Circuit Court for Montgomery County
Case No. 106079FL

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1383

September Term, 2016

DUANE WENSEL

v.

LYNNE-MARIE F. ZETTERGREN

Leahy,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: January 8, 2018

The parties return to this Court for a second time on the matters of child custody and child support obligations. Duane Wensel ("Father") and Lynne Zettergren ("Mother") were married on April 4, 1997, and have two children together, a now 15-year-old daughter ("Daughter") and a 14-year-old son ("Son").

The zig-zag custody and child support chronical underlying this appeal began in May 2012, when Mother informed Father that she wanted to separate and intended to seek a divorce. A year later, in May 2013, the parties entered into a custody agreement according to which they shared legal custody of both children. By this agreement, the parties established a physical custody schedule whereby Father had 148 overnights with the children per year. It was also agreed that Father would pay Mother $355 per month in child support. A judgment of absolute divorce was entered in the Circuit Court for Montgomery County in January 2014, and the parties agreed to proceed in accordance with the custody order. The marital home—and the home that Father continues to reside in—is located in Olney, Maryland.

In June 2013, Mother married Mr. Craig Zettergren and moved to Connecticut where Mr. Zettergren and her own parents and siblings resided. Fearing the children would be relocated, Father, representing himself, filed an emergency custody motion in May 2014 to prevent Mother from moving the children to Connecticut, and argued that he should be given primary physical custody of the children. Mother opposed, proceeding without counsel, and contended that she should have primary physical custody of the children. She also filed a motion to modify child support, alleging that her income had substantially decreased as she was currently unemployed and in the process of relocating.

The parties appeared before a magistrate on November 4, 2014. The magistrate bifurcated the matters of child custody and child support, hearing the issue of child custody first, and postponing the child support hearing until the next calendar year. The magistrate recommended that Mother be awarded primary physical custody of the children in Connecticut, and that Father should have ample opportunities for visitation. Father filed a series of exceptions, virtually all of which were overruled by the trial court. Father appealed, and we affirmed the decision of the trial court in an unreported opinion.

In September 2015, the child support modification hearing was held, following which, the magistrate recommended that the child support obligation should be increased, but that Father should not be obligated to contribute to the children's private school tuition. Both parties filed exceptions. The trial court entered the magistrate's recommendations, but ordered that Father contribute to the private school tuition. Father then appealed the trial court's decision regarding the increase of his child support obligation.

Father filed another petition to modify child custody in April 2016, alleging that the children were miserable in Connecticut and had failed to adjust to the relocation. Mother filed a motion to dismiss, claiming that Father had failed to demonstrate a material change in circumstances sufficient to warrant modification of the existing custody order. Mother's motion was denied, and the case proceeded to trial. The circuit court determined that a material change in circumstances had occurred since the prior custody determination, and ordered that the children be returned to Maryland. Mother noted a timely appeal to this

Court. The parties' appeals were then consolidated into one appeal.[1]

Father, who is the Appellant/Cross-Appellee in these consolidated appeals, presents the following issues in the child support appeal, which we have rephrased:

1. Did the court err in addressing issues at the February 4 modification of child support hearing which Mother failed to plead?

2. Did the court err in requiring Father to contribute toward the cost of therapy sessions for the children and afterschool care expenses?

3. Did the court err in requiring Father to contribute toward the cost of private school tuition?

4. Did the court err in determining that mortgage payments made by Father's parents towards the family home constituted actual income?

5. Did the court err in finding that Mother was not voluntarily impoverished and that potential income should not be imputed to her when assessing the economic standing of the parties?[2]

Mother, Appellee/Cross-Appellant, in her cross-appeal presents the following issues in the child custody appeal, which we have condensed and rephrased:

[1] On March 7, 2017, Father filed an unopposed motion to separate the appeals. On March 31, this Court issued a Show Cause Order requiring Mother to demonstrate why the motion should not be granted. Mother failed to respond to the order, and on May 4, 2017, this Court denied Father's request to separate the appeals. Then, on May 18, 2017, Father filed a motion to reconsider the order denying his motion to separate the appeals. On July 3, 2017, this Court denied Father's motion to reconsider.

[2] Father originally phrased his questions in the form of the following assertions:

1. "The court erred in affirming issues which Appellee failed to plead and/or request."
2. "The court erred in awarding Appellee therapy and after school expenses."
3. "The court erred in awarding contribution toward private school expenses."
4. "The court erred in finding Appellant voluntary impoverished and imputing income to the Appellant."
5. "The court erred in failing to determine that Appellee was voluntarily impoverished and failing to impute income to the Appellee."

1. Did the court err when it denied Mother's motion to dismiss Father's motion to modify custody?

2. Did the court err in addressing issues that had been litigated after finding that Father had demonstrated that a material change in circumstances existed to justify relocating the children to Maryland?[3]

We consider Mother's appeal first, as the facts concerning the modification of the child custody appeal began prior to the child support obligation appeal. In regard to Mother's appeal of the child custody determination, we hold that Father failed to rebut the presumption under the existing custody order that it was in Daughter's best interests to live with her mother. Because there was insufficient evidence to support the court's determination that a material change in circumstances warranted modifying the prior custody order in regard to the Daughter, we remand, rather than reverse, the custody decision for the limited purpose of allowing the court to take additional evidence to consider whether a material change in circumstances has affected the welfare and best interests of Daughter, and if so, whether the change in circumstances for both children was significant enough to justify the removal of one or both children from the primary physical custody of Mother. We affirm the circuit court's determination in regard to Father's child

[3] Mother originally phrased her questions in the form of the following assertions:

1. "The trial court committed legal error and abused its discretion when it denied Appellee's motion to dismiss Appellant's motion to modify custody, and committed further legal error when it considered matters outside the pleadings without treating Appellant's dispositive motion as one for summary judgment."
2. "Appellant's motion to modify legal and physical custody, and other appropriate relief, and Appellant's request for a the [*sic*] appointment of a best interests attorney, were barred by the legal principles of res judicata and claim preclusion."
3. "The trial court abused its discretion in granting Appellant's motion to modify legal and physical custody and other approriate [*sic*] relief."

support obligations.

BACKGROUND

A. Factual Background in Child Custody Case

1. Prior Proceedings

In 2015, Father appealed a circuit court decision granting Mother primary physical custody of the children after she remarried and relocated to Connecticut. In an unreported opinion, *Wensel v. Zettergren*, No. 326, September Term, 2015 (filed March 30, 2016), we affirmed the trial court's decision. The facts and circumstances involved in that case form the predicate for the material change in circumstances analysis that we must undertake in the underlying case. Judge Arthur, writing for this Court, summarized the parent's divorce and the inception of litigation:

> In May 2012, Mother told Father that she wanted to separate and that she intended to seek a divorce. The parties voluntarily separated in September 2012, and on May 28, 2013, they entered into a custody and parenting agreement, which the Circuit Court for Montgomery County approved in a custody order on June 5, 2013. Under the custody agreement and order, the parents had joint legal custody over the children and shared physical custody: under a regular access schedule, the children would primarily reside with Mother, but Father would have them in his care on certain evenings and weekends. The court granted the parties a judgment of absolute divorce on January 27, 2014.
>
> The custody order required the parties to give 45 days' written notice if they planned to relocate outside of the Washington, D.C., area. By letter dated April 23, 2014, Mother notified Father that she planned to relocate with the children to Connecticut in August 2014. Shortly thereafter, in June 2014, Mother remarried and moved to her new husband's residence in Connecticut.
>
> In the meantime, on May 20, 2014, Father, representing himself, filed a motion to modify custody, visitation, and child support and to appoint a best interest attorney for the children. He argued that because Mother intended to relocate with the children, "changed circumstances" made the current

> custody arrangement "impossible" and required the court to grant him primary physical custody.
>
> On June 11, 2014, Mother, representing herself, answered Father's motion and filed a cross-motion to modify custody to give her primary physical custody of the children.
>
> In an order entered on July 8, 2014, the court denied Father's request for the appointment of a [Best Interest Attorney ("BIA"]. Two days later, Father moved for a custody evaluation or that the trier of fact interview the children.
>
> * * *
>
> In an order entered on July 29, 2014, . . . the court denied Father's request for a custody evaluation and deferred to the trier of fact on whether to interview the children.

Id., slip op. at 1-2.

On July 31, 2014, Father, fearing that the children would be moved to Connecticut before a final custody hearing took place, filed a "Motion for Immediate and Temporary Custody" of the children. Judge Arthur described Father's emergency motion:

> Father argued that Mother had violated a provision in the custody agreement prohibiting either party from removing the children from the Washington, D.C., area "for the purpose of changing the children's residence to a location outside of [the area] unless that party first obtains a written agreement from the other party or, in the absence of an agreement, obtains a court order." The certificate of service stated that Father had served the motion on Mother at an address in Olney, not at her current address in Connecticut.

Id., slip op. at 2.

On Thursday, August 21, 2014, Father appeared for an ex parte proceeding before Judge McGann, who attempted to call Mother by phone before the hearing started, but was unsuccessful in reaching her. At the hearing, Father

> told the judge that Mother had moved to Connecticut with the children and that she had obtained neither his consent nor a court order before doing so,

> in violation of the custody agreement. On the basis of Father's representations, Judge McGann granted Father's motion for immediate and temporary custody. After obtaining the order, Father enrolled the children in school in Maryland.

Id., slip. op. at 2.

The following Monday, Mother appeared before Judge Joan Ryon, and the following occurred:

> Mother insisted that she had not received notice of Father's motion and that she had only learned from Father over the weekend that the hearing had occurred and that he had been granted temporary custody. After determining that Mother had notified the court of her new address in Connecticut and that Father had served her with notice of the motion at a defunct address in Olney, Judge Ryon decided that Judge McGann had simply tried to maintain the status quo until the court could decide whether to modify the custody order. Judge Ryon inferred that Judge McGann had been concerned about whether Mother was going to enroll the children in school in Connecticut, which might prove disruptive if the court ultimately decided that they should remain with Father in Maryland.
>
> Judge Ryon vacated Judge McGann's order, "out of an abundance of caution," and added that she would include another provision requiring that "the children shall not be relocated out of Maryland or [the children's Catholic] school until such time as the matter can be heard" at the final custody hearing.

Id., slip op. at 3. After that ruling, Mother moved back to Maryland and rented an apartment so that she could exercise shared custody while the court's order on the proposed custody order was pending.

During the November 10, 2014, child custody hearing, Magistrate Segal heard testimony from the parties and other witnesses. Both parties were represented. Father testified

> that both children were heavily involved in after-school sports activities and that he played a significant role in this part of their lives. He said that when

> he had visitation with the children, he adhered to their usual schedules, including picking them up from school and assisting them with homework. He said that his parents saw Daughter and Son once or twice a week, came to their sporting events, took them on annual Christmas shopping outings, and lent the family money to cover the cost of the children's tuition.

Id., slip op. at 3.

Father told the court that Daughter had ADHD and was in a specialized learning program in school, but could not recall the specifics of the program. Specifically, Father testified that

> he addressed Daughter's problems with ADHD by helping her with homework and by ensuring that she took her prescribed medication. He admitted that there had come a time when he was reluctant to give her the medication because of the severe side effects. He said that he and Mother resolved a conflict over this issue by changing medications. He also said that, with regard to joint medical decisions, Mother would sometimes notify him in advance, sometimes notify him on "the day of" a decision, and sometimes notify him "after the fact."

Id., slip op. at 3. On cross examination,

> Father confirmed that Son's teacher believed that Son might also have ADHD. Mother wanted Son to get tested, but Father resisted because he believed testing might cause undue stress for Son. Father later testified, however, that he also believed that the testing was unnecessary because Son was doing well in school and showed no "outward signs" of the disorder.

Id., slip op. at 4.

Following the presentation of Father's case, Mother testified that

> after the divorce she moved her belongings to Connecticut partly because her new husband lived there, but also because she had been having financial difficulties in Maryland and had long wanted for herself and her children to be closer to her parents and siblings in Connecticut. She said the target date for total relocation with the children would be when the custody motions were finally resolved.

* * *

> She said that she and the children had now been to Connecticut many times and that the children knew and had become closer with their new stepfather and his two children.
>
> Mother spoke about the Catholic school that she hoped for the children to attend if she were permitted to obtain primary physical custody. She said that the school was highly regarded and that it was similar to the children's parochial school in Maryland. Her new husband was on the school's Board of Directors, one of his children attended the school, and one of the school's sisters was holding two places for the children pending the outcome of litigation. She said that when her children visited the school, they "felt very comfortable there ... because the atmosphere is so similar to what they're experiencing now[.]" She had discussed Daughter's accommodation plan with the same sister, and her new husband had told the school about Daughter's speech-related problems.

Id., slip op. at 4-5. Mother also testified that during the marriage

> she and Father had agreed that she would take on the role of primary caregiver, working part-time and taking the lead on matters such as working with the children with their homework. She had been in control of scheduling medical appointments and "follow-up care" for the children. She denied Father's claim that since the divorce she had only sometimes kept him informed of developing medical issues, but she did admit that on two occasions she had needed to "seize the moment" and, immediately thereafter, had informed Father of what occurred. She said that if she were to obtain primary custody, she would continue to inform Father of every joint decision regarding the "health and welfare of the children."

Id., slip op. at 5. With regard to Father's parenting style, Mother

> expressed "numerous concerns" over whether Father would be adequately equipped to have primary physical custody. She was most concerned about what she saw as his lack of experience in addressing or managing Daughter's ongoing medical needs. She did not believe that Father knew just how intensive the children's school needs can be, stating that "[w]hen they arise they seem to get brushed under the rug." She said Father "has been combative on every issue with every doctor and every professional" and that "[t]o get something implemented there's a process that he goes through [that] seems to take months."

Id., slip op. at 5. On December 4, 2014, the parties appeared before Magistrate Segal for the presentation of her findings and recommendations. The magistrate

> found "overwhelming [evidence] that the children have a close bonded, supportive, mutual, loving relationship with each of the parents." She emphasized that the children had developed strong friendships in Maryland and substantial bonds with Father's parents. In addition, she found that both parents, and particularly Father, were very involved in the children's extracurricular activities.
>
> Nonetheless, the master emphasized that "participating in extra-curricular activities is not the same [as] and can be distinguished from day-to-day caretaking regarding food, ... their clothing, their medical, their academic needs[.]" The master found that this "primary caretaker" role had belonged to Mother, who "has always generally been and continues to be the [one] who takes the lead[,]" and who most often scheduled medical appointments and spent the most time with the children on school issues. The master found that, except on two occasions, Mother regularly kept Father apprised of joint decisions regarding the children's welfare and consistently allowed him to provide input.
>
> By contrast, the master found that Father often was "riding on the coattails" of his former wife's decision-making. She expressed concerns as to whether Father had a full understanding of Daughter's educational needs, "what her deficits may be, and how to address those deficits[.]" She noted Father's inability to recall specifics about Daughter's accommodation plan, whereas Mother recalled "significant details." She found that Father offered inadequate reasons for resisting Son's ADHD testing, which "raised some concerns" about his parental judgment. She also found that Father "tends to minimize" Daughter's ADHD and academic disabilities and that, in contrast to Mother, Father did not appear to recognize that there may be some connection between the two.
>
> The magistrate noted that although stability in the children's lives was important,
>
> she did not "believe that [it] trumps the other factors." She placed great weight on the high value of maintaining stability for the children, not just in the current home life but with the parent who had played the role as their "primary caretaker" and who had been most in touch with their important needs. The master noted testimony indicating that Mother had been that primary caretaker on many key issues and had taken steps to ensure that the children's needs would continue to be met following any permanent move.

> The master presumed that the relocation would require adjustment, but she concluded that, in light of Mother's considerable efforts to minimize future disruptions in the areas of school, home, and health, "nothing that [she] heard . . . would lead [her] to believe that [the move] would [have] a significant adverse impact on the children." "It would simply be an adjustment."
>
> Lastly, the master concluded that Mother's reasons for moving were credible and genuine, and not born of any attempt to create more distance between Father and the children. She found that Mother had been always "consistent [in] providing [Father] with information and updates" and that she had developed an access schedule that was sensitive to Father's ability to see his children.

Id., slip op. at 7.

Magistrate Segal expressed concern that Father would not be "as supportive of the children's relationship and contact and access with their mother[.]" *Id.*, slip op. at 7. Ultimately, the magistrate recommended

> that the parents continue to exercise joint legal custody, with tie-breaking power belonging to Mother. She laid out a detailed visitation schedule, including liberal email and telephone access, but required that Father give 72 hours' notice before attending any "school and extracurricular activities of the children[.]" Finally, she recommended that the children remain in Maryland "through the end of the current either semester or grading period."

Id., slip op. at 8.

After the child custody hearing before Magistrate Segal, Father filed two sets of exceptions, complaining that, among other things, the magistrate failed to act in the children's best interests when she denied Father's requests to appoint a best interest attorney. Father also challenged the 72-hour notice requirement to attend school and extracurricular events. On March 26, 2015, the parties appeared for the exceptions hearing before Judge Ryon. During the hearing, the court considered the prior hearing, and examined the final recommendation. Judge Ryon then delivered her opinion:

> "I don't find that any of the Master's findings of fact, first level findings of fact, were erroneous. As to the inferences drawn and the conclusions reached from those facts, after exercising independent judgment based on the record, the Court is going to overrule the plaintiff's exceptions, with the exception of the 72–hour written notice. I would strike that[.]"

Id., slip op. at 9.

In a written order, the court also

> overruled all of Father's exceptions, save for the exception to the provision requiring Father to provide 72 hours' notice[.] The court awarded Mother primary physical custody, and it maintained joint legal custody, while setting forth a detailed visitation schedule. The court ordered that Father have full access to the children's healthcare providers, teachers, and academic and medical records, and it ordered that both parties enjoy "liberal telephone, email and internet access with the minor children."

Id., slip op. at 9.

Father noted his timely appeal to Judge Ryon's 2015 custody order. **App. 32.** We affirmed the decision of the trial court, and took notice of the thorough factual findings at both the magistrate and trial court levels:

> [T]here is no factual reason to reverse the court's ruling, which was based on findings (by the master) that were amply supported by evidence on the record.
>
> * * *
>
> The master noted testimony, for instance, supporting her findings that both parents are significantly involved in their children's daily lives and that the children had established strong family and school connections in Maryland. The master also heard ample testimony, however, to support her findings that Mother was and had been the primary caretaker, who had taken the lead on most of the important educational and medical decisions. Similarly, the master heard testimony to support her findings that Father, while very involved in sports-related and extracurricular activities, was far less involved in most major medical and academic decisions and indeed had difficulty recalling some salient details, such as the details of Daughter's accommodation plan. In addition, the master heard testimony to support the

> finding that Father, more than once, had either resisted the recommendations of third-party professionals regarding the children's welfare or had interfered with Mother's attempts to follow through on the recommendations.
>
> Although the master noted that the children enjoyed stability in Maryland, she also credited testimony that the children were adjusting well to Connecticut, in large part because Mother had gone to great lengths to minimize any disruptions that could attend a move. Lastly, the master noted testimony supporting the conclusion that Mother's reason for moving was genuine, and that, despite the distance from Maryland, she would keep Father informed of developments and would allow him to provide input on joint decisions regarding the children.
>
> These findings are subject to the legitimate disagreement of either or both of the parties. But on our review of the extensive record, we cannot say that any of the master's findings are clearly erroneous. The circuit court, in turn, did not err in its independent assessment of the master's findings in the face of Father's numerous exceptions. The court considered and discussed on the record each of the factual exceptions, and it found them all to be wanting. In particular, having fully reviewed the record, the court specifically stated, "I don't find that any of the master's findings of fact, first level findings of fact were erroneous." We see no reason to disagree.

Id., slip op. at 12.

In addressing Father's challenge to the trial court's ultimate ruling that there was a material change in circumstances that permitted the children to move to Connecticut with Mother, we held that the trial court did not abuse its discretion, and that it had

> considered the master's careful review of various factors, under established precedent, as well as the master's conclusion that, although stability in the children's daily life is important, their interests were best served, in this particular case, by maintaining physical custody with the parent whom the court viewed as having been the children's primary caregiver over the years. Taking full note of Father's concerns, the court tailored a detailed plan that ensured that he would have ample visitation as well as nearly unhindered email and telephone access with his children.

Id., slip op. at 12-13.

2. The Underlying Motion to Modify the Custody Agreement

a. Mother's Motion to Dismiss Father's Motion to Modify Custody

On April 19, 2016—not even three weeks after we issued the decision set out above on March 30—Father filed the underlying motion to modify legal and physical custody, alleging that material circumstances had arisen that justified modification of the existing custody order. Father argued, *inter alia*, that Mother had violated the legal custody provisions entered into by the parties in 2013 on numerous occasions, and unilaterally made all legal decisions to the exclusion of Father. Additionally, Father cited the children's displeasure in being away from him and their "unhappiness with the relocation" to Connecticut.

Father filed another motion on May 4, 2016, requesting the appointment of a BIA to determine the children's wishes in relation to the custody dispute. He alleged that the children "have been miserable" and have constantly felt uncomfortable while residing with Mother and their step-father in Connecticut. According to Father, the children repeatedly "expressed their great disappointment that the court would not even consider their wishes in the court proceedings" and wished to have a voice in the removal process.

On June 7, 2016, Mother filed a motion to dismiss Father's motion to modify custody, contending the issues raised in that motion had just been litigated, and that Father had acted in bad faith throughout the course of the litigation.[4] Mother also requested a

[4] More specifically, Mother asserted that Father had "filed five (5) petitions for contempt against Ms. Zettergren[,]" and that the petitions "were frivolous." She alleged that Father's "hatred and distain for" her had "cloud[ed] his judgement," "fueled his litigiousness, and contributed to his initiation of [] unjustified proceedings[.]" Finally,

hearing on the matter. Due to a scheduling conflict, the hearing was postponed until October 7, 2016, before Judge Dugan.

Meanwhile, on June 17, 2016, the circuit court ordered, over Mother's objection, that a BIA be appointed in the matter. Once the court had granted the appointment of a BIA, counsel for both parties conferred and agreed to appoint a separate BIA.

On October 7, 2016, the parties appeared for the hearing on Mother's to dismiss Father's motion to modify custody. Ms. Webb, the BIA, agreed upon by the parties, appeared as well. The trial court reserved his ruling on the matter until October 19 so that the BIA could conduct a home study and visit the Connecticut home to assist the court in determining whether the children's unhappiness constituted a material change in circumstances.

At the hearing on October 19, Ms. Webb reported that she had had an opportunity to speak with Mother, the step-father and his biological daughter, Daughter, Son, and the children's therapist. She testified that "one of the children had a strong preference" against staying in Connecticut and wanted to speak to the court directly. She added that she was unsure whether the child was "really excited to miss school" or actually felt the "need to speak with the judge." Accordingly, Ms. Webb felt the "need to speak with them further." Ms. Webb urged the court not to grant the motion to dismiss because the children's "voice hasn't been before this court, and so if we were to deny it now, I think that would be a

Mother asserted that Father's attempt to "re-litigate matters which have already been fully adjudicated" constituted bad faith and that his continued attempts to change the custody arrangement proved "that he is incapable of placing the best interests of the children before his own wants and desires."

continued, lingering issue. Good or bad. So sometimes maybe we just have to address it and hopefully that will help stop these jackets from accumulating." In response, the court denied Mother's motion to dismiss Father's motion to modify custody, noting that if Son "hasn't made the change, hasn't made the adjustment, I think the court should take a look at it, and I think it's appropriate to do that." The court then set trial for November 28, 2016.

b. Second Trial on Modification of Custody

November 28, 2016 marked the first of the three-day trial on Father's motion to modify child custody. Both parties were represented by counsel. At the close of the parties' opening statements, the parties entered an agreement that any "statements the children have said to witnesses" would be exempt from the hearsay rules.

At trial, the paternal grandparents testified that they were active in the children's lives and saw the children at least once per week while the children were in Maryland. The grandmother said that during the Wensel marriage, she and her husband would routinely care for the children while they were sick if the parties were unable to do so. She told the court that when Daughter had graduated from middle school, the she and her husband went up to Connecticut to attend the graduation ceremony. She testified that the Wensel family was seated in a different area from the rest of the family during the ceremony, and that after the ceremony, they were permitted to see Daughter for only a few minutes before Mother took her to an after party. The grandmother also informed the court that while the children were living in Maryland, they had paid for the children's tuition, but had not contributed towards the tuition since the relocation. The paternal grandfather also testified that during a visit to Maryland, he had observed that the children did not want to return to Connecticut,

and that the children considered Maryland to be their home, although he had never actually heard them say so directly.

Father testified that his children had been doing fairly well in school and were "B, C students[.]" He believed that Son's grades remained the same, but that Daughter's grades had dropped slightly after the relocation. Although he shared joint legal custody with Mother, Father testified that he had yet to receive a report card from the school, and that he relied on the children to bring the report cards with them during visits. Father also testified that in general, Mother had failed to keep him adequately updated and informed on some legal custody matters, including school activities and sporting events. Additionally, Father said that Mother failed to tell him about the therapy sessions that the children received or the children's enrollment in afterschool care.

Father told the court that, according to the children, they are not allowed to have friends visit them in their home in Connecticut. Later in his testimony, Father contradicted his prior testimony and noted that Son is allowed to have one friend in the house at a time, while Mr. Zettergren's children can have several friends in the house at one time. Regarding the discipline in the household, Father relayed to the court that Son "doesn't like all the rules" imposed in the house in Connecticut, including Mr. Zettergren's prohibition on drinking soda while in the car, and the limitation of only being able to take "[o]ne glass out of the cabinet in the kitchen" at one time, and that the children are not allowed to cook for themselves in the kitchen. Father also testified that according to what Son has told him, he is "in constant battle with [Mr. Zettergren]."

Father relayed that his Son has been "very vocal" about wanting to return to

Maryland because "[a]ll his friends are here. His whole life has been here. He wants to come back and go to school where he's always gone to school, be with his normal doctors, be with all his friends, be, you know, in his home."

In regard to Daughter, Father testified that she loves sports, and that she had played soccer at Mercy High School. Father told the court that if Daughter were to return to Maryland, he would "work with her on the sports[.]" He believed that Daughter "had adjusted, but would prefer to come back and live in Maryland and attend school at Good Counsel." He said that Daughter told him "that Mr. Zettergren [] has informed her or told her that she is the cause of all the problems in the house" and that both of the children "feel like outsiders" in the Connecticut home. He testified that Daughter had expressed an interest in applying to Good Counsel, that she had applied on her own initiative, and that she had been accepted. When pressed further on the matter, Father admitted that while Daughter completed the substantive portion of the application, he did the paperwork, but omitted Mother's contact info from the application, and failed to inform her that he had submitted the application on Daughter's behalf.

Father told the court that, in his opinion, Maryland would be a better environment for the children because his brother lived in the area, and his parents were heavily involved in the children's lives. Father noted that the children were not as close with Mother's parents, who lived in Connecticut. Father also reported to the court that Mother had breached the custody order on several occasions because she routinely refused to meet at the halfway point to exchange the children, and had withheld the children from visiting with him on several occasions.

Mother then testified about the living arrangements in the home in Connecticut. She told the court that Mr. Zettergren has two children from a prior marriage that live in their house on Tuesdays, Wednesdays, and every other weekend. Mother refuted Father's claim that the children are forbidden from having friends visit, and added that the "one rule in our house [is] that if all four children are there, no one is sleeping over. It just creates chaos."

Mother reported that the children had made numerous friends in Connecticut and had developed strong relationships with their step-siblings and step-father. She told the court that she believed the source of Son's trouble adjusting after the move stemmed primarily from Father's behavior. She explained that Son had begun to experience mood swings, and that his outbursts occur "[e]very time he gets off the phone with his father[.]" She also said that she had noticed changes in the children's demeanor "when they visit their dad and when they're dropped off back home[.] [T]here's an adjustment period." Mother recalled an instance where Son "had made the soccer team in Wallingford[, Connecticut]. And he was very excited. It was his first experience there where he was invited to do something and he made the team. His dad called shortly after that and he got on the phone with him. I'm sorry. He just started crying. His father was yelling at him." She related that Father told Son, "[w]hy did you think it was okay to try out for a soccer team when you don't, it hasn't been determined that's where you're going to live."

Mother denied Father's allegations that she had taken away the children's internet access to prevent them from speaking with him, and explained that the children are required to turn in their phones before bed, which is routinely between 8:30 and 9:30 pm.

Addressing Father's allegations that the children are not allowed to cook, she clarified that the children are permitted to cook under adult supervision.

Mother testified that Daughter had been prescribed ADHD medication, but Daughter had refused to take it after returning from Father's care. She explained that she and Father had disagreed whether Daughter should be tested for ADHD.

Mother also testified that Son had shadowed at Xavier, which is an all-boys high school in Connecticut, and told the court that he would not have asked "to shadow with his friends at Xavier High School if that's something that he really didn't want to do[.]" She related that her parents lived "about 20 minutes away" and that the children saw their maternal grandparents "[s]omewhere between every two and three weeks."

According to Mother, although Father gave "the children a chance to really, you know, release and have fun, to get away from, you know, academics and things like that[,]" she had several concerns about his parenting, including not being in touch with Daughter's needs, not understanding the structure that teenagers require, and failing to properly supervise the children, leaving them to "do whatever they want." She testified that since the relocation, Father had continually called the children, "telling them that he was coming to get them, that the sheriff was coming to take me, that they would be coming back with him and what sports did they want to be signed up for in the spring."

The court then heard testimony from Mr. Zettergren, who expressed the view that the children's adjustment to the relocation had been "very rough" but they did "very, very well" and they are "just absolutely fine." Son had a good relationship with his step-sisters, and he had numerous friends in the neighborhood. Mr. Zettergren told the court that Son

was a talented athlete, especially in football, and that Xavier's football program was "pretty darn good."

He also testified that Daughter and her younger step-sister "are best friends. They, they do everything together when they're here, you know." He denied allegations that he had told Son that he did not like him, or that Daughter was the cause of the problems in the house. However, Mr. Zettergren expressed concerns about Daughter because he had seen her "FaceTiming or SnapChatting" in her room with boys in either a bathing suit or a bra. He added, "I mean she's talking about sex. She's talking about it. It's going to happen. [Mother] and I are very concerned about this. So, you know, she's monitored very closely."

Mr. Zettergren testified he could sense "that there are loyalty conflicts that the kids have pertaining to their two parents[.]" He explained that on one occasion the children told him that they hated him, but that they have also told him that they loved him. Daughter had told him that "you know, my father hates you. . . . My father tells me you broke up our family." He explained that since the relocation, he has attempted to distinguish himself from the children's biological father. "I continually tell them the same thing. I'm their stepdad. I'm not their dad." He said that he tried to emphasize that "[i]t's our Connecticut home" to try to make the children feel welcomed. Mr. Zettergren noted that when the children were in Father's care, they were routinely prohibited from communicating with Mother. But, despite the clear animosity from Father towards him and Mother, he tells the children "that their dad loves them. . . . I've never held that back. Your dad loves you."

After hearing closing arguments from both parties, the court turned to the BIA for her recommendations. Ms. Webb started out by stating that she had really "struggled with

this case," and observed that "there is a nice house in Connecticut and there is a nice house in Maryland, and both parents seem to love their kids very much . . . ." Still, she recommended that custody be modified and that Father should be awarded custody of the children. To support her recommendation, Ms. Webb reported that Son "is adamant that the only way he's going to be happy is to be living back in his home in Maryland. He has never wavered, he's been plain and clear since the beginning, that is what he wants[.]" She also admitted that there may have been "some brain-washing going on," and that she "believe[d] that each parent has had discussions with these children either directly or indirectly in trying to influence in some way or another, yes."

Ms. Webb also reported that she was "concerned about [Son] if he doesn't move back" to Maryland, but expressed doubts as to "different scenarios [in which] he comes back here, has truly appreciated what his Mom does for him and how much he might miss her[.]" Ms. Webb added that the decision regarding Daughter was more difficult because "she's not been as vocal with me[.] . . . I think she feels torn." She pointed out that Daughter did really well academically in Connecticut, and that she has a close relationship with her step-sister and "[s]he does have an accommodation at the school, she's on sports, she's very excited about softball that's coming up." She noted that although Mother has been the primary caretaker throughout the marriage, Father "hasn't had the opportunity to" prove himself. She also stated that in her opinion, it would be a "huge loss" if the children were separated from their paternal grandparents in Maryland.

Ms. Webb explained that part of what makes the situation difficult is that the children keep returning to Maryland,

> they come back here and they stay here for long periods of time for the summer, they come back at least is sounds like once a month, and they're probably reminded of this is how it was and this is how it felt, and this feels good to me, especially for Shane. He feels very comfortable in this house, he does not feel comfortable in the Connecticut home and I can see that. He again, its loud, you have a lot of kids in the home, you have four kids all going in different directions, all busy, you have Mom with a new relationship, he's competing for time and attention from her, it's just a reality, she's working, it's the new relationship.
>
> * * *
>
> . . . . So I don't think the adjustment for him to come back to something he already knows, it's not something new, would be that hard, it's a matter of how much would he miss his Mom and how much does he recognize that Mom really does for him and whether or not his sister would join him, how much he'd miss her and that relationship and that way we'd have to factor something to make sure that stays in place.

The Court took the matter under advisement. The next day, Judge Dugan issued his oral opinion. The judge thanked the BIA for travelling to Connecticut to see the children in their home there, and noted that, "had Ms. Webb not gone to the extents that she'd [*sic*] gone to in this case, I might well have dismissed it."[5] The court then acknowledged that Son and Daughter are "two completely different kids, and both have taken two completely different positions in this case[.]"

The judge stated that he believed that there had been a material change of circumstances based on the BIA's recommendations and the testimony presented. He observed that it had "been almost two years since the children ha[d] been uprooted and moved to Connecticut" and they expressed to the BIA that they were "not comfortable" in

[5] The court observed, mistakenly, that counsel for both Mother and Father asked for the appointment of a BIA.

their new home. As to the children's preferences, the court found that the Son expressed "in no uncertain terms" that he desired to come back to Maryland to his` friends, to Father, to Saint Peter's, and to his friends. The court found that the situation in the Connecticut home was a "fragile situation[,]" and that Mother's new husband was not connecting well with the children emotionally. Additionally, the court believed the testimony proffered that Son was having mood swings, adding that "if he hasn't adjusted now, how much harder is it going to be for him to adjust?" The court stated:

> [W]hat's so defining to the Court is that [Son] has made his position clear, despite the fact that all of the outward signs might point to the fact that he's adjusted, right? I mean he's a snake on the football team, I assume he's a starting halfback or something. Generally, your better athletes are the quarterback and the halfbacks. He's playing basketball and lacrosse, as well.
>
> His grades are about the same. He's going to school. He's not skipping school. You know, he's helping with the chores. It's the same type of school that he was in before. He's in a nice house. There's plenty of kids in the neighborhood. So, why is it that he wants to leave?
>
> Well, . . . he's having mood swings. He needs counseling. I mean that's what was put forth in the pleadings that were filed before this because an issue by Ms. Zettergren.
>
> I believe him, and, more importantly, Ms. Webb, his best interest attorney with the duties that she's been given, believes him, and, in fact, says to me he would be devastated, devastated.
>
> Now, he's going on the record saying I don't want to go. . . . He knows his mother's going to hear. He knows Craig's going to find out. What would it be like to send him back after all that? Is he going to feel more at home? I don't think so.

Regarding Daughter, the court noted that "it doesn't appear to be as clear." The court opined that "she was likely upset from the move, but was less vocal concerning her preferences." However, Daughter informed the BIA that she did not "want to be separated

from [her] brother." The judge noted that after two years, he believed that "there has not been a real adjustment[.]" The judge conjectured that:

> I doubt she's happy that she moved to Connecticut in the first place. I believe that she probably didn't want to go if somebody had asked her at the time. Why would she want to leave the house that she knew, and uproot herself, and go to Connecticut, and move in with two girls that she, essentially, doesn't know, other than she's met them, I guess, and visited with them a little bit before it happens?
>
> So now, she's got to leave her school, leave her friends, leave the only home she's known, move up to Connecticut, and go to a new school, new friends, live in a house with a new dad, a guy she doesn't know, she didn't pick him, mom picked him. There's got to be some resentment there, and some upset there.

The court noted that coming back to Maryland would be a smooth transition for the children, as Daughter "has been accepted at Good Counsel" and has "told people that she'd like to go[.] . . . [T]hey have the Ryken Program for her ADHD." Additionally, the court noted that Saint Peter's and a Catholic education in Maryland went towards the "physical, spiritual, and moral well-being of the child[ren]," and believed it to be in their best interest to return.

The trial court placed a great deal of weight on the presence of the paternal grandparents in Maryland, and the active role that they had previously played in the children's lives. Although the court noted that Mother provided more structure as the primary caretaker during the marriage, the court believed that because of past transgressions and Mother's occasional refusal to cooperate with the custody order, Father would provide structure for the children and communicate with Mother.

In addressing the children's home life, the court noted that the house in Connecticut

was spatially limited, as the Mother, her husband, and Son all shared a bathroom. Additionally, the court noted that because of the transitional period, the children felt like they were "competing for affection" from Mother, and did not feel comfortable within the home. The court also took notice of the strained relationship between the children and Mother's new husband, which further hampered their mental and emotional wellbeing. Ultimately, the court concluded:

> Monitoring a teenage girl and disciplining her isn't going to be easy. It's hard work to discipline a kid. It's not fun, but I'm not going to separate these kids from each other. I won't do that, and I really believe that it's in their best interests to return to an environment where the sole focus of dad and the grandparents are on them, and where they don't have to continue to try and adapt and adjust to a change they didn't want, and I don't believe has been in their best interests.

The court granted the motion to modify custody, and awarded primary physical custody of both children to Father. Mother noted her timely appeal to this court.[6, 7]

[6] We note here that, although the trial court granted Father's motion to stay enforcement of child support arrears pending appeal, the court denied Mother's motion to stay the December 22, 2016, order.

[7] Father, in his reply brief, argues that Mother's brief is defective and should be disregarded because she captioned her brief incorrectly as a cross-appeal without filing a notice of cross appeal pursuant to Maryland Rule 8-202. Father's argument, rather than Mother's brief, is defective.

Father's appeal of the child support obligation determination and Mother's appeal of the child custody modification determination were consolidated by this Court. Mother correctly titled herself as "Cross-Appellant" pursuant to Maryland Rule 8-111(a)(1), which reads:

> (a) **Formal designation.** (1) No prior appellate decision. When no prior appellate decision has been rendered, the party first appealing the decision of the trial court shall be designated the appellant and the adverse party shall be designated the appellee. Unless the Court orders otherwise, *the opposing parties to a subsequently filed appeal shall be designated the cross-appellant and cross-appellee*.

B. Factual Background in the Child Support Case

1. The 2015 Child Support Modification Hearing

After Magistrate Segal bifurcated the child support and custody issues in the underlying case on November 10, 2014, a hearing was held on September 22, 2015, before Magistrate Wittier on Mother's request to modify child support. Early in the proceedings, the parties disagreed about which issues were properly before the court. The underlying motion was a form Motion to Modify Child Support filed by Mother who was unrepresented at the time. Father's counsel argued that because Mother had "checked the box" on the form stating that "child support be paid . . . directly to the person who has custody" and asked, on the form "that [Father] be ordered to provide health insurance," those were the only contentions before the court. In other words, he argued the court could not disturb the amount of child support but determine only that it be paid directly to the person who had custody. He also contended that, because of the lack of any perceived issues properly pled before the court, he opted to not engage in any discovery.

In response, Mother's counsel argued that she checked the box for "all appropriate relief," and therefore, all matters were properly before the court, including payment of Father's arrears. Mother requested child support, retroactively applied to January 15, 2015, "back to when the kids actually got" to Connecticut, and to incorporate "monthly tuition, aftercare and tutoring expenses," along with the "uninsured costs . . . for the children's therapy" insofar that they are "extraordinary medical expenses[.]" The magistrate agreed

(Emphasis added). Therefore, Mother's nomenclature on appeal is correct.

with Mother that the scope of the proceedings was not limited as Father proposed.

Despite Father's disagreement that the issue of increasing child support was not properly before the court, he attempted to introduce direct testimony of a vocational rehabilitation expert, who would testify that Mother was working only 30 hours per week and was earning far below "her provable potential income" to prove that she had voluntarily impoverished herself. Mother's counsel objected to the expert testimony on the grounds of notice and prejudice. Although the expert witness was once identified two years earlier in the divorce proceedings and had interviewed Mother at that time, Mother's counsel was not alerted to Father's intention of using the witness again at the child support modification hearing. Ultimately, the court elected to exclude the testimony of the vocational rehabilitation expert as it was a violation of the scheduling order.

Mother took the witness stand and testified as to her employment situation. Mother testified that she made an internal transfer with the company that she worked for in Maryland, which had a subsidiary office in New York called Hudson Valley Radiology. Mother testified that her monthly income with Hudson Valley was roughly $4,000. Mother further testified that she had been working 30 hours per week at her new job, which was about 75 miles from her new home, but had been applying to jobs closer to her home that would allow her to work closer to 40 hours per week. Her commute to and from work typically took roughly an hour and 15 minutes, and put her home around 6:30-7pm. Mother moved to admit her paystubs into evidence, and Father objected as he "never had an opportunity to review them all." The court overruled Father's objection, and allowed the paystubs into evidence.

Mother testified that during the marriage, the parties had an "agreement" that Son and Daughter would attend private school. In December 2014, Mother began researching schools in Connecticut, and found Holy Trinity, a private school that was similar to the school the children had attended in Maryland. Mother then testified, over Father's objection for failure to plead, that the children's tuition at Holy Trinity, a private school in Connecticut, was $745.20 per month, and aftercare, for the days that Mother worked, was $450 per month. One of Mother's stepdaughters also attended Holy Trinity, and Mr. Zettergren was on the board of directors at the school. Mother testified that both Son and Daughter were involved with several extracurricular activities at Holy Trinity, and had adjusted well to their new school. Son had ended the previous semester with "all As and Bs" but Daughter continued to struggle academically. Mother testified that she had suggested that Daughter enter tutoring, but Father opposed it "[b]ecause there was a cost involved." Mother overruled Father's suggestion that Daughter not be enrolled in tutoring pursuant to her tie-breaking authority relating to legal custody. Mother testified that Daughter is tutored for one hour per week by the school librarian in all subjects, which costs $180 per month.

Mother then testified about costs associated with counseling therapy for the children in Connecticut in an attempt to retroactively collect contribution costs from the date that Mother filed for modification of child support. Father strenuously objected to the issue of therapy contribution, arguing that it was not in any of the pleadings and the issue would need to be framed as an enforcement action for the court to have proper authority to address it. Mother's counsel argued that costs for the children's therapy was pled in the "catchall

appropriate relief provision" contained in her pro se motion to modify child support filed in June 2014, which was granted. The court sustained Father's objection, but chose to "deal with it on a question by question basis."

Mother testified that the children see a therapist two or three times per month, and pay a $20 co-pay per visit. As Father carried insurance through his employment with Verizon, the remainder of the cost was covered by insurance. Mother also testified that the children have been seeing a therapist since the separation, while the children were still in Maryland. Although no expert witness was present to testify to the children's diagnosis, Mother was permitted to testify that the children were generally benefiting from the therapy sessions.

Father then testified as to his financial situation, including the issue of the mortgage on the family home. Father testified that he received a two percent annual raise in August 2015, and that his gross income per month is $6,664.12. Father owns a Camero, a Tahoe, and a motorcycle, and testified that the vehicles are paid off.

Addressing the issue of the mortgage on the home, Father testified that after the separation, he purchased Mother's interest in the home, had the home retitled in his name, and refinanced the mortgage for the remaining amount owed. Father explained that his parents are the lien holders on the mortgage, and that out of the full $2,412 that is owed per month on the mortgage, he pays his parents "what [he] can afford[,]" which was approximately $135 per month. Father claimed Mother has not asked him, either individually or through counsel, to increase his payment beyond the $355 contained in the June 5, 2013 custody order.

Regarding the children's education at Holy Trinity, Father testified that he had seen Daughter's report card from the second semester of 2015, but had not seen a recent report card. Overall, Father opined that her grades "seemed okay[,]" but admitted that he did not know her grades. Since the children started at Holy Trinity, Father has visited the school two times, and met with their teachers on one occasion. Father then testified that he was not opposed to the children continuing therapy in Connecticut, but did oppose the children attending Holy Trinity because he "can't afford it[,]" "the student/teacher ratio is extremely high as far as students to teacher[,] [t]hey have to go off-site to do any of their extracurriculars[,]" and Holy Trinity does not offer sport programs "that are available to them in the public school system." Father admitted that Daughter "would benefit from tutoring[,]" but noted that "[a]nyone would benefit from more instructions."

He testified that it was his belief, based on research that he had done of the area, that public schools in the Wallington, Connecticut area were "better equipped to deal and address with [*sic*] [Daughter]'s ADHD than a private school[.]" While he agreed that the children had been in private school virtually their entire lives, it was "simply because [his] parents were paying . . . for it." However, since the children had relocated to Connecticut, Father's parents were no longer willing to pay for private education.

Because of his monthly trips to Connecticut to see his children, Father testified that he has incurred additional costs for travel, hotel accommodations, food, tolls, and repairs to his vehicle because of the added mileage. Father contested the afterschool care itemized bill requested by Mother because Daughter is "qualified as a [] Red Cross certified babysitter[,]" making her capable of caring for herself and her younger brother, obviating

the need for an afterschool care program.

During closing arguments, the parties briefly mentioned attributable income in relation to voluntary impoverishment. Father's counsel made the argument that Mother's "income needs to be what her provable potential income is. There is no basis for making a retroactive award for the itemized things that she is requesting retroactive award for." Mother's counsel responded to this argument, reminding the court that "it cannot impute income without finding voluntary impoverishment" and that this case did not involve voluntary impoverishment.

2. The Magistrate Court's Oral Recommendations

On October 29, 2015, at 10:00 am, the parties appeared in front of Magistrate Wittier for the presentment of her oral recommendations regarding the modification of child support. Magistrate Wittier found Father's testimony to be largely unpersuasive, and recommended a substantial increase in the amount of child support owed. Addressing the issue of Father's parent's contribution to his mortgage, the magistrate found "that in accordance with Maryland law an additional sum of $2,277 per month should be added to [Father]'s income calculated as follows. $2,412 less $135." The magistrate noted that in general, "the parties are not able to communicate effectively for the benefit of the children[,]" but was not persuaded by Father's testimony that Mother "does not discuss issues with him in advance including school placement and the children's medical care." The magistrate also found that Father did not notify Mother of his intention to call the vocational rehabilitation expert–who, ostensibly, would have testified that Mother had voluntarily impoverished herself–until the eve of trial, in violation of the post-judgment

scheduling order, and was properly excluded from testifying.

With regard to the modification of child support, the magistrate made three child support calculations in addition to an assessment of arrears. The magistrate found that Mother's relocation with the children to Connecticut, coupled with the parties' changes in income, established the fact that a material change had occurred. As to the first finding, because Mother did not begin to incur tutoring and afterschool care expenses until September 2015, the magistrate recommended "that commencing and accounting January 15th, 2015 through August 31st, 2015 [Father]'s child support obligation is $1,604 per month." Second, after factoring tutoring and afterschool expenses, the magistrate recommended "that [Father]'s child support obligation commencing and accounting September 1, 2015 through October 31, 2015 is $2,037." Finally, the magistrate found that "commencing and accounting from November 1st, 2015 and continuing on the first day of each month thereafter[,] . . . [Father] shall pay through an earnings withholding order the sum of $2,037 in child support to [Mother] for the support of the minor children."

> Addressing the issue of arrears, the magistrate recommended the following:
>
> $880 for 17 days in January plus $11,228 for the months of February through August 2015 plus $4,074 for the months of September and October 2015 less the sum of $355 per month that the [Father] has paid for the months of January through October for total payments made by [Father] of $3,550. That yields total arrears of $12,632.

The magistrate also recommended that Father pay $200 per month towards the total arrearage until it was paid in full.

3. The Parties' Exceptions to the Child Support Recommendations

After Magistrate Wittier gave her oral recommendations as to modification of child

support, both Mother and Father filed exceptions to the recommendations. Father alleged, among other issues, that the magistrate committed error when she: 1) considered matters not pled by Mother, namely the children's tutoring, extracurricular expenses, afterschool care, and therapy sessions; 2) failed to determine that Mother had voluntarily impoverished herself and instead imputed gift income to Father; 3) failed to exercise discretion as to the parents' financial ability to meet the needs of their children; 4) considered expenses unilaterally determined by Mother such as enrollment in private school, placement in afterschool care, and tutoring; and 5) failed to consider Father's transportation and lodging expenses during his visitation of the children when crafting a support order. Mother alleged a single error, namely that the magistrate erred in omitting contribution from Father "for the minor children's private school tuition proportionate to his adjusted actual income[.]"

The exceptions hearing was held on February 4, 2016, before Judge Smith. During the hearing, Father drew the court's attention to the issue of lack of sufficient notice in the pleadings, noting the fact that Mother checked neither the box alleging that the "expenses for the children have substantially increased[,]" nor did she check the box that "Father's or Mother's income ha[d] substantially increased." The only box that Mother checked, Father averred, was to "order any other appropriate relief. . . . And so the question then becomes, what does that mean?" Because the request for specific relief was not pled, Father continued, Magistrate Wittier "had no authority, discretionary or otherwise, to rule upon a question not raised as an issue in the pleadings." In response, Mother argued that Father had notice of the issues that were pending before the court, as there were "pleadings by both parties . . . [and] a scheduling order" was in place. Mother continued that Father's

determination to not engage in discovery in this case was his decision, and that he had to face the consequences of his strategic choices.

Father also alleged error in the magistrate's handling of the after-school care costs, the child therapy sessions, and that funds that Mother's new husband had been providing to her while she was working part time were not imputed to her in the same fashion that the money from Father's parents was imputed to him. Finally, Father alleged that the magistrate's failure to consider Father's transportation and lodging costs during his visitation with the children in Connecticut was in error.

Mother alleged that Magistrate Whittier erred when she did not assess payment from Father for private school tuition at Holy Trinity, alleging that "the totality of the income, the prior [history of private school] education," and Father's choice to provide Daughter with a flyer from Good Counsel, which Mother argued was a ploy to cajole the children to return to Maryland, "all suggest[ed] that the magistrate erred in the second-level facts which relate to the contribution for private school education." Responding to these arguments, Father asserted that while the children attended private school in Maryland, the parties had agreed that this was contingent on the paternal grandparents contributing to the cost, and without that help, Father could not afford it. Additionally, Father alleged that he was excluded from the decision-making process of where to send the children to school. The court informed the parties that it would file judgment in writing.

On April 13, 2016, the trial court entered its written order on the parties' exceptions. In tackling the issues presented by both parties, the court noted "that the relocation of the children to Connecticut and the parties' changes in income were material changes." The

trial court then discussed all of Father's exceptions, first noting that "[a] motion to modify child support, no matter which party requests the relief, opens the door for the court to consider all aspects of support, in light of the best interests of the child[.]" Therefore, the court continued, the magistrate's inclusion of costs associated with Daughter's tutoring, afterschool care, extracurricular activities, therapy sessions, and any other expenses "related to the care of the children" into the final child support order was not in error. Additionally, the trial court adopted the magistrate's finding that Mother was not voluntarily impoverished, and that Father's parent's contributions to the payment of the mortgage was properly considered income. Finally, the trial court considered Father's contention that he should receive a travel credit for his trips to Connecticut to see the children, and awarded "reasonable travel expenses" in the child support guidelines, but declined to include the activities and food costs for the children's trips to Maryland.

The trial court then addressed Mother's sole contention that Father should have been obligated to contribute to the children's private school tuition, specifically giving great weight to the "children's need for stability and consistency" and declining to displace the children once again. In its written opinion, the court ordered that Father contribute to the cost of private tuition, and increased his child support payment by "$511 per month; in other words, 27.6% of [Father]'s income would go towards child support."[8] In support of

[8] In a written order, the trial court established Father's monthly obligation to be "two thousand five hundred sixty-seven dollars ($2567)[.]" This award included "an additional one hundred fifty dollars ($150) per month" to be included in the payment until the arrearages owed were paid in full.

this award, the trial court reviewed Father's financial statement, and found "that this additional financial obligation would not impair his ability to support himself or his children when they are in his care." In a separate order, the trial court additionally established Father's arrears, which included the contributions towards private school education, at $28,995 as of April 1, 2016.

On April 25, 2016, Father filed a "Motion to Alter or Amend, or in the Alternative, Motion to Revise Court's Order," alleging that Judge Smith's Order following the February 4, 2016 exceptions hearing was in error. Father also requested to be heard on this matter. On July 21, 2016, the court denied[9] Father's motion to alter Judge Smith's Order. On August 22, 2016, Father noted his timely appeal to this Court.[10] Roughly one month after filing for appeal, on September 26, 2016, Father filed yet another motion to modify child support, alleging that there had been a material change in circumstances since the last child support order. In response, Mother alleged, among other things, that Father had yet to

[9] Although the trial court denied Father's Motion and affirmed the trial court's ruling on Father's exceptions, it noted that "the Court was incorrect in stating that this was an above the guidelines [child support] case."

[10] Father filed a motion to alter or amend Judge Smith's order overruling his exceptions on April 25, 2016. Pursuant to Rule 3-534, Father had 10 days from April 13, 2016 to file a motion to alter or amend Judge Smith's exceptions hearing order. Father's 10 day mark fell on Saturday, April 23, 2016, which extended his time to file a motion to alter or amend the judgment until Monday, April 25, 2016, making the filing of this motion timely.

Father filed his appeal to this Court on August 22, 2016. Pursuant to Rule 7-104, Father had 30 days to note his appeal of the court's denial of his motion to alter Judge Smith's order. The court denied the order on July 21, 2016, making the last day to note a timely appeal on August 20, 2016, which was a Saturday. Accordingly, Father's time to note his appeal was extended until Monday, August 22, 2016, making his appeal in the instant matter timely.

comply with the newest child support order, and had been sending her checks for $355 per month, reflecting the amount in the original Custody Agreement.

We will supply additional facts as needed in the discussion.

DISCUSSION

I.

Child Custody

A. Motion for Sanctions

Father asks this Court to sanction Mother based on (1) her failure to attend alternative dispute resolution ("ADR") and (2) defects in the brief and appendices she filed in this Court on May 4, 2017, which purportedly prejudiced Father. First, we decline to sanction Mother for her failure to attend ADR. Father originally sought sanctions on this basis back on January 9, 2016. In a February 22, 2016, order, this Court denied the motion but granted Father leave to seek sanctions in his Appellant's brief. Rather than doing so, Father did not request the sanctions until he filed his reply brief with this Court. As a result, he deprived Mother of an adequate opportunity to respond to his motion and, as a result, limited this Court's understanding of the merits of Father's claim. Consequently, although we maintain the authority to sanction a party for its failure to participate in mediation, our "inherent discretion never requires [us] to do so," and we decline to do so here. *Pinsky v. Pikesville Recreation Council*, 214 Md. App. 550, 590 (2013).

Second, we perceive no prejudice to Father from any defects in Mother's briefing. As Father notes, this Court has already issued several orders addressing the technical defects and faulty pagination in Mother's briefing and appendices. Among those

orders was one entered on October 13, 2017, granting Father an extension of time to file his reply brief based on the defects in Mother's briefing, and denying his motions for attorney's fees based on those defects. In his reply brief, Father asks this Court to award him attorney's fees based on the *very same* grounds we denied in our October 13 order. This issue was already decided and we will not disturb our prior ruling.

B. Denial of Mother's Motion to Dismiss

Mother contends that the court erred by not granting her motion to dismiss Father's motion to modify custody. She argues that when she filed her motion to dismiss, Father had attached no exhibits to his motion to modify custody and was merely attempting to relitigate matters already adjudicated. Specifically, Mother points us to the fact that at the first hearing on the motion to dismiss, Father could not provide precedent for his claim that the children's failure to adjust to their new home constituted a material change in circumstances. To this end, Mother argues, the court erred by allowing the BIA to travel to Connecticut and report back without then treating Mother's motion to dismiss as one for summary judgment.[11] Finally, Mother alleges that the court should have made a

[11] Under Maryland Rule 2-322(c):

> If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

The requirement that the trial court convert a motion to dismiss to a motion for summary judgment may apply if the evidence outside of the pleading—*inter alia* the BIA report—is offered by the moving party to the motion to dismiss. *Cf. Trim v. YMCA of Cent.*

determination of the sufficiency of the pleadings at the time of the filing of the motion to dismiss and not deferred to the BIA's status report which was outside of the proceedings.

Father argues that the court's decision to defer his ruling on Mother's motion to dismiss until after the BIA conducted her interview in Connecticut was correct, as the prior determination for child custody had been conducted before the relocation took place, when no BIA had been appointed and the children's preferences were not considered. Father further asserts that the judge properly tested the sufficiency of Father's factual pleadings in his motion to modify custody by allowing the BIA to visit with the children in Connecticut before making his ruling and that the BIA's findings substantially supported Father's factual allegations.

In a motion to dismiss,[12] the party filing the motion "is asserting that despite the truth of the allegations, the plaintiff is barred from recovery as a matter of law." *Porterfield v. Mascari II, Inc.*, 142 Md. App. 134, 138 (2002), *aff'd*, 374 Md. 402 (2003). The trial court is obligated to assume "the truth of all well pleaded facts and all inferences reasonably drawn therefrom." *Id.* (citations omitted). On appeal, we are obligated to consider the facts in the light most favorable to the moving party. *Id.* (citations and quotations omitted).

Maryland, Inc., 233 Md. App. 326, 332, *cert. denied sub nom. Trim v. YMCA*, 2017 WL 6026733 (Md. Nov. 17, 2017). But the trial court was not required to convert Mother's motion to dismiss to a motion for summary judgment where the evidence presented in response to that motion was offered by Father and the motion to dismiss was denied.

[12] Mother titled her motion as "Defendant's Motion to Dismiss Plaintiff's Motion to Modify Custody, for a Finding of Bad Faith, and Request for a Hearing." In her motion, Mother alleged, among other things, that Father had failed to plead a material change in circumstances that would justify moving the children back to Maryland and that the changes that Father contended had occurred had previously been litigated.

A trial court has authority to grant a motion to dismiss only "if the complaint does not disclose, on its face, a legally sufficient cause of action." *Hrehorovich v. Harbor Hosp. Ctr., Inc.,* 93 Md. App. 772, 785 (1992).

In a similar case, *McMahon v. Piazze*, 162 Md. App. 588 (2005), the father filed a motion to modify custody, alleging "[t]he current situation, including the residents and circumstances of the home life at [the mother's] residence" along with the child's "age and maturity, and other things, constitute a material change of circumstances[.]" *Id.* at 591-92. The mother responded with a motion to dismiss, arguing that the petition to modify custody failed to state a claim and that no change in circumstances that affected the child existed. *Id.* at 592. The circuit court dismissed the father's petition, because "'there [was] not sufficient material change in circumstances that [was] even alleged in the [Petition] to bring it to the level of being heard.'" *Id.* at 592-93. On appeal, we affirmed the circuit court's decision, noting that the father's motion contained factual allegations that were "extremely general" and amounted to "no more than a reference to factors present in almost any case. The averment of a material change in circumstances is entirely conclusory. No nexus between the facts and the conclusion can be inferred, other than by speculation." *Id.* at 597.

Back in this case, Father's petition to modify custody, *inter alia*, sought to change the primary physical custody of the children. To support his request, he alleged, among other complaints:

> 21. [T]he children no longer desire to reside with [Mother]. Since relocating to Connecticut, the children have begun attending therapy in Connecticut due to their unhappiness with the relocation.

> 22. Moreover, the children have consistently voiced their unhappiness with the relocation to [Father]. Now, [Daughter] will begin high school in the Fall [*sic*] and desires to live with her father and attend school in Montgomery County. Likewise, [Son] has asked to live with his father and return to Montgomery County. Both children have been very vocal in their feelings.
>
> 23. The children have continuously stated that they consider Montgomery County, Maryland to be their home and do not wish to stay with [Mother] and her husband in Wallingford, Connecticut. The children have repeatedly expressed their great disappointment that the court would not even consider their wishes in the court proceedings. They believe that the court does not know what is in their best interest without even talking to them. . . .
>
> 24. The children have access with [Father] one weekend per month to be exercised in Connecticut. In addition, the children have access with the Plaintiff in Montgomery County on long weekends when there is no school either on a Monday or Friday and on most holidays and school breaks. Each time the children are in Montgomery County they plan play dates and get togethers [*sic*] with their extensive group of friends. They are always quite upset each time they must be returned to the Plaintiff's custody in Connecticut. Both of the children are adamant that Montgomery County is their home and that's where they want to live to be with their father, friends, extended family and pets.

Mother, in her motion to dismiss Father's petition to modify custody, alleged that the only matters that had not been litigated previously—paragraphs 21-24 as included above—"[w]hen taken in the light most favorable to [Father]'s cause[] . . . do not contain a material change in circumstance." Additionally, Mother alleged that any perceived unhappiness stemming from the relocation was caused by Father's frequent discussion of the litigation with the children "in such detail[] that he was causing them an undue amount of stress." Further, Mother asserted that "[t]here is no truth in [Father]'s allegations" that the children were not adjusting to the relocation.

Considering the facts in the light most favorable to Father, at the time of Father's

motion, the court was unable to conclude that all of Father's allegations, if true, would still fail to demonstrate a material change in circumstances. *C.f. Ricketts v. Ricketts*, 393 Md. 479, 492 (2006). Father pointed to specific factual allegations—most notably that the children preferred to live in Maryland and that they were unable to adjust to their new surroundings—that Mother disputed in her motion to dismiss. We cannot conclude that the court erred when, after testing the sufficiency of the pleadings by allowing the BIA to conduct a home study to investigate Father's allegations, the court denied the motion to dismiss.[13]

C. Material Change in Circumstances

Mother contends that Father's broad claim that the children are unhappy is not a material change in circumstances that permits a change in custody. Relying on our holding in *McMahon*, *supra*, Mother maintains that Father's claims have not changed, and are merely speculative as to whether it would be in the children's best interests to reside with him. Mother asserts that '[t]he 2016 hearing [before Judge Dugan] was the same exact case that had been litigated before Magistrate Segel and decided on December 4, 2014 when [Mother] sought to relocate with the children to Wallingford, Connecticut." Mother

[13] Mother also urges that the trial court erred in appointing a BIA because Father's request for the appointment had already been denied—first at the recommendation of Magistrate Segel, then by Judge Boynton, and then at the exceptions hearing before Judge Ryon. Those decision were affirmed by this Court in its March 30, 2016, opinion. Nevertheless, the decision to appoint a BIA in a custody case is within the discretion of the trial court, and will not be disturbed absent an abuse of discretion. *Garg v. Garg*, 393 Md. 225, 238 (2006). We cannot say it was error or an abuse of discretion for the trial court to appoint a BIA in 2016, even if a prior court had made a contrary decision. Indeed, it appears that the court agreed to the appointment so that the BIA could investigate certain issues, including whether there actually was a material change in circumstances.

notes several occasions during trial when the judge stated that the precise facts before him had already been litigated, that they were known to the court in prior proceedings, and that he did not believe that the issues pled constituted a substantial change in circumstance.

Father contends that the issues that he raises, specifically the "children's unhappiness" and the failure to adjust to their lives in Connecticut, had not occurred until after the 2014 custody hearing, and thus had not been previously argued. He asserts that Daughter had "regressed" on multiple levels, and that the children were in therapy for "adjustment purposes." He further asserts that at the hearing before Magistrate Segel in November 2014, the children did not have a BIA and their preferences were not considered by the magistrate or the court.

Our standard of review in child custody disputes is subject to three distinct but interrelated parts:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8–131(c)][14] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

[14] Rule 8-131(c) states:

> **Action Tried Without a Jury.** When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (alterations added in *Gillespie*). "In our review, we give 'due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses.'" *Id.* at 171 (quoting *In re Yve S.*, 373 Md. at 584).

Clearly, in cases in which parents seek to modify a preexisting custody agreement or order, it is—for the vast majority of cases—an inevitable certainty that one parent will be awarded primary custody of the children to the disappointment of the other. But the guiding principle is always the best interests of the child standard, *Ross v. Hoffman*, 280 Md. 172, 178 (1977), and exposing children to repeated, contentious litigation does not further this standard.[15] Thus, in order for a court to consider altering a prior custody order, the party petitioning in favor of the change must demonstrate that one or more material changes in circumstances "have occurred subsequent to the last court hearing." *Hardisty v. Salerno*, 255 Md. 436, 439 (1969) (citation omitted). If the court finds that a material change of circumstances has occurred, the court must then examine the facts presented and consider the best interests of the child as if it were determining custody for the first time. *Gillespie*, 206 Md. App. at 170. The ultimate "determination of which parent should be awarded custody of a minor child rests within its sound discretion of the trial court." *Giffin v. Crane*, 351 Md. 133, 144 (1998).

A change in circumstances is said to be "material" only when the change "affects

[15] We note that the trial judge repeatedly expressed his care and concern for the children above all, observing that "I have to treat these cases as though these kids were my own kids," and "I have to try and determine what's in their best interest because their parents can't agree . . . it is a terrible position to be put in[.]"

the welfare of the child." *Gillespie*, 206 Md. App. at 171 (citing *McMahon,* 162 Md. App. at 594). When the "visitor" parent seeks to transfer custody of a child from the "custodial" parent, the moving party bears the burden of "establish[ing] that the modification is necessary to safeguard the welfare of the child." *Shunk v. Walker*, 87 Md. App. 389, 397-98 (1991). Moreover, if the moving party fails to demonstrate a reason why the court should take action, the court should refrain from intervening. *Wagner v. Wagner*, 109 Md. App. 1, 31-32 (1996) (discussing *Shunk*, 87 Md. App. at 397). Therefore, it was Father's burden to demonstrate that a material change in circumstances had arisen since the prior child custody hearings before Magistrate Segal and Judge Ryon.

The material change in circumstances requirement is a tool to foster finality in the matter and stability in the child's life. Promoting and maintaining stability in a child's life—especially in the context of a contested child custody case—is of special importance to the welfare of the child, as "a change in custody may disturb that stability." *McCready*, 323 Md. at 481. As the Court of Appeals explained in *Slacum v. Slacum*, the failure to demonstrate that a change in circumstances had occurred bars the request to modify custody[16] under the principles of claim and issue preclusion:

[16] The requirement to demonstrate a material change in circumstances also applies to a party seeking to modify visitation. *McMahon*, 162 Md. App. at 595 (referring to *Campbell v. Campbell*, 477 S.W.2d 376, 378 (Tex. App. 1972)).

> The provisions of the chancellor's decree with respect to the custody and maintenance of the infant are . . . res judicata with respect to these matters and conclusive upon both husband and wife so far as concerned their rights and obligations at the time of the passage of the decree. But the conditions which determine the custody and care of the infant and the amount necessary for its maintenance are not fixed, and may change from time to time, and so, from considerations of policy and the welfare of the infant, *a* ***material alteration in the substantial circumstances*** *will take the particular provisions of the decree with reference to the custody and maintenance of the infant out of the rule of res judicata and authorize a change*, from time to time, of the decree in these respects.

158 Md. 107, 110-11 (1930) (emphasis added). This requirement is not to bar legitimate claims from being brought, but to prevent a particularly "litigious or disappointed parent" from "relitigat[ing] questions of custody endlessly upon the same facts, hoping to find a chancellor sympathetic to his or her claim." *McCready*, 323 Md. at 481.

While the material change in circumstances requirement and the best interest of the child factors are separate considerations in change of custody determinations, it is often the case that one inquiry may shed light on the other. Although some cases may arise where it is clear to the court that the petitioning party is offering nothing new, it is much more frequently the case that

> there will be some evidence of changes which have occurred since the earlier determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination[.]

Id. at 482; *see also McMahon*, *supra*, 162 Md. App. at 594.

Maryland decisional law is clear that merely asserting that a change has occurred will not afford a trial court the discretion to modify an existing custody agreement. Indeed,

it is a "heavy burden" requiring extensive evidence demonstrating that the current custody arrangement is contrary to the child's welfare. *Wagner*, 109 Md. App. at 32 (quoting *Shunk,* 87 Md. App. at 398). There is no all-encompassing definition of what constitutes a material change in circumstances affecting the welfare of the child. Rather, appellate courts have dealt with this question on a case-by-case basis.

In *McCready*, *supra*, a father and mother shared legal custody of their only daughter, while the mother, pursuant to an unwritten agreement between the parties, assumed primary physical custody of the daughter. 323 Md. at 478. After a disagreement between the parties, they reached an agreement where they would share physical custody of the child, and arranged a custody schedule. *Id*. Due to a change in the mother's employment, she requested that the schedule be modified, and the father refused. *Id.* at 479. The mother then filed for sole custody of the child. *Id.* At trial, the chancellor found that the mother's plans to foster stability for the child by requesting sole custody and reducing the father's role to that of a visitor was an obvious attempt to ostracize the father and constituted "sufficient evidence of change to demonstrate that the parties were not simply seeking to relitigate issues previously decided." *Id.* at 483. The chancellor awarded primary physical custody to the father with extensive visitation with the mother. *Id.* at 485-86. The Court of Appeals, on its own motion grated certiorari and affirmed the chancellor's decision. *Id.* at 485-86. The Court held that under the circumstances presented, the best interests of the child would be achieved by awarding the father primary physical custody. *Id.*

In *Domingues v. Johnson*, 323 Md. 486 (1991), the Court of Appeals considered whether a parent's relocation, post-divorce, was a material change in circumstances. In

that case, the parents separated and agreed to share joint custody with alternating visitation. *Id.* at 488-89. The parties divorced, and over a year later, the mother married a military officer who was scheduled to be transferred from Maryland to Texas for two years. *Id.* at 489. The mother filed a petition to modify the existing child custody and visitation agreement to allow her to relocate with the child. *Id.* The father, in his answer, sought sole custody of the children. *Id.* The chancellor implemented the recommendations of the family relations master and found that "a substantial change of circumstances since the entry of the divorce decree[]" and awarded the father primary custody of the children. *Id.* We reversed, and held that the move to Texas was not a material change in circumstances as there was no evidence that it "had any adverse effect on the children[.]" *Johnson v. Domingues*, 82 Md. App. 128, 134 (1990), *rev'd*, 323 Md. 486 (1991).

The Court of Appeals reversed, holding that the move to Texas constituted "sufficient evidence of changes relating to the welfare of the children to justify a full consideration of whether modification of custody was required." 323 Md. at 498-99. The Court instructed:

> To determine that a modification is required, the chancellor need not find[] . . . that the changes have already caused identifiable harm to the children. It is sufficient if the chancellor finds that changes have occurred which, when considered with all other relevant circumstances, require that a change in custody be made to accommodate the future best interest of the children.
>
> * * *
>
> A change in circumstances which, when weighed together with all other relevant facts, requires a court to revise its view of what is in the future best interest of a child, is a sufficient change. It is neither necessary nor desirable to wait until the child is actually harmed to make a change which the evidence shows is required. Clearly, change is not to be lightly made. The benefit to

> a child of a stable custody situation is substantial, and must be carefully weighed against other perceived needs for change.
>
> * * *
>
> [C]hanges brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody. The result depends upon the circumstances of each case.

Id. at 499-500. Additionally, the Court noted that "stability" was a factor that "cut both ways[,]" between remaining in the care of the primary caretaker in the marriage and remaining in the area that they had been raised where their family and friends were present. *Id.* at 503-04.

In *McMahon,* the parties separated and entered into a consent order, which granted the parties joint legal and physical custody over their eight-year-old child. *Id.* 162 Md. App at 591. Months later, they divorced. *Id.* Roughly four years after the consent order, the father filed a petition to modify it, but he did not seek sole custody. *Id.* at 591-92. In his petition, the father alleged that the "residents and circumstances of the home life" at the mother's home, as well as the child's "age and maturity, and other things, constitute[d] a material change of circumstances from the circumstances at the time the Consent Order was entered." *Id.* at 592. During a hearing on the petition, the trial court dismissed the father's petition for failure to plead a material change in circumstances, and the father appealed. *Id.* at 592-93. We affirmed, and held that the fact that the child's age and maturity level had subsequently changed since the initial custody arrangement was entered did not create a material change in circumstances "'because aging is an inexorable progression prevalent in all custodial contests.'" *Id.* at 596 (quoting *Campbell v. Campbell*,

477 S.W.2d 376, 378 (Tex. App. 1972)). Additionally, we noted that a material change must be shown to exist "*any time* a party to a custody or visitation order wishes to make a contested change, even if it is to an arguably minor term." *Id.* at 596 (emphasis in original).

In *Levitt v. Levitt*, this Court explained that in order to justify a modification of a previous custody order, the alleged change must affect the children and not the parents. 79 Md. App. 394, 398 (1989). This Court instructed:

> The custody of children should not be disturbed unless there is some strong reason affecting the welfare of the child. To justify a change in custody, *a change in conditions must have occurred which affects the welfare of the child and not of the parents.* The reason for this rule is that the stability provided by the continuation of a successful relationship with a parent who has been in day to day contact with a child generally far outweighs any alleged advantage which might accrue to the child as a result of a custodial change. In short, when all goes well with children, stability, not change, is in their best interests.

Id. at 397-98 (quoting *Sartoph v. Sartoph*, 31 Md. App. 58, 66-67 (1976)) (emphasis added in *Levitt*). Accordingly, in *Levitt*, we held that the mother's lack of immediate family in the area and the presence of father's family in the area were not circumstances that necessarily affected the child, and that on remand, the chancellor should determine what changes to the current custody agreement—if any—would be in the child's best interests. *Id.* at 401, 404.

Returning to the case before us, Father's allegations, the BIA's recommendations, and the trial court's decision, rest largely on the notion that the children were not well adjusted to their new home in Connecticut and that the children's preferences should be heard. The day after trial concluded, the judge delivered his oral opinion, and found, based on the BIA's recommendations and testimony presented, that there had been a material

change in circumstances. The court observed that "[i]t's now been almost two years since the children have been uprooted and moved to Connecticut," and concluded:

> They feel more secure in their home where they grew up, the only home, the neighborhood, and schools, and friends that they knew until January of 2015. It gives them an emotional center, stability, and a sense of security.
>
> I am extremely concerned about their emotional welfare, what may manifest itself down the road based on the Court's decision. The burden was on [Father] to show the modification is necessary to safeguard the welfare of the child. [*sic*] The Court has found that material change, and it's been set out by [the BIA]. She[']s satisfied that there has not been a real adjustment after two years.
>
> So, I do find that [a] material change[has occurred.]

We hold that there was insufficient evidence to support the court's determination that a material change in circumstances warranted modifying the prior custody order in regard to the Daughter, and the presumption under that order that it was in her best interests to live with mother. *See Davis v. Davis*, 280 Md. 119, 125 (1977). The Court found, based on the testimony presented, that Son had failed to adjust to the relocation and that his preference had changed in the months between the prior custody decision and Father's renewed motion for custody. However, there was insufficient evidence to establish Daughter's preference and whether she had failed to adjust to the relocation. Consequently, the trial court lacked the "extensive evidence demonstrating that the current custody arrangement is contrary to [Daughter's] welfare," *Wagner*, 109 Md. App. at 32, and therefore, the evidence was also insufficient to establish that a modification was necessary to safeguard the welfare of both children. *Shunk*, 87 Md. App. at 397-98

Our holding is informed by several overarching concerns. First, we note that

Magistrate Segel and Judge Ryon already considered the very same circumstances upon which the judge in the underlying case based his holding—that the children may "feel more secure in their home where they grew up, the only home, the neighborhood, and schools, and friends that they knew until January 2015, "and that "it gives them an emotional center, stability, and a sense of security." However, Magistrate Segel also observed that that security doesn't always "trump[] the other factors." She placed great weight on the high value of maintaining stability for the children, not just in the current home life but with the parent who had played the role as their "primary caretaker" and who had been most in touch with their important needs. Master Segel thoroughly considered the potential effect of the move on the wellbeing of the children, and noted:

> Well, the Court presumes that if they were to relocate, it will have some impact on the children. They will go through an adjustment period. As much as they may be comfortable in the home with their stepsiblings and their stepfather, as much as they may be comfortable in school and school being able to address their needs, there, it's just – it would be imprudent, I think, for the Court to believe that they would have absolutely no effect.
>
> Would that effect be significant or adverse? There's nothing that I head from either of the parties or any of the witnesses that would lead me to believe that it would be a significant adverse impact on the children. It would simply be an adjustment. As I've articulated already on a number of occasions, they've established friendships up there, they've been to the school, they apparently feel comfortable at the school, and apparently the kids, from both, testimony of both parties, I get the impression that the children make friends easily and have lots of friends, and both parties are very supportive of the children's friendships.

Second, we note that it is not clear that the Son's unhappiness with the relocation was not fueled by "brainwashing" by Father, although the transcript reflects that the court did take this somewhat into account as something that both parents engaged in. But Mother

testified at trial that Father incessantly called the children and urged them to return home. When the Son made the soccer team in Connecticut, Father scolded him, telling him that he should not have tried out for a team when his residence had not been determined. Independent of any testimony, the record discloses that Father filed numerous pleading in court during this time, including the motions on appeal and five petitions to hold Mother in contempt. While it may be true that the children have had difficulty adjusting to the relocation, the record clearly demonstrates that Father did little to facilitate the relocation process. We also note that there was no expert testimony offered, by either party, to demonstrate how the children were adjusting emotionally or psychologically, beyond what each parent had heard the children say about the other parent.

Our third concern is that during the course of the trial, it became clear that the court disagreed with the prior custody decision:

> [THE COURT]: But you thought it was in [Daughter's] best interest to go to Connecticut and start a new school, right?
>
> [MOTHER]: I thought it was in her best interest for me to help her throughout her academic—
>
> [THE COURT]: But wouldn't, wouldn't it have really been in her best interest for you to stay here, and then she could stay in her school, her same neighborhood?
>
> [MOTHER]: I—
>
> [THE COURT]: I mean, it was in your best interest to move to Connecticut because I guess of your financial problems and you had a new suitor who had two new kids. But what you really asked her to do, didn't you, is to adjust to a new dad at a time she was adjusting to a divorce, recognizing you had been separated, to adjust to a new dad, to adjust to a move to Connecticut, way far away from where she was, way far away from her grandparents and her father and the visitation schedule she had with her father. And you were

asking her to adjust to two new kids living in the house with a new man, right? And two new schools, or a new school for two new kids, two kids.

[MOTHER]: Uh-huh.

[THE COURT]: Right?

[MOTHER]: Correct.

[THE COURT]: Isn't that, wasn't that a pretty big adjustment to ask for that you thought was in her best interest?

[MOTHER]: I had a lot of support up there with my family as well.

[THE COURT]: Yeah but, but that, my question is what you were asking them to do was because you wanted to get married, and you wanted to move up there, right?

[MOTHER]: No. No. It was –

At this point, Mother's counsel objected to the court's line of questioning. The court overruled the objection, and continued:

[THE COURT]: Wasn't that a big adjustment to make?

[MOTHER]: It was a big adjustment.

[THE COURT]: Okay. And the primary purpose of that was so that you could live with your husband?

[MOTHER]: No.

[THE COURT]: No?

[MOTHER]: No. It was so that I could provide for my children.

[THE COURT]: Okay.

[MOTHER]: I have always been the primary caretaker of the children since they were small. I have always been the one that helped them with homework, that brought them to doctor's appointments, that made their appointments, that helped to –

[THE COURT]: But you could have done all of that right here.

[MOTHER]: No, I couldn't, because I couldn't' afford to live here anymore.

[THE COURT]: Oh, okay. Go ahead. Next question.

Regardless of whether the court disagreed with the prior custody decision, the court needed evidence of a "material alteration in the substantial circumstances" to overcome the presumption that the existing custody order was in the best interests of the children in order to take the provisions of that order "out of the rule of res judicata and authorize a change." *Slacum*, *supra* 58 Md. at 110-11. In cases in which the non-primary custodial parent petitions the court for a modification of custody, the court may not revisit a prior custody order that the court believes was in error, rather, it must determine whether further change in the child's life is in the child's best interest. *Cf. Wagner*, 109 Md. App. at 28-29.

Turning to the court's decision with respect to each child in this case, and keeping in mind our deferential standard of review, *see Giffin v. Crane*, 351 Md. 133, 144 (1998), we are unable to say that the court erred in finding that a material change in circumstances occurred with regard to Son. Based on her interviews with Son, Ms. Webb reported:

> . . . I'm concerned about [Son] if he doesn't move back [to Maryland] because I'm concerned that this is what he has built-up in his mind that this is the answer, and having said that, I think a great thing which probably wouldn't happen, but I'm thinking about different scenarios is when he comes back here, has he truly appreciated what his Mom does for him and how much he might miss her, and what if [Daughter]'s here without him. And we talked about that, and I think he can appreciate it as best he can with not really living it yet, but looking at the pros and cons of it, and he didn't seem too upset that he came back without [Daughter]. She felt differently and I'll get to that, but he was okay with it. He said whatever it takes for me to get back to living in Maryland is what I want.

The court, in its oral opinion, credited the BIA's findings that Son would be "devastated" if he were not permitted to move back to Maryland, and that "[h]e remains emotionally upset by the move."

Examining the evidentiary threshold required to demonstrate that a change of circumstances has occurred as set forth in *Domingues*, and *McCready*, *supra*, a child's failure to adjust to a prior relocation—especially if the child is experiencing emotional stability problems—can justify a modification of the custody order. Establishing a rule that would prevent a change in custody regardless of the particular child's mental wellbeing would counter the trial court's duty to protect the best interests of the children.

However, the necessary assessment for the court was to determine whether a material change in circumstances affected Son and Daughter individually before deciding whether a custody modification was warranted for them collectively. The record does not demonstrate that Daughter was unhappy in Connecticut, or that she was unable to adjust to living in Connecticut, or, most importantly, that it would be better for her to live with Father rather than with Mother. We agree with Judge Dugan's assessment that the children are "two different kids, and both of them have taken two completely different positions in this case, and are in two different places maybe, maybe not."

In the prior custody case, the magistrate and trial judge carefully delineated all of the reasons why it was in Daughter's best interests to live with Mother—the person who was the "primary caretaker" and who "has always generally been and continues to be the [one] who takes the lead[,]" and who most often scheduled medical appointments and spent the most time with the children on school issues. Moreover, the magistrate expressed

concerns over whether Father fully understood Daughter's educational needs, and noted Father's inability to recall specifics about Daughter's accommodation plan, whereas Mother recalled "significant details." She also found that Father "tends to minimize" Daughter's ADHD and academic disabilities and that, in contrast to Mother, Father did not appear to recognize that there may be some connection between the two.

Father failed to meet his "heavy burden" to demonstrate that circumstances had changed such that these prior decisions could no longer protect the Daughter's welfare. Consequently, the court's determination that Daughter should move back to Maryland was predicated on mere assumptions. For example, the court noted:

> So, what's the one thing that [Daughter] did tell Ms. Webb in no uncertain terms, and she's very definite? I don't want to be separated from my brother. Now, think about that. She doesn't say I don't want to be separated from my new best friend's sister. She says I don't want to be separated from my brother.
>
> And what's the one thing she knows? Well if you're going to tell me that, you know, I don't think there's any question Ms. Webb's represented she believes that there's been an attempt to influence both kids by both parents, and I don't have any disagreement with that, I think that's a certainty.
>
> If that's a certainty, what do you think is the certainty that these two kids have talked amongst themselves or I should say between themselves? And who knows maybe [the stepsister]'s been included too. I don't have a doubt in my mind that they have talked, and that he has said to her I told Ms. Webb I don't want to stay here, I want to go back. You know, you can stay if you want, but I want to go back.
>
> So, what's she do? She makes it real easy. She say, well, I don't know. I can't say. I don't want you to make me choose. I'm not choosing, but I don't want to be separated from my brother.

In making these findings based on a hypothetical conversation between the children, the court effectively assumed evidence existed that justified relocating Daughter back to

Maryland. But Daughter never testified in this case. No expert ever testified in this case. The BIA testified that Daughter did not share any concerns or intentions with her. However, the BIA pointed out that Daughter did really well academically in Connecticut, that she has a close relationship with her step-sister, and that "[s]he does have an accommodation at the school, she's on sports, she's very excited about softball that's coming up." Clearly then, Daughter may have said she doesn't want to be separated from her brother for many reasons other than, as the court speculated, that she was disguising an intention to move back to Maryland. As in *McMahon*, no nexus between the facts and the conclusion can be inferred in this case, other than by speculation. 162 Md. App. at 597.

We reiterate that the moving party bears the burden of "establish[ing] that the modification is necessary to safeguard the welfare of the child," *Shunk*, 87 Md. App. at 397-98, and that it is a "heavy burden" requiring extensive evidence demonstrating that the current custody arrangement is contrary to the child's welfare. *Wagner*, 109 Md. App. at 32 (quoting *Shunk,* 87 Md. App. at 398). In this case, the evidence was lacking to support a determination that the prior custody arrangement for Daughter was contrary to her welfare. That determination must be made before the court can decide whether it is in the best interest of the children to stay together and then, assuming that is the case, whether modification of existing order is necessary to protect their welfare. The decision to take physical custody of Daughter away from Mother may have detrimental effects on Daughter who, the evidence suggests, not only has a learning disability that Mother has historically helped manage, but is also experiencing certain age-related social-emotional issues that Mother may be better able to address than Father. Finally, we also observe that, based on

the record before us, Father failed to present evidence supporting his allegations that Mother attempted to ostracize him from the children's lives or block access to his children.[17]

In light of our standard of review and the deference that we extend to the trial court in custody matters, we remand, rather than reverse, pursuant to Rule 8-604(d)[18] for the limited purpose of taking additional evidence to consider whether a material change in circumstances affected the welfare and best interests of Daughter, and if so, whether the

[17] Between September 2015 and February 2016, Father filed five petitions to hold Mother in contempt of court for various alleged breaches of the custody agreement. More specifically, in one petition he alleged that Mother failed to permit the children to visit him during a blizzard, that Mother had restricted the children's access to the internet, and that Mother failed to deliver the children to him on two occasions without justification; in another petition he alleged that Mother failed to meet him at the designated meeting area during a hurricane; in a third petition he alleged that Mother refused to allow the children to travel to Maryland because of a school event that the children's teachers advised that they attend; in a fourth petition he alleged that Mother refused to allow him to claim Son as a dependent, although a prior court order allowed Mother to claim both children as dependents; in a fifth and final petition he alleged that Mother purchased a plane ticket for the children to travel down to Maryland, and because he was unable to find an affordable ticket, he was forced to drive the children back to Connecticut. Father subsequently withdrew all five of his petitions prior to a hearing on the merits.

[18] Maryland Rule 8-604(d) reads, in relevant portion:

> (d) **Remand.** (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

change in circumstances for *both children*[19] was a "material alteration in the substantial circumstances" justifying the removal of one or both children from the primary physical custody of Mother. *Slacum*, *supra*, 158 Md. at 110-11.

II.

Child Support

Standard of Review

On review of an exceptions hearing, we examine the facts found by the magistrate and the deference accorded to those facts by the trial court on review. The magistrate's findings of "first-level" facts are entitled to deference by the trial court; deference is not accorded, however, to "second-level" facts or to recommendations. *Levitt*, *supra*, 79 Md. App. at 398. This Court explained the distinct levels of deference in *Levitt*:

> First-level facts are those that answer the What?, Where?, and How? questions. Deference is not accorded to "second-level" facts or to recommendations. Second-level facts are ultimate conclusions drawn from the first-level facts. Second-level facts are conclusions and inferences drawn from first-level facts. A first-level fact would be that one or both parents used drugs. A second-level fact would be that that use did or did not affect [the child]. A recommendation would be a change or lack of change of custody.

Id. (internal citations omitted).

During an exceptions hearing, it is the duty of the trial court to "carefully consider the [moving party]'s allegations that certain findings of fact are clearly erroneous, and

[19] Because it is part of the overall best interests equation, the trial court must consider whether it is in the best interests of the children to keep them together. We intend for the trial court to have, on remand, full remedial flexibility to examine the current circumstances for both children, if, in its discretion, the court finds it to be in their best interests to do so.

decide each such question." *Domingues*, *supra*, 323 Md. at 496. The trial judge must resolve each of these factual challenges to the magistrate's recommendations, apply the appropriate legal principles and "exercise independent judgment to determine the proper result." *Id.*

Pursuant to Rule 8-131(c), our review of the trial court's decision in an exceptions case extends to "both the law and evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Factual findings are clearly erroneous only "[i]f there is [no] competent evidence to support the factual findings below[.]" *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (quoting *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002). Generally, child support orders are left to the discretion of the trial court, and should not be disturbed absent a clear abuse of discretion. *Walter v. Gunter*, 367 Md. 386, 392 (2002) (additional citations omitted). When the trial court interprets and applies statutory and case law to reach a conclusion regarding a child support order, however, we review "whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Id*.

A. The Sufficiency of Mother's Pleadings for Modification of Child Support

Before this Court, Father argues that Mother's pleadings before Magistrate Whittier, and subsequently before Judge Smith, were legally insufficient to permit the increase in child support. Father asserts that Mother's pro se motion to modify child support, which she filed on June 11, 2014, failed to formally request an increase in child support, and therefore, it was improper for the trial court to consider increasing child support. Father

avers that the only proper request before the court was that "child support be paid directly to the person who has custody[,]" which constituted a "lack of due process and lack of any notice at trial." Additionally, Father argues that Mother failed to assert in her initial Motion to Modify Child Support, and subsequently failed to amend the motion, that the expenses for the children had increased or that Father's income had substantially increased, making the consideration of afterschool care expenses, tutoring costs, or therapy costs inappropriate. Finally, Father suggests that although Magistrate Whittier correctly denied Mother's request for attorney's fees because it had not been pled, she erred by not similarly excluding an increase in child support for failure to plead.

Mother responds that in her initial Motion to Modify Child Support, while she did request that "child support be paid directly to the person who has custody," she also requested that the court order "any other appropriate relief[.]" She asserts that Father was on notice that she would be seeking an increase in child support because of the scheduling conference between the parties that noted that she would be seeking a modification of child support. Mother also distinguishes this case from the cases that Father relies on in which "a party did not raise the issue in its entirety, meaning the entire issue was avoided at the pleading stage, and an opposing party did not have any ability to prepare for the issue." Finally, Mother points out that before trial, Father's retained a vocational rehabilitation expert to testify that Mother could make more money in her field, proving that he was aware of the pending issues and was properly prepared to dispute them.

Pursuant to Maryland Rule 2-305, "[a] pleading that sets forth a claim for relief[] . . . shall contain a clear statement of the facts necessary to constitute a cause of action and

a demand for judgment for the relief sought." When requesting a court order, a motion "shall be made in writing, and shall set forth the relief or order sought." Md. Rule 2-311(a). While Maryland has "long since abandoned the technical requirements of common law pleading," the pleading requirements continue to serve several important purposes, the most crucial being notice. *Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc.*, 121 Md. App. 467, 476 (1998) (quoting *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997) (superseded by rule on unrelated grounds)). These pleading requirements "apply equally in the family law context." *Huntley v. Huntley*, 229 Md. App. 484, 492 (2016).

Father cites several cases for the proposition that a trial court has no authority or discretion to rule upon a question not formally raised in the pleadings, arguing that he was effectively blindsided as to which issues would be litigated. Each of these cases, however, stands for the notion that a trial court has no discretion to rule upon a question presented at trial when the party opposing the relief has practically no inkling that the relief granted at trial was in dispute at all. *See Woodham v. Woodham*, 235 Md. 356, 361 (1964) (reversing the trial court's *sua sponte* increase in child support when the parties appeared solely for matters relating to termination of alimony pursuant to a separation agreement); *Huntley*, 229 Md. App. at 492-94 (affirming the circuit court's decision to deny husband's request to "make an equitable division of [wife]'s retirement benefits" when the only relief requested was to "grant him a Divorce, and deny [wife] alimony.").

We cannot agree with Father's broad assertion that "there is no dispute that [Mother] failed to provide the requisite notice" to him as to issues that could possibly arise during

the child modification hearing. During that hearing, Father testified that Mother failed to obtain his consent, pursuant to the Custody Agreement, before taking the children to therapy, enrolling the children at Holy Trinity, or hiring a tutor for Daughter. Father admitted, however, that Mother sent him emails apprising him of her decisions and detailing the costs of the services. Magistrate Whittier, during her oral recommendations, noted that she was not persuaded by Father's testimony that he had no notice of the costs associated with the services in which Mother enrolled the children, and entered a recommendation that would increase Father's contribution. Judge Smith adopted Magistrate Whittier's factual findings in a written opinion, and found that Father's claim that he was not on notice as to these expenses was "disingenuous" and non-credible. We discern no error in these decisions and hold that Mother's pleadings were legally sufficient to allow Magistrate Whittier and Judge Smith to address costs associated with child care, tutoring, and therapy.

Finally, we address Father's contention that because the magistrate, and subsequently the trial court, denied Mother's request for attorney's fees for lack of notice, it erred when it did not bar Mother's subsequent claims for child-support modification on the same grounds. A trial court "may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person[ ] applies for a decree or modification of a decree concerning the . . . support[] . . . of a child of the parties[.]" Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 12-103(a)(1). When making this determination as to costs and fees, the trial court must weigh "'the financial status of each party; the needs of each party; and whether there was

substantial justification for bringing or defending the proceeding.'" FL § 12-103(b). The trial court is afforded discretion of whether to award counsel fees. *Petrini v. Petrini*, 336 Md. 453, 468 (1994). Before making an award for attorney's fees in a child-support case, "[c]onsideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error." *Id.* (citing *Carroll Cty. v. Edelmann*, 320 Md. 150, 177 (1990).

In this case, Magistrate Whittier chose not to award attorney's fees, and framed the inquiry around whether Father was on notice in advance of the modification hearing that Mother intended to proceed on the issue of counsel fees. The magistrate found "that he was not" on notice and precluded Mother from presenting evidence as to the statutory factors under FL § 12-103(b). Failure to consider these factors would have been in error had the court imposed an award for attorney's fees.

B. Award of Afterschool Care and Therapy at the Modification Hearing

Father next argues that the trial court erred in awarding Mother costs associated with therapy sessions and afterschool care. Specifically, Father asserts that before Mother moved to Connecticut with the children, the children were traditionally allowed to remain home by themselves after school. Further, Father argues that Daughter is especially equipped to take care of herself and her younger brother, as she obtained a child-care-provider certificate from the Red Cross, and failure to consider this was in error. In the alternative, Father avers that if the children were incapable of taking care of themselves after school, then Mr. Zettergren's 16-year-old daughter, J.Z., could watch the children after school. Finally, Father argues that because Mother failed to disclose the newly added

costs for afterschool care and therapy as required by Maryland Rules 9-202(f)[20] and 9-203(c),[21] it was inappropriate for the court to increase the child-support obligation to reflect these changes.

Mother, in response, argues that "work-related child care expenses," under FL § 12-204(g)(1), are specifically permitted for considering a child-support obligation in a "guidelines case." Additionally, Mother asserts that pursuant to her tie-breaking authority as to parental decisions, the decision to employ a healthcare provider was within her power to make.

FL §12-204(g)(1) specifically permits the inclusion of "work-related child care expenses" and states:

> [A]ctual child care expenses incurred on behalf of a child due to employment . . . shall be added to the basic obligation and shall be divided between the parents in proportion to their adjusted actual incomes. [] Child care expenses

[20] Maryland Rule 9-202(f) contains, in relevant portion:

> **Financial Statement--Child Support.** If establishment or modification of child support is claimed by a party, each party shall file a current financial statement under affidavit. The statement shall be filed with the party's pleading making or responding to the claim. If the establishment or modification of child support in accordance with the guidelines set forth in Code, Family Law Article, §§ 12-201 - 12-204 is the only support issue in the action and no party claims an amount of support outside of the guidelines, the required financial statement shall be in substantially the form set forth in Rule 9-203 (b). . . .

[21] Maryland Rule 9-203(c) reads, in substantive portion:

> **(c) Amendment to Financial Statement.** If there has been a material change in the information furnished by a party in a financial statement filed pursuant to Rule 9-202, the party shall file an amended statement and serve a copy on the other party at least ten days before the scheduled trial date or by any earlier date fixed by the court.

> shall be [] determined by actual family experience, . . . or [] if there is no actual family experience[,] . . . the level required to provide quality care from a licensed source[.]

The burden is on the parent seeking actual child care expenses to prove "the existence of the prerequisites to entitlement" of work-related child care expenses. *Shenk v. Shenk*, 159 Md. App. 548, 554 (2004). As the Maryland Legislature "used mandatory language and distinguished child care expenses from basic support obligations . . . child care expenses always fall outside of the [trial judge]'s discretion[.]" *Chimes v. Michael*, 131 Md. App. 271, 292-93 (2000). Therefore, because the award of child care expenses in this case involves the application of FL §12-204(g)(1), we review the court's decision *de novo*. *See Walter*, 367 Md. at 392.

A trial court may only award child care costs if the party seeking the award demonstrates that the time away from the children necessitating the costs is tied to actual employment or an attempt to secure employment. *Shenk*, 159 Md. App. at 554-55. In the current case, testimony was elicited at the initial child support custody modification hearing before Magistrate Whittier that Mother worked approximately 30 hours per week, her commute to work took approximately an hour and 15 minutes, and that she only placed the children in afterschool care on days that she worked, namely, Tuesday, Wednesday, and Thursday. Mother also testified that she was searching for additional employment in the area that would allow her to work closer to 40 hours per week, but had been unsuccessful so far. These findings of fact as to Mother's working hours were "first-level" facts, to which the circuit court made a determination based on FL §12-204(g).

Father contends that the trial court was precluded from considering afterschool child care expenses because of Mother's failure to supplement a financial statement concerning these costs. However, Father cites no existing Maryland cases consistent with this assertion.[22] Additionally, Magistrate Whittier heard testimony from Mother as to the cost of child care. As there were no documents in the case file at the beginning of the hearing before Magistrate Whittier, she engaged in her "primary responsibility[,] [which] is to develop the first-level facts." *Levitt*, 79 Md. App. at 399. It was then the circuit court's decision whether to credit those facts, and make an independent application of FL §12-204(g) to reach a conclusion as to the final child support obligation. Examining the record before us, we find no error in the trial court's ruling and determine that there was no error in factoring in afterschool care as part of the child-support obligation.

Moving to Father's contention that the trial court erred when it obligated him to contribute towards the costs of the children's therapy sessions, we find that argument similarly unavailing and hold that the court correctly ordered him to contribute towards those fees. Magistrate Whittier heard testimony from Mother that the children were placed in therapy after the separation, but while the children were still in Maryland. In Judge Smith's written order, she accepted the findings of Magistrate Whittier, insofar as "both parties agreed the children would benefit from therapy." Additionally, Magistrate Whittier

[22] In *Barnes v. Barnes*, 181 Md. App. 390 (2008), we were asked to consider the consequences for failure to submit a financial statement in the context of a divorce where the parties disputed what property should be considered marital property. *Id.* at 421-24. We did not reach the issue, however, as the parties subsequently entered an agreement in open court, without a financial statement. *Id.* at 422. Accordingly, we held that the issue was not properly before us. *Id.* at 424.

"believed [Mother]'s testimony that [Father] refused to discuss expenses associated with the children[,]" which included the children's therapy sessions.

In setting a child-support award, the trial court may award "extraordinary medical expenses," which "means **uninsured** expenses over $100 for a single illness or condition." FL § 12–201(g)(1) (emphasis added). In this case, the children were seen by a therapist, and the cost, besides the $20 co-pay, was presumably covered by insurance, making FL § 12–201(g)(1) inapplicable. Accordingly, we hold that the trial court did not abuse its discretion when it ordered Father to contribute to the costs of the therapy sessions.

C. Contribution to Private Education Tuition

In *Witt v. Ristaino*, 118 Md. App. 155 (1997), this Court fashioned a non-exhaustive, six-factor test to determine "whether a child has a 'particular educational need' [under FL § 12-204(i)(1)[23]] to attend a special or private elementary or secondary school":

> First, courts should consider the child's educational history, such as the number of years the child has been in attendance at that particular school. While we give no minimum of time to consider, it seems evident that a child who has attended a private school for a number of years may have a more compelling interest in remaining in that school than a child who has yet to begin his or her education at the private institution. Further, as part of the history factor, courts should evaluate the child's need for stability and continuity during the difficult time of the parents' separation and divorce. This factor also contemplates the premise of the Income Shares Model that

[23] FL § 12-204(i)(1) states, in relevant portion:

> (i) By agreement of the parties or by order of court, the following expenses incurred on behalf of a child may be divided between the parents in proportion to their adjusted actual incomes:
>
> (1) any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child[.]

> the child should receive the same proportion of parental income he or she would receive if the parents lived together.
>
> Second, courts should look at the child's performance while in the private school. It is often in a child's best interest to remain in a school in which she or he has been successful academically.
>
> Third, courts should consider family history. That is, a court should look at whether the family has a tradition of attending a particular school or whether there are other family members currently attending the school. Part of this consideration can include a review of the family's religious background and its importance to the family unit, if the private school is a religiously-oriented institution.
>
> Fourth, courts should consider whether the parents had made the choice to send the child to the school prior to their divorce. Although the statute provides that expenses of a special or private school may be divided by agreement of the parties or by order of court, often there is no express agreement as to the child's schooling. Consideration should be given, however, to the prior decision and choice of the parents to send the children to a private institution as the intent of the parties before the separation is instructive.
>
> Fifth, courts should consider any particular factor that may exist in a specific case that might impact upon the child's best interests.
>
> Finally, courts must take into consideration the parents' ability to pay for the schooling. While not the primary factor, it is vital for a court to consider whether a parent's financial obligation would impair significantly his or her ability to support himself or herself as well as support the child when the child is in his or her care.

Id. at 169-71 (citations, quotation marks, and alterations omitted).

Father alleges that the court applied this test incorrectly. We review the findings that the trial judge made as she considered each factor, and determine whether the court erred in determining that Father should contribute to the children's private tuition at Holy Cross.

First, the court recognized that the children had a history of attending private school. While in Maryland, both children attended Saint Peter's School in Olney, and before that, they attended Olney Adventist Preparatory School. The children had been in private school for their entire lives.

Second, trial court noted that at the child-support modification hearing before Magistrate Whitter, there was testimony elicited that while Son performed "quite well" at Saint Peter's and continued to perform well at Holy Trinity, Daughter struggled at Saint Peter's because of her ADHD, and was now receiving tutoring at Holy Cross. The trial court also determined that the fact that "[b]oth children have friends at their new school and have adjusted well[] . . . weigh[ed] in favor of the children remaining in private school."

Third, the trial court observed that there was "no testimony regarding the family history with respect to private school[,]" but found that the fact "that one of the children's step siblings attends Holy Trinity and their step-father i[s] on the board of the school" weighed in favor of the children remaining at Holy Cross.

Fourth, the trial court noted conflicting testimony between the parties as to an agreement for the children to attend private school. Mother testified that as the children had previously been enrolled at Saint Peter's School, which is a Catholic institution in the Archdiocese of Washington, there was an existing agreement that the parties "both wanted them to be in Catholic School." However, the trial court took issue with Father's testimony that the parties "agreed the children would attend private school as long as his parents were willing to pay for it" and noted that "this factor is neutral."

Fifth, regarding other factors that weigh on the best interests of the children, the trial court stated the following:

> [T]here has been tremendous instability in these children's lives. Their parents have divorced. Their mother has remarried which has meant adjusting to living with a stepfather and two stepsiblings. And, they have moved to Connecticut and begun attending a new school, which has meant new teachers and new friends. The Court finds that requiring them to make another transition would be extremely disruptive to their lives and their well-being. In the instant case, the children's need for stability and consistency weighs heavily in favor of them remaining in private school.

Finally, the trial court reviewed the parties' ability to pay for private school, which is Father's main contention. Father contends that his parents paid for the children's private education, and since their relocation to Connecticut, they have refused to contribute towards the tuition bill. While a parent's ability to pay is "not the primary factor[,]" it is still important nonetheless. *Witt*, 118 Md. App. at 171. Based on the court's imputation of income from Father's parents to him, it determined that the "additional financial obligation" of contributing towards the children's tuition "would not impair his ability to support himself or his children when they are in his care."

After thoroughly reviewing the testimony at the child-support modification hearing, the exceptions hearing, and the trial court's written order, we conclude that the trial court did not misapply the *Witt* test in this case, and did not abuse its discretion in ordering Father to contribute to the cost of tuition at Holy Trinity.

D. Determination of Actual Income

Father contends that the trial court erred in its determination that "support" from Father's parents to cover the outstanding payments due on the mortgage on the marital

home was actual income. Additionally, Father contends that the support was required "[s]olely because of the visitation expenses," and should not be misconstrued as "permanent gift income."[24] To the contrary, Mother asserts that the monthly support from Father's parents was properly considered gift income as it has the net effect of lowering his monthly income.

Appellate courts review whether the trial court was correct in determining that supplemental income conferred upon a parent in a child-support case constitute actual income under an abuse of discretion standard. *Petrini*, 336 Md. at 464. Under Maryland statutory law, the trial court may consider severance pay, capital gains, gifts, or prizes as actual income. FL § 12-201(4).

In *Petrini*, 336 Md. at 459, the Court of Appeals determined whether a non-cash gift to a parent can be considered as actual income for the purpose of calculating his child support obligation under the FL § 12-201(4) and the accompanying Maryland Child Support Guidelines. The parties sought a divorce, and the trial court granted custody to the wife, and awarded child support to the wife. *Id.* at 458. The trial court found the husband's employment income to be roughly $14,000 per year. *Id.* The court also found that the husband's mother had been permitting him to live in her home rent free, that she paid the expenses relating to his health issues, and that she paid his health insurance

[24] Father also contends that the trial court erred in finding that he was voluntarily impoverished. We note that there is no testimony in the magistrate or trial court hearing, nor is there language in the trial court's written order, to support this assertion. A trial court does not need to find that a party is voluntarily impoverished in order to determine that its actual income is higher than stated. *See Petrini*, 336 Md. at 466.

premiums. *Id.* The trial court calculated the actual income that he received increased by roughly $10,000 because of the various non-cash gifts. *Id.* at 458-59. On appeal, the Court affirmed the trial court's imputation of gift income from the husband's mother as actual income and noted:

> [I]f a parent is relieved of some of these expenses through outside contributions, it may be appropriate under certain circumstances to increase the parent's actual income to account for such contributions. Manifestly, these benefits may have the effect of freeing up other income that may not have otherwise been available to pay a child support award. . . . Essentially, [the husband]'s mother paid for things that he would otherwise have been responsible for paying for himself out of his take-home salary.

Id. at 464.

In another case, the Court of Appeals held that a husband's obligation to pay the mortgage on a home that his former wife and children lived in under a use and possession order was to be considered as income to the wife, as well as a reduction of husband's income. *Walsh v. Walsh*, 333 Md. 492, 502 (1994). When "money is made available to the party benefitting from the contribution that would not have otherwise been available to pay this ordinary living expense[,]" a gift has been transferred, and the court may consider it as actual income under the child-support guidelines. *Petrini*, 336 Md. at 467 (interpreting *Walsh*, 333 Md. 492).

In this case, while Father's parents do not provide him with cash, they still provide him with a non-cash gift: the freedom to live in a large home while paying a small portion of the outstanding mortgage. Father testified at the child-support modification hearing that he has a mortgage on the marital home of $2,412, but that his parents, after a refinancing of the home, were now the lienholders. Father testified that he "pays what [he] can afford"

but estimated that he pays around $135 out of the $2,412 owed on the mortgage.[25]

Father's relies on *Reynolds v. Reynolds*, 216 Md. App. 205 (2014) for the proposition that because the gifts were intended only to benefit him during the period of litigation when his finances were strained, they should not be considered actual income. We are unconvinced by this argument. In *Reynolds*, a wife's father gave her certain sporadic "gifts" throughout the course of the divorce proceedings while her finances were particularly strained. *Id.* at 223. Nearly a year before trial, the payments ceased abruptly. The trial court reasonably inferred that because the wife's father intended to assist her only while her finances were strained due to the divorce proceedings, he was "unable or unwilling to continue" to supplement her income, and that the payments did not represent future income. *Id.* at 224. Therefore, whether a gift should be determined as actual income involves a time function, namely, whether the person receiving payment will continue to receive the supplemental income.

Under the principles established in the foregoing cases, we conclude that the trial court did not abuse its discretion by imputing Father's parent's support towards Father's mortgage payments as actual income to Father.

E. Voluntary Impoverishment

Father maintains the trial court erred when it failed to conclude that Mother had voluntarily impoverished herself and chose to "rely on her new husband's largesse." Father asserts that Mother intentionally chose to resign from her job and relocate to Connecticut

[25] Subtracting the $135 that Father pays from the $2,412 owed on the mortgage, he is receiving $2,277 per month, or $27,324 per year, from his parents as a non-cash gift.

"for the purposes of improving—not decreasing—her economic resources" and to gain the benefit of her new husband's additional income. As Father claims, the trial court should have imputed either her former income or considered Mother's new husband's income in crafting the child-support order. Finally, Father argues that the court erred when it precluded Mr. Anthony Bird, a vocational rehabilitation specialist, from testifying at the child-support modification hearing to rebut Mother's contentions that she had been seeking, but was unsuccessful, in securing full-time employment in the Connecticut area.

Mother maintains that as it was not her intention to deprive herself of the economic resources to pay child support, and the trial court correctly found that she had not involuntarily impoverished herself.

Under FL § 12-204(b), "if a parent is voluntarily impoverished, child support may be calculated on a determination of potential income." When determining whether a parent is "voluntarily impoverished," courts consider several factors concerning a parent's ability to work, including:

1. his or her current physical condition;
2. his or her respective level of education;
3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
4. the relationship of the parties prior to the divorce proceedings;
5. his or her efforts to find and retain employment;
6. his or her efforts to secure retraining if that is needed;
7. whether he or she has ever withheld support;
8. his or her past work history;
9. the area in which the parties live and the status of the job market there; and
10. any other considerations presented by either party.

Goldberger v. Goldberger, 96 Md. App. 313, 327 *cert. denied*, 332 Md. 453 (1993). *See also Sieglein v. Schmidt*, 447 Md. 647, 671–72 (2016) (quoting the *Goldberger* factors).

Additionally, as we recognized in *Goldberger*, "a parent shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Id.* at 327.

In addition to considering the 10 factor test, the trial court must also look to "parent's motivations and intentions." *Wills v. Jones*, 340 Md. 480, 489 (1995) (citing *Goldberger*, 96 Md. App. at 327). The dispositive factor is whether the parent voluntarily impoverished herself, not whether that parent had done so specifically to avoid child support payments. *Sieglein*, 447 Md. at 672 (citing *Wills*, 340 Md. at 494). In *Wills*, the Court of Appeals further recognized that while "[i]t is true that parents who impoverish themselves 'with the intention of avoiding child support . . . obligations' are voluntarily impoverished[,] . . . a parent who has become impoverished by choice is 'voluntarily impoverished' regardless of the parent's intent regarding his or her child support obligations." 340 Md. at 494 (internal citations omitted). In order to be deemed voluntarily impoverished, the parent must have "made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Goldberger*, 96 Md. App. at 327.

In this case, Father claims that because Mother volitionally moved to Connecticut with her new husband and was only working 30 hours a week and not 40, she should be considered voluntarily impoverished. The trial court disagreed, and in a detailed opinion, gave appropriate weight and consideration to each factor as to voluntary impoverishment. The circuit court determined that Mother had obtained a college degree and had attended a

radiology program. She had worked in the field of radiology, as a sonographer, for roughly 20 years. The court found that Mother is doing the same type of work in Connecticut as she had been doing in Maryland, "albeit for less money." The court also credited her testimony that she continued to seek employment that would provide her with the opportunity to earn more by working 40 hours per week. Because the court exercised its discretion in precluding Mr. Bird from testifying about the job market in Connecticut, it heard no testimony concerning the state of the job market in the area. But the court found credible Mother's testimony that "she would continue to pursue new employment" as she had related her attempts to obtain a second job, closer to her home, where she hoped that she would eventually be able to obtain more hours. Lastly, the court found it unlikely that additional training would result in an increase of income. In light of the circuit court's detailed findings, we perceive no error in the trial court's ruling that Mother was not voluntarily impoverished.

Finally, we address Father's contention that precluding Mr. Bird from testifying as a rebuttal expert witness was in error. Father proffered that Mr. Bird had researched the job market in Connecticut and found that there were "five openings today" and that "she is capable of earning . . . $75,000 on an annual basis." Father further proffered that, based on Mr. Bird's 2013 interview with Mother,[26] she had "made no legitimate effort to obtain employment."

[26] Mr. Bird had previously interviewed Mother in 2013 in regard to the divorce proceedings. Father's counsel sent Mother a letter on September 17, 2015, which was five days prior to trial, in an attempt to re-interview her. Mother's counsel objected due to a lack of prior notice.

The trial court has discretion to admit or preclude rebuttal testimony. *Women First OB/GYN Associates, L.L.C. v. Harris*, 232 Md. App. 647, 687, *cert. denied sub nom. Women First Ob/Gyn v. Harris*, 456 Md. 73 (2017). The decision of the trial court will not be disturbed "unless the ruling of the trial court was both 'manifestly wrong' and 'substantially injurious.'" *Riffey v. Tonder*, 36 Md. App. 633, 646 (1977). *See also Harris*, 232 Md. App. at 687 (*quoting Riffey*). "[R]ebutal evidence is any competent evidence which explains, is a direct reply to or a contradiction of material evidence introduced by an accused in a criminal case by a party in a civil action." *Riffey*, 36 Md. App. at 645 (citing *State v. Hepple*, 279 Md. 265, 270 (1977)). While Mr. Bird may have been able to testify as to Mother's efforts to find employment in 2013, there was no evidence before the court to show that he could provide accurate testimony as to her efforts to find employment at the time of the child-support modification hearing. Accordingly, we find no abuse of discretion in the trial court's decision to preclude Mr. Bird to testify as a rebuttal witness.

JUDGMENT OF CHILD CUSTODY APPEAL REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES. JUDGMENT OF CHILD SUPPORT OBLIGATION APPEAL AFFIRMED. COSTS TO BE PAID BY APPELLANT/CROSS-APPELLEE.