

Circuit Court for Montgomery County
Case No. 122908FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 281

September Term, 2018

CHRISTOPHER D. LIBERTELLI

v.

YUKI E. NOGUCHI

Nazarian,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: January 29, 2020

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

The Circuit Court for Montgomery County granted appellant Christopher Libertelli and appellee/cross-appellant Yuki Noguchi an absolute divorce in January 2018. On appeal, Mr. Libertelli challenges various findings (concerning dissipation and the division of other marital property) that contributed to the circuit court’s monetary award in favor of Ms. Noguchi. Finding no error with respect to these contested findings, we affirm those aspects of the circuit court’s ruling and monetary award.

Ms. Noguchi, in turn, raises one counter-claim: that the circuit court should have re-opened the record upon new evidence that Mr. Libertelli had apparently submitted falsified drug test reports throughout the course of litigation. Ms. Noguchi argues that the circuit court should have potentially reconsidered its previous attorneys’ fee award of \$100,000 in light of the new evidence. We agree with Ms. Noguchi, and so vacate the circuit court’s March 2018 written order that denied her motion to amend or reconsider on that point.

BACKGROUND AND PROCEDURAL HISTORY

Ms. Noguchi and Mr. Libertelli were married in July 2008. At the time of the wedding, she was 32 and he was 39. During the marriage and throughout the litigation, Ms. Noguchi was a reporter for NPR; beginning in December 2011, Mr. Libertelli started working on public policy matters in Netflix’s Washington office. By the time of the divorce he was earning around \$1.3 million a year. In the words of the circuit court, the couple “enjoyed a comfortable upper-income lifestyle.”

In 2013, Ms. Noguchi became aware that Mr. Libertelli was using drugs. (As elicited at trial, back surgery spurred an addiction to prescription opioids.). Two days after Ms. Noguchi staged an intervention in September 2013, Mr. Libertelli had hired counsel and told Ms. Noguchi that he wanted a divorce. They formally separated on October 31, 2013, when Mr. Libertelli moved out of the marital home in Bethesda. Their separation continued uninterrupted throughout the course of the litigation.

By the time the circuit court granted the couple an absolute divorce in January 2018 (restoring Ms. Noguchi to her maiden name), the issues before the court included equitable distribution, a division of the marital property, a dissipation claim, and Ms. Noguchi's claim for attorneys' fees.¹

With respect to the division of property, the parties essentially agreed that the marital property should be divided evenly. One major point of contention concerned whether the original balance in an E*Trade account titled in Mr. Libertelli's name should be included as marital property.² As we shall described further below, Mr. Libertelli held \$263,253.97 in the E*Trade account at the time of the marriage.³ Mr. Libertelli

¹ By the time of the circuit court's ruling, the parties had waived alimony, agreed on child support for their two young sons, and agreed on the disposition of the marital home and the division of household goods and furnishings.

² The parties also had marital property in a separate E*Trade account that was a Netflix stock option account. There is no dispute on appeal with regard to this stock option account. All references to the "E*Trade account" only refer to the account whose classification as marital property is in dispute.

³ We note that throughout the record this figure is sometimes and alternatively given as \$263,253.79 or \$263,235.79. Ms. Noguchi points us to a statement from E*Trade in
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maintained at trial (and on appeal) that that amount should be treated as non-marital property, given that the account balance never went below that original amount of \$263,253.97. The circuit court, however, agreed with Ms. Noguchi that the amount became marital property, along with the rest of the account, because any non-marital property so commingled with marital property it lost its non-marital character. As the circuit court stated in its finding: “Millions of dollars went into and out of the account during the term of the marriage, and it’s impossible to find, because of the commingling, that only marital funds were expended . . . here, the commingling destroyed the non-marital nature of the funds in the [] account.” Accordingly, the circuit court found that the entire balance of the E*Trade account was marital property.

Another major point of contention concerned Ms. Noguchi’s claim that she should be given credit for \$775,218 that she claimed was dissipated. As the circuit court recognized, dissipated funds would constitute extant marital property that could be considered for equitable distribution purposes in a monetary award.⁴

We shall describe in greater detail below precisely how the circuit court arrived at its dissipation figure, but in short the circuit court found generally that “there was

the record extract that shows the account’s value at the end of July 2008 (the month of the couple’s wedding) as \$263,253.97.

⁴ As the circuit court noted, the parties agreed that the following property constituted marital property: the marital home in Bethesda; the Klinge Street, NW, Washington, D.C. home that Mr. Libertelli moved into during the separation; the value of the E*Trade account that was above the contested amount of \$263,253.97; the separate Netflix stock option account; a Netflix 401(k); a TIAA-CREF NPR account; a TransAmerica NPR 403(b) account; a 2016 Tesla; and a 2010 Mazda.

dissipation as related to [Mr. Libertelli’s] cash withdrawals in the amount of \$319,901[.]” Comparing Mr. Libertelli’s increased rate of cash withdrawals in the years after the separation (when the marriage “was in the midst of an irreconcilable breakdown”) to a baseline period before the separation, the circuit court found that “[t]here was no adequate explanation given by Mr. Libertelli as to how the money represented by these large cash withdrawals was spent”; “[h]is conflicting explanations were simply unconvincing”; “he continued to withdraw cash with conflicting explanations for where it was going”; and “his cash withdrawals increased significantly . . . without credible explanation.” As such, the circuit court found by a preponderance of the evidence that Mr. Libertelli had depleted marital funds to reduce the money that would be available for equitable distribution at the time of divorce. The circuit court then found by a preponderance of the evidence that Mr. Libertelli had also dissipated \$114,230 that he claims he repaid to Sophy Chen in return for a loan on a down payment to a house.

The final issue that the circuit court considered concerned Ms. Noguchi’s request for attorneys’ fees. Ms. Noguchi spent over \$500,000 on the litigation and requested \$300,000 in attorneys’ fees (plus \$10,400 in costs). In announcing its finding, the circuit court stated that both parties had significant financial resources and significant financial needs. While noting the parties had substantial justification for prosecuting and defending the proceeding, the court found that “the costs of the litigation were drive[n] up as a result of the need by [Ms. Noguchi] to take multiple actions because of Mr. Libertelli’s conduct, particularly in the custody portion of the case.” On the other hand, the court

found that “there were times when I felt that [Ms. Noguchi] was taking unreasonable positions and pushing things more than things needed to be pushed.” After considering those factors, the court announced that it was awarding Ms. Noguchi \$100,000 in fees.

Immediately after the circuit court announced its ruling, Ms. Noguchi’s counsel notified the court that she had filed an emergency motion that day, pertaining to a newfound discovery that Mr. Libertelli had apparently altered 23 of his court-ordered drug test reports that were submitted as part of the litigation. On cross-appeal, Ms. Noguchi argues that the circuit court should have later reconsidered its attorneys’ fee award in light of this new evidence.

We shall further explain facts as relevant below.

DISCUSSION

Mr. Libertelli challenges the circuit court’s dissipation findings, as well as its finding that the contested \$263,253.97 in the E*Trade account was marital property. Additionally, Mr. Libertelli contends that the circuit court erred by not considering the tax consequences of its monetary award. Ms. Noguchi, through her counter-claim, argues that the circuit court abused its discretion in not re-opening the record upon new evidence that Mr. Libertelli had submitted falsified drug test reports in conjunction with the litigation.

Whether property is marital or non-marital, and the valuation of marital property, are questions of fact that we review for clear error. *Innerbichler v. Innerbichler*, 132 Md. App. 207, 229 (2000); *Flanagan v. Flanagan*, 181 Md. App. 492, 521 (2008). Likewise,

we “will not set aside a trial court’s determination regarding dissipation of marital assets unless the determination is clearly erroneous.” *Beck v. Beck*, 112 Md. App. 197, 216 (1996). The clearly erroneous standard means that we will not disturb a factual finding supported by any competent material evidence. *MAS Assocs., LLC v. Korotki*, 465 Md. 457, 474 (2019). Then, at a broader level, “the ultimate decision regarding whether to grant a monetary award, and the amount of such an award, is subject to review for abuse of discretion.” *Flanagan*, 181 Md. App. at 521. With respect to Ms. Noguchi’s counter-claim, we review a ruling on a motion to alter or amend under Rule 2-534, and on motions to revise under Rule 2-535(a), for abuse of discretion. *Wells v. Wells*, 168 Md. App. 382, 394 (2006).

I. THE CIRCUIT COURT’S DISSIPATION FINDING WAS NOT CLEARLY ERRONEOUS.

Mr. Libertelli contends that the circuit court erred in awarding Ms. Noguchi the \$319,901 that it determined Mr. Libertelli had dissipated through increased cash withdrawals during the separation period. The crux of Mr. Libertelli’s claim is two-part: he argues that (1) a circuit court may only find dissipation if it determines that a spouse intentionally squandered money for the purpose of keeping funds from his or her spouse in a pending divorce, and (2) here, the circuit court could not legally conclude that Mr. Libertelli “intentionally” squandered money on his opioid addiction, as the very nature of addiction means his purchases were made in the involuntary throes of a disease. Though we are sensitive to the insidious grip of addiction, we believe that Mr. Libertelli’s

argument is misplaced, both with respect to the caselaw as well as the circuit court’s finding.

To begin, Mr. Libertelli overlooks that dissipation does not require one spouse to have intentionally depleted marital funds for the purpose of keeping money away from an estranged spouse. Undoubtedly, the concept of dissipation is most generally understood as entailing a situation where one spouse intentionally squanders marital property to avoid its inclusion in a monetary award. *See, e.g., Sharp v. Sharp*, 58 Md. App. 386, 399 (1984). However, in *Omayaka v. Omayaka*, 417 Md. 643, 652 (2011), the Court of Appeals squarely noted that:

[D]issipation may occur on occasions in which . . . the dissipating spouse’s principal purpose was a purpose other than the purpose of reducing the amount of funds that would be available for equitable distribution at the time of the divorce. Dissipation occurs when marital assets were taken by one spouse without agreement by the other spouse. (Citations, quotation marks, and emphasis omitted).

As such, the court’s dissipation finding here (to the extent that it was even based upon Mr. Libertelli’s drug purchases) need not have depended upon whether Mr. Libertelli’s behavior was actually voluntary. An individual who is suffering through the torment of addiction can still dissipate funds.⁵

⁵ Though unwise, temporarily satisfying the pangs of addiction falls within the ambit of “us[ing] marital property for [one’s] own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown.” *Omayaka*, 417 Md. at 651. (Citation omitted).

Mr. Libertelli suggests the adoption of a bright-line test that would prohibit finding dissipation when one spouse suffers from Opioid Use Disorder. This Court has previously noted that “it would clearly be against the Legislature’s stated public policy to
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Mr. Libertelli’s argument also overlooks that (1) the circuit court *did*, in fact, find that he intentionally dissipated certain funds,⁶ and (2) those funds, as calculated by the circuit court, were not necessarily tied to his drug use. In announcing its dissipation determination, the circuit court explicitly stated that it considered addiction to be a disease, and that it was not seeking to punish Mr. Libertelli for his drug use. The circuit court then described the basis for its calculations—and the court’s calculations were not

permit one spouse to squander marital property and render it impossible to make an equitable award of property.” *Sharp*, 58 Md. App. at 399. As Ms. Noguchi suggests, such a bright-line rule would allow one spouse to entirely drain a marital estate and leave the other spouse with no recourse. Nor is it clear why such a rule, if extended for those suffering from Opioid Use Disorder, should not extend to other addictions.

⁶ The circuit court found by a preponderance of the evidence “that at a time when the marriage was undergoing an irreconcilable breakdown, Mr. Libertelli depleted marital funds, and that his primary intent—and intent is something that is necessarily shown circumstantially—was to reduce the money that would be available for equitable distribution at the time of divorce.” As such, Mr. Libertelli is incorrect when he argues that “the trial court determined that there was no dissipation under a ‘traditional’ analysis” (*i.e.*, that the spouse intentionally sought to reduce the marital estate).

Mr. Libertelli also argues that the circuit court improperly attempted to “safeguard” its dissipation decision by equating any “non-traditional” finding (*i.e.*, grounded in *Omayaka*’s recognition that dissipation does not require intentionally depleting the marital estate) to an equitable marital property award bestowed under § 8-205(b) of the Family Law Article. Mr. Libertelli’s critique is misplaced. By referencing § 8-205(b) (which allows a circuit court to make an equitable monetary award after considering 11 factors), the circuit court was effectively acknowledging that dissipation is a step on the path to making an ultimate monetary award. *See Abdullahi v. Zanini*, 241 Md. App. 372, 414-15 (2019) (“[T]o determine whether to grant a monetary award, and if so, the amount, the court must determine the value of the marital property. Generally, property disposed of before trial cannot be marital property. An exception exists when the court finds that property was [dissipated]When dissipation is found, the court may include, as extant marital property, marital property that was transferred, spent or disposed of in some fashion by one of the spouses.”) (Internal citations and quotation marks omitted).

necessarily pegged to Mr. Libertelli’s drug habit. The court first described a “base period” (from January 2010 through September 2013) that reflected a typical, acceptable rate of cash withdrawals by Mr. Libertelli prior to his separation from Ms. Noguchi; the value of his cash withdrawals during this period were not included in the court’s dissipation award. We note that this “base period” covered a period during which Mr. Libertelli had admitted to using drugs. As such, it is simply not the case that the circuit court mechanistically transferred any purported drug use withdrawals into the “dissipation” column. Rather, the dissipation award was based upon the increased—and unexplained—rate of cash withdrawals made by Mr. Libertelli following his separation from Ms. Noguchi (*i.e.*, after the “base period”). Specifically, the court broke the period following the separation into two distinct time periods. The first period went from October 2013, when Mr. Libertelli announced that he wanted a divorce and moved out of the marital home, through the end of 2015; the second period cover January 2016 through February 2017. The difference between Mr. Libertelli’s average cash withdrawals during each of those periods from the base period was found to be dissipated. And while Mr. Libertelli now argues that the circuit court was punishing him for his drug addiction by doing so, we note that the second period (January 2016 through February 2017) covered times when Mr. Libertelli had stressed to the circuit court that he was *not* using drugs. In other words: whether Mr. Libertelli may or may not have been using drugs was not necessarily determinative of whether the court found dissipation.⁷ Rather, the court’s

⁷ In light of our conclusion regarding Ms. Noguchi’s counter-claim (discussed
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dissipation finding was based upon a determination that in the two time periods following the “base period,” Mr. Libertelli made increasing cash withdrawals, then provided no adequate explanation for those withdrawals. It was Mr. Libertelli’s unavailing or non-existent explanations for those increased withdrawals that led the court to make its ultimate dissipation finding, and not the specter of drug use.⁸ In doing so, we do not believe the circuit court was clearly erroneous.

II. THE CIRCUIT COURT’S FINDING THAT MR. LIBERTELLI DISSIPATED FUNDS TO SOPHY CHEN WAS NOT CLEARLY ERRONEOUS.

Mr. Libertelli argues that the circuit court erred in finding \$114,230 of dissipated funds that, according to Mr. Libertelli, he had repaid to Sophy Chen in return for a loan. Specifically, Mr. Libertelli contends that after he moved out of the marital home in Bethesda that he shared with Ms. Noguchi, Ms. Chen loaned him \$114,230 to pay for the

further below), we note that even if Ms. Noguchi’s new evidence demonstrates that Mr. Libertelli *had* been using drugs, this new fact would not require a reconsideration of the dissipation award. The circuit court concluded that Mr. Libertelli had dissipated money; its finding would be valid regardless of whether the funds were actually spent on drugs, or on other items. As mentioned above, we are not persuaded by Mr. Libertelli’s argument that any money spent on a drug addiction should not be counted toward a dissipation finding.

⁸ In a dissipation analysis, the initial burden of production and the ultimate burden of persuasion rests with the party raising the dissipation claim. *Omayaka*, 417 Md. at 656. However, “after that party establishes a prima facie case that monies have been dissipated . . . the burden shifts to the party who spent the money to produce evidence sufficient to show that the expenditures were appropriate.” *Id.* at 656-57 (Quoting *Jeffcoat v. Jeffcoat*, 102 Md. App. 301, 311 (1994)). Here, Ms. Noguchi submitted Mr. Libertelli’s ATM records, documenting his increasing rate of cash withdrawals following the separation. In turn, the circuit court found that Mr. Libertelli did not convincingly or adequately explain the withdrawals. As such, the circuit court was not clearly erroneous in finding that Ms. Noguchi had met her burden of persuasion.

down payment on a home in Northwest Washington, D.C.⁹ Mr. Libertelli challenges the sufficiency of the circuit court’s finding: he contends (1) no proffered evidence definitively showed that the funds for the down payment came from any source other than Ms. Chen; (2) in contrast, he testified to the loan arrangement with Ms. Chen; and (3) the circuit court erred by not accepting into evidence a purported promissory note between him and Ms. Chen.

In making this argument, however, Mr. Libertelli misapprehends our standard of review on appeal. Our task is not to determine whether we would have reached the same exact conclusion as the circuit court, but whether the court’s finding was supported by the evidence and not clearly erroneous. *Ayers v. Liller*, 65 Md. App. 178, 183 (1985). Once the court determined that Ms. Noguchi had made a *prima facie* case for dissipation, *Omayaka*, 417 Md. at 656-67, it was free to then disbelieve Mr. Libertelli’s testimony. *Id.* at 659 (“In its assessment of the credibility of witnesses, the Circuit Court was entitled to accept—or reject—all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence.”)

⁹ Though not particularly relevant for the purposes of appeal, Mr. Libertelli further contends that the loan was structured so that Ms. Chen provided the funds to Mr. Libertelli’s father, who then “gifted” the money to Mr. Libertelli.

Additionally, Mr. Libertelli argues that the circuit court “double counted” the money used for the down payment: (1) by counting as dissipated the funds that Mr. Libertelli (claims he) repaid to Ms. Chen for the loan, and (2) counting the resulting equity in the Washington, D.C. home as part of Mr. Libertelli’s “column” when calculating the monetary award. However, because we conclude that the court’s dissipation finding was not erroneous, the calculation of the monetary award was not an erroneous “double counting.”

(Emphasis removed); *see also Shapiro v. Chapman*, 70 Md. App. 307, 318 (1987).¹⁰ Nor does a valid finding require definitive proof that the funds for the down payment came from a source other than Ms. Chen: despite Mr. Libertelli’s argument that “[t]he trial court made its decision in this matter based solely on circumstantial evidence,” circumstantial evidence is sufficient to support a factual finding. *See, e.g., Hamilton v. Kirson*, 439 Md. 501, 527 (2014) (“We have recognized repeatedly that a plaintiff may prove causation in fact through circumstantial evidence, as well as direct evidence or a mixture of the two.”).

As to the purported promissory note, it was within the circuit court’s discretion to preclude its admission into evidence. *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48 (2016) (“Generally, whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court and reviewed under an abuse of discretion standard.”) (Citation and quotation marks omitted). Mr. Libertelli did not attempt to introduce the promissory note until his closing argument of the merits trial, and the circuit court did not abuse its discretion by holding that Mr. Libertelli should have introduced it earlier during the trial’s evidentiary portion, or made it available to Ms. Noguchi during discovery. Moreover, and especially in light of our holding with respect to Ms. Noguchi’s counter-claim (that Mr. Libertelli apparently forged his court-ordered drug test reports), we do not believe that the circuit court was

¹⁰ Ms. Noguchi points out that at Mr. Libertelli’s April 2016 deposition, he testified that Ms. Chen gave him “approximately \$60,000” to buy the house.

abusing its discretion if it was wary of accepting into evidence a last-minute promissory note from a defendant whose credibility was an issue throughout the course of litigation. *See Nicholas v. Owrutsky*, 230 Md. 60, 65-66 (1962) (no abuse of discretion in refusing to reopen a case and admit a contested will when it did not “suppl[y] any clear support for the appellant’s claim that a trust was created.”); *101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013) (“A proper exercise of discretion involves consideration of the particular circumstances of each case.”). Ms. Noguchi even points out that Ms. Chen testified on July 25, 2016 that there was no promissory note. As such, the circuit court did not err, and its finding regarding the payments to Ms. Chen was not clearly erroneous.

III. THE CIRCUIT COURT DID NOT ERR IN INCLUDING 100% OF THE E*TRADE ACCOUNT AS MARITAL PROPERTY.

Mr. Libertelli contends that the circuit court erred by finding 100% of the E*Trade account to be fully marital property. Mr. Libertelli argues that because he had an undisputed \$263,253.97 of non-marital property in the account prior to the marriage, and because the account never fell below that value, the sum of \$263,253.97 that remained in the account at the time of the divorce should have been construed as traceable non-marital property that never blended with the other marital funds that *were* deposited into the account. *See* Md. Code. Ann. (2019 Repl. Vol.), Family Law Article (“FL”), § 8-201(e)(3) (“Marital property” does not include property “directly traceable” to property acquired before the marriage.). In contrast, Ms. Noguchi argues—and the circuit court found—that all the funds in the account became inexorably commingled during the

marriage, rendering the entire account marital property. We cannot say the circuit court’s conclusion was error.

To be sure, “the mere fact that non-marital funds rested in the same account as marital funds does not compel the conclusion that the funds commingled.” *Richards v. Richards*, 166 Md. App. 263, 276 (2005) (quoting *Noffsinger v. Noffsinger*, 95 Md. App. 265, 284 (1993)); *see also Dave v. Steinmuller*, 157 Md. App. 653, 671 (2004) (“[E]ven if a spouse commingles funds, the character of the nonmarital property may be preserved if its origins can be traced to nonmarital property.”). However, if marital and nonmarital funds become commingled “to the point that direct tracing is impossible . . . [the property can] lose its nonmarital status.” *Richards*, 166 Md. App. at 276 (quoting *Noffsinger*, 95 Md. App. at 284).

Mr. Libertelli’s claim, boiled down, is that money is fungible, and so the fact that there was always at least \$263,253.97 in the E*Trade account means that *any* \$263,253.97 in the account at the time of the divorce can be thought of as the same non-marital dollars that preceded the marriage. However, “[d]irectly traceable’ is not synonymous with ‘attributable,’” *Melrod v. Melrod*, 83 Md. App. 180, 187 (1990), and it is a mistake to simply assume that “only the marital funds” have been spent from a commingled account. *Jeffcoat v. Jeffcoat*, 102 Md. App. 301, 313 (1994) (“The fallacy. . . is the assumption that appellee, after commingling the \$41,617 along with substantial marital funds in a single account, spent only the marital funds. This is not possible. Since the marital and non-marital funds were commingled, it is impossible to trace \$41,617 as

non-marital funds.”). Mr. Libertelli simply asserts that \$263,253.97 in the account at the time of the divorce is the very same as the non-marital property that preceded the marriage. Without more than this mere assertion, we cannot say that the circuit court erred by instead finding that it was not possible to directly trace any of the funds as being the same that were in the account prior to the marriage. *See Richards*, 166 Md. App. at 276 (“Because we do not find the trial court’s factual findings on the tracing issue to have been clearly erroneous, we will not disturb the findings.”). Indeed, Ms. Noguchi introduced all the relevant E*Trade statements from January 2009 to December 2017; she notes those statements showed \$1.9 million in deposits and \$1.3 million in withdrawals across 218 separate transactions. The circuit court’s finding was not clearly erroneous.

Alternatively, Mr. Libertelli points to FL § 8-205(b)(8) to argue that even if the \$263,253.97 was properly deemed to be marital property, the circuit court should not then have equally divided that money between him and Ms. Noguchi, given the short length of their marriage, the fact that the money had originated as non-marital property, and the fact that the full E*Trade account gained value primarily through Mr. Libertelli’s larger income. We are not persuaded.

In announcing its decision, the circuit court considered Ms. Noguchi’s contributions to the marriage pursuant to § 8-205(b); additionally, the circuit court found that Ms. Noguchi’s efforts to freeze the E*Trade account during the litigation, and in pursuing contempt actions against Mr. Libertelli (for using funds from the account despite court orders), helped to maintain the value of the account by the time of the

divorce. Moreover, Mr. Libertelli only argued at trial for marital property to be divided 50/50. In short, we do not believe that the circuit court abused its discretion by equally dividing the value of the E*Trade account when determining the monetary award. *Flanagan*, 181 Md. App. at 521.

IV. THE CIRCUIT COURT DID NOT ERR BY NOT CONSIDERING TAX CONSEQUENCES WHEN MAKING THE MONETARY AWARD.

Mr. Libertelli contends that the circuit court erred by not considering the tax consequences of the monetary award. *See* FL § 8-205(b)(11). Specifically, Mr. Libertelli argues that the circuit court should have realized that Mr. Libertelli would need to sell assets from his E*Trade account to satisfy the monetary award, given that the court was aware of both his cash flow difficulties and the fact that the account in question had a comparatively higher balance than almost all of the parties' other accounts. We disagree. In *Solomon v. Solomon*, 383 Md. 176, 191 (2004), the Court of Appeals held that “tax liabilities may be considered as ‘other factors’ for purposes of distributing a marital property award . . . only when they are ‘immediate and specific or not speculative.’” (Citations omitted).¹¹ The Court in *Solomon* went on to conclude that the petitioner’s “asserted tax liabilities only could have been ‘immediate and specific’ if he had no option

¹¹ In announcing this standard, the Court of Appeals expressly adopted the “underlying reasoning” of *Rosenberg v. Rosenberg*, 64 Md. App. 487 (1985)—a case in which this Court held that the appellant’s “future tax liabilities on the realization of retirement plan benefits and sales of assets to satisfy the marital property were speculative[.]” *Solomon*, 383 Md. at 189 (discussing *Rosenberg*, 64 Md. App. at 526).

other than to withdraw funds from his [] accounts in order to pay the marital award[]”—which the Court determined was not the case on the record before it. *Id.* at 193.

Here, Ms. Noguchi points out that Mr. Libertelli presented no evidence and made no argument at trial regarding any alleged tax consequences associated with the E*Trade account. *See Williams v. Williams*, 71 Md. App. 22, 37 (1987) (stating, when vacating a monetary award, that the circuit court must consider tax consequences “assuming that evidence of tax consequences is presented on remand”). In short, the circuit court did not err by not considering an argument that Mr. Libertelli did not make.

V. THE CIRCUIT COURT SHOULD HAVE REOPENED THE RECORD TO ADMIT EVIDENCE THAT MR. LIBERTELLI HAD FALSIFIED TRIAL EXHIBITS AND TO RECONSIDER MS. NOGUCHI’S ATTORNEYS’ FEE AWARD.

Ms. Noguchi challenges the court’s decision on one counter-claim in a cross-appeal. At the conclusion of the merits trial on January 11, 2018, the circuit court awarded Ms. Noguchi \$100,000 in attorneys’ fees. (Ms. Noguchi had spent more than \$500,000 on the litigation.). Immediately after the circuit court announced its ruling, Ms. Noguchi’s counsel informed the court that an emergency motion had been filed that same day.¹² Ms. Noguchi’s counsel explained that, the week before, a discrepancy in one of Mr. Libertelli’s drug test reports led them to discover that a series of his reports had been “altered.” Later that day, the circuit court held a hearing with the parties’ counsel and

¹² As explained to the court that day, the motion at that time did not concern attorneys’ fees: Ms. Noguchi asked the court to immediately reduce Mr. Libertelli’s access to the two children, and to order a change in Mr. Libertelli’s drug-testing regimen.

granted a temporary order suspending Mr. Libertelli's access to the children pending further action.

Eventually, Ms. Noguchi filed a motion to amend or reconsider the attorneys' fee award, which the circuit court denied in an order dated March 28, 2018. On appeal, Ms. Noguchi claims that the circuit court abused its discretion by not admitting the evidence that Mr. Libertelli had purportedly altered at least 23 drug test reports, and not reconsidering its attorneys' fee award in light of the new evidence. We agree.

When the circuit court announced its ruling on January 11, 2018, it found that “the costs of the litigation were drive[n] up as a result of the need by [Ms. Noguchi] to take multiple actions because of [Mr. Libertelli's] conduct, particularly in the custody portion of the case. His drug use and the need to trace cash increased the costs.” If Mr. Libertelli had consistently and deliberately engaged in a pattern of falsifying his drug test reports, as Ms. Noguchi alleges, that would only strengthen the substantial justification behind Ms. Noguchi's efforts. Moreover, evidence that Mr. Libertelli had falsified drug test reports would cut against the circuit court's finding that “there were times . . . that [Ms. Noguchi] was taking unreasonable positions and pushing things more than things needed to be pushed.” To the contrary: evidence that Mr. Libertelli had deliberately doctored his court-ordered drug test reports would strongly suggest that Ms. Noguchi's positions were not as unreasonable as the circuit court thought. *See Kusi v. State*, 438 Md. 362, 385 (2014) (“The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion.”) (Internal

quotation marks and citations omitted); *101 Geneva LLC*, 435 Md. at 242 (“A proper exercise of discretion involves consideration of the particular circumstances of each case.”). Throughout the litigation, Ms. Noguchi persistently raised the issue of whether Mr. Libertelli could potentially continue to use opioids, especially in the context of determining access to the couple’s two young sons. Ms. Noguchi’s new evidence would indicate that she had substantial justification in doing so.

Moreover, evidence that Mr. Libertelli had doctored drug test reports would support an attorneys’ fee award under Rule 1-341’s provision for bad faith. *Miller v. Miller*, 70 Md. App. 1, 12 (1987) (Rule 1-341 applicable in a divorce proceeding). Although we are sympathetic toward those who are suffering through the throes of addiction, an addiction is not an excuse to intentionally falsify two dozen drug test reports, submit those (court-ordered) reports, and then repeatedly claim in court that you are drug-free. Such a course is hardly “proceed[ing] in good faith” amidst personal difficulties, as Mr. Libertelli attempts to downplay in his reply brief. In light of Ms. Noguchi’s extraordinary claim regarding her newfound evidence, the circuit court should have reopened the record for the purpose of reconsidering the fee award.

**ORDER OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY DATED
MARCH 28, 2018 IS VACATED.
JUDGMENTS OTHERWISE AFFIRMED.
CASE REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
APPELLANT.**