UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1132

September Term, 2013

JOSEPH WILLIAM KOEGEL, JR.

v.

IRENE LEVENTHAL KOEGEL

Eyler, Deborah S.,
Woodward,
Wright,

JJ.

Opinion by Woodward, J.

Filed: September 10, 2015

Joseph William Koegel, Jr. ("Husband"), appellant and cross-appellee, and Irene Leventhal Koegel ("Wife"), appellee and cross-appellant, were divorced by Judgment of Absolute Divorce dated May 6, 2013, in the Circuit Court for Montgomery County. The divorce judgment awarded Wife rehabilitative and indefinite alimony, child support, a monetary award, and a shared interest in Husband's Steptoe & Johnson defined benefit plan. Both parties filed motions to alter or amend, and, after a hearing on June 24, 2013, the court issued a memorandum opinion and an amended judgment of absolute divorce dated July 9, 2013.

On appeal to this Court, Husband raises five issues for our review, which we have consolidated and rephrased into four questions:[1]

[1] Husband's issues, as presented in his brief, are as follows:

> 1. Whether the Circuit Court abused its discretion in ordering indefinite alimony despite;
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> 2. Whether in awarding alimony the Circuit Court erred in disregarding the parties' agreement regarding Mr. Koegel's financial support for the parties' emancipated children;
>
> 3. Whether the Circuit Court abused its discretion in awarding child support when that award was based on a fundamental misunderstanding of the parties' Financial Statements and was not based on the standard of living the minor child would have experienced had the parents remained together;
>
> 4. Whether the Circuit Court abused its discretion by characterizing Mr. Koegel's non-marital contribution to

(continued...)

1. Did the circuit court err or abuse its discretion in awarding indefinite alimony to Wife?

2. Did the circuit court abuse its discretion in the award of child support to Wife?

3. Did the circuit court abuse its discretion in its consideration of Husband's non-marital contribution to the parties' tenancy by the entirety marital residence?

4. Did the circuit court abuse its discretion in dividing Husband's retirement and pension accounts as of the date of divorce, rather than the date of separation?

Wife filed a separate cross-appeal, setting forth one issue for our review, which we have slightly rephrased:

> Whether the trial court erred in finding that the parties agreed that Wife would receive a shared interest in Husband's Steptoe & Johnson defined benefit plan.

For reasons set forth herein, we affirm the judgment of the circuit court.

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[1](...continued)

a marital residence as a gift based solely on the absence of a formal agreement to the contrary; and

5. Whether the Circuit Court abused its discretion in dividing Mr. Koegel's retirement and pension accounts as of the date of divorce, rather than the date of separation, despite finding that the marriage had ended by the date of separation.

BACKGROUND

The background for this case is set forth in the procedural history and findings of fact in the circuit court's May 6, 2013 memorandum opinion:[2]

> The parties were married on December 21, 1991 in Washington, D.C. Their marriage produced three children, Victoria (DOB: August 20, 1992); Katherine (DOB: April 2, 1995); and Joseph (DOB: August 24, 2000). They separated on June 17, 2010 when [Wife] left the former marital home located at 9604 Halter Court, Potomac, Maryland 20854.
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> On July 30, 2010, [Wife] initiated the instant case by filing a Complaint for Limited Divorce. At the time, both parties were already represented by counsel.
>
> On December 8, 2010, the parties reached a *pendente lite* agreement on a number of issues, which agreement was incorporated but not merged into a consent order docketed on January 13, 2011. Among other things, [Husband] agreed that [Wife] could have use of [Husband's] credit card to pay [Wife's] gas and electric bills, "reasonable" oil and gas expenses for her automobile, "reasonable" birthday and holiday gifts for the children, and the clothing purchases for the parties' minor children. On March 9, 2011, the parties resolved their dispute regarding custody of Katherine ("Katie") and Joseph via Consent Custody Order. Pursuant to this Consent Order, the parties have joint legal custody and shared physical custody under a schedule that affords each parent roughly equal time with the children, including equal vacation time.
>
> Between entry of the Custody Court Order and the start of trial, the parties both pursued a number of pre-trial motions. Many of these motions are out of allegations that one or the other was not abiding by the terms of the pendente lite consent order.

[2] Record references and internal citations are omitted in all citations to the circuit court's opinion.

Between September, 2011 and November 19, 2012, trial was postponed several times for various reasons, some of which were within, and others of which were beyond, the parties' control. During trial, the parties reached agreement on the disposition of their tangible personal property and on the characterization and valuation of some of their liquid assets.

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The marriage was [Wife's] second and [Husband's] first. From [Wife's] first marriage, she had a three-year-old son, Gianmarco, over whom [Wife] had primary custody at the time. [Wife] was acquainted with [Husband] during her first marriage. Shortly after her separation from her first husband in 1991, [Wife] began dating [Husband]. At that time, [Wife] worked part-time (70%) as an associate at the law firm of Morgan Lewis. Her duties consisted primarily of assisting a partner in planning conferences and speakers. When the parties met, [Husband] was a partner at the law firm of Steptoe & Johnson.

[Husband] and [Wife] dated for approximately three or four months before they began discussing marriage. At that time, both parties owned their own homes. [Wife] owned a home at 7635 Heatherton Lane in Potomac, Maryland. [Husband's] home was at 4524 Verplanck Place, N.W., Washington, D.C. The parties decided to sell their existing homes and jointly purchase a home in the District of Columbia, acquiring a home on Rockwood Parkway approximately two months prior to their marriage. It was a gracious home with a swimming pool. The home was titled in both parties' names as joint tenants. [Husband] contributed a $35,000 downpayment and $153,385.13 in closing costs.

[Wife's] home did not close until after the purchase of Rockwood Parkway. . . . [I]t sold for $270,000. Several months earlier, in conjunction with the loan application for the Rockwood Parkway home, the parties represented that the indebtedness of the Heatherton Lane home was $198,000. Accordingly, the Court will find that the net sale proceeds were roughly $70,000. These sale proceeds were used for the upkeep of the Rockwood Parkway home.

In addition, the parties renovated the kitchen and master bedroom during the marriage.

Shortly after the parties' marriage, the parties learned that [Wife] was pregnant with their first child, Victoria, and they decided that [Wife] would cease working after Victoria's birth. Nevertheless, [Wife] returned to work on a part-time basis at a dental HMO approximately a year after Victoria's birth. After Katie's birth in 1995, [Wife] accepted a position in a company related to the dental HMO, working ten hours per week. [Wife] continued to work at that position until the birth of Joseph in August, 2000. . . .

At all times[] prior to their separation, the parties employed nannies and other domestic help to assist them. [Wife] took responsibility for running the household and caring for the children when [Husband] was at work.

[Husband] is a litigator. [Husband] tried to leave work each night between 6:00 p.m. and 7:00 p.m., but there were occasions when it "would be substantially later." Until 2005 or 2006, [Husband] worked on Saturdays. When he was not at work, [Husband] assisted [Wife] in the care of the children. [Husband] did everything from changing diapers, attending parent-teacher meetings, attending all of the children's events, to helping coach the children's sports teams. He assisted with homework, drove the children to school, and was an involved, caring, and great father.

The parties purchased their home on Halter Court on August 29, 2001, for $1,345,000. It is titled as tenants-by-the-entireties. The home sits on two acres of land, has 6,523 square feet, and consists of at least twelve above-grade rooms, including five bedrooms and three-and-half baths. There is a 3,155 square foot basement that includes an indoor pool with a retractable cover, a family room, an exercise/recreation room, two bedrooms and two baths. Other amenities include a wine cellar, wet bar, four-car garage and a tennis court. By style, the house is ornate. Color photos show expensive, well-maintained, furniture, window treatments, finishes, and counter-tops throughout.

In addition to residence at the Halter Court home, the parties vacationed in the U.S. and abroad, educated their children at private schools, belonged to a country club, and kept a private wine cellar holding approximately 1000 bottles of wine. During the marriage, [Husband] attended "not expensive" dinners with wine aficionados six times per year.

Maintenance of this upper-class lifestyle was not without its financial difficulties for the parties, however. For although [Husband] came to earn at least $900,000 annually, it was not paid out evenly over the year. [Husband] started the year with smaller draws that increased over the year. These draws were accompanied by bonuses over the year and in January. [Husband's] disposable income was further reduced by his firm's mandate that he make large annual retirement contributions in addition to capital account contributions. As a consequence, the parties used credit cards and other personal loans to finance their expenses until [Husband's] bonuses allowed them to reduce the debt. Nonetheless, they carried substantial personal debt, which, at the time of divorce, totaled more than $80,000. The parties felt as though they did not know where the money went. [Wife], whose responsibility it was to pay the bills, started to use Quicken to track finances. The parties consulted an estate planner in an attempt to increase college savings for their four children.

The demise of the parties' marriage occurred over many years. [Wife] described their life in Potomac as isolated, with few friends and little community involvement. [Husband] worked long hours while she was home with the children. [Wife] first contemplated divorce in 1999. In 2004, [Wife] had an emotional relationship with another man, who she kissed one time and with whom she exchanged emails. [Wife] attributed the relationship to being a low point in her marriage. The emotional relationship ended when she lost contact with the other man.

By 2008, [Wife] decided she wanted a divorce and so notified [Husband]. Although they opted to try marital counseling instead, and participated in therapy for approximately two years, by the spring of 2009, they were vacationing separately.

In late 2009, [Wife] told [Husband] that she wanted to separate and moved to the basement. In January, 2010, the parties saw another mental health professional from whom [Wife] sought advice on how to tell the children of the impending separation and [Husband] sought advice as to how to make the marriage work. [Husband] did not want a divorce. In the middle of March, 2010, the parties notified their children of their intention to separate and sell the Halter Court home. Thereafter, realtors came in to assist in determining a listing price.

Meanwhile, by March 8, 2010, [Husband] had contacted counsel about the matter. On March 8, 2010, [Husband's] counsel reviewed a summary and emails about this matter and created a file on it. On March 9, 2010, [Husband] had a 2.4-hour meeting with [counsel to] "review facts and options." Another long conference followed on March 16, 2010. [Husband] spoke by telephone with his counsel on March 18, 2010.

By the end of March, 2010, [Husband] had changed his mind regarding the sale of Halter Court, saying to [Wife] that after having had dinner with a friend, he would no longer assist [Wife] in separating and moving out of the Halter Court home, nor would he agree to sell the Halter Court home. [Husband] explained that while he had agreed to the sale for financial reasons at first, he no longer thought it in the children's best interest. Thereafter, [Wife] started plans on her own to move out and used savings she had to finance the move.

In April, 2010, [Wife] started dating other men and started an extramarital relationship. She notified Victoria and friends about it.

At some point in May, 2010, [Wife] consulted counsel. She had an initial consultation with her current counsel on May 26, 2010. Around Memorial Day of 2010, following what he perceived were some questionable spending decisions by [Wife], [Husband] separated their finances and so notified [Wife] by letter.

> On June 17, 201[0][3], [Wife] left the marital home. At the time, [Husband] assisted [Wife] with the actual move out. As a result, [Husband] continues to reside in the Halter Court home with Joseph and Katie when they are with him. [Wife] moved into and rents a townhouse at 8004 Rising Ridge Road in Bethesda, Maryland, where she lives with Joseph and Katie when they are with her.

Trial took place in circuit court over four days from November 2012 through January 2013. On May 6, 2013, the circuit court issued its memorandum opinion[4] and judgment of absolute divorce, ordering division of certain marital property, a $105,000 monetary award in favor of Wife, an award of $9,100 per month for five years in rehabilitative alimony to Wife, followed by indefinite alimony in the amount of $7,800 per month, and an award of $4,453 per month in child support to Wife. On May 20, 2013, Wife and Husband filed motions to alter or amend the judgment of absolute divorce. On June 7, 2013, both parties filed their oppositions. On June 24, 2013, the circuit court held a hearing on the parties' motions to alter or amend the judgment. At the hearing and in a subsequent memorandum opinion issued on July 9, 2013, and entered on July 15, 2013, the circuit court ruled on both parties' motions and entered an amended judgment of absolute divorce. On August 13, 2013, both parties filed their notices of appeal.

[3] The circuit court's opinion stated the year as 2012; this was a clerical error.

[4] The circuit court amended its memorandum opinion on May 20, 2013, to correct two typographical errors. The May 20 memorandum opinion readopted the balance of the May 6, 2013 memorandum opinion without change.

DISCUSSION

APPEAL

I. Indefinite Alimony

A. Circuit Court Opinion

Because Wife requested indefinite alimony, the circuit court first considered all of the factors set forth in Section 11-106(b) of the Family Law Article ("FL").[5] Of the factors relevant to the arguments raised by Husband in the instant appeal, the court wrote:

> **(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;**
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> In this case, there is a dispute as to whether [Wife] can be self-supporting, and, if so, how long it would take her to find suitable employment. As noted . . . above, [Wife] has a law degree, but is not currently licensed to practice law. She has not worked at a law firm since the birth of the parties' oldest child, and her part-time employment until the birth of Joseph was, at best, quasi-legally related. Since 2005, [Wife] has been a pilates instructor. [Husband] did not object to [Wife] leaving her employment when Joseph was born, or to her becoming a pilates instructor in 2005.
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> In essence, [Husband] is asking this Court to find that [Wife] is currently under-employed. Anthony Bird, [Husband's] vocational expert, testified as to the amount of money that [Wife] could earn if she resumed practicing law. Mr. Bird opined that [Wife] would be employable as a lawyer earning between $75,000 and $80,000 per

[5] Md. Code (1984, 2012 Repl. Vol.), § 11-106 of the Family Law Article ("FL").

annum. He also opined that within six months, [Wife] could earn $65,000 as a paralegal, although, he admitted on cross-examination that [Wife's] law degree would be a "hurdle for her to overcome" in obtaining a paralegal position. As a final option, Mr. Bird opined that [Wife] could earn $40 per hour as a contract attorney.

[Wife] offered the testimony of Kathleen Sampeck to rebut the testimony of Mr. Bird. Ms. Sampeck testified that she could not state within a reasonable degree of certainty that [Wife] could obtain a job in the legal field. Ms. Sampeck also noted that the demand for contract lawyers had declined, and these positions are temporary in nature, and provide no benefits. Ms. Sampeck believed that [Wife] was best suited for an administrative position earning $33,000 to $36,000 per annum, or, the same amount that [Wife] was earning as a pilates instructor.

The Court has weighed the testimony of Mr. Byrd and Ms. Sampeck. In the Court's view, Mr. Byrd has minimized how difficult it will be for [Wife] to get a full-time job practicing law. [Wife] is not currently licensed to practice law and has not done so full-time since prior to the parties' marriage. For someone in [Wife's] shoes, passing the Maryland attorney's bar exam, an option to which Mr. Byrd referred, is not an insignificant undertaking. On balance, therefore, the Court did not find Mr. Byrd's opinion particularly persuasive.

In John O. v. Jane O., 90 Md. App. 406, 422 (1992), the Court of Special Appeals identified ten factors a trial court should consider in determining whether an individual is voluntarily impoverished or underemployed.

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Weighing all of these factors, the Court finds that [Wife's] decision to cease the practice of law is not tantamount to voluntary impoverishment. While [Wife] has held some law jobs at times, these were part-time or many years ago. The legal market has since changed substantially, a change that took place after Joseph's birth and the parties' joint decision for [Wife] to be home with the children. Under these circumstances, the Court cannot conclude that [Wife's]

failure to have looked for a job that she may not have obtained (law) in favor of building a business in an industry in which she has trained since 2005 (pilates), and in which her expectation of improved performance in the future is reasonable (as discussed below), amounts to voluntary impoverishment. Thus, the Court will assess [Wife's] employability based upon what she could earn as a pilates instructor.

With respect to her earnings history as a pilates instructor, . . . [o]n her amended financial statement, filed April 5, 2012, [Wife] reported "gross monthly wages" of $1932, which factors out to $23,184 per year. Assuming the ratio of business expenses to gross receipts remained the same in 2012—42.71%—$23,184 in gross monthly wages would suggest gross receipts of $54,282.37. This is consistent with [Wife's] trial testimony that she works 20 hours in "a good week" and that she earns an average of $50 per hour, assuming a 48-week year. This factors out to a gross receipts of $48,000 per year. No contradictory business records were produced for 2012.

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At trial, [Wife] projects that within the next five years, the gross receipts from her pilates business will increase to $72,000. Given that her income generally increased between 2005 and 2012, her expectation of improved performance in the future is not unreasonable.

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Deducting these figures for projected rent and remaining expenses would result in net profit of $45,440 per annum. The court concludes that this is the amount that [Wife] may be able to earn within five years if she is successful in developing her business. As discussed below, this amount is not sufficient to meet [Wife's] reasonable needs at the standard of living established during the marriage. This factor suggests that an award of alimony is appropriate.

(3) The standard of living that the parties established during their marriage;

The parties established an upper middle-class lifestyle as evidenced by their home on Halter Court. In addition the parties employed assistance in the home, maintained a large wine cellar, spent $140,000 on renovating the master bath, chose private schools for their children, saved substantial sums for their retirement, traveled, and drove luxury automobiles.

With respect to his support of the parties' adult children, including [Wife's] son Gianmarco, [Husband] contends that he should be able to continue to support his emancipated children and pay for their college educations because this was the standard of living contemplated by the parties during the marriage.

The parties have two adult children, Gianmarco (who is [Husband's] stepson) and Victoria. During their marriage, the parties provided these adult children with financial support. [Husband] testified that the parties agreed to provide Gianmarco with financial support for a period of years after his graduation from college given his pursuit of a career in musical theatre. [Wife] testified that she does not object to [Husband] spending a reasonable amount to support Gianmarco, but that because Gianmarco is twenty-four years old, it is time that he began supporting himself. Additionally, [Husband] has been financially supporting Victoria while she attends college. While [Wife] testified that she has some objections regarding the amount of support [Husband] is contributing to Victoria, [Wife] never indicated that she was against continuing that support.

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Read against the plain language of Sections 11-106(b)(3), [the case law cited by Husband does not] suggest that the Court must or should include an emancipated child's standard of living as part of the parties' standard of living. Noting that the Family Law article sets out a parent's obligation to support a destitute adult child at Title 13, the Court assumes that if the legislature had intended for parents to be legally responsible for supporting their emancipated adult children, which is the natural result of including adult children in the standard-of-living analysis, the legislature would have passed specific statutes

to this effect like Title 13. None exist. Therefore, this Court is not inclined to read such a requirement into the alimony statute.

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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;

[Husband] is an equity partner at the law firm of Steptoe & Johnson, LLP in Washington D.C. where he has been employed since October 1981. In 2010, [Husband's] partnership status with Steptoe & Johnson was a share level 9.0 and his budgeted share level income was $965,000.00. In 2011, he dropped to a share level 8.5 and his budgeted share level income was $980,000.00. In 2012, he again stepped down, this time to a share level 8.0, and his budgeted share level income is $920,000.00. There have been years when [Husband] earned slightly in excess of $1,000,000.00; such has not been the case since 2009, however. Since entry of the *Pendente Lite* Consent Order on January 13, 2011, [Husband's] income has decreased by approximately 15%.

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[Husband] does not receive any other form of income other than that from Steptoe & Johnson, LLP. [Husband] testified at trial that he expects his 2012 income to be approximately $920,000 based upon Steptoe & Johnson, LLP's budgeted amount for [Husband's] pay level. At that annual salary, [Husband's] net monthly income is $32,834.00 without adjustment for any tax deductions he receives as a result of paying alimony.

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As above, [Husband] asks the Court to include expenses for his emancipated children among his reasonable expenses. Even if this Court has the discretion to consider such expenses in assessing [Husband's] ability to pay alimony, the Court does not find such expenses reasonable under these facts. The financial circumstances

of the parties in this case suggest that they will have to live at a somewhat lower standard of living (townhouses v. 12-bedroom home, most notably) than they enjoyed during their marriage. Even at a lower standard of living, the continued support of the Koegel's emancipated children would leave both parties with a significant deficit. The Court does not find that it would [be] reasonable to put the financial needs of the emancipated children ahead of [Wife's] needs, or Joseph's, and as such, the Court does not find that the continued support of the parties' emancipated children is reasonable and necessary for [Husband].

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Without the above tax liability, [Wife's] reasonable needs from all of the above categories totals $9397.75 per month. As above, she currently nets $1792 per month, leaving a monthly need of $7605.75. As above, [Wife's] estimated tax liability on this figure is 20.33% or $1546.25 per month. Thus, [Wife's] total need (including funds for paying the above estimated tax liability) is $9152 per month.

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[Husband's] reasonable needs total $13,939.75 per month. According to his financial statement, . . . [Husband's] earned income is $76,667 per month. After deductions that include a mandatory contribution toward the firm's consolidated taxes, capital contribution, and mandatory retirement contribution, among other deductions, [Husband] currently nets $32,834. No evidence was presented to suggest that [Husband] is currently taking any deduction as a result of his current *pendente lite* alimony payment on a separately-filed tax return[]. Thus, as above, and with the decrease in tax liability anticipated from payment of $9152 per month in alimony to [Wife], [Husband] will have approximately $36,915.79 per month before meeting his needs, those of Joseph, and those of [Wife]. Subtracting [Husband's] own reasonable needs ($13,939.75 per month), those of Joseph, as discussed below, ($7,614.42 while with [Husband] and $4453.75 while with [Wife]), [Husband] will have a monthly surplus

> of approximately $10,908.87 per month to meet [Wife's] need for $9152 in alimony per month.[6]

Next, the circuit court turned to the statutory requirements for an award of indefinite alimony. After setting forth the language of Section 11-106(c), the circuit court found:

> As above, the evidence shows that when [Wife] makes as much progress as she can toward becoming self-supporting, she will earn $45,440 per year. In contrast, [Husband] earns $920,000 per year. Accordingly, even using [Wife's] highest income level, her income is 4.94% of [Husband's] income. Although gross disparity in income alone does not warrant an award of indefinite alimony, our appellate courts frequently list comparative income percentages as examples of cases in which indefinite alimony awards have been affirmed. In each case cited therein, the alimony recipient earned a greater percentage of the alimony payor's income than [Wife] does here. Ultimately, although " . . . each case must be evaluated on its facts and not on some fixed minimum or universal standard[,]" income percentage comparison can be a useful guide in this regard. Once disparity is established in what would be the parties' respective standards of living without alimony, the trial court should attempt to alleviate the disparity with alimony.
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> In assessing [Wife's] need for alimony, and to address the above disparity, the Court has attempted to include among [Wife's] reasonable needs some of those items that reflected the parties' standard of living. Neither will be able to live at the same standard they enjoyed while married. Thus, the Court included funds for carrying the mortgage and related costs on a purchased townhome (not merely a rental), funds for replacement appliances, routine repairs, adequate health insurance, some (albeit fewer) vacations, a relatively new car, a cell phone, dining out, a pool membership, and ongoing contributions to an IRA. All are items that, while not strictly necessary, are within [Husband's] grasp on his earned income alone. Without indefinite alimony, however, [Wife] would have to depend

[6] These figures reflect the two corrected figures in the May 20, 2013 amended memorandum opinion.

on earned income alone of $23,184 per year, her current checking account balance of $8000, approximately $1300 from the parties' joint checking and savings accounts, $105,000 in a monetary award, and whatever she receives for her interest in Halter Court. From these sums, she would be expected to purchase a townhome and pay her other debts. In five years, her income will increase a bit to $45,440 per year, and her ability to be self-supporting will improve a bit. Nonetheless, even if it were possible for [Wife] to invade the retirement account assets she will receive, without alimony, [Wife] could not afford all of the above extras, and would be consigned to an unconscionably disparate standard of living, now and in five years.

In considering and weighing all of the above factors, particularly the length of the marriage, the parties' contributions and [Husband's] ability to pay alimony while meeting his own needs, and the marital standard of living, it is the Court's judgment that an award of alimony is appropriate in the amount of $9100 per month for a period of 60 months, which is the period of time [Wife] anticipates is needed to build her pilates business and thus "rehabilitate." At that time, as above, [Wife's] earned income is expected to grow to $45,440. Thus, after tax on her earned income, [Wife] will be able to contribute roughly $35,000 annually or approximately $2,900 per month to her own support, thus leaving a need of approximately $6,500 per month before payment of tax on the alimony. Thus, based on the available evidence, after tax, [Wife's] need for alimony in five years is likely to decrease to approximately $7,800 per month. Accordingly, following the above period of rehabilitative alimony, and in consideration of all of the above factors, the award will decrease to $7,800 per month in indefinite alimony. At these levels, while some income disparity will remain between the parties, [Wife] will nonetheless be able to lead a lifestyle along the lines of [Husband's].

B. Parties' Contentions

1. Voluntary Impoverishment

Husband argues that the circuit court abused its discretion in awarding indefinite alimony, because Wife voluntarily impoverished herself. Specifically, Husband claims that the circuit court's conclusion that Wife "has the ability to earn $45,400 per year, but that she had not voluntarily impoverished herself" by not pursuing legal employment or "anything other than work part-time as a Pilates instructor" was "not supported by substantial evidence," because Wife "has made *no efforts* to obtain a legal position" or to work full-time as a Pilates instructor. Husband argues that the court abused its discretion when it awarded rehabilitative alimony of $9,100 per month "without any finding that this would in any way assist [Wife] in rehabilitating her legal career or becoming a full-time Pilates instructor."

In response, Wife argues that the circuit court did not err in awarding indefinite alimony, because the court correctly found that she was not voluntarily impoverished. Wife contends that the circuit court heard expert testimony from both parties regarding her earning power, found Wife's expert more persuasive, and "did a complete analysis of the ten factors . . . to consider when determining whether an individual is voluntarily impoverished or underemployed." Wife argues that she would not be employable as an attorney, because (1) she "has not worked at a law firm since the birth of the parties' oldest child"; (2) her later part-time employment was "at best, quasi-legal"; (3) she is not currently licensed to practice law; and (4) the demand for contract lawyers has declined. Furthermore, Wife notes that

Husband "did not object to [Wife] leaving her employment when Joseph was born, or, to her becoming a Pilates instructor in 2005." Wife argues that she did not pursue a career as a Pilates instructor for purposes of litigation, and that "just because [she] has a law degree does not per se mean that she should be required to pursue a legal career."

2. Unconscionable Disparity

Next, Husband argues that the circuit court abused its discretion when it ignored Maryland's statutory preference for rehabilitative alimony over indefinite alimony, because this is not an "exceptional case" that requires indefinite alimony. Husband claims that the court "relied solely on the parties' disparity in income" in awarding indefinite alimony, "without finding how the parties' living standards would be unconscionably disparate without such an award." According to Husband, a finding of "unconscionably disparate" standards of living absent indefinite alimony is a threshold test for awarding indefinite alimony, but the court committed reversible error when it "conducted no analysis of standards of living and made no findings based upon evidence in the record on that subject."

Wife claims that the circuit court's award of indefinite alimony was proper, because the court found that, even after she "has 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." Wife disputes Husband's assertion that the court relied solely on the parties' disparity in income, arguing that "the court conducted its analysis by assessing [Wife's] reasonable needs, based on the parties' standard of living during the

marriage," as well as the retirement and pension benefits Wife will receive from Husband, and concluded that "without alimony [Wife] would be consigned to an unconscionably disparate standard of living, both now and within five years." Wife points to the court's finding that the maximum annual income that she could earn represents less than five percent of Husband's annual income. Finally, Wife argues that the circuit court "did a thorough review of the evidence adduced during trial before making" its alimony award, and that this award should be affirmed under the deferential abuse of discretion standard.

3. Husband's Support for Emancipated Children

Husband argues that the circuit court erred in calculating alimony when it failed to include his financial support for the three emancipated children among his reasonable expenses, given his agreement with Wife "that they would put their children through college, as well as provide financial support for [Wife's] son by her first marriage, Gianmarco." Husband claims that, even if the parties did not have an agreement "as to the exact amount of support" for the emancipated children, "there is no dispute that there was an agreement during the parties' marriage that [Husband] would provide such support and that he did in fact provide such support." Husband contends that the court is obligated by statute to consider this agreement when awarding alimony, and that its failure to do so resulted in an inflated alimony award.

Wife counters that the circuit court did not err in excluding from its alimony calculation Husband's financial support for the three emancipated children, because the

parties had no agreement regarding that support. Wife notes that at trial, she testified that she did not know how much money Husband gives to Gianmarco and that she did not agree with the amount of money that Husband gives to Victoria. Finally, Wife contends that, because there is "no common law or statutory duty to support an emancipated child who is not 'destitute,'" the court's decision to exclude Husband's financial support for the emancipated children from its alimony calculation was proper.

C. Standard of Review

An appellate court reviews an alimony award to determine whether the circuit court made any clearly erroneous factual findings or abused its discretion in making its decision. *Boemio v. Boemio*, 414 Md. 118, 124-25 (2010). "This standard implies that appellate courts will accord 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). Therefore, a circuit court's alimony award will "not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Id.*

D. Analysis

The purpose of alimony is "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 391. "The concept of alimony as life-long support enabling the dependent spouse to maintain an accustomed standard of living has largely been superseded by the view that the dependent

spouse should be required to become self-supporting, even though that might result in a reduced standard of living." *Id*. Maryland's alimony statute favors rehabilitative alimony over indefinite alimony. *Malin v. Mininberg*, 153 Md. App. 358, 415 (2003).

In considering a request for alimony, whether rehabilitative or indefinite, the circuit court must consider the following factors:

> (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.

Md. Code (1984, 2012 Repl. Vol.) § 11-106(b) of the Family Law Article ("FL").

In addition, the circuit court may award indefinite alimony only upon a finding 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.

FL § 11-106(c).

1. Voluntary Impoverishment

We are not persuaded by Husband's argument that the circuit court abused its discretion in making an alimony award because Wife voluntarily impoverished herself. This Court noted in *Reynolds v. Reynolds* that

> [m]ost, if not all, of the voluntary impoverishment factors will be relevant to alimony under FL § 11-106(b)(1) and (b)(2), and so a finding of voluntary impoverishment would ordinarily entail a finding, for purposes of alimony, that the impoverished party *could* support him or herself, but *chooses* not to.

216 Md. App. 205, 220 (2014).

In *Reynolds*, this Court affirmed the circuit court's award of alimony based on facts similar to the case at hand. The appellant in *Reynolds* argued that the court should have found that the appellee could earn a higher annual income, based on the appellee's legal education and past earnings. *Id*. at 221. This Court affirmed the alimony award, because, as in the instant case, the circuit court was satisfied that the appellee had met her burden of proving "that she lacked the resources to pay her ongoing expenses, without additional income." *Id.* This Court stated in *Reynolds* that "the evidence showed that [the appellee] had not practiced law for more than two decades and now suffered from health problems and advanced age, factors which would limit her employment prospects." *Id.* We also noted that, although the appellant argued that the appellee could earn more annual income, he did not introduce any evidence to support that contention. *Id.*

In the case *sub judice*, the circuit court considered each statutory factor in Section 11-106(b), as well as the ten voluntary impoverishment factors established in *John O. v. Jane O.*, 90 Md. App. 406, 422 (1992), *abrogated on other grounds by Wills v. Jones*, 340 Md. 480 (1995). Both parties submitted evidence on Wife's legal education, work experience, and the legal job market, and the court found Wife's evidence more persuasive.

As in *Reynolds*, Wife met her burden of proof that she had not voluntarily impoverished herself by failing to secure a legal job, given the evidence regarding the parties' joint decision that Wife would quit her legal job to care for the children, the length of time away from the practice of law, the lack of a law license, the poor legal job market, and her subsequent training as a pilates instructor. *See id.* at 221. Moreover, the facts show that Wife did not leave the practice of law for purposes of litigation. *See Gordon v. Gordon*, 174 Md. App. 583, 646 (2007) (noting that while leaving a high paying job may not have been "the best monetary career move," the decision did not amount to voluntary impoverishment, because it was not "done for purposes of this litigation"). Therefore, the trial court's finding that Wife was not voluntarily impoverished was neither clearly erroneous nor an abuse of discretion.

We also disagree with Husband's contention that the circuit court erred in calculating Wife's income based on thirty hours of work per week, instead of a full-time forty hours per week. In a voluntary impoverishment analysis, a party must have a reason for only working part-time, rather than full-time. *See Malin*, 153 Md. App. at 407-09 (remanding with

instructions to the circuit court to determine whether the appellee could increase her work hours from fifteen hours per week to full-time employment); *Petitto v. Petitto*, 147 Md. App. 280, 316-17 (2002) (affirming the circuit court's finding that the appellant was voluntarily impoverished because she only worked part-time, but "did not specify any reason that she was unable to work more than regular reserve stint for part of each year"). In the instant case, however, the court never determined Wife's employment to be part-time. Rather, the court found that Wife could earn $45,440 per year based on thirty hours per week because that was the level of business that the Wife could reasonably expect to generate. Specifically, the court stated that Wife "projects that within the next five years, gross receipts from her pilates business will increase to $72,000," a figure based on Wife working thirty hours per week. The court arrived at this figure by crediting Wife's testimony at trial, which included the following:

> Once I went off on my own it was basically how many classes I could put together, how much, you know, how many jobs I could get.
>
> ***
>
> I recently took a job working for a studio . . ., and their goal is to give me as much—any new business that comes in will be mine. So they've been starting to give me more and more business.
>
> ***
>
> If I could be on a more regular schedule and have, you know, my hope would be to at least get up to 30 hours a week. There's always, just like teachers or anything else, there's always slow times during the summer, slow times over Christmas or Thanksgiving week is totally

> dead. But, pretty much, if I could get up to 30 hours a week working making $50 an hour, that would be my goal for going forward, hopefully within the next five years.

In summary, the trial court simply credited Wife's testimony that working thirty hours per week as a pilates instructor would be the most business that she could reasonably bring in each week. Because the court's finding was based on competent evidence, there was no error.

2. Unconscionable Disparity

As stated above, Maryland has a statutory preference for rehabilitative alimony over indefinite alimony. *See Solomon v. Solomon*, 383 Md. 176, 194 (2004). The Court of Appeals has stated that the alimony statute limits "a trial court's ability to grant indefinite alimony and requires a comprehensive case-by-case analysis." *Id.* at 196. In *Solomon*, the Court noted that, although there are no bright-line tests to determine whether a disparity is unconscionable, several appellate court decisions found unconscionable disparity "based on the relative percentage the dependent spouse's income was of the other spouse's income." *See id.* at 198 (summarizing cases where Maryland appellate courts affirmed indefinite alimony awards based on income disparities ranging from twenty percent to forty-three percent). In *Solomon*, the Court of Appeals affirmed an award of indefinite alimony where one party's income was approximately 8.5% of the other party's income, noting that this disparity was "on par with the lowest in the cases identified" by the Court. *Id*. at 200.

Here, the circuit court found that, even after making as much progress as she can toward becoming self-supporting, Wife would earn only 4.94% of Husband's pre-tax income. Then, contrary to Husband's contention, the court considered other factors besides the income disparity: the parties' standard of living, Wife's reasonable needs in light of that standard of living, the contributions of the parties to the marriage, the other financial resources available to Wife, the length of the marriage, and Husband's ability to pay alimony while meeting his own needs. Because the court properly considered all of the relevant statutory factors in finding that the parties' standards of living would be unconscionably disparate in the absence of an award of indefinite alimony, the court did not abuse its discretion in making that award.[7]

3. Husband's Support for Emancipated Children

Husband's contention that the circuit court failed to consider any agreement between the parties regarding support for the parties' emancipated children is also misplaced. The court stated that "the parties provided these adult children with financial support," but that the parties disputed whether there was in fact an agreement to do so. In other words, the court found that both parties agreed that Husband *did* support Gianmarco and Victoria, but

[7] As stated above, Husband urges this Court to impute full-time earnings to Wife of approximately $104,000 per year. Even if this Court did so, Wife would earn only eleven percent of Husband's annual income, a disparity that is still far greater than those in other cases where indefinite alimony awards were upheld. *See Solomon v. Solomon*, 383 Md. 176, 198 (2004).

that the parties had no agreement regarding that support. The court's determination that no such agreement existed is a factual finding, and because such finding was based on the competent evidence adduced at trial, it will not be disturbed. As the trial court correctly noted in its memorandum opinion, absent any agreement, there is no obligation in either the case law or the alimony statute "that the Court must or should include an emancipated child's standard of living as part of the parties' standard of living." *See* FL § 11-106(b)(3), (10).

II. Child Support

A. Circuit Court Opinion

With regard to the parties' child support obligations, the circuit court stated: "The parties have shared physical custody of the minor child[]. The parties[']' combined adjusted actual incomes are in excess of $15,000 per month. At this income level, the court may use its discretion in establishing child support." The court then compared the parties' expenses for Joseph, the minor child, and made findings of fact regarding his reasonable expenses in the categories of primary residence, cell phone, household necessities, medical/dental, school expenses, recreation and entertainment, allowance and camp, transportation, gifts, clothing, incidentals, and miscellaneous. The court found that Joseph's reasonable needs when with Husband, including Husband's direct expenses of Joseph's tuition and health insurance, totaled $7,614.42 per month, while Joseph's reasonable needs when with Wife were $4,452.75 per month.

Next, the circuit court considered the child support guidelines:

> Application of the Maryland Child Support Guidelines, including extrapolation at the approximate 13% marginal rate that appears for one child at the top of the guidelines, yields a monthly child support obligation for [Husband] to [Wife] of $5,319 per month if [Husband] is assigned 183 overnights per year and $5,359 per month if [Wife] is assigned 183 overnights per year. This calculation includes [Husband's] monthly health insurance premium for Joseph of $276 per month, $387 per month for extraordinary medical expenses incurred by [Husband] for Joseph, $387 extraordinary medical expenses for Joseph incurred by [Wife], and $2,833 per month in tuition for Landon School. Copies of the child support guidelines worksheets are attached hereto and incorporated herein.
>
> Having considered the Maryland Child Support Guidelines as above, and Joseph's specific reasonable needs, the Court will exercise its discretion and award child support to [Wife] in the amount of $4453 per month. In addition, [Husband] will continue to be ordered to make direct payment of Joseph's health and vision insurance premiums and Landon tuition. [Wife] will be ordered to pay Joseph's overall cell phone expense up to $54 per month. The parties will also be ordered to pay Joseph's extraordinary medical expenses up to the monthly sums indicated and camp expenses up to $291.50 per month each.

B. Parties' Contentions

1. Financial Statements

Husband argues that the circuit court erred in finding that the annual expenses for Joseph amount to $140,868. Husband contends that this finding was "a wooden extrapolation from the guidelines wholly without regard to the needs of the child and the parties' past actual expenditures." Husband argues that this finding was in error because Joseph's actual expenses "are substantially less than $100,000 per year," and that Husband's "Financial Statement is the only evidence in the record of actual expenses for the parties'

children," because Husband was paying all expenses for the minor child. Husband claims that the circuit court misconstrued the parties' financial statements because it interpreted Wife's statement "to reflect her purported *actual* expenses for the minor child," even though Husband was paying all of Joseph's expenses under the *pendente lite* agreement. Furthermore, Husband argues that the circuit court interpreted many of the categories in his financial statement as expenses for Joseph only, even though the expenses were for the household or for all four of the parties' children. Husband contends that these miscalculations resulted in an inflated determination of Joseph's expenses.

Wife responds that the circuit court did not double count the children's reasonable expenses, because "the trial court correctly viewed [Wife's] Financial Statement as a *projected* estimate of what she would have to pay for Joseph's care and well-being in the absence of the *pendente lite* Order." Wife notes that the circuit court found her projected expenses for Joseph's cell phone, household necessities, medical/dental, recreation/entertainment, allowance and camp, and clothing more credible than the expenses claimed by Husband. Wife argues that the court "understood the parties' financial statements, carefully analyzed them and correctly applied the law."

2. Joseph's Private School Tuition

Husband argues that the circuit court should have calculated child support for Joseph on a "50-50 basis" based on Husband's financial statement, including fifty percent of private school tuition, rather than ordering Husband to be solely responsible for private school

tuition. In the alternative, Husband argues that Wife should be responsible for one-third of Joseph's private school expenses. Wife responds that the circuit court "simply found [Husband] better able to afford" this expense than Wife.

C . Standard of Review

In most cases, child support awards are determined by the child support guidelines found in Section 12-204 of the Family Law Article. Use of the guidelines is mandatory unless, as here, the parents have a monthly combined adjusted income in excess of $15,000. FL § 12-204(a), (d). In such case, "the court may use its discretion in setting the amount of child support," although circuit courts often extrapolate from the guidelines even where their use is not mandatory. FL § 12-204(d); *Malin*, 153 Md. App. at 411 ("Therefore, by analogy, we turn to the process of calculating support under the Guidelines."); *Richardson v. Boozer*, 209 Md. App. 1, 19-21 (2012) (affirming the circuit court's calculation of child support under the guidelines, even though the parties' adjusted annual income exceeded $15,000). "An award of child support in an above Guidelines case will not be disturbed unless there is a clear abuse of discretion." *Malin*, 153 Md. App. at 410 (internal quotation marks omitted).

D. Analysis

1. Financial Statements

Contrary to Husband's contention, the circuit court's child support award was not based on "a wooden extrapolation from the guidelines wholly without regard to the needs of

the child and the parties' past actual expenditures." The court based its award on Joseph's reasonable expenses when residing with Wife. The court engaged in a thorough analysis of each expense category by weighing Husband's claimed expenses and Wife's projected expenses for each and determining whose expenses were more credible. In most cases, the court used the lower figure, which turned out to be Husband's figure for gifts, and Wife's figure for household necessities, clothing, transportation, and miscellaneous expenses. Furthermore, the court reduced Husband's figure in many categories to take into account that such figures reflected expenses for all four children. Although Husband may not agree with all of the court's findings of fact regarding Joseph's expenses, these findings were not clearly in error.

2. Joseph's Private School Tuition

Husband is mistaken in his claim that he is solely responsible for Joseph's private school tuition. When considering an extrapolation of the child support guidelines, the circuit court noted in its worksheet that Husband's income comprised eighty-six percent of the parties' shared income, and that Husband was, at the time of trial, paying $2,833 per month in tuition. Pursuant to Section 12-204(i) of the Family Law Article, which allows a division of tuition "between the parents in proportion to their adjusted actual incomes," the tuition payments were adjusted so that Husband was responsible for $2,436, or eighty-six percent of the cost of tuition, and Wife was responsible for the remaining $397, or fourteen percent of the cost of tuition. Such adjustment, along with others, resulted in a $157 reduction in

Husband's child support obligation according to the extrapolated guidelines, from $5,516 to $5,359 (or from $5,476 to $5,319 if Husband is assigned 183 overnights per year). Thus, if the court had awarded child support based upon the extrapolated guidelines, Husband would have been required to pay either $5,359 or $5,319 in child support each month, *plus* the full amount of Joseph's tuition. *See Witt v. Ristaino*, 118 Md. App. 155, 173-74 (1997) (noting that whether to divide private school expenses in proportion to parents' adjusted actual incomes is within the discretion of the trial judge). Instead, the court awarded child support based on Joseph's reasonable monthly expenses when with Mother of $4,453, *plus* the full amount of the school tuition. We see no error or abuse of discretion.

III. Husband's Non-Marital Contribution to Marital Residence

A. Circuit Court Opinion

The circuit court made the following findings of fact and conclusions of law regarding Husband's non-marital contribution to the marital residence:

> [Husband] asks this court to consider that he made a contribution of $188,000 of his separate property toward the acquisition of the parties' home on Rockwood Parkway. The parties jointly purchased their home on Rockwood Parkway prior to their marriage. At the time of its acquisition on October 18, 1991, the Rockwood Parkway home was titled as "joint tenants." [Husband] contributed all of the $188,385.13 needed for acquisition of the Rockwood Parkway home, which acquisition costs came directly from [Husband's] sale of the Verplanck home.
>
> In addition to [Husband's] contribution of proceeds to acquire Rockwood Parkway, the evidence also showed that [Wife] contributed approximately $70,000 in sale proceeds from the Heatherton Lane

> home when it sold after the Rockwood purchase. These funds were used for upkeep of Rockwood Parkway, though over what period is unclear. Whether "upkeep" included mortgage payments was also unclear. Thus, netting the two above-referenced figures together, the Court finds that [Husband] contributed $118,385.13 more in sale proceeds to Rockwood Parkway than [Wife] did.
>
> The parties, themselves lawyers, had ample opportunity to address this imbalance. Natural times to have done so were when they purchased Rockwood Parkway, when they got married, and when they committed the proceeds of Rockwood Parkway to Halter Court. No such agreements were made, however, and many years have passed. Under these circumstances, the Court will find that the imbalance was intended to by [Husband's] gift to the marital whole and not a particularly important factor for the Court to consider now.

B. Parties' Contentions

Husband argues that the circuit court erred in denying his request for a monetary award of $138,000.00 to "recover his non-marital contribution" to the couple's pre-marital home, which was purchased as a joint tenancy. Husband argues that the court failed to consider his non-marital contribution as a factor, as required by statute, when it found the contribution to be a gift, even though "there is no evidence in the record to support that conclusion." Husband contends that the court erred in concluding that his contribution was a gift "to the marital whole," because of a lack of a formal agreement, which has "no support in Maryland law," and "is not for the Circuit Court to impose." Furthermore, Husband claims that the court "ignored the burden of proof for gifts," because Wife, as the donee, had the burden to demonstrate Husband's donative intent, and the court cited no evidence of such

intent. Husband concludes that, "[e]ven using a gift approach is questionable given the repudiation of the gift approach . . . by the 1994 Amendments to the Marital Property Act."

Wife responds that the circuit court did not abuse its discretion when it declined to consider Husband's contribution toward the parties' joint purchase of their pre-marital home. Wife contends that each party had a non-marital interest in the home, and each "equally contributed their respective non-marital interest" in their subsequent acquisition of their marital home on Halter Court. Wife points to the court's finding and Husband's acknowledgment that Husband, like Wife, "contributed the proceeds of sale from [his] non-marital home to the parties' joint account," and argues that the sale of Husband's prior home before Wife's prior home is of no consequence. Wife argues that the court properly found that Husband's behavior demonstrated his intent to donate his contribution to the marriage. Wife concludes that "the circuit court has discretion in granting a monetary award," and that the court properly determined that Husband "did *not* hold title to less than an equitable portion of the marital property."

C. Standard of Review

A circuit court's classification of property as marital or non-marital is subject to review under the clearly erroneous standard, while a discretionary standard of review applies to the decision of whether to grant a monetary award and the amount of that award. *Gordon*, 174 Md. App. at 625-26. "This means that we may not substitute our judgment for that of

the fact finder, even if we might have reached a different result, absent an abuse of discretion." *Id*. at 626 (citations and internal quotation marks omitted).

D. Analysis

After the court determines which property is marital property and values that property, the court may exercise its equitable powers by granting a monetary award upon consideration of, among other factors, "the contribution by either party of [non-marital property] to the acquisition of real property held by the parties as tenants by the entirety." FL §§ 8-205(a)(1), 8-205(b)(9).

Gordon is instructive to this case. In *Gordon*, this Court stated:

> Of significance here, the statute does not authorize an automatic "credit" or "reimbursement" to a spouse who contributes nonmarital funds towards the acquisition of a marital home that is owned TBE. Rather, F.L. § 8-205(b)(9) permits a court, in its discretion, to recognize a nonmarital contribution used to acquire the real property. While F.L. § 8-205(b)(9) could, standing alone, support a monetary award under appropriate circumstances, it is just one of eleven statutory factors that must be considered by the court before making a monetary award.
>
> * * *
>
> [T]he source of funds theory does not apply to an interest in real property held by the parties as tenants by the entireties, even if nonmarital funds were applied to its purchase (so long as it was not excluded by valid agreement . . .). Consequently, the fact that [appellee] used non-marital funds in the purchase of the parties' [marital] house could not mean that a portion of that property was non-marital.

174 Md. App. at 630-31 (alterations in original) (citations and internal quotation marks omitted).

Contrary to Husband's assertion, the circuit court did consider his $188,000 non-marital contribution as a factor under Section 8-205(b)(9). After considering both parties' testimony regarding their pre-marital home on Rockwood Parkway and subsequent purchase of their marital home on Halter Court, as well as the fact that Husband had never addressed the issue of his non-marital contribution when the parties married or when they committed the proceeds of the sale of Rockwood Parkway to the purchase of Halter Court, the court determined that Husband's contribution was "not a particularly important factor for the Court to consider now."

Given the circumstances of the instant case, the existence or non-existence of a "gift" is irrelevant to our review of the monetary award. *See Gordon*, 174 Md. App at 632-33 (noting that this Court already rejected the gift analysis in favor of the source of funds theory, which was supplanted by the Amendments to the Marital Property Act in 1994). Since 1994, real property owned as a tenancy by the entirety is marital property, absent an agreement to the contrary. FL § 8-201(e)(2). Here, the parties acquired Halter Court as tenants by the entirety through the contribution of their non-marital interests in Rockwood Parkway, which they owned as joint tenants. The court considered both parties' non-marital contributions, as required by statute, and determined that, given the passage of time and absence of any agreement regarding such contributions, Husband's contribution was not an important factor

in determining a monetary award. The circuit court's decision was well within its discretion and not clearly erroneous.

IV. Date of Division of Husband's Retirement and Pension Accounts

A. Circuit Court Opinion

The circuit court made the following findings of fact and conclusions of law regarding the division of Husband's retirement benefits:

> With respect to the post-separation increase in [Husband's] retirement assets and capital account, [Husband] asks the Court to find that [Wife] did not contribute to the acquisition of this portion of these assets because she did not continue to cook, clean, and otherwise care for [Husband] at the Halter Court home after the separation. Given that the parties had separated, the Court would not have expected such an arrangement. What [Wife] did continue to do, however, was to care (at least half-time) for Joseph and at times, Katie. [Wife] continued to press [Husband] for a divorce even in the face of [Husband's] September, 2010 motion to dismiss, and several postponements of the trial date, the first of which was occasioned by [Husband's] denial of the mutual and voluntary nature of the parties' separation.
>
> Ultimately, had [Husband] agreed on the grounds for divorce in December, 2011, he could have effected the earlier valuation date that he wants, and thus limited the extent to which these assets were vulnerable to equitable distribution. As it happened, though, he delayed [Wife's] receipt of any marital award, including that occasioned by [Husband's] ownership of these assets. Under these circumstances, the Court does not deem the fact that these assets increased post-separation to be a persuasive factor.

B. Parties' Contentions

Husband argues that the circuit court abused its discretion when it failed to address his argument that his retirement and pension accounts ("retirement accounts") should be divided as of the parties' date of separation rather than the date of divorce, which was approximately two years later. Husband notes that all contributions to the retirement accounts following the parties' separation "were based solely on his continued employment, with no contribution, financially or otherwise, from [Wife]." Husband claims that none of the statutory factors support a division of retirement accounts two years after separation.

Wife responds that the "law in Maryland is clear; the circuit court is required to value property as of the date on which the divorce is entered." Wife argues that Husband cites no legal authority for his contention that the retirement accounts should be divided as of the date of separation.

C. Standard of Review

As stated above, the circuit court's classification and valuation of marital property is subject to review under the clearly erroneous standard, while a discretionary standard of review applies to the decision of whether to grant a monetary award and the amount of that award. *Gordon*, 174 Md. App. at 625-26. The same standard of review applies to the classification and valuation of retirement accounts, as well as any division thereof. *See Imagnu v. Wodajo*, 85 Md. App. 208, 215-16 (1990) (noting that appellate courts "have

consistently shown great respect for the judgments of trial courts in choosing methods for valuing pension benefits in divorce proceedings").

D. Analysis

Wife is correct that marital property is valued as of the date that the divorce is entered. *See Doser v. Doser*, 106 Md. App. 329, 348 (1995) ("The law is settled that, in a proceeding for absolute divorce, the value of marital property must be decided as of the date on which divorce is actually entered."). As Wife notes, Husband cites no legal basis for his claim that the value of his retirement accounts should be determined as of the date of separation, rather than the date of the divorce, besides the statutory obligation for the court to consider each party's contributions when dividing marital property.[8]

[8] At oral argument before this Court, Husband's counsel cited *Alston v. Alston*, 331 Md. 496 (1993), as authority for the proposition that the retirement accounts should be valued as of the date of separation. In *Alston*, the husband purchased a winning lottery ticket following his separation from the wife, but before the date of divorce. *Id*. at 501. The trial court determined that the lottery ticket winnings were marital property, and awarded the wife "fifty percent of the yearly net distribution on the [lottery] annuity." *Id*. at 503. The Court of Appeals reversed, holding that, "[u]nder the particular circumstances" presented, the trial court should have given more weight to the final statutory factor, "relating to how and when specific marital property was acquired and the contribution that each party made toward its acquisition." *Id*. at 507 (internal quotation marks omitted). The Court, however, emphasized that "each case must depend upon its own circumstances to insure that equity be accomplished," and that

> [w]here one party, wholly through his or her own efforts, and without any direct or indirect contribution by the other, acquires a specific item of marital property after the parties have separated and after the marital family has, as a practical matter, ceased to exist, a monetary award representing an equal division of that particular property would

(continued...)

The circuit court, in its exercise of its discretion, considered Husband's argument that Wife did not contribute to the retirement accounts after the date of separation. The court noted that Wife was still caring for the parties' minor children at least half of the time, and determined that, because Husband delayed the granting of a divorce, the fact that the value of his retirement accounts increased following separation was not "a persuasive factor." Thus the court did consider, but rejected, Husband's claim. The court's consideration was proper, as was the exercise of its discretion to not give this factor much weight in its determination of the date of the division of the retirement accounts.

CROSS APPEAL

Wife's Interest in Husband's Defined Benefit Plan

A. Circuit Court Opinion

The circuit court made the following findings of fact and conclusions of law regarding Husband's defined benefit plan in its July 9, 2013 memorandum opinion:

> [O]n November 20, 2012, the parties submitted Joint Exhibit No. 1, a one-page chart entitled, "Summary of Agreed Upon Premarital Values." In it, they agreed that [Husband's] Steptoe &

[8](...continued)
not ordinarily be consonant with the history and purpose of the statute.

Id. at 507. *Alston* is distinguishable from the instant case, because, even though the parties were separated, Wife indirectly contributed to Husband's employment by continuing to provide child care for the parties' minor children. As a result, the contributions to the retirement accounts following the parties' separation were not a result of Husband's efforts alone.

Johnson Defined Benefit Plan . . . had a total value of "*if, as and when*" and a premarital value of "*if, as and when*."

On May 10, 2013, the Court issued a Memorandum Opinion and Judgment of Absolute Divorce addressing the disposition of the marital share of [Husband's] Steptoe & Johnson Defined Benefit Plan. Specifically, the Court found that " . . . the parties agree that the marital portion of this defined benefit plan should be divided on an if, as, and when basis . . . ." Thereafter, based on its consideration of the factors in Section 8-205 of the Family Law Article, the Court ordered that "[Husband] shall transfer [Wife] one-half of the marital share (the marital share being a fraction, the numerator of which will be the total number of months the parties were married and the denominator of which will be the total number of months [Husband] participated in the plan) of the balance of the Steptoe & Johnson Defined Benefit Plan on an "if, as and when" basis. Thus, per the parties' agreement, the Court ordered distribution on an "if, as, and when" basis and adopted the marital fraction approved in *Bangs*.

In her [m]otion [to alter or amend], [Wife] asks that the Court " . . . clarify that the qualified domestic relations order will award her a separate interest in the benefits." In her letter brief, [Wife] says that the "dispositive provision of a separate share qualified domestic relations order would read as follows:" and then requests that the Court award the "actuarial equivalent of Fifty Percent (50%) of the 'marital share' of the Participant's accrued benefit as of the Alternate Payee's benefit commencement date." Then follows a definition of the "marital share" as "257 Months/Total Number of Full Months Between The Date Participant Began Participating in the Steptoe & Johnson Defined Benefit Plan and Alternate Payee's Benefit Commencement Date." [Wife] relies on *Eller v. Bolton* for the proposition that the Court is authorized by Section 8-205 to order a separate interest in the division of the defined benefit plan at issue here.

[Husband] opposes the requested clarification. He argues that no such request was made by [Wife] in pleadings, no evidence presented from which the Court could consider the implications of such a request on the Steptoe & Johnson Defined Benefit Plan, and

> there is nothing before the Court to suggest that the Plan would approve a separate share for [Wife], among other arguments.
>
> Having reviewed *Eller*, the Court is not persuaded that it grants the kind of blanket authority [Wife] suggests. The retirement plan at issue in *Eller* was the Husband's defined contribution plan, not a defined benefit plan. Moreover, the parties in *Eller* specifically agreed that at the time of divorce, Wife would receive a separate interest in the plan.
>
> **In this case, the parties agreed to an "if, as, and when" distribution and the use of a marital fraction whose denominator is measured by the total number of months [Husband] participates in the plan, not [Wife's] alternate benefit commencement date. Neither party has suggested that there is anything ambiguous about the terms of their agreement such that the Court should look beyond its plain language for some nuanced alternate meaning.** Thus, even though the Court may be generally authorized to order either a *shared* or a *separate* interest in the allocation of a defined benefit plan in divorce, **the parties' agreement here precludes the use of the marital fraction [Wife] wants, and with it, the specification of a separate interest for her.** Accordingly, [Wife's] request for a separate interest will be denied.

(Emphasis added).

B. Parties' Contentions

Wife argues that the circuit court erred in finding that the parties agreed that she would receive a shared interest in Husband's defined benefit plan, rather than a separate interest. Wife contends that the parties agreed on the proper calculation of the benefit plan—the number of months the parties were married divided by the total number of months Husband participated in the plan—but did *not* agree that this interest would be a shared interest. According to Wife, the court erred in interpreting the agreement as to the

calculation of the interest to be an agreement as to how Wife's share would be transferred. Wife concludes that she "should be permitted to receive her portion of the balances at a time and in a form to be determined by her in accordance with the provisions of the plan," and that the parties' agreement as to the calculation does not preclude such a result.

Husband responds that the issue regarding Wife's interest in his defined benefit plan

> is not whether or not the Circuit Court is empowered by statute o[r] case law to award [Wife] a separate interest in [his] defined benefit plan, but whether, [Wife] waived her currently requested relief by agreeing that the defined benefit plan would be divided and valued on an 'if, as and when' basis. Indeed, the Circuit Court acknowledged that it would have that power had the parties not previously agreed otherwise.

Husband concludes that Wife did agree to the shared interest, and that the court did not err "in refusing to change that agreement."

C. Standard of Review

Agreements regarding division of marital property are subject to general contract law. *See Fultz v. Shaffer*, 111 Md. App. 278, 298 (1996). "The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law, subject to *de novo* review by an appellate court." *Maslow v. Vanguri*, 168 Md. App. 298, 317 (citations and internal quotation marks omitted), *cert. denied*, 393 Md. 478 (2006).

D. Analysis

In *Maslow*, this Court summarized the applicable rules of contract interpretation:

> To ascertain the parties' intent, **courts in Maryland have long adhered to the objective theory of contract interpretation, giving effect to the clear terms of agreements, regardless of the intent of the parties at the time of contract formation.** Under this theory, when a contract is clear and unambiguous, its construction is for the court to determine.
>
> **A court will presume that the parties meant what they stated in an unambiguous contract, without regard to what the parties to the contract personally thought it meant or intended it to mean.** Put another way, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean. Rather, **contractual intent is determined in accordance with what a reasonable person in the position of the parties at the time of the agreement would have intended by the language used.**
>
> **Notably, a contract is not ambiguous merely because the parties do not agree as to its meaning.** Contractual language is considered ambiguous when the words are susceptible of more than one meaning to a reasonably prudent person. To determine whether a contract is susceptible of more than one meaning, the court considers the character of the contract, its purpose, and the facts and circumstances of the parties at the time of the execution.

Id. at 318-19 (emphasis added) (citations and internal quotation marks omitted).

This Court explained the difference between shared and separate interests in retirement plans in *Eller v. Bolton*:

> One type of payment available is a "shared payment," whereby the QDRO [qualified domestic relations order] "seeks to divide only actual payments made with respect to the participant under the plan." Under a shared payment approach, only the participant's stream of

> income is divided and the "alternate payee is not actually given a portion of the actual retirement benefit." Therefore, the alternate payee's right to receive payment is dependent upon the participant's receipt of payments under the plan and he or she will not receive a distribution unless, and until, the participant is in pay status. Accordingly, QDROs providing for shared payments are typically entered in cases where the participant is already receiving payments under his or her plan.
>
> In contrast to the shared payment QDROs are QDROs providing for "separate interest" payments. Under a separate interest QDRO, the participant's actual retirement benefit is divided, and the alternate payee is permitted to "receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant." A separate interest QDRO is often preferred where the order "seeks to divide a pension as part of the marital property as opposed to providing for support payments."

168 Md. App. 96, 109-10 (2006) (internal citations omitted).

At trial in the instant case, the parties advised the court that they were in agreement on the division of Husband's defined benefit plan. *Wife's* counsel told the court: "We've always agreed on that. That's just a defined benefit plan, so we would use the [*Bangs*] formula on that." *See Bangs v. Bangs*, 59 Md. App. 350, 368 (1984). Later, the parties introduced into evidence Joint Exhibit No. 1, entitled "Summary of Agreed Upon Premarital Values." In that exhibit, the parties agreed that Husband's defined benefit plan, Item No. 3.8, had a total value of "[i]f, as and when" and a premarital value of "[i]f, as and when."

In her motion to alter or amend, Wife asked the trial court "to clarify that the qualified domestic relations order will award [Wife] a separate interest," as distinguished from a shared interest, in Husband's defined benefit plan. Wife submitted to the trial court a

proposed qualified domestic relations order that requested the trial court to award a separate interest in Husband's defined benefit plan, namely, the "*actuarial equivalent* of Fifty Percent (50%) of the 'marital share' of the Participant's accrued benefit *as of the Alternate Payee's benefit commencement date*." (Emphasis added). The proposed order further provided the definition of "marital share" as "257 months / Total Number of Full Months Between The Date Participant [Husband] Began Participating in the [ ] Defined Benefit Plan *and Alternate Payee's [Wife's] Benefit Commencement Date*." (Emphasis added).

The trial court observed that "the parties agreed to an 'if, as, and when' distribution and the use of a marital fraction whose denominator is measured by the total number of months [Husband] participates in the plan, not [Wife's] alternate benefit commencement date." The court then concluded that, because the parties' "if, as, and when" agreement was unambiguous, such agreement prevented the court from awarding Wife a separate interest in Husband's defined benefit plan.

The *Bangs* "if, as and when" formula is predicated on the notion that both parties will begin to receive benefits on the same date—the date the pension is received by the plan participant. *See Bangs*, 59 Md. App. at 368 (establishing the formula calculation "if, as and when the pension is received by Mr. Bangs"). In *Eller*, we stated that the "if, as and when" formula

> *is consistent with a shared interest or shared payment approach*, whereby "payments start when the participant chooses, are paid in the form that he chooses, and will terminate completely on his death

> unless a qualified joint survivor annuity has been selected." *In fact, the shared interest or shared payment approach "is sometimes known as the if, as, and when received approach."*

168 Md. App. at 117 (emphasis added) (quoting David Clayton Carrad, *The Complete QDRO Handbook: Dividing ERISA, Military, and Civil Service Pensions and Collecting Child Support from Employee Benefit Plans,* 70 (2nd ed. 2004)).

Wife, nevertheless, points us to *Prince George's County Police Pension Plan v. Burke*, 321 Md. 699 (1991), as a case where the Court of Appeals affirmed a trial court's order granting the wife a separate share of the husband's pension. In that case, however, the trial court

> ordered that [the wife] be given an interest in her husband's pension, calculated as "one-half (½) of a fraction of which the number of years and months of the marriage . . . is the numerator and the total number of years and months of employment credited toward retirement is the denominator." The Trustees were ordered to issue [the wife's] portion directly to her when it became payable.

Id. at 701. The phrase "when it became payable," however, is not identical to the phrase "if, as and when." Neither the trial court order nor the Court of Appeals' opinion used either the phrase "if, as and when" or "*Bangs* formula" to refer to the wife's separate interest. *Id*. Therefore, *Burke* does not provide any support for Wife's position.

We have not found any reported opinion that uses either phrase—"if, as and when" or "*Bangs* formula"—to refer to a separate interest. As a result, we conclude that, under the objective theory of contract interpretation, "a reasonable person in the position of the parties

at the time of the agreement would have intended" the phrase "if, as and when" in the valuation of the defined benefit plan to mean a shared interest in the defined benefit plan. *Maslow*, 168 Md. App. at 319; *see also id.* ("The clear and unambiguous language of an agreement will not give way to what the parties thought that the agreement meant or intended it to mean." (citations and internal quotation marks omitted)). Accordingly, we agree with the trial court's conclusion that, by agreeing to an "if, as and when" valuation of Husband's defined benefit plan, Wife agreed to a shared interest in that plan. Accordingly, the court was correct in holding that the parties' agreement precluded an award to Wife of a separate interest in Husband's defined benefit plan.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID 80% BY APPELLANT AND 20% BY APPELLEE.