Circuit Court for Montgomery County
Case No. 121844 FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1043

September Term, 2016

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George Akumbu,

v.

Georgette Akumbu.

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Eyler, Deborah S.
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Harrell, J.

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Filed: October 10, 2017

In this family law case, Appellant, George Akumbu, complains that the Circuit Court for Montgomery County awarded incorrectly to Appellee, Georgette Akumbu, rehabilitative alimony. Appellant assigns error also to the circuit court's finding that he dissipated the withdrawn net proceeds from his 401 (k) plan, including that amount ultimately as "husband's marital property" on the "Marital and Non-Martial Property Schedule."

The circuit court (in granting Appellee an absolute divorce from Appellant), taking into consideration the relevant statutory factors and evidence, found it also fair and equitable to grant Appellee $250.00 per month in rehabilitative alimony for a period of three years. The circuit court, in support of its inclusion of the net proceeds of Appellant's 401 (k) plan as "marital property," found that "between January 2013, and October 2015, [Appellant] dissipated a minimum of 22,826.77 of his 401 (k)."

In this appeal, Appellant frames the following questions:

I. Did the trial court err by including $22,826.77 in husband's column on the Court's Marital and Non-Marital Property Schedule; and
II. Did the trial court abuse its discretion by awarding Appellee $250 per month in rehabilitative alimony for three years commencing 1 July 2016?

We answer both queries in the negative. The circuit court did not abuse its discretion in granting Appellee rehabilitative alimony. Further, it found correctly that Appellant dissipated the proceeds of his 401 (k).

## Factual Background

The parties married on 28 December 2001 in Cameroon, West Africa. They came to the United States in 2005. The parties share four children between them: M. A., born

13 June 2001; A. A., born 17 April 2007; S. A., born 2 November 2008; and K. A., born 15 February 2015. The family resided in Germantown, Maryland, in a jointly-owned property.[1] Appellant managed the family's finances. Appellee cared for the home and children. Both parties were employed, with Appellant being the greater financial contributor. Appellant worked with K-Force for Qiagen,[2] earning approximately $70,000.00 per year. Appellee, who is illiterate largely, was a Walmart employee garnering approximately $30,000.00 per year. The parties (until their separation) had a combined monthly income of $ 9,000.00.

The marriage began to disintegrate in 2012 when Appellee developed suspicions of Appellant's infidelity. She claimed to have discovered checks totaling $15,000.00[3] written by Appellant to Ms. Lovelean Mbah from the parties' joint checking account. Appellant executed these checks without Appellee's knowledge or consent. Appellee confronted Appellant regarding her suspicions, sparking an intense argument.

In January of 2014, Appellant blocked Appellee's access to the parties' joint account. This did not hinder apparently the parties' desire to salvage their marriage. They attempted to reconcile their differences and rekindle their marriage by taking a trip to

[1] Appellee and the four children continued to reside in the marital home after the parties' separation.

[2] Qiagen is a provider of sample and assay technologies for molecular diagnostics, applied testing, and academic and pharmaceutical research.

[3] Appellee's testimony and the physical evidence were a little inconsistent regarding the total amount of money Appellee gave to Ms. Mbha. The record shows, however, that Appellant wrote checks to Ms. Mbha totaling over $10,000.00, at a minimum.

Texas. They were intimate on this trip, resulting in the conception of their fourth child, K. A. The rekindling attempt proved ultimately a failure. Appellant vacated the martial home on 18 July 2014, leaving Appellee to care for the (soon-to-be) four children.

Appellant filed a complaint in the Circuit Court for Montgomery County, seeking a limited divorce, full child custody, alimony, and an order compelling Appellee to contribute to all family, personal, and real property costs. Appellee counterclaimed for an absolute divorce based on adultery, seeking full child custody, child support, alimony, and any other relief to which she may be entitled.

The circuit court held a *pendente lite* hearing on 14 January 2015, granting Appellee $1,514.00[4] per month in child support and $300.00 per week in *pendente lite* alimony to be paid by Appellant. Additionally, the circuit court found that each party should be responsible for paying their proportionate share of the work-related childcare expenses; specifically, Appellant was to pay seventy-one percent and Appellee twenty-nine percent. The parties entered into a consent order as to the custody of the four children, obligating that the "children of the parties, shall be in the primary residential custody of the [Appellee]," Appellee will reside in the marital home with the children for three years, and "the parties shall have joint legal custody of the children."

[4] Effective on 1 February 2015, Appellant was to pay Appellee $1,350.00 per month in child support until the fourth child, K. A., was born and Appellee returned from maternity leave. Once Appellee returned from maternity leave and began working again, child support would increase to $1,514.00 per month.

Appellant failed regularly to pay child support, as called-for by the *pendente lite* order. Appellee reminded frequently and promptly Appellant of the accumulation of unpaid child support. Without such support, Appellee was forced to apply for government assistance. Appellee asserts that Appellant contributed "0.00 to [] Appellee for her or the minor children's support from [18 July 2014], until [15 January 2015], resulting in poverty for [] Appellee and the minor children."

Appellant quit his job at Qiagen, enrolled in pharmacy school, and withdrew the balance in his 401 (k) plan. Appellant testified that he withdrew these funds and used them to pay child support, credit card debt, his attorney's fees, and his household expenses. Appellee contends, however, that Appellant used this money to support his "carefree single" life, maintain his relationship with Ms. Mbha, and purchase a car.

Trial on the merits began on 27 October 2015. At the conclusion of trial, the circuit court, ruling in favor of Appellee, stated it:

> T[ook] all the factors and evidence into consideration, including the assets and debt of each party, their respective incomes and abilities to be self-supporting, and the length of the marriage, [and] orders consistent with its oral opinion on [12 May 2016[5]], that it is fair and equitable to make the following adjustments of the parties' equities and rights concerning the distribution of marital [property], [it is ordered], that [Appellant], is granted an absolute divorce from [Appellee] . . .

[5] Although the circuit court refers in its final written order of 14 June 2016 to an "oral opinion" on 12 May 2016, which it states was "consistent" with the contents of its 14 June 2016 order, we could find no record of such an oral opinion. The parties' attorneys were questioned at oral argument regarding the oral opinion's absence in the record. They contended that the court's reference to an "oral opinion" was a typographical error. We shall proceed as if that is so.

> [Appellant's 401 (k) account valued at $22,826.77] will be subject to equitable distribution . . . [Appellee]'s request for alimony is granted . . . and [Appellant] shall pay [Appellee] [$250.00] per month for a period of three years as rehabilitative alimony. . . .

The circuit court based apparently its $22,826.77 marital property award from the starting point of the parties' agreement[6] that the total balance, at the time of Appellant's withdrawal, was $25,044.20. The court reached apparently the net amount of $22,826.77 by deducting $2,217.43 in early withdraw fees and penalties. Ultimately, the trial court found "that between January 2013 and October 2015, [Appellant] dissipated *a minimum* of $22,826.77 of his [401 (k)]." (emphasis added).

## ANALYSIS

### I. The Trial Court Included Appropriately the Net Proceeds of the 401 (k) as Dissipated Marital Property.

*a. Appellant's Arguments.*

Appellant avers that the circuit court considered erroneously the net proceeds of his 401 (k) to be dissipated marital property because the funds were not "used for marital or family expenses," i.e., payment of his attorney's fees, personal credit card bills, payments to his alleged paramour, and accrued child support payments. Moreover, Appellant (to his mind) contends the circuit court failed to consider "Appellee's financial

[6] Appellant disagreed initially regarding the net amount received from the closure of the 401 (k) account. Appellant's testimony was that he received upon withdrawal $16,000.00 or $17,000.00. It was not until he was shown a balance sheet at trial that he conceded the gross balance was $ 25,044.20 and that he received $22,826.77, after early withdrawal penalties were taken out.

mismanagement, [her persistent terrorization] of [] Appellant, [and] [her consistent accusations of Appellant's] infidelity[,] and similar relevant factors." According to him, consideration of these factors compelled a more fair attribution of the marital assets.[7]

*b. Appellee's Arguments.*

Appellee responds that there was credible evidence that Appellant dissipated his 401 (k) proceeds. Specifically, Appellant spent "$670.00 a month on transportation costs, $676.00 a month on credit card payments, [$800.00 per month payments on his automobile], and a total of $15,000.00 [in] loan[s] to [Ms. Mbha]." Thus, the evidence suggests "Appellant's expenditures were not [] reasonable, necessary[,] [or for] []marital purposes." Therefore, the circuit court considered correctly all factors and evidence when making an equitable distribution of the parties' marital property.

*c. Standard of Review.*

A trial court's judgment regarding dissipation is first a factual one, which we review under a clearly erroneous standard. "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Fuge v. Fuge*, 146 Md. App. 142, 180, 806 A.2d 716, 738 (2002). Md. Rule 8-131(c) 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 regard to the opportunity of the trial court to judge the credibility of the witnesses.

[7] The circuit court found that Appellant had $33,314.37 and Appellee $15,304.50 in respective Marital Property values.

We do not sit as a "super" trial court; rather, we search "the record for the presence of sufficient material evidence to support the [circuit court]'s findings. Additionally, all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party." *Lemley v. Lemley*, 109 Md. App. 620, 628, 675 A.2d 596, 599 (1996) (citing *Maryland Metals v. Metzner*, 282 Md. 31, 41, 382 A.2d 564, 570 (1978))

*d. Appellant Dissipated the 401 (k) Proceeds.*

The evidence supports a logical conclusion (as reached by the trial court) that Appellant dissipated the 401 (k) proceeds. At the outset, "[m]arital property means property, however titled, acquired by [one] or both parties during the marriage." MD. CODE FAM. LAW ART., § 8–201(e)(1). Therefore, "[p]roperty acquired by a party up to the date of the divorce, even though the parties are separated[,] is marital property." *Williams v. Williams*, 71 Md. App. 22, 34, 523 A.2d 1025, 1031 (1986); *see also* MD. CODE FAM. LAW ART., § 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."). Generally, "property disposed of before trial under most circumstances cannot be marital property," *Gravenstine v. Gravenstine*, 58 Md. App. 158, 177, 472 A.2d 1001, 1010 (1984), except where one spouse claims the other spouse improperly dissipated the property. *See Rock v. Rock*, 86 Md. App. 598, 618-20, 587 A.2d 1133, 1143 (1991).

Dissipation of marital property occurs "where one spouse uses marital property for his or her [] benefit for a purpose unrelated to the marriage at a time where the marriage

is undergoing an *irreconcilable breakdown*." *Sharp v. Sharp*, 58 Md. App. 386, 401, 473 A.2d 499, 506 (1984) (emphasis added). What matters is not that one spouse has expended, post-separation, some of the marital assets, rather, the question is what is the purpose behind the expenditure. *Heger v. Heger*, 184 Md. App. 83, 96, 964 A.2d 258, 265 (2009). A finding of dissipation aims to rectify the nefarious purpose of one spouse's spending for his or her personal advantage and thus compromises the other spouse in terms of the ultimate distribution of marital assets. *Id.*

When dissipation is found, the court may include, as extant marital property, property that was transferred, spent, or disposed of by the culpable spouse. *See Jeffcoat v. Jeffcoat*, 102 Md. App. 301, 311, 649 A.2d 1137, 1141 (1994). The initial burden of production rests with the spouse claiming dissipation to prove that the other spouse used the marital property during the marriage to prevent inclusion of the assets for monetary award consideration. *Id.* When this burden is shouldered, the other spouse is obligated to produce evidence sufficient to show that the expenditures were appropriate. *Hiltz v. Hiltz*, 213 Md. App. 317, 349, 73 A.3d 1199, 1218 (2013) (citing *Jeffcoat*, 102 Md. App at 311, 649 A.2d at 1141). Thus, "when the circuit court is called to assess the credibility of witnesses, the court is "entitled to accept—or reject—all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence." *Hiltz*, 213 Md. at 353, 73 A.3d at 1220 (emphasis omitted) (quoting *Omayaka v. Omayaka*, 417 Md. 643, 659, 12 A.3d 96, 105 (2011)).

Here, Appellee presented evidence of Appellant's suspicious expenditure of his 401 (k) proceeds sufficient to shift the burden to Appellant to prove the expenditures' appropriateness. For example, a spouse's sizable withdrawals from joint bank accounts under his or her control is sufficient to support a finding that the spouse dissipated the withdrawn funds. *Ross v. Ross*, 90 Md. App. 176, 191, 600 A.2d 891, 898–99 (1992) *vacated on other grounds*, 327 Md. 101, 607 A.2d 933 (1992). Here, Appellee testified that, "in July of 2014," Appellant closed and withdrew his 401 (k) account assets, and took or used the funds, without Appellee's consent, for predominantly non-marital purposes. Appellee presented testimony evincing that:

> Appellant spent $670.00 a month on transportation costs and $676.00 a month on credit card payments, [] he loaned [Ms. Mbha] $15,000.00 . . . Appellant finance[ed] a 2013 automobile for . . . $800.00 a month . . .[and,] Appellant['s] . . . expenditures were payments to his attorney, payment of credit card debt and payment of child support.

In *Sharp v. Sharp*, we held that a court may find dissipation where one spouse uses marital property for his or her benefit for a purpose unrelated to the marriage. 58 Md. App. at 401, 473 A.2d at 506.

Appellant testified that he used the withdrawn funds from his 401 (k) for payment of his attorney's fees, credit card debt, his household expenses, and child support.[8] Appellant's testimony, however, could be deemed fairly as vague and uncorroborated. In

[8] The record reflects only that two checks were drawn, however; one for $5,000.00 and another for $1,600.00. At oral argument, Appellant contended that the $5,000.00 check was to pay his attorney's fees and the $1,600.00 check to pay child support.

its assessment of the credibility of witnesses, the circuit court was entitled to accept (or reject) all, part, or none of the testimony of any witness, whether that testimony was contradicted or corroborated by other evidence. *Omayaka*, 417 Md. at 659, 12 A.3d at 105.

In addition to the evidence alluded to earlier, Appellee adduced the following details during cross and direct examination:

> [APPELLANT'S COUNSEL]: Ms. Akumbu, you testified about checks that were written by your husband to [Ms. Mbha], I believe, a courtesy copy for the court. I'm showing you what has been marked for identification as Defendant's Exhibit No. 1 Can you take a look at this document and tell me if you recognize it? Do you recognize the document?
> [APPELLEE]: Yes.
> [APPELLANT'S COUNSEL]: What is the document?
> [APPELLEE]: This check [Appellant] issued to [Ms. Mbah] . . . without my consent.
> [APPELLANT'S COUNSEL]: And how do you know that these are checks that were written by [Appellant] to [Ms. Mbha]?
> * * *
> [APPELLEE]: Because they all come from our joint account.
> * * *
> [APPELLEE'S COUNSEL]: On January 22, do you see another deposit from Fidelity Investment pension for $11,300.00?
> [APPELLEE]: Yes.p
> [APPELLEE'S COUNSEL]: What do you know about this $11,300.00 deposit?
> [APPELLEE]: What I know is the one that he wrote a check to [Ms. Mbha].
> * * *
> [APPELLEE'S COUNSEL]: In the past six months, have you been hospitalized?
> [APPELLEE]: Yes.
> [APPELLEE'S COUNSEL]: What was the purpose? Why were you there?
> [APPELLEE]: I was told that I had too much stress because [Appellant] bought furniture for [Ms. Mbha] worth $10,000.00. . . .

The circuit court was entitled to conclude that the purpose behind Appellant's expenditures between January 2013 and October 2015 was to reduce the amount of money available for equitable distribution.

This may be (and was) discerned as well from the following during Appellee's counsel's cross-examination of Appellant, where husband discussed his monthly travel and vehicular expenses expended in support of his choice to pursue pharmacy school, although knowing that his marriage was undergoing an irreconcilable breakdown:

> [APPELLEE'S COUNSEL]: . . . You listed your automobile payment as $370.00?
> [APPELLANT]: Yes.
> [APPELLEE'S COUNSEL]: And you listed your maintenance and tax and oil and gas and automobile insurance plus parking fees to total $670.00
> [APPELLANT]: Yes.
> * * *
> [APPELLEE'S COUNSEL]: So your car is a 2013 Toyota Venza[,] Correct? And it requires $41.00 every month in maintenance and tags and oil?
> * * *
> [APPELLANT]: That one is going towards maintenance more.
> [APPELLEE'S COUNSEL]: Okay. And [] you also have oil and gas listed for $60.00.
> [APPELLANT]: Yes.
> [APPELLEE'S COUNSEL]: And automobile insurance for $191.00
> [APPELLANT]: Yes
> * * *
> [APPELLEE'S COUNSEL]: [I]f we took out [your] $670.00 [vehicular expenditures] that would give you a break so that you can contribute to your children?
> [APPELLANT]: It is going to give me flexibility to contribute to my children but *then it is going to inconvenience me* to follow up with my clinical rotations . . . .

(Emphasis added).

We hold that the circuit court exercised its discretion appropriately in finding that Appellant committed dissipation and including the dissipated amount it found as part of "husband's marital property" available for determining a marital award.

## II. The Award of Rehabilitative Alimony to Appellee was Appropriate.

*a. Appellant's Argument.*

Appellant maintains that the trial court misapplied the statutory factors in MD. CODE FAM. LAW ART., § 11-106(b).[9] Appellant believes "it is patently clear, that

[9] In making an alimony 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;
(9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
(10) any agreement between the parties;
(11) the financial needs and financial resources of each party, including:
(i) all income and assets, including property that does not produce income;
(ii) any award made under §§ 8-205 and 8-208 of this article;
(iii) the nature and amount of the financial obligations of each party; and
(iv) the right of each party to receive retirement benefits; and
(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from

(Continued…)

Appellee should not have been awarded alimony." Appellee failed to seek opportunities to further her education to place her in a better position to support the family and herself. Moreover, Appellant contends that the trial court erred in neglecting to consider Appellee's "fraudulent[ly] [filed] tax return . . . Appellee's unsubstantiated claims of abuse and adultery, and Appellee's unsubstantiated claims of [] physical ailments [suffered at Appellant's hand]."

*b. Appellee's Argument.*

In response, Appellee contends the trial court applied the § 11-106(b) factors correctly, considered all of the evidence, and fashioned Appellee's appropriate and modest rehabilitative alimony award.

*c. Standard of Review.*

The statutory scheme regarding alimony awards provides trial court judges with a great deal of discretion in weighing the relevant factors to arrive at fair and appropriate results. *Blaine v. Blaine*, 97 Md. App. 689, 699, 632 A.2d 191, *aff'd*, 336 Md. 49, 646 A.2d 413 (1994). That said, each case depends on its idiosyncratic facts and circumstances. *Alston v. Alston*, 331 Md. 496, 507, 629 A.2d 70, 75 (1993).

When reviewing a trial court's alimony award, we will not reverse the judgment unless we are able to conclude that "the trial court abused its discretion or rendered a

(…continued)

> whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

MD. CODE FAM. LAW ART., § 11-106(b).

judgment that was clearly wrong." *Malin v. Mininberg*, 153 Md. App. 358, 414-15 837 A.2d 178, 211 (2003) (quotation marks and citations omitted). Moreover, "[we] accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity when conducting divorce proceedings." *Id.* (quotation marks and citations omitted). As long as the trial court's findings of fact are not clearly erroneous and the ultimate decision is not arbitrary, we must affirm, even if we might have reached a different result on the same record. *Id.* The trial court is not expected necessarily to expound explicitly on each of the required statutory factors; as long as the record reflects implicitly that all of the required factors were considered, we will presume that each factor was considered. *Hoffman v. Hoffman*, 93 Md. App. 704, 724, 614 A.2d 988, 998 (1992).

*d. The Award of Rehabilitative Alimony was Appropriate.*

Alimony awards "are founded upon notions of equity; equity requires sensitivity to the merits of each individual case without the imposition of bright-line tests." *Boemio v. Boemio*, 414 Md. 118, 141, 994 A.2d 911, 924 (2010) (quoting *Tracey v. Tracey*, 328 Md. 380, 393, 614 A.2d 590, 597 (1992)). The Court of Appeals in *Solomon v. Solomon*, 383 Md. 176, 194–95, 857 A.2d 1109, 1119–20 (2004), opined:

> It is well settled in Maryland that the statutory scheme generally favors fixed-term or so-called rehabilitative alimony, rather than indefinite alimony. Underlying Maryland's statutory preference is the conviction that the purpose of alimony is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently. . . .

(quotation marks and citations omitted).

The goal of rehabilitative alimony is "to vitiate any further need for alimony." *Hull v. Hull*, 83 Md. App. 218, 223, 574 A.2d 20, 22 (1990). "The twelve factors [of § 11-106(b)] . . . are non-exclusive, and 'although the court is not required to use a formal checklist, the court must demonstrate consideration of all necessary factors.'" *Solomon*, 383 Md. at 196 n. 15, 857 A.2d at 1120 n. 15 (quoting *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143, 740 A.2d 125, 130 (1999)).

The trial court observed that Appellee is thirty-six years old, suffers from both emotional and physical health issues (for which she receives emotional and physical therapy), and does not have a high school education, a GED, or reading or computer skills. Appellee is a Walmart employee making approximately $30,000.00 annually. She renders all care for the parties' four children, including managing their daily activities—school and track and field, especially—while working at Walmart approximately thirty-three hours per week.

As of trial, Appellee and Appellant no longer shared the same standard of living as they did during their thirteen-year marriage. Appellant, forty-three years old, earned $70,000.00 annually, contributing then a majority of the parties' combined monthly income of $9,000.00. Appellee maintained the home and cared for their children.

Appellant quit his job, enrolled in pharmacy school, and vacated the marital home. Appellant receives $56,000.00 in student loans per year, as well as income earned as a

pharmacy intern.[10] Appellee, on the other hand, was forced to apply for government assistance because of Appellant's lack of financial support of the family. Appellee testified that, pre-separation, Appellant blocked her access to their joint account, berated and belittled her, and forged her signature on financial documents. The trial court drew inferences adverse to Appellant regarding his post-marital spending habits on his vehicle, Ms. Mbha, and his failure to pay child-support consistently or timely.

Although Appellant maintained that Appellee filed a "fraudulent tax return . . . , and Appellee's [] claims of abuse[,] adultery[,] and [claims of] suffered physical ailments [because of Appellant's conduct are unsubstantiated]," the trial court, consistent with *Hiltz v. Hiltz*, 213 Md. App. at 349, 73 A.3d at 1218, was "entitled to accept—or reject—all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence." The circuit court found more compelling Appellee's testimony, and took that into account when it "[took] all the factors and evidence into consideration" and awarded Appellee $250.00 in rehabilitative alimony per month for three years.

[10] The record does not reflect the amount of this income as a pharmacy intern.

We hold that the circuit court awarded correctly Appellee rehabilitative alimony. The trial court exercised sound discretion and fashioned an appropriate alimony award. We shall not disturb its judgment.

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