Circuit Court for Montgomery County
Case No. 142737FL

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1622

September Term, 2022

ANYSIA VALKO

v.

ERIC TIN

Leahy,
Friedman,
Gill Bright, Robin D.
(Circuit Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: November 1, 2023

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

This case returns to us on appeal from the entry of a custody and access order in the Circuit Court for Montgomery County, Maryland, on October 19, 2022, following a five-day custody modification trial. The order gives Eric Tin ("Father") primary physical custody of the parties' minor child, E. The order also delineates child's visitation with Anysia Valko ("Mother") at her home in North Carolina according to a detailed schedule set by the court.

According to the transcript of the proceedings, after concluding that Mother, a former teacher, was voluntarily impoverished, the court imputed income to her based in large part on monthly expenses subsidized by her new spouse. The court further ordered that Mother split evenly with Father all of the child's uninsured medical expenses and pay the entire cost of E.'s extracurricular activities and all expenses related to E.'s travel to and from North Carolina for visitation. The circuit court also ordered Mother to pay $27,050.30 in attorneys' fees to Father.

Mother noted a timely appeal and presents three questions, challenging only the monetary components of the circuit court's order, for our review:

I. "Did the trial court err in its calculation of Mother's income when determining child support?"

II. "Did the trial court abuse its discretion and violate the plain language of the child support statute in its order regarding child-related expenses?"

III. "Did the trial court abuse its discretion in ordering Mother to pay a substantial portion of Father's attorney's fees?"

For the reasons that follow, we shall vacate, in part, the circuit court's order of additional expenses associated with the child's care and the court's award of attorneys'

fees. We remand for the circuit court to reconsider these issues in light of the guideposts set forth herein.

BACKGROUND

Divorce Proceedings and First Appeal

Father and Mother are the parents of E., a minor child born during their marriage in 2013. The parties resided in Montgomery County and were divorced in 2017. By consent order incorporated into the final judgment of divorce, they agreed "that the parties shall have joint legal custody of [E.] and that [Mother] shall have primary physical custody with reasonable rights of visitation reserved to [Father]." *E.T. v. A.T.*, No. 2498, Sept. Term 2018, slip op. at 1 (filed Apr. 10, 2019) ("*Tin I*"). This arrangement, however, "did not provide a structured visitation schedule, thus leaving it to the parties to decide on a visitation schedule themselves." *Id.* Soon thereafter, the parties were unable to agree on a set schedule regarding overnight visitation during the school week and returned to court to work out a more definite arrangement. *Id.* In January 2018, Mother filed a motion to enforce the consent order, requesting that the circuit court "mandate a visitation schedule for Father and E., taking into consideration that Mother has primary physical custody and that E. would be entering elementary school in the coming months." *Id.* Father, in turn, filed "a motion to modify" and requested that the court order joint physical custody "because of a 'material change in circumstances,' citing his move into a three-bedroom home which provides E. with her own bedroom, a separate playroom, and a backyard." *Id.* at 2.

At the modification hearing, the court "did not find a material change in circumstances sufficient to warrant a modification of the existing custody arrangements" but proceeded to "set out a specific visitation schedule for E. to replace the existing, and disputed, arrangement between the parties." *Id.* at 2. Specifically, the court found "that neither Father's move to a single-family home nor Mother's living arrangement necessitated custody modification because neither constituted a material change in circumstances affecting E.'s welfare."[1] *Id.* at 3. Additionally, the court, in enforcing the prior consent order, clarified "what was 'reasonable' visitation" and ordered that "[d]uring the school year, Father would have visitation with E. Tuesdays and Thursdays until 7:00 p.m., as well as on alternative weekends from Friday after school until E. returned to school on Monday" while the parties would alternate having E. on a weekly basis during the summer. *Id.* at 5. Father noted a timely appeal and we affirmed the circuit court's decision in an unreported opinion, reasoning that the court did not err or abuse its discretion in resolving the parties' custody and visitation disputes. *Id.* at 6.

Mother's Move to Washington and Corresponding Motions

While the parties' first appeal was pending, Mother filed a motion styled as "Motion to Modify Access[.]" In the motion, Mother asserted that "[m]aterial circumstances have occurred since entry of the 2018 Custody Order, which impact the best interest of the child and warrant a change to [Father's] access schedule." Specially, Mother explained that her

[1] At the time of the 2018 custody modification hearing, Mother had become engaged and "Mother, her fiancée, and E. moved in together into their own home." *Tin I*, No. 2498, Sept. Term 2018, slip op. at 6.

new spouse was set to take a new position in Seattle, Washington, and that Mother would be moving with him. Mother requested that "the parties' Consent Order be modified to allow [E.] to move with [Mother] to Washington State and to allow [Father] liberal and significant visitation during summer, holidays, and school breaks." Father filed an "Answer" to Mother's Motion, in which he urged the court that E. "should remain in Montgomery County, Maryland, the only place where she has ever lived, and where she has strong connections with her school, friends, family, community, and most importantly, her father."

Following a brief scheduling hearing, the circuit court set a hearing on Mother's motion to commence on February 2, 2020, and ordered the parties to participate in a visitation evaluation. Shortly thereafter, Father counter-moved for a modification of custody, arguing that Mother's proposed move to Seattle constituted a material change in circumstances that justified awarding him primary physical custody of E. In his motion, Father again emphasized the fact that E. had only ever lived in Montgomery County and that her friends, school, and extended family were all located in the area, and, therefore, it was in E's best interests to remain with Father. Although a hearing on the matter was set for February 2, 2020, Mother then moved for an interim order permitting her to take E. to Washington with her for the start of the upcoming school year pending further order of the court. That motion was denied by written order entered on August 30, 2019.

Unfortunately, in 2020, a confluence of events prevented the parties' scheduled modification hearing from going forward as planned. First, on January 29, 2020, the parties

filed a joint motion to postpone the hearing until March 2, 2020, to build in time for a possible third day of testimony and because Father's counsel was experiencing a family emergency. That motion was granted by written order entered on the docket on February 11, 2020. The hearing was pushed once again to commence March 23, 2020. Then, of course, in mid-March 2020, access to the courts became extremely limited with the onset of the COVID-19 pandemic, thereby pushing the hearing yet again to commence on May 18, 2020. Finally, the May 18 hearing date was postponed to March 1, 2021, due to the backlog created during the peak of the pandemic.

In the meantime, as her move to Washington was approaching, Mother sought temporary resolution of E.'s status. On June 30, 2020, she filed an "Emergency Motion For an Interim Order Modifying [Father's] Access Due to Relocation" notifying the court that she was relocating to Seattle, Washington, "on or before July 24, 2020." Before the court ruled on Mother's motion, however, Mother unilaterally completed her move to Seattle on July 24, 2020, taking E. with her and enrolling her in school there.

Father filed an Emergency Motion on July 27, 2020, asserting that Mother had "willfully absconded out-of-state with [E.]" and was in violation of the parties' then-operative custody order, which provided for a rotating two-week schedule between the parties in the summers. Father requested that he be given temporary physical and legal custody of E. and that Mother be ordered to return E. to Montgomery County. On August 11, 2020, the circuit court ordered, *inter alia*, that "the parties shall have alternating two-week period of access" with E. to take place "in the Washington, D.C. metropolitan area"

except that "as long as the child's schooling is to be conducted virtually, [Mother's] access with the minor child may occur in Seattle, Washington for every third two-week visitation period she has[.]" Then on September 9, 2020, the court ordered that Father have the final authority to decide where E. would be enrolled in school for the 2020-21 academic year. All other matters relating to the parties' requests for modification were deferred until the merits hearing scheduled for March 1, 2021.

2021 Consent Order and Mother's Withholding of Access to E.

Prior to the merits hearing scheduled for March 2021, the parties reached an agreement and entered in to a "Custody Consent Order" on February 11, 2021. Pursuant to the order, the parties agreed that Father "shall have primary residential custody of [E.]" and that Mother will enjoy liberal visitation during school breaks and holidays as set forth in detail in the order. The parties further agreed to split, with Father paying 75% and Mother paying 25%, the costs of therapy for E. as well as any medical expenses not covered by insurance exceeding $250. Father would solely pay for the cost of E.'s travel to and from Seattle and Mother "beginning on February 1, 2021, and continuing on the 1st of each month thereafter" would pay child support to Father in the amount of $400. For the purposes of calculating child support, the parties imputed $2,892 in monthly income to Mother, who had been unemployed since 2018, and arrived at a figure of $400 per month.[2]

[2] In her principal brief, Mother claims that the parties imputed "minimum wage" to Mother in calculating her support obligation. We struggle to see how that claim lines up with the numbers provided in the worksheet. At the time of the Consent Order, the minimum wage in Maryland was $11.75 per hour for employers with 15 or more employees (continued)

With most of the outstanding matters before the court settled by the February 2021 Consent Order, the parties entered a period of relative repose that lasted only a few months. In August of 2021, Father filed an "Emergency Motion for Immediate Sole Custody and Related Relief" in which he alleged that Mother refused to return E. to his care on August 16, 2021, as required by the summer access schedule laid out in the February 2021 Consent Order. Father explained that "Mother's justification was that she claimed that Father had inappropriately looked at [E.] in the shower[,]" an allegation that Father claimed was entirely fabricated. Father, who was in Washington at the time of the motion, therefore requested that the court award him sole temporary physical and legal custody of E. and order Mother to immediately return E. to his care in Montgomery County. On August 18, 2021, that circuit court entered an order granting Father's motion and ordering that (1) Father have "sole legal and sole physical custody of [E.] . . . pending further order" and (2) Mother personally return E. to Montgomery County within 3 days.

On that same day, August 18, 2021, Mother filed her own "Emergency Motion for Immediate Physical Custody" in which she stated that she had contacted Child Protective Services regarding Father's alleged inappropriate behavior. Mother thus requested that E.

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and $11.60 per hour for employers with 14 or less employees. *See* Md. Code LE §3-413; *see also* 2023 Md. Laws Ch. 2 (S.B. 555) (amending § 3-413 to remove references to prior escalations of the minimum wage and moving the commencement of a $15.00 minimum wage to January 1, 2024, from January 1, 2025). Assuming that Mother would work a standard 40-hour week at $11.75 per hour, her monthly before-tax earnings would come nowhere near the imputed $2,892 in monthly income. Regardless, this was the amount on which the parties agreed and, therefore, even if it is based on an incorrect understanding of Maryland's minimum wage law, it does not change our analysis in this case.

stay in her care and custody "until such time as CPS has completed its investigation." The circuit court set a hearing on Mother's Emergency Motion for the next day, August 19, 2021, and denied her motion by written order entered on August 26, 2021. On September 13, 2021, the court entered a scheduling order directing the parties to complete all discovery by July 18, 2022 and setting a merits trial for modification of E.'s custody for August 15, 2022. A *pendente lite* hearing was also set for February 18, 2022.

Thereafter, on November 21, 2021, Mother moved to modify custody on a permanent basis and sought both sole legal and primary physical custody of E. In her motion, Mother again asserted that Father "had exhibited inappropriate behaviors" toward E. which made her uncomfortable. Mother claimed that E. wanted to reside with her and asserted that Father was unwilling to cooperate with Mother.

Once again, prior to the parties' scheduled hearing, they entered into a consent *pendente lite* order providing a visitation schedule for Mother up through the summer of 2022, specifying that Mother's visitation with E. would occur at her new home in North Carolina. All other terms of the August 18, 2021 Temporary Custody Order remained in full force and effect.

2022 Merits Trial and Operative Custody/Support Order

On August 15, 2022, the parties' trial on cross-motions for modification commenced in the Circuit Court. Over five days, the parties—including E., who was represented by an appointed best interests attorney—presented voluminous testimony and documentary evidence, calling nine witnesses in total. Due to the nature of the issues presented in this

appeal, we shall focus our discussion on the relevant facts adduced at trial necessary to resolve our consideration of the monetary aspects of the court's ruling. *See Thomas v. State*, 454 Md. 495, 498-99 (2017).

Father

Father testified first and explained that he was employed as a middle school teacher and as a soccer coach. He provided a detailed rundown of his involvement in E.'s schooling, recreational activities, daily routine, and social life in his care. He explained that he attempted to maintain ties between E. and Mother's extended family in the area, including E.'s maternal grandmother. He expressed that if Mother were awarded primary custody of E., he feared he would not see her because Mother had "violated numerous court orders" and was "toxic" in communicating with him, often trying to "manipulate [the] narrative." Father explained that he had worked diligently to get E. into good schools and opined that it would be best for her to remain in Montgomery County, with Mother having visitation one weekend a month and rotating access in the summer and on school breaks. He emphatically denied being inappropriate with E. and stated that he was "completely distraught" by the allegations. He added that he was never contacted by CPS.

Father also explained his financial support of E., stating that he spent around $1,000 per month on her extracurricular activities, in addition to other expenses relating to her eyecare. Due to the ongoing litigation, Father claimed he had already maxed out one credit card and was close to maxing out another. Through Father's authenticating testimony, counsel moved into evidence two fee invoices, one from Father's prior counsel dating back

to August 2021, and another from his then-current trial counsel. An affidavit from Father's prior counsel averred that Father had incurred $40,575.45 in fees from August 2021 to July 2022 and the attached invoice evidenced that $37,195.00 in fees were incurred through April 2022. Trial counsel's invoice indicated that Father had incurred approximately $9,620 in fees through July 2022. Each of the invoices confirmed that Father had made periodic payments on the balances owing, which he confirmed at trial.

On cross-examination, Father admitted that he had a poor relationship with Stepfather and claimed that Stepfather would yell at E. He reiterated that he solely paid for nearly all of E.'s extracurricular activities.

Mother

Mother testified next and said that E. loved spending time with her two half-siblings and had begun making friends with other children in Mother's new neighborhood in North Carolina. Mother noted that she had been unemployed since June 2018 and had previously worked as a teacher before then. She explained that Stepfather would provide her with money and that she purchased household items with a credit card and Target card provided by Stepfather. She also noted that her attorneys' fees were paid by Stepfather as a "loan."

Referring to the February 2021 Consent Order, Mother explained that the child support calculations reflected that she had a monthly income of $2,892 because the parties "stipulated" minimum wage to her as she was unemployed. She noted that, pursuant to the Consent Order, she was required to pay child support to Father and that she did so through "loans" from Stepfather. Mother stated that, based on the allegation of Father's

inappropriate behavior, she was requesting primary physical custody and joint legal custody with tie-breaking authority.

On cross, Mother conceded that CPS never opened an investigation against Father but claimed that she had been told by CPS to notify E.'s school. When asked what proof she had of any improper behavior by Father towards E. other than what E. purportedly told her, Mother conceded that there was none. She claimed that she was not attempting to damage Father's reputation by reporting E.'s purported allegations to the school and other parents. She admitted that, in her communications with Father, she overstated her description of E.'s allegations. With regard to her initial move to Washington, Mother expressed that she had tried to obtain court permission before leaving, but that she took E. with her because she "had to go" since her father, with whom she and E. were staying, was selling his house. She also conceded that, prior to withholding E. from Father in August 2021, she should have sought a court order.

Father's counsel then broached the subject of Mother's former employment. Mother explained that she was well-educated, having obtained multiple graduate-level degrees, and had last worked as a teacher in 2018. She stated that she had not looked for a new job after moving to North Carolina. Mother confirmed that Stepfather had provided her with two credit cards, a Chase card and a Target card, that she used to buy "all our home stuff." She maintained that Stepfather's voluntary payment of her child support was a "loan," but Father's counsel impeached with her answers to interrogatories—which did not disclose any such loan. Mother authenticated several monthly statements for the Chase

and Target cards, which were admitted into evidence, and noted that Stepfather paid the balance every month. The Chase statements contained itemized lists of Mother's purchases, with the amount spent and merchant details, but the Target statements were not broken down into the specific items purchased. Mother also authenticated Venmo statements for her account, which demonstrated several payments of $400 by Stepfather to Mother for E.'s child support.

Stepfather

Stepfather testified as part of Mother's case. He conceded that CPS never opened any case against Father. Regarding Mother's move to Seattle, Stepfather stated that the move could not be delayed any further because he needed to return to the office. Stepfather confirmed that he paid for Mother's legal fees and paid off her monthly expenses charged to the credit cards that he provided to her. He testified that his current salary was approximately $360,000.

Court's Ruling

On September 28, 2022, the circuit court announced its oral ruling in a lengthy and thorough opinion from the bench. The court commenced by summarizing the lengthy procedural history of the case, noting that the parties had been in litigation for several years and that Father had filed two emergency motions to return E. from Washington due to Mother acting outside the confines of the court's orders. Next, after explaining that both parties had filed for modification of the February 2021 Consent Order, the court found that "there have been several changes in circumstances" since the entry of the order—namely,

(1) "the allegation [] of inappropriate conduct on the part of [Father]"; (2) Mother's act of withholding access to E. in August 2021; (3) Father's withholding of information regarding E.'s schooling from Mother; and (4) Mother's move to North Carolina from Washington. Next, the court proceeded to consider in meticulous detail the best interests of E. pursuant to the factors set forth in *Taylor v. Taylor*, 306 Md. 290 (1986) and *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977). The court ultimately concluded that Father was a fit parent and determined that "it is in [E.'s] best interest for [Father] to remain the primary custodian" with Mother to have liberal visitation as set forth in the detailed schedule provided by the court.

The court then turned to the issue of child support, explaining that it assessed Father's "actual income at 14,339.44 a month based on the evidence received[.]" Next, the court found Mother to be voluntarily impoverished due to her "not regaining employment since leaving work in 2018," a decision which was "her free and conscious choice and not compelled by factors beyond her control." The court explained that Mother was well-educated, having obtained several graduate-level degrees, and was "certified to teach Spanish and French" but had not "looked for a job in North Carolina since moving there." Instead, the court found that Mother was supported by Stepfather, who the court noted, "provides her with the funds to pay [Father] child support" in accordance with the February 2021 Consent Order. The court therefore resolved to impute income to Mother and highlighted Mother's testimony that "she can put whatever she needs on her Chase and Target credit cards and that her husband's income would cover these costs." Thus, citing

Petrini v. Petrini, 336 Md. 453 (1994), the court imputed the following as "gifts" for purposes of calculating Mother's income:

> The monthly average of payments made to the Chase credit card and Target credit card, which plaintiff explained she can charge whatever she wants to or needs to; the $400 a month [Mother's] husband sends her through Venmo, which she then uses to pay [Father] child support.

Accordingly, the court expounded that, after imputing the applicable minimum wage "plus the average of the 2022 Target credit card payments, the average of the 2022 Chase credit card payments, plus the average monthly amount of Venmo payments [Mother] received from her husband[,]" the court arrived at a figure of $4,351 per month for Mother's income. The court, referencing a worksheet that it used to calculate the parties' support obligations, explained that "[w]hen the court puts in" the parties' combined incomes and Father's payment of E.'s medical insurance, "under the custody order that the Court just set forth, 93 days of overnights for Mom, which leaves Dad at 272 overnights, the child support guidelines say that [Mother] shall pay $10 in child support because of the overnights she has." After arriving at such a low figure, the court crafted a different solution as follows:

> The Court is not going to order a child support payment of $10 per month. If the court were to impute less income to [Mother], that would have [Father] paying [Mother] child support which also does not seem fair or appropriate in that he has more nights than the plaintiff has.
>
> [Father] has the child for more than half of the nights in the year, 272 of them. Ordering that [Mother] not need to financially contribute to expenses associated with [E.'s] care would be unjust, inappropriate, and not in [E.'s] best interest. [Mother] has the ability to contribute financially to [E.'s] needs. She has consistently paid monthly child support in the amount of $400 a month, and testimony and evidence provided to the Court regarding

> her financial situation made it clear that she had the ability to financially provide for E.
>
> Family Law Section 12-204 gives the Court some leeway in determining child support when the monthly support is over $15,000 a year, when it would be inappropriate or unjust. Since the child support guidelines say the $10 and the Court is not going to order that, the Court is further going to order that [Mother] pay the cost of all extracurriculars that E. participates in. In order to ensure that this position is not taken advantage of by either party, the activities need to be agreed-upon, but neither party shall unreasonably deny an activity for E.
>
> * * *
>
> [Father] will provide a bill for those amounts that he currently has or is paying for E. going forward for those activities and [Mother] will cover the cost of those activities.
>
> However, if either parent chooses to put E. in some kind of summer camp over the summer, they will bear the cost of that camp themselves.
>
> The Court finds that this contribution towards E., as well as paying for the travel expenses for the visits, is [Mother's] contribution to E. since the child support guidelines are a wash.

In discussing the custody schedule, the court also ordered that Mother "shall arrange and purchase all airfare for both E. and her traveling parent whether that be [Father] or [Mother]" to facilitate E.'s travel to and from North Carolina. Finally, the court determined that "all non-covered medical expenses, such as the [contact lenses] for E., be split between the two parties equally." The court clarified that this arrangement would cover "medical expenses that aren't covered by health insurance," including the cost of E.'s therapy.

The circuit court then turned to consider Father's request for attorney's fees. At the outset of its analysis, the court noted:

> . . . In determining attorney's fees, the Court must consider whether the litigation was justified. If the litigation was not justified, the need and ability to pay need not be considered. But if the litigation was justified, the need and ability to pay should be considered.

After considering whether there was substantial justification, the circuit court found that Mother "was at fault in causing [Father] to have to file the two emergency petitions to return [E.] to Maryland" in August 2020 and August 2021. Thus, because Mother "was not justified in doing what she did[,]" the circuit court ordered that she "should have to pay some portion of those attorney's fees." The Court was careful, however, to note that Mother "was justified in filing for a modification as there have been material changes in circumstances and at some point, the attorney's fees in addressing the issues of both modification[] [petitions] become intertwined."

After stating that it had reviewed the fee statements submitted by Father, the court held that "it seems reasonable that 2/3rds of [prior counsel's] work was related to the emergency filings and the follow-up on those and that those scenarios were created by [Mother] that were unjustified." Therefore, the court awarded Father attorneys' fees in the amount of $27,050.30, with the court reserving determination of how much of that award would be directed to Father's prior counsel and how much would be directed to his trial counsel. In a colloquy with Mother's counsel, after asking the parties whether they had any questions regarding her ruling, the trial judge further explained her reasoning in calculating the fee award:

> [MOTHER'S COUNSEL]: . . . Can you explain -- I'm not sure how you came up with the attorneys' fees.
>
> THE COURT: So in --
>
> [MOTHER'S COUNSEL]: And two-thirds of [Father's prior counsel's] bill?
>
> THE COURT: Correct.

> [MOTHER'S COUNSEL]: How was that determined?
>
> THE COURT: In looking at [Father's] Exhibit 20, which was his bills[,] in determining how much of his time went to dealing with the emergencies and the follow through on the emergencies, with the timing of his work, and the work itself.
>
> [MOTHER'S COUNSEL]: Okay. So the emergency -- because the emergency was through the summer. So that's why I'm -- the summer of '21. So that's why I'm wondering. I'm just trying to get some clarification. So it's also for the modification process, as well, if you're going through the Spring of 2022, correct?
>
> THE COURT: Right. Because some of the modification was the result of the emergency. So I felt that some of that carried through as still related to her actions. That there wouldn't have been necessarily a change in circumstances that he would have raised but for her actions that resulted in the emergency filings which then resulted in the consent order in 2021 and the consent order in 2022. All of those kind of flowed from the emergencies and from her decisions and actions.

On October 20, 2022, the circuit court entered a corresponding written order encompassing its September 28, 2022 ruling from the bench. In regard to attorneys' fees, the order clarified that Mother "shall pay a total of $27,050.30" with $16,497.50 to be paid directly to Father's prior counsel and $10,552.80 to be paid to Father "toward costs he incurred for representation by his current attorney." Mother noted a timely appeal from that order on November 15, 2022.

DISCUSSION

I.

Voluntary Impoverishment and Potential Income

A. *Parties' Contentions*

Mother raises three objections to the circuit court's imputation of income to her based on its finding that she was voluntarily impoverished. First, she argues that the court abused its discretion in changing the level of support established under the February 2021 consent order without making a finding as to a material change in circumstances. Mother emphasizes that no relevant change to her employment or income had occurred because she was still "unemployed and staying home with her younger children." Second, she contends that the trial court erred in calculating her "actual income" rather than her "potential income." Third, Mother asserts that even if actual income could be imputed to her, the court improperly considered Stepfather's income and payment of household expenses as gifts. She highlights that her credit card statements—the payment of which by Stepfather the trial court considered to be a gift under the logic of *Petrini v. Petrini*, 336 Md. 453 (1994)—did not "differentiate between her own expenses, E.'s expenses, [Stepfather's] expenses, or those of [their] two younger children[,]" thereby placing "the sole burden of those expenses on Mother." She concludes that these errors were not harmless because (1) the erroneously calculated figure "will be used as the baseline for [her] income" in any future modification proceeding and (2) the court relied on that figure in ordering Mother to pay a variety of the child's additional expenses.

Father responds that the trial court was justified in re-calculating the parties' income and modifying child support because there had been several material changes in circumstances since the entry of the February 2021 consent order—namely, an increase in his income from $10,833 per month to $14,339 per month, as well as Mother's relocation to North Carolina and increased access to E. under the October 2022 custody order.[3] Next, citing to *Goldberger v. Goldberger*, 96 Md. App. 313 (1992), Father asserts that the trial court properly considered the relevant factors, including Mother's actual income, in calculating her "potential income" as being $4,351 per month. Father contends that the court properly considered Stepfather's payment of Mother's credit card bills to be "gifts" constituting income and that Mother's argument that the credit cards were used to pay household expenses was unsupported by the record. Father concludes that the court's calculation of Mother's income was "supported by competent material evidence" and built upon the court's meticulous analysis of Mother's earnings history, standard of living, and monthly expenses.

B. *Governing Law*

Pursuant to FL § 12-204 "if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income." A person is voluntarily impoverished when her or she "has made the free and conscious choice, not compelled by

[3] Father also noted that in Mother's Motion to Modify Custody filed on November 21, 2021, she alleged that "material circumstances have occurred since the entry of the February 11, 2021 Consent Custody Order which impacts the best interest of the child and warrants a modification of legal and physical custody."

factors beyond his or her control, to render himself or herself without adequate resources." *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1992).[4] Under the operative standard in place at the time of the parties' motions, once a determination of voluntary impoverishment was made, the court would then calculate potential income by looking to a variety of factors, including: (1) age; (2) mental and physical condition; (3) assets; (4) educational background, special training or skills; (5) prior earnings; (6) efforts to find and retain employment; (7) the status of the job market in the area where the parent lives; (8) *actual income from any source*; and (9) any other factor bearing on the parent's ability to obtain funds for child support.[5] *Id.* at 328 (emphasis added).

FL § 12-201, in turn, defines "[a]ctual income" as meaning "income from any source" including "gifts" when considering "the circumstances of the case." FL §§ 12-201(b)(1), (4)(iii). In *Petrini v. Petrini*, the Supreme Court of Maryland discussed the

[4] In 2020, the General Assembly amended FL § 12-201 to adopt this definition. 2020 Maryland Laws Ch. 384 (S.B. 847) (amending FL § 12-201 to add current subsection (p), which provides that "'Voluntarily impoverished' means that a parent has made the free and conscious choice, not compelled by factors beyond the parent's control, to render the parent without adequate resources."). This change was originally slated to take effect on October 1, 2021, but was further delayed and did not take effect until July 1, 2022. 2021 Maryland Laws Ch. 385 (H.B. 1339) (delaying the effective date of S.B. 847 to July 1, 2022).

[5] In 2020, the General Assembly also amended FL § 12-201 to provide a list of factors to be considered in calculating potential income. 2020 Maryland Laws Ch. 384 (S.B. 847) (amending FL § 12-201 to add current subsection (m)). Prior to that point, potential income was calculated utilizing the *Goldberger* factors. *See Durkee v. Durkee*, 144 Md. App. 161, 184-85 (2002). S.B. 847 did not mark a dramatic shift, however, as it adopted, with some small changes, each of the *Goldberger* factors as part of the newly-added FL § 12-201(m). As with the other changes enacted by S.B. 847, they did not take effect until July 1, 2022. 2021 Maryland Laws Ch. 385 (H.B. 1339).

discretion imbued upon the trial courts to consider gifts in calculating a parent's income. 336 Md. 453 (1994). In that case, sole custody of the parties' only child was awarded to Mother, and Father was ordered to pay child support in the amount of $81.31 per week. *Id.* at 458. In calculating Father's income, the court took into account not only his take-home pay of $14,063.00, but also included the value of his medical and living expenses, each of which were paid by his mother (who allowed him to stay in one of her homes rent-free). *Id.* at 458-59. Father then noted a timely appeal to this Court, and we affirmed the support award in an unreported opinion. *Id.* at 459. The Supreme Court of Maryland affirmed our decision, reasoning that the trial court properly considered the value of those gratuitous payments in calculating Father's income. *Petrini*, 336 Md. at 466-67.

The Court explained that the "types of 'gifts' that may be includable as part of a parent's actual income in a particular case is within the court's discretion, and should only be reversed if it acted arbitrarily in exercising its discretion or if the judgment on the matter was clearly wrong." *Id.* at 462. The Court further emphasized that "the General Assembly purposely did not define with pin-point precision what it intended the term 'gifts' to encompass under the guidelines" and instead "afforded trial courts the latitude to consider all the relevant circumstances in a particular case" including "actual ability to pay the specified child support award, any lack of liquidity or marketability of a party's assets, the fact that a parent's take-home income is not an accurate reflection of his or her actual standard of living, and whether either party is voluntarily impoverished." *Id.* at 463-64. Applying a loose definition of a "gift" as being "a voluntary transfer of property to another

made gratuitously or without consideration[,]" the Court explained that the benefits Father received from his mother fit under that definition because they had "the effect of freeing up other income that may not have otherwise been available to pay a child support award." *Id.* at 463-64. The Court therefore concluded that "the trial court, in the circumstances of this case, properly considered the subject gifts" in calculating his actual income. *Id.* at 467.

The next year, we returned to this issue in *Moore v. Tseronis*, 106 Md. App. 275 (1995). In that case, Moore moved to modify a prior support order awarding his ex-wife, Tseronis, $600 a month in child support for the parties' three children. *Id*. at 279. Seeking a decrease in support, Moore testified at the modification hearing that his salary as an auto technician had been more than halved due to his move from Baltimore to Garrett County. *Id.* The special master declined to decrease her calculation of Moore's income, finding him instead to be voluntarily impoverished, but ultimately decreased his obligation to $500 per month because he was caring for his two children from a second marriage. *Id.* at 279-80. In reaching that conclusion, the special master also explained that Moore's second wife was a licensed attorney who had chosen to stay home to take care of their children, thus leaving Moore as the sole income-earning party. *Id.* at 285. Despite Moore's obligation to his children with his second wife, the special master explained that his second wife's choice to forego employment as an attorney could not eliminate his obligation to his children from his first marriage. *Id.*

Moore appealed and, before this Court, argued that the master's reasoning was in error because she considered "the potential income of [his] second wife in calculating [his]

child support obligation." *Id.* at 284. We disagreed, explaining that although FL § 12-201 "does not provide for imputation of a new spouse's income to a parent upon remarriage[,]" the special master did not impute any income to Moore's second wife and appropriately took her obligation to support her children into account in determining how much of a reduction in Moore's support obligation to his children with Tseronis was appropriate. *Id.* at 284-85. We also suggested that although "the property interest and income of the new spouse may not be considered in determining the parent's economic status," it might be proper for the court to consider "the extent of the new spouse's voluntary contributions to the child's support." *Id.* at 284 (quoting *Commonwealth ex rel. Hagerty v. Eyster*, 429 A.2d 665, 669 (Pa. Super. 1981)).

In *Allred v. Allred*, 130 Md. App. 13 (2000), we confronted a similar situation. There, Mother and Father had shared physical custody of their two children and each worked full-time, with Father earning substantially more than Mother. *Id.* at 15. Father, however, argued at a hearing on Mother's request for support that Mother's income was supplemented by her splitting all of her household expenses with her new boyfriend. *Id.* at 16. The circuit court agreed with Father's contention and increased Mother's income by $510.00 per month, representing the half of household bills that were paid by her boyfriend. *Id.* at 16-17. Therefore, the court lowered Father's support obligation from $177.00 per month to $116.39. *Id.* at 17.

Mother noted a timely appeal and we reversed the award, concluding that the boyfriend's payment of a portion of the household expenses did not constitute a gift within

the meaning of *Petrini*. *Id.* at 18-21. We explained that unlike in *Petrini*, the "payments [were] not gratuitous" because the boyfriend and his son made use "of the apartment, electricity, cable, phone, and trash removal service." *Id.* at 19. Further, we explained that the boyfriend's payment of common expenses were the "equivalent of contributions that might be made by a new spouse" and that the income of a new spouse may not be imputed as actual income, though it could be considered in determining whether a deviation from the guidelines is appropriate. *Id.* at 19-21. We thus concluded that the trial court erred in its calculation of support, but were careful to note that, in a proper case, a court could "impute as gift income to a parent the parent's roommate's payment of a portion of rent and expenses" when those payments "exceeded the roommate's fair share of the rent[.]" *Id.* at 21 n.4.

C. *Analysis*

"A trial court's factual findings on the issue of voluntary impoverishment of a parent, for child support purposes, are reviewed under a clearly erroneous standard, and the court's ultimate rulings are reviewed under an abuse of discretion standard." *Sieglein v. Schmidt*, 224 Md. App. 222, 249 (2015) *aff'd*, 447 Md. 647 (2016) (citation omitted). "[S]o long as the factual findings are not clearly erroneous, the amount calculated is realistic, and the figure is not so unreasonably high or low as to amount to abuse of discretion, the court's ruling may not be disturbed." *Durkee v. Durkee*, 144 Md. App. 161, 187 (2002) (cleaned up). With that overarching standard in mind, we shall address each of

Mother's three contentions of error regarding the trial court's imputation and calculation of her potential income.

1. *Material Change in Circumstances*

Mother objects first that the trial court erred in re-calculating her income because there had been no material change in circumstances following the entry of the February 2021 consent order, in which the parties' imputed minimum wage to Mother. Generally, a court can "modify the child support payment only if there is an affirmative showing of a material change in circumstances in the needs of the children or the parents' ability to provide support." *Payne v. Payne*, 132 Md. App. 432, 442 (2000). The "burden of proving a material change in circumstance is on the person seeking the modification." *Petitto v. Petitto*, 147 Md. App. 280, 307 (2002). A change is "material" when it (1) is "relevant to the level of support a child is actually receiving or entitled to receive" and (2) is "of a sufficient magnitude to justify judicial modification of the support order." *Wills v. Jones*, 340 Md. 480, 488-89 (1995). A "change 'that affects the income pool used to calculate the support obligations upon which a child support award was based' is necessarily relevant." *Petitto*, 147 Md. App. at 307 (quoting *Wills*, 340 Md. at 488 n.1). The trial court's "decision regarding modification is left to the sound discretion of the trial court and will not be disturbed, unless that discretion was arbitrarily used or the court's judgment was clearly wrong." *Payne*, 132 Md. App. at 442.

We are unpersuaded by Mother's argument that the circuit court abused its discretion in changing the calculation of her potential income from the February 2021

consent order. First, we observe that Mother herself admits that, because Mother had moved across the country, there were material changes that "impacted the best interest of the child and warrant[ed] a modification of legal and physical custody." We note also that the trial court found that "[t]here have also been times since the previous consent order in 2021, when each parent has done or said things to place [E.] in the middle of their conflict. And, therefore, something about the custody arrangement is not working out to her best interest." Under section 12-104 of the Family Law Article, "The court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." Accordingly, the court was entitled to review as part of any change in custody, the appropriate child support obligations, and thereby, Mother's potential income.

Second, we observe that the parties' purported imputation of minimum wage to Mother for purposes of the February 2021 consent order never had any discernable evidentiary basis and was flatly arbitrary. *See supra*, note 2. We discern no reason why the circuit court, when subsequently presented with competent evidence, could not consider that evidence and arrive at a new and better approximation of her potential income. *See, e.g.*, *Lieberman v. Lieberman*, 81 Md. App. 575, 592 (1990) (holding that increase in obligor's income constituted a material change in circumstances). Because Mother moved to North Carolina, the Court was able to apply and correctly compute the North Carolina minimum wage law. Moreover, even if Mother's employment situation remained the same, the newly presented evidence of her monthly expenses and standard of living constituted

an "affirmative showing of a material change in circumstances in the needs of the children *or the parents' ability to provide support*." *Payne v. Payne*, 132 Md. App. 432, 442 (2000) (emphasis added). For all of these reasons, we find no error in the trial court's determination that there was a material change in circumstances, and we discern no abuse of discretion in the court's decision to impute Mother's income based on the new evidence presented.

2. *The Circuit Court Properly Considered Actual Income*

Next, Mother contends that the circuit court abused its discretion by imputing "actual income" to her rather than "potential income." We disagree. At most, Mother points to a distinction utterly without significance. Under *Goldberger* (and now FL § 12-201(m)), the trial courts are directed to consider "actual income from any source" in calculating the "potential income" of a parent that it has found to be voluntarily impoverished. *Goldberger v. Goldberger*, 96 Md. App. 313, 327-28 (1992). Although perhaps a bit odd sounding, that direction ultimately serves the predominant statutory purpose of ensuring that the "child should receive the same proportion of parental income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together." *Voishan v. Palma*, 327 Md. 318, 322 (1992). Indeed, the Supreme Court of Maryland has made clear that "[b]ecause the parents' income levels determine the amount of support that a child receives, it is imperative to accurately assess the parents' respective incomes" and "equally imperative that parents be prevented from avoiding their support obligations by purposefully reducing their income." *Wills v. Jones*,

340 Md. 480, 485 (1995). Accordingly, to the extent that Mother received any benefits that constituted "actual income" within the meaning of FL §§ 12-201(b)(1), the court was well within its discretion in considering those assets in determining her potential income.

3. *"Gifts" From a New Spouse as Actual Income*

Finally, Mother asserts that the circuit court erred in determining that Stepfather's voluntary payment of her monthly credit card bills constituted gift income within the meaning of *Petrini*. She asserts that the instant case is instead governed by *Allred* and *Moore* because, as in those cases, the circuit court improperly imputed the income of Stepfather. We do not agree.

In our view, the core tenets of *Petrini*, *Allred*, and *Moore* can easily be harmonized, with *Petrini* establishing a baseline rule for imputing gift income deriving from the gratuitous payment of basic living expenses, and *Allred* and *Moore* establishing reasonable limits on that principle. Specifically, *Petrini* stands for the proposition that a family member's (or friend's) payment of a parent's living expenses can constitute a "gift" when it has "the effect of freeing up other income that may not have otherwise been available to pay a child support award" particularly because it relieves the burden to pay for "things that [the parent] would otherwise have been responsible for paying for [themself] out of [their] take-home salary." *Petrini*, 336 Md. at 463-64. *Moore*, meanwhile, establishes that although the statutory language "does not provide for imputation of a new spouse's income to a parent upon remarriage[,]" the court may consider "the extent of the new spouse's voluntary contributions to the child's support." *Moore*, 106 Md. App. at 284-85 (quoting

Commonwealth ex rel. Hagerty v. Eyster, 429 A.2d 665, 669 (Pa. Super. 1981)). Finally, *Allred* clarifies that payments by a roommate that are not truly gratuitous—because the roommate pays only a portion of the living expenses and makes use of the shared space—cannot be considered gift income except when those payments "exceeded the roommate's fair share of the rent[.]" *Allred*, 130 Md. App. at 19-21 n.4.

Applying those precepts here, we conclude that the trial court did not err or abuse its discretion in calculating Mother's income. We start by noting what the trial court was not permitted to do in this case. Under *Moore*, it could not simply look to the fact that Stepfather earns a salary of $360,000 per year and impute that entire sum to Mother under the theory that all assets were shared between them. It is clear from the record that the court did not engage in that type of overbroad imputation analysis. Moreover, under *Allred*, the court could not impute transfers from Stepfather to Mother that were not truly gratuitous and did not confer any discernable benefit on her. On this record, this presents a closer question, but we ultimately conclude that the court did not veer outside the bounds of its ample discretion.

At the 2022 merits trial on the parties' respective motions to modify custody, the court was presented with only a limited snapshot of Mother's and Stepfather's financial arrangements. Mother testified that Stepfather had provided her with two credit cards, a Chase card and a Target card, that she used to buy "all our home stuff." Several monthly statements for the Chase and Target cards were admitted into evidence, and Mother noted that Stepfather paid the balance every month. The Chase statements contained itemized

lists of Mother's purchases, with the amount spent and merchant details, but the Target statements were not itemized. Mother also authenticated Venmo statements for her account, which demonstrated several payments of $400 by Stepfather to Mother for E.'s child support. Based on this evidence, the court imputed as gift income the "monthly average of payments made to the Chase credit card and Target credit card, which plaintiff explained she can charge whatever she wants to or needs to; [and] the $400 a month [Mother's] husband sends her through Venmo, which she then uses to pay [Father] child support."

Certainly, we understand Mother's point that many of the expenses listed on her monthly Chase card statements likely constituted household expenses that not only benefitted herself, but also benefitted Stepfather, E., and their two other children. The statements do show charges for cable bills, groceries, and children's clothing among other things. Yet, it is also clear that many of the charges—such as certain meals and clothing purchases, pedicures, and haircuts—could not reasonably be construed as family expenses and were necessarily gift payments by Father of Mother's personal expenses. Additionally, under the logic of *Moore*, it is difficult to construe Stepfather's prior payment of E.'s $400 monthly child support pursuant to the February 2021 consent order as anything but "'voluntary contributions to the child's support.'" *Moore*, 106 Md. App. at 284-85 (quoting *Commonwealth ex rel. Hagerty v. Eyster*, 429 A.2d 665, 669 (Pa. Super. 1981)).

Regardless, Mother essentially asserts that the trial court was duty bound to separate both the personal and family expenses charged to her credit cards, apportion the family

expenses between her and Stepfather, and then award only the expenses that exceeded Stepfather's "share" under the logic of *Allred*. *Allred*, 130 Md. App. at 19-21 n.4. We do not read *Allred* in that manner. As Father points out, Mother failed to present or suggest any methodology for making such a fine division of expenses, nor is it clear that any such calculation would have even been possible on the evidence presented. Moreover, this case is easily distinguishable from *Allred* where the parent's new partner paid *half* of the living expenses associated with their new residence, whereas here, Stepfather pays *all* of the family expenses due to Mother's unemployment. Accordingly, rather than apportioning the responsibility for the expenses listed on Mother's credit card statements between the two, the court reasonably concluded that these were expenses that Mother "would otherwise have been responsible for paying for [herself] out of [her] take-home salary." *Petrini*, 336 Md. at 463-64.

In sum, we conclude that the trial court did not abuse its discretion in its calculation of Mother's potential income. "[S]o long as the factual findings are not clearly erroneous, the amount calculated is realistic, and the figure is not so unreasonably high or low as to amount to abuse of discretion, the court's ruling may not be disturbed." *Durkee v. Durkee*, 144 Md. App. 161, 187 (2002) (cleaned up).

II.

Award of Other Expenses

A. *Parties' Contentions*

Mother contends that the circuit court abused its discretion in its award of additional expenses to Father. First, she claims that the court improperly ordered the parties to equally split the payment "of all uninsured medical expenses, rather than just the extraordinary ones." She stresses that, pursuant to the plain language of FL § 12-204, only extraordinary medical expenses could be awarded and were required to be apportioned based on the parties' comparative incomes. Next, Mother similarly asserts that the court abused its discretion in ordering Mother to pay for all of E.'s airfare to and from North Carolina because the plain language of FL § 12-204 required an apportionment of those expenses according to the parties' respective incomes. Finally, citing to *Horsley v. Radisi*, 132 Md. App. 1 (2000), Mother emphasizes that the trial court had no authority to order the payment for E.'s extracurricular activities.

Father counters that the court was within its discretion to "order the equal sharing of medical expenses" because ordinary medical expenses can fall within the basic support calculation and the trial court "expressly found that application of the guidelines would be unjust or inappropriate[.]" He further responds that the court's award of extracurricular expenses and transportation expenses were within the court's discretion, pointing out that the parties' combined adjusted actual income exceeded the guidelines schedule and thus provided the court "independent authority in setting the amount of child support." In

Father's view, because the parties' income fell above the guidelines' threshold, the court was well within its discretion to "consider medical expenses, extracurricular expenses, and travel expenses . . . when determining the proper amount of child support."

B. *The Child Support Guidelines and Permissible Categories of Additional Expenses*

We begin our analysis of Mother's challenges to the Court's award of additional expenses by noting that this is an above-guidelines case. At the time Father and Mother filed their respective motions for modification in August and November 2021 respectively, the highest combined adjusted actual income threshold provided for in the guidelines was $15,000. *See* Maryland Code (1984, 2019 Repl. Vol), Family Law Article ("FL"), section 12-204(e).[6] Because the parties' respective motions for modification were filed in 2021, the trial court's calculation of the parties' combined adjusted actual income (Father at $14,339.44 and Mother at $4,351 per month) as exceeding $15,000 placed this case above the guidelines. Still, the trial court in this case—as demonstrated by the child support guidelines worksheet attached to its final order—meticulously undertook its analysis under the post-July 1, 2022 guidelines, which was well within its discretion.[7]

[6] During the 2020 legislative session, the General Assembly enacted significant alterations to FL § 12-204, chief among them a change doubling the highest income threshold under the guidelines from $15,000 to $30,000. 2020 Maryland Laws Ch. 384 (S.B. 847). Nevertheless, S.B. 847 also provided that the changes which it ushered in would "apply only to cases filed on or after the effective date" of October 1, 2021. 2020 Maryland Laws Ch. 384 (S.B. 847). During the 2021 legislative session, the effective date was extended again to July 1, 2022. 2021 Maryland Laws Ch. 385 (H.B. 1339).

[7] Since the court had the benefit of the exacting calculation provided for in the post-July 1, 2022 guidelines, we see no reason why the court could not, in its discretion, consider (continued)

In above-guidelines cases, the decisional process to be applied by the trial court is far less rigid, and "the court may use its discretion in setting the amount of child support." FL § 12-204(d). This is due to the "legislative judgment [] that at such high income levels judicial discretion is better suited than a fixed formula to implement the guidelines' underlying principle that a child's standard of living should be altered as little as possible by the dissolution of the family." *Malin v. Mininberg*, 153 Md. App. 358, 410 (2003) (quoting *Voishan*, 327 Md. at 328). We have explained that in above-guidelines cases, the trial court "need not use a strict extrapolation method to determine support, but may employ any rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it." *Ruiz v. Kinoshita*, 239 Md. App. 395, 425 (2018) (cleaned up). Even still, the court must "balance the best interests and needs of the child with the parents' financial ability to meet those needs." *Id.* (citation omitted). In doing so, the court should consider "the parties' financial circumstances, the reasonable expenses of the child, and the parties' station in life, their age and physical condition, and expenses in educating the child." *Smith v. Freeman*, 149 Md. App. 1, 20 (2002) (citation omitted) (cleaned up). Additionally, "even in an above Guidelines case, '[t]he conceptual underpinning' of the Guidelines applies" and courts should strive to

the new guidelines in arriving at its award. *See Richardson v. Boozer*, 209 Md. App. 1, 7-8, 18-21 (2012) (finding that application of post-October 1, 2010 guidelines to modification motion filed prior to the effective date was not an abuse of discretion in above-guidelines case).

ensure that the child's standard of living is maintained. *Id.* at 19 (quoting *Voishan*, 327 Md. at 322).

Pursuant to FL § 12-204(g)–(h), in addition to calculating each parent's basic child support obligation, the following enumerated expenses "*shall* be added to the basic obligation and *shall* be divided between the parents in proportion to their adjusted actual incomes":

- "actual child care expenses incurred on behalf of a child due to employment or job search of either parent"[8];
- "[a]ny actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible"; and
- "[a]ny extraordinary medical expenses incurred on behalf of a child[.]"[9]

FL § 12-204(g)–(h) (emphasis added). Additionally, under FL § 12-204(i), "any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child" as well as "any expenses for transportation of the child between the homes of the parents" "*may* be divided between the parents in proportion to their adjusted actual incomes[.]" FL § 12-204(i) (emphasis added).

[8] Although an award of "actual child care expenses" is mandatory under FL § 12-204(g)(1), an award of "[a]dditional child care expenses" lies within the discretion of the court pursuant to FL § 12-204(g)(3) and "may be considered if a child has special needs."

[9] "Extraordinary medical expenses" are defined to mean "uninsured costs for medical treatment in excess of $250 in any calendar year" including "uninsured, reasonable, and necessary costs for orthodontia, dental treatment, vision care, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders." FL § 12-201(g).

In *Chimes v. Michael*, we explained that, despite the discretion generally afforded to the trial courts in above-guidelines cases, the mandatory categories of additional expenses delineated in FL § 12-204 must be included in any award. 131 Md. App. 271 (2000). There, the parties had one minor child together and Michael was ordered to pay Chimes $1000 in child support per month as well as cover the child's health insurance premiums. *Id.* at 279. We discerned no abuse of discretion in the court's division of the support obligation between the parties in that manner, but we further explained that the court improperly excluded from its award the child care expenses incurred by the parties prior to their separation. *Id.* at 291-92. Due to the mandatory language of FL § 12-204(g), we explained that it would be "difficult, after parsing the language of this section, to support an interpretation that leaves an award for child care expenses to the discretion of the [court], even in an above-guidelines case such as this one." *Id.* at 292. Thus, we expounded that "[b]ecause the Legislature used mandatory language *and* distinguished child care expenses from basic support obligations, we hold that child care expenses always fall outside of the [court's] discretion" and must be awarded even in an above-guidelines case. *Id.* at 292-93; *see also Ruiz v. Kinoshita*, 239 Md. App. 395, 432-33 (2018) (holding the same with respect to extraordinary medical expenses under FL § 12-204(h)).

That does not mean, of course, that the court has absolutely no discretion in fashioning an award in an above-guidelines case. In *Malin v. Mininberg*, for example, we approved a creative solution "ordering the parties to establish a $60,000 trust account for the child's future medical needs." 153 Md. App. 358 (2003). In that case, the parties'

income exceeded the guidelines threshold, and they had one minor child with serious developmental and health issues that required a significant amount of medical care. *Id.* at 371-72, 376-77. The court, at the parties' suggestion, ordered that they contribute to a separate fund to cover the child's extraordinary medical expenses. *Id.* at 421-22. We considered this entirely proper, noting that the plain statutory language "authorize[d] the court to supplement the child support obligation . . . for certain categories of expenses, including extraordinary medical expenses." *Id.* at 423. We agreed with the Appellant, however, that "the parties' contributions to the fund should be made in proportion to their respective incomes" and that the circuit court erred by not deducting the Appellant's alimony payments from his income and adding them to Appellee's income. *Id.* at 424-25. We therefore remanded for the court "to revise the allocation of the parties' respective contributions to the medical fund[.]" *Id.* at 425.

Although FL § 12-204(g)–(i) equally govern both guidelines and above-guidelines cases, the enumerated categories of additional expenses set forth by those provisions are also entirely coextensive when operating under the guidelines. In *Horsley v. Radisi*, a guidelines case, we confronted a situation in which, after Mother had moved to modify the prior support order, Father was ordered to pay $360 per month for the children's activities including "costs of tutoring, music lessons, gifted and talented programs, and camps." 132 Md. App. 1, 18 (2000). We considered this award to extend beyond the court's authority, explaining that "the plain and unambiguous language of the statute authorizes the court to supplement the Guidelines obligation only for certain categories of expenses: child care;

extraordinary medical expenses; the cost of attendance at a special or private elementary or secondary school; and transportation expenses." *Id.* at 26. Accordingly, we held that "that the court was not entitled to add to the Guidelines obligation the cost of discretionary activities such as camp, music lessons, tutoring, and gifted and talented programs, even if such activities are desirable or beneficial." *Id.*

In an above-guidelines case, however, courts are afforded more leeway to consider and award additional expenses beyond the narrowly-defined categories codified in FL § 12-204(g)–(i). In *Walker v. Grow*, for example, Grow was ordered to pay $1,609 per month in child support. 170 Md. App. 255, 261 (2006). Walker noted a timely appeal and contended that "the costs of child care [including basketball and horseback riding camps] during the summer months and family therapy should have been included in the calculation of Grow's child support obligation." *Id.* at 287-88. We agreed, explaining that although "in actual guidelines cases, 'discretionary activities such as camp, music lessons, tutoring, and gifted and talented programs' are not added to the child support obligation . . . [i]n an above guidelines case, [] the court may consider such activities in determining the proper amount of child support." *Id.* at 288. Further, we noted that Walker had presented competent evidence of the cost of the parties' joint family therapy sessions with the child and held that "[i]n an above guidelines case, it is within the court's discretion to include the cost of family therapy" in the basic support award to the extent that it does not qualify as an extraordinary medical expense within the meaning of FL § 12-204(h). *Id.* at 288-89. Accordingly, because the trial court had apparently not considered the costs of these

additional expenses in its support calculation, we remanded for the court to revisit those issues. *Id.* at 288-89.

C. Analysis

We now return to the present case and shall address each of mother's contentions regarding the circuit court's support award: (1) that the court improperly ordered the parties to equally split the payment "of all uninsured medical expenses" because only extraordinary medical expenses could be awarded and were required to be apportioned based on the parties' comparative incomes; (2) that the court abused its discretion in ordering Mother to pay for all of E.'s airfare to and from North Carolina instead of apportioning those expenses according to the parties' respective incomes; and (3) that the trial court had no authority to order the payment for E.'s extracurricular activities.

As noted, the trial court, recognizing that it had "some leeway in determining child support when the monthly support is over $15,000 a year[,]" applied the post-July 1, 2022 guidelines as a rough gauge for determining the parties' basic support obligations. Because of the increased overnight visitation that Mother was set to receive under the court's newly-fashioned custody schedule, with "93 days of overnights for Mom, which leaves Dad at 272 overnights, the child support guidelines say that [Mother] shall pay $10 in child support because of the overnights she has." With that low figure established as a presumptive measure, the court resolved instead to apportion a greater share of the additional expenses associated with E.'s care to Mother. The court explained:

> [Father] has the child for more than half of the nights in the year, 272 of them. Ordering that [Mother] not need to financially contribute to

> expenses associated with [E.'s] care would be unjust, inappropriate, and not in [E.'s] best interest. [Mother] has the ability to contribute financially to [E.'s] needs. She has consistently paid monthly child support in the amount of $400 a month, and testimony and evidence provided to the Court regarding her financial situation made it clear that she had the ability to financially provide for E.

The court then ordered Mother to pay for *all* of E.'s transportation expenses for visitation in North Carolina, *all* of E.'s extracurricular activities, and to equally split with Father "all non-covered medical expenses[.]" We conclude that the court abused its discretion, in part, in arriving at that apportionment.

To start, Mother asserts that the circuit court had no authority to award either the cost of E.'s "ordinary" medical expenses or extracurricular activities. Certainly, it is true that the court's award covered both extraordinary *and* ordinary medical expenses as it provided for the parties to split equally all medical expenses not covered by insurance—a broader formulation than the narrow categories included within the definition of "extraordinary" medical expenses under FL § 12-201(g)(2). *Bare v. Bare*, 192 Md. App. 307, 319-20 (2010). Yet, to the extent the court's order covered ordinary medical expenses, the court was empowered to provide for payment of those expenses as an exercise of its wide discretion in this above-guidelines case. *Walker*, 170 Md. App. at 288-89 (explaining that the cost of family therapy may be included in support award in above-guidelines case). The same rationale applies with respect to the court's award of E.'s extracurricular expenses. If this were an actual guidelines case, then Mother would have a strong argument, but as made clear by *Walker*, "[i]n an above guidelines case, [] the court may consider such [discretionary extracurricular] activities in determining the proper amount of

child support." *Walker*, 170 Md. App. at 288. We disagree with Mother's argument, therefore, that the court lacked the authority to apportion these expenses between the parties.

We do, however, find persuasive Mother's argument that the court's apportionment of expenses between the parties extended beyond the scope of its discretion, at least on the reasoning provided. As we have explained, with respect to the statutorily-enumerated categories of additional expenses set forth in FL § 12-204(g)–(i), the court is presumptively required to divide those expenses "between the parents in proportion to their adjusted actual incomes[.]" FL § 12-204(g)–(i). Additionally, although the award of ordinary medical expenses and discretionary extracurricular activities lay within the court's discretion, it is not as if at least some consideration of the parties' relative income completely falls away in the face of that discretion. *See, e.g.*, *Smith v. Freeman*, 149 Md. App. 1, 20 (2002) (providing that, in above-guidelines cases, the court must consider "the parties' financial circumstances, the reasonable expenses of the child, and the parties' station in life, their age and physical condition, and expenses in educating the child.") (citation omitted) (cleaned up). Here, the court explained, it ordered Mother to bear a greater portion of these additional expenses because otherwise, "ordering that [Mother] not need to financially contribute to expenses associated with [E.'s] care would be unjust, inappropriate, and not in [E.'s] best interest." Essentially, the court determined that a deviation was appropriate due to Mother's ability to provide support for E. and the fact that she was only set to have E. for approximately one-quarter of the year.

The court's rationale for deviating from an income-based apportionment of medical, transportation, and extracurricular expenses, rested on the premise that, in the absence of such an award, Mother would "not need to financially contribute to expenses associated with [E.'s] care[.]" It appears, therefore, that the court's view sprung from its application of the guidelines and that, by shifting of the majority of the additional expenses related to E.'s care to Mother, the court could compensate for the low $10 figure produced by the court's guidelines analysis. Yet, implicit in the court's initial calculation under the guidelines is an embedded assumption that Mother *would be* contributing to E.'s care. Indeed, the low guidelines figure calculated by the circuit court was the byproduct of two factors. First, because Mother's imputed income was still significantly lower than Father's, her share of the parties' combined adjusted actual income was only 23.3%. Second, because Mother had at least 25% of the overnights with E. under the new custody schedule, the court performed the additional shared custody calculations pursuant to FL § 12-204(m), which accounted for the time E. was set to spend with Mother and implicitly assumed that, during those periods, Mother would spend an allotted portion of her income on E.'s care.

Accordingly, the reduced sum that the trial court arrived at under the guidelines simply accounted for Mother (1) having significantly less income than Father even including the gifts from Stepfather and (2) having significantly less time with E. It follows that Father was presumptively expected to bear a greater portion of E.'s care and expenses because of his superior income and parenting time with E. There is nothing manifestly unjust about that state of affairs. We have no doubt that an order requiring Mother to pay

her income-based proportion of additional expenses associated with E.'s care would be appropriate. We cannot, however, accept the court's rationale for placing the broad majority of that burden on Mother's shoulders in a manner that far exceeded the presumptive income-based apportionment of those expenses. Accordingly, we shall vacate, in part, the court's order insofar as it required Mother to equally split all medical expenses and pay for *all* of E.'s airfare and extracurricular activities. On remand, the court shall take into account the parties' respective incomes in awarding these expenses.

III.

Attorneys' Fees

A. *Parties' Contentions*

Mother contends that the circuit court abused its discretion in ordering her to pay a significant portion of Father's attorneys' fees without making explicit findings as to the needs of each party or a lack of substantial justification on her part. She further claims that she was substantially justified in both withholding E. from Father and filing for modification, emphasizing that the court found that E. had made disclosures about Father's management of her bathing routines. She asserts that due to "the serious allegations made by E., and the trial court's finding that [her] concerns were understandable, [she] should not be penalized for advocating on E.'s behalf." Finally, Mother contends that the figure awarded by the court "was arbitrary and incorrect" because the fee statements submitted by Father "do not distinguish between the work performed on Father's Emergency Motion

and the work performed on Mother's Motion to Modify Custody[,]" which the court found she was substantially justified in filing.

Father retorts that the circuit court "properly reviewed the statutory factors and found that [Mother] was at fault in causing [him] to have to file two emergency petitions to return [E.] to Maryland." Father further asserts that the amount of fees awarded was reasonable as the court reviewed the fee statements submitted by Father and had considered Mother's financial status in the course of its oral ruling.

B. *Analysis*

The circuit court may award attorneys' fees "that are just and proper under all the circumstances in any case in which a person: (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties[.]" FL § 12-103(a)(1). In doing so, the court 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(b). Generally, "The trial court has significant discretion in applying the § 12-103(b) factors to decide whether to award counsel fees and, if so, in what amount." *David A. v. Karen S.*, 242 Md. App. 1, 39 (2019) (quoting *Ruiz v. Kinoshita*, 239 Md. App. 395, 438 (2018)). "Consideration 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) (citing *Carroll County v. Edelmann*, 320 Md. 150, 177 (1990)). If the court determines that an award is appropriate, the fees "must be reasonable, taking into account such factors as labor, skill, time, and benefit afforded to the

client, as well as the financial resources and needs of each party." *Id.* at 467 (citing *Brown v. Brown*, 204 Md. 197, 213 (1954)).

Here, the trial court failed to apply properly the statutory criteria. First, and most fundamentally, the court presaged its analysis by noting that "[i]n determining attorney's fees, the Court must consider whether the litigation was justified. If the litigation was not justified, the need and ability to pay need not be considered. But if the litigation was justified, the need and ability to pay should be considered." That is an incorrect summation of the law as FL § 12-103(b) clearly requires that each of the statutory criteria be considered. A finding that the litigation was not substantially justified most certainly does not obviate the need to consider the parties' needs and financial circumstances. And, although the court had reviewed the parties' financial circumstances in its analysis of child support, it did not—apparently upon its mistaken view that it was not required to—make any mention of the parties' needs or ability to pay an award of attorneys' fees in the course of its analysis. That alone constituted an abuse of discretion as "[c]onsideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error." *Petrini*, 336 Md. at 468 (citation omitted); *see also Davis v. Petito*, 425 Md. 191, 205 (2012) ("financial status and needs of each of the parties must be balanced in order to determine ability to pay the award to the other; a comparison of incomes is not enough.").

Moreover, the court's findings with respect to lack of substantial justification contradicted earlier findings. In considering substantial justification, the circuit court found that Mother "was at fault in causing [Father] to have to file the two emergency

petitions to return [E.] to Maryland" in August 2020 and August 2021. Thus, because Mother "was not justified in doing what she did[,]" the circuit court ordered that she "should have to pay some portion of those attorney's fees." At the same time, however, the court noted that Mother "was justified in filing for a modification as there have been material changes in circumstances and at some point[.]" Additionally, in the course of its analysis, the court explained that it found that E. had made some disclosure of feeling uncomfortable with the bath time routine at Father's and that Mother was right to be concerned about this revelation. In essence, the court simply found that Mother's action of withholding E. from Father was unjustified in August 2021, which necessitated Father filing his emergency motion. On the merits, however, the court unwound its prior order granting the emergency motion—which gave Father sole legal and physical custody—and awarded Mother expanded visitation with E. We are reticent, therefore, to accept the court's finding that Mother lacked substantial justification in defending herself in the proceeding when she was at least partially successful in doing so. *See also Davis*, 425 Md. at 204 ("substantial justification, under both subsections (b) and (c) of section 12-103, relates solely to the merits of the case against which the judge must assess whether each party's position was reasonable.").

Accordingly, we shall vacate the circuit court's award of attorneys' fees. On remand, the court shall consider all of the FL § 12-103(b) factors and explain, especially if it again finds an award of attorneys' fees to be appropriate, how it considered the parties' needs and financial circumstances, and how it determined which portion of fees are

attributable to the relevant party's lack of substantial justification in defending against the action.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-THIRD BY APPELLANT AND TWO-THIRDS BY APPELLEE.