

Circuit Court for Prince George's County
Case No. CAD22-16774

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1181

September Term, 2023

NICOLE K. GILBERT

v.

KURT ULLYSEESE GILBERT

Berger,
Zic,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: October 9, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On July 24, 2023, the Circuit Court for Prince George’s County granted an absolute divorce to appellant, Nicole Gilbert (“Wife”), and appellee, Kurt Ullyseese Gilbert (“Husband”). The court also distributed the parties’ marital property and denied Wife’s request for attorneys’ fees. Wife timely appealed that judgment and presents the following issues, which we have rephrased as follows:

1. Whether the trial court erred in its distribution of the marital property, specifically:
 - A. Whether the trial court made clearly erroneous factual findings;
 - B. Whether the trial court erred in failing to value the parties’ pensions and in transferring title to personal property;
 - C. Whether the trial court erred in failing to consider the required statutory factors before making a monetary award.
2. Whether the circuit court abused its discretion in declining to award Wife attorneys’ fees.
3. Whether the trial judge should be recused from hearing this matter on remand.

For the reasons set forth below, we shall vacate the judgment of the circuit court and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The parties married on June 15, 1996, in Roanoke, Virginia. During the marriage, the parties had two children together, both of whom were emancipated at the time of trial. In 2008, the parties purchased the marital home in Beltsville. On June 2, 2022, Wife filed a complaint for absolute divorce. Husband filed an answer and counter-complaint for absolute divorce, and Wife amended her complaint for an absolute divorce.

The circuit court held a merits trial on May 24, 2023. Both parties were represented by counsel, and the parties submitted a Joint Statement Concerning Marital and Nonmarital Property, pursuant to Maryland Rule 9-207 (“Joint Property Statement”).

Wife, age 53, has a master’s degree in social work and a bachelor’s degree in psychology. Wife was employed as a therapeutic social worker and administrator for the duration of the marriage. She worked for Catholic Charities from 1997 to 2006, and she was the Deputy Director for the Healthy Families Thriving Communities Collaborative Council from 2006 to 2012. Since 2013, Wife has been employed with the District of Columbia Department of Children and Family Services, overseeing assessments and investigations of abused and neglected children. She was promoted to Deputy Director in 2021. At the time of trial, Wife’s annual income was \$169,789.

Wife’s work was stressful, requiring her to handle difficult cases of abused and neglected children in foster care, and she was often on-call during evening hours. Wife was the primary caregiver, working a traditional 9:00 a.m. to 5:00 p.m. schedule so that she could care for the children after school, take them to activities, and support Husband’s rotating police schedule. Husband assisted Wife in caring for the children and managing the home. Wife also managed the family’s finances, and from 2009 through 2020, the parties shared a joint checking account.

In 1993, Husband, age 54, began working as a police officer for the Takoma Park Police Department (“TPPD”). Husband was earning approximately \$138,000 per year when he retired in October 2020, after twenty-seven years. In November 2020, he began working for the Bladensburg Police Department (“BPD”), where he earned approximately

\$90,000 per year. In June 2022, he retired from police work. Husband’s police schedule fluctuated between day shifts, evening shifts, and overnight shifts, and often included weekends. Husband struggled with stress and insomnia due to the challenges of his job and the shiftwork. According to Husband, Wife was supportive of his work and his health struggles.

In 2008, the parties began experiencing marital difficulties. Wife testified that she learned that Husband was having an extra-marital relationship. As a result of the parties’ marital problems, Wife began experiencing cardiac pain, numbness in her arms and face, lightheadedness, headaches, and vertigo. In or about 2010, Husband moved into the family’s guest room, but continued living in the family home.

Husband denied having a sexual relationship outside the marriage. According to Husband, in 2014, he learned that he had contracted a sexually transmitted disease from Wife, causing him to suffer anxiety and depression.¹ In May of 2014, Husband leased an apartment in Takoma Park close to the police station because he felt that he needed space to try and get his anxiety “under control.” He told Wife that he planned to rent the apartment on a monthly basis, but he signed a one-year lease “by mistake.” In 2010, Husband had started a vending machine business. He used the apartment to store product for the vending machines.

Early in the marriage, the parties discussed increasing the amount of contributions to their respective retirement accounts. Husband informed Wife that he was “paying extra

¹ Wife had disclosed the condition to Husband prior to their marriage.

money toward the Takoma Park retirement” in order to increase his pension, which Wife understood to be for the benefit of both parties. Husband receives a monthly pension payment of \$4,300 from TPPD. He testified that he was seeking an award of one hundred percent of his pension, which he stated, is “just enough for [him] to get by.” Husband had a Mission Square 457(b) retirement account with a balance of approximately \$18,000;² a New York Life Securities account that, according to Husband, had a balance of \$176,929.54; and a Maryland State Retirement and Pension Systems account with a balance of \$10,051.22 that was payable upon a single lump sum withdrawal.

Wife’s Mission Square 401(a) deferred compensation plan was valued at \$269,957.98, and her Mission Square 403(b) account was valued at \$72,463.61. Wife testified that she had a pension through Catholic Charities and that she was projected to receive a monthly pension payment of \$621.00 upon her retirement.

The parties disputed the value of Husband’s Truist savings account x3013 and checking account x8496. Wife valued Husband’s account x8496 at \$42,196.01 and account x3013 at \$34,221.21. In the Joint Property Statement, Husband reported \$11,000 in account x3013 and a zero balance in account x8496. At trial, he stated that his account x3013 had a balance of \$300. Husband stated that he used the funds in his accounts to pay

² Husband reported in the Joint Property Statement that his Mission Square 457(b) account represented retirement funds in the amount of \$21,867.70 that he earned prior to the marriage. At trial, he provided no evidence showing the balance in the account as of the date of the parties’ marriage. The circuit court found Husband’s Mission Square account to be marital property. Husband does not challenge that finding.

his increased rent, attorneys' fees, and living expenses, but he failed to produce any records in discovery or at trial showing his expenditures.

The marital home was valued at \$650,000 with an outstanding mortgage of \$451,157, resulting in a net equity of approximately \$198,843. The parties valued the furniture in the home at \$13,200 and Wife's jewelry at \$2,000. Wife requested that she be awarded the marital home, where she was living with the parties' daughter.

On June 29, 2023, the court delivered an oral opinion as to the divorce and the division of marital property, followed by a written order. The court granted the parties an absolute divorce on the ground of a twelve-month separation.

The court ordered the sale of the marital home and the proceeds to be divided equally, further ordering that Husband's share of the proceeds was to be reduced by \$42,196.01 plus an additional \$22,797.30, representing funds the court found that Husband had dissipated. The court awarded Wife the furniture, valued at \$13,200, and her jewelry, valued at \$2,000. Each party was awarded sole ownership of the vehicle in his and her name, and Husband retained sole ownership of the vehicle utilized by the parties' daughter. The court ordered that each party was to retain sole ownership of their individually titled bank accounts, retirement accounts, and pensions. The court denied Wife's request for attorneys' fees.

Wife filed this appeal.

DISCUSSION

Standard of Review

We review the rulings of a circuit court sitting without a jury, “on both the law and the evidence.” Md. Rule 8-131(c). We review a trial court’s factual findings under the clearly erroneous standard of review and determine whether the court’s findings are supported by substantial evidence in the record. *Innerbichler v. Innerbichler*, 132 Md. App. 207, 230 (2000). “When a trial court decides legal questions or makes legal conclusions based on its factual findings, we review these determinations without deference to the trial court.” *Plank v. Cherneski*, 469 Md. 548, 569 (2020) (quoting *MAS Assocs., LLC v. Korotki*, 465 Md. 457, 475 (2019)).

1.

Equitable Distribution of the Marital Property

Wife asserts that the trial court erred in distributing the pensions because the parties had waived any distribution other than on an “if, as, and when” basis or, alternatively, that it erred in failing to value the parties’ pensions. Wife further contends that the trial court erred in failing to consider the statutory factors before making two monetary awards, referring to the findings of dissipation and the consequent reduction of sale proceeds to Husband. Husband responds that the trial court properly valued the parties’ marital property, considered the relevant statutory factors, and did not abuse its discretion in making its award.

A. Statutory Framework

Section 8-202(a)(1) of the Family Law Article (“FL”) of the Maryland Code (1984, 2019 Repl. Vol.) authorizes a trial court, in the context of a divorce proceeding, to “resolve any dispute between the parties with respect to the ownership of personal property.” In making a proper division of marital property upon divorce, trial courts must utilize a three-step process. *Abdullahi v. Zanini*, 241 Md. App. 372, 405 (2019); FL §§ 8-203–205. First, the trial court must determine which property is marital. *Abdullahi*, 241 Md. App. at 405 (citing FL § 8-203(a)). Second, the court must value the property. *Id.* (citing FL § 8-204(a)). Third, the court must determine whether distribution of the marital assets by title would be unfair, and if so, the court may adjust any inequities in property ownership by granting a monetary award or transferring ownership of an interest in a pension or retirement account, or both. *Id.*; FL § 8-205. “[T]he purpose of going through the steps outlined is to acquire the requisite information from which an informed, equitable decision can be made.” *Jandorf v. Jandorf*, 100 Md. App. 429, 440 (1994).

At step three, when deciding whether to order a monetary award or transfer an interest in property, courts must comply with FL § 8-205(b), which requires the court to consider each of the following factors before making an award:

- (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
- (2) the value of all property interests of each party;
- (3) the economic circumstances of each party at the time the award is to be made;
- (4) the circumstances that contributed to the estrangement of the parties;

(5) the duration of the marriage;

(6) the age of each party;

(7) the physical and mental condition of each party;

(8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;

(9) the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;

(10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and

(11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

FL § 8-205(b); *see also Abdullahi*, 241 Md. App. at 406; *Hart v. Hart*, 169 Md. App. 151, 161 (2006); *Otley v. Otley*, 147 Md. App. 540, 547 (2002).

In this case, the circuit court completed the first step in the process outlined above, and found that all of the property was marital property. In valuing the marital property, the court accepted the parties' valuations as to the marital home, furniture, vehicles, and the parties' retirement accounts. The court found that Husband had dissipated funds in the amount of \$42,196.01 from his checking account x8496 and \$22,797.30 from his savings account x3013. With regard to the parties' pensions, the court found:

[Wife] requested a share of [Husband's] pension in this case, which again, I certainly find that [Husband's] pension is marital property.

But I also – the [c]ourt has to make a finding or its decision has to be one that reflects an equitable distribution of that marital property.

And what is clear and unequivocal is that [Wife] currently and for quite some time has earned, based on the testimony and the documents that were submitted in this case, has earned substantially more money than [Husband].

[Husband’s] current income is his pension, which is approximately \$4,600 a month. [Wife’s] monthly income is I believe over \$13,000, as she earns almost \$170,000 a year. And she works for the Federal government.

And so what the [c]ourt has decided, based on the evidence in this case and because it is my responsibility to equitably divide the property, the marital property of the parties, is that the [c]ourt . . . will divide the proceeds as follows.

* * *

So, to be clear, [Husband] will retain his pension from the City of Takoma Park, for which he is currently receiving \$4,690.65, and [Wife] will retain her Catholic Charities pension, for which she is currently receiving \$621.83.

But again, if you look at the value of the other bank accounts and retirement accounts that are in the names of each of the parties, I believe that this constitutes a fair and equitable distribution of the assets of both of the parties.

The court’s finding that Wife was currently receiving her pension was erroneous, as there was no evidence that Wife was receiving a monthly pension payment.³ She testified that she was entitled to a Catholic Charities pension, which she projected to be \$621.00 per month upon her retirement. *See Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562,

³ The court also incorrectly stated that Wife was working for the “Federal government.” The evidence showed that Wife worked for the District of Columbia Department of Children and Family Services.

576 (2007) (“A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it.”). Though the circuit court’s erroneous finding as to Wife’s pension was the basis, in part, of the marital property awards, we need not determine the extent that the circuit court’s error contributed to the awards because those awards must be vacated for the reasons below. *See Pac. Mortg. & Inv. Grp., Ltd. v. LaGuerre*, 81 Md. App. 28, 34-35 (1989) (vacating injunction that was issued based on erroneous factual finding and legal error).

B. Pension Valuation

Maryland courts employ three methods of valuing pension and retirement benefits:

“First, a trial court could calculate the value of the member’s contributions to the pension during the marriage, plus interest. Second, the court could attempt to compute the present value of the pension when it vests. Third, the court could determine a fixed percentage for [the spouse] of any future payments [the pension recipient] receives under the plan, payable to [spouse] as, if, and when paid to [the pension recipient].”

Abdullahi, 241 Md. App. at 421 (internal quotation marks, further citation, and footnote omitted) (quoting *Dziamko v. Chuhaj*, 193 Md. App. 98, 111 (2010)).

It is unnecessary to value a pension, however, if the party requesting the award agrees to an award on an “if, as and when” basis. Cynthia Callahan & Thomas C. Ries, *Fader’s Maryland Family Law* § 13-16(n) (7th ed. 2021); *see* FL § 8-204(b)(1) (providing that a court “need not determine the value of a pension, retirement, profit sharing, or deferred compensation plan, unless a party has given notice in accordance with paragraph (2) of this subsection that the party objects to a distribution of retirement benefits on an ‘if, as, and when’ basis”); *see also Otley*, 147 Md. App. at 547. If a party objects to distribution

on an “if, as, and when” basis, that party may present evidence of the value of the retirement benefits. FL § 8-204(b)(2). However, if no notice is given, any objection to distribution on an “if, as, and when” basis is waived. *Id.*; see *Abdullahi*, 241 Md. App. at 422 (holding that, where neither party gave notice of an objection pursuant to FL § 8-204(b)(1), the trial court was required to distribute the parties’ pensions on an “if, as, and when” basis, or its equivalent, and the trial court erred in setting off one spouse’s pension against another).

Under the “if, as and when” distribution method, known as the *Bangs*⁴ formula, the court calculates the marital portion of a pension using “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[.]” *Dziamko*, 193 Md. App. at 112 (quoting *Bangs*, 59 Md. App. at 356). The non-member spouse’s share is determined by applying a “fixed percentage” to the marital portion of the pension. *Id.*

Here, Husband provided no notice that he objected to an “if, as, and when” valuation, and the parties did not present evidence at trial as to the value of their pensions. On this record, it was error for the circuit court to set off one pension against another, and we must vacate the judgment and remand for further proceedings. See *Abdullahi*, 241 Md. App. at 421 (explaining that in the absence of a valuation of the parties’ pensions, it was “impossible” for this Court to determine the basis for the circuit court’s award). On remand, the circuit court must apply the “if, as, and when” analysis, or an equivalent method, to determine the appropriate distribution of the parties’ pensions. See *id.* at 422-

⁴ *Bangs v. Bangs*, 59 Md. App. 350 (1984).

23. As explained below, the court must also analyze the factors set forth in FL § 8-205(b) before making a monetary award or transfer of ownership of property.

C. The FL § 8-205(b) Factors

In deciding whether to order a monetary award or transfer of property, as the court did in this case, the court must make findings based on its consideration of the factors set forth in FL § 8-205(b). *See Quinn v. Quinn*, 83 Md. App. 460, 464-65 (1990). A court’s failure to consider the statutory factors requires that any monetary award be vacated. *Id.*; *Campolattaro v. Campolattaro*, 66 Md. App. 68, 79 (1986).

In this case, the circuit court did not reference FL § 8-205(b) or the statutory factors in its decision, and we cannot tell from the court’s ruling whether the court factored in those considerations in balancing the equities between the parties. “Although the court is not required to recite each factor in making a monetary award, appellate courts must be able to discern from the record that these factors were weighed.” *Hart*, 169 Md. App. at 166-67; *accord Quinn*, 83 Md. App. at 466.

There was evidence at trial, for example, as to the age of each party, the mental condition of each party, and the monetary and non-monetary contributions of the parties to the well-being of the family, though the court did not discuss that evidence in its findings. Wife argues that the trial court focused primarily on Husband’s work as a police officer and ignored evidence of the sacrifices that she made to promote his career and secure his pension benefits. With respect to the economic circumstances of the parties, the court noted that “the parties are for the most part . . . sort of equally situated in terms of their financial status and their contribution to marital property during the marriage.” *See* FL §

8-205(b)(3) (requiring consideration of the economic circumstances of the parties at the time of the award). The court stated that Wife “currently and for quite some time . . . has earned substantially more money than [Husband,]” noting that Wife earned approximately \$13,000 monthly and Husband’s monthly pension was approximately \$4,600.

Wife argues that because Husband did not request alimony, the court improperly focused on her non-marital income and conflated the parties’ assets with income. We have noted that alimony and monetary awards serve distinct functions:

[A]limony is intended to provide periodic support to a financially dependent spouse following the divorce. . . . [T]he principal focus is really on the future[.]

* * *

A monetary award, on the other hand, is not intended as support, and it focuses not on the future but on the present and past. . . . The sole purpose of the [monetary] award is to assure that the disposition of that property upon the divorce will be equitable in terms of the overall contributions that each party made to the acquisition of the property and to the marriage and its breakup.

Riley v. Riley, 82 Md. App. 400, 406 (1990).

In this case, the circuit court erred in failing to demonstrate that it considered the factors set forth in FL § 8-205(b). On remand, the court shall decide whether additional evidence is required to address the required statutory considerations, and the court must explain how it balanced the equities in reaching its allocation of the marital assets.

i. Transfer of Ownership of Furniture

Because the issue is likely to arise on remand, we shall address Wife’s contention that the circuit court erred in transferring ownership of the parties’ furniture to her absent

the parties’ consent.

FL § 8-205(a)(2)(ii) provides that, “subject to the consent of any lienholders,” the circuit court may transfer the ownership of an interest in family use personal property from one party to another. “Family use personal property” means personal property acquired during the marriage, owned by one or both of the parties, and used primarily for family purposes, and specifically includes “furniture.” FL § 8-201(d)(1)-(2).

Wife relies on *Blake v. Blake*, 81 Md. App. 712, 725 (1990), in support of her argument that the circuit court was not authorized to transfer the parties’ furniture to her. In *Blake*, this Court stated that no provision under FL §§ 8-202 and 8-205 permits the trial court to transfer ownership of personal or real property from one party to the other. 81 Md. App. at 725. Our decision in *Blake*, however, predated the enactment of subsection (a)(2)(ii) in FL § 8-205, which authorizes the trial court to transfer the ownership of an interest in family use personal property from one party to another. *See* 2004 Md. Laws, ch. 457 (effective October 1, 2004). Because FL § 8-205(a)(2)(ii) authorizes a court to transfer family use personal property, such as furniture, from one or both parties to either or both parties, the court’s order transferring ownership of the family use furniture to Wife was not error. On remand, the court may or may not choose to reach the same result with regard to the furniture, after applying the statutory factors and balancing the equities.

2.

Attorneys’ Fees

Wife further challenges the circuit court’s denial of her request for attorneys’ fees. Because the case is remanded for reconsideration of the monetary award, the circuit court

may also reconsider Wife’s request for attorneys’ fees. *See Turner v. Turner*, 147 Md. App. 350, 400 (2002) (explaining that “[t]he factors underlying alimony, a monetary award, and counsel fees are so interrelated that, when a trial court considers a claim for any one of them, it must weigh the award of any other”); *accord Wasyluszko v. Wasyluszko*, 250 Md. App. 263, 283 (2021).

3.

Circuit Court’s Alleged Bias

Wife requests that, on remand, this case be assigned to another judge due to the trial judge’s demonstrated bias in favor of Husband’s history of public service, as evidenced in the following comments:

As someone who has worked with law enforcement for the past, over 25 years, I don’t doubt that any of that [the stresses of being a police officer] is correct.

And what I find in this case is that [Husband] as a retired police officer is entitled to have his day in the sun, so to speak.

He should not have to go out and continue to work after he has put in his time and he has made the sacrifice of being a police officer.

* * *

But I am not finding that he has to do anything because he has put in the sacrifice as a public servant and I think that anyone who has been a public servant for 25 years should be entitled to enjoy the fruits of that service. So, I just wanted to be clear about that.

Indeed, courts should avoid any potential appearance of partiality, even where no partiality exists, in order “to promote public confidence in the integrity of the judicial process.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). On

remand, we leave the assignment of this matter to the discretion of the circuit court.

**JUDGMENT VACATED. CASE
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID 50%
BY APPELLANT AND 50% BY
APPELLEE.**