Circuit Court for Anne Arundel County
Case No.: C-02-FM-16-003373

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2237

September Term, 2017

MATTHEW REED

v.

JENNIFER SAPP

Kehoe,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 8, 2018

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

By written order dated December 28, 2017, the Circuit Court for Anne Arundel County entered judgment of absolute divorce in favor of Jennifer Sapp ("Mother"), appellee, and granted Mother and Matthew Reed ("Father"), appellant, joint legal custody of the couple's children, with tie-breaking authority to Mother, primary physical custody to Mother, and visitation and holiday and summer access to Father. The court further awarded Mother child support in the amount of $2,500 per month, indefinite alimony in the amount of $4,000 per month, and a monetary award to adjust the parties' equities in marital property in the amount of $24,459.

Father timely appealed the order of the circuit court, raising the following questions for our consideration:

1. Did the Circuit Court err in granting tie-breaking authority to Appellee when both Appellee and Appellant testified that joint legal custody was in the children's best interest, Appellee did not request to be the tie-breaker, and the Circuit Court found that an analysis of the factors militated in favor of joint custody?

2. Did the Circuit Court err in granting Appellee primary physical custody of the minor children and Appellant only four overnights every other week and in failing to follow the proposed holiday schedule when both Appellee and Appellant testified that a custody and holiday schedule in which Appellant would have significantly more time with the minor children was in the minor children's best interest?

3. Did the Circuit Court err in awarding indefinite alimony to the Appellee in the amount of $4,000 per month?

4. Did the circuit court err when, in determining the monetary award, it failed to reduce the value of Appellant's solely-titled boat by the lien on it when both parties agreed to the amount of the lien and placed the lien on their Joint Statement of Marital and Non-Marital property?

For the reasons set forth below, we conclude that the circuit court, in awarding Mother indefinite alimony, did not properly consider whether the respective standards of living of Mother and Father would be unconscionably disparate once Mother makes as much progress toward becoming self-supporting as can be reasonably expected. Therefore, we shall vacate the award of indefinite alimony and remand to the circuit court for further findings in accordance with this opinion. In addition, because Mother concedes, and we agree, that the circuit court erred in failing to account for a lien on marital property titled solely to Father in calculating the monetary award due to Mother, our remand order also requires a recalculation of the appropriate monetary award in accordance with this opinion. We perceive no error or abuse of discretion in the custody and visitation orders of the circuit court and therefore affirm the remainder of the circuit court's judgment.

FACTS AND LEGAL PROCEEDINGS

Mother and Father married in a religious ceremony in Alexandria, Virginia on November 7, 1998. Two children were born to the marriage, daughter N.R. in August 2003, and son M.R. in June 2005.

Problems in the marriage led to the couple entering counseling in 2012 and 2014. Despite the problems, the marriage continued until March 2016, when Mother and Father agreed to separate. Any hope of reconciliation ended in May 2016, when Mother learned that Father had begun an extra-marital affair with one of her closest friends in 2015.

On August 18, 2016, Mother filed a complaint for absolute divorce, alleging that Father had committed adultery and requesting, *inter alia*, alimony, primary physical and

joint legal custody of the minor children, reasonable child support, use and possession of the family home and family use personal property, and a monetary award after adjusting the parties' rights in marital property. Father filed a counter-complaint requesting joint legal and physical custody of the children, or, in the alternative, sole legal and primary physical custody of the children, and an award of child support in accordance with the Maryland Child Support Guidelines.

The circuit court heard the matter on June 20-22, 2017. Mother, aged 53 at the time of the hearing, testified that after encountering "[n]ormal marital difficulties" relating to intimacy issues and financial disagreements, and despite partaking in couples' counseling to repair the marriage in 2012 and 2014, she and Father decided to separate in March 2016. Father signed a lease for an apartment a few miles away from the marital home effective May 1, 2016, but he never moved in and broke the lease in September 2016.[1]

In May 2016, Mother sensed some impropriety in the relationship between Father and their neighbor and her friend, Tiffany Dean. That suspicion was confirmed when she found a pair of women's panties in Father's briefcase. When she confronted Father about

[1] Father paid monthly rent of approximately $1700, plus approximately $50 per month for utilities, on the apartment during the lease period. Father explained that he had not moved into the rental after the lease began in May 2016 because he was not comfortable moving out of the marital home without an agreement with Mother regarding access to the children. At the time of the hearing, Mother and Father were both still residing in the marital home, albeit in separate bedrooms.

the panties, he would not admit to an affair.[2] Mother thereafter retained a private investigator to obtain proof of Father's infidelity. Mother said the marriage was irreparable once she learned of her husband's affair with one of her "closest friends."

On or about May 20, 2016, when Mother and Father told the children of their plan to separate, the children cried and were "kind of hysterical." Mother did not tell the children about Father's infidelity because she thought it would be detrimental to them; she believed Father to be "the indirect beneficiary" of her decision to say nothing to the children about his affair.

After receiving news of the separation, N.R. developed obsessive-compulsive tendencies, which required counseling to alleviate, along with physical anger toward Mother and Father. M.R. developed a fear about spending the night away from home, always wanting to be in the presence of his parents. By the time of the hearing, both children's issues had improved to some degree.

Mother explained that she held two master's degrees and licensure as a Licensed Graduate Social Worker. She described her ownership of Aging Services Management, an

[2] In fact, Father continued to deny any infidelity until several weeks before the divorce hearing. At the hearing, Tiffany Dean, subpoenaed as a witness for Mother, admitted that she and Father had begun a sexual relationship in 2015, during his marriage to Mother, and that the relationship was ongoing at the time of the hearing. Ms. Dean was hopeful that the relationship with Father would continue, but she said that they and Mother were attempting to keep the existence of the affair from their children (the Deans also have two children, who are friends with the Sapp/Reed children), to "make sure that nobody gets hurt." Ms. Dean and her husband were also involved in a contentious divorce at the time of the hearing.

LLC she operates from her home, which helps families and seniors navigate the healthcare system. She said she generally works during the children's school hours and has been self-employed, by agreement with Father, since 2000. In 2016, her estimated total income was $48,000, less the $17,000 she paid the two independent contractors she employs.

Mother acknowledged that she would likely have to "put in more hours" after the divorce to increase her business and income.[3] Currently, she does not consider herself self-supporting, as she works part-time and is the primary caregiver for the children. She labeled the family's lifestyle "fortunate," with the ability to "meet all of our needs and many of our wants."

Mother expressed her desire to share joint legal custody of the children with Father. She believed the pair communicated about the children in a meaningful way, as they had when they were together as a couple, and assumed they would continue to do so in the future. She acknowledged that both children love their father and that he is a good dad. Even so, she sees herself as the "primary parent, for 80, 90 percent of the time." She therefore sought primary physical custody, with Father having one night a week overnights with the children, along with every other weekend, and alternating holidays and extended vacation time with each parent.

Father, aged 48 at the time of the hearing, testified that he is an attorney employed as Chief Counsel of the Office of Financial Research, which is part of the U.S. Treasury

[3] She had also reconsidered a part-time job offer she had received and turned down in 2015.

Department. His annual income in that position is approximately $245,000, plus bonuses. His employment benefits include paid vacation and sick leave, health, dental, and vision insurance, and retirement plans.

Until 2016, his work hours were approximately 7:30 a.m. until 7:30 p.m., and he had travelled for business for several days at a time. Since then, he had stepped down from a position that required so much travel (without affecting his salary) and now came home early on Thursdays to help with the children. He testified that both he and Mother have always been involved as parents with the children's school and home lives, and he believed that they would be able to co-parent the children after the divorce.

Father agreed with Mother's testimony that they had entered counseling in 2012, characterizing the need for therapy as arising from his concern that the family was not saving enough money and was spending more than it should. In addition, the couple was "not having much of a sex life" in the years before 2012. After 12 to 18 months of counseling, Father reached out to the counselor again in 2014 because arguments were increasing between him and Mother, and he did not feel deeply connected to her.

Father admitted to the affair with Ms. Dean and conceded that beginning the relationship during his marriage to Mother was a mistake that he and his children would always have to live with. He denied any intention to move in with Ms. Dean or to make any of their children aware of their relationship. Grateful that Mother had acknowledged how much he loved the children and they loved him, he worried that if the children found

out about the affair—a "complex adult emotional situation"—they would become estranged from him.

Father explained that he had signed a lease on a new residence, which had begun on June 1, 2017, with rent of $2,200 per month for the first 6 months and $2,500 per month thereafter. The house is approximately three miles from the family residence and on the bus route to the children's schools.

Father shared with the court his desire for joint physical custody of the children, on the ground that it is in their best interest for him to have custody following a two-week schedule: from Wednesdays after work until Friday mornings when they leave for school on week one, and Wednesdays after work until Monday mornings on week two. He believed he and Mother would be able to share custody in that manner and could reasonably split summer vacation time and other holidays. He also perceived no problem sharing joint legal custody with Mother.

Father presented the testimony of a vocational rehabilitation counselor, who was asked to render an opinion about Mother's employability and future earning potential. Without having met with Mother, instead relying on deposition testimony and other discovery in this matter, the expert opined that Mother could obtain employment within three months as a full-time assistant administrator for an assisted living facility earning approximately $72,000 per year, and increasing to approximately $96,000 per year within three to five years as her experience increases. The expert acknowledged the challenge of Mother having been out of the workforce for approximately 17 years but discounted the

brevity of Mother's work history before becoming self-employed and the fact that she had been laid off from two of those positions and left one after a short period of time because she was unhappy and "wasn't very good at what [she] was doing."

All the character witnesses presented by Mother and Father agreed that they are excellent parents. The testimony was undisputed that Mother is "a phenomenal parent" who "always puts the children first" and that Father is "an involved parent, motivating, caring."

In closing, Mother asked for a grant of absolute divorce, indefinite alimony in the amount of $5,500 per month, child support in the amount of $1,980 per month, and a monetary award of $30,066 to equalize the couple's assets. In her view, the disparity in earnings between her and Father, the length of their marriage, Father's infidelity, and the lifestyle to which the family was accustomed supported a grant of indefinite alimony. She further advocated having primary physical custody of the children, with five overnights with Father and nine with her during each 14-day period, along with alternating holidays. Finally, she asked for use and possession of the family home and possessions.

Father sought an additional four overnights during each one-month period but agreed to the proposal of joint legal custody. With regard to balancing the equities with a monetary award, Father claimed that some property included in Mother's calculations was non-marital and argued it should not be included in the award. Father acknowledged that "this is a rehabilitative alimony case," but claimed that indefinite alimony to Mother was inappropriate.

Given the complex issues, the circuit court held the matter *sub curia*. On December 28, 2017, the court filed a written memorandum opinion.

In determining the best interest of the children regarding legal custody, the court specifically considered and discussed the factors set forth in *Taylor v. Taylor*, 306 Md. 290 (1986), which suggested to the court that joint legal custody with tie-breaking authority to Mother on "fundamental issues" was appropriate. In determining the best interest of the children regarding physical custody and access, the court specifically considered and discussed the factors set forth in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1977), which the court found to be in favor of primary physical custody to Mother, with reasonable access to Father, as set forth in the court's judgment of absolute divorce.[4]

[4] The non-exhaustive list of factors be considered by a court when determining an appropriate custody arrangement include: (1) fitness of the parents, (2) the character and reputation of the parties, (3) the desire of the natural parents and any agreements between them, (4) the potential for maintaining natural family relations, (5) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment, (6) material opportunities affecting the future life of the child, (7) the age, health, and sex of the child, (8) the residence of the parents and opportunity for visitation, (9) the length of separation from natural parents, (10) whether there was prior voluntary abandonment or surrender of custody of the child, (11) potential disruption of the child's social and school life, (12) geographic proximity of parental homes, (13) demands of parental employment, (14) financial status of the parents, (15) impact on state or federal assistance, (16) benefit to parents, (17) capacity of parents to communicate and to reach shared decisions affecting the child's welfare, (18) willingness of parents to share custody, (19) the relationship established between the children and each parent, and (20) the sincerity of the parent's request. *Taylor*, 306 Md. at 304–11; *Sanders*, 38 Md. App. at 420.

As for child support in this above-guidelines case, the court used its discretion to set Father's child support obligation to meet the best interest of the children. Given the family's standard of living, the court ordered Father to pay $2,500 per month in child support beginning in January 2018.

Because Mother is self-employed with income of approximately $36,000 per year and Father is employed with income of approximately $245,000 per year, plus bonuses and benefits, the court found Mother unable to be wholly self-supporting, especially given her age and exclusive work history in the same field for the past 17 years.[5] Considering the disparity in the parties' income and other factors, the court ordered Father to pay indefinite alimony to Mother in the amount of $4,000 per month beginning in January 2018.

To "adjust the equities in the marital property, based upon the titling of the property," the court found that Father is "in a comfortable economic circumstance to afford to pay a marital award in addition to his obligations towards the marital home, alimony and child support," while Mother "has limited income and may need to rely on a marital award in addition to any alimony and child support to meet her obligations." Mother and Father were therefore ordered to agree upon the disposition of items of marital property, other than the family home and possessions, or sell them within six months of the entry of judgment of divorce. The court found Mother and Father to have equitable interests in

[5] In so doing, the court "categorically reject[ed]" the opinion of Father's expert witness that Mother can, "practically overnight," find full-time employment and progress financially to earn approximately $96,000 annually within the next three years.

each other's retirement accounts, which were to "be distributed on an if, as and when basis, according to the *Bangs* formula."[6] As Father had sole title to remaining marital property valued at $87,804 and Mother had sole title to remaining marital property valued at $38,886, the court found Mother entitled to a marital award from Father in the amount of $24,459 to "adjust the equities in some marital property," to be paid from Father's share of the net proceeds from the sale of the marital home at settlement, after the award of use and possession of the family home and family use personal property expires on July 31, 2019 and the property is sold.

The court also entered a judgment of absolute divorce in favor of Mother. In its written judgment, the court set forth the physical custody schedule on a bi-weekly schedule, as it pertained to each parent, along with two weeks to each parent during summer breaks. The order also created a holiday custody schedule for the children.

DISCUSSION

I. and II.
Custody Issues

Father first contends that the circuit court erred or abused its discretion in granting him and Mother joint legal custody of the children, with tie-breaking authority to Mother. Because Mother did not request tie-breaking authority, and because he and Mother do not have poor communication, which could provide a valid basis for the grant of tie-breaking authority, Father stresses that the judge's error was apparent because the court failed to cite

[6] The "*Bangs* formula" is a formula for the division of pension payments as established in *Bangs v. Bangs*, 59 Md. App. 350 (1984).

any facts to show that an award of tie-breaking authority to Mother is in the children's best interest.

Second, Father avers that the circuit court erred in granting Mother primary physical custody of the children with only four overnights with him during each two-week period. He is also aggrieved by the court's failure to follow the parties' proposed holiday schedule, when both he and Mother agreed that more time with him would be in the children's best interest.

Resolving custody disputes is considered "one of the most difficult and demanding tasks of a trial judge," requiring "thorough consideration of multiple and varied circumstances, full knowledge of the available options, including the positive and negative aspects of various custodial arrangements, and a careful recitation of the facts and conclusions that support the solution ultimately selected." *Taylor*, 306 Md. at 311. In child custody cases, "the power of the court is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interest of the child." *Id*. at 301-02.

This Court reviews a trial court's decision in a child custody case on both the law and the evidence. "[W]hen we scrutinize factual findings, we apply the clearly erroneous standard; when we review issues of law, we do so *de novo*; and, finally, we disturb the trial court's ultimate conclusion on the question of custody 'only if there has been a clear abuse of discretion.'" *Karen P. v. Christopher J.B.*, 163 Md. App. 250, 264 (2005) (quoting

Davis v. Davis, 280 Md. 119, 125–26 (1977)). In our review, "we give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

A. Legal Custody

As we recently explained in *Kpetigo v. Kpetigo*, -- Md. App. – (2018), WL 4162790, at *11, (No. 2122, SEPT.TERM, 2017, filed Aug. 30, 2018):

> Legal custody encompasses "the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor v. Taylor*, 306 Md. 290, 296, 508 A.2d 964 (1986). Likewise, "[j]oint legal custody means that both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other." *Id.* Although often preferable to vesting sole legal custody in one parent, joint legal custody can be challenging because "[c]onflicts in the post-divorce period typically revolve around one or more of several areas including unresolved marital issues, lingering anger and hurt about the divorce, conflicts with or over new partners, or fruitless power struggles that revolve only around efforts to 'win' over the ex-spouse, such 'wins' often being a Pyrrhic victory." *Shenk* [*v. Shenk*], 159 Md. App. [548,] 559, 860 A.2d 408 [(2004)].
>
> Tie-breaking authority "proactive[ly] [ ] anticipate[s] a post-divorce dispute." *Id.* at 560, 860 A.2d 408. The tie-breaker can and should only be used when both "parties are at an impasse after deliberating in good faith" and by "requir[ing] a genuine effort by both parties to communicate, as it ensures each has a voice in the decision-making process." *Santo* [*v. Santo*], 448 Md. [620,] 632–33, 141 A.3d 74 [(2016)]. We review a trial court's custody determination for abuse of discretion, *Petrini v. Petrini*, 336 Md. 453, 470, 648 A.2d 1016 (1994), and we reverse only when the court's ruling is "clearly against the logic and effect of facts and inferences before the court." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312, 701 A.2d 110 (1997) (cleaned up).

Joint legal custody with tie-breaking authority is a form of joint legal custody and "'has unquestionably been recognized in Maryland.'" *Id*. (quoting *Santo*, 448 Md. at 632–33); *see also Shenk*, 159 Md. App. at 560. Tie-breaking authority is often granted when the parents cannot effectively communicate with each other regarding matters pertaining to their children. *Santo*, 448 Md. at 646.

Here, the trial court, in its order granting joint legal custody to Mother and Father, with tie-breaking authority to Mother, appropriately addressed the *Taylor* factors and took the children's best interest into account. The court found that both Mother and Father are fit parents who care deeply for their children. But, although the court found that the parents "have managed to communicate effectively concerning their children to date," it cautioned that "they have not yet lived apart fully and have had no experience in dealing with the new dynamics of two households."

In the court's view, that factor was significant in its award of joint legal custody with tie-breaking authority, which, the court said, is "best held by the party with primary physical custody due to their day-to-day responsibilities," that is, Mother. In addition, the court questioned Father's judgment in engaging in an extra-marital affair without regard to the potential emotional harm to the children and in failing to address the issue with the children while Mother shielded the children from negative information about the affair.

We find no clear error in the court's fact-finding, nor an abuse of discretion in its conclusion. There is no dispute that Mother and Father have, thus far, communicated effectively about decisions pertaining to the children, but that is, at least arguably, easier

to do while living in the same house without much change to their and the children's daily routines. Once Father moves to his new residence, if he has not already done so, maneuvering the difficulties of maintaining two households with the concomitant increase in expenses, the weekly change in physical custody of the children, the remnants (or return) of the children's psychological difficulties in response to the separation and new living arrangement, the possibility of Father's continuing relationship with Ms. Dean and the children's reaction to the eventual discovery of that relationship, Mother's reaction once the children and the family's social circle find out about the affair, and Mother's lingering feelings about "covering" for Father's infidelity with the children may negatively impact the parents' ability to communicate effectively in the future.[7] And, of course, the trial court was in a position to witness the demeanor of Mother and Father during the three-day divorce hearing, privy to nuances in their attitudes toward each other that are not apparent from our cold reading of the transcripts.

Although this is not a case like *Santo* or *Kpetigo*, in which the parents could not communicate effectively under any circumstances, or like *Shenk*, in which Mother specifically requested tie-breaking authority, there is nothing in any of those cases to suggest that an award of tie-breaking authority, which is "not a rare or extraordinary measure," *Kpetigo*, ____ Md. App. at _____, 2018 WL 4162790 at *12, is limited to their facts. In fact, the Court of Appeals, in *Taylor*, 306 Md. at 303, expressly acknowledged

[7] Father admitted that he feared estrangement from the children once they discovered the affair.

the existence of "multiple forms" of joint custody and stated that "[f]ormula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made."[8]

Moreover, the award of joint legal custody places Mother and Father on equal footing in their decision making, with the tie-breaking provision permitting Mother to make the final call if, and only if, she and Father reach an impasse after deliberating in good faith. *Santo*, 448 Md. at 632. If, as Father suggests, he and Mother are able to continue communicating about the children's welfare in a meaningful way, the tie-breaking provision will never be called into play. And, if problems do arise between them, the tie-breaking provision requires a genuine effort by Mother and Father to communicate, so "it ensures each has a voice in the decision-making process" and that Mother, the parent with tie-breaking authority, does not abuse the privilege. *Id*. at 633-34. If she does, the circuit court has the means to sanction her abuse. *Id*. at 634.

[8] Regarding Father's suggestion that the circuit court abused its discretion in granting tie-breaking authority to Mother when she never requested it, we point out that a trial court's discretion in ordering custody is not governed by the parties' formal requests, but by the children's best interests. *See Kerns v. Kerns*, 59 Md. App. 87, 94 (1984) ("[t]he fact that the parties do not request joint custody is no limitation upon a court's authority to award it"). A child has "an indefeasible right to have any custody determination concerning him made, after a full evidentiary hearing, in his best interest." *Flynn v. May*, 157 Md. App. 389, 410 (2004). As the Court of Appeals noted in *Santo*, 448 Md. at 636-37, "[f]or us now to constrain trial courts in fashioning awards in the best interests of the child at the center of a dispute would be plainly inconsistent with our recognition in *Taylor* that such courts have broad and inherent power as equity courts to deal *fully and completely* with matters of child custody. In short, trial courts have broad discretion in *how* they fashion relief in custody matters." (emphasis in original; internal quotation marks, citation and footnote omitted).

In order for us to set aside the tie-breaking provision of the custody order, we must conclude that the circuit court's decision was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994). The record before us in this matter does not support such a conclusion.

B. Physical Custody

"'Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody,'" while "'[j]oint physical custody is in reality "shared" or "divided" custody. Shared physical custody may, but need not, be on a 50/50 basis.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 152 n.1 (2012) (quoting *Taylor*, 306 Md. at 296–97).

In determining the issue of physical custody and access to the Sapp/Reed children, the circuit court expanded on its analysis for the grant of legal custody and considered and discussed the *Sanders* factors before granting primary physical custody of the children to Mother and ordering that "Father shall have access every other week, from Thursday after school (or 5:00 PM if no school) until Monday morning at school (or 9:00 AM if no school)," along with two "weeks" each summer, with a "week" defined as "Friday at 5:00 [PM] until the Sunday a week later at 5:00 PM (total of 9 nights)." The court also set forth a detailed holiday schedule for custody or access. The court's order of four overnights to Father during each two-week period deviated from Father's request for equal access, and

the holiday schedule deviated from Father's proposed holiday schedule, but only in some of the start/end times for the holidays.[9]

In reaching its decision, the court considered ten *Sanders* factors and found six of them to be neutral or not applicable, including a finding that both parents are fit to have physical custody. Of the remaining four, however, the court found in favor of Mother, as follows:

> Character and reputation of the parties: While the court found Mother to be of excellent character and reputation, it called Father's character "profoundly in question due to his sexual dalliance with a family friend and neighbor in such close proximity and with such potential emotional harm to his teenage children."
>
> Desire of the parents and agreements between them: With no agreement between the parents, the court concluded that "[s]hared custody with equal access would be confusing and disruptive to the teenagers' busy lives."
>
> Potentiality of maintaining natural family relations: Mother had sought to shield the children from negative information regarding Father's affair, but Father had not yet confronted the issue with the children. In the court's view, "[t]his factor is potentially so volatile as to favor primary physical custody for Mother."[10]

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[9] For example, Father proposed that he have the children every year for the observance of Martin Luther King Day, from Friday at 4:00 p.m. through Monday at 8:00 p.m. (Father's Proposed Parenting Arrangement), while the court granted his request but defined the holiday as "Friday at 5:00 p.m. through Monday at 7:00 p.m."

[10] Although Father complains that the *fact* of his affair should not adversely impact his access to his children, we disagree with his assertion that the court based its grant of primary physical custody to Mother on that ground. The court did not find Father unfit to have custody as a result of the fact that he had an affair. Instead, the court considered the negative *effect* the affair will likely have on the children, once they are apprised, because of Father's refusal to address his infidelity and Mother's decision to keep it from the children. The court determined the issue is so volatile, given the circumstances, that it will affect the welfare of the children, a permissible factor in weighing the grant of custody. *See Davis*, 280 Md. at 127.

> Age, sex and health of the children: Noting that the children were 14 and 12 years of age, the court pointed out that "[t]eenagers present more complex management issues for their parents as they explore their own desire for independence and increasingly favor time with their friends and in extracurricular activities, over their parents. This factor favors a primary custodian, to provide a stable foundation for the children and the security of identifying 'home,' while enjoying significant time with both parents."

Father complains that he was not awarded joint physical custody, nor the exact holiday schedule he desired. Upon careful reflection, however, the circuit court concluded that a 50/50 arrangement was not in the teenage children's best interest. Instead, the court awarded Father four of every fourteen overnights, and all the holidays (albeit with different hours) and summer access he sought.[11] We see no clear error in the court's weighing of the testimony and evidence presented by the parties, and the record reveals that the circuit court properly considered the best interest of the children. While the visitation award to Father is not equal with Mother's access, the division of time does not amount to an abuse of discretion. *See*, *e.g., Gordon v. Gordon*, 174 Md. App. 583, 638 (2007) (concluding that five of 14 overnights with the father was "generous visitation").

III.
Indefinite Alimony

Father next assigns error to the circuit court's award of indefinite alimony to Mother. Although he acknowledges that Mother is entitled to rehabilitative alimony, he disagrees that she is entitled to life-long support, which should only be awarded in

[11] In fact, the court awarded Father more visitation than he asked for during summer vacations. Father had requested two "weeks," with a week comprising seven days/six nights, while the court defined a "week" as nine overnights.

exceptional circumstances not present in this case. Even accepting that Mother might only work part-time to be available for the children, Father continues, in six years both children will have graduated from high school, and Mother will have no reason not to obtain full-time employment then, a factor the circuit court did not consider in its alimony award.

Maryland's appellate courts "'will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings.'" *Malin v. Mininberg*, 153 Md. App. 358, 415 (2003) (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)). We review an award of alimony under an abuse of discretion standard and uphold the factual findings of the trial court unless clearly erroneous. *Solomon v. Solomon*, 383 Md. 176, 196 (2004).

The circuit court's analysis of whether to award alimony and the amount to award necessarily includes the factors described in Md. Code (1984, 2012 Repl. Vol.), §11-106(b) of the Family Law Article ("FL"):

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
> (3) the standard of living that the parties established during their marriage;
> (4) the duration of the marriage;
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
> (6) the circumstances that contributed to the estrangement of the parties;
> (7) the age of each party;
> (8) the physical and mental condition of each party;
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
> (10) any agreement between the parties;
> (11) the financial needs and financial resources of each party, including: (i) all income and assets, including property that does not produce income; (ii)

> any award made under §§8-205 and 8-208 of this article; (iii) the nature and amount of the financial obligations of each party; and (iv) the right of each party to receive retirement benefits; and
> (12) whether the award would cause a spouse who is a resident of a related institution as defined in §19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Although the court is not required to use a formal checklist, and each individual factor in the statute does not have to be satisfied, the court is required to demonstrate that it at least took each factor into consideration when making its findings prior to granting alimony. *Simonds v. Simonds*, 165 Md. App. 591, 604-05 (2005) (quoting *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999)). The party seeking alimony bears the burden of meeting the statutory factors. *Thomasian v. Thomasian*, 79 Md. App. 188, 195 (1989).

The statutory scheme governing alimony "'generally favors fixed-term or so-called rehabilitative alimony,' rather than indefinite alimony." *Solomon*, 383 Md. at 194 (quoting *Tracey*, 328 Md. at 391). The preference for rehabilitative alimony stems from "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.'" *Id.* at 194-95 (quoting *Tracey*, 328 Md. at 391).

Notwithstanding the general rule favoring fixed-term alimony, the statute recognizes two "exceptional circumstances" in which a court may award indefinite

alimony. *Roginsky*, 129 Md. App. at 142. Pursuant to FL §11-106(c), the circuit court may award a requesting spouse alimony for an indefinite period if it finds that:

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

Here, the court specified that it had "considered all factors contained in Family Law §11-106 in determining the fair and equitable basis for an alimony award," and it set forth its analysis for each factor, which we summarize.

The circuit court found that Mother, aged 53 at the time of the hearing, is self-employed suitably (and has been for the past 17 years), earning approximately $36,000 per year. According to the court, her employment and salary history "do not allow [Mother] to be wholly self-supporting."

Prior to the separation after 19 years of marriage, Mother and Father, aged 48, had lived "a very comfortable lifestyle, which included ownership of a five[-]bedroom home, new cars, boats and vacations for themselves and their two children as well as a standard of living which permitted [Mother] to be the primary caregiver for the parties' children and not to be required to work on a full-time basis outside the home." Mother had also been "primarily responsible for the operations of the household," while Father was the "primary financial provider throughout the marriage." Father's approximate salary of $245,000 per

year provided him the ability to pay alimony, which is tax deductible to him and taxable to Mother,[12] along with child support, while still maintaining a comfortable lifestyle.

The court also took into account a monetary award of $24,459 to Mother in the calculation of alimony and determined that Mother and Father would be entitled to receive retirement benefits. In considering the family use marital home and allocation of expenses, the court explained that during Mother's short period of possession of the family home, she and Father would share expenses for that home. Thereafter, Mother and Father would be required to acquire their own residences.

The court found that Father's extra-marital affair, which he continued to deny nearly until the divorce hearing, and which was ongoing at the time of the hearing, contributed to the estrangement of the parties. In addition, Father had rented a home he had never lived in, instead remaining in the marital home "as a constant reminder to his [wife] of his infidelity."

In awarding Mother indefinite alimony, the court found that at Mother's age, and after having worked in her chosen field for the past 17 years, "[i]t cannot be reasonably expected that the job market will allow her to make a significant change in career paths in order to make substantial progress towards becoming fully self-supporting." The court further "categorically reject[ed]" the opinion of Father's vocational rehabilitation counselor that Mother can, "practically overnight, find full-time employment . . . and

[12] This case was decided before Congress passed a "tax reform" bill, that does not allow a spouse to deduct, from income, alimony payments.

progress financially to earn approximately $96,000 annually within the next three years," as her past experience in the field was for a "mere 1½ years" many years ago, and it was uncontradicted that she was unhappy in, and unsuited to, the job. Given the court's determination that Mother had made as much progress toward becoming self-supporting as can reasonably be expected in her well-established field, it concluded that the respective standards of living of Mother and Father would be unconscionably disparate after the divorce, and it awarded Mother indefinite alimony in the amount of $4,000 per month on that basis.

Although there is a great disparity between the incomes of Mother and Father, in *Ware v. Ware*, 131 Md. App. 207, 232 (2000), we explained that a finding of mathematical disparity will not automatically trigger an award of indefinite alimony; the circuit court must carefully consider each of the twelve factors spelled out by FL §11-106(b) that are pertinent to a particular case. "The interplay of those factors may frequently have a strong bearing on whether a particular disparity can fairly be found to be an unconscionable disparity." *Id.* at 232-33. Although there is no "hard and fast rule regarding any disparity" in income for purposes of awarding indefinite alimony, *Tracey*, 328 Md. at 393, to be unconscionable, the disparity in the post-divorce standards of living must work a "gross inequity" upon the dependent spouse. *Brewer v. Brewer*, 156 Md. App. 77, 100 (2004); *see also Karmand v. Karmand*, 145 Md. App. 317, 338 (2002) (Indefinite alimony, which must be determined on a case-by-case basis, is warranted when "the standard of living of

one spouse will be so inferior, qualitatively or quantitatively, to the standard of living of the other as to be morally unacceptable and shocking to the court.”).

“[T]he issue of unconscionable disparity must be determined by projecting into the future, to a time of maximum productivity of the party seeking the award, and not by looking solely to the past.” *Whittington v. Whittington*, 172 Md. App. 317, 340 (2007). *See also St. Cyr v. St. Cyr*, 228 Md. App. 163, 197 (2016) (FL § 11-106(c) “requires a comparison of the disparity in the parties’ future standards of living at the hypothetical point in time when [the requesting spouse] will have made as much progress towards becoming self-supporting as can reasonably be expected.”); *Francz v. Francz*, 157 Md. App. 676, 701 (2004) (to be eligible to receive indefinite alimony, the requesting spouse must show that, projecting into the future, even after he or she will have made as much progress toward self-sufficiency as reasonably can be expected, there will be an unconscionable disparity between the standards of living). The burden of proof regarding unconscionable disparity is “upon the economically dependent spouse who seeks alimony for an indefinite period.” *Thomasian*, 79 Md. App. at 195.

Here, in finding an unconscionable disparity, the court considered Mother's age (53) and the fact that she had been self-employed exclusively in her chosen field for the past 17 years with only limited work experience prior to that. The court rejected Father’s expert’s opinion that Mother would be able to find full-time employment with a senior living facility and progress financially to earn approximately $96,000 per year within three years. The court therefore found that Mother had made as much progress toward becoming self-

supporting as can be reasonably expected, such that her annual income of approximately $36,000 would remain unconscionably disparate from Father's annual income of approximately $245,000 plus bonuses.

While we note that, in finding an unconscionable disparity warranting an award of indefinite alimony, a mathematical comparison of income is "'the starting point of the analysis,'" *Roginsky*, 129 Md. App. at 146 (quoting *Blaine v. Blaine*, 336 Md. 49, 71 (1994)), and that Mother's current income - approximately 14.7% of Father's - does support the court's finding of unconscionable disparity,[13] the court did not project into the future or consider Mother's potential maximum productivity, as required. In other words, although Mother testified that she currently works mostly during the children's school hours and acknowledged the fact that she would be required to put in more hours to grow her business after the divorce, the court did not discuss the possibility of an increase in Mother's income if she were to increase to full-time work in her LLC, either currently or when the couple's younger child has graduated from high school and there is no reason for

[13] Our courts found unconscionable disparity in the following cases, which indicate the percentage of income the dependent spouse had in relation to the other spouse: *Tracey*, 328 Md. at 393 (28%); *Caldwell v. Caldwell*, 103 Md. App. 452, 463-64 (1995) (43%); *Blaine v. Blaine*, 97 Md. App. 689, 708 (1993), *aff'd on other grounds*, 336 Md. 49 (1994) (22.7%); *Rock v. Rock*, 86 Md. App. 598, 613 (1991) (20-30%); *Bricker v. Bricker*, 78 Md. App. 570, 577 (1989) (35%); *Benkin v. Benkin*, 71 Md. App. 191, 199 (1987) (16%); *Zorich v. Zorich*, 63 Md. App. 710, 717 (1985) (20%); *Kennedy v. Kennedy*, 55 Md. App. 299, 307 (1983) (33%).

her not to work full-time.[14] Moreover, the court did not mention the possibility of Mother obtaining another part-time job, although she said she had reached out about a job offer she had previously turned down. Therefore, we must remand to the circuit court for further consideration of the propriety of indefinite alimony in light of these issues.

As discussed in Section IV of this opinion, *infra*, we are also remanding this case for a re-evaluation of the interrelated order regarding the monetary award. In light of our conclusion that remand is required on the issue of indefinite alimony, we would have remanded on the issue of the monetary award in any event because our decision to vacate the alimony award would also have affected the monetary award.

A circuit court's determinations as to alimony, child support, and monetary awards "involve overlapping evaluations of the parties' financial circumstances. The factors underlying such awards 'are so interrelated that, when a trial court considers a claim for any one of them, it must weigh the award of any other.'" *St. Cyr*, 228 Md. App. at 198 (quoting *Turner v. Turner,* 147 Md. App. 350, 400 (2002)). "Therefore, when this Court vacates one such award, we often vacate the remaining awards for re-evaluation." *Turner*, 147 Md. App. at 400. *See also Alston v. Alston*, 331 Md. 496, 509 (1993) (remanding

[14] In *Whittington*, we guided the circuit court, upon remand, to specify whether the wife had the ability to earn more in the future if she worked full-time, after having worked part-time by choice for years. 172 Md. App. at 340. Of course, in considering Mother's ability to work full-time after both children graduate from high school, the circuit court must remain cognizant of the fact that Mother will then be approximately 60 years of age.

alimony issue upon reversal of monetary award).[15] Until the circuit court completes the proceedings required by this opinion, the existing alimony order will continue to have "the force and effect of a *pendente lite* award." *Simonds,* 165 Md. App. at 613.

IV.
Monetary Award

Finally, Father asserts that the circuit court erred in determining the amount of the monetary award to Mother, by failing to reduce the value of marital property - a boat titled solely to Father - by the outstanding lien on the boat. As both parties agreed on the amount of the lien and included the lien on their joint statement of marital and non-marital property, the court's grant of monetary award was too high. Mother concedes that Father is correct in this argument and acknowledges that the court must recalculate the monetary award.

Neither Mother nor Father disputed that Father is the title owner of a 2001 Beneteau boat or that the boat constitutes marital property. Although they disagreed as to the present value of the boat—Mother valued it at $85,000 and Father at $75,000—both agreed there is a current balance of $35,986 owed on the boat.

In granting a monetary award to Mother, the court found the value of the boat to be $75,000. The court concluded that Father had sole title to marital property with a value of $87,804 (presumably the total of the value of the boat and the fair market value of Father's TD bank account, which the court determined was $12,804) and Mother had sole title to

[15] We will not vacate the award of child support on this ground because this is an above-guidelines case, and the award of child support to Mother, based not on the guidelines but on the circuit court's discretion in relation to the best interest of the children, was not challenged on any basis by Father.

marital property with a value of $38,886. The court calculated that Mother was therefore due a monetary award in the amount of $24,459, which left Mother and Father each with $63,345 in the marital property.

The court did not, however, mention or factor into its calculation the undisputed lien on Father's boat in the amount of $35,986, which serves to lower the value of Father's solely titled marital property to $51,818. Mother acknowledges this was error on the part of the court. We agree.

When a marriage is dissolved, "the property interests of the spouses should be adjusted fairly and equitably, with careful consideration given to both monetary and nonmonetary contributions made by the respective spouses[.]" *Schweizer v. Schweizer*, 301 Md. 626, 629 (1984). If a party to a divorce seeks a marital property award, the circuit court must undertake a three-step process to determine how the marital property should be distributed between the parties and whether a monetary award would be appropriate to balance the equities after distribution:

> First, for each disputed item of property, the court must determine whether it is marital or nonmarital. Second, the court must determine the value of all marital property. Third, the court must decide if the division of marital property according to title would be unfair. If so, the [circuit court] may make a monetary award to rectify any inequity created by the way in which property acquired during marriage happened to be titled.

Brown v. Brown, 195 Md. App. 72, 109-10 (2010) (internal citations, quotation marks, and emphasis omitted); *see also* FL §§ 8-203 to 8-205.

A "marital debt" is a debt that is "directly traceable to the acquisition of marital property." *Schweizer*, 301 Md. at 636. That part of marital property that is represented by

an outstanding marital debt has not been "acquired" for the purpose of an equitable distribution by way of a monetary award. Therefore, the value of that marital property is calculated by subtracting the marital debt from the property's reported or assessed value. Marital debt is considered in step two of the process noted above, namely the valuation of marital property in setting a monetary award. *Id.* at 637.

It is this necessary step that the court failed to undertake, that is, subtracting the marital debt related to the boat from its value before making a monetary award to Mother. We therefore remand to that court to adjust the monetary award according to the equities, as adjusted by the lien on the boat at the time of the divorce. In so doing, the court should also consider its change in award of alimony to wife, if any, based on our discussion in Section III, *supra*.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND VACATED IN PART. JUDGMENT WITH RESPECT TO ALIMONY AND MONETARY AWARD VACATED; ALIMONY AND MONETARY AWARD TO REMAIN IN FORCE AND EFFECT AS *PENDENTE LITE* ORDERS PENDING FURTHER ORDERS OF THE CIRCUIT COURT; JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLANT TO PAY ONE HALF OF COSTS AND APPELLEE TO PAY ONE HALF OF COSTS.