Circuit Court for Anne Arundel County
Case No. C-02-FM-17-004382

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1036

September Term, 2019

ALEXANDER D. SHUSHAN

v.

TRACEY RESNICK

Berger,
Beachley,
Zic,

JJ.

Opinion by Beachley, J.

Filed: February 25, 2021

On April 11, 2019, the Circuit Court for Anne Arundel County granted appellant Dr. Alexander Shushan and appellee Tracey Resnick[1] a Judgment of Absolute Divorce. Both parties filed motions to alter or amend, and on June 26, 2019, the court issued an Amended Judgment of Absolute Divorce. Dr. Shushan timely appealed that judgment and presents five issues for our review, which we have re-ordered as follows:

1. Whether the court erred and/or abused its discretion in its monetary award by giving [Ms. Resnick] a far greater proportion of the marital assets?

2. Whether the court erred and/or abused its discretion in both the amount and duration of its alimony award to [Ms. Resnick]?

3. Whether the court erred and/or abused its discretion in its attorney[']s fees award to [Ms. Resnick]?

4. Whether the court erred and/or abused its discretion in its child support determination?

5. Whether the court erred and/or abused its discretion when it granted tie-breaking authority to [Ms. Resnick] in its legal custody determination?

Although we disagree with Dr. Shushan's assertion that the court's monetary award gave Ms. Resnick "a far greater proportion of the marital assets," we nevertheless hold that the court erred in its monetary award analysis. Because we shall vacate that monetary award, we must also vacate and remand the court's awards for alimony and attorney's fees. Additionally, although we perceive no error regarding the child support award, we shall

[1] In the Judgment of Absolute Divorce the court restored Ms. Shushan to her former surname (Resnick). Accordingly, we shall refer to appellee as "Ms. Resnick" throughout this opinion, and modify the case caption to reflect the name change.

vacate and remand the court's award of arrearages. Finally, we perceive no error in the court's determination of tie-breaking authority as it pertains to joint legal custody.

FACTUAL AND PROCEDURAL BACKGROUND

The parties married on May 19, 2006, and have three minor children. By December 2016, the parties recognized that "unhappy differences" had arisen between them, and entered into a voluntary separation and custody agreement. Dr. Shushan vacated the marital home the following month. Litigation began on November 2, 2017, when Ms. Resnick filed a complaint for absolute divorce, or in the alternative, for limited divorce. Dr. Shushan responded by filing an answer and counterclaim on December 6, 2017, and both parties thereafter proceeded to file supplemental complaints.

On March 27, 2018, the parties entered into a *Pendente Lite* Consent Order, which granted use and possession of the marital home to Ms. Resnick, and required Dr. Shushan to pay Ms. Resnick $9,000 per month in *pendente lite* alimony in addition to other specific family expenses. A merits trial was held over three days in late October and early November 2018. On April 11, 2019, the trial court issued a Judgment of Absolute Divorce and a corresponding 114-page Memorandum Opinion.

Relevant to this appeal, in its Judgment of Absolute Divorce, the court granted Ms. Resnick: a monetary award of $190,000 in addition to $113,794 to be transferred from Dr. Shushan's retirement plan; $8,500 per month in indefinite alimony; $48,452.80 in

attorney's fees; $11,500 per month in child support[2] and $19,656 in child support arrearages; and joint legal custody with Ms. Resnick having tie-breaking decision-making authority regarding the children's education and extracurricular activities through high school, and Dr. Shushan having tie-breaking authority concerning the children's medical and dental care, as well as decisions related to the children's college admissions.

Both parties filed timely motions to alter or amend. Ms. Resnick's motion acknowledged "that there are certain mathematical and typographical errors and omissions in the Judgment and the Memorandum Opinion . . . as well as incongruities in the Judgment and Memorandum Opinion which could be raised as grounds for appeal if not corrected in response to the instant Motion." Despite recognizing such errors, Ms. Resnick essentially asserted that the court's ultimate decisions could be sustained with clarified factual findings.

Dr. Shushan's motion alleged more problematic errors. For example, he noted that in its identification and valuation of marital property, the trial court: incorrectly placed a 2014 Jeep Wrangler valued at $27,000 in his column where it should have been treated as Ms. Resnick's property; that in light of the court's transfer of the BMW X5 valued at $17,200 to Ms. Resnick, the court improperly characterized the vehicle as joint marital property; arbitrarily valued family use personal property from the marital home in order to

[2] During the pendency of the use and occupancy order, Dr. Shushan was to pay $5,156 as child support because he was paying $6,344 per month for the use and occupancy of the marital home. Once those obligations expired, Dr. Shushan was to simply pay $11,500 in monthly child support.

match the exact value of personal property in Dr. Shushan's new home without evidence supporting such a valuation; and improperly characterized the bulk of Ms. Resnick's Individual Retirement Account ("IRA") as her non-marital property.

In response to these motions, the court held a hearing on May 22, 2019, and on June 26, 2019, the court issued an Amended Judgment of Absolute Divorce. The amended judgment did not change any of the original awards, except that it increased Dr. Shushan's child support arrearages from $19,656 to $55,234. As stated above, Dr. Shushan timely appealed. We shall provide additional facts as necessary.

DISCUSSION

I. THE MONETARY AWARD

We first address Dr. Shushan's allegations of error concerning the monetary award. When a party requests a monetary award (as Ms. Resnick did here), a trial court must complete a three-step process before determining whether to grant such an award. *Abdullahi v. Zanini*, 241 Md. App. 372, 405 (2019). In the first step, the court determines whether each disputed item of property is marital or non-marital. *Id*. (citing *Flanagan v. Flanagan*, 181 Md. App. 492, 519 (2008)). The relevant statute, Md. Code (1984, 2019 Repl. Vol.), § 8-201(e) of the Family Law Article ("FL"), defines marital property as follows:

> (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 second step requires the court to determine the value of all marital property. *Abdullahi*, 241 Md. App. at 406 (citing *Flanagan*, 181 Md. App. at 519). Finally, the court "must decide if the division of marital property according to title would be unfair, and if so, it may make a monetary award to rectify any inequality created by the way in which property acquired during marriage happened to be titled." *Id*. (internal quotation marks omitted) (quoting *Flanagan*, 181 Md. App. at 519-20).

This Court has noted that "[t]he clear intent of [the monetary award] is to counterbalance any unfairness that may result from the actual distribution of property acquired during the marriage, strictly in accordance with its title." *Id*. at 406-07 (quotation marks omitted) (quoting *Brewer v. Brewer*, 156 Md. App. 77, 110 (2004)). "Ordinarily, it is a question of fact as to whether all or a portion of an asset is marital or non-marital property. Findings of this type are subject to review under the clearly erroneous standard embodied by Md. Rule 8-131(c)[.]" *Collins v. Collins*, 144 Md. App. 395, 408-09 (2002) (quoting *Innerbichler v. Innerbichler*, 132 Md. App. 207, 229 (2000)). We review the ultimate decision to grant a monetary award for an abuse of discretion. *Abdullahi*, 241 Md. App. at 407; *Collins*, 144 Md. App. at 409.

Here, in issuing the monetary award, the trial court expressly employed the three-step process outlined above and considered the statutory factors set forth in FL § 8-205(b). The court determined that the marital property was worth $963,386.51, with $755,213.00 titled in Dr. Shushan's name, and $208,173.51 titled in Ms. Resnick's name. This determination resulted in a disparity of $547,039.49 between the parties in favor of Dr. Shushan. In its Memorandum Opinion, the court explained that it was granting Ms. Resnick a $190,000 monetary award,[3] stating, "In following her request for a $190,000 Monetary Award, [the court] assesses somewhat more responsibility for the breakup to Dr. Shushan and quantifies it as 55% on him and 45% as to [Ms. Resnick], which disposition it employed as an alternate method to arrive at the for [sic] Monetary Award." Later in its Memorandum Opinion, the court stated that "it could make an unequal adjustment of 55% to [Ms. Resnick] – 45% to [Dr. Shushan,]" but chose instead to comport with Ms. Resnick's request for a $190,000 monetary award in an effort to avoid an appeal.

As noted above, following the court's initial Judgment of Absolute Divorce, both parties filed motions to alter or amend. Ms. Resnick acknowledged that the court made a seemingly "typographical" error, incorrectly placing the 2014 Jeep Wrangler valued at $27,000 in Dr. Shushan's marital property column when it should have been placed in her column because the vehicle is titled in her name. Nevertheless, Ms. Resnick asserted that this error should not impact the court's $190,000 monetary award in light of the fact that

[3] As noted above, the court also granted Ms. Resnick $113,794 from Dr. Shushan's retirement plan.

the court expressly found that that it "could easily award a significantly higher figure as a Monetary Award to [Ms. Resnick] than [the] $190,000 she ha[d] requested."[4]

Dr. Shushan's motion, however, alleged other errors in the court's monetary award.[5] In addition to echoing Ms. Resnick's concession that the court improperly allocated the value of the 2014 Jeep Wrangler to him, Dr. Shushan claimed that the court: improperly identified a BMW X5 as joint property when it should have been identified as Ms. Resnick's sole property; arbitrarily valued the household furnishings in the marital home at $8,000, to match the value of the furnishings in his new home; and improperly treated the bulk of Ms. Resnick's IRA as her non-marital property.

At the May 22, 2019 hearing on the two motions to alter or amend, the trial court acknowledged its error regarding the 2014 Jeep Wrangler, but nevertheless affirmed the $190,000 monetary award, agreeing with Ms. Resnick's contention that the court had not sought "mathematical certainty."[6] The court rejected Dr. Shushan's other alleged errors, however, including the valuation of household furnishings at the marital home, and the court's treatment of Ms. Resnick's IRA. On appeal, Dr. Shushan again challenges the court's monetary award analysis.

[4] Ms. Resnick's motion also alleged other errors not relevant to the court's monetary award.

[5] We note that Dr. Shushan alleged numerous other errors in his motion not specifically recounted here.

[6] Indeed, in its Memorandum Opinion, the trial court wrote that although "it could have awarded a greater amount, [it] acceded to [Ms. Resnick's] concern about an appeal and ordered a lesser amount as she requested."

In his appellate brief, Dr. Shushan argues that we must vacate the monetary award because:

1. The court only treated $8,967.99 of Ms. Resnick's $86,453 Jackson IRA as marital property when there was no evidence that the remaining $77,485.01 was non-marital property;

2. The court arbitrarily valued the personal property in the marital home at $8,000, which was $97,000 lower than Dr. Shushan's $105,000 estimate, but also $4,000 lower than Ms. Resnick's own estimate;

3. The court incorrectly treated Ms. Resnick's 2014 Jeep Wrangler, valued at $27,000, as Dr. Shushan's property;

4. The court incorrectly treated a BMW X5 valued at $17,200 as joint property despite having awarded it to Ms. Resnick;

5. The court found that a $70,000 investment Dr. Shushan made to a surgery center constituted marital property titled in his name despite the fact that it "indisputably had no current value"; and

6. The court "found that $30,000 worth of designer bags and jewelry were 'by their nature' gifts and excluded them as marital property even though there was no testimony to that effect."

As we shall explain, we agree that the trial court erred in its treatment of the Jackson IRA, the valuation of personal property in the marital home, the 2014 Jeep Wrangler, and the BMW X5. Although we discern no error related to the $70,000 investment in the surgery

center or the allegedly $30,000 valuation in designer bags and jewelry,[7] we conclude that the court should have added approximately $117,085.01[8] to the $208,173.51 in property titled in Ms. Resnick's name—increasing Ms. Resnick's marital property by 56 percent for purposes of the monetary award calculation. Because the sum of these errors is not *de minimus*, we shall vacate the court's monetary award.

1. Jackson IRA

First, the trial court erred in its treatment of Ms. Resnick's Jackson IRA. For background, the parties stipulated that Ms. Resnick's Jackson IRA, which she opened prior to the marriage, had a value of $86,453 at the time of trial. At trial, Ms. Resnick produced

[7] Regarding the $70,000 investment for the surgery center, Dr. Shushan testified at trial that it "would be fair" for Ms. Resnick to receive $35,000 as half of the value of that investment. Implicit in that concession is that Dr. Shushan had no objection to a $70,000 valuation of the surgery center. As to the "$30,000 worth of designer bags and jewelry," we can find only a single reference to this property in the nearly 1,300-page record extract—when Dr. Shushan testified that there was no reference to Ms. Resnick's "bags and diamond rings and things" on the joint marital property statement. Moreover, Dr. Shushan has failed to provide any citation to the record where we may review the evidence on this issue. Accordingly, we decline to address it. *See Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008) (noting that an appellate court will not sift through the record "to unearth factual support" for a party (quoting *von Lusch v. State*, 31 Md. App. 271, 282 (1976), *rev'd on other grounds* 279 Md. 255 (1977))).

[8] As we explain *infra*, Ms. Resnick should have been credited with an additional $77,485.01 for her Jackson IRA; at least $4,000 more for personal property in the marital home; $27,000 for the 2014 Jeep Wrangler; and $8,600 more for the full value of the BMW X5. $77,485.01 + $4,000 + $27,000 + $8,600 = $117,085.01. Similarly, the correction of these errors would reduce Dr. Shushan's total assets by $35,600; $27,000 for the Jeep and $8,600 for the BMW should be subtracted from his marital property column.

evidence showing that in 2008 she withdrew $8,967.99[9] from two other IRAs, both of which were acquired during the marriage, and deposited these sums into the Jackson IRA. Despite recognizing that there was no evidence indicating the value of the Jackson IRA when initially opened, nor on the date of marriage, the trial court found that "*Dr. Shushan* ha[d] not *met his burden* of proving the $77,488.01 difference is marital property[.]"[10] (Emphasis added).

This was error. *Dr. Shushan* did not bear the burden of proving that the commingled assets were marital property; *Ms. Resnick* bore the burden of proving that a portion of the commingled assets were *not marital property*.[11] It is well-settled in Maryland that, "[T]he party seeking to demonstrate that particular property acquired during the marriage is nonmarital must trace the property to a nonmarital source." *Richards v. Richards*, 166 Md. App. 263, 276 (2005) (quoting *Noffsinger v. Noffsinger*, 95 Md. App. 265, 283 (1993)). In fact, "Any property acquired during the marriage that cannot be directly traced to a nonmarital source is marital property." *Noffsinger*, 95 Md. App. at 281.

In *Gravenstine v. Gravenstine*, this Court underscored the importance of being able to trace the non-marital portions of property. 58 Md. App. 158 (1984). There, the trial

[9] The uncontradicted evidence showed that Ms. Resnick withdrew $4,508.15 between July 1 and September 30, 2008, and $4,459.84 between April 2 and July 1, 2008. $4,508.15 + $4,459.84 = $8,967.99.

[10] This appears to be a minor mathematical error on the court's part. $86,453 - $8,967.99 = $77,485.01, rather than $77,488.01.

[11] At oral argument, Ms. Resnick's counsel conceded that the court erred in its allocation of the burden of proof regarding the non-marital value of the IRA.

court determined that the full value of a husband's pension constituted marital property. *Id*. at 167. Notably, "it was undisputed that [husband's] pension rights began to accrue (prior to the marriage)." *Id*. at 168. We recognized that, "Where property is purchased and paid for in part before marriage and in part during marriage with nonmarital and marital funds, the property is nonmarital in part and marital in part." *Id*. (citing *Harper v. Harper*, 294 Md. 54, 81 (1982)). Because there was "no specific proof of the value of the marital portion" of the pension, we remanded the case for the court to determine the value of the marital portion of the pension to enable it to equitably distribute marital property. *Id*. at 171.

Here, Ms. Resnick liquidated two "marital" IRAs in 2008 and commingled those marital funds totaling $8,967.99 with her purportedly non-marital Jackson IRA. We know nothing about the subsequent investment history of the Jackson IRA, and Ms. Resnick made no effort to trace any of the $77,485.01 in the Jackson IRA to a non-marital source. Accordingly, there is no evidence in this record to support the court's finding that this sum constitutes Ms. Resnick's non-marital property. Indeed, in its Memorandum Opinion, the trial court acknowledged that it did "not know the value of the account when established pre-marriage nor on the date of the marriage[.]" The trial court therefore erred in placing the burden on Dr. Shushan to prove that the property was marital, and in treating $77,485.01 of the Jackson IRA as Ms. Shushan's non-marital property where there was no evidence to support such a finding.

2. Personal Property at the Marital Home

Next, the court erred in its valuation of personal property in the marital home, which it ultimately transferred to Ms. Resnick. In the parties' joint statement of marital property, Dr. Shushan valued this property at $105,000, while Ms. Resnick valued it at $12,000. The trial evidence reflects that Dr. Shushan's valuation of $105,000 was based on internet searches for the cost of replacing the personal property with "new items" rather than accurately portraying their fair market values. Ms. Resnick, on the other hand, testified that the value of the property was much lower than $105,000 because the property was used, and "used furniture just doesn't sell, unless it's an antique it doesn't -- it doesn't hold its value."

In her post-trial memorandum, Ms. Resnick, for the first time, requested that the court value this property at only $8,000 in order to match the $8,000 of furnishings at Dr. Shushan's home. Ms. Resnick also requested that the court transfer ownership of each party's home furnishings to that respective party pursuant to FL § 8-205(a)(2), so that she would be the sole owner of the personal property in the marital home, while Dr. Shushan would retain ownership of the property in his new home. By valuing the marital home furnishings at $8,000, Ms. Resnick essentially sought a complete setoff whereby she would keep all of the property in the marital home in exchange for Dr. Shushan retaining all property in his home. Ms. Resnick argued that doing so "is the fair thing to do."

In its Memorandum Opinion, the trial court acceded to Ms. Resnick's request. First, it adopted her argument that Dr. Shushan's internet searches were not persuasive that the

marital home furnishings were currently worth $105,000.[12] Then, despite no evidence tending to show that the personal property in the marital home was worth $8,000, the court valued that property at $8,000, noting that it did not believe that the personal property at *Dr. Shushan's home* was actually worth $8,000 either. Pursuant to FL § 8-205(a)(2), the court then transferred title to the family use personal property at the marital home to Ms. Resnick.[13] This determination resulted in each party having $8,000 worth of marital property, representing furnishings and related property in their respective homes. The court explained that this course of action was "the fair, equitable and practical thing to do."

At the hearing on the motions to alter or amend, Dr. Shushan challenged the accuracy of the court's valuation of the furnishings in the marital home, but the court justified its finding by relying on its "discretion." In its Amended Judgment of Absolute Divorce, the court reiterated its decision to transfer the family use personal property to Ms. Resnick and value the property at $8,000 as an offset to the personal property in Dr. Shushan's home.

This, too, constituted error. "Valuation is a question of fact subject to the clearly erroneous standard of review." *Abdullahi*, 241 Md. App. at 413 (citing *Blake v. Blake*, 81 Md. App. 712, 720 (1990)). Although it is true that "[A]n owner of property is presumed

[12] We agree with the court that, as a general rule, replacement value does not equate to fair market value.

[13] The court stated, "Items with each party to be legally transferred to each respectively per FL 8-205(a)(2)." We merely note that the personal property Dr. Shushan acquired for his new residence would not be subject to "transfer" pursuant to FL § 8-205(a)(2) because he is undisputedly the sole owner of such property.

to be qualified to testify as to his [or her] opinion of the value of property he [or she] owns," a trial court's valuation of property must still be based on evidence in the record. *Id.* (quoting *Colonial Pipeline Co. v. Gimbel*, 54 Md. App. 32, 44, *cert. denied*, 296 Md. 110 (1983)).

In *Abdullahi*, a wife challenged the trial court's treatment of property she owned in Somalia for purposes of calculating a monetary award. *Id.* at 412. The wife testified that the property "had a value of zero because it was uncertain whether anyone would receive anything, given the uncertainty in Somalia and that her share was one-sixteenth of the property." *Id.* In their joint statement of marital property, the husband claimed that the home was worth $77,200, and the farm was worth $20,000. *Id.* At trial, however, the husband did not testify as to the value of the property, and "gave no basis for the reasoning behind these values, not even whether he had ever seen them or had any idea how property would be valued in Somalia." *Id.* at 413-14. We held that the trial court erred in relying on the husband's valuations for the property because they were "unsupported by any reasoning regarding how he arrived at that result." *Id.* at 414.

Similarly here, where the parties' joint statement pursuant to Maryland Rule 9-207 valued the personal property in the marital home at a minimum of $12,000, and where neither party testified that the value of the personal property in the marital home was worth $8,000 as determined by the court, the court's finding lacked evidentiary support and was therefore clearly erroneous. *Id.* ("Findings of fact that are clearly erroneous are marked by a lack of competent and material evidence in the record to support the decision." (quoting

In re Dany G., 223 Md. App. 707, 719 (2015))). If the court deems it necessary, it may reopen proceedings to receive evidence regarding the actual value of the personal property in the marital home.[14]

3. 2014 Jeep Wrangler and BMW X5

Dr. Shushan also argues that the court erred in its treatment of the 2014 Jeep Wrangler and the BMW X5. As stated above, at the hearing on the motions to alter or amend, the trial court acknowledged that it had erroneously treated the 2014 Jeep Wrangler, valued at $27,000, as belonging to Dr. Shushan when it should have been placed in Ms. Resnick's column as marital property titled in her sole name. Rather than revise its monetary award, the trial court adopted Ms. Resnick's counsel's suggestion that the error "[did] not change [its] determination that [the] $190,000 monetary award [was] appropriate in this case."

Regarding the BMW X5, in their joint statement of marital property, the parties agreed that the BMW X5 was jointly titled. In its Memorandum Opinion, the trial court valued the BMW X5 at $17,200, transferred ownership of it to Ms. Resnick pursuant to FL § 8-205(a)(2), but still treated the vehicle as titled jointly for purposes of its monetary award

[14] We recognize that determining the value of furniture and other household personal property can be a difficult and arduous task. Nevertheless, unless the parties stipulate, the value of such property must be based on competent evidence in the record.

calculation. In its Amended Judgment of Absolute Divorce, the trial court recognized its error, but stated that this change would not affect its $190,000 monetary award.[15]

As we have explained, the aggregation of the court's errors resulted in an additional $117,085 worth of marital property that should have been placed in Ms. Resnick's column in the monetary award analysis. The court wrongly excluded $77,485.01 from Ms. Resnick's Jackson IRA as non-marital property. Next, it arbitrarily valued the personal property in the marital home at $8,000, which was $4,000 lower than Ms. Resnick's own valuation of the property. Finally, the court failed to place the $27,000 2014 Jeep Wrangler in Ms. Resnick's column, and treated a $17,200 BMW X5 as jointly titled despite transferring ownership to Ms. Resnick. We are not satisfied that the court fully appreciated the significance of its errors, which cannot be characterized as *de minimus* in nature.[16] On remand, the court may, in its discretion, hold an evidentiary hearing to determine an accurate fair market value of the personal property in the marital home.[17] In conclusion,

[15] If the incorrect allocation of the value of the BMW X5 were the only error, we would not disturb the court's award because the court expressly acknowledged its understanding that the BMW X5 transfer was in addition to the $190,000 monetary award. On remand, however, the court should consider the value of the BMW X5 which it transferred to Ms. Resnick in its overall analysis.

[16] At oral argument, Ms. Resnick's counsel conceded that the aggregation of these errors would constitute "real money," *i.e.*, a significant sum in the overall marital property valuation.

[17] The court should not receive further evidence concerning the Jackson IRA. These proceedings were lengthy and Ms. Resnick should not be permitted to produce evidence of non-marital funds in her IRA where she previously had ample opportunity to do so.

to enable the court to equitably resolve discrepancies in marital property distribution caused by title, the court must have accurate information to inform its analysis.

II. ALIMONY

Having determined that the trial court erred in its marital property/monetary award analysis, we must also vacate the award for alimony. *See Turner v. Turner*, 147 Md. App. 350, 400-01 (2002) (noting that the factors underlying alimony, a monetary award, and counsel fees are so interrelated that, when a court issues a reversal for one award, it usually must issue reversals for the other two). Although we must vacate the alimony award, for purposes of assistance on remand, we do not perceive any abuse of discretion in the court's indefinite alimony analysis.[18]

"An alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (quoting *Solomon v. Solomon*, 383 Md. 176, 196 (2004)). FL § 11-106 governs the amount and duration of an alimony award, with FL § 11-106(b) providing numerous factors that must guide a court's decision. The FL § 11-106(b) factors at issue here include: (1) "the ability of the party seeking alimony to be wholly or partly self-supporting," (3) "the standard of living that the parties established during their marriage," (4) "the duration of the marriage," (6) "the circumstances that

[18] We recognize the possibility that, if the court substantially increased the monetary award on remand, Ms. Resnick could hypothetically no longer be entitled to indefinite alimony. We simply note that we see no error in the court's consideration of the relevant factors in awarding indefinite alimony based the evidence presented.

contributed to the estrangement of the parties," (7) "the age of each party," (8) "the physical and mental condition of each party," and (9) "the ability of the party from whom alimony is sought to meet the party's needs while meeting the needs of the party seeking alimony." FL § 11-106(c) permits a court to award indefinite alimony if the court finds that:

> (1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or
>
> (2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

Here, the trial court invoked FL § 11-106(c)(2), awarding Ms. Resnick $8,500 per month in indefinite alimony after projecting a "gross disparity of the parties' future standard of living." Dr. Shushan challenges this determination for multiple reasons. First, he argues that the court incorrectly "focus[ed] solely on the income percentage differential between the parties." Second, he argues that the trial court incorrectly construed the significance of the relevant FL § 11-106(b) factors. Finally, Dr. Shushan alleges that the trial court erred by failing to consider the tax consequences of the alimony award. We shall reject each of these arguments in turn.

1. Income Differential

We first reject Dr. Shushan's argument that the trial court erred by exclusively relying on the income differential between the parties as the basis for its indefinite alimony award. To be sure, we agree with Dr. Shushan that "A mere *difference* in earnings of spouses, even if it is substantial, and even if earnings are the primary means of assessing

the parties' post-divorce living standards, does not automatically establish an 'unconscionable disparity' in standards of living." *Karmand v. Karmand*, 145 Md. App. 317, 336 (2002). Rather, "[t]o constitute a 'disparity,' the standards of living must be fundamentally and entirely dissimilar" to the point of being unconscionable. *Id.*

Contrary to Dr. Shushan's assertion that the court solely focused on the income disparity, the court here noted that "since separation, the evidence shows that [Dr. Shushan's] lifestyle has been the more extravagant of the two – a second home,[19] a Porsche, a boat & a recent Mexican vacation." In fact, the court took great effort to acknowledge what Maryland law requires to substantiate an "unconscionable disparity." The court noted that, pursuant to *Innerbichler*, 132 Md. App. at 248, "its conclusions must not be 'based simply on a mathematical computation. Rather, the [c]ourt [should make] a careful analysis of the various equitable considerations.'" In justifying its indefinite alimony award, the court noted that Dr. Shushan "is in good health entering his peak performance years as an orthopedic surgeon," and "is taking an aggressive approach to growing his practice by investing in a medical center and maintaining and fostering an excellent professional reputation and by having privileges and physician employee responsibility at a local hospital." Relying on these facts, the court justified its award of indefinite alimony by finding that Dr. Shushan was "in his prime earning years" and was

[19] To the extent Dr. Shushan argues that the court incorrectly found that he had a second home, we merely note that the evidence demonstrated that Dr. Shushan had purchased his own home after the separation—a "second home" in addition to the marital home.

likely to continue earning more than he had in the previous four years. These findings were not clearly erroneous, and demonstrate that the court considered more than just income differential in awarding Ms. Resnick indefinite alimony.

In a tangential argument concerning income differential, Dr. Shushan also argues that the court erred by failing to project into the future the maximum productivity of the party seeking alimony—Ms. Resnick. It is well settled that

> "A trial court must evaluate and compare" the parties' respective post-divorce standards of living "as a separate step in making its judgment" on a claim for indefinite alimony. [*Tracey v. Tracey*, 328 Md. 380, 393 (1992)]. "In this context, 'standards of living' means how well the respective parties can live based on their respective financial means." [*Boemio*, 414 Md. at 144]. To make the necessary comparison, the court "should project those standards for the future, *based on all of the available evidence*." *Id*. at 144 n.18[.]

St. Cyr v. St. Cyr, 228 Md. App. 163, 189 (2016) (emphasis added). Here, the court's projection of Ms. Resnick's income as between $38,000 to $40,000 was based on the only available evidence in the record.

The trial court noted in its Memorandum Opinion that Ms. Resnick "will likely reach[] her 'maximum self-sufficiency when she obtains employment providing a salary in the range of $38,000[] - $40,000.'" Dr. Shushan now argues that the $38,000 - $40,000 figure only represents Ms. Resnick's *present* earning capability, but not her *future* earning capability.

We summarily reject this allegation of error. Lianne Friedman, Ms. Resnick's expert,[20] authored a report reflecting that, based on Ms. Resnick's education and experience, she could obtain employment as an administrative assistant and earn approximately $38,000 to $40,000 annually. This was the only evidence presented concerning Ms. Resnick's earning potential. Implicit in the court's finding is the assessment that, in light of Ms. Resnick's education, experience, and lengthy absence from the workforce, the maximum she could reasonably earn in the foreseeable future was $38,000 to $40,000 per year. Accordingly, the trial court relied on "all of the available evidence" in projecting Ms. Resnick's future earning capabilities. *Id.* If Dr. Shushan wished to prove that Ms. Shushan had the future potential to earn substantially more than $40,000, we presume that he would have produced such evidence. Regardless, the court did not err in relying on the evidence actually presented.

2. FL § 11-106(b) Factors

Dr. Shushan also challenges the court's award of indefinite alimony by arguing that the trial court failed to properly consider the relevant statutory factors. We disagree; our review of the record reveals that the trial court carefully considered the relevant FL § 11-106(b) factors.

[20] In her brief, Ms. Resnick indicated that Ms. Friedman was Dr. Shushan's expert. At oral argument, however, appellate counsel clarified that Ms. Friedman was actually Ms. Resnick's expert, but that the parties stipulated to the admission of her report.

In his brief, Dr. Shushan argues that the following FL § 11-106(b) factors show that the court should have awarded rehabilitative rather than indefinite alimony:

> (3) the standard of living that the parties established during their marriage;
> (4) the duration of the marriage;
> (6) the circumstances that contributed to the estrangement of the parties;
> (7) the age of each party;
> (8) the physical and mental condition of each party; and
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony[.]

We perceive no error in the trial court's evaluation of these factors. Regarding the standard of living that the parties established during their marriage, the court found that the parties "enjoyed one of the higher standards of living in the United States, living in an upper middle-class home and conducting a robust social life to include cruises, vacations and extensive [extracurricular] activities for the children, i.e., summer camp, driving high end automobiles and having a boat." Following the separation, the court noted that

> Dr. Shushan has been able to maintain his historic more affluent standard of living, e.g., Mexican vacation, maintaining a Porsche, a boat and a second home while [Ms. Resnick] has realized some decrease in the standard of living she had grown accustomed to while they were living together; little dining out, less vacation trips and cruises.

Because of the projected income disparity, the court found that Ms. Resnick would not be able to participate in the lifestyle to which she had become accustomed during the marriage. This factor therefore weighed in favor of indefinite alimony.

As to the duration of the marriage, Dr. Shushan argues that "this was a relatively short marriage of 10 ½ years." Because the parties were married in May 2006, and divorced in April 2019, the length of the marriage was technically nearly 13 years. The

court, however, acknowledged the parties' separation period in considering the length of the marriage, stating that the parties had been married "for a period of almost 13 years, a large portion of their adult lives, separating in January 2017; a marriage of sufficient duration to justify an award of indefinite alimony." Thus, the court expressly recognized the duration of the parties' marriage, and to the extent that Dr. Shushan argues that its length precludes an indefinite alimony award, we disagree.

Turning to the circumstances that contributed to the estrangement of the parties, the court found that "both parties shoulder significant responsibility as to their estrangement[.]" The court found that the conflict was "mainly a product of tensions that arise from the classic dilemma of the successful workaholic husband in a demanding profession with its accompanying stresses and the neglected stay at home wife and mother along with all their own unique circumstances." Assessing "55%" of the blame to Dr. Shushan, the court noted that his "continued demands for sex at inappropriate times, his insensitivity regarding the Porsche purchase . . . and his at times over-the-top public and private outburst[s]" slightly outweighed Ms. Resnick's "alcohol problems" and her physically assaulting Dr. Shushan. We discern no error in the court's findings as to this factor.

Regarding the parties' ages and physical and mental conditions, the court found that Ms. Resnick was relatively young at 40 years of age, college educated, and was both mentally and physically capable of re-entering the workforce. As to Dr. Shushan, the court noted that he was 42 years old at the time of divorce and that "[t]here [was] no evidence of

any physical or mental condition or impairments, which would prohibit or greatly impair Dr. Shushan from continuing to practice medicine for many years to come[.]"

Finally, as to Ms. Resnick's ability to meet her needs as the party seeking indefinite alimony, and Dr. Shushan's ability to meet his own needs while paying alimony, the court found that Dr. Shushan's net worth was likely "to continue to grow" given his "demonstrated income generating ability," leading the court to conclude that Dr. Shushan possessed the ability to "meet his own needs and to live a relatively luxurious lifestyle while continuing to meet [Ms. Resnick's] and his children's needs[.]" Additionally, we reject Dr. Shushan's assertion that the court erred in awarding an amount that exceeds Ms. Resnick's own needs. A court may, in its discretion, award alimony beyond a spouse's reasonable needs. *See Boemio*, 414 Md. at 131 (stating that "The Circuit Court acted within its discretion in declining to limit its award to the monthly expenses it found [wife] needed based on her current financial statement.").

As in most cases, some of the FL § 11-106 factors favored an award of indefinite alimony, and some did not. Nevertheless, the court's analysis of the statutory factors was thorough. We perceive no error in the court's evaluation and application of the factors.

3. Tax Consequences

Finally, we summarily reject Dr. Shushan's argument that the trial court erred in awarding indefinite alimony by failing to consider the tax consequences of such an award. In his brief, Dr. Shushan argues that "The court also failed to consider the tax consequences to [him] of the alimony award which, because [the court] delayed [its] ruling into 2019,

rendered the payment taxable to [Dr. Shushan] and tax[-]free to [Ms. Resnick]." Dr. Shushan failed to provide any citation to the record or extract wherein he introduced evidence or expert testimony on this issue, and conceded as much at oral argument. It is not this Court's obligation to unearth facts favorable to a party. *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008). In fact, our review of the trial transcripts indicates that neither party produced an expert in accounting or taxation. Finally, at the hearing on the motion to alter or amend, the trial court stated that it was aware of the changes to the tax law, and that it understood the law and "frankly took that into consideration conceptually in awarding the [$]8,500" in alimony.

In conclusion, although we see no error or abuse of discretion in the court's alimony analysis, because we have vacated the monetary award, our case law mandates that we also vacate the alimony award. *Turner*, 147 Md. App. at 400-01.

III. ATTORNEY'S FEES

As noted above, we must vacate the court's award of attorney's fees. *See id*. (noting that the factors concerning the monetary award, alimony, and attorney's fees are so closely related that vacation of one requires vacation for all). For guidance on remand, we shall address Dr. Shushan's half-page appellate argument.[21] Despite Dr. Shushan's claims that the court failed to "consider its other awards in making its attorney's fees determination,"

[21] Dr. Shushan's brief failed to cite a single legal authority or citation to the record in challenging the court's attorney's fees award. This Court will neither comb the record for factual support favorable to a party, nor will it "seek out law to sustain" a party's position. *Rollins*, 181 Md. App. at 202 (quoting *von Lusch*, 31 Md. App. at 285).

the record clearly shows that the trial court: considered the relevant statutory factors for awarding attorney's fees; subtracted fees related to "criminal and DV proceedings" where the court lacked "clarification of the exact involvement of either party"; and, contrary to Dr. Shushan's assertions, considered the "financial aspects herein involving physical & legal child custody & access, child support & arrearages, real and personal property, . . . a [use and occupancy] award, alimony, and large amounts of attorneys' fee[s]," as well as the parties' respective earning potentials. Accordingly, although Maryland caselaw requires us to vacate and remand the attorney's fees award, we reject Dr. Shushan's appellate arguments on this subject.

IV. CHILD SUPPORT

We next turn to Dr. Shushan's allegations of error concerning the court's child support award and its award of arrearages to Ms. Resnick. As we shall explain, although we perceive no error in the court's child support award, we are unable to follow the court's reasoning and calculations in its arrearages determination. Accordingly, we must vacate the arrearages award with instructions for the court to explain or correct the errors in its calculations.

1. Monthly Child Support

In its Memorandum Opinion, the trial court correctly recognized that, due to Dr. Shushan's income alone, the child support award would be based on its discretion rather than the statutory Guidelines. *See* FL §§ 12-204(d), (e). To calculate Dr. Shushan's income, the court computed his four-year earning average from 2015 through 2018 to be

$741,243.50,[22] or $61,771[23] per month. For Ms. Resnick's income, the court found her anticipated annual earnings to be $39,000,[24] or $3,250 per month.

The court also correctly recognized the goal of child support, namely that:

> a child should receive the same proportion of parental income, and thereby enjoy the same standard of living, he or she would have experienced had the child's parents remained together. Accordingly, the model establishes child support obligations based on estimates of the percentage of income that parents in an intact household typically spend on their children.

Bagley v. Bagley, 98 Md. App. 18, 36 (1993) (quoting *Voishan v. Palma*, 327 Md. 318, 322-23 (1992)). After noting Dr. Shushan's affluence, and determining that the children's needs were $10,373 per month, the court awarded Ms. Resnick $11,500 in child support.

Although Dr. Shushan asserts that the court's child support award was "fraught with inconsistent, often rambling findings," we confess having some difficulty understanding his precise allegations of error. As best we can tell, he seems to claim that the court's award was erroneous because it exceeded the children's needs; that the court's Guidelines worksheet failed to incorporate its alimony award and his percentage of time with the children; and that its second Guidelines worksheet figure of $11,517, issued after the

[22] The court's average was based on the following annual incomes for Dr. Shushan: 2015—$698,095; 2016—$690,838; 2017—$673,041; and 2018—$903,000.

[23] The court appears to have rounded up by $0.71. $741,243.50 divided by 12 months would equal $61,770.29.

[24] The court's finding was based on the parties' stipulation that Ms. Resnick could earn between $38,000 and $40,000 a year.

motions to alter or amend hearing, was suspiciously "coincidental[]." We reject each of these arguments.

At the outset, we note that a court may award child support beyond what it finds to be the needs of the children. In *Smith v. Freeman*, 149 Md. App. 1, 29 (2002), this Court recognized that the children's needs alone are not the only factor in determining child support:

> Many other cases support the general proposition that a child's needs are not the exclusive consideration in resolving a request for modification of child support, particularly in an above Guidelines situation. *See, e.g.*, *In re Marriage of Nimmo*, 891 P.2d 1002, 1007 (Colo. 1995) (stating that "[t]he guidelines were not enacted to prevent an increase in a child's standard of living by denying a child the fruits of one parent's good fortune after a divorce.")[.]

We summarily reject Dr. Shushan's remaining assertions of error. First, we discern no error in the court's second child support worksheet, which the court filed with the issuance of its Amended Judgment of Absolute Divorce. To be sure, the court's initial child support worksheet contained at least one error—its input for the "Monthly Actual Income-Before Taxes" failed to account for its alimony award. The court clearly corrected this error in the worksheet it issued with its Amended Judgment of Absolute Divorce. Second, both worksheets accurately reflected and accounted for the court's finding that, due to its decision regarding custody, Dr. Shushan would be responsible for the children 35% of the year. Finally, as to Dr. Shushan's assertion that the court's second child support worksheet was "coincidentally" similar to its initial decision to award $11,500 in child support, we note that the corrected worksheet supports a child support award of $11,517,

and the fact that the corrected worksheet may be "coincidental" to the court's initial award does not mean that it is erroneous.

2. Arrearages

Although we perceive no errors in the court's award of monthly child support, we must vacate the court's award of child support arrearages because we are unable to follow the court's explanation for its calculation of arrearages.

In order to explain why we must vacate the arrearages award, it behooves us to first explain what, according to the trial court, were the totals both owed and paid over the relevant time periods. Pursuant to the *Pendente Lite* Consent Order, beginning on April 1, 2018, Dr. Shushan was required to pay Ms. Resnick $5,500 per month in child support.[25] In its Memorandum Opinion, the court first calculated arrearages accumulated under the *Pendente Lite* Consent Order from March 27, 2018,[26] to October 1, 2018. Beginning November 1, 2018, however, Dr. Shushan was required to pay $11,500 in child support pursuant to the Judgment of Absolute Divorce. Lastly on this point, the court credited Dr. Shushan with making payments totaling $24,344 spanning from March 27, 2018, through October 2018, and $33,422 spanning from November 2018 through April 1, 2019. The

[25] We note that the *Pendente Lite* Consent Order does not explicitly order Dr. Shushan to pay $5,500 in child support. Instead, it appears that the parties extrapolated this amount from the $14,500 amount that Dr. Shushan was required to pay under the *Pendente Lite* Consent Order, which consisted of $9,000 in alimony and the remaining approximately $5,500 covering the mortgage and other expenses.

[26] The court apparently used March 27, 2018, the date of entry of the Consent Order, rather than April 1, 2018.

following table illustrates what Dr. Shushan owed and purportedly paid for these periods of time that formed the basis of the court's arrearages calculation.

Date	Amount Owed	Amount Paid
March 27, 2018 / April 1, 2018	$5,500	
May 1, 2018	$5,500	
June 1, 2018	$5,500	
July 1, 2018	$5,500	
August 1, 2018	$5,500	
September 1, 2018	$5,500	
October 1, 2018	$5,500	$24,344[27]
November 1, 2018	$11,500	
December 1, 2018	$11,500	
January 1, 2019	$11,500	
February 1, 2019	$11,500	
March 1, 2019	$11,500	
April 1, 2019	$11,500	$33,422[28]
TOTAL:	$107,500	$57,766

Based on the above table, the court should have ordered $49,734[29] in arrearages. The court, however, ordered Dr. Shushan to pay $55,234, which is $5,500 more than the expected amount of $49,734. Although we believe we can trace the source of the excess $5,500, there are other problems with the court's award that require vacation and remand.

[27] According to the trial court, this figure represents how much Dr. Shushan paid pursuant to the *Pendente Lite* Consent Order through October 2018. The record does not reflect that Dr. Shushan made a lump sum $24,344 payment on October 1, 2018.

[28] As in footnote 27, *supra*, this figure is meant to reflect how much Dr. Shushan paid in this time period according to the trial court's findings—the record does not reflect that Dr. Shushan made a $33,422 payment on April 1, 2019.

[29] $107,500 - $57,766 = $49,734.

We first address the problems with the court's calculation spanning from March 27/April 1, 2018 through October 1, 2018. We reprint the relevant section from the court's Memorandum Opinion verbatim:

> Thus, noting there has been an **eight month** arrearage attributable to that monthly total $5,500. child support substitute portion of the total $14,500.00 monthly ordered from 3/27/18 to 10/1/18, calculated as follows:
>
> $5,500. X **8 months** = $44,000.
> (Note that total amount is close to the $42,000. Wife claims she ran up in credit card debt during this period.)
>
> minus
>
> amount paid per PL Consent Order as child support substitute portion per Schedule V of Wife's Closing Memorandum during the 8-month period
>
> - $24,344.
>
> Child support substitute arrearage per PL Order thru 10/1/18
>
> $19,656.

(Emphasis added).

At the outset, we note that the child support payments were presumably due on the first of the month to cover that month's expenses, *i.e.*, the May 1, 2018 payment covered child support for the month of May in 2018. Against this backdrop, we perceive two problems with the court's calculation. The first problem is that the period from March 27, 2018, through October 2018 is only *seven months and four days*—not *eight months* (and it is precisely seven months from April 1, 2018). We surmise that this additional month explains why the court calculated Dr. Shushan's arrearages to be $5,500 higher than

expected. If the court intends to account for the last four days in March as part of its arrearages calculation, we encourage it to explicitly state its intention to do so on remand.[30] Otherwise, the court's calculation of arrearages for this period should be based on seven months, or $38,500.

The second and more problematic calculation, however, is the court's finding that Dr. Shushan made $24,344 in payments during this period. In its Memorandum Opinion, the court stated that it relied on Ms. Resnick's "Schedule V" in determining the amount to credit Dr. Shushan for child support payments. That schedule, however, does not support the finding that Dr. Shushan made $24,344 in payments. According to Ms. Resnick's Schedule V, Dr. Shushan made the following payments between March 27, 2018, and October 1, 2018:

April 1, 2018	$4,742
May 1, 2018	$10,292
June 1, 2018	$2,942
July 1, 2018	$2,942
August 1, 2018	$2,942
September 1, 2018	$2,942
October 1, 2018	$2,942
TOTAL:	$29,744

[30] Nothing in this opinion should be construed as ordering the court to award arrearages for the last four days in March. Indeed, the *Pendente Lite* Consent Order stated that it was effective April 1, 2018.

Not only does this span of time cover seven rather than eight months as mentioned above, but the payments total $29,744—not $24,344. Not only are we unable to determine how the court arrived at $24,344, but neither party could provide an explanation when asked at oral argument. On remand, we urge the trial court to specifically itemize Dr. Shushan's payments or contributions during this period so that the parties may understand how the arrearages pursuant to the *Pendente Lite* Consent Order have been calculated.

Turning to the period spanning from November 2018 through April 2019, we are unable to verify whether Dr. Shushan actually made payments of $33,422 over that time. Despite scouring the record, we are unable to verify how the court arrived at this amount (and the parties' counsel could not provide any explanation as to how the court arrived at $33,422). On remand, the trial court should explicitly state how it arrived at Dr. Shushan's total payments for this period.

In summary, we must vacate the child support arrearages for several reasons. First, the court's own calculation of Dr. Shushan's arrearages was $5,500 greater than what it should have been. Second, the court needs to resolve whether it intends to count the last four days in March 2018 for purposes of calculating Dr. Shushan's arrearages. Third, the court's finding that Dr. Shushan paid $24,344 from March 27, 2018, through October 2018 is not supported by the materials the court apparently relied upon. Finally, we are unable to verify how the court determined that Dr. Shushan contributed $33,422 for the period from November 2018 through April 2019. We trust that resolution of these issues will

yield an arrearages calculation that would be supported by the record and easily understood by the parties.

V. TIE-BREAKING AUTHORITY

Finally, we summarily reject Dr. Shushan's half-page argument that the trial court erred in awarding Ms. Resnick tie-breaking authority regarding school-related decisions. We review the court's ultimate decision regarding tie-breaking authority, a component of joint legal custody,[31] for an abuse of discretion. *See Gizzo v. Gerstman*, 245 Md. App. 168, 191-92 (2020) (noting that, when reviewing aspects of a custody decision, we review the "ultimate decision" for an abuse of discretion). Here, in awarding joint legal custody, the trial court ordered that Ms. Resnick be responsible for decisions regarding the children's "academic education through high school and as to the children's [extracurricular] activities and social life." In awarding her tie-breaking authority as to these aspects of the children's lives, the court found Ms. Resnick,

> by virtue of the history and practicalities of [the parties'] respective past, present and projected living situations, i.e., as the agreed to stay-at-home Mom, to be the more supporting, nurturing, more fully engaged parent and to be more likely available and better situated to devote more time and attention to them, due [to] a large degree to the demanding nature of the doctor's now very successful medical practice.

The court tempered this imbalance, however, by awarding Dr. Shushan tie-breaking authority as to routine and non-routine medical and dental health decisions, although the

[31] *See Santo v. Santo*, 448 Md. 620, 632-33 (2016) ("In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children.").

court tasked both parents with ensuring that the children get to their medical and dental appointments. Thus, the court concluded that Dr. Shushan was better-equipped to make ultimate decisions regarding the children's medical and dental care, while Ms. Resnick, the children's primary caretaker, was in a better position to make decisions concerning school and their day-to-day lives. We perceive no abuse of discretion in this division of decision-making responsibility.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED IN PART AND AFFIRMED IN PART. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE EQUALLY DIVIDED BETWEEN THE PARTIES.