Circuit Court for Montgomery County
Case No.: 131134-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1617

September Term, 2017

DAVID MATCHA

v.

SUSAN J. BERSOFF-MATCHA

Meredith,
Graeff,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: October 8, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, David Matcha (Husband), divorced Susan Bersoff-Matcha (Wife), Appellee, but appeals from an order of the Circuit Court for Montgomery County which denied his request for alimony as well as his request to receive outright payment of a monetary award, as opposed to a roll over of funds contained in an IRA titled solely in Wife's name to an IRA of his choosing, and from the trial judge's finding that he had dissipated marital assets. In asking this Court to reverse the judgment of the Circuit Court, Husband presents the following questions for our review:

> 1. Whether the Circuit Court erred in denying Appellant alimony despite a significant income disparity among the parties?
>
> 2. Whether the Circuit Court erred in vacating its prior monetary award to Appellant?
>
> 3. Whether the Circuit Court erred in concluding that Appellant had dissipated marital funds?

Concluding that the trial court did not err, we shall affirm the judgment below.

STANDARD OF REVIEW

We "accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Karmand v. Karmand*, 145 Md. App. 317, 326 (2002) (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)). As such, we evaluate the factual findings of a trial judge with respect to questions involving alimony and marital property under a clearly erroneous standard, "and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016) (citing Maryland Rule 8-131(c)); *see also Omayaka v. Omayaka*, 417 Md. 643, 652, 659 (2011); *Gordon v. Gordon*, 174 Md. App. 583, 625–26

(2007). Accordingly, if "there is any competent evidence to support the factual findings [of the trial court], those findings cannot be held to be clearly erroneous." *St. Cyr*, 228 Md. App. at 180 (alteration in original) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004)). A legal conclusion, such as the denial of alimony or the distribution of marital property, will not be reversed unless the trial judge's "discretion was arbitrarily used or the judgment below was clearly wrong." *Karmand*, 145 Md. App. at 326 (quoting *Tracey*, 328 Md. at 385); *see also Gordon*, 174 Md. App. at 626. "'This means that we may not substitute our judgment for that of the fact finder, even if we might have reached a different result' absent an abuse of discretion." *Gordon*, 174 Md. App. at 626 (quoting *Innerbichler*, 132 Md. App. 207, 230, *cert. denied*, 361 Md. 232 (2000)). A trial court, however, "must exercise its discretion with correct legal standards." *Id.* (quoting *Alston v. Alston*, 331 Md. 496, 504 (1993)).

ALIMONY

Husband first argues that the decision of Judge Debra Dwyer of the Circuit Court for Montgomery County to deny his request for indefinite alimony was "clearly erroneous in light of the gross income disparity among the parties," urging that he should have received alimony based upon the fact that, at the time of trial, Wife "earned in excess of $180,000 working at the FDA, as well as a history of earning in excess of $200,000" as a medical doctor, whereas he earned "a mere $30,000 at the time of trial." He contends that the trial judge further erred in her alimony determination by failing to properly consider his age and lack of education, beyond that of an associate degree, as well as the fact that, at the time of trial, his expenses exceeded his annual income by $20,000.00. Accordingly,

Husband posits that Judge Dwyer abused her discretion by denying his request for alimony. Before us, Husband asserts that he "does not, at this time, take a position as to whether the [alimony] award should be rehabilitative or indefinite." Under either standard, Husband is not entitled to an award of alimony, as Judge Dwyer found.

As a point of departure, we reiterate that "the principal function of alimony is 'rehabilitation of the economically dependent spouse.'" *St. Cyr*, 228 Md. App. at 184 (quoting *Whittington v. Whittington*, 172 Md. App. 317, 335–36 (2007) (internal citation omitted)). The statutory framework governing awards for alimony gives preference to "fixed-term or so-called rehabilitative alimony" under certain circumstances, as opposed to indefinite alimony, "to ease the transition from the joint married state to their new status as single people living apart and independently." *Id.* at 184–85 (quoting *Solomon*, 383 Md. at 195 (internal citation omitted)). The purpose of an alimony award "is to provide an opportunity for the recipient spouse to become self-supporting," even if "that might result in a reduced standard of living." *Tracey*, 328 Md. at 391. An award of rehabilitative alimony "must be grounded in a finding that the recipient spouse is not self-supporting and needs training, education, or other steps to help that spouse achieve financial self-reliance." *Karmand*, 145 Md. App. at 328 (citing *Reuter v. Reuter*, 102 Md. App. 212, 229 (1994)); *see also Lemley v. Lemley*, 102 Md. App. 266, 300 (1994) (providing that rehabilitative alimony may not be awarded unless the recipient spouse is unable to self-support).

In evaluating a party's request for alimony, Section 11-106(b) of the Family Law Article delineates the factors a trial judge must consider upon making such a determination:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
> (3) the standard of living that the parties established during their marriage;
> (4) the duration of the marriage;
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
> (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;
> (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;
> (10) any agreement between the parties;
> (11) the financial needs and financial resources of each party, including:
> (i) all income and assets, including property that does not produce income;
> (ii) any award made under §§ 8-205 and 8-208 of this article;
> (iii) the nature and amount of the financial obligations of each party; and
> (iv) the right of each party to receive retirement benefits; and
> (12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Maryland Code (1984, 2012 Repl. Vol.).

In the instant case, after presiding over a two-day trial at which both parties testified, and during which a multitude of financial statements and other documents were received and reviewed, Judge Dwyer made specific factual findings as to each of the statutorily enumerated factors contained in Section 11-106(b), each of which was supported by evidence adduced during the trial. Husband argues, however, that Judge Dwyer erred with respect to the finding that he could be self-supporting:

> [Husband] has an Associate of Arts degree and additional three years of college from Cal State Northridge. He does not hold a Bachelor's Degree. Throughout the majority of his working life, [he] has been employed. At the time of the marriage in August 1997, [Husband] had been employed for 13 years as a sales manager with ADP, making on average $60,000-

> $70,000/year. Sometime in 2010, [he] left his job with ADP and began an at-home business called Scanhelpers where he testified he earned about $50,000/year. [Husband] voluntarily shuttered Scanhelpers in 2016 after the parties' separation. Since then, [Husband] testified he has routinely sought new employment, saying he spent the majority of his days at the computer searching for employment. At trial, [Husband] produced no evidence at all of job searches such as emails, cover letters, responses, resumes, etc. In October 2016, despite having no experience in insurance sales, [Husband] began semi-regular employment with Aflac Insurance Company where he remains employed. He is paid by commission only. Since October 2016, [Husband] testified he has received "two or three" commission checks totaling "less than $5,000," but there was no proof of this presented by [Husband]. [He] testified he considered software sales, recruiting, financial advising and "a lot of different things" but curiously chose irregular employment at Aflac because he thought he "would be good at it based on what I know about the business." In addition, evidence revealed that in October 2016 [Husband] received $3,950 in income from a company named Straight Source.
>
> [Husband] testified that he is simply unable to find other employment and cites his age and lack of a Bachelor's Degree as the primary reasons. [He] produced no other evidence to corroborate this. Contrary to [Husband's] trial testimony, evidence showed that at a pre-trial deposition, [he] testified he could easily become re-employed. As previously noted, [Husband's] monthly expenses are $7,399/month. Based on [his] education, experience, and work history, which includes years of management-level employment and the ability to create and operate his own at-home business successfully, the Court is satisfied that [Husband] has the ability to gain full-time employment in the Washington, DC area that provides him with a self-supporting annual income. Instead, based on the evidence, it is the Court's belief that [he] has chosen to deplete assets from the Merrill Lynch IRA [] to provide him with income.

Based upon the evidence before her, Judge Dwyer found that Husband's testimony regarding his inability to support himself to be incredible, a finding that we do not disturb on appeal. *St. Cyr*, 228 Md. at 180. Accordingly, the trial judge did not err in finding that Husband was able to be self-supporting.

Husband, nonetheless, contends that he is entitled to indefinite alimony, because an "unconscionable disparity" existed in the standards of living between him and Wife, which is one of the two exceptional circumstances in which a trial court may award indefinite alimony, as embodied in Section 11-106(c) of the Family Law Article, which enumerates the criteria for indefinite alimony and provides:

> The court may award alimony for an indefinite period, 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.

Maryland Code (1984, 2012 Repl. Vol.) (emphasis added).

A trial court's finding with regard to unconscionable disparity in the respective standards of living between parties, or lack thereof, is a question of fact which we will not disturb unless clearly erroneous. *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999), *cert. denied*, 358 Md. 164 (2000); *Karmand*, 145 Md. App. at 330. "It is a second-level fact, however, that necessarily rests upon the court's first-level factual findings on the factors, listed in FL section 11-106(b), that . . . are relevant to all alimony determinations[.]" *Whittington*, 172 Md. App. at 337–38. "Whether there will be a post-divorce unconscionable disparity in the parties' standard of living usually begins with an examination of their respective earning capacities." *Id.* at 338. In deciding on a request for indefinite alimony, Section 11-106(c)(2) requires the court to "project[] forward in time to the point when the requesting spouse will have made maximum financial progress, and comapr[e] the relative standards of living of the parties at that future time." *Id.* (quoting

Simonds v. Simonds, 165 Md. App. 591, 607 (2005)) (alteration in original); *see also St. Cyr*, 228 Md. App. at 189. 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*, 145 Md. App. at 336. To be considered "disparate," the "standards of living must be fundamentally and entirely dissimilar," *id.*, a finding which can only be made "by a fact-intensive case-by-case analysis." *Id.* at 338 (citing *Tracey*, 328 Md. at 393).

With respect to the "standard of living that the parties established during their marriage," Judge Dwyer found that:

> The evidence supports a finding that the parties lived a modest yet comfortable lifestyle. The family home is estimated to be worth $1.2 million with approximately $600,000 in equity. During the marriage, the parties were able to make substantial contributions to IRA accounts. While there was testimony the [Wife's] parents assisted with tuition, all three of the couple's children attended private school in Potomac, Maryland. Two of the children are still enrolled in the school and, by all accounts, plan to graduate. All of the children participated in various extra-curricular activities including Hebrew School, piano lessons, Tae Kwon Do and interstate travel AAU basketball programs.
>
> [Husband] testified that since the separation, he has been living in an apartment near the family home. Other than that relocation, the Court does not find that [Husband's] standard of living has diminished. As mentioned above, he has gone on numerous trips, including vacations, costing thousands of dollars. [Husband's] financial statement shows monthly expenses of $7,399/month. There was no testimony of how [his] monthly expenses were reduced as a result of that separation. The same financial statement shows a total income of $3,300/month, resulting in a deficit of $4,099/month. [Husband's] income statement does not reflect [his] income from funds from the [marital property Merrill Lynch IRA].
>
> [Wife] has remained in the family home and is paying the mortgage and related household expenses. As mentioned previously, a balloon payment is due in late July on a HELOC loan against the mortgage. [Wife]

> asserted she would be able to make this payment with the assistance of her parents, although no evidence was presented on that point. [She] continues to pay for the children's clothing, school and medical related expenses with the benefit of $516/month in child support from [Husband]. She testified she has not taken a vacation with the children other than to spend a week at a local beach with her parents during the summer. She does contribute to FERS and TSP but otherwise has no savings account. Her financial statement shows total monthly expenses of $18,590. During cross examination, [Wife] admitted that many of the monthly expenses related to the children and their medical care and other expenses would be reduced by approximately $3,650/month with the emancipation of the parties' oldest child resulting in expenses at or near $14,940/month. [Wife] reports a total monthly income of $7,049 resulting in a monthly deficit of $7,891.

The trial judge, thus, found, based upon an evaluation of the parties' testimony and upon review of their financial statements that Husband's report of a monthly deficit of $4,099.00 was both inconsistent and incredible, while Wife's report of a monthly deficit of $7,891.00 was credible. Judge Dwyer's findings are based on the evidence adduced at trial and, as such, she did not err in denying Husband an award of indefinite alimony.

MONETARY AWARD

Husband next takes issue with Judge Dwyer's ultimate decision to order the monetary award of $40,000.00 to be the subject of a roll-over from an IRA titled solely in Wife's name to an IRA of his choice, rather than a one-time payment, as a method to equitably distribute the marital assets.

Pursuant to Section 8-205(a) of the Family Law Article, a trial court may, upon the determination and valuation of marital property, issue a monetary award to adjust for inequities resulting from the distribution of property between divorcing parties solely by title:

> *Grant of award*. – (1) Subject to the provisions of subsection (b) of this section, after the court determines which property is marital property, and the value of the marital property, the court may transfer ownership of an interest in property described in paragraph (2) of this subsection, grant a monetary award, or both, as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded.

Maryland Code (1984, 2012 Repl. Vol.) (emphasis added). The purpose 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." *Abdullahi v. Zanini*, 241 Md. App. 372, 406–07 (2019) (quoting *Brewer v. Brewer*, 156 Md. App. 77, 110, *cert. denied*, 381 Md. 677 (2004)).

When a party petitions for a monetary award, the court undertakes a "three-step process which may culminate in a monetary award." *Gordon*, 174 Md. App. at 623 (quoting *Alston v. Alston*, 331 Md. 496, 499 (1993)); *see also* Maryland Code (1984, 2012 Repl. Vol.), Sections 8-203, 8-204, 8-205 of the Family Law Article. First, for each disputed item, the trial judge must determine whether it is marital or non-marital. Section 8-203 of the Family Law Article; *Gordon*, 174 Md. App. at 624. The valuation of all of the marital property is the next step. Section 8-204 of the Family Law Article; *Gordon*, 174 Md. App. at 624. Finally, the court "must decide if the division of marital property according to title would be unfair; if so, the court may make a monetary award to rectify any inequity 'created by the way in which the property acquired during the marriage happened to be titled.'" *Id.* (quoting *Doser v. Doser*, 106 Md. App. 329, 349 (1995)); *see also Abdullahi*, 241 Md. App. at 405–06 (quoting *Flanagan v. Flanagan*, 181 Md. App. 492, 520 (2008)).

In fashioning a monetary award, Section 8-205(b) provides the factors that the court must consider:

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

Maryland Code (1984, 2012 Repl. Vol.).

In the instant matter, after receiving evidence regarding the various pieces of property owned by Husband and Wife over the course of the two-day trial, Judge Dwyer, in her written Memorandum Opinion, made the following findings and valuations:

Marital Property

Item 1 – Marital Residence: valued at $615,175.00;

Item 2 – Merrill Lynch titled in Wife's name: $446,178.00;

Item 3 – Bank of America checking account for Scanhelpers, the business which Husband previously owned and operated: $4,238.00;

Item 4 – 2005 Saturn: $2,500.00;

Item 5 – 2014 Toyota van: $21,000.00;

Item 6 – 2010 Toyota Venza: $10,000.00;

Item 7 – Jewelry: $10,000.00;

Item 8 – PNC checking/savings account titled in Wife's name: $300;

Item 9 – ADP Pension Plan, titled in Husband's name: to be divided "if, as and when" pursuant to *Bangs v. Bangs*, 59 Md. App. 350 (1984);

Item 10 – Husband's Bank of America checking account: $2,317.00;

Item 11 – Four shares of ADP stock titled in Husband's name: $400;

Item 12 – Furniture and Furnishings: insufficient information upon which to value the property;

Item 13 – Federal Employee Retirement System retirement account titled in Wife's name: to be distributed "if, as and when";

Item 14 – Thrift Saving Plan account titled in Wife's name: $8,220.

Non-Marital Property

Item 15 – Piano identified with Wife: $10,000.00;

Item 16 – LP records identified with Husband: $0.00;

Item 17 – Baseball cards identified with Husband: $0.00

Contested Marital or Non-Marital Property

Item 18 – Husband's $60,000.00 down payment on marital home, which, based on the increase in property value was equivalent to $102,000 at the time of trial pursuant to an analysis under *Harper v. Harper*, 294 Md. 54 (1982); and,

Item 19 – Merrill Lynch IRA titled in Husband's name: $163,000.00

Following the identification and valuation of the property held by the parties, Judge Dwyer concluded that:

> The Court is satisfied [Husband's] request for a monetary award has been properly pled. In [his] Amended Complaint [he] requests an "equitable division" of marital property. A monetary award is merely a remedy the Court may use to achieve equitable distribution. FL § 8-205 provides the court may use a monetary award or transfer ownership interest in specific property as an adjustment of the equities of the parties concerning marital property.
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> Accordingly, based on the findings herein, the Court will grant [Husband's] request for a monetary award. . . . [A] division of property by title would result in [Husband] receiving marital value of $357,730 while [Wife] will receive marital value in the amount of $464,697. While an equalization of value would require a monetary award of $53,483 to [Husband], *equitable distribution* does not mean *equal distribution*. . . . The Court has considered all of the factors pursuant to FL § 8-205(b) to make an equitable award. Accordingly, the Court shall order [Husband] be granted a monetary award in the amount of $40,000 and said amount shall be reduced to judgment in favor of [Husband] and against [Wife].

Wife, then, filed a motion requesting that the trial judge alter her order requiring an outright payment of $40,000.00 in favor of payment via a roll over from Wife's Merrill Lynch IRA to an IRA of the Husband's choosing. Husband then stated in response, that:

> While [Husband] disagrees with the Order's assertion that he dissipated $187,775 from his IRA and without waiving any arguments he may raise on an appeal, in following the Court's intention in the JAD to assign $40,000 to [Husband] from [Wife's] retirement, then the [Wife's] proposal of having this accomplished via a[n IRA roll over] is appropriate[.]

Upon consideration of the parties' written motions, Judge Dwyer amended her previous order to reflect that the $40,000.00 be rolled over from Wife's Merrill Lynch IRA to an IRA belonging to Husband:

> **Ordered,** that [Husband's] request for a monetary award is granted in the amount of $40,000 and said amount is to be paid . . . from [Wife's] Merrill Lynch IRA . . . to an IRA of [Husband's] choosing within 60 days of the date of this order.

Section 8-205(c) of the Family Law Article provides that, "[t]he court may reduce to a judgment any monetary award made under this section, to the extent that any part of the award is due and owing." Accordingly, in fashioning an award, the trial judge "should consider the amount of the monetary award and the method of its payment in light of the payor's ability to pay or to borrow and repay." Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law*, § 13-19 (6th ed. 2016). "In the absence of specific and probative evidence to the contrary, the trial judge may infer the ability to pay from the financial evidence adduced on the other issues in the case." *Id.* (citing *Williams v. Williams*, 71 Md. App. 22, 38 (1987); *Innerbichler*, 132 Md. App. at 520–21). It is within the discretion of the trial judge to consider any evidence regarding a party's ability to pay in determining the method in which payment may be received. *See Thacker v. Hale*, 146 Md. App. 203, 214 (2002) ("Decisions regarding the method of payment of a monetary award lie within the sound discretion of the trial court."). Accordingly, Judge Dwyer properly exercised her discretion to determine that, based upon the financial circumstances of the parties, a practical way in which to equitably distribute the assets would be by way of the roll over, as opposed to a money judgment, a decision about which we discern no error based upon the proof that Wife did not have liquid assets nor the ability to pay a lump sum of $40,000.00.

Husband further contends that he is also entitled to an additional $60,000.00 based upon his contribution of non-marital assets toward the acquisition of the family home. He posits that, because Judge Dwyer did not account for his down payment for the marital home on the "Monetary Award Sheet," she must not have considered it when equitably distributing the marital property, and as such, should have ordered Wife to reimburse him for such contribution.[1]

Husband's contention lacks merit, however, because Judge Dwyer did consider his down payment on the family home when she made findings of fact pursuant to the factors

[1] In Husband's "Opposition to Defendant's Motion to Alter or Amend Judgment of Divorce Entered July 28, 2017," Husband stated:

> While [Husband] agrees that the Court's Judgment of Absolute Divorce ("JAD") needs to be revised, [Husband] disagrees with [Wife's] proposed remedy of vacating the judgment entered against [Wife], as the Order granting an immediate Judgment is appropriate to reimburse [Husband] for his down-payment on the marital home, which [Wife] will continue to occupy for another 2 years per the JAD.
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> The Court's memorandum Opinion states . . . Item 18 that the down-payment of $60,000 made by [Husband] was documented with over $50,000 of cash withdrawals from his separate accounts, and [Wife] could not remember the source of the down-payment. "Accordingly, the Court concludes this item is non-marital property and is the property of [Husband]," yet the Schedule attached to the JAD fails to note this $60,000.
>
> The JAD and Memo also fails to address the $13,000 of marital debt incurred prior to the separation on [Husband's] Marriott credit card, which both parties testified was used for family expenses through October 2015. [Husband] believes a judgment of $6,500 should be entered against [Wife] for her share of this marital debt that remains in [Husband's] name.

Husband, before us, however, does not argue that Judge Dwyer erred in failing to consider the $13,000.00 in alleged marital credit card debt. The credit card was titled solely in Husband's name, and, as Judge Dwyer found, Husband had failed to proffer any evidence to demonstrate that half of the debt belonged to Wife.

enumerated in Section 8-205 of the Family Law Article. Judge Dwyer first found, in her written Memorandum Opinion, that the $60,000.00 down payment on the marital home constituted non-marital property, belonging to Husband:

> [Husband] testified this property is solely his and asserted the property was acquired by [him] prior to the marriage and was subsequently used as a down payment on the marital home at the time of its purchase. He produced evidence at trial of cash withdrawals in March, April and July 1999 totaling $50,900 and testified this cash was used as the down payment on the family home. At trial [Wife] testified she could not remember the source of the down payment. Accordingly, the Court concludes these funds represent [Husband's] non-marital contributions to the marital home.
>
> With respect to the value of the item, [Husband] asserts the value of the property has grown as the value of the residence has grown. Specifically, [he] asserts that because the value of the marital home has doubled since its purchase (purchased for $600,000, valued today at $1,200,000) so too should the value of the down payment double. Accordingly, [Husband] values Item 18 at $120,000. [He] did not provide any basis for his valuation of the property other than the simple doubling in value of the residence. This analysis is not correct. This contribution, based on the current value of the property, would have a value of approximately $102,000 pursuant to an analysis under *Harper v. Harper*, 294 Md. 54 (1982). The Court must consider all of the statutory factors in FL § 8-205(B) to determine if a monetary award is necessary to adjust the equities since the property is titled to the parties as tenants by the entirety and the parties are co-equal owners of the home, which is marital property by agreement of the parties.

(emphasis added). Judge Dwyer also considered the other "equitable factors pursuant to FL § 8-205 to consider whether it is equitable to make a monetary award." In so doing, she reiterated her previous finding, with respect to Husband's contribution to the purchase of the marital home:

> [Husband] testified he was solely responsible for the down payment on the parties' marital home at its purchase in 1999. As previously noted, he produced evidence at trial of cash withdrawals in March, April and July 1999 totaling $50,900 and testified this case was used as the down payment. As

> stated previously, based on the current value of the property, this contribution would have a value of $102,000.

Judge Dwyer recognized, nonetheless, that Husband's down payment lost its non-marital flavor when it was used to purchase property titled as tenants by the entirety, which constitutes marital property, absent an agreement between the parties that it should continue to be non-marital.

Section 8-201(e) of the Family Law Article defines "marital property," provides that real property titled as tenants by the entirety is marital property, unless excluded by valid agreement, and allows all other property "excluded by valid agreement" to be excluded from marital property:

> (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 provide 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.

Maryland Code (1984, 2012 Repl. Vol.); *McGeehan v. McGeehan*, 455 Md. 268, 280–81 (2017). The Court of Appeals, in *McGeehan*, 455 Md. at 282–84, in interpreting Section 8-201(e), held that the General Assembly, in its 1994 amendment to the statute, intended to eliminate the "source of funds analysis" as a means by which to deem a portion of marital property held as tenants by the entirety as non-marital. Rather, the statute, as amended, provided that property titled as tenants by the entirety "was marital and could only be

excluded as nonmarital by the execution of a valid agreement." *Id.* at 284; *see also Gordon*, 174 Md. App. at 630 (stating that Section 8-205 of the Family Law Article "does not authorize an automatic 'credit' or 'reimbursement' to a spouse who contributes nonmarital funds towards the acquisition of a marital home that is owned [tenants by the entirety]."); *Karmand*, 145 Md. App. at 341.

In the present case, Judge Dwyer properly concluded that the family home was marital property, a finding which comports with the evidence adduced at trial. Husband's down payment, thus, lost its non-marital status as soon as it was used to purchase a marital asset, absent an agreement to exclude, which was not proven at trial. The trial judge did not err in denying Husband reimbursement of the down payment, especially in light of all of the factors she considered in fashioning the monetary award.

DISSIPATION OF MARITAL ASSETS

Before trial, relevant to the instant appeal, Husband possessed two IRAs with Merrill Lynch titled solely in his name. Judge Dwyer found that the account entitled "Ruth M. Matcha DCSD IRA FBO David L. Matcha," which had been completely depleted at the time of trial, did not constitute marital property, but that the IRA entitled "David L. Matcha IRRA FBO David L. Matcha" did, a finding which is supported by the record and about which there is no challenge.

After hearing testimony and reviewing a wealth of documents, Judge Dwyer, however, found, in a written memorandum opinion, that Husband had dissipated funds from the marital Merrill Lynch IRA by having withdrawn, after the couple physically separated, $20,074.00 in 2015, $120,203.40 in 2016 and $47,497.00 between January and

April of 2017. In calculating the amount of dissipated monies, Judge Dwyer explained that she:

> [D]ivided the $120,449 withdrawn from the marital IRA in 2015 by 12 months. This equals $10,037 per month. This is multiplied by two for the months of November and December when [Husband] was no longer living in the family home. The court then added $120,203 which is the amount of the marital IRA funds withdrawn in 2016. Finally, the court added $47,497 which is the amount of marital IRA funds withdrawn in 2017 at the time of trial. This results in the sum of $187,775.[2]

Evidence adduced at trial upon which Judge Dwyer relied to conclude that Husband had dissipated the marital Merrill Lynch IRA included:

- Husband had been employed full-time for many years, including years as a sales manager at ADP, LLC, earning between $60,000.00 and $70,000.00 annually;
- Sometime in 2010, Husband left his employment with ADP to begin an at-home scanning business, "Scanhelpers," which, both parties agreed, provided him the flexibility to care for the children while also earning an income;
- Husband had testified that his salary derived from "whatever additional money" remained after paying Scanhelpers' expenses, but was "less than $50,000 per year," a claim Judge Dwyer found to be unsubstantiated;
- In December of 2014, Wife, a medical doctor, lost her job with Kaiser Permanente, whereupon she temporarily worked at a clinic in Virginia at a decreased salary, until she began a position with the Food and Drug Administration, earning a salary of $183,674.00, in June of 2015;
- To maintain the family's standard of living during a period of financial strain, the couple withdrew money from savings accounts and Wife borrowed money from her parents;

[2] Judge Dwyer noted that withdrawals prior to November of 2015, before Husband left the marital home, may have been "necessary to sustain the family," and, as such, found that money withdrawn prior to that date did not constitute dissipation.

- Wife had testified that "communications between the parties began to breakdown during this time and the marriage began to crumble";
- "Meanwhile [Husband], unbeknownst to [Wife], began withdrawing money" from the marital IRA and deposited it into the Scanhelpers checking account, from which he paid the business's expenses;
- In 2015, $120,449.15 was withdrawn from the marital Merrill Lynch IRA and $149,771.66 was deposited into the Scanhelpers account, the company which Husband formed and operated;
- Following the parties' separation, in 2016, Husband continued withdrawing large amounts of money from the IRA and made no monetary contributions to the family or the marital home;
- In 2016, after the parties had separated, Husband withdrew $120,203.40 from the marital Merrill Lynch IRA and $138,399.76 was deposited into the Scanhelpers checking account;
- Husband parted ways with Scanhelpers in April of 2016, but remained unemployed until October 2016 when he began working for Aflac Insurance Company on a commission-based salary, and, between October 2016 and April 2017, had earned "less than $5,000," a claim Judge Dwyer found to be unsupported;
- Between January and April of 2017, Husband withdrew $47,497.00 from the marital Merrill Lynch IRA;
- Husband's testimony that he withdrew $100,000.00 from the IRA in the eighteen months before trial, and that, between 2015 and 2017, he lent his sister $19,700.00 from the account;
- Husband's testimony that he had paid "his rent, his medical bills and Scanhelpers taxes" with funds withdrawn from the IRA;
- Husband's inability to provide proof of the source of the money contained in the IRA;
- Husband's admission that the funds in the IRA were accumulated throughout the marriage;

These findings are supported by the evidence adduced at trial. Husband, however, takes issue with Judge Dwyer's ultimate determination that his withdrawals constituted dissipation.

With respect to the jurisprudence regarding dissipation, it generally occurs "where one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown." *Omayaka*, 417 Md. at 651 (quoting *Sharp v. Sharp*, 58 Md. App. 386, 401 (1984)). Dissipation, however, may also "occur on occasions in which (1) the marriage is *not* undergoing an irreconcilable breakdown, and/or (2) the dissipating spouse's *principal purpose* was a purpose other than the purpose 'of reducing the amount of funds that would be available for equitable distribution at the time of divorce.'" *Omayaka*, 417 Md. at 652 (emphasis in original) (footnote omitted) (quoting *Welsh v. Welsh*, 135 Md. App. 29, 51 (2000)). Dissipation occurs ordinarily when "marital assets were taken by one spouse without agreement by the other spouse." *Id.* (quoting John F. Fader, II & Richard J. Gilbert, *Maryland Family Law*, § 15-10 (4th ed. 2006)). "It matters not, however, that one spouse has, post-separation, expended some of the marital assets," but "what is critically important is the *purpose* behind the expenditure." *Hiltz v. Hiltz*, 213 Md. App. 317, 349 (2013) (emphasis in original) (citing *Heger v. Heger*, 184 Md. App. 83, 96 (2009)).

"The burden of persuasion and initial burden of production in showing dissipation is on the party making the allegation." *Omayaka*, 417 Md. at 656 (quoting *Jeffcoat v. Jeffcoat*, 102 Md. App. 301, 311 (1994) (internal citation omitted)). Upon establishing a *prima facie* case that assets have been dissipated, the burden shifts to the party who spent

the money to produce evidence to show that the expenditures were appropriate. *Id.* at 656–57 (quoting *Jeffcoat*, 102 Md. App. at 311); *see also Turner v. Turner*, 147 Md. App. 350, 409 (2002). "Proof that a spouse made sizable withdrawals from bank accounts under his or her control is sufficient to support the finding that the spouse had dissipated the withdrawn funds." *Omayaka*, 417 Md. at 657.

Where a party alleging dissipation provides evidence of withdrawals and the withdrawing party then provides an explanation of what he or she did with the money, the trial court is permitted to credit one party's assertion over the other's, and that finding will not be overturned, unless clearly erroneous. *Omayaka*, 417 Md. at 652, 658–9 (citations omitted) (affirming judgment below because "the Circuit Court was entitled to find that Appellee had 'explain[ed] adequately where the funds [that she had withdrawn from her bank accounts in 2005] went'" (alteration in original)). *See also Rock v. Rock*, 86 Md. App. 598 (1991); *Ross v. Ross*, 90 Md. App. 176, *vacated and remanded on other grounds*, 327 Md. 101 (1992) (affirming a finding of dissipation where the accused party failed to adequately respond to allegations of dissipation and explain how withdrawn funds had been spent).

In the present matter, Husband has conceded that he dissipated $19,700.00 from the marital Merrill Lynch IRA when he loaned that amount to his sister. As such, he posits that the remaining $168,075.00 does not constitute dissipated assets. He, however, contends that Wife failed to demonstrate that he had dissipated the marital Merrill Lynch IRA, particularly in light of his "showing of ample evidence that the monies were spent for marital purposes and household uses." Accordingly, Husband avers that the trial court

erred in failing to conclude that he used the $168,075.00 from the marital Merrill Lynch IRA for living expenses "during a period of struggling employment and later, unemployment," thereby precluding a finding of dissipation.

Husband posits that his conduct does not constitute dissipation, because, he asserts, dissipation is generally found only in circumstances, for example, where the spent marital funds are used for jewelry and private vacations, *Simonds*, 165 Md. App. at 614, tax fraud and unauthorized expenditures, *Sharp*, supra, 58 Md. App. 386, transfers of property and money to persons outside the marriage, *Karmand*, *supra*, 145 Md. App. at 343, and extraction of marital funds for purposes of concealment from the other party, *Jeffcoat*, *supra*, 102 Md. App. at 305. He argues that the circumstances surrounding his withdrawals from the marital Merrill Lynch IRA are more akin to cases in which dissipation was not found based upon testimony that the liquidating spouse had used marital assets for living expenses. *See Omayaka*, *supra*, 417 Md. 643; *Turner*, *supra*, 147 Md. App. 350. Husband's comparison, however, is not apt because, in those cases, the trial judge credited the alleged-dissipating spouse's explanation as to the necessity of the withdrawn monies for living expenses. *See Rock*, supra, 86 Md. App. at 619–21. Here, however, Judge Dwyer did not find Husband's explanation for the withdrawals from the marital Merrill Lynch IRA to be credible:

> [T]he court simply cannot believe that withdrawals beyond November 2015 when the parties separated were appropriate or necessary for [Husband's] support. For example, [Husband] was still actively operating Scanhelpers in November 2015 when he left the marital home and there is ample evidence that he was not contributing in any way to family expenses following the separation. Presumably, all of the salary Scanhelpers was generating following the separation and until its demise was going solely to [Husband]

> for housing and personal expenses. Moreover, a close review of [Husband's] claimed expenses on his financial statement reveals that the $120,203.40 he liquidated from the Merrill Lynch IRA [] was far above expenses [he] incurred. For example, accepting as true [his] amended financial statement, his total monthly expenses are $7,399/month. This leaves an excess income of approximately $31,415 in 2016 for which [he] does not account. Moreover, the excess income figure does not take into account [Husband's] earnings from Aflac or his $3,950 earnings from Straight Source or an admitted tax refund of approximately $9,000.

Judge Dwyer's finding that Husband's testimony was incredible regarding his having not dissipated assets is one we do not disturb on appeal. *Omayaka*, 417 Md. 659.

Accordingly, Judge Dwyer properly concluded that Husband had dissipated the marital Merrill Lynch IRA for purposes unrelated to the marriage during a time the parties were going through a divorce. Husband failed to credibly explain the need for his liquidation of the funds, such that the determination of dissipation was not an abuse of discretion.

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