

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1828

September Term, 2014

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PETER L. FRIZ

v.

KERRI L. FRIZ

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Wright,  
Berger,  
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: September 4, 2015

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

This case involves an appeal from a divorce proceeding in the Circuit Court for Carroll County between Appellant Peter Friz (“Peter”) and Appellee Kerri Friz (“Kerri”). On appeal, Peter contends that the trial court committed several errors, and presents the following questions for our review:

1. Did the trial court err in its calculation of Peter’s income?
2. Did the trial court err in awarding indefinite alimony of \$830 per month to Kerri?
3. Did the trial court err in granting Kerri use and possession of the marital home and family vehicle for a period of three years?
4. Did the trial court err in ordering Peter to continue to pay the mortgage on the marital home?
5. Did the trial court err in granting Kerri a monetary award in the amount of \$26,746?
6. Did the trial court err in awarding Kerri a \$60,000 contribution to her attorney’s fees?

For the following reasons, we affirm in part, vacate in part, and remand for limited proceedings consistent with this opinion.

### **FACTUAL BACKGROUND**

The parties were married on June 7, 1997, and had two children, Madison, currently age 15, and Mia, currently age 12. At the time the parties were married, Kerri worked full-time as a neonatal nurse at the University of Maryland Medical System. Kerri testified that once the couple began to have children, they agreed that Kerri would work part-time, twenty-four hours a week, so that she could care for the children. In 2003, Peter returned

to graduate school to pursue a master's degree and requested that Kerri further reduce her hours to two, twelve hour shifts every third weekend. In August 2013, after the parties had separated, Kerri added shifts to her schedule and began working two, twelve hour shifts on alternating weekends.

Peter is a business executive. In April 2011, Peter was laid off from his position at INVeSHARE where he was earning an annual salary of \$185,000, exclusive of bonuses. His employment and income fluctuated until June 2012. Since June 2012, Peter has been employed by the Brickman Group Ltd., LLC as the Director of Operations. In 2013, Peter testified that his annual salary at Brickman was \$155,000. Additionally, he testified that he had received \$31,000 in total bonuses from Brickman since 2012.

On January 29, 2013, Kerri filed a Complaint for Limited Divorce, or, in the Alternative, for Absolute Divorce. Prior to trial, the parties entered into a consent *pendente lite* custody order (“first consent order”). By the terms of the first consent order, the parties agreed to share joint legal custody of the children, and Kerri retained primary physical custody. The first consent order also gave Kerri use and possession of the marital home.

The divorce case proceeded to trial on November 12, 2013. On May 6, 2014, prior to the conclusion of the trial, the parties entered into a final consent custody order (“final custody order”). Under the terms of the final custody order, both parties agreed to share joint legal custody of the children, and Kerri retained primary physical custody.

At trial, Kerri offered Bruce O’Heir as an expert witness. The trial court accepted O’Heir as an expert in certified public accountancy and income analysis. O’Heir testified that he used the parties’ last five income tax returns to determine the parties’ income as it

was relevant to alimony and child support. O’Heir testified that he calculated Peter’s income by averaging Peter’s income from the last five years, and determined that Peter’s actual income was \$211,000. By contrast, Peter alleged that the proper measure of his income was his 2013 Brickman salary, \$155,000.

The trial concluded on April 25, 2014, and the trial court issued its ruling in a memorandum opinion and written order on October, 15, 2014. The trial court granted Kerri’s petition for absolute divorce on the grounds that Peter had committed adultery during the marriage. The trial court credited O’Heir’s testimony about Peter’s actual income and found Peter’s income to be \$211,000. The trial court also granted Kerri: indefinite alimony in the amount of \$830 per month; a monetary award of \$26,746; use and possession of the marital home and the family vehicle for a period of three years while requiring Peter to continue making the mortgage payments; and a \$60,000 contribution to her attorneys’ fees. Peter filed a timely appeal challenging these aspects of the trial court’s ruling.

## **DISCUSSION**

### **I. Calculation of Peter’s Income**

On appeal, Peter first argues that the trial court incorrectly calculated his income, which is relevant to the calculation of child support, as a factor in marital award, and as a consideration in alimony. Md. Code Ann., Fam. Law (“FL”) §§ 8-203, 11-106, 12-204. Peter asserts that by averaging his income over a period of five years, the expert witness did not determine Peter’s actual income, but instead determined Peter’s potential income,

which is impermissible without also finding that Peter was voluntarily impoverished. Finding no error in the trial court's calculation of Peter's actual income, we affirm.

Pursuant to Md. Code Ann., Fam. Law ("FL") § 12-201(h), income means the "actual income of a parent, if the parent is employed to full capacity," or "potential income of a parent, if the parent is voluntarily impoverished." To determine a party's actual income, FL § 12-203 requires the trial court to verify the income statement of the parent with "both current and past actual income." Potential income, on the other hand, is "income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." FL § 12-201(l).

In domestic matters generally, we review the trial court's factual findings for clear error, and findings that are supported by substantial evidence are not clearly erroneous. *Collins v. Collins*, 144 Md. App. 395, 409 (2002). We review the trial court's application of the law *de novo*, and the ultimate award or decision is reviewed for abuse of discretion. *Reynolds v. Reynolds*, 216 Md. App. 205, 218-19 (2014).

Regarding Peter's income, the trial court made the following factual findings:

Husband's average income from all sources for the years 2008-2012 is \$211,239.00, which includes the following sources of income: salary, interest, dividends, capital gains, business income and unemployment compensation.... Maryland Fam[.] Law Code Ann § 12-203(b)(3) allows the Court to consider 5 years of income tax returns "if a parent is self-employed or has received an increase or decrease in income of 20% or more in a 1 year period within the past 3 years." Husband has met both criteria. In 2012 he was self-employed as a consultant and his income fluctuated more than 20% nearly every year since 2008. In light of the income and compensation received by Husband

in 2013, it is clear that a five year income average is more reflective of Husband's actual income than Husband's allegation that he earns only \$155,000.

The trial court then rounded down the amount offered by the expert witness, O'Heir, to find Peter's actual income was \$211,000. Peter challenges the trial court's calculation of his actual income, alleging: (1) that O'Heir improperly calculated Peter's income, and (2) that the trial court improperly applied FL § 12-203 by averaging his five years of prior income to determine his actual income. Because there was no error in O'Heir's analysis—or the trial court's reliance thereupon—and because the trial court's application of the statute was not erroneous, we affirm the determination of Peter's actual income.

*1. O'Heir's Calculation of Peter's Income*

Peter argues that O'Heir's analysis was flawed. On appeal, Peter asserts that his actual income in 2013 was \$173,681.07: his base salary of \$155,000, plus \$18,681.07 in bonuses.<sup>1</sup> Peter faults O'Heir's inclusion of the following sources of income in calculating Peter's average income: a one-time \$55,000 retention bonus from INVeSHARE in 2010, \$60,000 in derivative stock options from Peter's former employer that he was required to cash out as part of his severance agreement, his consulting income, and his unemployment income. These faults, Peter contends, amount to an imputation of income over \$37,000 more than Peter's actual income. Further, Peter asserts that it was erroneous for O'Heir to

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<sup>1</sup> At trial, Peter alleged that his actual income was \$155,000, his salary, and that any bonuses he received were one-time events that shouldn't have been considered in determining his income. On appeal, Peter now contends that, while those bonuses are not guaranteed, it is reasonable to add an "average" bonus to his yearly salary, which he calculates to be \$18,681.07.

attribute income received from Kentledge Capital solely to Peter when the proceeds were from a joint marital investment and were distributed to both Peter and Kerri. Because all of the sources of income included by O’Heir in his analysis are permitted under FL § 12-201, we discern no error in O’Heir’s analysis and the trial court’s reliance thereupon.

Section 12-201 lists the sources of income that are actual income:

**Actual income**

\* \* \*

(3) “Actual income” includes:

- (i) salaries;
- (ii) wages;
- (iii) commissions;
- (iv) bonuses;
- (v) dividend income;

\* \* \*

(ii) unemployment insurance benefits;

\* \* \*

(4) Based on the circumstances of the case, the court may consider the following items as actual income:

- (i) severance pay;
- (ii) capital gains[.]

Thus, with the exception of the Kentledge Capital income, all sources of income considered by O’Heir and the trial court are expressly permitted by statute.

Regarding the Kentledge Capital income, Peter claims that he and Kerri jointly invested \$150,000 in Kentledge Capital in 2006 and, therefore, any distributions from the

company are joint and should be allocated evenly as income to both Peter and Kerri. At trial, Peter testified that, in 2006, he and three former colleagues founded Kentledge Capital. While Peter contributed \$150,000 to the venture from marital funds, it was Peter, not Kerri, who was listed as the part-owner of Kentledge Capital. On Peter and Kerri's tax return, the income from Kentledge Capital was attributed to Peter, individually, as "Partner's Share of Income, Deductions, Credits, etc." Internal Revenue Service, K-1 Form (2014), *available at* <http://perma.cc/GKY5-5JH7> (Title of the K-1 Tax Form on which the Kentledge Capital income was reported.). Given all this, the trial court did not abuse its discretion by attributing the income from Kentledge Capital to Peter.

*2. The Trial Court's Application of FL § 12-203*

The court is required to verify a party's actual income "with documentation of both current and past actual income." FL § 12-203(b)(1). "[S]uitable documentation of actual income includes pay stubs, employer statements otherwise admissible under the rules of evidence, or receipts and expenses if self-employed, and copies of each parent's 3 most recent federal tax returns." FL § 12-203(b)(2)(i). In the case of a parent whose income fluctuated more than 20% for a one year period in the past three years, "the court may require that parent to provide copies of federal tax returns for the 5 most recent years" to verify the party's actual income. FL § 12-203(b)(2)(ii). The provisions relating to tax returns apply only to 'documentation of both current and past actual income,' FL § 12-203(b)(1), and not to potential income." *Reuter v. Reuter*, 102 Md. App. 212, 224 (1994). Thus, the court is not permitted to look at prior tax returns to calculate a party's potential income, but only to verify actual income. And when a party's income fluctuates more than

20% during the prior three years, as Peter's did, the trial court is permitted to use the five past years of federal income tax returns to verify the actual income of the party.

Peter argues that the trial court impermissibly averaged his prior five years of income to determine his actual income. He is incorrect. Under the terms of the statute, we need only determine whether the trial court's calculation of Peter's actual income can be verified. It can. The amount that the trial court calculated for Peter's actual income can be verified by Peter's 2008-2012 tax returns. The trial court did not, as Peter asserts, improperly use FL § 12-203(b)(2)(ii) to calculate Peter's potential income. The trial court properly verified Peter's prior actual income. There is no erroneous application of the statute and consequently we affirm the trial court's determination of Peter's actual income.

## **II. Indefinite Alimony Award of \$830 per month to Kerri**

The trial court awarded indefinite alimony to Kerri in the amount of \$830 per month. The Maryland Alimony Act favors fixed term alimony over indefinite alimony because fixed term alimony incentivizes the parties to become self-supporting. *Francz v. Francz*, 157 Md. App. 676, 691 (2004) (discussing the policy behind the Maryland Alimony Act, FL § 11-106). Nevertheless, indefinite alimony is allowed in exceptional circumstances. *Id.* at 692; FL § 11-106(c). Peter challenges the indefinite alimony award for two reasons: (1) Peter claims that the trial court erred when it found that Kerri had made as much progress toward become self-supporting as can reasonably be expected; and (2) Peter asserts that the trial court erred in finding there was an unconscionable disparity between the standards of living of Peter and Kerri. We reject both of Peter's arguments and affirm the award of indefinite alimony to Kerri.

Section § 11-106(c) of the Family Law article sets forth the circumstances under which a trial court may award indefinite alimony:

(c) The court may award alimony for an indefinite period, if the court finds that:

(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or

(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

“Indefinite alimony may thus be warranted where it would be impractical to expect the dependent spouse to become self-supporting through further education or training or where rehabilitative alimony for a limited time would result in gross inequity.” *Wassif v. Wassif*, 77 Md. App. 750, 755-56 (1989) (citing *Holston v. Holston*, 58 Md. App. 308, 473 (1984)). The determination of whether an unconscionable disparity exists is a finding of fact, reviewed under a clearly erroneous standard. *See* Md. Rule 8-131(c). We review the amount of the alimony itself under an abuse of discretion standard. *Solomon v. Solomon*, 383 Md. 176, 196 (2004).

*1. Progress to Becoming Self-Supporting*

Peter argues that Kerri is readily able to add more shifts to her schedule and increase her earning potential by \$25,000 per year, and that an award of indefinite alimony cannot be based on the perceived needs of the parties’ minor children who will not remain in the care of their mother indefinitely. We reject Peter’s argument.

In assessing whether Kerri had made as much progress toward becoming self-supporting as can reasonably be expected, the trial court found:

Considering the entire context of this matter and the context of Wife's employment situation, Wife has made as much progress toward becoming self-supporting as can reasonably be expected at this time. ... There are no other opportunities for employment benefits, stock options bonus or the like available to Wife as a result of her employment.

\* \* \*

Wife works as a [neo-natal intensive care] nurse for the University of Maryland Medical center. She began her employment in 1994. Since December of 2013, Wife has worked two 12 hour weekend shifts every other weekend, one 12 hour weekday shift per week and required holidays[.]

\* \* \*

After the parties determined to marry and have children, the parties agreed that Wife would abandon her plan to attend graduate school to become a Neonatal Nurse Practitioner. Her current education does not qualify her for same. Instead, her education coupled with her experience, limits Wife to employment as a bedside nurse.

\* \* \*

The parties' children were experiencing high levels of emotional distress as a result of the parties' separation. ... In fact, the parties' oldest daughter was refusing to, and continues to refuse to, see Husband at all. Wife testified that caring for the children in this situation was all-consuming. Wife credibly testified that she did not want to further upset the children's lives by increasing her work hours[.] ... Ever since Madison was three years old and since Mia was born, Wife had been home with the children and their care, by agreement of the parties, had been her focus. ... Wife testified credibly that increasing her work hours beyond what she has already done since the separation would be detrimental to the children who would [need] care from 6:30 a.m. until the start of school and

again from after school until 8:30 p.m. ... The length of time and the needs to be met by a care provider made it difficult to find a reasonable child care option. ... Despite same, Wife progressively added shifts to her schedule. She testified that in August 2013 she began working 2, 12 hour shifts every other weekend and a few months later she added one shift each week. In light of her age, the number of years she has been minimally employed, the opportunities [for] career changes and or advancement she has missed, and her need to manage more than just a career, Wife is employed to her maximum capacity.

We find the facts here to be strikingly similar to those found in *Boemio v. Boemio*, 414 Md. 118, 132 (2010). In *Boemio*, the Court of Appeals noted a “pattern” in cases, which reflected that indefinite alimony was appropriate in situations involving a long marriage, where one spouse stayed home to take care of the children and the payor spouse acquired an advanced degree with the support of the payee spouse during the marriage, resulting in a large income discrepancy. *Id.* at 143-46. That pattern applies to this case. Kerri reduced her work hours to take care of the couple’s two children, and later further reduced them to allow Peter to return to school to obtain a master’s degree. Furthermore, the trial court cited to sufficient evidence to support its conclusion that Kerri had made as much progress to becoming self-supporting as can reasonably be expected: her age, the number of years she has been minimally employed, the opportunities for career changes and advancement she has missed, her need to manage more than just a career, and that her employment does not allow her opportunities for extra benefits. The trial court’s findings are not clearly erroneous.

## *2. Unconscionable Disparity*

Peter alleges that Kerri is currently able to make \$80,834.04 per year if she worked full-time and he maintains that his actual income is \$173,681.07. Thus, Peter asserts that Kerri earns 47% of what he does, and receives child support, therefore there is no unconscionable disparity. We reject Peter's argument and uphold the alimony award.

The trial court determined that during their marriage, “[t]he parties established a comfortable standard of living... [and] accumulat[ed] a substantial net worth[.]” The trial court found that this standard of living was established while Kerri was largely a stay-at-home parent. The trial court went on to find that Peter had displayed a long history of earning bonuses, investing in profitable ventures, and that those opportunities were likely to continue given Peter's education and employment. On the other hand:

There are no other opportunities for employment benefits, stock options bonus or the like available to Wife as a result of her employment. Wife does not, and will not, have the financial means or business acumen to invest in private ventures such as Kentledge Capital, LLC. Even after receipt of alimony, Wife will have little ability to save money for retirement or otherwise.

Thus, the trial court reasoned that the respective standards of living of the parties was, and would remain, unconscionably disparate. We perceive no clear error in the trial court's finding the parties' standards of living unconscionably disparate.

Therefore, the trial court did not err in awarding indefinite alimony in the amount of \$830 per month to Kerri. The trial court determined that Kerri's actual income was \$57,810 gross annually, \$39,333 after taxes based on the parties' income tax returns. We agree with the trial court's decision to decline to impute \$22,000 in additional salary to

Kerri, and, as we have explained, we uphold the trial court's determination that Peter's income is \$211,000 annually. With Peter making over three times annually what Kerri makes, and in light of the factual findings articulated by the trial court and supported by the record, we find no abuse of discretion in the trial court's award of alimony. We affirm the award of indefinite alimony in the amount of \$830 per month to Kerri.

### **III. Use and Possession**

Peter also challenges the trial court's award of use and possession of the marital home and family vehicle, a GMC Yukon, to Kerri. Peter argues that the trial court only considered one of the three factors it should have considered and, as to that factor, was wrong too. Section § 8-208(b)(1)-(3) of the Family Law article requires a trial court to consider three factors when deciding to award use and possession of the family dwelling and family use property: (1) the best interests of the child; (2) the interest of each party in using the home as a dwelling or to produce income; and (3) any hardship imposed on the party not awarded use and possession. As the trial court's opinion only considered the best interest of the children and omitted discussion of the other two requisite factors, we vacate the use and possession order and remand for further proceedings.

### **IV. Mortgage Payment on the Marital Home**

Peter claims that the trial court erroneously calculated his monthly expenses, resulting in the court's imposition of financial responsibilities, including mortgage payments, that were in excess of Peter's income. To this end, Peter's argument that the trial court erred in requiring him to pay the mortgage on the marital home is, in part, a repackaging of his first contention—that the trial court erred in determining his actual

income to be \$211,000. In other part, Peter claims that the financial requirements imposed by the trial court exceed his monthly disposable income. On both counts, the first of which we addressed in Part I, Peter's math is simply wrong.

Section 8-208(c) of the Family Law article permits the trial court to allocate the mortgage payment on marital property following a use and possession award. "When granting use and possession and ordering a spouse to make the mortgage, tax and insurance payments, the court should not make an award so harsh as to make compliance impossible." Cynthia Callahan & Thomas Ries *Fader's Maryland Family Law*, § 16-5 (5th ed. 2011). We review the trial court's allocation of mortgage payments for an abuse of discretion. *Broseus v. Broseus*, 82 Md. App. 183, 192 (1990).

Peter's argument on appeal challenges the manner in which the trial court totaled his monthly expenses. As we have discussed, the trial court appropriately found that Peter's actual income was \$211,000. The trial court then determined, based on a \$211,000 annual salary, that Peter's monthly income was \$11,541. The trial court calculated Peter's monthly expenses as being \$8,365. Thus, the trial court determined that Peter had over \$3,000 in surplus monthly income. Peter, however, claims that his expenses exceed his income, and that the trial court's calculation was incorrect. Our review of the record convinces us that the trial court did not abuse its discretion.

According to Peter's amended financial statement, at the time of trial, his monthly expenses, exclusive of any court imposed expenses, totaled \$14,296. After hearing testimony, the trial court made four corrections to that amount:

- an \$850 reduction from Peter’s claim of maintenance expenses associated with the marital home, as those expenses were to be transferred to Kerri after the entry of the final judgment.
- a \$246 reduction from Peter’s claim of medical expenses because the trial court found that Peter had not incurred any therapy expenses for himself, nor had he paid for the medical/dental expenses of the children since June 2013.
- a \$5,326 reduction from Peter’s claim of miscellaneous expenses that reflects the amount Peter paid in monthly legal fees, which, the trial court reasoned, would cease to be an expense at the end of the litigation.
- a \$490.84 addition to account for his medical insurance bill.

Thus, the trial court found that Peter’s monthly expenses were \$8,365. Subtracted from his after-tax monthly income of \$11,541 (based on a \$211,000 annual salary), the trial court concluded that Peter has \$3,176 in surplus monthly income. Each of these calculations is supported by the record and none of them is an abuse of discretion.

If the trial court had imposed financial obligations on Peter in excess of \$3,176 (Peter’s surplus monthly income), that would have constituted an unbearable financial hardship. That wasn’t what happened. The trial court imposed \$2,580 in monthly expenses, including the following:

- Alimony in the amount of \$830 per month.
- Child support in the amount of \$1,000 per month.
- Kerri’s attorneys’ fees in the amount of \$750 per month.

In his calculations, Peter mistakenly counts the mortgage payment twice: once on his amended financial statement and again as a court imposed expense. Because Peter had

already included the mortgage payment in his financial statement, the trial court did not add it as an expense, rather it instructed Peter to continue making a payment that he was already making. Peter's mathematical error does not amount to an abuse of discretion by the trial court. The trial court did not impose more court related expenses than Peter is able to afford. To the contrary, Peter still retains a \$576 monthly surplus. Moreover, upon the sale of the marital home, Peter is entitled to recover "one half of his [mortgage] payments from October 2014 to date of sale [of the marital home] to the extent that his payments pay down the mortgage principle."

The trial court correctly calculated both Peter's income and his monthly expenses, therefore, it did not abuse its discretion in requiring Peter to continue making the mortgage payments on the marital home.

#### **V. Grant of Monetary Award to Kerri**

Peter challenges the trial court's decision to award Kerri \$26,746 as her portion of the marital property. *First*, he argues that the trial court improperly classified Peter's Brickman Equity Incentive Plan as a "non-retirement individual asset." *Second*, he claims that while the trial court correctly valued the family vehicle at \$10,000, after the three year period of Kerri's use and possession ends, the vehicle's value will be substantially less, therefore, the trial court should have transferred possession of the vehicle to Kerri and adjusted her monetary award downwards accordingly.

A monetary award following a divorce or annulment proceeding is "an addition to and not a substitution for legal division of the property accumulated during marriage, according to title or ownership," and it is "intended to compensate a spouse who holds title

to less than an equitable portion of that property.” Cynthia Callahan & Thomas Ries, *Fader’s Maryland Family Law*, § 12-4[b] (5th ed. 2011). In Maryland, the trial court undertakes a three-step process prior to granting a monetary award:

- (1) the trial court must initially characterize all property owned by the parties, however titled, as either marital or nonmarital;
- (2) the court shall then determine the value of all marital property; and, finally, (3) the court may then make a monetary award as an adjustment of the parties’ equities and rights in the marital property.

*Gallagher v. Gallagher*, 118 Md. App. 567, 575 (1997) (quoting *Strauss v. Strauss*, 101 Md. App. 490, 501 (1994)); FL § 8-203. “When a monetary award or other relief pursuant to [FL] § 8-205 is an issue, the parties shall file a joint statement listing all property owned by one or both of them.” Md. Rule 9-207. The purpose of Maryland Rule 9-207 is to “facilitate[] the chancellor’s decision-making by clarifying, before trial, areas of dispute and agreement between the parties.” *Flanagan v. Flanagan*, 181 Md. App. 492, 529 (2008). We will not overturn a trial court’s decision in granting a monetary award “unless the judgment is clearly erroneous and due regard will be given to the trial judge’s opportunity to judge the credibility of the witnesses.” *Caccamise v. Caccamise*, 130 Md. App. 505, 521 (2000).

First, Peter does not contest that the Brickman Equity Incentive Plan, which constitutes 114 units of restricted stocks in Brickman,<sup>2</sup> is not marital property, nor does he

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<sup>2</sup> “[R]estricted stock option plans ... are a form of employee compensation, providing to the employee the right to accept within a prescribed time period and under certain conditions the corporate employer’s irrevocable offer to sell its stock at the price

challenge the value the trial court ascribed to it, rather he only asserts that, because he is currently unable to access the funds to distribute them to Kerri, the funds should have been treated as retirement funds for the purposes of property distribution. Peter’s argument fails, however, because he failed to classify the funds as retirement funds in the first place. Peter and Kerri submitted a Joint Proposed Statement Concerning Marital and Non–Marital Property (a “Rule 9-207 Statement”). Notably, in Peter’s amended Rule 9-207 Statement, he classified the Brickman Equity Incentive Plan as “Other,” the same category that included the parties’ travel rewards and timeshare. Within that category, Peter asserted that the plan’s value was \$28,156.05. The trial court, in reliance on the parties’ Rule 9-207 Statement, valued the Brickman Equity Incentive Plan at \$28,156.05 and attributed the income to Peter, specifically noting that the amount only included vested assets. Peter could have included the Brickman Equity Incentive Plan in the “Retirement Accounts” section, as he did with the Brickman Retirement Investment Plan. On appeal, Peter now faults the trial court for relying on the Rule 9-207 Statement he himself prepared.

In *Flanagan*, we rejected an appellant’s contention that the trial court failed to include all marital assets in its calculation of the marital award because we found that the trial court had properly relied on the parties’ Rule 9-207 Statement that stipulated what property was to be excluded from the marital property pool. 181 Md. App. at 532 (“Accordingly, an agreement reflected in a joint statement under Rule 9-207, to the effect

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quoted. *Otley v. Otley*, 147 Md. App. 540, 549 (2002) (quoting *Green v. Green*, 64 Md. App. 122, 136 (1985)).

that the parties have resolved the disposition of certain marital property, serves to render that property non-marital.”). As is the case here, the trial court was not clearly erroneous when it relied on the parties’ Rule 9-207 Statement, which did not classify the Brickman Equity Incentive Plan as retirement funds.

*Second*, Peter contends that the trial court erred when it included the GMC Yukon as marital property valued at \$10,000 while also awarding Kerri use and possession of the vehicle for three years. Peter argues that the trial court failed to properly consider the depreciated value of the vehicle after the three year use and possession period terminates. Peter has not pointed to any evidence, nor can we glean any, from the record to establish if and how much the GMC Yukon will depreciate over a period of three years. As we explained in Part III, we have vacated and remanded the entire use and possession order, and the trial court in its discretion may consider Peter’s argument on remand.

Finally, we note that there is a discrepancy in the order pertaining to the amount of the marital award. The order reads “the Defendant shall pay to the Plaintiff the sum of Thirty-Eight Thousand Seven Hundred Fifty-Four dollars (\$26,746).” The memorandum opinion states that the award is \$26,746, both Kerri and Peter agree that \$26,746 is amount that the court intended to impose, and the reference to “Thirty-Eight Thousand Seven Hundred Fifty-Four dollars” is a typographical error. Thus, while we affirm the marital award of \$26,746, on remand the trial court is instructed to correct the discrepancy in the order.

## **VI. Award of Attorneys' Fees and Costs to Kerri**

Lastly, Peter argues that the trial court abused its discretion in awarding Kerri a \$60,000 contribution to her attorneys' fees and costs. His argument has no merit.

The domestic fee statutes codified at FL §§ 7-107 (divorce), 8-214 (marital award), 11-110 (alimony), 12-103 (child support) (collectively "domestic fee statutes") all provide that a trial court may order either party to pay to the other party an amount for the "reasonable and necessary expenses" of prosecuting or defending the proceeding. After determining what expenses are reasonable and necessary, the trial court is then required to consider the following two factors: (1) the financial resources and needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the proceedings. FL §§ 7-107(c), 8-214(c), 11-110(c), 12-103(b). "The standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002).

### *1. Reasonable and Necessary Expenses*

First, the trial court was required to determine whether the attorneys' fees and costs incurred by a party were a reasonable and necessary expense. Peter claims that Kerri's \$125,147.80 in litigation related expenses is unreasonable because (1) one-third of the charges were related to custody and visitation issues, even though the final custody order was almost identical to the first custody order; (2) O'Heir's expert testimony regarding Peter's income was allegedly flawed; and (3) the trial court did not rely on Kerri's real estate appraisal.

Regarding the custody and visitation dispute, while the final custody order was nearly identical to the first, that does not mean that the parties necessarily incurred only limited fees to arrive at the final custody order. Contrary to Peter’s suggestion that minimal attorney effort was expended to reach the final custody order, the trial court noted the following difficulties:

The *Pendente Lite* Order entered in this matter and the Consent Custody Order, which has been submitted to this Court, demonstrate that significant child related issues were present in this matter. As a result, the parties employed the services of Zoa Barnes, Esquire as a Best Interests Attorney and worked with several mental health professionals. Counsel for Wife were actively in this process and all matters relating to the children.

Peter’s assertion to the contrary is insufficient to convince us that the trial court abused its discretion when it determined that the litigation costs associated with reaching an agreement on custody and visitation were reasonable and necessary.

Peter’s other two contentions—that the fees associated with O’Heir and the real estate appraisal were unnecessary because they were “flawed” or not relied upon by the trial court—also fail. Both Peter’s income and the value of the marital home were contested at trial. Kerri was, therefore, required to present evidence to support her position, regardless of whether it was relied upon by the trial. Because there were costs associated with litigating disputed aspects of the divorce, the trial court did not abuse its discretion in determining that the costs were reasonable and necessary.

In explaining why the expenses incurred by Kerri were reasonable and necessary, the trial court highlighted how Peter's conduct played a prominent role in inflating those expenses:

All of [Kerri's] expenses were necessary and the charges for the same were reasonable. In fact, many of the fees were driven by Husband's conduct. First, Husband denied that he was engaged in an adulterous relationship, despite Wife's repeated, direct questions. As a result, Wife had to hire a private detective and incur the expenses associated with same. Second, Husband regularly made resolution of any issue difficult, blamed Wife and persisted in his requests/demands for a resolution of his liking. The following two incidents highlight this pattern. The testimony established that in 2012, shortly after the separation [that] was fraught with lies and misrepresentations, Husband presented Wife with the parties' proposed 2012 Income Tax Return and asked that she sign same. There was a very large tax liability associated therewith of which Wife had little knowledge or understanding. ...[C]ounsel for Wife, more than one time, sought an explanation as to the liability and indicated that Wife would sign the return, provided Husband would sign an Indemnification Agreement. Husband could not provide any evidence that he ever advised Wife that he would not do so or why. On the stand in response to questioning by this Court and counsel for Wife, Husband, for the first time, admitted that he would not do so because he did not want to assume the liability for mistakes of the CPA related to his income. Despite this truth, he regularly accused Wife of failing to cooperate and to have caused the parties to incur fees. He did so even in this trial to attempt to prove bad behavior on her part, without providing the full story to the Court.

A second example of how Husband's conduct needlessly increased the costs of this litigation is the circumstances surrounding the parties['] 2013 Income Tax Return. Plaintiff's Trial Exhibit 24 demonstrates that Husband approached Wife about income taxes for 2013, and that the parties did not resolve the matter because Husband did not answer Wife's questions. On February 3, 2014, counsel for Wife wrote to counsel for Husband and advised that Wife would file a joint return provided:

Ms. Friz is given sufficient time to review the returns prior to her needing to sign same; (ii) Provided that Ms. Friz's review of same does not raise any unforeseen issues [that] require her to alter her position; and (iii) the parties either equally divide any refund or any refund is held in escrow pending resolution at trial[.]

...As of February 19, 2014 no response was received and counsel for Wife again wrote to counsel for Husband. ... Rather than simply saying 'yes' (which would have been the most cost effective way to resolve this issue), Husband responded with a letter falsely accusing Wife of refusing to communicate with Husband and attaching 29 pages of electronic mail between the parties that purported to resolve the issue. ... The letter did not substantively resolve any of the outstanding tax related issues. ... The Reports requested still have not been produced. It is important to note, that even though Husband did not respond to Wife's questions, she moved forward in good faith to work with the accountant to prepare a joint 2013 Income Tax Return, which was ultimately filed. This could have and should have been accomplished with minimal attorney fees included.

We agree. The trial court did not abuse its discretion in finding that Kerri's expenses were reasonable and necessary, particularly in light of Peter's conduct before and during trial.

## *2. Financial Resources and Needs*

Regarding the parties' respective financial resources and needs, Peter reargues his assertion that by requiring him to contribute \$60,000 to Kerri's attorneys' fees and costs

paid in monthly installments of \$750, the trial court imposed expenses in excess of Peter's disposable income. As we discussed in Part IV, Peter has sufficient resources to accommodate the \$750 monthly payment.

For its part, the trial court made the following findings regarding the financial resources and needs of the parties:

It is important to note that Husband has paid all of his attorney fees with marital funds. Wife, on the other hand, borrowed monies for the private detective. Wife did use the \$75,000.00 that she accessed from the parties' PNC account mostly to pay litigation expenses, but her litigation expenses exceeded that amount and many of the litigation expenses remain due and owing.

The trial court properly considered the parties' financial needs and resources. We perceive no abuse of discretion in its analysis.

### *3. Substantial Justification*

Peter asserts that while Kerri had substantial justification to file for divorce on the grounds of adultery, she did not have substantial justification to maintain the action because: (1) Peter was forthcoming to Kerri and the trial court regarding the affair; (2) Peter continued to financially support the family after the separation; and (3) Kerri unnecessarily prolonged the litigation by asserting that Peter was hiding marital funds. We reject these contentions and explain.

The domestic fee statutes<sup>3</sup> require the court “to consider whether there was substantial justification for bringing, maintaining, or defending a suit.” *McCleary v. McCleary*, 150 Md. App. 448, 466 (2002). Substantial justification is not equivalent to success, and a party may be justified in bringing an action even if the party does not prevail. *Doser v. Doser*, 106 Md. App. 329, 359, (1995). The award of attorney’s fees is governed by the abuse of discretion standard. *Id.*

In determining that Kerri had substantial justification to prosecute the case—seeking a divorce, alimony, child support, and marital award—the trial court observed that:

[Divorce:] After seventeen years of marriage the marriage abruptly ended, unbeknownst to her, due to Husband’s adultery. Had she not pursued the issue, she would not have been able to prove that the cause of the estrangement of the parties was Husband’s conduct. ...

[Alimony:] The position taken by Husband with regard to Wife’s earning capacity and his own income and Wife’s right to alimony required her to prosecute her positions on these matters.

[Child Support:] Husband even contested whether or not the parties’ daughters require child care during Wife’s twelve hour shifts.

[Marital Award:] The parties have substantial disputes regarding the value of many items of their property.

The trial court’s factual findings were supported by the record before the court and therefore, are not clearly erroneous. Further, whether Kerri was successful in proving that

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<sup>3</sup> FL §§ 7-107 (divorce), 8-214 (marital award), 11-110 (alimony), 12-103 (child support).

Peter dissipated marital funds is immaterial to whether she had substantial justification to pursue her claim. *See Doser v. Doser*, 106 Md. App. at 359.

Accordingly, the trial court did not abuse its discretion in awarding Kerri a contribution to her attorneys' fees in the amount of \$60,000 and we affirm. We note, however, that the written order at one point states that the contribution amount is \$65,000. The memorandum opinion states that the contribution award was \$60,000, and both Peter and Kerri agree that this was the amount that the court intended to impose. Therefore, we remand with the instruction that the trial court is directed to correct the clerical error in the written order that substitutes \$65,000 for \$60,000 to correspond with the memorandum opinion.

### **CONCLUSION**

For the reasons we have set forth, we affirm the judgment of the circuit court with the following caveats: (1) the use and possession order pertaining to the marital home and family vehicle is vacated and remanded for further proceedings as deemed necessary by the trial court to allow for consideration of all of the factors outlined in FL § 8-208; and (2) while we affirm both the martial award (\$26,746) and attorneys' fees contribution (\$60,000), the trial court is instructed to correct the numerical discrepancies in the order so that they conform to the amounts listed in the memorandum opinion.

**JUDGMENT OF THE CIRCUIT COURT  
FOR CARROLL COUNTY AFFIRMED IN  
PART, VACATED IN PART, AND  
REMANDED IN PART. COSTS TO BE  
PAID BY APPELLANT.**