

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2223

September Term, 2014

TIMOTHY C. McNAMARA

v.

PAULA McNAMARA

Hotten,
Leahy,
Friedman,

JJ.

Opinion by Hotten, J.

Filed: December 22, 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.

Timothy C. McNamara (“appellant”), and Paula McNamara (“appellee”) received a judgment of absolute divorce in the Circuit Court for Baltimore County after 17 years of marriage. After a six day trial, the circuit court awarded appellee a monetary award of \$238,580, indefinite retroactive alimony of \$1,750 per month, \$4,062.50 per month from appellant’s pension plan (to be paid once the plan is fully funded), and attorney’s fees of \$41,500. The parties thereafter filed motions to alter or amend that judgment. In that regard, the circuit court altered the monthly pension payments so that appellee would receive a lump sum payment of \$426,516, because post-judgment evidence indicated that the pension benefits were rolled into appellant’s 401(k) plan in a lump sum. The court also determined that appellant would be entitled to a credit against the retroactive alimony award for all temporary alimony payments made. Appellant appealed, and presents four questions for our review:

- I. Did the [circuit] court commit error or abuse its discretion when it awarded indefinite alimony to appellee?
- II. Was the retroactive nature of the alimony award in error or an abuse of discretion?
- III. Did the [circuit] court commit error or abuse its discretion when it granted appellee a monetary award of \$238,580?
- IV. Did the [circuit] court commit error or abuse its discretion when it concluded that appellant should pay temporary alimony beginning as of January, 2012 and by finding appellant in contempt of court for his alleged failure to pay temporary alimony in accordance with the parties’ settlement term sheet?

For the reasons that follow, we shall reverse the judgment of the circuit court, and remand to that court for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Appellant and appellee were married on July 10, 1993, separated in September of 2007, and received a judgment of absolute divorce on March 8, 2010. There are no children between them.¹

A Settlement Term Sheet agreed to by the parties was incorporated into the Judgment of Absolute Divorce. The Settlement Term Sheet reserved resolution of the parties' financial issues, such as the division of marital property and appellee's claim for alimony, until two properties owned by the parties were sold. One of these properties was located in Lusby, MD (hereinafter "Lusby"), and one was located in Lutherville, MD (hereinafter "Tremblant"). Among other things, the term sheet also provided that: (1) appellant would advance the payments for the Lusby mortgage, Lusby home equity line of credit, Lusby revolving credit lien to Jim Boyd's Flooring America, and Tremblant Mortgage starting with the payments due on April 1, 2010; (2) appellant shall be reimbursed for 50% of all such post-divorce payments upon sale of the properties; (3) appellant reserved and preserved his claim for all such pre-divorce payments (*Crawford* credits); and (4):

Commencing on the first day of the month immediately following the settlement of sale of Lusby and the termination of [appellant's] obligations to make any payment with respect to the (i) Lusby mortgage, (ii) Lusby Home Equity Line of Credit, and (iii) Lusby revolving credit lien to Jim Boyd's Flooring America through Citi Financial ... [appellant] shall pay temporary alimony in the amount of One Thousand Two Hundred Fifty Dollars (\$1,250) to [appellee] each month. Notwithstanding the above, if [appellant's] obligations with respect to both Lusby and Tremblant have

¹ Both parties have adult children from prior marriages.

terminated ..., then [appellant] shall pay temporary alimony in the amount of Two Thousand Five Hundred Dollars (\$2,500) to [appellee] each month....

The parties sold Tremblant in April of 2011 for less than the remaining balance on the mortgage. The parties withdrew funds from appellant's 401(k) account to satisfy this deficiency. Lusby was sold in December of 2011, resulting in a deficiency on both the home equity line of credit and mortgage. Appellant negotiated the release of the unsatisfied home equity line of credit with BB&T bank, but the parties remained liable for an \$80,000 deficiency on the Lusby mortgage.

Trial on the financial issues in the circuit court lasted for six days between August, 2011 and February, 2012. On October 3, 2012, prior to the circuit court's ruling on the financial issues, the court found appellant in civil contempt for failure to make temporary alimony payments required by the Settlement Term Sheet. Appellant was ordered to purge the contempt by immediately paying appellee \$9,000 in alimony arrears, and to begin making temporary alimony payments of \$2,500 per month.

On November 14, 2013, the circuit court issued an oral ruling relative to the parties' financial issues. In making a monetary award, the court acknowledged that it must determine what property is marital, determine the value of that property, and then determine an appropriate award to balance the equities between the parties. The court also noted that alimony may be temporary or indefinite, and indefinite alimony is appropriate in one of two scenarios:

[I]f the [c]ourt finds that due to age, illness, infirmity or disability, the party seeking alimony cannot reasonably expect to make substantial progress

towards becoming self-supporting, or even after the party seeking alimony will have made such substantial progress toward becoming self-supporting, respective standards of living of the parties will be unconscionably disparate.

The court also made extensive findings on the various factors that the court must consider under Md. Code (Repl. Vol. 2012), § 8-205(b) of the Family Law Article (“Fam. Law”) (monetary award), and Fam. Law § 11-106(b) (alimony). Those findings revealed the following:

After the parties’ marriage in 1993, appellant lived with appellee in her previously owned home for one year, until that property was sold for a profit of \$168,000. This profit was used for a down payment and improvements on Tremblant. Appellee also received \$200,000 in non-marital assets as the result of her mother’s death, and these funds were used as a down payment on Lusby.

In 2001, appellant started a business known as Global Search Associates (“GSA”), a business executive search firm. Appellant was the president and CEO of GSA, and owned 86% of the company’s shares. As president and CEO of GSA, appellant earned a salary of \$120,000 annually plus commissions. Appellant’s automobile and health insurance were paid by GSA. The court found that appellant worked hard to ensure the parties’ financial well-being, and the lifestyle of the parties during their marriage was “just shy of extravagant.”

Appellee held a master’s degree in art, and was employed with the Baltimore City School System as an art instructor until 2006, when the parties agreed that appellee should retire and accompany appellant on his business travels. Appellee was a devoted wife

committed to seeing appellant succeed in his business. She did limited payroll for appellant's business, traveled with appellant to help further the business, and helped design and improve appellant's office in Baltimore.

In August of 2007, appellant became verbally abusive to appellee, and began an extra-marital affair with a woman who also works at GSA. Around this time, appellant pushed appellee into a door frame during an argument, resulting in appellee having surgery with four screws implanted in her ankle. Shortly after this incident, the parties were completely separated.

Appellant paid 100% of the mortgages, home equity line of credit, and revolving credit lien to Jim Boyd's Flooring America for Lusby and Tremblant from the time of the parties' separation in September, 2007, until the properties were sold in 2011. Those payments amounted to \$36,644 (pre-divorce), and \$56,421.11 (post-divorce).

Appellant was 67 years of age at the time of trial, and suffered from kidney disease which was likely to require dialysis or a kidney transplant in the near future. Appellant's average yearly income from GSA was \$284,463 between 2007 and 2011. Appellant's monthly expenses were approximately \$16,500. Appellant had a Defined Benefit Pension Plan which was commenced in 2005, but frozen on May 11, 2010. With the sale of Lusby and Tremblant, appellant was relieved of \$8,600 in monthly mortgage payments. In 2010, appellant was expected to receive a tax benefit of \$60,000 for the sale of the properties, and in 2011, that benefit was expected to be \$40,000.

At the time of trial, appellee was 65 years of age, had two knee replacements, suffered from irritable bowel syndrome as well as osteoarthritis, and had permanent ankle instability. Appellee had current income of \$1,283 per month from social security, and \$1,855 per month from a State of Maryland pension. Appellee was also receiving a yearly dividend check from John S. Connor, Inc., which amounted to \$63,173 in 2011. These sources combined for approximately \$100,000 in yearly income. Appellee's anticipated monthly expenses were \$8,235 per month. These expenses included appellee's plans to purchase a home in Charleston, South Carolina, resulting in a mortgage payment of \$2,000 to \$2,300 per month. Should appellant reenter the work force, she could be expected to earn \$20,000 per year. However, there are certain "cautions[]" she would have to take because of her medical conditions.

During the parties' marriage, appellee loaned appellant \$53,000 to fully fund the life insurance policy of appellant's mother, for which appellant is the beneficiary of \$350,000. This loan, appellant's 86% interest in GSA, and the underfunded Defined Benefit Pension Plan were all marital property.

The parties presented conflicting expert testimony about the value of appellant's interest in GSA. Appellee presented the testimony of Ira N. Tucker ("Mr. Tucker"), CPA, to value appellant's ownership interest in GSA. Mr. Tucker used a capitalization of earnings method to conclude that the fair market value of the marital portion of appellant's ownership interest in GSA was \$472,000. Mr. Tucker assumed a debt free transaction between a willing seller and a willing buyer, and did not account for the liabilities of GSA.

Appellee presented the testimony of Mark W. Norris (“Mr. Norris”), also a CPA, who opined that the fair market value of appellant’s interest in GSA was \$0. Mr. Norris disagreed with Mr. Tucker on multiple points, but two were particularly relevant. First, Mr. Norris opined that Mr. Tucker should have considered the liabilities of GSA, including the underfunded portion of the Defined Benefit Pension Plan, in performing his valuation. Second, Mr. Norris noted that Mr. Tucker’s normalization, or adjustment, of appellant’s compensation to industry standards was inappropriate.

Ultimately, the court credited the \$472,000 valuation of Mr. Tucker as more compelling than that of Mr. Norris.

After making extensive findings, the court ruled as follows:

[Appellee] is granted a marital award of \$238,580. The [c]ourt has found that the monthly total marital portion of the GSA Defined Benefit Plan is \$8,125, and [appellee] is granted 50 percent of the marital portion which will be \$4,062.50. [Appellee] shall prepare a QDRO at her expense to roll over [appellee’s] portion to include [appellee’s] receiver survivor annuity benefit. [Appellee] is granted indefinite alimony in the amount of \$1,750 per month retroactive to I believe it was August of 2008. [Appellee] is also awarded attorney fees in the amount of \$41,500.

On November 14, 2013, appellant filed a motion to alter or amend the court’s ruling, seeking among other things, amendment of the indefinite alimony award and amendment of the monetary award.² On November 19, 2014, the court heard oral argument from the parties and issued an oral ruling. The court decided to leave its ruling largely unchanged. However, the court did alter appellee’s award of the Defined Benefit Pension Plan, because

² Appellee also filed a Motion to Alter or Amend.

of new evidence that the pension plan had become fully funded and had been rolled into appellant's 401(k) plan in a lump sum. The court determined that the marital portion of those funds would be \$853,032, and appellee was entitled to half of that (\$426,516). The court also determined that appellant was entitled to a credit for temporary alimony payments against the alimony arrears that were due under the retroactive alimony award. This credit resulted in alimony arrears of \$53,250, to be paid in six equal monthly installments.

Appellant noted an appeal on December 22, 2014.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

The circuit court's decision that indefinite alimony was appropriate is a finding of fact, and is therefore reviewed under the clearly erroneous standard. *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999); *see Simonds v. Simonds*, 165 Md. App. 591, 607 (2005) (citing *Solomon v. Solomon*, 383 Md. 176, 196 (2004)) (“[T]he circuit court’s finding[s] of fact [are] reviewed under the clearly erroneous standard.”). A finding “is not clearly erroneous if there is competent or material evidence in the record to support the court’s conclusion.” *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) (citations omitted).

“We review the *amount* of the alimony itself under an abuse of discretion standard.” *Solomon*, 383 Md. at 196 (quoting *Blaine v. Blaine*, 336 Md. 49, 74 (1994)) (emphasis in original). We also review the circuit court’s decision to make a monetary

award, including the amount of that award, for an abuse of discretion. *Richards v. Richards*, 166 Md. App. 263, 272 (2005) (citing *Gallagher v. Gallagher*, 118 Md. App. 567, 576 (1997)). An abuse of discretion occurs “‘where no reasonable person would take the view adopted by the [circuit] court,’ or when the court acts ‘without reference to any guiding rules or principles.’” *North v. North*, 102 Md. App. 1, 13 (1994) (citations omitted).

DISCUSSION

I. Indefinite Alimony

Appellant alleges that the circuit court erred in awarding appellee indefinite alimony where the “evidence established that [appellee] was self-supporting without the need for any alimony from [appellant,]” “[appellee] did not meet her burden of producing evidence to support a finding that the parties’ post-divorce ... living standards would be unconscionably disparate[,]” and the circuit never explicitly discussed the issue of unconscionable disparity between the living standards of the parties. For the reasons that follow, we hold that the circuit court did not err in awarding indefinite alimony.

In Maryland, fixed-term or rehabilitative alimony is preferred because “‘the purpose of alimony is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently.’” *Solomon*, 383 Md. at 194-95 (quoting *Tracey v. Tracey*, 328 Md. 380, 391 (1992)); *Roginsky*, 129 Md. App. at 142 (“An alimony award should reflect the desirability of each spouse becoming self-supporting and the undesirability of alimony as

a lifetime pension.”). However, under Fam. Law § 11-106(c), the court may award alimony for an indefinite period in one of two exceptional circumstances:

(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.

Appellant correctly points out that the circuit court found appellee to be self-supporting without the need for alimony, but “self-sufficiency per se does not bar an award of indefinite alimony if there nonetheless exists an unconscionable disparity in the parties’ standards of living after divorce.” *Tracey*, 328 Md. at 392. Accordingly, we focus our attention on unconscionable disparity under Fam. Law § 11-106(c)(2).

The party seeking indefinite alimony has the burden of establishing unconscionable disparity regarding the living standards of the parties. *Francz v. Francz*, 157 Md. App. 676, 692 (2004). This Court has described unconscionable disparity as “gross inequity” in the parties’ post-divorce standards of living, *Whittington v. Whittington*, 172 Md. App. 317, 339 (2007) (quoting *Brewer v. Brewer*, 156 Md. App. 77, 100-101 (2004)), or “a situation in which one spouse’s standard of living is ‘so inferior, qualitatively or quantitatively, to the standard of living of the other as to be morally unacceptable and shocking to the court.’” *Id.* (quoting *Karmand v. Karmand*, 145 Md. App. 317, 337 (2002)).

In determining whether unconscionable disparity exists, the court is to consider a variety of factors which have been deemed “necessary for a fair and equitable award”:

- (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;
- (4) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
- (5) 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.

Fam. Law § 11-106(b); *see Whittington*, 172 Md. App. at 337 (remarking that the existence of unconscionable disparity is a question of fact which is dependent upon the analysis of the § 11-106(b) factors).

In *Whittington*, we explained that the starting point for a court in examining the above factors is to “project [] forward in time to the point when the requesting spouse will have made maximum financial progress, and compar[e] the relative standards of living of the parties at that future time.” *Id.* at 338 (citations omitted). However, the mere difference in the earning potential of the parties, even where the difference is substantial, is not determinative of unconscionable disparity. *See Lee v. Andochick*, 182 Md. App. 268, 272 (2008) (noting that the party seeking indefinite alimony had failed to establish unconscionable disparity, despite that fact that one party had a projected salary of \$1,760,282 per year, and the other had a projected gross income of \$267,000 per year). Rather, “each case must be evaluated on its facts and not on some fixed minimum or universal standard.” *Boemio v. Boemio*, 414 Md. 118, 137 (2010) (quoting *Solomon*, 383 Md. at 198).

In addition to engaging in the fact intensive analysis mentioned above, the circuit court must explicitly discuss the issue of unconscionable disparity when either denying or granting a request for indefinite alimony. *Hart v. Hart*, 169 Md. App. 151, 170 (2006). In *Hart*, the evidence in the circuit court indicated that the husband was earning a salary of \$127,000, while the wife was earning \$21,000 per year. *Id.* at 156-57. The circuit court awarded the wife \$2,300 per month in temporary alimony, so that the wife could earn a

teaching certification and eventually earn a starting salary of approximately \$35,000. *Id.* at 168. The court also awarded indefinite alimony of \$1,500 per month for the period after the court's temporary alimony award. *Id.*

On appeal of the circuit court's indefinite alimony award, we observed that the evidence may well support a finding of unconscionable disparity, but held that the circuit court erred by failing to explicitly find that the living standards of the parties would be unconscionably disparate after the period of rehabilitative alimony. *Id.* at 169. We observed that:

the court did not make any findings as to what the parties' respective standards of living would be after [the wife] obtains a certified teaching position, much less decide whether [the wife's] will be unconscionably lower than [the husband's].

Id. at 170.

Turning to the case at bar, we hold that the evidence was sufficient for appellee to satisfy her burden of establishing unconscionable disparity, and that the circuit court correctly focused on this disparity in making its findings. In addressing the factors listed under Fam. Law § 11-106(b), the circuit court found that appellant had an average yearly income of \$284,463 with expenses of \$16,500 per month, while appellee had an average yearly income of approximately \$100,000 with anticipated expenses of \$8,235 per month. While we have previously noted that a comparison of the projected future income/expenses of the parties is merely a starting point in determining unconscionable disparity, the court also found that the parties were married for 17 years, and that the parties lived a "just shy of extravagant[]" lifestyle during this time. *Boemio*, 414 Md. at 143 ("It is fair to say that

length of the marriage is a key factor, outweighing several of the others listed in [Fam. Law §] 11-106(b), in determining what is unconscionably disparate.”). The circuit court also found that appellant has been on several vacations since the parties’ separation, while appellee has not been on a single vacation.

Based on the above uncontested findings, the circuit court did not commit clear error in awarding indefinite alimony on the basis of unconscionable disparity. As illustrated by the circuit court’s findings regarding the parties’ income and expenses, appellant would have approximately \$85,000 in disposable income after expenses, whereas appellee would make just enough to cover her anticipated expenses. In light of the length of the parties’ marriage and the excessive standard of living which the parties enjoyed during their marriage, there was a sufficient basis for the circuit court to conclude that indefinite alimony was appropriate.

We also hold that appellant’s allegation that the circuit court “erroneously failed to explicitly discuss the issue of unconscionable disparity[,]” is unsupported by the record. The circuit court properly acknowledged that a finding of unconscionable disparity in the living standards of the parties may support an award of indefinite alimony under the Family Law Article. The court also made findings on the comparative income and expenses of the parties, the length of the parties’ marriage, and the lifestyle of the parties during the marriage that are directly relevant to the issue of disparity in the parties’ post-divorce living standards. Lastly, during the hearing on the parties’ motions to alter/amend, the court explicitly acknowledged that, while appellee’s income may be sufficient for her to be self-

supporting, it would not be sufficient for her to enjoy “the lifestyle that she had at one point become accustomed to living.” Accordingly, we hold that the circuit court engaged in a sufficient discussion of unconscionable disparity.

a. The circuit court’s consideration of the motion to alter/amend its alimony award.

When the court originally resolved the parties financial issues in 2013, the court noted that appellant “will be the recipient of the Defined Benefit [Pension] Plan, which is underfunded now, but in all likelihood will become fully funded.” The court determined that the marital portion of the plan was \$8,125 per month, and appellee was awarded half of that “on an if, as and when basis.” However, in 2014, during the hearing on the parties’ motions to alter or amend, the court had evidence that the pension plan had become fully funded and was terminated – resulting in a lump sum deposit into appellant’s 401(k) plan. Appellant provided the court with a calculation of the marital portion of the pension funds, and the court ordered that appellee receive a lump sum payment of \$426,516. According to appellant, the circuit court erred in declining to alter or amend the indefinite alimony award, because the court made no reference to how the lump sum pension benefit might impact appellee’s need for alimony. We disagree.

Prior to issuing a ruling on the parties’ motions to alter or amend, the court noted that it had reviewed its notes and outline, the transcript that had been provided, and the parties motions and responses. The court also allowed appellant’s counsel to introduce a letter from the corporate counsel of GSA’s retirement plans, explaining the lump sum payment which appellant had received. Appellant’s counsel was further permitted to

explain that, in September, 2014, the plan had become fully funded and each of the plan's participants received a lump sum distribution. Appellant's counsel further explained that the portion of this distribution that was accumulated prior the parties' divorce was \$853,032. After hearing the above evidence regarding the Defined Benefit Pension Plan, the court remarked that it had "[taken] a great deal of time to review the evidence that was presented." The court also noted that it had considered all the factors that the court must consider and weighed the evidence to arrive at a decision regarding alimony, a marital award, and attorney's fees.

In the context of a motion to alter or amend, we believe that the above evidence from the circuit court record is sufficient to demonstrate that the court considered the effect of appellee's lump sum pension distribution on her need to receive alimony.³

II. Retroactive Alimony

Appellant next alleges that the circuit court committed an abuse of discretion in making its alimony award retroactive from October, 2013 to August, 2008. According to

³ Appellant also alleges that the circuit court improperly relied on facts that were not in evidence when making its findings in regards to alimony. As an example, appellant alleges that, when discussing appellant's income, the circuit court speculated that he "should also get... an additional \$2,320 [per month] in social security benefits." However, appellant acknowledges that appellee introduced a statement of appellant's estimated social security benefits into evidence (appellee's exhibit 18), and the record reveals that appellant failed to make a contemporaneous objection when this evidence was offered. Accordingly, any argument regarding the speculative nature of appellant's social security income has not been preserved for our review. *Taylor v. Mandel*, 402 Md. 109, 123 (2007) ("The general rule of preservation is that a party will only be permitted to raise on appeal an error to which he has interposed a seasonable objection.") (citation omitted).

appellant, the court unjustly enriched appellee by failing to give appellant credit for (1) the \$1,500 he had given to appellee during their separation, (2) appellee's share of the pre-divorce expenses on Tremblant and Lusby incurred by appellant (\$36,344), and (3) the \$51,151 that appellant contributed to appellee's expenses between August, 2008 and August, 2009.⁴ For the reasons that follow, we hold that the circuit court did not err in making a retroactive alimony award without including the credits requested by appellant.

As noted in Part I, *supra*, the court granted indefinite alimony, not temporary or rehabilitative alimony. This distinction is important because, while the purpose of rehabilitative alimony is "to provide an opportunity for the recipient spouse to become self-supporting," the purpose of appellee's indefinite alimony award was to protect her from a comparatively harsh lifestyle, when judged against that of appellant. *Tracey*, 328 Md. at 391-92 (1992). Accordingly, retroactive alimony was appropriate where the living standards of the parties were unconscionably disparate between August, 2008, and October, 2013 – regardless of the fact that appellant made certain payments on behalf of appellee during that period.

Furthermore, under the terms of the parties' Settlement Term Sheet, incorporated into the Judgment of Absolute Divorce, the court was under no obligation to give appellant

⁴ Appellant also alleges that the circuit court erred by failing to give him a credit against the retroactive alimony award for the temporary alimony payments made pursuant to the party's Settlement Term Sheet. However, appellant acknowledges that "[this] error was corrected at the 2014 hearing on each party's Motion to Alter or Amend [], and resulted in a 'built-in' alimony arrearage of \$53,500 which the court ordered to be paid in six (6) equal consecutive monthly payments." Accordingly, we do not address this contention.

credit against its alimony award. Regarding, pre-divorce payments towards the parties' properties, the Settlement Term Sheet only provided that appellants' claims for reimbursement were "reserved and preserved."⁵ Regarding appellant's requested credit for post-divorce payments towards appellee's general expenses, there is absolutely no mention of any such credit in the Settlement Term Sheet. Had the parties intended that appellant would receive a credit for pre-divorce payments against any alimony award, they could have easily included language in the Settlement Term Sheet to that effect. In the absence of any such agreement, the circuit court was not required to award appellant a credit against its retroactive alimony award.

III. The circuit court's monetary award of \$238,580.

Appellant takes multiple issues with the circuit court's monetary award. However, appellant's principal argument is that the circuit court erroneously valued his ownership interest in GSA by accepting the valuation of appellee's expert accountant, Mr. Tucker.

⁵ Appellants' right to contribution from appellee for expenses he incurred in the upkeep of the parties' jointly owned marital property after their separation is referred to as a Crawford credit:

Crawford Credits-the general law of contribution between cotenants of jointly owned property applies when married parties, owning property jointly, separate. A married, but separated, cotenant is, in the absence of an ouster (or its equivalent) of the nonpaying spouse, entitled to contribution for those expenses the paying spouse has paid.

Gordon v. Gordon, 174 Md. App. 583, 641 (2007) (citation omitted). As noted in *Gordon*, however, "the award of contribution is an equitable remedy within the discretion of the court." *Id.* at 642 (citation omitted).

According to appellant, Mr. Tucker failed to account for GSA's significant liabilities, because his opinion of GSA's fair market value only accounted for the business's goodwill.⁶ We agree with appellant, and hold that the circuit court committed clear error in valuing appellant's interest in GSA.

Our holding on this issue requires that we vacate the judgment of the circuit court on all financial issues, and remand to that court for further proceedings consistent with this opinion. *See Turner v. Turner*, 147 Md. App. 350, 400 (2002) ("The factors underlying alimony, a monetary award, and counsel fees are so interrelated that, when a [circuit] court considers a claim for any one of them, it must weigh the award of any other.") (citations omitted); *Malin v. Mininberg*, 153 Md. App. 358, 425-26 (2003).

When making a monetary award, Fam. Law §§ 8-203 to 8-205 require that the court follow a three step process: first, the court must determine which of a divorcing couple's property is marital property, second, the court must value such property, and lastly, the court must determine whether to grant a monetary award "as an adjustment of the equities and rights of the parties[.]" *Hart*, 169 Md. App. at 158 (quoting *Kelly v. Kelly*, 153 Md. App. 260, 270 (2003)). In valuing a business interest under step two of this process, the

⁶ Appellant also alleges that Mr. Tucker inaccurately adjusted appellant's compensation to industry norms when determining the value of GSA's goodwill – resulting in overvalued earning potential for GSA. In addition, appellant proffers that the circuit court failed to adjust its marital award to account for the evidence that "[appellee] would receive a lump sum transfer of \$426,516 from [appellant's] 401(k) Plan in lieu of the 'if, as and when' monthly benefits from the Defined Benefit [Pension] Plan that the court had initially awarded[.]" and that the court failed to provide any indication of how it calculated the marital award of \$238,580.

court endeavors to discover a fair market value, which is defined as “the amount at which property would change hands between a willing buyer and a willing seller[.]” *Rosenberg v. Rosenberg*, 64 Md. App. 487, 526 (1985) (citation omitted).

We have previously observed that fair market value is reached by first placing a value on each of the three component assets of the business – tangible assets, liabilities, and goodwill – and then combining those numbers. *Skrabak v. Skrabak*, 108 Md. App. 633, 649 (1996) (citation omitted). Many of Maryland’s sister jurisdictions that consider goodwill to be a marital asset have also recognized that goodwill, tangible assets, and liabilities must be accounted for to arrive at a fair market value.⁷

⁷ See e.g., *In re Marriage of Piper*, 820 P.2d 1198, 1200 (Colo. App. 1991) (“In valuing a business or professional practice, the trial court must consider both the tangible and intangible assets, including the accounts receivable, the value of work in progress, and goodwill.”) (citation omitted); *Swaney v. Swaney*, 720 S.E.2d 461 (N.C. Ct. App. 2011) (noting that, in valuing a professional practice or business, “a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities.”); *In re Marriage of Feldman*, 199 Ill. App. 3d 1002, 1004 (Ill. App. Ct. 1990) (“To determine the value of a business which is marital property, the court must consider (1) fixed assets, (2) other assets, including accounts receivable, (3) the goodwill in the business, and (4) business-related liabilities.”); *In re Marriage of Iredale, Cates*, 121 Cal. App. 4th 321, 327 (Cal. Ct. App. 2004) (“In determining the value of a law practice or interest therein, the trial court should determine the existence and value of the following: (a) fixed assets, which we deem to include cash, furniture, equipment, supplies and law library; (b) other assets, including properly aged accounts receivable, costs advanced with due regard for their collectability; work in progress partially completed but not billed as a receivable, and work completed but not billed; (c) goodwill of the practitioner in his law business as a going concern; and (d) liabilities of the practitioner related to his business.”).

As noted above, one of the components of fair market value is goodwill, or intangible value that is quantified by “the probability that the old customers will resort to the old place.” *Skrabak*, 108 Md. App. at 641 (citation omitted). Stated differently, goodwill represents “those advantages which may inure to the *purchaser* from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his *predecessor*.” *Prahinski v. Prahinski*, 321 Md. 227, 232 (1990) (citation omitted) (emphasis in original).

Of the two types of goodwill, personal goodwill and enterprise goodwill, only the latter is marital property. *Strauss v. Strauss*, 101 Md. App. 490, 507 (1994). Accordingly, to arrive at the proper marital portion of a business’s goodwill, the court must deduct that portion of goodwill that is attributable to the personal reputation and skills of an owner. *Id.* The remaining intangible value, enterprise goodwill, quantifies those intangible assets that are not dependent on the reputation or skills of an individual, but are attributable to the business itself. *Prahinski*, 321 Md. at 239. According to appellant’s expert accountant, Mr. Tucker, enterprise goodwill quantifies factors like name recognition, intellectual property, workforce/systems in place, franchise or license agreements, and ability to generate income as an operating entity.

In the case at bar, Mr. Tucker used the capitalization of earnings method to arrive at a fair market value of GSA because this methodology is best suited to value a business that “has been operated to serve the needs of the controlling owner without the intention of

accumulating equity in the business.”⁸ Using this methodology, Mr. Tucker valued GSA’s goodwill at \$831,778, and calculated appellant’s 86% interest to be a rounded \$715,000. Mr. Tucker then reduced that number by \$243,000 to account for the portion of goodwill that was personal to appellant, and arrived at a total intangible goodwill value of \$472,000. According to Mr. Tucker, this figure represented the fair market value of GSA.

On cross examination, Mr. Tucker was asked whether his valuation of GSA accounted for a loan of \$350,000 that GSA owed to Wachovia Bank, or the underfunded Defined Benefit Pension Plan. Mr. Tucker responded that “[his] entire valuation was predicated on future stream of earnings and that is intangible value, goodwill and that is it.” According to Mr. Tucker, a hypothetical buyer in a debt-free transaction for goodwill only, would purchase GSA for \$832,000, but assume none of the company’s liabilities. Thus, under Mr. Tucker’s valuation, the fair market value of GSA was synonymous with the value of GSA’s goodwill, and liabilities were irrelevant to what a willing buyer would pay.

While the circuit court is granted the discretion to accept or reject expert testimony on the valuation of marital property, this Court must assure that expert testimony has an adequate foundation. *See Skrabak*, 108 Md. App. at 648 (“This Court’s job on appeal ‘is

⁸ In support of this point, Mr. Tucker noted that the yearly book value of GSA (beginning retained earnings minus the loss for the year) was a negative \$348,241 in 2005, \$185,251 in 2006, \$15,291 in 2007, \$146,924 in 2008, and a negative \$647,503 in 2009. According to Mr. Tucker, the substantial deficit in 2009 was the result of \$794,000 in accrued commissions owed to appellant that, when put on GSA’s balance books, effectively withdrew any assets or equity that had been accumulated in the business.

not to re-weigh expert testimony, but to assure that there is an adequate foundation for the opinion rendered below.”) (citation omitted); *cf. Long v. Long*, 129 Md. App. 554, 570 (2000) (“It was thus no abuse of discretion for the court to accept the valuation of one party’s expert over the expert of the other, *as both were grounded in fact.*”) (emphasis added). Here, Mr. Tucker’s opinion was without an adequate foundation, because it was predicated on a debt-free sale to a hypothetical buyer for goodwill only, thus ignoring the tangible assets and liabilities of GSA. This is problematic because, unlike appellant’s arguably excessive compensation, the hypothetical buyer of GSA is not free to reduce or eliminate liabilities like the Defined Benefit Pension Plan or the Wachovia Bank loan. Instead, these liabilities are binding on the purchaser of appellant’s interest, and would certainly affect the price that buyer is willing to pay.⁹

We therefore adhere to this Court’s guidance in *Skrabak*, along with the decisions of several other jurisdictions, indicating that goodwill alone does not represent the fair

⁹ Mr. Tucker himself testified on cross examination that GSA had a mandatory obligation to fully fund the accrued benefits under the Defined Benefit Pension Plan, or be subject to penalties. The circuit court further noted that, according to GSA’s accountant, Robert Jones, the penalties for underfunding the pension plan could total anywhere between \$350,000 and \$1,700,000. Regarding the loan with Wachovia Bank, appellant personally guaranteed that loan, but GSA was primarily liable as the borrower. E. 237; *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atl., Inc.*, 149 Md. App. 336, 358 (2003) (“[T]he guarantor is therefore secondarily liable to the creditor on his contract and his promise to answer for the debt, default, or miscarriage of another becomes absolute upon default of the principal debtor and the satisfaction of the conditions precedent to liability.”) (citation omitted); *Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 59 (2004) (“A guaranty is a form of commercial obligation in which the guarantor promises to perform if his principal does not.”).

market value of a business interest. Fair market value is “the amount at which property would change hands between a willing buyer and a willing seller,” and that amount is dictated by tangible assets, liabilities and goodwill. *Rosenberg*, 64 Md. App. at 526.

On remand, the circuit court is not required to accept the opinion of appellant’s expert accountant, Mr. Norris, that the fair market value of GSA is \$0. Furthermore, we do not dictate which method must be used to value GSA. However, the value that the circuit court assigns to appellant’s interest in GSA must account for all of the components of that business, not just goodwill.¹⁰

IV. The circuit court’s contempt order

We must next address appellant’s contention that, more than a year prior to the resolution of the parties’ financial issues, the circuit court erroneously found him in contempt for failure to make temporary alimony payments pursuant to the parties’ Settlement Term Sheet. For the reasons that follow, we hold that the circuit court’s contempt ruling was not erroneous.

The temporary alimony provision of the Settlement Term Sheet (paragraph 3.H.) read as follows:

¹⁰ In making a monetary award, the circuit court should also explain how it settles on the figure ultimately reached. This Court is aware that many of the factors that must be considered under Fam. Law § 8-205 are difficult to quantify in rendering a monetary award. However, at a minimum, the circuit court should explain whether its monetary award takes into account appellant’s mandatory credit of \$56,421.71 in post-divorce payments in connection with the jointly owned properties; appellant’s discretionary credit of \$36,644 in pre-divorce payments; appellant’s obligation to repay the \$53,000 loan from appellee; and any other claimed credits provided for in the parties’ Settlement Term Sheet.

Commencing on the first day of the month immediately following the settlement of sale of Lusby and the termination of [appellant's] obligations to make any payment with respect to the (i) Lusby mortgage, (ii) Lusby Home Equity Line of Credit, and (iii) Lusby revolving credit lien to Jim Boyd's Flooring America through Citi Financial ... [appellant] shall pay temporary alimony in the amount of One Thousand Two Hundred Fifty Dollars (\$1,250) to [appellee] each month. Notwithstanding the above, if [appellant's] obligations with respect to both Lusby and Tremblant have terminated ..., then [appellant] shall pay temporary alimony in the amount of Two thousand Five Hundred Dollars (\$2,500) to [appellee] each month. The temporary alimony provisions contained in this Paragraph are intended to be temporary in nature and have been agreed upon as the most expeditious handling of the issues in the event of the sale of Lusby prior to the Court's determination of all of the issues which are being reserved as set forth in this Term Sheet. These provisions regarding temporary alimony are therefore "without prejudice" and shall not be considered a waiver of either party's rights.

According to the circuit court, the second-to-last sentence of paragraph 3.H. – providing that “[t]he temporary alimony provisions contained in this Paragraph are intended to be temporary in nature and have been agreed upon as the most expeditious handling of the issues in *the event of the sale of Lusby ...*” – indicated that the parties intended for the temporary alimony provision to take effect upon the sale of Lusby. (emphasis added). Therefore, appellant's failure to make temporary alimony payments in the amount of \$2,500 after December, 2011, when Lusby was sold, contravened the Settlement Term Sheet.

Appellant alleges that this ruling was erroneous because his obligation to pay temporary alimony was not triggered by the sale of Lusby alone. Instead, under the unambiguous language of the Settlement Term Sheet, the obligation to pay temporary alimony was only triggered by “(1) the settlement of sale of Lusby *and* (2) the *termination*

of his obligations to make *any payment* with respect to the Lusby mortgage.” (emphasis in original). Appellant points out that the parties were still personally liable for the Lusby mortgage at the time Lusby was sold, because the mortgage was not satisfied by the proceeds from the sale. Accordingly, appellant was under no obligation to pay temporary alimony.

We first observe that the circuit court’s finding regarding the meaning of paragraph 3.H. is reviewed under the clearly erroneous standard. *See Droney v. Droney*, 102 Md. App. 672, 683 (1995) (Noting that we will only reverse a contempt ruling “upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous.”) (citing *Baltimore v. Baltimore*, 89 Md. App. 250, 253-54 (1991)). As previously mentioned, a finding “is not clearly erroneous if there is competent or material evidence in the record to support the court’s conclusion.” *Lemley*, 109 Md. App. at 628 (citations omitted).

Applying the above standard, we hold that the circuit court’s finding regarding the meaning of paragraph 3.H. was not clearly erroneous. The parties included explicit language in paragraph 3.H. that “[t]he temporary alimony provisions contained in this Paragraph are intended to be temporary in nature and have been agreed upon as the most expeditious handling of the issues *in the event of the sale of Lusby*[.]” (emphasis added). On the basis of this language, there was some evidence to support the finding that “a reasonable person in the position of the parties” intended that the temporary alimony

provision of paragraph 3.H. would be triggered by the sale of Lusby alone. *See Calomiris v. Woods*, 353 Md. 425, 436 (1999) (noting that, when interpreting a contract, the court should “[d]etermine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated.”) (quoting *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)). Accordingly, we assign no error to the circuit court’s contempt ruling.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EQUALLY AMONGST THE PARTIES.