

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

Nos. 1542 & 2006

September Term, 2015

CONSOLIDATED CASES

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LANCE A. FELACTU

v.

TROY D. FELACTU

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Meredith,  
Leahy,  
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: October 4, 2016

\*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.

The record is clear: Lance Felactu has behaved abominably in his divorce. He has hidden money, refused to make required payments, and thumbed his nose at the court. The trial court sought to remedy Lance's misbehavior. We shall affirm everything we can. What we can't affirm, we will remand so that the trial court may try again.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Lance (Husband) and Troy (Wife) Felactu began the process of divorce in 2012, after 17 years of marriage. After the parties separated, Lance remained in the family home in Lexington Park, Maryland with the three children.

In January of 2014, Lance took out a home equity line of credit (HELOC), using the family home as collateral. Lance did not disclose the HELOC to Troy or list it on the financial statement required for the divorce proceedings. *See* Md. Rule 9-203. By August of 2014, Lance had withdrawn for his personal use \$153,313.20 of the maximum \$186,900.00 available on the HELOC.

The parties' three-day divorce hearing was held before a magistrate starting at the end of August 2014. Between hearing dates, Lance let slip about the HELOC. Troy sought an injunction to keep Lance from continuing to borrow on the HELOC, but by the time a hearing could be held Lance had already maxed out the HELOC and the trial court had to deny the injunction as moot.

After the close of the divorce proceedings, the family law magistrate issued his report and recommendations, which included: (1) that the family home was marital property and had a value of \$210,000; (2) that Troy was self-supporting and as a result,

that she should not receive alimony; (3) that Lance's income was \$123,000 per year and Troy's income was \$32,000 per year; (4) that Lance's access to additional funds, including retirement funds and the HELOC, was "significant;" (5) that Troy be awarded 50% of Lance's Wells Fargo retirement account and that Lance be awarded 50% of Troy's Wells Fargo retirement account; (6) that Troy be awarded \$107,955 in a monetary award; (7) that Troy's child support obligation be \$678 per month; and (8) that Lance pay Troy attorney's fees of \$30,000.

Both Lance and Troy filed exceptions to the magistrate's report. By Order entered March 10, 2015, Judge David W. Demsford of the Circuit Court for St. Mary's County overruled all of the parties' respective exceptions and entered a judgment of absolute divorce. The judgment of divorce followed the magistrate's recommendations and awarded Troy 50% of Lance's Wells Fargo retirement account with a value of \$176,636.99 and awarded Lance 50% of Troy's Wells Fargo retirement account with a value of \$3,763.77. Troy was also awarded a monetary award of \$107,955, and attorney's fees of \$30,000.

Thereafter, Lance began a campaign of ignoring his obligations and Troy began a reciprocal campaign to try to force his compliance. Lance steadfastly refused to pay the \$107,955 monetary award. Troy filed motion after motion to try to force Lance to pay. The court granted injunctions to freeze some of Lance's bank accounts. Lance lied about how much money was in his bank accounts; he lied about whether he had removed money from specific accounts; and he hid money by moving it into his children's accounts. When Lance failed to comply, the court found him in contempt and ordered Lance to pay Troy

\$194,098.50 within thirty days.<sup>1</sup> Lance still did not make any payment. By the beginning of August, 2015, Troy still had not received any payments from Lance on the monetary award.

Troy, who had been paying Lance child support during this time, filed a motion to modify child support. At the hearing on Troy's motion, the circuit court recalculated Troy's child support obligation to \$605. The circuit court then reduced that obligation by \$90 per month to account for Troy's therapy costs finding that "mom going to counseling ... is to her children's advantage. It does provide a more stable, counseled mother that is in the children's best interest." The circuit court then found that Lance had stolen money from Troy and hidden it. The circuit court stated that it had not "seen a case of perfidy and deception similar to this." The court found that requiring Troy to pay Lance child support would be detrimental to the children: "It would be an absolute abomination for two boys to be in the house with their dad, who steals this money, refuses to say where it is, makes mom's lawyer go fetch time and time again ... and then to make her pay into [this] household." Thus, the court reduced the child support to \$0. Lance noted his appeal of the child support order.

Troy also filed a motion to amend the divorce judgment to add an additional award of attorney's fees for the exceptions. On October 5, 2015, the circuit court granted Troy's

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<sup>1</sup> The first finding of contempt is not part of this appeal. Although Lance appealed the first finding of contempt after a failed motion for reconsideration, he does not make any arguments on appeal related to the first finding of contempt and, in any event, the first finding of contempt was subsumed by the second.

motion to amend the judgment of divorce and awarded Troy an additional \$12,937.50 in attorney's fees in the amended judgment. Lance noted his appeal of the divorce judgment on the issues of the valuation of the family home and the grant of attorney's fees. Troy cross-appealed on the issues of alimony, payment of monetary award, classification of the Fidelity account, and dissipation.

As part of Troy's efforts to force Lance to pay the monetary award, a show cause hearing was held before Judge Karen H. Abrams in September. At the hearing, Lance requested that Judge Abrams recuse herself from the case. That motion was denied. Lance renewed the request at the October show cause hearing. Again the request was denied. At the November contempt hearing, Judge Abrams found Lance in contempt of court for a second time. She ordered Lance to pay Troy \$106,036.25 or to serve 179 days at the county detention center. Lance noted an appeal of this second contempt finding and from the denial of the recusal request.

We consolidated all of the appeals.

### **ARGUMENTS**

Lance and Troy raise a total of nine arguments that the circuit court erred in the course of their divorce, child support modification, and contempt hearings. Lance argues that the circuit court erred: (1) by valuing the marital home incorrectly; (2) by finding that Lance had no substantial justification in bringing exceptions from the magistrate's findings; (3) by incorrectly calculating Lance's income and reducing Troy's child support obligation; (4) by finding Lance in contempt; and (5) by the Judge refusing to recuse

herself from the contempt hearing. Troy argues that the circuit court erred: (6) by denying Troy's alimony request; (7) by not requiring that Troy's monetary award be taken from Lance's Wells Fargo 401(k) account; (8) by finding that Lance's Fidelity IRA was nonmarital property; and (9) by failing to find that Lance had dissipated marital funds.<sup>2</sup> We address each allegation in turn.

### **1. Valuation of the marital home**

On the recommendation of the magistrate, the circuit court valued the marital home at \$210,000 and based Troy's monetary award on half of that ( $50\% \times \$210,000 = \$105,000$ ). *See* FL § 8-205(b)(2) (monetary award based, in part, on valuation of real property). Lance argues that this is wrong because, according to him, the HELOC debt ought to be deducted from the value of the home. Once the \$148,072.50 of HELOC debt is subtracted from the \$210,000 value of the home, the adjusted value is \$61,927.50 and Troy's monetary award should have been based on that amount instead ( $(\$210,000 - \$148,072.50) \times 50\% = \$30,963.75$ ). We think the circuit court's math was correct because the HELOC is not marital debt.

When dealing with property during a divorce, the court takes three steps, the second of which is the focus here: (1) it determines what property is marital property; (2) it determines the value of that marital property; and (3) it determines whether to transfer

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<sup>2</sup> Troy also questions the trial court's decision not to admit her second journal into evidence. Troy, however, doesn't offer the journal, explain what it contained, or argue why the journal was relevant and should have been admitted. In the absence of an argument, we will not address this issue further.

ownership or use of the property or to grant a monetary award. Maryland Code Ann., Family Law (“FL”) Article §§ 8-203—8-205; *see also*, Cynthia Callahan & Thomas C. Reis, Fader’s Maryland Family Law 12-20, 12-22, 12-107 (LexisNexis, 5th ed.) (“Fader’s Family Law”). The value of marital property is calculated by subtracting marital debt from the property’s reported or assessed value. *Schweizer v. Schweizer*, 301 Md. 626, 637 (1984). “[M]arital debt is a debt which is directly traceable to the acquisition of marital property.” *Id.* at 636. “Conversely, a ‘nonmarital debt’ is a debt which is not directly traceable to the acquisition of marital property” and “may not serve to reduce the value of marital property.” *Id.* at 637.

Here, the circuit court determined that the family home was marital property and that the HELOC was nonmarital debt and, therefore, that the HELOC had no effect on the value of the family home. Lance testified that he used the HELOC proceeds to pay for a trip to Greece with the children, to pay his taxes, to “move forward,” and to pay his attorney. None of these uses was to acquire the family home, and, therefore, the trial court did not err in refusing to subtract the HELOC debt from the value of the family home.

Lance’s argument is ludicrous—he bled off the equity in the house unbeknownst to Troy and for his own benefit and now wants her to pay him for the privilege. The error would have been in allowing such conduct.

## **2. Attorney’s Fees for Defending Exceptions**

Lance argues that the circuit court abused its discretion and erred as a matter of law by awarding Troy attorney’s fees related to the exceptions hearing. Moreover, Lance

argues that the circuit court failed to differentiate between fees incurred responding to Lance's exceptions and fees incurred bringing cross-exceptions. We conclude that the circuit court did not abuse its discretion by awarding attorney's fees.

Both parties filed exceptions to the magistrate's findings and recommendations:

- Lance argued that the magistrate erred in refusing to allow his witness, William Halley, to testify;
- Lance argued that the magistrate improperly determined that the family home was marital property. And even if the magistrate was correct that the home was marital property, Lance argued the home was overvalued because of the HELOC;
- Lance argued that the magistrate erred in not considering all of the factors when granting Troy \$30,000 toward attorney's fees and assigning Troy 50% of Lance's real property and retirement;
- Troy argued that the magistrate failed to properly consider the statutory factors in denying her alimony;
- Troy argued that the magistrate erred by refusing to recommend that her monetary award be taken out of Lance's Wells Fargo 401(k);
- Troy argued that the magistrate erred by refusing to award her any portion of Lance's Fidelity IRA; and
- Troy argued that the magistrate made evidentiary errors.

The circuit court denied all of the exceptions taken by both parties. And the circuit court awarded Troy attorney's fees related to the exceptions.

Before a circuit court may award costs or attorney's fees, it must consider: (1) "the financial status of each party;" (2) "the needs of each party;" and (3) "whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103. Although "[d]ecisions concerning the award of counsel fees rest solely in the

discretion of the trial judge,” ... “[c]onsideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error.” *Petrini v. Petrini*, 336 Md. 453, 468 (1994). Although consideration of the statutory criteria is mandatory, the circuit court is not required to recite “magic word[s]” or phrases. *Horsley v. Radisi*, 132 Md. App. 1, 31 (2000). Rather, the circuit court is “entitled to the presumption that [it] has performed [its] duties properly.” *Stern v Stern*, 58 Md. App. 280, 301 (1984). This Court will not reverse an award of attorney’s fees unless that “discretion was exercised arbitrarily or the judgment was clearly wrong.” *Horsley*, 132 Md. App. at 31 (internal citation omitted).

Here, the circuit court properly considered each of the three statutory factors before awarding Troy attorney’s fees. First, the trial court looked at the parties’ respective financial statuses and found that Lance’s was superior to Troy’s. This mirrors the family law magistrate’s finding that Lance had access to large sums of money while Troy had limited access to financial resources. Second, in assessing the parties’ respective needs, the circuit court found that Troy had incurred over \$12,000 in attorney’s fees litigating the exceptions. Given the prior finding that Troy did not have access to financial resources and that Lance had access to large sums of money, this was sufficient to demonstrate Troy’s financial need and Lance’s lack of financial need. Third, the circuit court went through each of Lance’s exceptions and made specific findings that there was no substantial justification for him to bring each. We conclude that the circuit court adequately considered

the statutory criteria mandated by FL § 12-103 and, therefore, did not err in awarding to Troy her attorney's fees.<sup>3</sup>

Lance, however, goes one step further and argues that even if the circuit court properly awarded Troy attorney's fees for *defending* against Lance's exceptions, that doesn't mean that the trial court could award Troy attorney's fees related to *bringing* her own exceptions. Lance would have us declare that the circuit court is required to distinctly and separately consider whether Lance had substantial justification to bring his exceptions (and whether Troy was justified in defending against his exceptions) and whether Troy had substantial justification to bring her own exceptions. We do not agree.

Here, the circuit court did not specify if the fees awarded were solely based on Troy's defense of Lance's exceptions or if they were also because Troy was substantially justified in bringing her own exceptions. But the trial court did award Troy the full amount of attorney's fees that she requested, which suggests the award was for both defending and bringing exceptions. The use of the allegedly magic phrase, however, that "Troy was substantially justified in bringing her exceptions *and* in defending against Lance's exceptions" was not necessary. The circuit court reviewed the entire file and, as demonstrated above, clearly contemplated the question of whether Troy should receive attorney's fees related to all of the exceptions. Trial courts are presumed to know and apply

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<sup>3</sup> Lance also argues that the circuit court improperly based its decision to award Troy attorney's fees on Lance's failure to argue his first exception at the exception hearing, concerning the magistrate's refusal to allow William Halley to testify. We read the circuit court's decision to say that Lance's failure to argue that exception was further proof that the exception was meritless. We agree with that assessment.

the law. *Wagner v. Wagner*, 109 Md. App. 1, 50 (1996); *see also Cobrand v. Adventist Health Inc.*, 149 Md. App. 431, 445 (2003) (stating that “a trial judge’s failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion.”). We cannot say, then, that the circuit court’s discretion was arbitrarily used or clearly erroneous. We affirm.

### **3. Child Support—Income Calculation and Deviation from Guidelines**

Lance argues that the circuit court made two errors related to child support: (1) it incorrectly calculated his income; and (2) it deviated from the child support guidelines without proper application of FL § 12-202(a)(2)(v)(2). We will address each allegation in turn.

#### *1. Calculating Lance’s Income*

The trial court calculated Lance’s income as composed of two parts: unemployment benefits and money in his Wells Fargo IRA. Lance receives \$1,864 in unemployment benefits monthly, an amount which is not contested here. The trial court also found that during the past year, Lance had been living off of his Wells Fargo IRA. The trial court found “as a fact that [Lance] had income of \$88,469.44 [from the Wells Fargo IRA] in the past year, that he has that money, that it is available, and it is income.” The \$88,469.44 imputed as income to Lance was half of his Wells Fargo account. The other half of the Wells Fargo account had been awarded to Troy in the judgment of divorce but had not yet

been transferred to her. The circuit court divided that by 12 to get a monthly income of \$7,372.45 from the Wells Fargo IRA, and, with the unemployment benefits, a total monthly income of \$9,236.

Lance argues that the circuit court erred in this calculation because it should not have included the \$7,372.45 monthly from the Wells Fargo IRA. Lance argues that there is no statutory authority for counting that money as income or for the court to assume that the account would be paid out in one year. We conclude that the circuit court did not abuse its discretion by including the Wells Fargo account as part of Lance's income.

We start at the beginning. To determine child support, the circuit court must first calculate each parents' "actual" income. FL §§ 12-201, 12-204. Although there are certain things that must be included as actual income, what comprises actual income is not limited to a specific list. *Petrini*, 336 Md. at 461 n.9 (citing FL § 12-201(c)(3) but noting that actual income is not limited to the list found in FL § 12-201(b)(3)). "[T]rial courts [have] the latitude to consider all the relevant circumstances in a particular case before making any determination about what should be considered in calculating a parent's support obligation." *Id.* at 463. All of these sources of income, however, must be presently accessible. We review the circuit court's determination of actual income under an abuse of discretion standard, and "only [reverse] if it acted arbitrarily in exercising its discretion or if the judgment on the matter was clearly wrong." *Id.* at 462. Normally, an IRA would not be included as actual income for child support calculations because it is not currently accessible without substantial tax penalties. 26 U.S.C. § 72(t) (stating that unless an

employee is 59 ½ years old, or meets another exemption, early withdrawals from an IRA are subject to a 10% tax). Where an individual is using an IRA as income, courts have found that the IRA may be counted as actual income. *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 466 (Ill. App. Ct. 2005) (noting that like other forms of income listed in the Illinois Marriage and Dissolution of Marriage Act, “IRA disbursements are a gain that may be measured in monetary form” and holding that IRA disbursements should be counted as income); *Croak v. Bergeron*, 67 Mass. App. Ct. 750, 760 (Mass. App. Ct. 2006) (holding that because the father was using his “IRA funds as a replacement for earnings and for his own support and benefit” that “a failure to consider the IRAs [as income] would have resulted in an inequity.”).

Here, Lance was no longer using his IRA as an IRA and it was not being saved for retirement. Rather, the circuit court concluded that Lance had decided to regularly withdraw from his IRA as current income—to accept the penalties for early withdrawal and use the IRA assets now. The circuit court explained that “[Lance] has that money... He will not tell where it has gone. There is not one scintilla of evidence that he has spent it on any valid lawful purpose. I conclude that he has it, and that it is income.” For our purposes, Lance’s IRA no longer had the attributes of an IRA account, it merely bore the name “IRA.” And the name alone is not enough. Thus, we are persuaded that the circuit court’s inclusion of the Wells Fargo IRA as part of Lance’s actual income was not an abuse of discretion.

## 2. *Deviation from Guidelines*

Once the circuit court determined what Troy’s child support obligation would be under the guidelines, it reduced her obligation by \$90 to account for the cost of her counseling, and then, after finding that the remaining child support obligation was unjust and inappropriate, reduced her support obligation to \$0.

Lance makes two arguments related to the circuit court’s deviation from the child support guidelines. *First*, Lance argues that the circuit court should not have subtracted Troy’s \$90 counseling expense from the child support amount because there was no change in circumstance related to the counseling as Troy had been going to counseling for some time. *Second*, Lance argues that the circuit court improperly reduced Troy’s child support obligation to \$0 to punish Lance for not paying the monetary award and that the reduction was clearly not in the best interest of the children. We conclude that the circuit court did not abuse its discretion.

First, modification of child support is only proper if there has been a material change in circumstance. *Guidash v. Tome*, 211 Md. App. 725, 743 (2013). The change must be (1) “relevant to the level of support a child is actually receiving or entitled to receive[.]” and (2) “of a sufficient magnitude to justify judicial modification of the support order.” *Petitto v. Petitto*, 147 Md. App. 280, 307 (2002).

But Lance is confused. The \$90 for Troy’s counseling was not the material change in circumstance. The material change was Lance’s unemployment and the emancipation of the parties’ oldest child, Athanasios. After the court found the material change, however,

it was free to modify the child support in any way that comported with the best interest of the remaining children, including subtracting the \$90 counseling expense. We conclude, therefore, that Lance’s argument that the trial court used the \$90 counseling fees to satisfy the material change requirement is without merit.

Second, although Maryland uses the child support guidelines to determine how much child support a child is entitled to receive, the circuit court may deviate from those guidelines if it finds application of the guidelines would be “unjust or inappropriate.” *Tannehill v. Tannehill*, 88 Md. App. 4, 14 (1990). There is not a precise rubric for what constitutes “unjust or inappropriate.” *Id.* The trial court may consider:

1. the terms of any existing separation or property settlement agreement or court order, including any provisions for payment of mortgages or marital debts, payment of college education expenses, the terms of any use and possession order or right to occupy the family home under an agreement, any direct payments made for the benefit of the children required by agreement or order, or any other financial considerations set out in an existing separation or property settlement agreement or court order; and
2. the presence in the household of either parent of other children to whom that parent owes a duty of support and the expenses for whom that parent is directly contributing.

FL § 12-202(a)(2)(iii). “No list of factors or considerations[, however,] could identify every situation in which the application of guidelines would produce an unjust or inappropriate result.” *Tannehill*, 88 Md. App. at 14. Rather, the considerations listed in the statute provide a framework for judges to use. *Id.* (noting that the “factors contained in [FL] § 12-202(a)(2)(iii) delineate situations that affect the financial resources of the parents or

the financial needs of the children.”). We review the circuit court’s deviation from the guidelines for an abuse of discretion. *Voishan*, 327 Md. at 331.

If the circuit court concludes that application of the guidelines would be “unjust or inappropriate,” it must then make the following specific findings:

1. The amount of child support that would have been required under the guidelines;
2. How the order varies from the guidelines;
3. How the finding serves the best interests of the child; and
4. In cases in which items of value are conveyed instead of a portion of the support ... the estimated value of the items conveyed.

FL § 12-202(a)(2)(v)(2). To deviate from the guidelines, therefore, the circuit court must first determine that application of the guidelines would be unjust or inappropriate, and then make the four required findings that include explaining how the deviation is in the best interest of the children. FL § 12-202(a).

That is just what the circuit court did here. First, it determined that application of the guidelines would be unjust or inappropriate. The circuit court determined that the application of the guidelines would be unjust or inappropriate by considering: that Lance had access to funds; Lance’s past spending of large sums of money in brief periods of time; Lance’s refusal to pay the money ordered in the monetary award; Troy’s inability to pay child support due to Lance’s “having impoverished her;” and the “shell game” perpetuated by Lance to hide money and assets from the court. The circuit court’s considerations analyzed the financial resources of the parents and concluded that Lance’s financial

situation was not only superior to Troy's, but that Lance, in effect, controlled Troy's financial situation. The evidence was not merely sufficient; it was overwhelming. We conclude, therefore, that the circuit court did not abuse its discretion by determining that following the guidelines in this case would be unjust and inappropriate.

Once that step was complete, the trial court then made the required four findings. *See* FL § 12-202(a). Contrary to Lance's argument, the circuit court did make a finding of why reducing the child support obligation to \$0 was in the children's best interest. The circuit court, on the record, found that:

1. Under the guidelines, Troy was required to pay \$605.
2. The child support Order varied from the guidelines by reducing her obligation by \$90 for her counseling, and then reducing the obligation to \$0.
3. The finding served the best interest of the children because:
  - a. counseling "provide[s] a more stable, counseled mother that is in the children's best interest;" and
  - b. deviation to \$0 was "not to punish the children." But that "[i]t would be an absolute abomination for two boys to be in the house with their dad, who steals this money, refuses to say where it is, ... and then make [mom] pay into a household where this money I find exists."
4. The fourth finding regarding conveying items of value was not applicable.

Despite Lance's argument, the circuit court did not reduce Troy's child support obligation to \$0 to punish Lance. Rather, the circuit court reduced the child support obligation to \$0 because it was in the children's best interest not to live in a house where the court was

helping the children’s father profit from theft. While we can agree that normally it would be in a child’s best interest to receive monetary support from their non-custodial parent, we do not agree that monetary support is always of a higher importance than other interests of the child. We don’t think that the trial court abused its discretion in finding that the children’s interest in receiving monetary support from Troy was outweighed by the interest in not endorsing Lance’s reprehensible conduct.

Therefore, because application of the guidelines would have been unjust and inappropriate, and the circuit court made the required findings, including the finding of how deviation was in the children’s best interest, we conclude that the decision to reduce Troy’s child support obligation to \$0 was not an abuse of discretion. We affirm.

#### **4. Contempt**

The circuit court held Lance in contempt twice—first on June 23, 2015, and then again on November 12, 2015. At the first contempt hearing, the circuit court found Lance in contempt for lying to the court at prior hearings, for “playing games,” and for hiding money.<sup>4</sup> The court ordered Lance to pay \$194,098.50 by July 23, 2015, or he would be held in contempt again. Lance did not pay the money. The court then held Lance in contempt again in November for his failure to comply with the June 23 contempt order. The circuit court found that Lance was willfully in contempt and had the ability to pay the amount ordered in the first contempt order. The circuit court set the new purge amount at

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<sup>4</sup> *See, supra*, n.1.

\$106,036.25, which reflected “the outstanding monetary award of [\$105,780] and an award of attorney’s fees of [\$1,256.25].”

“The decision of whether to hold a party in contempt is vested in the trial court.” *Dronney v. Dronney*, 102 Md. App. 672, 683 (1995). “Ordinarily, in a review of contempt proceedings, this Court does not weigh the evidence; rather we merely assess its sufficiency.” *Id.* at 684 (explaining that this Court will only reverse a contempt decision if the finding of fact on “which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous.”). A party cannot be held in contempt, however, for failure to pay a monetary award.<sup>5</sup> *McAlear v. McAlear*, 298 Md. 320, 352 (1984).

Trial court erred in finding contempt based on non-payment of the monetary award. *McAlear* is clear that a monetary award is not exempted from the prohibition on holding an individual in contempt for debt. *Id.* The trial court’s contempt order states that Lance was held in contempt for his failure to pay the monetary award. Moreover, the trial court erred by setting the purge provision at the amount of the monetary award. *McAlear*, 298 Md. at 352. Setting the purge provision at the amount of the monetary award further

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<sup>5</sup> Had Lance failed to pay child support or alimony, the procedure employed by Judge Abrams would have been exactly correct. Md. Rule 15-207(e); *McAlear*, 298 Md. at 352 (distinguishing failure to pay child support or alimony from failure to pay a monetary award).

emphasizes that Lance was being held in contempt for his failure to pay the monetary award.

We, therefore, vacate the contempt finding and remand to the circuit court.<sup>6</sup>

## **5. Judge Abrams’ Recusal**

Lance asks us to reverse Judge Abrams’ decision not to recuse herself from presiding over the show cause and contempt hearings. Lance argues that Judge Abrams had demonstrated that she could not be impartial because Judge Abrams had received information, (from Lance himself) that he was not being truthful. Lance concludes that Judge Abrams had already determined the outcome of the contempt hearings before any evidence was heard.

The standard that Judge Abrams was required to apply to the question of her recusal “is an objective one—whether a reasonable member of the public knowing all [of] the circumstances would be led to the conclusion that the judge’s impartiality might be reasonably questioned.” *Surratt v. Prince George’s Cnty*, 320 Md. 439, 465 (1990) (internal quotations omitted). We review that decision for an abuse of discretion. *Id.*

We conclude that this is not a case in which a reasonable member of the public would conclude that Judge Abrams’ impartiality might reasonably be questioned and, therefore, we hold that Judge Abrams did not abuse her discretion by denying the recusal request. “Prejudice” arises from outside events. Here, Judge Abrams developed her views

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<sup>6</sup> On remand, the circuit court is free to reconsider Lance’s behavior and may find him in contempt based on his numerous other misbehaviors, excepting only his failure to pay the monetary award.

about Lance from his behavior in this case. Moreover, Judge Abrams promised that she would be fair: “I’m going to be absolutely fair. ... If he has defenses, if you present defenses, I’m going to hear them. ... [If] I thought I wouldn’t be fair, I would step aside. And I have done it in other cases... .” The mere allegation of lack of impartiality is not enough especially when Judge Abrams specifically stated that she would be fair. Judges are “sworn to administer impartial justice, and [their] authority greatly depends upon that presumption and idea.” *State v. Calhoun*, 306 Md. 692, 749 (1986) (citing 3 W. Blackstone, Commentaries). We conclude, therefore, that Judge Abrams did not abuse her discretion by denying Lance’s recusal request.

We now turn to Troy’s allegations of error.

## **6. Denial of Alimony**

As mentioned above, Troy was not awarded alimony because the court found that she had attained economic self-sufficiency. Troy claims that this was error and blames the error on the trial court counting both her primary and her part-time secondary employment in the computation of her income.<sup>7</sup>

Troy is correct that Maryland law generally instructs courts to calculate income based on “regular, full-time employment,” *Tracey v. Tracey*, 328 Md. 380, 388-89 (1992), but not to include “wages from temporary, part-time work.” *Id.* at 389. That is because

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<sup>7</sup> In a burst of inexplicable self-confidence, Lance chose not to respond to Troy’s cross-appeal, issues 6 through 9 in this opinion. Nonetheless, we will not treat this as waiver and will review each of these issues in full.

“[p]art-time work is often tenuous in prospect and short in duration,” “and may ultimately result in a false picture of a party’s economic self-sufficiency or security.” *Id.* at 389.

While we agree that this is a good general rule, and will generally advise trial courts not to include tenuous or short-term secondary employment, we see nothing in the statute, case law, or common sense, to make a blanket prohibition on a trial court including secondary employment in the calculation, especially when that secondary employment is long-term and steady. Thus, we see no error in the circuit court including Troy’s secondary employment in its calculation of income, its determination that Troy had achieved self-sufficiency, or its denial of alimony.

## **7. Monetary Award Judgment**

Troy argues that the circuit court erred by failing to order that Troy’s monetary award of \$107,955 be taken from Lance’s Wells Fargo 401(k). Troy reasons that because the circuit court has the discretion to determine how a monetary award should be paid and because the circuit court knew that Lance was engaging in a scheme to hide his money so that he would not have to pay Troy, that the circuit court should have ordered the monetary award be paid specifically out of Lance’s Wells Fargo 401(k). We conclude that the circuit court did not abuse its discretion by refusing to order that the monetary award be paid out of the specific Wells Fargo 401(k) account.

Judges have broad discretion to grant a monetary award and discretion to determine how that monetary award should be paid. *Thacker v. Hale*, 146 Md. App. 203, 214 (2002). The trial court may transfer ownership of an interest in property, may grant a monetary

award, or may do both. FL § 8-205. “Decisions regarding the *method* of payment of a monetary award lie within the sound discretion of the trial court.” *Thacker*, 146 Md. App. at 214 (emphasis added). Thus, the circuit court’s discretion extends not only to whether a monetary award should be granted, but also to how the award should be paid.

Here, the circuit court did not abuse its discretion by declining to mandate that Troy’s monetary award must be paid out of a specific account. The circuit court’s decision not to require that the money be taken from Lance’s Wells Fargo 401(k) account was reasonable under the circumstances. Lance had many accounts at different institutions. Troy’s argument that the circuit court should have known that Lance would not pay the monetary award, even if true, is insufficient to constitute an abuse of discretion.

#### **8. Classification of Lance’s Fidelity Retirement Account**

The family law magistrate found that Lance’s Fidelity IRA was not marital property because Lance had acquired it by rolling over retirement accounts that he possessed prior to the parties’ marriage. The circuit court agreed with the magistrate and did not award Troy any of the money in the Fidelity IRA. Troy argues that the Fidelity IRA is marital property because Lance has not met his burden of demonstrating that the Fidelity IRA could be traced to premarital assets and, therefore, she should receive a portion of the Fidelity IRA. Troy argues that Lance’s testimony was insufficient to directly trace the Fidelity IRA to nonmarital sources and that documentary evidence was required. We conclude that the circuit court did not err by accepting the magistrate’s recommendation.

“In determining marital and nonmarital property, Maryland follows the ‘source of funds’ theory.” *Dave v. Steinmuller*, 157 Md. App. 653, 663 (2004) (citing *Pope v. Pope*, 322 Md. 277, 281-82 (1991)).

Under that theory, when property is acquired by an expenditure of both nonmarital and marital property, the property is characterized as part nonmarital and part marital. Thus, a spouse contributing nonmarital property is entitled to an interest in the property in the ratio of the nonmarital investment to the total nonmarital and marital investment in the property. The remaining property is characterized as marital property and its value is subject to equal distribution. Thus, the spouse who contributed nonmarital funds, and the marital unit that contributed marital funds each receive a proportionate and fair return on their investment.

*Pope*, 322 Md. at 281-82 (quoting *Harper v. Harper*, 294 Md. 54, 80 (1982)). “If a property interest cannot be traced to a nonmarital source, it is considered marital property.” *Innerbichler v. Innerbichler*, 132 Md. App. 207, 227 (2000) (internal citation omitted). “Generally, the burden of proving a fact is on the party bearing the affirmative of the issue.” *Noffsinger v. Noffsinger*, 95 Md. App. 265, 281-82 (1993) (internal citation omitted). *See also Melrod v. Melrod*, 83 Md. App. 180, 194 (1990) (stating that “the burden is upon the party who asserts a marital interest in property to present evidence as to identity and value of property.”). Findings of whether property is marital or nonmarital “are subject to review under the clearly erroneous standard embodied by Md. Rule 8-131(c); we will not disturb a factual finding unless it is clearly erroneous.” *Id.* at 229.

The burden was on Troy to prove that the Fidelity IRA was marital property. Troy produced statements from the Fidelity IRA dating from during the marriage. Troy did not, however, produce a statement that showed the source of the funds in the IRA. Rather, the

only evidence of the source of the funds in the Fidelity IRA came from Lance's testimony. Lance testified that the Fidelity IRA was a rollover account funded from retirement accounts opened before the marriage. While there was evidence that the Fidelity IRA increased in value during the marriage, there was no evidence that the increase was due to the addition of marital funds or due to deposits from Lance's employment during the marriage. Thus, despite Troy's best efforts, she did not shift the burden to Lance to prove that the Fidelity IRA was nonmarital.

The family law magistrate credited Lance's testimony, as tenuous as it was, and found that the Fidelity IRA was a "roll over account of retirement accounts that [Lance] had prior to his marriage." As a result, the magistrate recommended that the Fidelity IRA be classified as nonmarital property. Following the exceptions hearing, the circuit court agreed that Lance had shown that the Fidelity IRA was traceable to premarital funds. The circuit court accepted the magistrate's recommendation and found that the Fidelity IRA account was nonmarital.

We conclude that the circuit court did not err by adopting the magistrate's recommendation. We recognize that the only source of evidence was Lance's testimony. But it is for the trial court to assess a witness's credibility, *see* Md. Rule 8-131(c), and it may believe even a known liar. We are unable to say, therefore, that there was *no* evidence to support the circuit court's conclusion that the Fidelity IRA was nonmarital. As a result, we conclude that the circuit court did not err in adopting the magistrate's recommendation that the Fidelity IRA be classified as nonmarital property.

## 9. Wrongful Dissipation

Troy argues that the circuit court should have found that Lance was intentionally and wrongfully dissipating marital funds prior to and during the divorce proceedings.<sup>8</sup> Troy argues that Lance dissipated marital assets so that he wouldn't have to split them with her.

Dissipation of marital property is, in general terms, the spending of money so that a soon-to-be-former spouse cannot have it. *Heger v. Heger*, 184 Md. App. 83, 96 (2009) (explaining that “[t]he doctrine of dissipation is aimed at the nefarious purpose of one spouse’s spending for his or her own personal advantage so as to compromise the other spouse in terms of the ultimate distribution of marital assets.”). The idea, for the dissipating spouse, is to expend money or assets because property that is not in existence at the time of a divorce cannot be marital property and, therefore, is not part of the calculation for a monetary award. Fader’s Family Law, 12-46. If the trial court finds that a spouse has intentionally dissipated marital property to avoid its inclusion in the calculations that dissipation is considered “a fraud on marital rights.” *Sharp v. Sharp*, 58 Md. App. 386, 399 (1984). As a result, property that is dissipated is included as extant marital property and is

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<sup>8</sup> The circuit court did not address the issue of dissipation at the exceptions hearing because it found that the issue was outside the scope of the exceptions, because in turn the trial court believed the issue had been addressed at the preliminary injunction hearing. We disagree. The preliminary injunction hearing was to determine whether accounts should be frozen to keep Lance from removing the money and hiding it from the court and Troy. At the injunction hearing, it was revealed that the money was already gone and, therefore, that the injunction was moot. The circuit court, therefore, denied the injunction finding that there was “no irreparable harm.” That injunction hearing did not address, and could not have addressed, whether Lance was dissipating marital funds. Therefore, although we will ultimately conclude that Troy’s three arguments fail, we think it is appropriate for us to address the issue of dissipation.

valued with the other existing marital property. *Id.* “The spouse alleging dissipation has the burden to prove dissipation and the value of the property.” *Ross v. Ross*, 90 Md. App. 176, 190, *vacated on other grounds*, 327 Md. 101 (1992).

Troy argues that Lance dissipated marital assets in three specific ways: (1) through the loan taken against his Wells Fargo 401(k); (2) through the HELOC; and (3) by moving money between various accounts as testified to by Lance at the contempt hearings. We will address each in turn.

*(1) Wells Fargo 401(k)*

Troy’s first argument is that the circuit court erred by not finding that Lance dissipated marital funds by taking out a loan against his Wells Fargo 401(k) account. This argument is without merit because the magistrate *did* include the loan amount as part of the Wells Fargo 401(k) total. The magistrate specifically noted that the value of the Wells Fargo 401(k) account on June 30, 2014, (after the parties had filed for divorce but before the divorce hearings began) was \$147,632.66. Lance then took out a loan against the account, which reduced its value. Lance, however, was unable to offer any evidence that the loan was used for family purposes. The magistrate, therefore, added the amount of the loan back into the value of the Wells Fargo 401(k) account. As a result, when Troy received half of the Wells Fargo 401(k) account, she received half of the full value of the account, without the loan subtracted. Therefore, there was no error.

(2) *HELOC*

Troy argues that Lance's draw down of the equity in the marital home through the HELOC and spending of all of the funds from the HELOC should qualify as dissipation of marital assets. The HELOC, however, as we noted in Section 1, is not marital debt because it was not incurred to acquire marital property. Instead, the HELOC is Lance's debt alone. Because the HELOC was not marital property, therefore, Lance did not wrongfully dissipate the HELOC. He dissipated his own money. The trial court did not err.

(3) *Movement of funds between various accounts*

Troy's final argument is that by Lance transferring money between known accounts and then to unknown accounts is further proof of his dissipation. It is unclear, however, from Troy's argument, what funds in which accounts she thinks were marital property and whether those accounts were or were not part of the calculations of marital property. While it is abundantly clear that Lance has done everything he could to avoid paying Troy and her attorneys any amount of money, Troy simply did not meet her burden to sufficiently allege dissipation.<sup>9</sup>

We conclude, therefore, that because each of Troy's arguments that Lance dissipated marital funds fails, the circuit court did not err by refusing find dissipation.

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<sup>9</sup> Additionally, it appears that Troy is arguing that Lance dissipated marital funds after the divorce judgment was entered. Dissipation, however, can only occur between the time of the separation of the parties, or breakdown in the marriage, and the ultimate divorce. *Heger*, 184 Md. App. at 96. Thus, Troy's argument that Lance continued to dissipate funds after the circuit court entered the divorce judgment, while it is potentially further proof of Lance's scheme to avoid paying Troy any portion of her monetary award, is not proof of dissipation.

In sum, we hold that: (1) the circuit court did not err in its valuation of the family home; (2) the circuit court did not abuse its discretion by assessing attorney's fees against Lance; (3) the circuit court did not abuse its discretion by deviating from the child support guidelines; (4) Judge Abrams did not abuse her discretion by denying the recusal request; (5) the circuit court did not abuse its discretion by declining to award Troy alimony; (6) the circuit court did not abuse its discretion by not awarding Troy's monetary award out of a specific account; (7) the circuit court did not abuse its discretion by classifying Lance's Fidelity IRA as non-marital; and (8) the circuit court did not err by not finding dissipation.

We vacate the finding of contempt and remand for further proceedings.

**JUDGMENT OF THE CIRCUIT COURT  
FOR SAINT MARY'S COUNTY HOLDING  
APPELLANT LANCE IN CONTEMPT  
VACATED AND REMANDED FOR  
FURTHER PROCEEDINGS. ALL OTHER  
JUDGMENTS AFFIRMED. COSTS TO BE  
PAID BY APPELLANT.**