C-02-FM-14-000582

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0126

September Term, 2017

THOMAS G. RINKER

v.

JENNIFER C. RINKER

Wright,
Kehoe,
Shaw Geter,

JJ.

Opinion by Wright, J.

Filed: September 25, 2017

This appeal arises from an Opinion and Judgment of Absolute Divorce issued by the Circuit Court for Anne Arundel County on March 20, 2017. The appellant, Thomas G. Rinker ("Mr. Rinker"), filed a Complaint for Absolute Divorce, or in the Alternative, for Limited Divorce, on November 17, 2014, while the parties were residing at the same residence. Appellee, Jennifer C. Rinker ("Mrs. Rinker"), filed an Answer and a Counter-Claim on January 14, 2015.

The circuit court conducted a trial beginning on June 30, 2016. The trial took place over six separate days and did not conclude until January 6, 2017. Following the final day of trial, both parties submitted memoranda and Proposed Findings of Facts and Conclusions of Law. On March 20, 2017, the circuit court issued a judgment, granting Mr. Rinker an absolute divorce, denying his request for alimony, and addressing marital property issues. The court granted the parties joint legal custody and shared physical custody of their two minor children and set forth an access schedule. The court found that both parties were generally charged with the support of the minor children.

Mr. Rinker timely appealed.

QUESTIONS PRESENTED

We have reworded Mr. Rinker's questions for clarity, as follows:[1]

[1]In his brief, Mr. Rinker asks:

1. Did the Trial Court abuse its discretion when it denied Mr. Rinker's request for alimony, or, at a minimum, his request to reserve his right to claim alimony in the future?

2. Did the Trial Court abuse its discretion in determining the monetary award it granted to Mr. Rinker because it erroneously calculated the amount

1) Did the court err when it denied Mr. Rinker's request for alimony and did not grant a right to claim alimony in the future?

2) Did the court err in determining the monetary award granted to Mr. Rinker?

3) Did the court err in determining the award to Mr. Rinker for his attorney's fees?

4) Did the court err in its valuation of the marital home?

5) Was the shared physical custody schedule established by the court an abuse of discretion?

For the following reasons, we answer all questions, except question 2, in the negative and, therefore, affirm in part and reverse in part the judgment of the circuit court.

BACKGROUND

The parties were married on June 3, 1995, and separated on or about January 3, 2015. They have two minor children: Reece, born on December 1, 2001, and Rachel, born July 12, 2003.[2]

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of marital property Ms. Rinker dissipated and it failed to credit Mr. Rinker for his premarital investment in the marital home?

3. Did the Trial Court abuse its discretion when it awarded only $15,000.00 in attorneys' fees to Mr. Rinker?

4. Was the Trial Court's valuation of the marital home clearly erroneous?

5. Did the Trial Court abuse its discretion when it established a shared physical custody schedule for the parties and the minor children that substantially reduced the amount of time the children are with Mr. Rinker?

[2] The trial record includes significant testimony and evidence as to the children's activities and the determination of where the children attend school. Although highly

Mr. Rinker was born in 1962, has a high school degree and has worked as a firefighter for the District of Columbia fire department since 1987. His work schedule is 24 hours on from 7:00 A.M. to 7:00 A.M. the following day, followed by 72 hours off. The circuit court found that his monthly income is $9,583.00,[3] or approximately $115,000.00 annually. Mr. Rinker is eligible for retirement, and wants to retire.[4] He has a pension through the fire department, but does not pay into Social Security, and is ineligible for Social Security benefits.

Mrs. Rinker was born in 1967, and she has a Bachelor's degree, a Master's degree in Finance, and a Master's in Business Administration. She is employed by Kaplan, Inc., a part of Graham Holdings, earning a base salary of $180,250.00. The circuit court found her annual salary to be approximately $207,000.00.[5] Mrs. Rinker works from home most days and travels for work periodically.

relevant on the issues before the trial court, these facts have no bearing on the outcome of any question raised by the parties, and we have chosen to omit those facts.

[3] In his brief, Mr. Rinker states that his monthly income is $9,083.00, but notes that the trial court found his income to be $9,583.00/month, "presumably based on his paystub that was submitted" as Exhibit 37. Mr. Rinker explains that the paystub was not an accurate reflection of his annual pay because of when the pay periods occurred. A loan application had his monthly income listed as $9,750.00.

[4] Mr. Rinker was out of work from October 2013 through the summer of 2014 due to a work related injury.

[5] Mrs. Rinker's pay structure includes a base salary as well as potential for bonuses. For example, in the spring of 2016, she received two bonuses of $29,167.00 and $26,250.00.

In 1994, prior to the marriage, the parties purchased 325 Beech Grove Court, Millersville, Maryland 21108 ("the home"). In 2009, they refinanced the home and took $186,000.00 in cash from the equity in the home to finance the purchase of a condominium in Ocean City, Maryland, and to pay bills.

By 2013, the relationship was strained, but Mr. Rinker did not want a divorce. Based on perceived changes in Mrs. Rinker's behavior and appearance, Mr. Rinker because suspicious that Mrs. Rinker was having an extramarital affair and engaged in extensive investigation to gather evidence of this affair. No evidence of an affair was presented at trial.

Throughout the marriage, Mrs. Rinker was primarily responsible for administering the parties' finances. Beginning in 2013, Mrs. Rinker made a number of large withdrawals from her retirement assets and, for reasons that are unclear, placed approximately $40,000.00 of inherited funds from the sale of her deceased mother's house with her brother.

Mr. Rinker filed for divorce on November 17, 2014, while the parties were both residing in the home. The circuit court conducted a trial beginning on June 30, 2016. The trial took place over six separate days and concluded on January 6, 2017. On March 20, 2017, the circuit court issued a judgment, granting Mr. Rinker an absolute divorce, denying his request for alimony, and addressing marital property issues. Mr. Rinker timely appealed.

Additional facts are included as they become relevant to our discussion below.

DISCUSSION

Mr. Rinker asks multiple questions regarding monetary issues and the custody schedule. Generally, Md. Rule 8-131(c) governs non-jury cases, and states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regarding to the opportunity of the trial court to judge the credibility of witnesses.

A "finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) (citations omitted). "As long as the trial court's findings of fact are not clearly erroneous and the ultimate decision is not arbitrary, we will affirm it, even if we might have reached a different result." *Malin v. Miniberg*, 153 Md. App. 358, 415 (2003) (citation omitted).

Additionally, as it pertains to dissolution of marriage, we give "great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Tracey v. Tracey*, 328 Md. 380, 385 (1992) (citation omitted). "The exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981) (internal citations omitted). However, "[w]hen a court must exercise discretion, the failure to do so is error." *In re Don Mc.*, 344 Md. 194, 201 (1996) (citation omitted).

A more nuanced discussion of the standard as to each question is included below.

I. Denial of Alimony

Mr. Rinker avers that although the circuit court properly addressed the alimony factors as set forth in Md. Code (1984, 2012 Repl. Vol.), Family Law Article ("FL") § 11-106, the court's finding that "an award of alimony is not appropriate" is "inadequate" and should, therefore, be reversed. He further avers that the court abused its discretion by not reserving Mr. Rinker's right to claim alimony in the future. Mrs. Rinker responds that the court committed no error, but rather it made "detailed and deliberate" factual findings in consideration of the statutory factors. She also states that Mr. Rinker did not request the right to reserve alimony in the future until his post-trial memorandum, and that he failed to put on any evidence to support such a request.

"[A] trial court has broad discretion in making an award of alimony, and a decision whether to award it will not be disturbed unless the court abused its discretion." *Ware v. Ware*, 131 Md. App. 207, 228-29 (2000) (citation and emphasis omitted). However, the denial of indefinite alimony relies on an underlying finding regarding unconscionable disparity in the standard of living of the parties. *See id.* A finding of unconscionable disparity "is a question of fact, and we review it under the clearly erroneous standard contained in Md. Rule 8-131(c)." *Id.*

FL § 11-106(a)(1) provides that the trial court has the discretion to make an award of alimony to either party as well as to determine "the amount of and the period for an award of alimony." "Where at the very threshold, however, the determination is made that each party to the dissolved marriage is so financially self-supporting that no alimony

at all is required, all such factors become essentially immaterial."[6] *Hull v. Hull,* 83 Md. App. 218, 221 (1990).

[6] The factors are enumerated in FL § 11-106(b), which provides in full:

> In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:
>
> (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;
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> (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

Mr. Rinker does not argue that the fact finding as to the factors was erroneous. Further, Mr. Rinker does not deny that the circuit court's analysis was based on the appropriate factors.

We first address Mr. Rinker's assertion that the circuit court's writings were "inadequate."

The circuit court detailed its findings in its opinion. The court found, among other facts:

- Mr. Rinker "has the ability to be, and is, wholly self-supporting."
- Mr. Rinker is "currently employed, and there is no evidence that additional education or training would in any way increase his employability or earning potential."
- The parties "enjoyed a comfortable standard of living during their marriage."
- "Both parties worked and contributed income to the family. In the later years, [Mrs. Rinker] was the economically dominant spouse. When the parties were first married, [Mr. Rinker] had greater financial resources. The parties divided household chores and child-rearing responsibilities. At various times they used outside daycare and housecleaning services. In short, both parties contributed to the monetary and non-monetary well-being of the family."
- "The parties did not have an express agreement regarding alimony."

(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.

- "Each party has a pension. Neither party is currently collecting on his/her pension. [Mrs. Rinker] also has certain defined contribution plans which will be divided upon divorce."

The circuit court also stated that it had "considered each party's financial obligations, needs, and resources" and that "[b]oth parties submitted supplemental long form Financial Statements, which were admitted into evidence, as was a Joint 9-207 Statement." The court then concluded: "Upon consideration of all of the above factors, this [c]ourt finds that an award of alimony is not appropriate in this case."

The circuit court's conclusion relies upon the detailed factual findings laid out in its opinion. The record indicates that the court fulfilled its duty as the fact finder, and then preceded to exercise its discretion in making a legal conclusion based on those facts.

When alimony is requested, if the trial court makes the determination that an award of alimony is warranted, then it must make a determination of whether the circumstances warrant an award of indefinite alimony. It should be first noted that Mr. Rinker did not seek rehabilitative alimony, but rather, sought only indefinite alimony. In that the court awarded no alimony, no further analysis as to length or amount was required. *Hull*, 83 Md. App. at 221. Therefore, the only question we must address is whether the denial of alimony at the onset was an abuse of discretion.

Maryland law "favors rehabilitative alimony over indefinite alimony." *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 142 (1999) (citation omitted). Under the statutory scheme, a court may only award alimony for an indefinite period under two sets of circumstances – either the party seeking alimony "(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 standard of living of the parties will be unconscionably disparate." FL § 11-106(c). The thrust of the statutory scheme is to "limit alimony, where appropriate, to a definite term . . . [and] change the focus of alimony from a form of lifetime pension toward a bridge to self-sufficiency." *Jensen v. Jensen*, 103 Md. App. 678, 692-93 (1995) (citations omitted). Indefinite alimony should only be awarded in "exceptional circumstances[.]"[7] *Roginsky*, 129 Md. App. at 142 (citation omitted).

Mr. Rinker avers that exceptional circumstances are present here because he earns approximately one-third of the family income from a physically demanding and dangerous job, while Mrs. Rinker is younger and has better security in her retirement, allowing her to "be able to afford a lifestyle comparable to the one the parties enjoyed" while allegedly Mr. Rinker will not. Mrs. Rinker responds that while there is inequality in the parties' incomes, there is no unconscionable disparity between the standards of living, as the statute and case law requires for an award of indefinite alimony.

[7] In a longer lasting marriage, the Court of Appeals has opined that to award indefinite alimony is not at all unusual. *Boemio v. Boemio*, 414 Md. 118, 143 (2010). "There has been a long pattern in Maryland cases, reflecting the implied statutory directive that a long marriage is more likely to result in indefinite alimony. Indeed it is fair to say that length of the marriage is a key factor, outweighing several of the others listed in FL § 11-106(b), in determining what is unconscionably disparate." *Id*. (footnote omitted).

In *Boemio*, the Court of Appeals did not indicate which factors listed in FL § 11-106(b) become secondary. We need not address this issue here as we discuss that there is not a significant disparity in their post marriage income.

While disparity of income is an important factor, "disparity in income, present and future, is not necessarily a sufficient condition to justify an award of indefinite alimony." *Ware*, 131 Md. App. at 229-30. Instead, "[m]athematical disparity is only the starting point for an unconscionability analysis." *Goshorn v. Goshorn*, 154 Md. App. 194, 214 (2003). "The greater the disparity, the more likely that it will be found to be unconscionable." *Ware*, 131 Md. App. at 229 (citation omitted). Finally, we note that "the economically dependent spouse seeking alimony bears the burden of proving the need for indefinite alimony." *Goshorn*, 154 Md. App. at 213-14 (citations omitted).

Without identifying those specific cases cited in *Ware* that he believes support his position, Mr. Rinker contends that *Ware* supports his argument. In *Ware*, 131 Md. App. at 229-32, we reviewed cases affirming an award of indefinite alimony where the lower earning spouse earned between 22-43% of the other spouse's income.

The cases cited in *Ware do not* support Mr. Rinker's position that an unconscionable disparity is present, as Mr. Rinker's income is more than 50% of Mrs. Rinker's income.[8] Additionally, closer inspection of those cases reveals an even more clear and important distinction between the circumstances of the parties in those cases.

For example, in *Tracey*, 328 Md. at 392-93, the Court of Appeals affirmed our holding, 89 Md. App. 701 (1991), and upheld the trial court's grant of indefinite alimony

[8] Mr. Rinker, in his brief, states that he earns "approximately one-third of the family income." While this is true, that also means that his income is approximately one-half of Mrs. Rinker's – not one-third of Mrs. Rinker's, which may have then put him parallel with the cases he refers to in *Ware*. The mathematics is the mathematics and a misstatement of the percentage of income is not persuasive.

because the "the respective standards of living of the parties will be unconscionably disparate." In *Tracey*, the lower earning spouse was earning $16,849.00 from a full-time job, while the higher earning spouse earned approximately $61,000.00. *Id.* at 393. Without alimony, the lower earning spouse was not self-supporting. *Id.* at 392. Where one party is not self-supporting, indefinite alimony is appropriate based on an unconscionable disparity in the standards of living between the parties. In this case, Mr. Rinker does not dispute the circuit court's finding that he is fully self-supporting.

Similarly, in *Digges v. Digges*, 126 Md. App. 361, 388 (1999), we affirmed a grant of indefinite alimony where the lower earning spouse had a projected income of approximately $30,100.00, compared to the higher earning spouse's projected income of $100,000.00. In *Digges*, the parties experienced not only a significant difference in income, where the lower earning spouse earned approximately 30% of the higher-earning spouse's income, but that income difference caused a disparate *standard of living. Id*. at 388-89. Without consulting any official definitions of income based class divisions, it is pellucid that there is a *significant* difference in standard of living one experiences between a person making $30,000.00 and that of a person making a six-figure salary.

Here, the record reflects that both parties are obviously fully self-sufficient and are of similar economic classes, each making over a six-figure income. Therefore, we see no error in the circuit court's denial of indefinite alimony because there is no unconscionable disparity in the standard of living between the parties. In that the trial court considered the factors contained in § 11-106, we do not perceive that the trial court abused its discretion. *Caldwell v. Caldwell*, 103 Md. App. 452, 464 (1995) (alterations added).

As to Mr. Rinker's reservation of his right to future alimony, we agree with Mrs. Rinker that this issue was not raised at trial. However, although it was first raised in post-trial memorandum, the circuit court does recognize the request in its written opinion. Assuming *arguendo* that it was requested below, the record is devoid of evidence to support a grant of reservation.

It is not appropriate for a court to reserve the right to future alimony "simply because there may be some vague future expectation of circumstances that might show a basis for alimony." *Turrisi v. Sanzaro*, 308 Md. 515, 528-29 (1986) (citations omitted). When considering whether to reserve, "the *probable* deterioration of a spouse's health, already known at the time of the divorce, justified the exercise of discretion in favor of a reservation. On the other hand . . . the future *possibility* of disparate standards of living would not constitute a proper basis on which to reserve." *Durkee v. Durkee*, 144 Md. App. 161, 177-78 (2002) (citation omitted) (emphasis in original).

Here, Mr. Rinker seemingly argues a possibility of future disparity if he is forced to retire due to an injury sustained in his employment. The circuit court noted in its opinion that Mr. Rinker "may have to delay his retirement." Mr. Rinker responds now that there is no evidence that he will be able to postpone the date he chooses to retire. However, although Mr. Rinker has indicated that he wants to retire, there is also no evidence that he *must* retire.[9] Although Mr. Rinker presented evidence of a prior injury that caused him to miss work a number of years ago, he presented no evidence of any

[9] There is nothing in the record that indicates that Mr. Rinker has a mandatory retirement date.

current health condition, known at the time of divorce, that would justify reservation. Instead he argues based on a possibility, which is not a proper basis for reservation. *Id.*

II. Monetary Award

Upon the dissolution of marriage in Maryland, the trial court, in ordering an annulment or divorce, must make an equitable distribution of all marital property between the parties, which often culminates in a monetary award. In making such an award, the court must adhere to a three step statutory scheme: "(1) the trial court must initially characterize all property owned by the parties, however titled, as either marital or nonmarital, (2) the court shall then determine the value of all marital property, and, finally, (3) the court may then make a monetary award as an adjustment of the parties' equities and rights in the marital property." *Strauss v. Strauss,* 101 Md. App. 490, 501 (1994) (internal citations omitted).

Mr. Rinker avers that the circuit court made two errors in its calculation on which the monetary award relied – first, in its determination of dissipated property, and second, when it failed to credit Mr. Rinker for his investment in the purchase of the marital home before the marriage.

We review the court's determinations regarding the monetary awards as follows:

> First, we utilize the "clearly erroneous" standard to the court's determination of what is, and what is not, marital property because "[o]rdinarily, it is a question of fact as to whether all or a portion of an asset is marital or non-marital property." *Innerbichler v. Innerbichler,* 132 Md. App. 207, 229 (2000); *see also* Md. Rule 8-131(c). Factual findings that are supported by substantial evidence are not clearly erroneous. *Collins v. Collins*, 144 Md. App. 395, 409 (2002). Second, as to the court's decision to grant a monetary award, and the amount thereof, we apply an abuse of discretion standard of review. *Gallagher v. Gallagher,* 118 Md. App. 567,

> 576 (1997). Within that context, "we may not substitute our judgment for that of the fact finder, even if we might have reached a different result." *Innerbichler, supra*, 132 Md. App. at 230.

Richards v. Richards, 166 Md. App. 263, 271-72 (2005). In sum, after we review the circuit court's factual findings, we will then review its decision to grant a monetary award under an abuse of discretion standard. *Id.*

Under Maryland law, property may be marital, non-marital, or part marital and part non-marital. *See Harper v. Harper*, 294 Md. 54, 80 (1982). Marital property is any and all "property, however titled, acquired by one or both parties during the marriage." FL § 8-201(e)(1). Generally, the "characterization of property as non-marital or marital depends upon the source of each contribution as payments are made, rather than the time at which legal or equitable title to or possession of the property is obtained." *Harper*, 294 Md. at 80.

The statutory definition excludes any property acquired before the marriage, acquired by inheritance or gift from a third party, excluded by valid agreement, or property that is directly traceable to any of these sources. FL § 8-201(e)(3). Any property that falls within one of the exceptions is non-marital property and is not subject to the court's calculation of a monetary award. A party asserting that any particular piece of property is non-marital bears the burden of proof "to demonstrate the non-marital nature of a particular property [by tracing] the property to a non-marital source." *Malin*, 153 Md. App. at 428 (citations omitted).

A. Marital Home

Mr. Rinker avers that the circuit court abused its discretion when it failed to credit Mr. Rinker for the $43,000.00 pre-marital funds he invested in the purchase of the home. Mrs. Rinker responds that this investment was a gift, and the court correctly excluded the investment in its considerations regarding the monetary award.

Mr. Rinker offers no case law to support his position, and relies only on FL § 8-205(b)(9), which states:

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

Here, the parties bought the home before the marriage. They paid $234,000.00 for the home and borrowed $198,000.00. The money used for the down payment, deposit, and expenses, totaling $43,541.62, was from funds that Mr. Rinker received from the sale of a prior house he owned. Mr. Rinker admits that he never discussed getting repaid for the use of these funds.

The circuit court deemed the funds to be a gift. At the time of purchase, the house was titled in the parties' name as joint tenants. However, following their marriage, the parties refinanced the home, and it became titled as tenants by the entireties.

Once a house is titled as tenants by the entirety, the source of funds theory no longer applies, and the entire property is considered marital property. FL § 8-201(e)(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.").

Because the home was titled as tenants by the entirety, and because there was no valid agreement as to the property, or even a discussion about repayment of the funds, we find no error in the circuit court's determination that the home was marital property, and that the funds were a gift. Therefore, the court correctly excluded the $43,541.62 from consideration when making the monetary award. "When the parties in this case pooled their money to purchase the . . . property, they gave to each other undivided ownership interests in property that was . . . neither marital nor nonmarital, for prior to their marriage those concepts did not exist. The mutual gifts were of *all* rights of property, legal and equitable, which each donor had." *Kline v. Kline*, 85 Md. App. 28, 43 (1990). Although here only one party contributed to the "pool," the concept still holds true. As in *Kline*, Mr. Rinker seems to argue in a "mistaken belief that a contribution of . . . property somehow entitles the contributor to get back the property or its value, as if the contribution is deemed to create an indebtedness for which the contributor should have a lien[. This] is a total distortion of the Act." *Id.* at 44. Instead:

> when one makes a valid gift of property . . . the donee acquires a vested interest in the property. The court, when it grants a divorce, cannot return to the grantor spouse the legal interest that he or she had earlier given just because the gift was of nonmarital property; to do so would violate § 8-202(a)(3) of the Act, which expressly prohibits the divorce court from transferring ownership of property, real or personal, from one spouse to the other.

Id. (citations omitted). We find no error in the circuit court's decision not to consider Mr. Rinker's initial investment in the home.

B. Dissipated Funds

Mr. Rinker next avers that the circuit court incorrectly calculated the amount of funds dissipated by Mrs. Rinker and then incorrectly taxed a portion of the funds that the court did find to be dissipated, thereby erroneously penalizing Mr. Rinker.

Dissipation of funds occurs when "joint funds have been spent for other than family purposes with the intention of reducing the amount of money available to the court for equitable distribution." *Welsh v. Welsh*, 135 Md. App. 29, 51 (2000) (citation omitted). When an allegation of dissipation occurs, "the party alleging dissipation of funds initially bears the burden to show dissipation has occurred. After that party establishes a *prima facie* case of dissipation, the burden shifts to the party who spent the money to prove appropriate use of the funds." *Id.* at 50-51 (internal citations omitted).

Mrs. Rinker made a number of withdrawals from her retirement account between 2013 and 2015 and made a private loan to her sister. The circuit court considered each of these actions to determine if any resulted in dissipating marital funds.[10] We now review them.

[10] Additionally, Mr. Rinker avers that funds Mrs. Rinker used to pay for an apartment should be considered dissipated. Mrs. Rinker rented an apartment from May 2014 through December of 2014, while the parties were still living together in the home. She furnished it, paid a monthly rent, and paid for cable and utilities. Mr. Rinker states that from this apartment, $17,500.00 should be considered dissipated funds, for "nine months rent, plus one month penalty" for breaking the lease. Mr. Rinker offers no statutory or case law to support this position, and states simply that he "should not be penalized for money [Mrs. Rinker] spent on non-marital activities which reduced the money available for distribution." He fails to recognize that dissipation requires *intent*, not just spending on non-marital activities that result in reduced funds. While Mrs. Rinker testified at trial regarding her use of the apartment, we find no argument below that the apartment payments should have been considered dissipated funds. From our review of the record, this issue was not included in Mr. Rinker's proposed findings of law, was not argued in opening or closing, and was never fully raised at trial or in his

The circuit court found that in 2013, Mrs. Rinker withdrew $84,820.00 from a retirement account. As to this withdrawal, the court found that it was made while the parties were living together and the funds were used for "family purposes." Mr. Rinker now states, without any reference to the case record, that this finding "is not supported by the evidence" because in 2013 Mrs. Rinker told Mr. Rinker "she was no longer in love with him and began spending money on herself. She could not account for how the money was spent and it was withdrawn without [Mr. Rinker's] knowledge."[11] However, Mr. Rinker recognizes that at the time, the parties were still living together. The parties were still married with no action towards divorce, and Mr. Rinker offered no evidence of Mrs. Rinker's intention to reduce the funds available for distribution – rather, he states in his brief only that Mrs. Rinker "began spending money on herself." On the other hand, Mrs. Rinker testified that at the time, the parties were in debt, despite their considerable combined income, and Mrs. Rinker used the money to pay their debts. She also testified that she lost a significant amount of weight which required purchasing new clothes that

papers. His passing mention of this issue in his briefs includes no citation to the record (to where he raised the issue, or to relevant facts). Accordingly, we decline to review this issue as it was neither fully raised below, nor adequately argued on appeal. "[A]ppellant is required to provide argument in his brief to support his position." *Van Meter v. State*, 30 Md. App. 406, 407-08 (1976). "We cannot be expected to delve through the record to unearth factual support favorable to appellant and then seek out law to sustain his position." *Id.* at 408 (citing *Clarke v. State*, 238 Md. 11, 23 (1965)).

[11] Although Mr. Rinker seems to contest the circuit court's finding that these funds should have been considered dissipated, and explicitly says so in his reply brief, in his initial brief Mr. Rinker did not include this sum in his calculation of what he believed to be the correct gross amount of dissipated funds.

fit her. The court's finding that the funds were used for family purposes is reasonable after due consideration of Mrs. Rinker's testimony, and the court, therefore, did not abuse its discretion in finding the 2013 withdrawal not to be dissipation.

In 2014, Mrs. Rinker withdrew $57,517.00 from her retirement accounts. The circuit court found that $16,027.00 gross ($9,977.02 net) was used to pay her attorney's fees. We have held that when "a spouse uses marital property to pay his or her own reasonable attorney's fees, such expenditures do not constitute dissipation of marital assets." *Allison v. Allison*, 160 Md. App. 331, 339-40 (2004). The court found that "the principal purpose in making the balance of the 2014 retirement withdrawal, $41,310.00, was to reduce the amount of funds that would be available for distribution at the time of divorce and these funds were dissipated."[12]

The circuit court then reduced the $41,310.00 by both the penalty for withdrawal (10% or $4,131.00), as well as the parties' effective tax rates (30.66% federal and state combined, which equals $12,665.65). After reduction by these two amounts, the court found that funds totaling $24,513.35 had been dissipated by the 2014 withdrawal. Mr. Rinker posits that the court's deduction of taxes and fees was error and the entire $41,310.00 should have been considered dissipated funds.

In 2015, Mrs. Rinker withdrew $15,000.00 from her retirement accounts. The circuit court found that this money was used entirely to pay her attorney's fees and

[12] It is unclear from the record where this value comes from, as $57,517.00 - $16,027.00 = $41,49.00, not $41,310.00. However, neither party disputes this figure.

correctly concluded that, therefore, it was not dissipated.[13] *Allison*, 160 Md. App. at 339-40.

Finally, between November 2014 and June 2015, Mrs. Rinker loaned her sister $24-25,000.00 by borrowing from a line of credit. Mrs. Rinker has not repaid that line of credit but makes monthly payments of between $750.00-$1,000.00 on the interest and principal, using her earnings, which are marital funds. The circuit court found that 28 months of payments totaling $24,500.00 were dissipated funds. The court noted that Mrs. Rinker could have easily loaned her sister this money from her inheritance, which her brother was holding for her, and avoided paying interest and fees. Since she did not, the court concluded that her motivation was to reduce the marital estate.

Having reviewed each of the transactions and concluded that the circuit court did not err in the finding as to each, we now turn to Mr. Rinker's question regarding the court's reduction of the $41,310.00 by the penalty and taxes. On this issue, both parties rely only on *Solomon v. Solomon*, 383 Md. 176 (2004), and *Rosenberg v. Rosenberg*, 64 Md. App. 487 (1985).

[13] Mr. Rinker also makes an argument regarding the amount that Mrs. Rinker had paid her attorney at different points over the years, and then concludes from her total payments that the court's math as to what Mrs. Rinker had paid in attorney's fees is "not supported by the evidence." Mr. Rinker's argument seems to rely on an underlying lack of understanding of the difference between a gross and net amount. It is possible that Mrs. Rinker withdrew *more* than her attorney's bill, in order to have the funds required to pay her bill after the withdrawal penalty and taxes were taken from the gross amount, but the entire withdrawal is considered an appropriate use of funds – just as his liquidation of a life insurance policy, which likely included some penalty, was appropriate to pay his attorneys fees.

In *Rosenberg*, we first addressed whether future income taxes that will be paid upon future realization of the benefit under a retirement plan should be considered in the valuation of marital property. 64 Md. App. at 503. "Under Maryland law, value means fair market value." *Id.* at 525-26 (citation omitted). We further defined that value means "the 'estimated or appraised worth' of property not its appraised worth minus taxes. It follows, then, that taxes should not be taken into account in valuing property before making a monetary award." *Id.* at 526 (internal citations omitted). We held that "future tax liabilities on the retirement plans, and any gain on the future sale of assets . . . are speculative; therefore, they need not be considered." *Id.* However, when discussing the tax liability for imputed interest received on a private loan that the party made, we stated, "appellant's tax liabilities for the imputed interest on the loan . . . are 'immediate and specific,' as evidenced by his tax returns . . . . Had he received the interest, it would have been subject to income taxes which are easily and specifically ascertainable." *Id.* (internal footnote omitted).

In *Solomon*, the Court of Appeals considered this Court's affirmation of the trial court's order of a significant marital award by Husband to Wife. Husband contended that the courts "erred in determining the amount of the marital award because they refused to consider the tax consequences he would face in prematurely liquidating his retirement accounts in order to pay the $550,000 monetary award." *Solomon*, 383 Md. at 187. The Court affirmed the dicta of *Rosenberg* that, "tax liabilities may be considered as an 'other factor' in an equitable distribution of marital property only when they are 'immediate and specific' or not 'speculative.'" *Id.* at 188 (citation omitted). But it stated that courts

"should consider the tax liabilities" on imputed interest payments because they were "immediate and specific." *Id.* at 189 (citation omitted). The Court held that where Husband was not required to pay the marital award from a retirement withdrawal because he had access to other funds, the court did not err in declining to consider speculative tax implications that he would suffer if he withdrew funds from his retirement account. *Id.* at 193-94.

Mr. Rinker reads *Solomon* to require a finding in his favor, because Mrs. Rinker was not compelled to make the withdrawal, so the court should not have considered the tax liabilities. Unlike in *Solomon*, the tax implications are not speculative, but rather, taxes and penalties that actually happened, making them immediate and specific.

Here, we are not considering the taxes on a future realization of a benefit that constitutes marital property, as in *Rosenberg*, nor uncompelled withdrawal to pay a marital award, as in *Solomon.* The question is also not whether taxes are an appropriate factor to consider when making a marital award. Rather, here we are faced with answering whether one party should be punished for the taxes and penalties paid on an uncompelled retirement withdrawal by the other party that constituted a dissipation of marital funds. This is a question of the valuation of dissipated marital property, that has been reduced due to taxes and fees, following an uncompelled withdrawal.

While *Rosenberg* and *Solomon* are instructive, the differences in the underlying facts and legal issues do not make them dispositive. Accordingly, we look instead to the Maryland cases on dissipation for clarity.

"[W]here a chancellor finds that property was intentionally dissipated in order to avoid inclusion of that property towards consideration of a monetary award, such intentional dissipation is no more than a fraud on marital rights, and the chancellor should consider the dissipated property as extant marital property under § 3-6A-05(a) to be valued with the other existing marital property." *Sharp v. Sharp,* 58 Md. App. 386, 399 (1984) (internal citation omitted). This remains true, "even where the dissipated property cannot be recovered because it is in the hands of a purchaser who took in good faith, without notice and for value." *Id.* (citation omitted).

Had Mrs. Rinker not withdrawn the $41,310.00, the entire value, not the value less taxes and penalties, it would have been considered marital property, valued along with the balance of the parties' retirement accounts accrued during the marriage. Here, the taxes are essentially unrecoverable dissipated property, because the property is in the hands of the governments, who took by right. Although the funds are unrecoverable, they are *still* dissipated property. *Id.* To hold otherwise would allow one spouse to significantly harm the other by taking the same steps as Mrs. Rinker. This is clearly contrary to the purpose of the doctrine of dissipation, which "was developed as a tool to prevent and remedy economic misconduct that could frustrate an equitable distribution of partnership assets." *Allison,* 160 Md. App. at 338 (citation omitted).

Because the doctrine aims to "remedy economic misconduct," we agree with Mr. Rinker that the taxes and penalties should not have been factored in after the circuit court found that the $41,310.00 was dissipated funds. *Id.* at 338. By reducing the dissipated

funds by the taxes and penalty, Mr. Rinker did not experience full remedy for Mrs. Rinker's "fraud" against his marital rights. *Sharp,* 58 Md. App. at 399.

Accordingly, we remand on this issue only, to be remedied by the circuit court so that Mr. Rinker may receive half of the dissipated funds – not half of the dissipated funds less the taxes and fees.[14]

III. Attorney's Fees

Next Mr. Rinker avers that the circuit court erred in awarding only $15,000.00 in attorney's fees.

"Decisions concerning the award of counsel fees rest solely in the discretion of the trial judge." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citation omitted). "Consideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error." *Id.* (citation omitted). "An award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Id*. (citations omitted).

Mr. Rinker recognizes that the determination regarding attorney's fees is within the court's discretion, and states that the circuit court made the award "pursuant to" the relevant statutory provisions. The court limited the award to $15,000.00 – far short of the $110,597.00 spent by Mr. Rinker. Mr. Rinker avers that the limitation in amount was in error because the court's reasoning, that Mr. Rinker "incurred a great deal of unnecessary

[14] Divorce appeals related to monetary awards often require remand on all issues if one determination is found to be error. That is not the case here. The court's determinations on all other issues are based on unrelated facts, and therefore are not "significantly interrelated." *Strauss*, 101 Md. App. at 511.

expense in pursuit of evidence for his elusive claim of adultery" and that "his alimony claim was not well-founded," was based on an inaccurate recitation of the facts and law.

In response, Mrs. Rinker states that "given that [Mr. Rinker] received any award of attorney's fees in spite of the totality of the circumstances, his appeal of that award claiming it to be insufficient is not only contrary to the relevant case and statutory law, but it is frankly disingenuous." While we decline to comment on Mr. Rinker's motivations, we agree with the legal conclusion that Mr. Rinker's position is again unpersuasive.

The circuit court was correct that his alimony claim was ill-founded. Although Mr. Rinker is correct that a significant portion of the trial was spent on other issues, a portion was indeed, unnecessarily, spent on an alimony dispute that the case law clearly does not support, as Mr. Rinker fails, both here and at trial, to offer a single Maryland case where a fully self-supporting spouse, making a six figure salary, was granted indefinite alimony.

Second, we agree with the circuit court that Mr. Rinker went to great lengths to attempt to prove an adultery claim. Mr. Rinker had stated that in 2013 Mrs. Rinker told him she no longer loved him, changed her hair color, lost weight, got a tattoo, started wearing tighter fitting clothes, buying lingerie, and that she became less engaged with the family, including working longer hours, and traveling more. Despite explanations from Mrs. Rinker, based on these changes, Mr. Rinker (and/or his parents) hired investigative firms to follow Mrs. Rinker, and the firm attached a GPS device to her car to track her movement. Mr. Rinker, and/or his parents, also tracked her cell phone and her iPad,

monitored her credit cards and credit, and had her underwear tested for DNA. On one occasion, Mr. Rinker got a key and "went to [Mrs. Rinker's] apartment" and took pictures.

Although Mrs. Rinker's actions in changing her appearance and habits were perhaps curious or suspicious, we agree that the record indicates that Mr. Rinker's actions went beyond reasonable, and accordingly, much of his expenses associated with his attempt to prove an adultery claim were unnecessary. This is further evidenced by the fact that at $110,597.00, Mr. Rinker's attorney's fees were more than double Mrs. Rinker's, which totaled $54,185.35.

Accordingly, we find no evidence that "discretion was exercised arbitrarily or the judgment was clearly wrong," and we, therefore, see no error in the court's determination to limit the award of attorney's fees to $15,000.00.

IV. Value of Marital Home

Mr. Rinker next avers that the circuit court's determination that the marital home was valued at $635,000.00 was clearly erroneous, because it was based only on the value stated on a loan application which was not signed by Mr. Rinker.

The valuation of a piece of marital property is a determination of fact and reviewed under the clearly erroneous standard. *Williams v. Williams*, 71 Md. App. 22, 36 (1987) (reviewing the valuation of a pension under the clearly erroneous standard).

On the parties' Joint Statement Regarding Marital Property, Mr. Rinker listed the current fair market value of the house as $500,000.00 and Mrs. Rinker listed it as $600.000.00. Mr. Rinker admitted as an exhibit a loan application showing he was

qualified to refinance the home in the event that the court transferred it to him. The application listed the value of the house as $635,000.00. Mr. Rinker testified that the $635,000.00 was put on the application by an employee from Fidelity First and testified that he knew that the house had been appraised but never saw the appraisal. The portion of the application that contained the house value was typed and not signed by Mr. Rinker.

Mr. Rinker now avers that the circuit court committed reversible error in finding that the home was valued at $635,000.00 because "the typed valuation without the appraisal is hearsay." He offers no law to support this position. Mrs. Rinker responds that Mr. Rinker lacks standing to appeal on this issue since the court relied on evidence submitted by Mr. Rinker himself.

The circuit court is charged with valuating the marital home, but "valuation is not an exact science" and "the chancellor is not bound to accept the values proposed by the parties." *Williams*, 71 Md. App. at 36 (citations omitted).

Here, the circuit court's finding of value was based on a value listed on a document related to the house which Mr. Rinker himself admitted into evidence. By admitting the document, he waived any objection to the contents therein. *See* Md. Rule 2-517(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). Accordingly, Mr. Rinker may not now appeal on this ground. *Washington v. State*, 191 Md. App. 48, 69 (2010) (We "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any

other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . .").

Mr. Rinker cannot, on appeal, now ask an evidentiary question, never before raised, based on evidence *he offered*, because the evidence inadvertently hurt him. His position that he never saw the appraisal is irrelevant, as he saw the loan application with the appraisal value, prior to offering it as evidence at trial. The circuit court relied upon competent evidence of the house's value, offered by Mr. Rinker himself, and the finding of the court is therefore not clearly erroneous. *Lemley*, 109 Md. App. at 629 (citations omitted).

V. Custody Schedule

Finally, Mr. Rinker avers that the circuit court abused its discretion in determining the shared custody schedule because the schedule has "significantly reduced time that the children spend with their father," and because the courts "only explanation was its 'concern' that [Mr. Rinker] is unable to get Reece to school on time regularly and both children to activities."

Maryland appellate courts have repeatedly affirmed the standard of review in child custody proceedings stated in *Taylor v. Taylor*, 306 Md. 290, 303 (1986):

> in any child custody case, the paramount concern is the best interest of the child. As Judge Orth pointed out for the Court in *Ross v. Hoffman*, 280 Md. 172, 175 n.1 (1977), we have variously characterized this standard as being "of transcendent importance" and the "sole question." The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.

Further, on review of "cases involving the custody of children generally, our precedents establish a three part review of the decisions of the lower courts, addressing the findings of fact, conclusions at law, and the determination of the court as a whole." *In re Yve S.*, 373 Md. 551, 584 (2003). In sum:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8-131(c)] applies. If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

Sider v. Sider, 334 Md. 512, 534 (1994) (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1977)); *accord Yve S.*, 373 Md. at 584-86. Thus, "the chancellor's decision is unlikely to be overturned on appeal." *Id.* (citations omitted).

During the separation, the children were with Mrs. Rinker the night before Mr. Rinker worked and the night he worked, followed by two nights with Mr. Rinker. Mr. Rinker requested that this schedule continue. The circuit court instead ordered that the children are with Mrs. Rinker on school nights and with Mr. Rinker on weekends. During the summer, the children are with each parent on a week on/week off basis. On nights that Mr. Rinker is working, the children are to be with Mrs. Rinker.

Mr. Rinker does not dispute any of the findings of fact and notes that the circuit court found that both parties were fit parents and it was in the children's best interest to share physical custody. Further, he acknowledges that the court appropriately evaluated the custody determination pursuant to *Montgomery Cnty. v. Sanders*, 38 Md. App. 406

(1978), and *Taylor v. Taylor*, 306 Md. 290 (1986). However, he states that the court "failed to explain . . . why the schedule that the children had been following for over two years was not in their best interests." Mr. Rinker continued by contending that he presented evidence that "in spite of the tardiness, Reece was doing well in school," and that there "was no evidence produced that even if they were at times late for activities, the children were harmed by it." He concludes that there was no "rational basis" for changing the schedule from the one that had been utilized by the parties during the separation.

Mr. Rinker's position is unpersuasive. Mr. Rinker acknowledges the circuit court's reasoning for this arrangement - concern that Mr. Rinker was unable to get the children to school and activities in a timely manner - while simultaneously saying that the court lacked reason. It is clear that this is precisely the reason the court determined that the children should be with Mrs. Rinker on school nights. Although Mr. Rinker states that despite the tardiness Reece was doing well in school, he offers no explanation as to how it is not in a child's best interest to not be tardy in the future. This is likely because no such explanation could reasonably exist as punctuality is a virtue and not a vice. Although the court would have been within its discretion to order that the prior 50/50 custody arrangement continue, it was also well within its discretion to order the present arrangement.

We find no error in the circuit court's order regarding the custody schedule, as it was based on undisputed facts, and it was well-reasoned in order to effectuate the best interest of the children.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE IS REMANDED FOR LIMITED PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT AND PAID 80% BY APPELLANT AND 20% BY APPELLEE.