 111 (A pre-trial order in effect while a divorce is pending "is not intended to have long-term effect and therefore focuses on the immediate, rather than on any long-range, interests of the child."). The court did not abuse its discretion in departing from the previous custody arrangement.

Ms. Nguyen further argues that the trial court should not have awarded "sole physical custody" to Mr. Oliver, under the guise of "primary physical custody," when it

[1] By contrast, when a court is presented with a request to change a final custody arrangement, it must first "assess whether there has been a 'material' change in circumstance." *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012).

had found that shared custody was in the children's best interests. We do not agree that there is any fundamental disconnect between the language the trial court used and the custody schedule it ordered. In its oral ruling, the court awarded "shared physical custody," explained that both parents should have "significant time with the children," and imposed a schedule in which Mr. Oliver has custody of the children a majority of time during the school year and the parents split time equally during the summer. The court's written order established the same schedule, referring to the arrangement as Mr. Oliver having "primary physical custody." Although the court used two different phrases to describe the arrangement, both are accurate descriptors. Mr. Oliver has primary physical custody, in that he has custody a majority of the time, and the parties also share custody, in that they each have the children at different times. Importantly, in both rulings the court expressly set forth the schedule it was ordering, leaving no doubt as to its intent.

Ms. Nguyen's contention that the schedule the court ordered is inconsistent with the terms it used seemingly emanates from a misunderstanding. She argues that the court did not actually order "shared physical custody," as stated in its oral ruling, because the children spend significantly more time with Mr. Oliver. However, "shared" custody merely means that both parents have custody at times, not that they share custody equally.[2]

[2] Ms. Nguyen also suggests that the court actually awarded Mr. Oliver "sole physical custody" as distinguished from "shared physical custody." In making that argument, however, Ms. Nguyen appears to rely on a definition of "shared physical custody" that is applicable only to child support calculations. For purposes of determining presumptive child support obligations, the child support guidelines define "shared physical custody" as an arrangement in which a child spends at least 35% of the year with each parent. Md. Code Ann., Fam. Law § 12-201(n)(1) ("'Shared physical custody' means that each parent

See Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 5-4(c) (6th ed. 2016) ("'Joint physical' custody (shared parenting time) is, in reality, divided or shared custody, with the child in the physical custody of each parent for periods of time that may or may not be on a 50/50 basis.").

Given the record before us and the substantial deference owed to the circuit court, we conclude that the court did not abuse its discretion in making its custody decision.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION AS TO MOST ASPECTS OF THE MONETARY AWARD, BUT THE AWARD IS VACATED TO RECONSIDER SPECIFIC ISSUES.

Both parties take issue with the trial court's valuation of certain assets. Although we affirm the majority of the court's decisions affecting its monetary award, we vacate that award and remand for reconsideration of three issues.

We review monetary awards using two standards of review. *See Richards v. Richards*, 166 Md. App. 263, 271 (2005). We use a "clearly erroneous" standard to review questions of fact such as determinations of whether property is marital. *Innerbichler v. Innerbichler*, 132 Md. App. 207, 229 (2000). "Factual findings that are supported by

keeps the child or children overnight for more than 35% of the year . . . ."). Where that threshold is met, each parent gets credit against its "adjusted basic child support obligation" for the percentage of time the child spends with that parent. Fam. Law § 12-204(m)(1)-(3). However, where that threshold is not met, the parent with whom the child spends less than 35% of the year does not get any such credit. *Id.* § 12-204(l)(3). Thus, a parent with whom a child spends more than 65% of the year is effectively treated, *for purposes of the child support guidelines*, as having sole custody of the child. Although Ms. Nguyen is therefore correct that the trial court's custody order here is not a "shared physical custody" arrangement for purposes of calculating child support obligations, that does not apply to the custody decision itself.

substantial evidence are not clearly erroneous." *Richards*, 166 Md. App. at 272 (citing *Collins v. Collins*, 144 Md. App. 395, 409 (2002)). We use an abuse of discretion standard to review the circuit court's ultimate decision to "grant a monetary award, and the amount thereof . . . ." *Richards*, 166 Md. App. at 272 (citing *Gallagher v. Gallagher*, 118 Md. App. 567, 576 (1997)).

Sections 8-203 to 8-205 of the Family Law Article set out the statutory scheme that applies to a monetary award. The court must go through a three-step process: (1) determine, for each item of disputed property, whether it is marital; (2) determine the value of all marital property; and (3) grant a monetary award as an adjustment of the equities and rights of the parties. Fam. Law §§ 8-203(a)(1), 8-204(a), 8-205(a)(1). Here, the parties agreed that all of the assets at issue on appeal were at one time marital property. After valuing each asset, the circuit court calculated the monetary award by adding the value of all of the marital assets (a total of $711,856), allocating half of the jointly-held property to each party ($234,852.50 each), adding to that the value of each party's separately-held property ($209,962 for Mr. Oliver and $32,189 for Ms. Nguyen), calculating the difference ($177,773), and ordering Mr. Oliver to pay half of that difference ($88,886.50) as a monetary award.

Neither party has challenged the court's decision to use the monetary award to equalize each party's share of marital assets or the methodology the court used to do so. Instead, with the exception of one asset that Mr. Oliver contends should have been excluded because it had been sold before the judgment was entered (the 1999 Camry), the

only challenges the parties raise that concern the monetary award are as to (1) the valuation of specific assets and (2) whether the court treated certain assets as being held by the correct party when making its calculations. As a result, we do not need to review the court's application of the factors it was required to consider in determining the amount and method of payment of the monetary award under § 8-205 of the Family Law Article.

A. The Court Did Not Err in Valuing the 2016 Toyota Highlander.

Ms. Nguyen first takes issue with the circuit court's treatment of her 2016 Toyota Highlander, which the court valued at $20,000. Ms. Nguyen contends that the evidence of the value of this vehicle presented at trial came from her testimony that the fair market value of the vehicle was $23,547, subject to an outstanding loan of $13,399.59. However, in the parties' joint statement as to marital property, which the court admitted into evidence as Joint Exhibit 1, Mr. Oliver valued the vehicle at $34,000, subject to the $13,399.59 loan, for a difference of $20,600.41. The evidence also established that Ms. Nguyen had purchased the vehicle in February 2016, just over a year before trial, for approximately $37,000, and that she had used $20,000 in marital funds as a down payment.

Based on Ms. Nguyen's valuation, the vehicle had lost more than 35% of its value in one year, while it had lost only 10% of its value during that time based on Mr. Oliver's valuation. Neither party introduced any evidence to support their respective valuations.[3]

[3] Although Ms. Nguyen attempted to testify as to the Kelly Blue Book estimate of the car's value, the court sustained a hearsay objection to that testimony. She has not taken issue with that evidentiary ruling on appeal.

We cannot conclude that the court clearly erred in choosing a valuation in between the two provided by the parties that was closer to the value provided by Mr. Oliver.

B. The Circuit Court Erred in Determining that the 1999 Toyota Camry was Marital Property.

Ms. Nguyen also contends that the court erred in valuing the parties' 1999 Toyota Camry at only $120, instead of the $1,000 for which Mr. Oliver sold the car in March 2016. Mr. Oliver argues that the vehicle should not have been considered marital property at all, because it had been sold, and that if it was marital property it was properly valued.

The "'marital property which generates a monetary award must ordinarily exist as 'marital property' as of the date of the final decree of divorce . . . . [P]roperty disposed of before commencement of the trial under most circumstances cannot be marital property.'" *Hiltz v. Hiltz*, 213 Md. App. 317, 348 (2013) (quoting *Gravenstine v. Gravenstine*, 58 Md. App. 158, 177 (1984)). There is an exception, however, in the case of dissipation of marital assets. *See Hiltz*, 213 Md. App. at 348-49 ("Wrongful dissipation occurs when one spouse uses marital property for his or her own benefit for purposes unrelated to the marriage . . . ."). The burdens of persuasion and production are initially on the party making the allegation of wrongful dissipation. *Jeffcoat v. Jeffcoat*, 102 Md. App. 301, 311 (1994) (citing *Choate v. Choate*, 97 Md. App. 347, 366 (1993)).

Because the vehicle was sold in March 2016, a full year before trial, it could only have been properly treated as marital property if the court had concluded that the sale constituted a wrongful dissipation of a marital asset. However, the court made no such finding and we have not identified evidence that would have supported one. In the absence

of a finding that the sale of vehicle constituted wrongful dissipation of a marital asset, the circuit court clearly erred in treating the vehicle as a marital asset. On remand, the court should leave this asset out of its calculation of a monetary award.

C. The Circuit Court Did Not Err in Valuing the Tower Federal Account 307-00.

Ms. Nguyen also argues that the court erred in valuing a Tower Federal savings account held in Mr. Oliver's name at $110,013 instead of $110,138. The court used both figures in its opinion, initially stating in its discussion that the balance of the account was $110,138 but then using the $110,013 valuation in its calculation of the monetary award. The evidence presented at trial as to the account balance was a February 2017 account statement, which reflected a beginning balance of $110,138.53 and a closing balance of $110,013.19 as of February 28, 2017. We find no clear error in the trial court's decision to use the closing balance to calculate the monetary award.

D. The Circuit Court Did Not Err in Valuing Bank of America Account 1554.

Ms. Nguyen also contends that the circuit court incorrectly calculated the amount by which she dissipated marital funds she withdrew from a joint bank account (# 6062) and deposited in a separate account solely in her name (# 1554). The court found that Ms. Nguyen withdrew $21,289 in marital funds from account # 6062 and deposited it into account # 1554. Although the court concluded that she proved that she spent $9,500 of those funds for allowable purposes, it found that the remainder—$11,789—was dissipated and so should be considered marital property in her possession.

Ms. Nguyen does not contest the court's finding with respect to most of these funds, but argues that she should not be charged with $1,000 that she testified she later deposited back into account # 6062. However, Ms. Nguyen points to no evidence that she deposited this sum back into account # 6062 beyond her testimony. The trial court was in the best position to assess the credibility of that testimony. *See* Md. Rule 8-131(c) ("[The appellate court] will give due regard to the opportunity of the trial court to judge the credibility of the witnesses."). Especially in light of the ease with which such a fact could have been established, the court's finding that there was "no credible evidence as to how" any of the $11,789 was used was not clearly erroneous.

E. The Circuit Court Erred in Its Treatment of the Lian Chen Loan.

The parties dispute the circuit court's treatment of $10,000 that constituted a partial repayment of a debt owed to both parties by the purchaser of the nail salon they previously owned. Although the court found that the funds were marital property in Mr. Oliver's exclusive possession in its narrative, it then misidentified the funds as being held jointly in the summary from which it calculated the monetary award.[4] Mr. Oliver argues that it was not erroneous for the court to identify the funds as "joint" because the debt was owed jointly to both parties. That position lacks merit. Indeed, the parties' joint ownership of the funds

[4] At oral argument and in the trial court, Mr. Oliver suggested that this result was equitable because the remaining $10,000 balance due on the loan could, and most likely would, be paid to Ms. Nguyen. However, he also acknowledged that the circuit court did not transfer his interest in the balance owed to Ms. Nguyen and that both parties have an equal legal claim to the balance. The possibility that the additional debt might be repaid to Ms. Nguyen is not a basis for treating her as possessing $5,000 that she does not possess.

is precisely Ms. Nguyen's point. In treating the jointly-owned funds as being *possessed* jointly, the court's calculation effectively allocated half of that money to Ms. Nguyen even though Mr. Oliver held all of it. On remand, the court's calculation should account for the $10,000 repayment as marital funds held by Mr. Oliver.

F. A Remand Is Necessary to Determine the Basis for the Circuit Court's Valuation of Funds Originally in Bank of America Account 4858.

The parties' final valuation dispute related to the court's monetary award concerns what became of the remaining funds in a bank account that the parties had used for their nail salon business, Bank of America Account # 4858. Based on an account statement, the court found that the balance in the account as of the date of separation was $8,159.21. From that, Mr. Oliver transferred $7,000 to two of his personal accounts in March 2016 and wrote checks to the business's accountant totaling $1,080 in April 2016, presumably leaving an account balance of less than $100.[5] Mr. Oliver introduced some evidence that he paid additional bills related to the business for property taxes ($300.00), utilities ($757.07), and water ($985.60), for a total of $2,042.67, from May through October 2016.

In its opinion, the court found that Mr. Oliver documented payments of $4,984 "to State and County agencies for personal property taxes and water and sewer charges; as well as payment to the firm's accountant," but could not otherwise account for how he used the

[5] The record does not contain an account statement after March 2016. The March statement reflects a monthly fee of $29.95. Assuming that fee was also paid for April, and there were no other withdrawals or deposits, the account balance after the two payments for accounting services would have been $79.21.

funds he withdrew. Subtracting $4,984 from $8,159, the court charged Mr. Oliver with holding $3,175 in unaccounted-for marital property. Mr. Oliver contends that the finding that he dissipated $3,175 in marital property was clearly erroneous because the court separately found that one of the personal accounts to which he had transferred the funds was used exclusively for marital purposes.[6]

We are unable to affirm the trial court's determination as to the funds that were in account # 4858 as of the date of the party's separation because we are unable to find in the record the evidence from which the court made its calculation, nor have we identified any other way to trace how the $7,000 transferred to Mr. Oliver's personal accounts was used. As noted above, the record reflects payments of business expenses of $1,080 from that account and that Mr. Oliver presented evidence of subsequent payments of business expenses, presumably from other accounts, totaling another $2,043, for a total of $3,123. Assuming these make up a portion of the expenses on which the court relied in reaching its determination, we do not know what comprises the remainder.[7] On remand, the trial

[6] Even if it were true that the funds in Mr. Oliver's personal account were used for marital purposes, Mr. Oliver's argument would run into two additional potential hurdles. First, Mr. Oliver seems to assume that all of the unaccounted-for funds were placed in that account, to which he transferred $3,000, rather than the other account, to which he transferred $4,000, without pointing to support in the record for that assumption. Second, the funds at issue came from a business account and there was testimony that Ms. Nguyen was the 95% owner of the business, thus apparently giving her a greater interest in funds in a business account than in those in a marital account.

[7] We sympathize with the trial court's difficulty in resolving this issue in light of the less-than-clear records, testimony, and argument presented by the parties at trial on this issue. However, we cannot perform our review function unless we are able to identify a basis in the record for the trial court's finding. On this particular issue, we cannot do so.

court should identify the expenses that form the basis for its conclusion that Mr. Oliver properly spent $4,984 of the funds that, as of the date of separation, were contained in account # 4858.

In summary, we vacate the trial court's monetary award and remand with instructions to recalculate the monetary award after: (1) removing the value of the 1999 Toyota Camry; (2) treating the $10,000 proceeds from the Lian Chen loan as being in Mr. Oliver's possession, not joint possession; and (3) resolving whether $3,175 is the correct amount with which to charge Mr. Oliver with respect to Bank of America account # 4858.[8]

III. THE CIRCUIT COURT'S DECISION NOT TO AWARD CHILD SUPPORT ARREARS WAS NOT AN ABUSE OF DISCRETION.

Mr. Oliver argues that the circuit court abused its discretion by failing to assess child support arrearages against Ms. Nguyen in the same amount as the child support payments he ordered her to make going forward. Ms. Nguyen contends that the trial court did not abuse its discretion because the amounts it ordered Mr. Oliver to pay her pre-judgment and the amounts it ordered her to pay Mr. Oliver post-judgment were based on different custody arrangements. We agree with Ms. Nguyen.

[8] The parties also initially contested on appeal the circuit court's determinations with respect to a 2015 Federal Tax Return and a 401(k) retirement savings plan. The parties informed this Court at oral argument that they had since reached an agreement with respect to these assets and so the issues were moot. We thus refrain from any comment on those issues. *See Hill v. Scartascini*, 134 Md. App. 1, 4 (2000) ("A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.") (quoting *Attorney Gen. v. Anne Arundel County Sch. Bus Contr's. Assn.*, 286 Md. 324, 327 (1979)). The court's treatment of those issues on remand should reflect the parties' agreement.

"The decision to make a child support award retroactive to the time of filing is one reserved for the trial court and will only be reversed upon a showing that the court abused its discretion." *Holbrook v. Cummings*, 132 Md. App. 60, 69-70 (2000) (citing Fam. Law. § 12-104(b)). Here, there were three different amounts paid at different times. Under the parties' initial consent order, Ms. Nguyen paid Mr. Oliver $133 every two weeks to contribute to all household expenses. Effective December 1, 2016, the court's *pendente lite* award, which was based on the custody arrangement in place at the time, reversed the flow of funds and required Mr. Oliver to pay Ms. Nguyen $100 per month.[9] In its final judgment, based on the prospective custody arrangement and the new guidelines calculations that accompanied it, the court ordered Ms. Nguyen to pay $637 per month in prospective child support.

Section 12-101(a)(1) of the Family Law Article states that "[u]nless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that requests child support pendente lite, the court shall award child support for a period from the filing of the pleading that requests child support." We find no abuse of discretion in the circuit court's decision not to award Mr. Oliver child support arrears at the time it rendered its final judgment. The parties' support arrangements before December 1, 2016 were pursuant to agreement. Effective December 1, the court complied with the

[9] Ms. Nguyen had apparently made five $133 payments after December 1 but before the *pendente lite* order, for a total of $665. In its final judgment, the court awarded Ms. Nguyen a credit in that amount against her prospective child support obligation.

requirements of § 12-101(a) by ordering child support based on the temporary custody arrangement it established.[10]

Mr. Oliver contends that in the absence of a specific finding that doing so would be inequitable, § 12-101(a) required the trial court to make its prospective award of $637 per month retroactive to the filing of his complaint. We do not read the statute that way. Section 12-101(a) requires the court to award child support from the filing of the pleading requesting it; it does not require that the amount awarded prospectively be automatically applied retroactively to the pre-judgment period. Nor would such a requirement make sense in any case in which custody arrangements are different after a judgment than they were before. Mr. Oliver has not provided us with any authority to the contrary.[11] We affirm the circuit court's decision not to award child support arrears.

[10] Notably, that custody arrangement was, for purposes of calculation of child support, a "shared physical custody" arrangement because both parents had custody more than 35% of the year. *See* Fam. Law § 12-201(n)(1). Mr. Oliver does not argue on appeal that child support was calculated incorrectly for the *pendente lite* period based on the arrangements that were in place at that time. The new custody arrangement the court imposed in its final judgment not only reduced by half the amount of time the children spent with Ms. Nguyen but, in doing so, deprived Ms. Nguyen of any credit against her support obligation for the time she has custody of the children. *See generally* Fam. Law §§ 12-201(n)(1), 12-204(l), (m) (generally allowing a credit for time spent with a paying spouse only if the spouse has custody of the children for at least 35% of the year). The prospective child support obligation the trial court ordered was dictated by the child support guidelines calculation, which was in turn based on the new custody arrangement.

[11] Although Mr. Oliver does not cite a single case in the one-page argument in his principal brief regarding child support arrears, his reply brief chides Ms. Nguyen for not citing any case authority in her opposition on that same issue. He also claims that Ms. Nguyen somehow waived her right to challenge an award of child support arrears by not objecting to his request for arrears, notwithstanding that she challenged his request for child

IV. THE CIRCUIT COURT COULD ONLY AWARD MS. NGUYEN THE RIGHT TO CLAIM A TAX DEPENDENCY EXEMPTION FOR EXCEPTIONAL CIRCUMSTANCES.

Mr. Oliver contends that the trial court erred in allowing Ms. Nguyen to declare their older child as a dependent on her tax returns for tax years 2017 and 2018 without a finding that the allocation would result in an increase in after-tax spendable income for the family as a whole. Ms. Nguyen argues that the circuit court did not err because it determined that granting her the exemption was in the best interest of the children because it would encourage her to pay her child support obligation. We agree with Mr. Oliver.

We review a trial court's allocation of a tax dependency exemption for abuse of discretion. *Reichert v. Hornbeck*, 210 Md. App. 282, 344 (2013). In *Reichert*, we held that when a court grants a non-custodial parent the right to claim a tax exemption, it must consider whether doing so is in the child's best interest. *Id.* at 341. We further observed that there is a presumption that it is in the child's best interest for the allocation of the exemption to be to the parent with whom it would result in "an increase in after-tax spendable income of the family as a whole." *Id.* at 343. Thus, we concluded, "it would be an abuse of discretion for a divorce court to" grant a non-custodial parent the right to a tax exemption absent a finding that doing so "would result in an increase in after-tax spendable income of the family" or a finding of "other exceptional circumstances making it in the best interest of the parties and their child[ren]." *Id.* at 343-44.

support with her own. We find no merit in his waiver claim and, in any event, would choose to exercise our discretion to decide the issue.

Here, the circuit court did not analyze whether shifting the exemption to Ms. Nguyen would maximize the money available to the family as a whole. To the contrary, the record establishes that Mr. Oliver earns a greater income than Ms. Nguyen, making it likely that shifting the exemption would, if anything, decrease the amount of money available to the family. Thus, shifting the exemption could only be justified by "exceptional circumstances" that would demonstrate that such a shift would be in the best interest of the children. Ms. Nguyen argues that the court effectively found such exceptional circumstances in concluding that shifting the exemption would be in the children's best interest by providing her an incentive to pay child support "because if she fails to do so, [Mr. Oliver] will likely decline to execute the waiver disclaiming the child as an exemption."[12] Notably, however, the court did not find this to be an exceptional circumstance, at least not expressly.[13] On remand, the circuit court should consider whether Ms. Nguyen has demonstrated an exceptional circumstance that would justify allocating the child tax exemption to her even though it is likely to reduce the overall amount of money the family collectively possesses to support the children. If the court determines that such exceptional circumstances do not exist—and, therefore, that Mr.

[12] As discussed in *Reichert*, the applicable federal statutory scheme allocates the tax exemption by default to the parent with primary custody. 210 Md. App. at 330. However, that default can be changed if the parent with primary custody executes a waiver disclaiming the exemption, which a circuit court can order that parent to do. *Id*.

[13] Although we do not decide here whether the incentive identified by the court, in and of itself, would qualify as an exceptional circumstance, we observe that the same incentive would presumably apply in every case in which a non-custodial parent both earns substantially less money than a custodial parent and is required to pay child support.

Oliver must maintain the benefit of the exemption—the court may choose to exercise its equitable authority to increase the amount of the monetary award or reduce her child support obligation accordingly to make up for the difference.

V. THE CIRCUIT COURT DID NOT ERR IN AWARDING MS. NGUYEN ATTORNEY'S FEES.

Finally, Mr. Oliver argues that the trial court erred in awarding attorney's fees against him because he lacked notice that they would be considered and the court failed to consider the required statutory factors before making the award. We conclude that Mr. Oliver had fair notice of Ms. Nguyen's request for fees. We also conclude that the court considered the required factors when its ruling on Ms. Nguyen's motion to alter or amend is considered in combination with its ruling in the original judgment of divorce.

The decision to award attorney's fees "rest[s] solely in the discretion of the trial judge. The proper exercise of such discretion is determined by evaluating the judge's application of the statutory criteria . . . as well as the consideration of the facts of the particular case." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citations omitted). However, "[c]onsideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error." *Id.*

The court considered awarding attorney's fees twice in this matter. First, in issuing its judgment of divorce on May 9, 2017, the court denied both parties' respective requests for fee awards. In doing so, the court expressly acknowledged the statutory factors it was required to consider: "the financial resources and financial needs of both parties and whether there was a substantial justification for prosecuting or defending the proceeding."

The court concluded that each party was "self-supporting," with the ability to bear the fees she or he had incurred, and that both parties had been "justified in initiating and participating in the instant case." As a result, the court concluded that "[n]either party should be required to contribute to the other's counsel fees and litigation costs."

Second, following the court's judgment, both parties filed motions to alter or amend. In her motion, Ms. Nguyen specifically requested "counsel fees and costs incurred in filing [her] Motion." Although the parties raised a number of different substantive issues in their respective motions, the only one on which the court held a hearing was Ms. Nguyen's contention that Mr. Oliver had a pension he had failed to disclose. At the conclusion of an August 23, 2017 hearing, the court found that Mr. Oliver did have a pension and awarded Ms. Nguyen a share of it. More importantly for our purposes, the court also awarded Ms. Nguyen counsel fees of $9,021 "for the cost and fees incurred subsequent to the judgment of divorce in pursuing the relief requested" in her motion to alter or amend. In doing so, the court determined that it was likely that Mr. Oliver "was aware that he was entitled to benefits under the" pension plan while defending against Ms. Nguyen's claim.

Mr. Oliver argues that the circuit court abused its discretion in awarding fees in two respects. First, he claims that he lacked sufficient notice or opportunity to respond to the request for fees. Specifically, he contends that the court had limited the August hearing "solely" to whether he had a pension. This defense is without merit. Although the merits issue at the August hearing was whether Mr. Oliver had a pension, that did not preclude the court from addressing the relief that would flow from a finding that he did. Ms.

Nguyen's fees claim, which she properly raised in her motion, was appropriately considered in that context. There was no lack of notice.

Second, Mr. Oliver argues that the circuit court erred in failing to state a legal basis, or to provide any analysis or reasoning, for the fees award. We disagree. Ms. Nguyen's pension claims related to the disposition of the parties' marital property. The applicable statutory scheme is set forth in Family Law § 8-214, which provides that the court may, "[a]t any point in a proceeding . . . order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding." Fam. Law § 8-214(b). Although the court did not expressly identify this statute, it seems apparent that it was proceeding under that authority.

Mr. Oliver further faults the circuit court for failing to consider the factors it was required to consider under § 8-214(c): "(1) the financial resources and financial needs of both parties; and (2) whether there was a substantial justification for prosecuting or defending the proceeding." Again, we disagree. The court expressly considered the second factor in reaching its conclusion that Mr. Oliver continued to defend against Ms. Nguyen's claim while knowing that he had a pension. Although the court did not use the term "substantial justification," it clearly found that Mr. Oliver had none.

Whether the court considered the financial resources and needs of the parties in making its ruling in August is a closer issue. The court certainly did not mention that factor when it presented its ruling in August. However, the August hearing followed by less than four months the judgment of divorce in which the court had expressly considered that factor

in denying both parties' previous requests for fees. The court concluded then that the parties were self-supporting and capable of bearing their own attorney's fees. There is no indication in the record that there had been a change in either party's financial resources or needs between May 9 and August 23. The court was thus well aware of the parties' financial circumstances. Indeed, the only change was the court's determination that Mr. Oliver had lacked a substantial justification for defending against Ms. Nguyen's pension claim. Considering the court's August award of fees in the context of its earlier consideration of the relevant factors in May, we conclude that the circuit court considered the relevant statutory factors and, therefore, did not err in awarding fees to Ms. Nguyen.

In summary:

1. We affirm the trial court's award of child custody;

2. We vacate the monetary award with instructions to recalculate it after: (1) removing the value of the 1999 Toyota Camry; (2) treating the $10,000 proceeds from the Lian Chen loan as being in Mr. Oliver's possession; and (3) resolving whether $3,175 is the correct amount with which to charge Mr. Oliver with respect to Bank of America account # 4858;

3. We affirm the trial court's decision not to award child support arrears;

4. We vacate the trial court's decision to allow Ms. Nguyen to take the dependency tax exemption for the parties' older child and remand for further consideration not inconsistent with this opinion; and

5. We affirm the trial court's award of attorney's fees to Ms. Nguyen.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EVENLY.