UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02581

September Term, 2013

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MELISSA BANNER

v.

LEONARD BANNER

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Kehoe,
Hotten,*
Leahy,

JJ.

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Opinion by Kehoe, J.

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Filed: February 19, 2016

*The Hon. Michele D. Hotten participated in the hearing of this appeal while an active member of this Court but did not participate in the preparation or adoption of this opinion.

Melissa Banner appeals from a judgment of the Circuit Court for Montgomery County entered in her divorce action against her former husband, Leonard Banner. She presents six issues, which we have reworded slightly and reordered for purposes of analysis:

1. Did the trial court err in determining Mr. Banner's income for alimony and child support purposes?

2. Did the trial court err in determining the value of the loan due to Mr. Banner from a company owned by him to be $1,000,000?

3. Did the trial court err in determining that Baylin, LLC was only 50% marital?

4. Did the trial court abuse its discretion in awarding Ms. Banner $1,000 per month in alimony?

5. Did the trial court abuse its discretion in the manner in which it ordered Mr. Banner to pay the monetary award?

6. Did the trial court abuse its discretion in declining to award Ms. Banner attorneys' fees?

Melissa[1] has not persuaded us that the trial court committed clear error in its calculation of Leonard's income, its valuation of the promissory note, or its conclusion that Leonard's interest in Baylin is partially nonmarital. However, the trial court's alimony award was flawed because the trial court failed to make findings as to Melissa's reasonable, post-divorce financial needs. In order to provide remedial flexibility to the court, we will vacate the monetary award as well as the court's denial of attorneys' fees.

[1]As we often do in family law cases, we will sometimes refer to the parties by their first names in the interest of brevity.

Accordingly, we will affirm the judgment in part, vacate it in part, and remand this case to the trial court for further proceedings.

## Background

The parties were married in Washington, D.C., in 1992. Two children were born of the marriage, one of whom was a minor at the time of the divorce proceeding. At the time the parties were married, Melissa worked as a legal assistant. After the birth of their first child in 1993, pursuant to agreement of the parties, Melissa stayed home to raise the children. In 2006, Melissa returned to working outside of the home, and has since held several part-time positions.

At the time the parties were married, Leonard and his parents owned A&S, Inc.,[2] which operated a chain of Hallmark card and gift stores. Leonard owned 50% of A&S and his parents the remainder. The parties signed a prenuptial agreement in which they agreed that Leonard's 50% interest in A&S would be treated as non-marital property in the event of a divorce. Leonard became the sole owner of A&S in 1999 when he purchased his parents' 50% interest in the company. Leonard does not dispute that this 50% interest is marital property.

A&S was a modestly successful enterprise for many years. A&S's profitability reached its apex in the 1990s when the Beanie Baby craze swept through the United

[2]A&S is rendered phonetically in the transcripts—"ANS."

States. Profits from the sale of Beanie Babies were so significant that Leonard, acting on the advice of A&S's accountant and the Banner family tax adviser, established Baylin, LLC, an entity wholly owned by him, as a vehicle to obtain a more favorable tax treatment from the proceeds of the sale of those evanescently-popular items.

In the years leading up to the parties' separation and ultimate divorce, the fortunes of A&S took a turn for the worse. According to Leonard, he sold assets and borrowed money to keep A&S in business. Melissa, on the other hand, asserts that Leonard manipulated the numbers to give the court an exaggeratedly woeful picture of A&S and his own financial situation.

The parties separated in 2012; Melissa filed a complaint seeking absolute divorce in the Circuit Court for Montgomery County in October of that year. In her complaint, and in addition to other relief, Melissa sought custody of the parties' minor child; alimony; child support; use and possession of the marital home; attorneys' and expert fees; and a determination as to what property owned by either of the parties was marital property, a valuation of the marital property, and a monetary award to "adjust[] the equities and rights of the parties in said marital property." Leonard filed a counter-complaint for absolute divorce in August 2013.

Prior to trial, the parties reached an agreement as to child custody and the division of the proceeds from the sale of the marital home. After a five day trial, the circuit court

granted Leonard's counter-complaint on the ground of voluntary separation. Particularly relevant to the issues raised in this appeal, the trial court found:

(1) For purposes of calculating alimony and child support, Leonard's current income from A&S was $100,000, consisting of $75,000 in salary and $25,000 in personal expenses paid by A&S;

(2) A&S had a value of $1 million of which 50% was marital property;

(3) A note from Leonard to A&S should be valued at $1 million; and

(4) Baylin and A&S were identical and both were covered by the prenuptial agreement, that is 50% of Baylin was marital property and 50% of Baylin was not marital property.

Based on these and other findings, the court attributed $35,000 to Melissa in annual earned income, awarded her $1,000 per month in indefinite alimony, and ordered that Leonard pay $949 per month in child support.[3] After considering the parties' assets and making specific findings as to the disputed items and their values, the court awarded Melissa a marital award in the amount of $750,000. Finally, the court ordered that each party pay its own attorneys' fees. The court entered judgment accordingly and this appeal followed.

## Analysis

### I.–III. Income, Assets, and Marital Property

Melissa contends that the trial court made several erroneous findings of fact with

[3]The court also awarded Melissa use and possession of the marital home through June 2014, and ordered that Leonard continue to pay the principal, interest, taxes, and insurance on the property.

regard to critical issues as to Leonard's income and assets. These contentions are closely related and we will consider them together. We begin with our standard of review.

When, as in this case, "an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." Md. Rule 8-131(c). We will disturb the court's factual findings only if we conclude that they are clearly erroneous, "giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id*. We cannot conclude that a trial court's findings are clearly erroneous if there is *any* competent evidence that supports the court's findings. *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010); *Solomon v. Solomon*, 383 Md. 176, 202 (2004). Moreover, we must consider the evidence "in a light most favorable to the prevailing party[.]" *Ryan v. Thurston*, 276 Md. 390, 392 (1975).

The parties' contentions as to A&S and Baylin presented the trial court with unusually challenging factual issues. The most relevant evidence was presented through:

(1) *Leonard*, who testified that A&S's ongoing viability was threatened by changes in the market, e.g., competition from Internet retailers, high rents on some stores in shopping malls, Hallmark's decision to sell greeting cards and collectibles through its website, as well as to his efforts to restructure A&S to meet these challenges;

(2) *Jeffrey Barksy*, a certified public account who specializes in forensic

accounting, and who testified as an expert witness for Melissa;

(3) *Brent Solomon*, a certified public accountant, who specializes in, among other things, forensic accounting and business valuation, and who was an expert witness for Leonard; and

(4) *Howard J. Postal*, a retired certified public accountant who for many years acted as accountant for A&S and Baylin, and was a tax and investment advisor for Leonard. He testified as a fact witness for Leonard.

**Leonard's Income**

The trial court found that Leonard's income from A&S was $100,000. Melissa argues that this finding was clearly erroneous. She marshals a number of arguments in support of her contention that Leonard's income was in excess of $100,000.

Central to Melissa's contentions is Leonard's characterization of the money flowing from A&S to him in the period preceding the trial. Melissa argues that, for the year prior to trial, Leonard received salary payments of approximately $15,000 every other week from A&S. She asserts that, shortly before trial, Leonard decided to treat the $15,000 bi-weekly transfers not as salary, but, rather, as payments on a loan that he had made to A&S. As a result, "these bi-weekly payments he received were now classified as repayments of his loan" instead of income. Melissa asserts that the trial court failed to acknowledge this evidence. Further, she contends that the trial court's conclusion that

A&S paid $25,000 in Leonard's personal expenses is clearly erroneous because Leonard's own expert testified that those payments averaged in excess of $87,000 annually for the five years prior to trial.

Melissa points to other evidence presented during trial which she asserts establishes that the court's finding as to Leonard's income was clearly erroneous. For example, Melissa asserts that the court disregarded the fact that Leonard's, as well as A&S's, obligations to his parents would cease in July 2014.[4] Melissa also argues that the court erred in attributing $385,955.41 deposited into Leonard's bank account from "undisclosed sources" to the liquidation of assets, money borrowed from Baylin, and overdraft protections provided by lenders. According to Melissa, that money should have been treated as income by the trial court. Finally, Melissa argues that the court's finding contradicts its *pendente lite* finding, made six months before trial.[5]

[4]We can dispose of this contention quickly. In its opinion, the trial court specifically addressed the fact that A&S's financial obligation to Leonard's parents would terminate shortly after trial. The difficulty from Melissa's perspective is that the trial court did not view this change as particularly significant in light of A&S's financial condition.

[5]This contention is unpersuasive. That the trial court's ultimate findings, based on a five day trial on the merits, differ from its findings following the *pendente lite* hearing is not a basis for error. *See Guarino v. Guarino*, 112 Md. App. 1, 11 (1996) (The factual record to support an award of alimony "cannot be developed in a preliminary hearing which forms the basis of an award pendente lite. It is only after a full and complete hearing on the merits of the respective claims of the parties that a chancellor is in a position to formulate a judgment which has a greater degree of permanency than the

(continued...)

Had the record before the trial court consisted solely of the evidence that we have summarized in the previous paragraphs, Melissa's contentions might have merit. Unfortunately for her, however, there was substantial evidence to the contrary.

Leonard and Solomon, his expert in business valuation, testified about the financial challenges faced by A&S and that A&S had been losing money for several years prior to the date of trial. Leonard testified that he kept A&S financially afloat by lending it money derived from liquidating assets and borrowing money personally. Barsky (Melissa's expert) and Solomon disagreed as to the amount of Leonard's personal expenses that were being paid by A&S. The trial court found that Solomon's testimony was more persuasive and explained why in its oral opinion. There was a basis for the court to discount to some extent the testimony of both experts because they based their conclusions on information provided to them by Postal, and Postal's reports did not differentiate between business-related and purely personal expenses.[6]

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[5](...continued)
judgment he pronounces after a hearing on temporary alimony." (internal quotation marks and citation omitted)).

[6]Specifically, the court stated:

> Mr. Barsky estimates that approximately $75,000 to $80,000 in defendant's personal expenses are being paid by ANS Incorporated each year. This then alone would [result] even if you took the $75,000 income claimed by the defendant to a total income of approximately $150,000.

(continued...)

In its opinion, the court noted that Leonard was "living based on borrowing and liquidating assets," that "[h]e's had to loan money to ANS to keep it afloat," and that his "current substantial decline in income is real and not manipulated." The court also noted:

> there is much reason to be suspicious when dealing with a closely held owner operator corporation that show as significant downturn in profits as the divorce appears likely. Here, however, after listening to all of the evidence and the cross-examination of the defendant and its accountants, the court finds that [Leonard]'s current substantial decline in income is real and not manipulated. Instead the downturn reflects [ ] significant negative trends in the industry . . . .

The trial court also concluded that Leonard was an "astute businessman" and that he had plans to turn the company around "by significantly reducing costs."

There is certainly evidence in the record, including but not limited to Leonard's testimony, to support all of the trial court's findings as to Leonard's income. For these reasons, we cannot conclude that the trial court was clearly erroneous when it concluded

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[6](...continued)

> However, in arriving at that figure, Mr. Barsky's estimate attributes zero percent of the car expense for business use. And most of the rest of the estimate is based on assumptions that are in turn based on a 2004 IRS audit with little actual support for the assumption based on current financial records.
>
> In cross-examination of the defendant about the charges on his corporate credit card, it appeared to the court that only a few of those were for personnel expenses. Therefore, while the court accepts that some of the defendant's personal expenses are charged to the company, the court finds that that amount is significantly less than Mr. Barsky's estimate of $75 to $80,000. And is more likely much closer to the figure of $25,000.

that Leonard's annual income was $100,000.

**The Value of the A&S Note**

As we have mentioned, Leonard lent large sums of money to A&S and, in 2012, A&S executed a note payable to him in the principal amount of $1,478,103. At trial, Melissa contended that the note should be valued at its face amount. In making this argument, she pointed to the fact that, in a personal financial statement accompanying an application for credit submitted in June 2013, Leonard valued the note at its face amount. For his part, Leonard argued that the note had no value because of A&S's parlous financial condition.

The trial court first acknowledged the challenges facing A&S, but placed a value on the note of $1 million. The court based its conclusion on the fact that it was "optimistic of the defendant's chances for success for ANS giving his proven track record and demonstrated ability in this industry." The court characterized Leonard's valuation of the note at its face value in his financial statement to be "an inflated and unrealistic value and doesn't take into consideration the prospect that the company will not be able to pay at least the full value on the note."

There was conflicting evidence before the court as to the value of the note. The way that Leonard treated the note on his 2013 financial statement could have supported a valuation of the note at its fact amount. But this single piece of evidence did not compel

such a conclusion. We do not believe that the trial court was clearly erroneous in discounting the value of the note to reflect the very real credit risk posed by a loan to a small business that had been losing money for several years.

**Baylin**

Melissa's final challenge to the court's factual findings is that the court erred in finding that Baylin was only 50% marital. Melissa asserts Baylin should be treated as 100% marital property and that the trial court's finding to the contrary was clearly erroneous.

We begin by placing this issue in context. Postal testified that A&S was organized as a "Subchapter C" corporation, that is, its profits were taxed at the corporate level prior to distribution to shareholders. Historically, A&S was a company that operated on thin margins with limited profits from its sale of Hallmark items. However, the Beanie Baby craze generated, in Postal's words, "a phenomenal amount of money," which money would, if attributed to A&S, be taxed twice: first at the corporate level and again, when the profits were distributed to the corporation's shareholders who, at the time, consisted of Leonard and his parents. To avoid this problem, in 1998, Postal established Baylin, LLC, which was, for all practical purposes, owned by Leonard.[7] Postal stated that:

[7]Postal testified that in Baylin's initial years, he was the managing member and held a nominal interest that he later transferred to Leonard.

> Baylin received all its cash from the sale of Beanie Babies. The Beanie Babies themselves were acquired by ANS and held in [a] warehouse. I don't know the exact process of how they were sold, but they were sold not in the store by Leonard personally. He was the only one that handled the transactions.
>
> * * * *
>
> The proceeds of [the sales] were not put into . . . . [w]ere not given to the ANS bookkeeper account and CFO. They were given to me [to hold for Leonard].

Leonard's testimony was essentially the same:

> Q. [Leonard's counsel]: And did you put — aside from the Beanie Babies that were acquired by ANS and booked on the books of Baylin, did you contribute any other capital or any other asset at all to the acquisition, or the funding, or capitalization of Baylin?
>
> A. No, there was no monies.
>
> Q. [A]nd Baylin was actually titled in whose name?
>
> A. In my name.

At the end of the 1998 fiscal year, and we gather thereafter until the Beanie Baby craze played itself out, Postal transferred the proceeds of the Beanie Baby sales, which apparently totaled in the millions of dollars, to Baylin for Leonard's benefit. Postal also testified that, in the following year, Leonard purchased his parents' interest in A&S and that the settlement documents for that transaction did not list Baylin among A&S's subsidiaries and affiliates. Postal characterized Baylin as a "subsidiary affiliate" for accounting purposes.[8]

[8]Although Postal did not specifically address the point in his testimony, the parties (continued...)

After the proceeds of the Beanie Baby sales were deposited in Baylin, Postal used those proceeds to make various investments, largely securities, real estate and loans secured by real property, which remained titled in Baylin's name. Leonard used Baylin for what it was—his holding company—and withdrew assets to meet personal and family expenses as well as to lend money to A&S as needed. Before the 2008 financial crisis, Baylin generated between $10,000 and $15,000 a month in income. After 2008, many of Baylin's assets became illiquid and lost value.

It is undisputed that even though Leonard's parents owned 50% of A&S when Baylin was established, and that A&S purchased the Beanie Babies that were titled in Baylin's name, Leonard owned 100% of Baylin. It is also undisputed that, when Leonard purchased his parents' interests in A&S in 1999, the purchase agreement required all of the A&S subsidiaries to guarantee the payments to them. Baylin is not listed among the subsidiaries.

At trial, the parties stipulated that Melissa "will get 50 percent of the marital share of monies which are received and available for distribution out of Baylin . . . . [o]n an if, as, and when basis." They agreed that the trial court's task was to decide whether Baylin

[8](...continued)
seem to agree that treating the Beanie Babies as Baylin's, that is, Leonard's, property enabled him to treat the proceeds of sale as a capital gain instead of ordinary income for tax purposes.

is "50 percent marital, 100 percent marital, or some other percentage."

With this as background, the trial court concluded:

> ANS's accountant, Howard [Postal] testified in this case advised the defendant to set up Baylin as an investment to subsidiary of ANS incorporated to move the profits of the sales from ANS Incorporated to Baylin. And also this allowed them to treat the sales of the Beanie Babies as collectibles which allowed the defendant -- I'm sorry. That is ANS Incorporated to treat the profits as capital gains which were a substantial tax savings for the corporation. And this is precisely what the defendant did. The Beanie Babies were purchased by ANS Incorporated by all of the evidence. They were sold out of the inventory. And the profits were booked to Baylin.
>
> There is no evidence. In fact, the evidence appears to the contrary. There's no evidence that the defendant put any personal funds into Baylin. Therefore, the court finds that Baylin and ANS Incorporated are identical and both are covered by the prenuptial agreement.

The parties do not dispute the law. Baylin was an asset acquired by Leonard after their marriage and is therefore presumptively marital. However, Leonard can demonstrate that the asset was non-marital by proving that it was "directly traceable" to a non-marital source.[9] This is a question of fact. *See Lowery v. Lowery*, 113 Md. App. 423, 438 (1997)

[9] *See* Family Law Article § 8-201(e):

> (e)(l) "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

(continued...)

("[A] determination of whether something is marital property is a question of fact for the court to resolve . . . ."). Leonard had the burden of proof as to this issue. *See Innerbichler v. Innerbichler*, 132 Md. App. 207, 227 (2000) ("[T]he party seeking to demonstrate that particular property acquired during the marriage is nonmarital must trace the property to a nonmarital source. If a property interest cannot be traced to a nonmarital source, it is considered marital property." (internal citations and quotation marks omitted)). *See also Malin v. Mininberg*, 153 Md. App. 358, 428 (2003); *Noffsinger v. Noffsinger*, 95 Md. App. 265, 282 (1993).

Melissa contends:

> None of the Baylin formation documents express any connection to A & S, and indeed refer to Baylin's business purposes as investment and sale of real and personal property, and the purchase, financing, ownership, operation and sale of real and personal property. . . . Baylin was always 100% owned by Mr. Banner despite the fact that it was created during the time when his parents owned 50% of A & S.

In sum, Melissa's position is that Baylin is entirely marital because: 1) Baylin was

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[9](...continued)
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

(iii) *directly traceable to any of these sources*.

(Emphasis added.)

formed during the parties' marriage, 2) Baylin was not a subsidiary of A&S, and 3) Baylin was created only as an entity in which to place the profits from the sale of Beanie Babies and that because Leonard placed all of the proceeds from the sale of the Beanie Babies in Baylin, and not A&S, it is a marital asset no different from a bank account established to receive income.

Leonard counters that although Baylin was created during the parties' marriage, it was directly traceable to A&S and thus the court was correct in concluding that Baylin is 50% marital. In support of his contention, Leonard explains the relationship between A&S, Baylin, and the Beanie Babies, as follows:

> A&S acquired and owned Beanie Babies as part of its inventory. They were purchased by A&S and stored in A&S's warehouse as A&S's inventory. The corporate profits from the sale of Beanie Babies in A&S's inventory were booked to Baylin. Leonard sold the Beanie Babies as collectibles, and the corporate profits were deposited into Baylin, a limited liability company instead of a C-corporation like A&S, to obtain a preferable tax treatment.

Moreover, Leonard reasons that: "But for the tax benefits, Baylin would never have been created. And, if Baylin had never been created, the Beanie Baby profits would have remained in A&S, and fifty percent (50%) of those profits would have been Leonard's non-marital asset."

We begin our analysis by noting that the wording of the trial court's finding, read literally, is a bit maladroit: Baylin and A&S are not the same entities and Baylin wasn't

addressed by the parties' prenuptial agreement. Leonard concedes as much, but argues that this error is harmless because: (1) the evidence before the court demonstrated that the Beanie Babies that were Baylin's original asset were derived from A&S; (2) Leonard's parents owned a 50% interest in A&S when it acquired the Beanie Babies for Baylin. We agree.

Courts are not necessarily bound by corporate formalities when deciding marital property and income issues. *See Bryant v. Bryant*, 220 Md. App. 145, 163-65 (2014). But that does not mean that corporate formalities are meaningless. The evidence before the court was that Baylin was formed to secure tax advantages to A&S. Melissa is correct that Baylin was owned by Leonard even though, at the time Baylin was established, A&S was owned by Leonard and his parents. But the evidence is not in dispute that 100% of the funding for Baylin came from A&S which, at that time was 50% non-marital according to Leonard and Melissa's prenuptial agreement. We believe that this evidence satisfied Leonard's burden to show that Baylin is "directly traceable" to A&S and the parties do not dispute that A&S was 50% non-marital. Accordingly, we will not disturb the circuit court's finding that Baylin is 50%, as opposed to 100%, marital property.

## IV. Alimony

Melissa next contends that the court abused its discretion in awarding her indefinite alimony in the amount of $1,000 a month. In support of this contention,

Melissa asserts that $1,000 a month is not sufficient to reduce the disparity in the parties' post-divorce standards of living and that the court failed to adequately consider several of the factors required by FL § 11-106(b). Melissa contends that the court failed to make factual findings as to Leonard's health (FL § 11-106(b)(8)), any agreement between the parties regarding alimony (FL § 11-106(b)(10)), and the financial needs and resources of the parties (FL § 11-106(b)(11)), and improperly weighed the length of the parties marriage (FL § 11-206(b)(4)).[10] Further, Melissa notes that reversal of the alimony award requires reconsideration of the marital award, as well.

Leonard counters that a review of his financial situation as well as the factors set forth in FL § 11-106(b) reveals that the court did not abuse its discretion. According to Leonard, a comparison of the parties' financial resources after adjusting for the court's awards of alimony and child support establishes that $1,000 a month is not inequitable. Moreover, with regard to the statutory factors, Leonard asserts that the court considered all required factors and that "a review of the record supports the fact that the trial court's ruling was based on a thorough analysis of the factors."

FL § 11-106(b) prescribes twelve factors that a court must consider in making an

[10]Melissa presents other arguments as to why the alimony award of $1,000 a month was inadequate, namely, that the court found that her need was at least $11,000 a month at the *pendente lite* hearing, and, the fact that the court imposed interest payments of $3,125 a month on the monetary award. We need not address these contentions because we are vacating the court's alimony award.

alimony award. Pursuant to the statute, the court must consider the following:

> (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 the 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; [and]
> (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[.][11]

While "'the court is not required to use a formal checklist, the court must demonstrate consideration of all necessary factors.'" *Simonds v. Simonds*, 165 Md. App. 591, 604-05 (2005) (quoting *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999)).

A review of the transcript reveals that the court made the following findings in determining the appropriate alimony award:

[11]The twelfth factor, requiring the court to consider "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," is not relevant to our analysis.

> The parties have been married for 21 and a half years. The plaintiff, as I mentioned, has a high school education with some post high school training paralegal training. The plaintiff has been a stay-at-home throughout the course of the marriage. Initially, certainly, this was a joint decision. Later at the very least, the defendant acquiesce in the plaintiff's decision to remain in the home to assist [their daughter] who has some special needs.
>
> The plaintiff is 57 years of age. It was already mentioned she is a very intelligent woman, obviously, despite the facts of having only a high school education and is in good health. And as I mentioned, reasonably inferred that the plaintiff is capable of making at least $35,000 annually. But at that, she will never make income comparable to what the defendant is capable of earning.
>
> As I already mentioned, I find that the defendant is currently earning in practically the darkest of times of his company the equivalent of $100,000 a year. I find with respect to the cause of the break up of the marriage that both contributed to the break up of the marriage. I do find that even with income -- even with the income of $100,000 which is nowhere near historically what the defendant's income has been, the defendant does have the ability to pay alimony. And I further find, based upon the consideration of all of the factors in Family Law section 11--106, that even after the plaintiff has made as much progress as she can toward becoming self sufficient as can be reasonably expected, that the respective standards of living of the parties will be unconscionably despaired.
>
> Accordingly, I order . . . . [t]hat the plaintiff shall be entitled to indefinite alimony. And that, at least, based upon the current assumption and finding that the defendant's income of $100,000 a year that the defendant shall pay to the plaintiff indefinite alimony in the amount of $1000 a month.

Our review of the transcript reveals that the trial court considered the majority of the factors required by FL § 11-106. With regard to Melissa's concerns, the court explicitly addressed the length of the parties marriage. As to Leonard's health, we read

the trial court's silence on the point to suggest that the court thought that it was not at issue. Melissa does not suggest that the parties had an agreement as to alimony. Were these the sum and substance of Melissa's contentions, we would not disturb the alimony award.

The court's failure to address Melissa's financial needs, however, is an entirely different matter. The court determined that Melissa's earning potential was $35,000 a year, but did not make any assessment of her monthly expenses or the amount necessary to sustain a reasonable standard of living. The court's failure to make this critical finding is fatal to the court's alimony award. Accordingly, we will vacate the alimony award and remand this case for the trial court to make the necessary findings and to reconsider the alimony award in light of Melissa's financial needs, as well as the other § 11-106(b) factors.

As a result, we must also require the court to reconsider its monetary award as well as the issue of attorneys' fees. As we noted in *Malin v. Mininberg*, 153 Md. App. 358, 433 (2003) (citing *Doser v. Doser*, 106 Md. App. 329, 335 n.1 (1995)), "the factors underlying an award of counsel fees, alimony, and a monetary award are so interrelated that a re-consideration as to one award requires a new evaluation of the others." To assist the court on remand, we consider the contentions Melissa raises as to the monetary award and issue of attorneys' fees below.

## V. Monetary Award

Melissa next takes issue with the manner in which the court awarded payment of the monetary award. As noted above, the court awarded Melissa a monetary award in the amount of $750,000. Leonard was ordered to pay the award in installments over several years. Pursuant to the court's order, Leonard was to pay Melissa $250,000 no later than December 1, 2015, and the remaining $500,000 was to be paid no later than December 1, 2017. Additionally, the court ordered that the unpaid amount of the monetary award was to accrue interest at the rate of five percent per year, beginning July 1, 2014, and that Leonard was to pay Melissa the interest owed on the monetary award on the first day of each month thereafter.

It is the interest with which Melissa takes issue. She asserts that, under Maryland law, "[t]he [c]ircuit [c]ourt had no authority to order interest to accrue prior to the monetary award becom[ing] due and owing." Leonard counters that, because the interest payments are to her benefit, Melissa cannot challenge them on appeal.

Melissa is correct. It is well-established that "[i]nterest can only accrue against that part of a monetary award that is reduced to judgment." *Skrabak v. Skrabak*, 108 Md. App. 633, 658 (1996) (citing *Ross v. Ross*, 90 Md. App. 176, 190, *vacated on other grounds*, 327 Md. 101 (1992)). Pursuant to FL § 8-205(c), the court may only reduce to judgment that part of the monetary award that is "due and owing." *See also Skrabak*,

108 Md. App. at 658. Because "[f]uture installments are not currently due and owing," *id*., interest "cannot accrue as to sums not currently payable." *Ross*, 90 Md. App. at 189. As Leonard points out, the court's error works to Melissa's advantage. However, because we are vacating the marital award anyway, the trial court will have an opportunity to restructure its award in accordance with *Skrabak* and *Ross.*

## VI. Attorneys' Fees

Melissa's final contention on appeal is that the circuit court abused its discretion in refusing to award her attorneys' fees. Melissa asserts that there was an inequity in the amount of marital funds paid toward Leonard's attorneys fees' in comparison to the amount paid toward her attorneys' fees. Moreover, Melissa acknowledges that the court "took issue with [her] prior counsel's refusal to use a court-appointed expert to value A&S, Baylin and Leonard's income," but attempts to justify the position. Leonard, on the other hand, asserts that the evidence presented at trial established that he "lacked the financial resources from which to pay counsel fees" and that "Melissa had the use of substantial marital funds from which to pay her counsel and expert witness fees." Leonard also contends that, while represented by prior counsel, Melissa undertook unnecessarily litigious strategies, including an attempt to have the prenuptial agreement declared invalid as well as rejection of Leonard's proposal to appoint a joint valuation expert, and, as a result, incurred certain unreasonable attorneys' fees.

"Attorney's fees are governed by F.L. § 11-110." *Malin v. Mininberg*, 153 Md. App. 358, 434 (2003). F.L. § 11-110 provides:

> (b) *Authority of court*. — At any point in a proceeding under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expenses of prosecuting or defending the proceeding.
> (c) *Required considerations*. — Before ordering the payment, the court shall consider:
>
> (1) the financial resources and financial needs of both parties; and
> (2) whether there was substantial justification for prosecuting or defending the proceeding.

It is evident from the transcript that the court considered the parties' financial positions as well as the justifications for the proceedings, in determining that each party would pay its own attorneys' fees. The court made the following findings:

> With respect to the issue then of attorney's fees. Both sides have spent enormous sums of money to litigate this case principally the issue of the value of ANS, Baylin, and the defendant's income which, obviously, have enormous impact on the issues of alimony support and monetary award. And, therefore, while I find certainly the majority of the funds spent to litigate those issues were reasonable and necessary, the court finds not all of the funds spent were reasonable and necessary.
>
> Early on in this case the court urged the parties to either agree on an expert to value the company or let the court appointment its own expert. Plaintiff's [former] counsel . . . represented to the court that it was too late to do that. That the expert had almost finished his work. And, therefore, the plaintiff would achieve little or no savings from such an arrangement. It now appears based upon the evidence of that the little work had been done as to the valuation of the company. A substantial savings could have been realized by the parties, particularly the plaintiff, if they had undertaken or accepted the court's invitation which the defendant had agreed to accept.

> And so I find, unfortunately, that some of those expenses incurred was the result of [former counsel's] decision in this case not to accept the offer of the court.
>
> I further find that the efforts to contest the prenup were not substantially justified. But most importantly, I find that the defendant simply does not have the ability to pay fees on top of those other financial obligations which I've imposed hereunder.

On the basis of the record before us, we cannot conclude that the court abused its discretion when it declined to award Melissa attorneys' fees. However, as we have explained, we are vacating the court's alimony award; therefore, we are vacating the court's decision on attorney's fees in order to provide remedial flexibility on remand. *See Malin*, 153 Md. App. at 433.

**THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED IN PART AND VACATED IN PART. THE CASE IS REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.**

**COSTS TO BE PAID: 75% BY APPELLANT AND 25% BY APPELLEE.**