

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 760

September Term, 2019

ISABEL GALVEZ LOPEZ

v.

STEVEN MARTINEZ

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 18, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On November 22, 2016, the Circuit Court for Anne Arundel County granted Isabel Galvez Lopez (“Lopez”), appellant, and Steven Martinez (“Martinez”), appellee, a judgment of absolute divorce. In the divorce decree, the court awarded Lopez “a marital share of Steven Martinez’s U.S. Military Pension on an if, as and when basis, according to the Bangs formula”—*see Bangs v. Bangs*, 59 Md. App. 350, 356 (1984)—and “pre-retirement survivor benefits, at her election and sole expense, if available to her within the time requirements of the plan administrator for such election[.]” Lopez has since sought to amend the decree by asking the circuit court to compel Martinez to elect “former spouse coverage” under the Survivor Benefit Plan, which is codified at 10 U.S.C. §§ 1447-55, and to explicitly provide that she could make a “deemed election request” directly to the Defense Finance Accounting Service (“DFAS”), pursuant to 10 U.S.C. § 1450(f)(3)(C), in the event that Martinez fails or refuses to make such an election in the first instance. Indeed, Lopez has filed not only an in banc appeal seeking that benefit, but has also filed numerous motions seeking benefits under the Survivor Benefit Plan she contends would pertain to Martinez’s retirement from the United States Navy. Upon remand from the in banc appeal, the circuit court has not only denied her any access to a Survivor Benefit Plan, but has also substituted for the share of Martinez’s pension “according to the Bangs formula” an award of a portion of Martinez’s pension pursuant to a federal statute that applies “when . . . a divorce occurs after December 23, 2016.” *See Fulgium v. Fulgium*, 240 Md. App. 269, 288 (2019) (applying the National Defense Authorization Act (NDAA) Fiscal Year (FY) 2017 (“NDAA 17”)).

QUESTIONS PRESENTED

The questions presented by Lopez are:

- I. Whether the circuit court abused its discretion in declining to implement survivor benefit plan language at the direction of the in banc panel?
- II. Whether the circuit court erred in its calculations and ordered timing of Husband's military pension division payments to Wife pursuant to the NDAA 17.
 - A. Whether the circuit court erred as a matter of law in determining that the National Defense Authorization Act Fiscal Year 2017 applied?
 - B. Whether the circuit court erred in its calculation of a [sic] military pension division payments in accordance with the National Defense Authorization Act Fiscal Year 2017?
 - C. Whether the circuit court erred as a matter of law in fixing the payable amount of the military pension division payments without cost-of-living adjustments?
 - D. Whether the circuit court abused its discretion in delaying military pension division payments to Wife until Husband has retired from the Reserves and is receiving his full military retired pay?

Martinez filed a cross-appeal, which this Court ruled, by order dated November 1, 2019, was timely only with respect to the July 23, 2019 order entered by the Circuit Court for Anne Arundel County denying Martinez's July 2, 2019 Motion to Strike, or in the Alternative, Dismiss Defendant's Notice of Appeal. To the extent he addressed that issue, we affirm the ruling of the circuit court, and, pursuant to this Court's order dated November 1, 2019, we will not consider the other arguments made in his cross-appeal, and we will grant Lopez's motion to strike.

With respect to the issues raised by Lopez, we first address Lopez's claims related to the Survivor Benefit Plan and conclude there was no timely appeal taken after the circuit court entered its amended judgment of divorce denying that claim on August 30, 2018. Similarly, with respect to her contention that the circuit court erred in ruling, upon remand from the in banc appeal, that the award of a marital share of Martinez's pension benefit was subject to application of the NDAA 17, we conclude that she did not timely appeal from the circuit court's decision to substitute the NDAA 17 provisions for computation based upon the Bangs formula in the amended judgment of divorce entered on August 30, 2018. We shall affirm in part the judgment of the circuit court, but conclude that a remand is necessary to address certain aspects of the court's computation of the marital share of the pension benefit pursuant to the NDAA 17.

FACTUAL AND PROCEDURAL BACKGROUND

When the parties married on February 9, 2011, Martinez was enlisted in the United States Navy and eligible for retirement on December 31, 2018. After nearly six years of marriage, the parties were granted a judgment of absolute divorce by the Circuit Court for Anne Arundel County on November 22, 2016. Pertinent to this appeal, the judgment of absolute divorce, filed on November 22, 2016, stated in part:

This matter came before the Court on the Amended Complaint for Absolute Divorce and Amended Counter-Complaint for Absolute Divorce, and testimony having been taken and heard, and for the reasons stated by the Court on the record, having found that the grounds of a 12-month voluntary separation having been sufficiently proven, it is thereupon:

ORDERED, that Steven Martinez and Isabel Galvez are granted an absolute divorce, and it is further,

ORDERED, that Isabel Galvez Lopez is awarded a marital share of Steven Martinez's U.S. Military Pension on an if, as and when basis, according to the Bangs formula. Further, Isabel Galvez Lopez is awarded pre-retirement survivor benefits, at her election and sole expense, if available to her within the time requirements of the plan administrator for such election; and it is further,

ORDERED, that the court reserves jurisdiction to pass or amend qualified pension orders, such initial order for the military pension to be submitted to the Court by Defendant's [*i.e.*, Lopez's] counsel within 30 days of this Order, and it is further,

ORDERED, that the Defendant's request for alimony, both rehabilitative and indefinite, is denied, and it is further,

ORDERED, that Steven Martinez shall pay to Isabel Galvez Lopez the sum of \$5,000.00, payable in full on or before December 31, 2016, as a monetary award to adjust the equities in the marital property. . . .; and it is further,

ORDERED, that all other requests for relief, including attorney fees, shall be denied;

As reflected in the above quoted excerpt, although the November 22, 2016 judgment stated that Lopez was "awarded pre-retirement survivor benefits, at her election and sole expense, if available to her," the judgment of absolute divorce made no explicit reference to, or award of former spouse coverage under, the Survivor Benefit Plan, codified at 10 U.S.C. §§ 1447-55.

On December 1, 2016, Lopez filed a motion to alter or amend the judgment of absolute divorce. Lopez asked the court to, among other things, amend the order to include language she proposed expressly providing:

Isabel Maria Galvez Lopez shall also be awarded former spouse coverage under the Survivor Benefit Plan, with a base amount to be determined by

the former spouse. This is a “deemed election” under 10 U.S.C. § 1450(f)(3)(C). [Lopez] shall reimburse [Martinez] the Survivor Benefit Plan premium, which shall be deducted by DFAS from the service member’s disposable retired pay in accordance with the Survivor Benefit Plan.

Lopez pointed out in her motion that the Survivor Benefit Plan does not allow for “pre-retirement benefits” as the court had “awarded” her in its November 22 order. In Martinez’s opposition to the motion to alter or amend, he did not seek to have the marital portion of the pension be calculated on a basis other than the *Bangs* formula; nor did he oppose permitting Lopez to seek coverage under the Survivor Benefits Plan so long as she paid the premium. Instead, he observed in his opposition that the trial judge had “stated in his decision that [Martinez’s] counsel shall work with [Lopez’s] counsel to determine the exact language necessary for the distribution of [Martinez’s] military pension pursuant to the *Bangs* formula and for [Lopez’s] SBP coverage, and submit the proposed order to the Court within thirty (30) days.”

The circuit court denied Lopez’s motion to alter or amend the judgment of absolute divorce on January 10, 2017.

On February 2, 2017, Lopez filed a request for in banc review of the circuit court’s denial of her December 1 motion to alter or amend the judgment of absolute divorce. In her memorandum of law, Lopez argued that the language in the judgment of absolute divorce providing for “pre-retirement survivor benefits, at her election and sole expense” was inconsistent with the Survivor Benefit Plan, and was “unenforceable as presently written.” She further asserted that preventing her from claiming “post-retirement

survivor benefits” “would be solely punitive” and “would be unjust and inequitable[.]” She also argued to the in banc panel that the trial court had erred in refusing to award her rehabilitative alimony for one year and attorney fees.

On July 22, 2018, the in banc panel ordered that the judgment of divorce was “affirmed-in-part” and remanded-in-part “for further findings as they relate to Plaintiff’s U.S. Military Pension.” In its written opinion, the panel noted that there were only two issues alleged to be in error: “(1) *Whether the language within the Judgment of Absolute Divorce relating to the military pension survivor benefits is unenforceable as presently constituted?* (2) *Whether the court erred in denying alimony and attorney’s fees to Defendant [Lopez]?*” (Emphasis added.) The in banc court observed that the judgment of divorce had “awarded a marital share of Steven Martinez’s U.S. Military pension on an if, as and when basis, according to the Bangs formula.” There was, however, no dispute argued before the in banc court with respect to that portion of the November 22, 2016 judgment. And there was no mention of NDAA 17. With respect to the Survivor Benefit Plan, the court agreed with Lopez that “[t]he election for SBP cannot be divided into parts and must be made before or at retirement. 10 U.S.C. § 1448 (a)(2)(A).” As a consequence of the flaw in the judgment relative to the “pre-retirement survivor benefits,” the in banc court explained:

Being that the election awarded [by the circuit court] cannot be divided into pre-retirement and post-retirement benefits as contemplated by the [trial court], the Panel shall remand to [the trial judge] for further findings **to effectuate the intended marital award as it pertains to Plaintiff’s U.S. Military Pension.**

(Emphasis added.)

On remand, without conducting a hearing, the trial judge entered an order on July 31, 2018, which provided in pertinent part:

Pursuant to the Order of the *in banc* review panel remanding the above-captioned matter to the trial Court to make findings **to effectuate the intended marital award as it pertains to Plaintiff's military pension**, and this Court finding that it may not divide pre-retirement and post-retirement survivor benefits; therefore, **the Judgment of Absolute Divorce is hereby modified as follows:**

ORDERED, that Isabel Galvez Lopez is awarded a marital share of Steven Martinez's U.S. Military Pension on an if, as, when basis, according to the Bangs formula; and it is further,

ORDERED, that the court reserves jurisdiction to pass or amend qualified pension orders, such initial order for the military pension to be submitted to the Court by Defendant's counsel within 30 days of this Order.

(Emphasis added.)

The July 31, 2018 order omitted any reference to Lopez having any access to the Survivor Benefit Plan. (And, again, there was no mention of NDAA 17.)

On August 1, 2018, Martinez filed a motion to alter or amend the July 31 order. Martinez now argued that the National Defense Authorization Act Fiscal Year 2017, which was enacted on December 23, 2016, made the award of a share of his military pension to Lopez on an "as, if, and when" [sic] basis "invalid."

On August 7, 2018, Lopez filed a response to Martinez's motion, and in the same filing, *also* requested that the circuit court alter or amend the July 31 order. Lopez's response indicated at one point that Lopez "concur[s]" that the order entered July 31, 2018, was invalid and unenforceable because of conflict with federal law. But, in the

conclusion to her response/request to alter or amend, Lopez nevertheless asked the circuit court to amend its July 31, 2018 order to: (1) grant “her marital share of the Plaintiff’s military pension on an ‘if, as, and when’ basis”; (2) add a provision permitting her to submit a military pension order “and a Survivor Spouse Benefit Form DD FORM 2656-10, APR 2009, and/or other supporting documentation, to the U.S. Military . . . in order to secure her marital military pension rights and/or Survivor Spouse Benefit rights”; and (3) include the following language: “ORDERED, that Isabel Galvez Lopez is awarded a marital share of Steven Martinez’s U.S. Military Pension on an ‘if, as and when’ basis, according to Maryland law and in accordance with Bangs v. Bangs, 59 Md. App. 350 (1984), the ‘Bangs formula.’” (Emphasis in original.)

On August 30, 2018, the circuit court entered an amended order (apparently in response to both the motion to alter or amend filed by Martinez on August 1, 2018, and the response/request filed by Lopez on August 7, 2018). The court’s amended order filed on August 30, 2018, stated in pertinent part:

Pursuant to the Order of the *in banc* review panel . . ., and this Court finding that it may not divide pre-retirement and post retirement survivor benefits; therefore, the Judgment of Absolute Divorce is hereby modified as follows:

ORDERED, that Isabel Galvez Lopez is awarded a marital share of Steven Martinez’s U.S. Military Pension, in conformance with the requirements of the National Defense Authorization Act (NDAA) Fiscal Year (FY) 2017 (“NDAA 17”) which require[s] a pension division order incident to divorce to be calculated upon the member’s retired pay base (“high 3”) amount at the time of divorce and the service member’s creditable years of service in the military at the time of divorce; and it is further,

ORDERED, that the court reserves jurisdiction to pass or amend qualified pension orders, such initial order for the military pension to be submitted to the Court by Defendant’s counsel within 90 days of this Order.

The circuit court again conspicuously omitted any reference to an award relative to the Survivor Benefit Plan. Moreover, this appears to be the first time the court adopted Martinez’s assertion that it needed to abandon the *Bangs* formula in favor of the formula provided by NDAA 17 for dividing military pension benefits. A motion to alter or amend this ruling pursuant to Rule 2-534 would have been required to be filed on or before September 10, 2018. But Lopez did not file such a motion. A motion asking the court to exercise its revisory power pursuant to Rule 2-535(a), however, was due on or before October 1, 2018.

On October 1, 2018, Lopez, acting on her own behalf (though still represented by counsel of record whose appearance had not been struck as of that date), filed a “Motion to Revise” the order entered on August 30, 2018. Lopez asked the court to revise its August 30 order by adding language providing that Martinez would be required to elect coverage for her under the Survivor Benefit Plan as his former spouse. As for the court’s application of NDAA 17, Lopez stated in her motion that she was “unaware of the real impact of recent NDAA 17,” but asserted—even though the same judge had entered the initial judgment of divorce on November 22, 2016 and the amended judgment of divorce on August 30, 2018—that the intention of the trial court had been to award her a portion of Martinez’s pension under the *Bangs* formula “as part of overall scheme of equitable

distribution in the final judgment of divorce.” (This motion was not ruled upon until February 12, 2019.)

On November 28, 2018, Lopez, through counsel, filed a proposed “Military Pension Division Order” in an apparent effort to comply with the court’s 90-day deadline as provided in the court’s August 30 order.¹

On January 16, 2019, Lopez filed a “Motion to Enter Military Pension Division Order Or, Alternatively, Motion to Extend Time.” The circuit court scheduled a hearing on Lopez’s motion for April 10, 2019.

After Martinez filed unsuccessful motions to strike Lopez’s October 1 motion to revise, Martinez filed an opposition on February 4, 2019. On February 12, 2019, Lopez’s motion to revise (filed on October 1) was denied without explanation. Lopez did not file an appeal or a subsequent motion to alter or amend the court’s ruling of February 12, 2019. The deadline for Lopez to appeal from the denial of her October 1 motion to revise would have been March 14, 2019. No notice of appeal was filed on or before March 14, 2019. (We glean from the entries in MDEC that Lopez attempted to file *pro se* a notice for in banc appeal on or about February 22, 2019, but, because she was still represented by an attorney of record at that time, the clerk of court returned that notice to her with a memo dated February 28, 2019, advising that the notice “cannot be processed because

¹ A copy of Lopez’s proposed military pension division order was not included as part of the record extract, and we are unable to locate the document in MDEC. But, regardless, on December 18, 2018, the court entered an order declining to sign the proposed order “at this time because it is not signed by the parties.” The parties were directed to submit a proposed signed order within 30 days.

you are represented by an attorney.” The next notice of appeal is listed in the docket entries as being filed by Lopez on June 26, 2019.)

Consequently, even though the revised judgment of divorce entered on August 30, 2018—applying the NDAA 17 and making no award of survivor benefits—was arguably contrary to the law of the case established by the in banc appeal, the amended judgment entered August 30, 2018, was final and beyond challenge on appeal after March 14, 2019.

The transcript of a hearing held on April 10, 2019, to consider terms of the military pension order reflects the following discussion:

[COUNSEL FOR MARTINEZ]: And then the share that I calculated was \$164 based on the application of the National Defense Authorization Act.

[COUNSEL FOR LOPEZ]: But the Act doesn't apply. We're still looking at (inaudible at 2:09:17 p.m.) at this point because the, it wasn't modified until December 23rd [2016] and it says any divorce decrees that came after December 23rd [2016].

[COUNSEL FOR MARTINEZ]: It also says any incident orders and Judge Plevans [sic] specifically ordered that the nine to seventeen [sic] apply. That hasn't been disputed. There was a motion to revise that by Ms. Lopez, however, that was denied. So at this point - -

THE COURT: All right, I'll tell you what, go to my chambers, the case management chambers, the fourth floor, and talk to the, talk to Erin, the Family Law paralegal and I'll be up there to talk with everybody in a few moments. You can take that with you.

Thereafter, the circuit court entered an order on April 12, 2019, which provided in pertinent part:

. . . [I]t is hereby

ORDERED, that this Court finds Defender's [sic] request as to the Survivor Benefit has been previously decided by Judge Klavans by Order docketed February 12, 2019; and it is further

ORDERED, that the Court accepts Plaintiff's calculations of the marital share of Steven Martinez's U.S. Military Pension, in conformance with the requirements of the National Defense Authorization Act (NDAA) Fiscal Year (FY) 2017 ("NDAA 17") as awarded to Defendant in the Amended Order docketed on August 30, 2018; and it is further

ORDERED, that Plaintiff shall pay directly to Defendant the amount of ONE HUNDRED SIXTY-FOUR DOLLARS and ZERO CENTS per month until his death.

On April 22, 2019, Lopez and Martinez each filed a motion to alter or amend the circuit court's order entered on April 12, 2019. In Lopez's motion to alter or amend the April 12 order, she disputed the court's application of the NDAA 17 because, she said, the parties were divorced prior to the enactment of NDAA 17. She also disputed the court's calculation of her share of Martinez's military pension. With respect to the court's finding that her request for survivor benefits had been decided on February 12, 2019, Lopez "renew[ed] her original argument" and claimed that "the SBP award was granted to [her] during the final divorce proceedings" and that the court "did not address [her] entitlement to the SBP award" in denying her motion to revise on February 12.

In Martinez's opposition to Lopez's motion, he stated that Lopez had not contested the calculations at any time during the discussion held in chambers. In his own motion to alter or amend the court's April 12, 2019 order, Martinez disputed the court's order to pay Lopez a portion of his military pension until his death, and noted that an onset date for when the payments were to begin was not specified in the April 12 order.

Martinez also argued in his motion: “It was discussed and established in chambers that Defendant was denied the right to the Survivor Benefit Plan and that the NDAA 17 would apply.”

On May 28, 2019, the circuit court entered two separate orders in response to the motions filed by the parties to alter or amend the court’s April 12 order. With respect to Lopez’s motion, the circuit court entered an order simply denying her motion. With respect to Martinez’s motion, the circuit court entered an order that stated in pertinent part:

. . . [I]t is hereby

ORDERED, that Plaintiff’s Motion to Alter or Amend Judgment Entered April 12, 2019 is hereby GRANTED in part and DENIED in part; and it is further

ORDERED, that Judgment is hereby amended to begin once Plaintiff has retired from the Reserves and is receiving his full military retired pay; and it is further

ORDERED, that Defendant’s award shall begin upon satisfaction of the \$1,565.83 judgment against Defendant in favor of Plaintiff; and it is further

ORDERED, that all other provisions of the Court’s Order docketed on April 12, 2019 that are not amended by this Order shall remain in full force and effect.

Although the filing deadline to file a motion to alter or amend the order entered on May 28, 2019, would have been Friday, June 7, 2019, not until June 10, 2019, did Lopez file a motion seeking to alter or amend the order entered on May 28, 2019. In her motion, she explained that the May 28 order “leaves room for ambiguity as well as non

compliance by Plaintiff,” does not require Martinez to notify Lopez of his retirement, and leaves her without “any recourse in the event that the Plaintiff does not notify the Defendant of his retirement.”

On June 26, 2019—before the circuit court entered a ruling on her motion to alter or amend the May 28 order—Lopez, acting on her own behalf (although still represented by counsel whose appearance had not been struck), filed a notice of this appeal.

On July 2, 2019, Martinez filed a “Motion to Strike, or in the Alternative, Dismiss Defendant’s Notice of Appeal.”

On July 3, 2019, the circuit court entered an order denying Lopez’s June 10 motion to alter or amend the May 28 order.

On July 23, 2019, the circuit court entered an order denying Martinez’s July 2 motion to strike.

On August 9, 2019, Martinez filed a notice of cross-appeal, which would have been timely only with respect to orders entered during the prior 30 days. Maryland Rule 8-202. On November 1, 2019, in response to Lopez’s motion to dismiss Martinez’s cross-appeal, this Court entered an order limiting the scope of the issues Martinez could raise in the cross-appeal. This Court ruled that the cross-appeal was timely only with respect to the order entered by the circuit court on July 23, 2019. Our order stated:

ORDERED that the appellee’s cross-appeal was not timely filed pursuant to Maryland Rule 8-202(e) to the extent it purports to challenge the April 12, 2019 and May 28, 2019 orders entered by the Circuit Court of Anne Arundel County in Steven Martinez v. Isabel Lopez, Cir. Ct. No. C-02-FM-15-004500; and it is further

ORDERED that the appellee’s “Notice of Cross-Appeal” was effective to secure the Court’s review of the July 23, 2019 order entered by the Circuit Court of Anne Arundel County denying the appellee’s July 2, 2019 “Motion to Strike, or in the Alternative, Dismiss Defendant’s Notice of Appeal[.]”

ISSUES APPEALABLE

The procedural history of this case is complicated, as is evident from the summary set forth above. As noted above, regardless of the correctness of the circuit court’s amended judgment of divorce (entered August 30, 2018), no notice of appeal was filed within 30 days after the entry of that judgment. Even though Lopez filed a timely motion to revise the August 30 judgment pursuant to Rule 2-535(a) on October 1, 2018, such motions, when filed more than 10 days after the entry of judgment, do not extend the time for filing an appeal from the judgment that is the subject of the motion to revise. When the October 1, 2019 motion was eventually denied by the circuit court on February 12, 2019, Lopez *could have* noted an appeal from that judgment on or before March 14, 2019, but the substance of the appeal would have been limited to whether the court had abused its discretion in denying the motion to revise. Regardless, no notice of appeal was filed within 30 days after the circuit court denied Lopez’s motion to revise on February 12, 2019, and as a consequence, Lopez cannot now take issue with the decisions embodied in the circuit court’s judgment of August 30, 2018.

Lopez’s notice of appeal filed on June 26, 2019, was timely, however, to contest judgments entered within the 30 days preceding June 26, 2019, which included the two orders entered on May 28, 2019: (1) denying the motion to alter or amend that Lopez

filed on April 22, which had asked the court to alter or amend the order entered on April 12, 2019 (and which, by rule, tolled the time for appealing the order entered April 12, 2019); and (2) granting Martinez’s April 22 motion to alter or amend the order entered on April 12, 2019. Lopez’s April 22 motion to alter or amend the court’s April 12 order tolled the time for filing an appeal of the April 12 order itself. *See* Md. Rule 8-202(c) (“[W]hen a timely motion is filed pursuant to Rule . . . 2-534, the notice of appeal shall be filed within 30 days after entry of . . . an order . . . disposing of a motion pursuant to Rule . . . 2-534.”); *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 60 (2017) (“Under Rule 8–202(c), when a Rule 2–534 motion is timely filed, i.e., filed within ten days of entry of the judgment, the deadline for filing a notice of appeal from the underlying judgment is 30 days after the entry of a notice withdrawing the motion or 30 days after the entry of an order disposing of the motion.”). Lopez’s April 22 motion to alter or amend was denied on May 28, 2019, and Martinez’s motion to alter or amend, filed also on April 22, was also denied on May 28, 2019.

Accordingly, Lopez’s notice of appeal, filed on June 26, 2019, was effective for securing our review of the orders entered on April 12 and May 28.

And, as noted above, this Court previously ruled on November 1, 2019, that Martinez’s notice of cross-appeal was effective only to secure the Court’s review of the July 23, 2019 order entered by the Circuit Court of Anne Arundel County denying Martinez’s July 2, 2019 Motion to Strike, or in the Alternative, Dismiss Defendant’s Notice of Appeal.

STANDARD OF REVIEW

“In general, the denial of a motion to alter or amend a judgment or for reconsideration is reviewed by appellate courts for abuse of discretion.” *Miller v. Mathias*, 428 Md. 419, 438 (2012) (quoting *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 673 (2010) (quoting *Wilson-X v. Dep’t of Human Res.*, 403 Md. 667, 674–75 (2008))). Similarly, this Court ruled in *Potts v. Potts*, 142 Md. App. 448, 462 (2002): “The decision to award survivor benefits is within the sound discretion of the trial court.”

In *North v. North*, 102 Md. App. 1, 14 (1994), this Court explained the abuse of discretion standard as follows:

. . . [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. That, we think, is included within the notion of “untenable grounds,” “violative of fact and logic,” and “against the logic and effect of facts and inferences before the court.”

In *Wilson-X v. Dep’t of Human Res.*, 403 Md. 667, 677 (2008), the Court of Appeals explained:

. . . [A]buse occurs when the judge “exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.” . . . [A]buse may be found “when the court acts ‘without reference to any guiding rules or principles[.]’”

(Citations omitted.)

With respect to Martinez's motion to strike the notice of appeal Lopez filed on her own behalf, we would review that ruling for abuse of discretion. *First Wholesale Cleaners Inc v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 38 (2002).

DISCUSSION

As a preliminary matter, we address Lopez's "Motion to Strike Appendix and/or Dismiss Cross-Appeal," filed pursuant to Maryland Rules 8-602(b)(2), 8-602(c)(6), and 8-603(c). Martinez did not provide a statement of the questions presented in the portion of his brief filed as cross-appellant, but the brief primarily presents arguments purporting to challenge the merits of the circuit court's award of pension benefits to Lopez. For example, he states in his opening brief:

Husband is asking that this court . . . remand to the Circuit Court to . . . remove any pension benefits to Wife.

* * *

Husband understands that this award is within the discretion of the court, but Husband is asking this Honorable Court to remand this case to the Circuit Court for them to order that the pension award is no longer granted to the Wife and that the case be closed.

* * *

. . . Husband respectfully requests this court to remand to the circuit court and deny any more financial awards to Wife. Husband also respectfully requests this court to remand award [sic] Husband the total cost for attorney fees, flight and hotel to appear in court today. Husband also respectfully request this court to remand to the circuit court for the circuit court to order past attorney fees and order this case closed once and for all.

* * *

Husband is requesting this court to remand this Case only on the issue of Wife receiving more than her contribution to the marriage by receiving a monthly retirement portion of which she did nothing to help contribute.

But this Court's November 1, 2019 order made clear that Martinez's cross-appeal was timely only to the extent it purported to challenge the July 23, 2019 order the circuit court entered denying Martinez's July 2 motion to strike Lopez's notice of appeal. We will, therefore, grant Lopez's motion to strike the portion of Martinez's brief filed as cross-appellant that address issues other than the denial of his motion to strike Lopez's notice of appeal.

In the statement of facts in the portion of the brief Martinez filed as appellee, he does recite that Lopez "filed a Pro Se Notice of Appeal on June 26, 2019. . . . Atty. Jimenez, entered appearance on April 2, 2019 (E.15) and was also copied on the Waiver of Prepaid Costs Being Granted per court records on July 2, 2019. (E. 17) Wife should not have been allowed to file Pro Se while still represented by counsel." And he returns to the subject in the penultimate paragraph of his brief as cross-appellant, stating: "Since the Appellant was represented by counsel [at the time she herself filed the notice of appeal], according to court records, this appeal was incorrectly granted." We ruled in *First Wholesale Cleaners* that we review such decisions for abuse of discretion. 143 Md. App. at 38. Given the procedural complexity of this case, we discern no abuse of discretion in permitting the appeal to proceed in this instance.

With respect to the motion to strike Martinez's appendix, the appendix consists of the following documents:

- Apx. 1: An email dated March 9, 2020, captioned: “FW: [Non-DoD Source] Copy of Documents – Steven Martinez”
- Apx. 2: A letter from Western Union dated July 1, 2016
- Apx. 3: An email dated December 28, 2016, captioned: “FW: [Non-DoD Source] NCCS Martinez refusal to obey court order”
- Apx. 4: Forms captioned “Initial CRC Review,” “Periodic CRC Review,” “Safety Response,” “Intervention Plan,” “Risk Assessment”
- Apx. 5: A report captioned “Time & Expenses by Client” from Hartel, DeSantis & Howie, LLP

Based upon our review of the record, only Apx. 2 is part of the trial court record; that document was admitted as Plaintiff’s exhibit #16. Martinez’s Apx. 1, 3, 4, and 5 do not appear in the circuit court record, and therefore, pursuant to Rule 8-501(f), should not have been included in the appendix. Therefore, we will strike Apx. 1, 3, 4, and 5, and the reference to Apx. 1 in Martinez’s reply brief. We now turn to Lopez’s contentions.

I. Survivor benefits

Maryland courts may require a participating service-member to designate a former spouse as a beneficiary under the Survivor Benefit Plan. *Matthews v. Matthews*, 336 Md. 241, 250 (1994). In *Potts*, 142 Md. App. at 466, this Court observed that awarding survivor benefits, in conjunction with a division of the service-member’s pension, requires the trial court to weigh various factors in order to determine whether to assign such benefits, and how that might affect the marital property award. *Id.* at 470. We noted that an award of survivor benefits could have the effect of reducing the service-member’s pension benefit, and, if the trial court orders the spouse of the service-member to be named as “surviving spouse,” it must decide which party will pay for the benefit if the parties cannot otherwise agree. *Id.* at 471, 474. The Court stated in *Potts*: “[T]he varying

manner in which a trial court may award survivor benefits requires a degree of inquiry that is better accomplished at the trial level, along with the other marital property considerations. . . .” *Id.* at 471.

On appeal, Lopez asserts that the mandate of the *in banc* panel, entered on July 22, 2018, required the circuit court to include in its order on remand the language necessary “to effectuate the intended SBP [i.e., Survivor Benefit Plan] marital award[.]” Lopez recognizes, however, that the omission of any reference to survivor benefits in the circuit court’s order entered on July 31, 2018 (after the remand) and the amended order subsequently entered on August 30, 2018, “could be construed that the SBP was revoked” by the trial judge. But she argues that that, too, would be “in violation of the *in banc* panel mandate.” Lopez therefore contends that, in the circuit court’s ruling entered on April 12, 2019, the court “abused its discretion by declining to consider an unresolved issue from the *in banc* panel’s mandate”; in essence, she argues that, in April 2019, the court erred in determining that Lopez’s request to take advantage of the Survivor Benefit Plan had been finally resolved by the circuit court on February 12, 2019.

Martinez maintains, however, that, upon remand from the *in banc* panel, and upon further consideration of the fact that the initial divorce decree had made an unenforceable award that was not permitted by law, the trial court clearly decided not to award Lopez any additional benefit relative to the Survivor Benefit Plan.

It is undisputed between the parties that the circuit court’s August 30, 2018 order, amending the divorce decree, is silent with respect to survivor benefits; there is no

mention of the Survivor Benefit Plan in the August 30 order. And there was, therefore, no grant of the benefit in that judgment.

As previously noted, Lopez, acting on her own behalf on October 1, 2018, filed a motion to revise the August 30, 2018 order, asking the court to add language that would require Martinez to elect “former spouse coverage” under the Survivor Benefit Plan, and to explicitly provide that she could make a “deemed election request” directly to the Defense Finance Accounting Service, pursuant to 10 U.S.C. § 1450(f)(3)(C). But Lopez’s motion to revise was denied on February 12, 2019. And Lopez did not file a notice of appeal or post-judgment motion within 30 days after the entry of the court’s February 12, 2019 order (refusing to revise the order entered August 30, 2018).

Consequently, we perceive no error or abuse of discretion in the circuit court’s subsequent recital on April 12, 2019, stating that Lopez’s “request as to the Survivor Benefit has been previously decided by Judge Klavans by Order docketed February 12, 2019” The court’s recap of the procedural history of the case that had preceded that point in this litigation was correct; Lopez’s requests for participation in the Survivor Benefit Plan had been denied by being excluded from every revised judgment of divorce entered by the circuit court after the remand from the in banc panel. Lopez cannot now challenge the court’s February 12, 2019 ruling and pursue the relief she seeks with respect to survivor benefits in this appeal.

II. Pension benefits

A. The NDAA 17

Lopez contends that the circuit court also erred in determining that the National Defense Authorization Act Fiscal Year 2017 (“NDAA 17”) governed the division of Martinez’s pension benefits in its April 12, 2019 order. Citing the U.S. Department of Defense Financial Management Regulations 7000.14–R (“DoD Regs”) 290801, Lopez argues that NDAA 17 applies to the division of pension benefits only for parties who were granted a divorce after December 23, 2016, and she asserts that, because she was granted a divorce from Martinez prior to that date—on November 22, 2016—the NDAA 17 does not apply in her case. We observed in *Fulgium v. Fulgium*, 240 Md. App. 269, 288 (2019), that NDAA 17 applies when “a divorce occurs after December 23, 2016, and the member has not yet retired” Although Lopez argues that the converse should be true—that NDAA 17 does not apply when a divorce decree was entered before December 23, 2016—neither party has cited any authority that has expressly addressed that point.

Martinez argues that the circuit court did not err in applying the NDAA 17 here because the final amended divorce decree was not issued until August 30, 2018. Neither party has directed us to a case that has held that the date of amendment affects whether NDAA 17 applies to a divorce even if the original judgment of divorce was entered prior to December 23, 2016.

An argument could perhaps be made that, because the initial judgment of divorce was entered November 22, 2016, and the appellate ruling of the in banc panel essentially

reaffirmed the grant of the divorce and the use of the *Bangs* formula to calculate the portion of Martinez’s pension subject to a marital award, those rulings became law of the case. But the circuit court’s amended judgment of divorce entered August 30, 2018, revised the pension language, replacing the *Bangs* reference with a direction to apply NDAA 17. To the extent that Lopez took issue with the changes introduced in the amended divorce judgment, it was incumbent upon her to pursue a timely appeal. *Cf. Potts*, 142 Md. App. at 462 (“Although Wife timely appealed the QDRO, she did not timely appeal the judgment for absolute divorce. . . . Because the parties’ marital property was divided at the time the judgment of absolute divorce was entered, that judgment was final with respect to the division of the marital property and cannot now be raised.”). As reviewed in the procedural history above, however, she did not appeal, either within 30 days after entry of the August 30, 2018 judgment, or within 30 days after the entry of the court’s February 12, 2019 order (refusing to revise the order entered August 30, 2018).

Consequently, we conclude that the judgment entered August 30, 2018, governs the division of Martinez’s pension benefits, and therefore NDAA 17 applies.

B. Calculation of payments

The circuit court determined in its April 12, 2019 order that the amount of pension benefits payable to Lopez is \$164.00/month. Lopez argues that, even if NDAA 17 applies, the circuit court erred in its calculation of the benefits payable to her. She asserts in her reply brief: “Husband and Wife agree as to the statutory formula for calculating Wife’s marital share of Husband’s pension under the NDAA 17. . . . However, Husband’s

calculations deviate[], at times without explanation, from the proper application of the statutory formula pursuant to 10 U.S.C. §[§] 1407-1409.” Martinez responds that the court correctly calculated Lopez’s share of his pension under the NDAA 17.

The rationale and arithmetic behind the court’s calculation of \$164.00/month is not clear from the record. The court did not explain what formula it used or how it arrived at Lopez’s share of Martinez’s pension, either in the April 12, 2019 order, or the May 28, 2019 amended order. Certain variables needed to calculate Lopez’s retired pay award were not expressly addressed by the court either—such as the duration of the parties’ marriage, the percentage of Martinez’s retired pay that Lopez was awarded, the years of Martinez’s creditable service, Martinez’s retired base pay amount, and Martinez’s retirement date. As Lopez notes in her opening brief, the record shows that certain variables were assigned two separate figures at various times during the course of the proceedings. For example, at one point, Martinez’s retired base pay (also known as a “high-3 amount”) was represented to be \$4,315.19/month, but on a different occasion, his retired base pay was represented to be \$4,265.17/month.² Similarly, it is not clear from the record whether the court found the duration of the parties’ marriage to be 66 months or 69 months, and whether the court found that Martinez’s months of service was 214

² Reference to the “high-3 amount” comes from 10 U.S.C § 1407(c)(1)(A)-(B), which applies to those who joined the military after September 1, 1980, and provides that a service-member’s retired base pay “is the person’s high-three average,” which is “the total amount of monthly basic pay to which the member was entitled for the 36 months (whether or not consecutive) out of all the months of active service of the member for which the monthly basic pay to which the member was entitled was the highest, divided by . . . 36.”

months or 215 months for purposes of the court’s calculations. Our remand will provide the court an opportunity to make necessary findings and clarify any discrepancies for the record.

On remand, the court may find it appropriate to apply the “career status bonus/reduction” (“CSB/Redux”) formula, set forth in 10 U.S.C. § 1409(a)-(b), based upon Lopez’s concession in her opening brief in this Court stating that, *if* the NDAA 17 applies, then, “for the purposes of this appeal, [Lopez] concedes that the CSB/Redux method should apply as previously suggested by [Martinez].”³ 10 U.S.C. § 1409 provides in pertinent part:

§ 1409. Retired pay multiplier

(a) Retired pay multiplier for regular-service nondisability retirement.-
-In computing--

(1) the retired pay of a member of a uniformed service who is entitled to that pay under any provision of law other than--

(A) chapter 61 of this title (relating to retirement or separation for physical disability); or

(B) chapter 1223 of this title (relating to retirement for non-regular service); . . .

* * *

³ At the divorce trial on November 16, 2016, the trial judge found that Martinez elected to receive the career status bonus under 37 U.S.C. 354; the trial judge stated:

As to the military bonus, that there was extensive testimony about, in the amount of \$30,000, the testimony is clear that that bonus was paid. It netted approximately \$22,500 and it was spent for reasonable living and marital expenses during the course of the marriage.

the retired pay multiplier (or retainer pay multiplier) is the percentage determined under subsection (b).

(b) Percentage.--

(1) General rule.--Subject to paragraphs (2) and (3), the percentage to be used under subsection (a) is the product (stated as a percentage) of—

(A) 2 ½, and

(B) the member's years of creditable service (as defined in subsection (c)).

(2) Reduction applicable to certain new-retirement members with less than 30 years of service.--In the case of a member who first became a member of a uniformed service after July 31, 1986, has elected to receive a bonus under section 322 (as in effect before the enactment of the National Defense Authorization Act for Fiscal Year 2008) or section 354 of title 37, has less than 30 years of creditable service, and is under the age of 62 at the time of retirement, **the percentage determined under paragraph (1) shall be reduced by--**

(A) 1 percentage point for each full year that the member's years of creditable service are less than 30; and

(B) 1/12 of 1 percentage point for each month by which the member's years of creditable service (after counting all full years of such service) are less than a full year.

(Emphasis added.)

According to the CSB/Redux formula set forth above, it appears the calculation of Lopez's expected pension benefit payment would have been as follows (subject to modification corresponding to the circuit court's findings with respect to the variables mentioned above):

Step 1. Apply § 1409(b)(1)(A)-(B):

Percentage = 2.5 x [Martinez’s total years of creditable service]

e.g., Percentage = 2.5 x 17.83 (i.e., 17 years and 10 months)
Percentage = 44.575%

Step 2. Apply § 1409(b)(2)(A)-(B):

Reduction = (30 - [Martinez’s full years of creditable service]) - ([Martinez’s months of creditable service after counting all full years of such service] ÷ 12)

e.g., Reduction = (30 – 17) – (10 ÷ 12)
Reduction = 12.166%

Step 3. Apply the reduction:

Retired pay multiplier = percentage from step 1 – reduction from step 2

e.g., Retired pay multiplier = 44.575% – 12.166%
Retired pay multiplier = 32.409%

Step 4. Apply § 1407(c)(1)(A)-(B):

Retired pay base = Retired pay multiplier from step 3 x [Martinez’s high-3 amount]

e.g., Retired pay base = 32.409% x \$4,265.17
Retired pay base = \$1,382.29

Step 5. Determine former spouse’s retired pay award⁴

Retired pay award = (([Months of parties’ marriage] ÷ [Martinez’s total months of creditable service at the time of the parties’ divorce]) x (retired pay base from step 4)) x [percentage of Lopez’s share]

⁴ “Retired pay award” means the “portion of a member’s disposable military retired pay awarded to a former spouse or current spouse by a court of competent jurisdiction as a property division.” DoD Regs ¶ 290207. *See also* DoD Regs ¶ 290211 (noting difference between “Formula Award” versus “Hypothetical Retired Pay Awards”); *Fulgium*, 240 Md. App. at 293.

e.g., Retired pay award = $((69 \div 214) \times \$1,382.29) \times 50\%$ ⁵
Retired pay award = \$222.85

But Martinez proposed the following calculation in his brief in this Court:

If this case is remanded to the Circuit Court, Husband requests this court to include language specific to the formula under NDAA17 using CSB/REDUX method, which has already been agreed to by Wife in her Appellate Brief:

- High 3=\$4,265.17
- ETS= 12/28/98, Married 2/9/11, Divorced 11/22/16, 69 months of marriage, 214 months of service as of date of divorce / 2 = 16.12% of \$4,265.17
- 17 years of service, CSB Redux is 1/5% for every year, 17 years= 25.5%
- 25.5% of \$4,265.17= \$1,087.62 and 16% of \$1,087.62=
\$174.01
- The court compensated for the tax by reducing pay from \$174.01 to \$164.00.

As one can see from our calculations above, even if we input the lesser of the two figures for Martinez’s alleged high-3 pay, we arrive at an award of \$222.85, which is approximately \$58.85 more than the amount established in the court’s April 12 order. Because we are unable to discern from the record the calculations utilized by the circuit

⁵ Lopez asserted in her motion to alter or amend, filed on April 22, 2019, that she is entitled to half of the marital share. This explains why Lopez, in her brief to this Court, divided the marital fraction “evenly in 2[.]” In her response to the motion to alter or amend that Martinez filed on April 12, 2019, Lopez asked that the court: “Amend the amount of the judgment for the Defendant to reflect the correct amounts based on the service years as provided for in Defendant’s Motion to Amend/Alter, (paragraph twenty-three (23)); (\$222.86 at the time of the divorce (November 2016); \$279.00 at twenty (20) years of service (December 2018); \$529 at thirty (30) years of service.)”

court to arrive at the number in its order of April 12, 2019, we shall remand this case for reconsideration of that award, and revision as may be necessary.

C. Cost-of-living adjustment

Lopez also contends that the circuit court erred by not accounting for cost-of-living adjustments (“COLAs”) in her retired pay award. She asserts that the court’s “fixed payments . . . do[] not account for the annual COLAs,” and she requests that the proportionate COLAs be calculated on an annual basis (beginning from the date of her divorce), and be added to her award (according to her calculations: \$222/month).

Guidance from the Department of Defense Financial Management Regulations 7000.14–R (“DoD Regs”) 290601, *available at* https://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/07b_29.pdf, suggests that applicability of COLA adjustments is determined by DoD without regard to what a court may order in an NDAA case:

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* * *

D. If the order contains a retired pay award, that award must be expressed as a fixed dollar amount or as a percentage of disposable retired pay. A retired pay award expressed as a percentage will automatically receive a proportionate share of the member’s cost-of-living adjustments (COLA), while one expressed as a fixed amount will not. There is no authority for a retired pay award to state a fixed dollar amount and also order COLAs. Retired pay awards phrased in that manner will be construed as a fixed dollar amount.

(Emphasis added.)

* * *

291002. Cost-of-Living Adjustment (COLA)

If a retired pay award is expressed as a percentage of disposable retired pay, the former spouse will automatically receive a proportionate share of the member's COLAs unless the court order states otherwise. Formula and hypothetical retired pay awards are considered a type of percentage award, and thus will automatically include a proportionate share of the member's COLAs. If a court order on a non-NDAA 2017 case awards a percentage, formula, or hypothetical retired pay award and specifically states that COLAs are not to be added, we will calculate the award and setup as a fixed amount to avoid COLAs. If the retired pay award is a fixed amount, COLAs cannot be added, even if awarded in the court order, and the former spouse's payments will remain fixed. **In an NDAA applicable case, COLAs will be added to the disposable income calculation on all awards regardless of what the court order states.** Also, the former spouse will automatically receive a proportionate share of the member's COLAs on all NDAA applicable cases in which the award is a percentage, formula, or hypothetical regardless of what the court order states.

(Emphasis added.)

Here, the April 12 order indicates that the award to Lopez was a fixed dollar amount as opposed to a percentage of Martinez's disposable retired pay. *Cf. Fulgium*, 240 Md. App. at 275 (quoting trial court's oral ruling that "[Ms.] Fulgium shall be awarded 15 percent of disposable military retired pay Mr. Fulgium would have received, had the member retired with retired base high of \$ 56,536.72, as of today, June 27, 2017" and subsequent order, which stated: "The Former Spouse is awarded 15% of the disposable military retired pay of the Member[.]"). (Emphasis added.)

Based upon our reading of the above-mentioned DoD Regs providing that "[i]n an NDAA applicable case, COLAs will be added to the disposable income calculation on all awards regardless of what the court order states," the court's order need not expressly

address COLAs in an NDAA applicable case. Accordingly, the circuit court did not err in declining to provide for COLAs in its order.

D. Onset of pension benefits

The court did not state any findings about the date of Martinez’s transfer to the Fleet Reserve and his receipt of retirement pay, yet ordered that Lopez’s award shall “begin once [Martinez] has retired from the Reserves and is receiving his full military retired pay” On appeal, Lopez contends that the circuit court erred in doing so, and delayed the onset of her share of Martinez’s pension benefits. She requests that this Court strike the conditions on her award in the court’s May 28, 2019 order and that she be paid retroactively, starting on January 1, 2019.

Based upon our review of the record, it appears that Martinez transferred to the Fleet Reserve effective December 29, 2018, and began receiving retired pay in the amount of \$1,954.00/month in January 2019. The rationale behind the court’s decision in April 2019 to have Lopez’s payments “begin once [Martinez] has retired from the Reserves and *is receiving his full military retired pay*” (emphasis added) is not apparent from the record. As far as we can see, the applicable regulations do not distinguish between “full military pay” and partial retirement payments. And the applicable regulations in DoD Regs 290401 provide that Lopez “may apply for payments *any time* after the court has issued a court order enforceable under the USFSPA [*i.e.*, the Uniformed Services Former Spouses’ Protection Act, codified at 10 U.S.C. § 1408].” (Emphasis added.) Indeed, the DoD Regs do not require courts to prescribe an onset date

for a retired pay award in its orders. *See* DoD Regs 290601. Instead, the former spouse makes an “Application for Former Spouse Payments From Retired Pay” to DFAS. DoD Regs 290401. DoD Regs 290404 also suggests that a former spouse may make an application even before the service-member begins to receive his or her retired pay; it provides:

Although payments will not start under the USFSPA until after the member starts to receive retired pay, the designated agent can conditionally approve a former spouse’s application prior to that, and retain the application pending the member’s retirement.

290405. Conditional Preapproval

A. If the former spouse applies prior to the member receiving retired pay, the designated agent will perform a legal review of the application, and may conditionally approve it based on information available at the time of the review concerning the member’s duty status (active or Reserve).

B. At the time the member begins to receive retired pay, the designated agent will perform a second review prior to establishing the former spouse’s direct payments. If the former spouse’s award was based on a formula or hypothetical retired pay amount, and the member’s status has changed since the initial legal review, it may be necessary to reject the application and require the former spouse to submit a clarifying order providing the necessary information. For example, if the formula or hypothetical award lists the Reserve retirement points, but the member retires from active duty, the designated agent would need a new court order that lists the active duty formula. *See* paragraph 290607 concerning formula awards and paragraph 290608 concerning hypothetical retired pay awards.

For all these reasons, we agree with Lopez that the court should not have included the contested language in the May 28 order concerning the onset of Lopez’s retired pay award.

**JUDGMENTS OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED IN PART AND VACATED IN
PART. CASE REMANDED PURSUANT
TO MARYLAND RULE 8-604(D)(1) FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION.**

**COSTS TO BE EVENLY DIVIDED
BETWEEN APPELLANT AND
APPELLEE.**