Circuit Court for Baltimore County
Case No. 03-C-09-009367

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 786

September Term, 2017

ELESHA CHERRY BRIDGERS

v.

ELMER CHERRY

Berger,
Arthur,
Shaw Geter,

JJ.

Opinion by Arthur, J.

Filed: August 5, 2019

*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.

This case concerns the proper calculation of a parent's child support obligation. The Circuit Court for Baltimore County determined that the parent violated a previous order requiring her to pay 13 percent of any "gifts from trust" as additional child support. The circuit court also modified the parent's child support obligation, upon finding that her income had materially increased. The court treated all distributions from trusts, including distributions of principal, and certain distributions from a limited liability company, including distributions from a capital account, as "actual income" for the purposes of determining the parent's child support obligation.

The parent has appealed. For the reasons stated in this opinion, we shall vacate the circuit court's judgment and remand the case for a redetermination of the parent's child support obligations. We shall also vacate an accompanying award of attorneys' fees against her.

BACKGROUND

Ms. Bridgers and Mr. Cherry were married on May 22, 1994. They are the parents of one child, a son, who was born on November 24, 2000. Ms. Bridgers also has a daughter from a previous marriage.

Ms. Bridgers and Mr. Cherry separated in 2004. At some point thereafter, while Ms. Bridgers was living in North Carolina, she initiated a proceeding concerning child support.

The North Carolina proceeding culminated in an order dated September 25, 2007. In that order, the North Carolina court awarded sole physical custody of the child to Mr. Cherry and ordered Ms. Bridgers to pay $257.00 per month in child support.[1]

Because Ms. Bridgers had received "exclusion gifts"[2] in the amount of $12,000.00 in 2005 and 2006 from a revocable trust controlled by her grandmother, Esther Gordy Edwards, the North Carolina order contained a provision that required her to pay "additional child support" if she received such gifts in the future:

> In the event that [Ms. Bridgers] receives a gift from trust and/or from the Esther Gordy Edwards Trust or any other in 2007 or in any year hereafter in which she is obligated to pay child support to [Mr. Cherry], she shall pay directly to [Mr. Cherry] as additional child support thirteen percent (13%) of the amount she receives within seven (7) days of receipt of that money.

We shall refer to that clause of the North Carolina order as the "13 percent provision."

When the North Carolina court entered its order, both Ms. Bridgers and Mr. Cherry had moved to Maryland. In 2009 Ms. Bridgers filed for divorce in Baltimore County, where she lived.

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[1] The court found that, at the time of the order, Ms. Bridgers had a gross monthly income of $1,291.50 per month from her employment as a part-time flight attendant. In the previous year, 2006, her gross monthly income from all sources had been $2,207.50. She had filed for protection from her creditors under the United States Bankruptcy Code in October 2006.

[2] An "exclusion gift" is a gift that is excluded from the federal gift tax (i.e., a gift that is not subject to the gift tax).

In 2010 the Circuit Court for Baltimore County entered a judgment of absolute divorce. The Baltimore County judgment required Ms. Bridgers to pay child support pursuant to the North Carolina order.

Between January 2006 and January 2011, Ms. Bridgers received annual exclusion gifts in the following amounts from her grandmother's trust:

January 30, 2006	$12,000.00
January 22, 2007	$12,000.00
January 10, 2008	$12,000.00
January 9, 2009	$13,000.00
January 15, 2010	$13,000.00
January 2011	$13,000.00

After her receipt of the exclusion gifts in 2008, 2009, 2010, and 2011, Ms. Bridgers paid $1,300.00 to Mr. Cherry. Each of those payments totaled less than 13 percent of the "gifts from trust" that the North Carolina order required her to pay.

Ms. Bridgers's grandmother died in August 2011. At that time, her grandmother's trust became irrevocable, and Ms. Bridgers became the beneficiary of an "issue trust"[3] that was established under the documents that governed her grandmother's trust. We shall refer to Ms. Bridgers's issue trust as the "Elesha Trust."

[3] An issue trust is a trust for the benefit of the settlor's "issue" or lineal descendants.

On December 15, 2011, the Elesha Trust was funded through its receipt of $177,800.00 from Ms. Bridgers's grandmother's trust. In 2013, after the death of Ms. Bridgers's father, the Elesha Trust received additional assets valued at $109,779.50, apparently from an issue trust that her grandmother had established for Ms. Bridgers's father.

Ms. Bridgers is the beneficiary of the Elesha Trust. She is not a trustee, and she does not have legal title to the assets held in trust. The trustees of the Elesha Trust are J.P. Morgan Chase and Ms. Bridgers's sister.

The trustees of the Elesha Trust must distribute an annual amount equal to five percent of the fair market value of the trust's assets. In addition, the trustees may, in their discretion, make additional distributions from the principal of the trust if the income is insufficient for the health, maintenance, support, and education of Ms. Bridgers or her dependents or if Ms. Bridgers needs the funds for some specific purpose, such as purchasing a residence or continuing her education. Ms. Bridgers has received discretionary distributions from the principal of the trust, including distributions to pay nearly $100,000.00 in attorneys' fees in this case and to pay a $100,322.00 tax liability that she and her husband incurred when he lost his job and was forced to liquidate his retirement assets.

Meanwhile, in November 2006, before the entry of the North Carolina order, Ms. Bridgers's grandmother, Esther Gordy Edwards, had established EGBE Family LLC. Ms. Edwards's trust contributed just under $16 million to the LLC and was, at first, its sole member. On December 22, 2006, again before the entry of the North Carolina order,

the trustees of Ms. Edwards's trust authorized the distribution of minority interests in the LLC to members of Ms. Edwards's family, including Ms. Bridgers. Ms. Bridgers originally had a 2.128 percent interest in the LLC, but in 2013, after her father's death, she received an additional interest from his estate, which brought her interest in the LLC to 3.3753 percent. Ms. Bridgers has received interest, dividends, and capital gains from the LLC, as well as distributions from her capital account in the LLC.

In May 2013 Mr. Cherry moved to enroll the North Carolina order in Baltimore County. The circuit court enrolled the North Carolina order in August 2013.

At the same time that he moved to enroll the North Carolina order, Mr. Cherry filed a petition for contempt, in which he alleged that Ms. Bridgers had violated the 13 percent provision of the North Carolina order. In support of that allegation, Mr. Cherry asserted that Ms. Bridgers had failed to pay 13 percent of all "disbursements" from her grandmother's trust, or any other trust.

In December 2013 Mr. Cherry filed a complaint to modify Ms. Bridgers's child support obligation. In that complaint he alleged that Ms. Bridgers's income had increased materially since 2007. In support of that allegation, Mr. Cherry asserted that Ms. Bridgers's income included, among other things, "trust distributions" and distributions from the LLC.

The parties went to trial on the petition for contempt and the complaint to modify the child support obligation in late 2015. At the trial, Mr. Cherry's expert, Karen May, C.P.A., prepared what she called an analysis of Ms. Bridgers's income, in which she

listed every distribution Ms. Bridgers had received from the Elesha Trust and from the LLC.

Ms. May's computation of trust "income" included distributions of trust principal, including extraordinary distributions to pay tens of thousands of dollars in attorneys' fees in this case and to pay the six-figure tax obligation that Ms. Bridgers and her new husband had incurred when a financial emergency required him to liquidate his retirement assets. According to Ms. May, Ms. Bridgers received trust "income" in the following amounts from 2013 through 2015:

2013	$33,826.50
2014	$123,545.98
2015	$217,918.17

In Ms. May's computation, Ms. Bridgers's trust "income" totaled $375,290.65 during those three years.

Ms. May's computation of "income" also included all distributions from the LLC, including distributions that entailed the return of capital from Ms. Bridgers's capital account and a $385,000.00 loan from the LLC. According to Ms. May, Ms. Bridgers received the following amounts of "income" from the LLC in 2013 through 2015:

2013	$428,099.00
2014	$65,890.00
2015	$98,149.50

In Ms. May's computation, Ms. Bridgers's "income" from the LLC totaled $592,138.50 during those three years.

Ms. Bridgers's expert, Mary-Kay Leary, disputed much of Ms. May's analysis. In particular, Ms. Leary exempted distributions of principal from the computation of Ms. Bridgers's trust income. Similarly, Ms. Leary exempted the return of capital, as well as the loan, from the computation of Ms. Bridgers's income from the LLC.

In Ms. Leary's opinion, Ms. Bridgers received $6,140.00 in "income" from the Elesha Trust from 2012 to 2014. Ms. Leary said that she could not compute Ms. Bridgers's trust income for 2015 until the year had ended, and the trust had determined how much income it had earned. The undisputed facts in the record establish that as of September 30, 2015, just before the trial began, the Elesha Trust contained only $948.44.

According to Ms. Leary, Ms. Bridgers received the following amounts of "income" from the LLC in 2013 through 2015:

2013	$16,851.00
2014	$34,020.00
2015	$19,285.00

According to Ms. Leary, Ms. Bridgers's actual income from 2012 through 2014 (the last complete year) was as follows:

2012	$49,254.00
2013	$43,274.00
2014	$32,152.00

Ms. Bridgers had had no income from employment since 2012.

The circuit court largely accepted Ms. May's accounting. It ruled that the 13 percent provision of the North Carolina order applied to all distributions from the Elesha Trust, including distributions of principal to pay the extraordinary expenses, as well as all distributions from the LLC, except for the $385,000.00 loan. It also ruled that all distributions from the Elesha Trust, including distributions of principal for extraordinary expenses, were "income" for purposes of computing child support. Similarly, it ruled that all distributions from the LLC, except for the $385,000.00 loan, were income for child support purposes.

On the basis of those determinations, the circuit court ultimately concluded that Ms. Bridgers's monthly income is $16,383.00 per month (or almost $200,000.00 per year); that she should pay child support in the amount of $1,396.39 per month; that she was in contempt of the 13 percent provision of the North Carolina order; and that she owed Mr. Cherry $42,836.89 (or 13 percent of $329,514,54) under the 13 percent provision. Although it was undisputed that the Elesha Trust had been almost completely depleted and that it contained less than $1,000.00, the court found that Ms. Bridgers "most likely w[ould] continue to receive discretionary distributions from the Trust" in the amounts that she had received in the past. Finally, the court ordered Ms. Bridgers to pay $132,512.50 in attorneys' fees to Mr. Cherry within 60 days.

The clerk docketed the final judgment on May 30, 2017, and Ms. Bridgers noted a timely appeal.

We shall introduce additional facts as they become relevant.

QUESTIONS PRESENTED

Ms. Cherry presents three questions, which we quote:

1. Did the court err or abuse its discretion when it determined that every disbursement from (a) Bridgers' trust and (b) her interest in a closely-held LLC were subject to a provision that required Bridgers to pay 13% of any gift she received from a trust?

2. Did the court err or abuse its discretion when it included every disbursement of (a) trust principal from Bridgers' trust and (b) the capital account of Bridgers' interest in a closely-held LLC, in her actual income for child support purposes?

3. Did the court err or abuse its discretion when it awarded attorney's fees to Cherry, including the amount awarded and the time when payment was to be made?

For the reasons stated below, we answer each of these questions in the affirmative. Consequently, we shall vacate the judgment below and remand the case for further proceedings consistent with this opinion.

STANDARD OF REVIEW

In general, an appellate court applies the deferential abuse of discretion standard in reviewing an award of child support and an order modifying the amount of child support. *See*, *e.g.*, *Shenk v. Shenk*, 159 Md. App. 548, 554 (2004); *Petitto v. Petitto*, 147 Md. App. 280, 318-19 (2002). A "'court's discretion is,'" however, "'always tempered by the requirement that the court correctly apply the law applicable to the case.'" *Schlotzhauer v. Morton*, 224 Md. App. 72, 84 (2015) (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)), *aff'd*, 449 Md. 217 (2016); *accord Rodriguez v. Cooper*, 458 Md. 425, 437 n.9

(2018) (stating that "it is an abuse of discretion for a court to base a decision on an incorrect legal standard").

A central question in this case involves the amount of Ms. Bridgers's "actual income" for child support purposes. The meaning of the term "actual income" is a matter of statutory interpretation, which is a question of law that we review de novo. *See Beall v. Holloway-Johnson*, 446 Md. 48, 76 (2016).

A subsidiary question in this case involves the interpretation of the North Carolina order, particularly the provision requiring Ms. Bridgers to pay "additional child support" in the amount of 13 percent of any "gifts from trust." The interpretation of a court order is also a question of law that we review de novo. *See Butler v. S&S P'ship*, 435 Md. 635, 645 (2013); *Webb v. Novak*, 433 Md. 666, 681 (2013).

The final issue in this case involves an award of attorneys' fees. In a family law case, an award of attorney's fees will be reversed if the court arbitrarily exercised its discretion or the judgment was clearly wrong. *See Petrini v. Petrini*, 336 Md. 453, 468 (1994).

DISCUSSION

I. WHAT IS MS. BRIDGERS'S "ACTUAL INCOME"?

Maryland's child support guidelines "are premised on the concept that 'a child should receive the same proportion of parental income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together.'" *Allred v. Allred*, 130 Md. App. 13, 17 (2000) (quoting *Voishan v. Palma*, 327 Md. 318, 322 (1992)). When a court determines a parent's child support obligations, "the central

factual issue is the 'actual adjusted income' of each party." *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994). As a necessary step in all child support cases, "the trial court must ascertain each parent's 'actual income.'" *Walker v. Grow*, 170 Md. App. 255, 267 (2006).

Maryland Code (1984, 2012 Repl. Vol., Supp. 2018), § 12-201 of the Family Law Article ("FL") defines the term "actual income" for purposes of child support. The statute provides, in pertinent part, as follows:

> (b) (1) "Actual income" means income from any source.
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> (2) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "actual income" means gross receipts minus ordinary and necessary expenses required to produce income.
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> (3) "Actual income" includes:
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> (i) salaries;
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> (ii) wages;
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> (iii) commissions;
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> (iv) bonuses;
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> (v) dividend income;
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> (vi) pension income;
>
> (vii) interest income;
>
> (viii) trust income;
>
> (ix) annuity income;
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> (x) Social Security benefits;
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> (xi) workers' compensation benefits;

(xii) unemployment insurance benefits;

(xiii) disability insurance benefits;

(xiv) for the obligor, any third party payment paid to or for a minor child as a result of the obligor's disability, retirement, or other compensable claim;

(xv) alimony or maintenance received; and

(xvi) expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business to the extent the reimbursements or payments reduce the parent's personal living expenses.

(4) Based on the circumstances of the case, the court may consider the following items as actual income:

(i) severance pay;

(ii) capital gains;

(iii) gifts; or

(iv) prizes.

The statutory definition is largely circular. In subsection (b)(1), the statute defines "actual income" as "income from any source," without defining the key term "income." In subsection (b)(2), it implies that "income" does not include the cost of generating "income." In subsection (b)(3), it gives examples of things that are included within the definition of "income." Finally, in subsection (b)(4), it enumerates four things that may or may not fall within the definition of "income," based on the circumstances.

Because the statute does not define the term "income" except through examples, we begin from the premise that "income" has its ordinary and popular meaning in the English language (*see*, *e.g.*, *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 171

(2010)), which is "the return in money from one's business, labor, or capital." *Income*, BLACK'S LAW DICTIONARY 687 (5th ed. 1984). In view of that definition and the other language of the applicable statute, we must evaluate whether the circuit court erred or abused its discretion in concluding that Ms. Bridgers's "income" includes (1) all distributions of principal from the Elesha Trust and (2) the return of her capital contribution in the LLC.

A. Are Distributions of Principal from the Trust "Income"?

Ms. Bridgers agrees that she received "income" (specifically "trust income" within the meaning of FL § 12-201(b)(3)(viii)) when she received distributions from the Elesha Trust of funds that were generated by investing the trust corpus. She disagrees that she received "income" when the trustees of the Elesha Trust distributed portions of the trust corpus to her. Although she focuses principally on the extraordinary distributions that went to pay her and her husband's one-time tax liability and the attorneys' fees that she incurred in defending this case, she argues, more broadly, that distributions of the trust's principal or corpus cannot be income. The circuit court, by contrast, concluded that all distributions from trust, whether regular or extraordinary, and whether of investment income or of principal, count as "income" for child support purposes.

In our view, both Ms. Bridgers and the circuit court are incorrect. The circuit court was incorrect in including all distributions in income without regard to the surrounding circumstances. Ms. Bridgers is incorrect in exempting regular, routine, and recurring distributions from her income.

In rejecting Ms. Bridgers's contention that the distributions of principal cannot be "actual income," the circuit court reasoned that Maryland does not include "a regularity prerequisite" before the receipt of something of value will count as "income" for child support purposes. The court was incorrect. FL § 12-201(b)(4) is clearly designed to focus a court's attention on items of value that a parent may not necessarily receive on a regular, recurring basis: severance pay, capital gains, gifts, or prizes. Under § 12-201(b)(4), those items may count as income "[b]ased on the circumstances of the case," which include whether the parent receives them on a regular, recurring basis.

For example, a parent may receive capital gains on a regular, recurring basis if she owns a mutual fund that periodically distributes its gains to its owners. On the other hand, if a parent sells all her shares in a closely-held business, her gain will not be regular and recurring, because the sale is a one-time event. Although the gain from sale of shares would be income for tax purposes, it would ordinarily be incorrect to include it in the computation of "actual income" for child support purposes, because the parent almost certainly will not receive the same amount in the next year or the years to come. *See Tanis v. Crocker*, 110 Md. App. 559, 584 (1996) (stating that "a capital gain which is the result of a one-time transaction – rather than a recurring source of income as when parties are engaged in the purchase and sale of real estate property as a means of income – may not qualify as ordinary income for purposes of calculating child support").[4]

[4] If, however, the parent invests some or all of the gain and earns regular income from the investment, it would be appropriate to include the investment income in the parent's income for child support purposes.

Similarly, a parent may receive gifts on a regular, recurring basis if, for example, his mother allows him to live rent-free in one of her houses, pays his health-insurance premiums, and gives him regular cash subsidies. *Petrini v. Petrini*, 336 Md. at 462, 465. More typically, a parent may receive gifts on a regular, recurring basis if, as a matter of estate planning, a well-to-do relative gives her annual "exclusion gifts" (gifts in the maximum amount that is exempt from federal taxation), as Ms. Bridgers's grandmother did in the years before her death. On the other hand, if a parent receives an inheritance when a relative dies, she may receive income for estate or gift tax purposes, but it would ordinarily be incorrect to include the inheritance in the computation of "actual income" for child support purposes, because the parent is almost certain not to receive another, similar inheritance in the next year or the years to come.[5]

Applying these principles, we conclude that under FL § 12-201(b)(4) the statutory definition of "income" cannot include the distributions from the corpus of the Elesha Trust that Ms. Bridgers received to pay her and her husband's one-time tax liability and her attorneys' fees in this case. The tax liability was an extraordinary event that occurred only because Ms. Bridgers's husband lost his job and was required to liquidate hundreds of thousands of dollars in retirement savings to pay his expenses.[6] The attorneys' fees,

[5] As with capital gains, however, if the parent invests some or all of the inheritance and earns regular income from the investment, it would be appropriate to include the investment income in the parent's income for child support purposes.

[6] The circuit court was suspicious that Ms. Bridgers can call upon her trustees or the managers of the LLC to distribute large sums of money to her whenever she might need them. The $100,000.00 tax liability refutes those suspicions: when Ms. Bridgers's

too, were the result of a one-time, non-recurring event – this litigation, in which Ms. Bridgers's ex-husband sought to reach into her inheritance to reduce his child support obligations. Ms. Bridgers's trustees had no obligation to fund those one-time, extraordinary expenses, and there is no reason to believe that they can or will fund anything like them in the future – especially since it is undisputed that the trust has less than $1,000.00 in assets. Because the distributions are in the nature of non-recurring gifts, the court erred in including them in Ms. Bridgers's "income" for child support purposes.[7]

Ms. Bridgers would go further. She points out that under FL § 12-201(b)(3)(viii) "actual income" includes "trust income." Thus she asserts that, in referring to "trust income" and not to "trust principal," the General Assembly implicitly excluded distributions of principal from the definition of "actual income" under FL § 12-201. We do not agree.

Ms. Bridgers's trust illustrates why "trust income" may include distributions of principal. Ms. Bridgers's trustees are required to distribute five percent of the fair market value of the trust on a regular, annual basis. Yet if the trust does not earn five percent on

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husband lost his job, they evidently had no option but to incur a six-figure debt to the IRS in order to satisfy their other obligations.

[7] In rejecting Ms. Bridgers's contention that her income did not include the distributions for non-recurring items such as her one-time, $100,322.00 tax liability and the attorneys' fees that she was forced to incur in this case, the circuit court relied on *Johnson v. Johnson*, 152 Md. App. 609 (2003). *Johnson* concerns a bonus – an item that is specifically defined as "income" in § 12-201(b)(3)(iv). Under the Family Law Article, a "bonus" is fundamentally different from a "gift," because a "gift" may or may not be income under § 12-201(b)(4) "[b]ased on the circumstances."

its investments in any given year, the trustees presumably must invade the principal of the trust to make up the shortfall. In those circumstances, a distribution of principal, as part of a regular and predictable distribution from a trust, could qualify as "actual income" within the meaning of FL § 12-201.

Furthermore, the record reflects that, at Ms. Bridgers's request, the trustees regularly made discretionary distributions of trust principal to pay medical and dental bills for her and her children, educational expenses for her older child, medical insurance premiums, and other routine expenses, such as monthly mortgage payments. Although the trust document did not require the trustees to comply with Ms. Bridgers's request for those discretionary distributions, the record supports an inference that they did so as a matter of course. In these circumstances, the circuit court was entitled to find that Ms. Bridgers's "income" included the regular, discretionary distributions of trust principal to pay for routine household expenses.

Ms. Bridgers also argues that all distributions from the corpus of the trust represent an intergenerational transfer of wealth, which, she says, should not count as income. In support of her argument, Ms. Bridgers cites cases from other jurisdictions that hold that an inheritance or a distribution from the corpus of a trust ordinarily is not income for child support purposes. *See*, *e.g.*, *Cnty. of Kern v. Castle*, 89 Cal. Rptr. 2d 874, 875 (Cal. Ct. App. 1999) (holding that, under California law, an inheritance is not income for purposes of calculating gross income, but that the newly found wealth and the corresponding reduction in living expenses may be considered in making a child support award); *Lasché v. Levin*, 977 A.2d 361, 370 (D.C. 2009) (holding that, under District of

Columbia law, the term "[r]egular income from an interest in an estate, directly or through a trust," did not include non-periodic disbursements from the corpus of a trust); *Sotoloff v. Sotoloff*, 745 So.2d 959, 961 (Fla. Dist. Ct. App. 1998) (holding that, under Florida law, the court abused its discretion in including distributions of trust principal in its child support calculations without first finding that the parties' recurring income was insufficient to meet the child's needs); *Cody v. Evans-Cody*, 735 N.Y.S.2d 181, 185 (N.Y. App. Div. 2001) (holding that, under New York law, an inheritance is not included in computing the basic child support obligation, but that an inheritance is a potential resource where additional support is warranted, as when the children had come to depend on it); *Humphreys v. DeRoss*, 790 A.2d 281, 284-85, 287 (Pa. 2002) (holding that, under Pennsylvania law, the corpus an inheritance was not income and, hence, did not fall within the statutory concepts of "income in respect of a decedent" or "income from an interest in an estate or trust"); *Gainey v. Gainey*, 948 P.2d 865, 869 (Wash. Ct. App. 1997) (holding that, under Washington law, under which the definition of "gross monthly income" does not include gifts, an inheritance or testamentary gift is not income for child support purposes).

The out-of-state cases are unpersuasive, not least because they involve statutory schemes that differ from ours. In Maryland, for example, a gift may be income "[b]ased on the circumstances" (FL § 12-201(b)(4)), but in California, Pennsylvania, and Washington the definition of "income" does not include gifts (and thus inheritances) at all. Moreover, some of the out-of-state cases contradict rather than support the categorical rule that Ms. Bridgers espouses. In states such as New York and Florida, for

example, an intergenerational transfer of wealth may indeed count as income in some circumstances, as it may in Maryland.[8]

As previously stated, if a parent receives a one-time, non-recurring, lump sum inheritance, it would ordinarily be incorrect to include it in the computation of income for child support purposes, because the parent is quite unlikely to receive such a sum in the next year, the year after, etc. In this case, however, Ms. Bridgers did not receive a one-time, non-recurring, lump sum. Instead, she regularly received funds from the corpus of the trust in numerous increments over time. The circuit court did not err or abuse its discretion in concluding that those numerous, incremental payments were "actual income" within the meaning of FL 12-201. *Compare Lasché v. Levin*, 977 A.2d 361, 370 (D.C. 2009) (exempting non-periodic disbursements from the corpus of a trust from the definition of "income").

To reiterate, the extraordinary, non-recurring distributions of principal to discharge the tax liability and Ms. Bridgers's attorneys' fees were not "actual income," but the semi-regular, discretionary distributions for routine expenses were. To this, we add one qualification.

[8] In other states, the statutory structure is even less hospitable to Bridgers's position than Maryland's is. In those states, the statute requires gifts or inheritances to be included in the computation of income, but gives the court the discretion to exclude some or all of the gift if it is unlikely to recur. *See*, *e.g.*, *In re A.M.D.*, 78 P.3d 741, 743 (Colo. 2003); *Gardner v. Yrttima*, 743 N.E.2d 353, 358 (Ind. Ct. App. 2001); *In re Marriage of Leif*, 266 P.3d 165, 168 (Or. Ct. App. 2011); *see also Goldhamer v. Cohen* 525 S.E.2d 599, 602-03 (Va. Ct. App. 2000).

Ms. Bridgers points out that under FL § 12-201(b)(2), the "ordinary and necessary expenses required to produce income" must be deducted from "gross receipts." She likens the "ordinary and necessary expenses required to produce income" to the fees that are distributed from her trust to compensate her trustees. We agree. The distributions to the trustees are much like the fees that an investor pays to a mutual fund or an investment advisor for managing an investment portfolio. From an economic perspective, they are not income to her, but an expense that she must pay. The circuit court should not have included those distributions in Ms. Bridgers's income.

Finally, the undisputed facts in the record establish that as of the trial the Elesha Trust contained only $948.44. It is unreasonable to find, as the circuit court did, that Ms. Bridgers will continue to receive tens of thousands of dollars in annual distributions from a trust that has less than $1,000.00 in assets. Because the trust does not have the assets to make even a small fraction of the distributions that it has made in the past, it is mathematically impossible for Ms. Bridgers to continue to receive that level of income in the future. The circuit court's finding to the contrary was clearly erroneous.

It is no answer to say that, if Ms. Bridgers did not receive another $100,000.00 distribution in the years after 2015, she could come back to court and move to reduce her child support obligation. We know now, with mathematical certainty, that she will not receive anything like a $100,000.00 distribution, because the trust's remaining assets are valued at less than one percent of that amount. It makes no sense to require her to pay

what we know she cannot pay, and then to require her to pay more to hire a lawyer to prove again that she cannot pay it.[9]

The case must be remanded so that the circuit court can recalculate Ms. Bridgers's "actual income." The recalculation must exclude the extraordinary, non-recurring distributions that she received, as well as the distributions that went to compensate her trustees for their service. In addition, the recalculation must take into account the reality that as of 2015 the Elesha Trust had less than $1,000.00 in assets.[10]

B. Is the Return of Capital "Income"?

The circuit court found that Ms. Bridgers's income included the distributions from the capital account with the LLC. That finding is based on a fundamental misconception.

The return of capital is the return of the principal amount of an investment. "There is no profit when one receives only a return of capital." *Leeder v. Leeder*, 884 P.2d 494, 499 (N.M. Ct. App. 1994). Unlike capital gains, which may be "income" under

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[9] The circuit court seemed, at times, to suggest that the LLC might replenish the Elesha Trust. There is simply no evidence that anything like that could or would occur. If the LLC's managers attempted to divert the entity's assets to Ms. Bridgers, the other members would undoubtedly object vociferously and prevent it from occurring.

[10] In reaching its decision concerning Ms. Bridgers's income, the court remarked on her "lavish lifestyle," which includes living in a $1.7 million home (which is subject to a $1.2 million mortgage), owning $180,000.00 in jewelry, taking regular vacations (including vacations outside of the United States), and undergoing elective cosmetic surgery. Those expenditures do not bear directly on Ms. Bridgers's income, because the record contains no indication that she paid them (except for a few monthly mortgage payments when her husband was unemployed and a few hundred dollars in bills from a dermatologist). In an above-guidelines case, however, the child support obligation may be increased to ensure that the child enjoys a lifestyle commensurate with the parent's economic position. *Walker v. Grow*, 170 Md. App. 255, 288 (2006) (citing *Smith v. Freeman*, 149 Md. App. 1, 21-37 (2002)).

FL § 12-201(b)(4), the return of capital is not "income." *See Leeder v. Leeder*, 884 P.2d at 499; *cf. Heyn v. Fidelity Trust Co*., 174 Md. 639, 648 (1938) (stating that a payment from paid-in surplus capital and not from earnings is a distribution of capital, and not income). This is not a purely legal concept; it is an axiom of economics and finance. The circuit court erred, therefore, in including the return of capital from Ms. Bridgers's capital account as part of her income for child support purposes.

In erroneously concluding that the return of capital was "income," the circuit court focused on cases concerning whether a parent might have understated his income when he caused his closely-held corporation to retain its earnings (and thus not to distribute them as income). The court also focused on cases concerning whether a parent's income should include income from a pass-through entity like an LLC or a Subchapter S corporation when the entity has not distributed the income to its owners. Those cases address the vagaries of whether undistributed income is or is not "income" for child support purposes – i.e., whether a parent is manipulating an entity's finances to make his income seem smaller than it is, or whether the rules of tax accounting have created the illusion that a parent's income is greater than what he actually received. Those cases have little bearing on whether Ms. Bridgers received "income" when the LLC returned part of her capital investment to her.

On remand, the recalculation of "income" may not include distributions from the capital account.[11]

[11] The court correctly excluded the $385,000.00 loan from the LLC from Ms. Bridgers's income, because loans are not income (unless they are forgiven).

II. WHICH DISTRIBUTIONS, IF ANY, ARE "GIFTS FROM TRUST" WITHIN THE MEANING OF THE 13 PERCENT PROVISION OF THE NORTH CAROLINA ORDER?

A. Are Distributions From the LLC "Gifts from Trust"?

The North Carolina order requires Ms. Bridgers to pay additional child support in the amount of 13 percent of any "gifts from trust." The circuit court included distributions from the LLC in the "gifts from trust" to which the 13 percent provision applied. In so doing, the court erred.

The plain language of the North Carolina order applies only to gifts from "trust," not to distributions from something other than a trust, such as the LLC. On its face, therefore, the 13 percent provision of the North Carolina order does not apply to distributions from the LLC.

Furthermore, when the North Carolina court entered its order, Ms. Bridgers already owned an interest in the LLC. Had the parties intended to require Ms. Bridgers to pay a percentage of the distributions that she might receive from the LLC, it would have been easy enough to do so. Yet, the order says nothing about distributions from the LLC. Instead, the order applies only to gifts from trust. As a matter of law, therefore, the circuit court erred in concluding that that North Carolina order required Ms. Bridgers to pay 13 percent of the distributions from the LLC as additional child support.

The trial court seems to have concluded that the distributions from the LLC are "gifts from trust" within the meaning of the North Carolina order because the LLC was initially funded through a distribution from a trust. Although the court's factual premise is correct, its conclusion is not.

Ms. Bridgers's late grandmother, Esther Gordy Edwards, established the LLC on November 15, 2006. At that time, the Esther Gordy Edwards Trust contributed almost $16 million to the LLC and became its sole member. Ms. Bridgers received her initial 2.128 percent interest in the LLC on December 22, 2006, from the Esther Gordy Edwards Trust. Ms. Bridgers's receipt of her initial interest in the LLC could arguably be characterized as a "gift from trust." That gift occurred, however, before the North Carolina court entered the North Carolina order in 2007. Therefore, it is not subject to the 13 percent provision.

Upon her father's death in 2013, Ms. Bridgers received an additional interest in the LLC, bringing her total interest to 3.3753 percent. Presumably, the interest passed to Ms. Bridgers's through her father's estate, through a bequest that he had made to her as a permitted transferee under the LLC's governing documents. Such a bequest would not be "a gift from trust." It too, therefore, would not be subject to the 13 percent provision.

In any event, by the time the North Carolina order took effect, Ms. Bridgers owned her interest in the LLC. In liquidating a portion of her capital account in the LLC, Ms. Bridgers was taking something that belonged to her. She was not receiving a "gift." Therefore the distributions from the LLC's capital account could not possibly be "gifts from trust" within the meaning of the North Carolina order.

Similarly, while the income and capital gains that Ms. Bridgers earns from the LLC are unquestionably "income" for purposes of determining her child support obligations, they are not "gifts from trust." Rather, they are investment income from a closely-held family business.

In summary, the term "gifts from trust," in the North Carolina order, does not include distributions from the LLC. The court erred in concluding otherwise. On remand, the court may not include any distributions from the LLC in its computations of amounts due under the 13 percent provision of the North Carolina order.

B. Which, If Any, Distributions from the Elesha Trust Are "Gifts from Trust"?

The circuit court included every distribution from the Elesha Trust as a "gift from trust" to which the 13 percent provision applied. In so doing, the court misconstrued the North Carolina order.

When the North Carolina court entered its order in 2007, Ms. Bridgers earned only a few thousand dollars a year through part-time employment. Hence her monthly child support obligation was small. Nonetheless, the order recognized that she would receive annual gifts from her grandmother, through her grandmother's trust, and that she might receive other, similar gifts from some other trust in the future. As a shortcut for computing the *additional* child support that Ms. Bridgers would owe on account of those gifts, the North Carolina order required her to pay 13 percent of whatever she received as "gifts from trust." For a number of years she endeavored to make those payments, though she underpaid Mr. Cherry by a few thousand dollars because she did not correctly compute her obligation.

In 2013, when Mr. Cherry moved to modify Ms. Bridgers's child support obligations, he specifically sought to include the distributions from her trust in her income for child support purposes. Yet, at the same time, Mr. Cherry also sought to

include those distributions in the "gifts from trust" that were subject to the 13 percent provision. In effect, therefore, Mr. Cherry sought to double-count the distributions – once for purposes of computing how much basic child support Ms. Bridgers would have to pay, and a second time for purposes of computing how much *additional* child support she would have to pay. The circuit court countenanced his efforts by including all distributions from the Elesha Trust both in the computation of her income and in the computation of the additional income that is due under the 13 percent provision.

We have already explained why the court erred in including some of the distributions from the Elesha Trust in the computation of her income. The court also erred in treating distributions from the Elesha Trust both as "gifts from trust" under the North Carolina order and as "actual income" under the Family Law Article.

The North Carolina order distinguishes Ms. Bridgers's income, which yields her basic support obligation, from "gifts from trust," of which she must pay an additional 13 percent. In the current litigation, however, the parties and the court included distributions from the Elesha Trust in the computation of Ms. Bridgers's basic support obligation (though they disagreed about how much of those distributions qualified as "actual income"). It is completely inconsistent with the structure of the North Carolina order to count those distributions a second time, as "gifts from trust" that are subject to the 13 percent provision. By double-counting the distributions from trust, the court contravened the goal of the North Carolina order, which was to create a simple mechanism to require Ms. Bridgers to pay *additional* child support equal to a specified percentage of the regular gifts that she received from her grandmother's trust.

Furthermore, if distributions from the Elesha Trust were treated as "gifts from trust" under the North Carolina order, absurd and unjust consequences would ensue. For example, one of the distributions from trust went to pay for more than $5,000.00 in orthodontic work for Ms. Bridgers's son. Ms. Bridgers paid the full amount of that bill even though the North Carolina order required Mr. Cherry to pay for 87 percent of the young man's uninsured medical expenses. Yet, by treating that distribution from trust as a "gift from trust," the court required Ms. Bridgers to pay an additional 13 percent to Mr. Cherry after she had already relieved him of his obligation of paying for 87 percent of the orthodontic work. As a result, she was required to pay 113 percent of an expense of which she was legally obligated to pay only 13 percent.

The term "gift from trust" is not meaningless if it is construed to exclude the distributions from trust that have already been counted in Ms. Bridgers's "actual income." The term obviously applied to the annual gifts that Ms. Bridgers received from her grandmother, via her grandmother's trust. It might also apply to similar gifts that she received through another trust in which she had no legal rights and no beneficial interest. It does not, however, apply to distributions that have already been counted as "actual income," such as distributions from the Elesha Trust.

On remand, the court may not include any distributions from the Elesha Trust in its computations of the amounts due under the 13 percent provision of the North Carolina order.

III. ATTORNEYS' FEES

Under the authority of FL § 12-103, the circuit court ordered Ms. Bridgers to pay $132,512.50 in attorneys' fees.[12] As grounds for that decision, the court cited the parties' financial circumstances, the needs of each party, and the justification for bringing this action. The court specifically observed that Mr. Cherry had spent over $127,000.00 on

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[12] Section 12-103 states:

> (a) The 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:
>
> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or
>
> (2) files any form of proceeding:
>
> (i) to recover arrearages of child support;
>
> (ii) to enforce a decree of child support; or
>
> (iii) to enforce a decree of custody or visitation.
>
> (b) Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.
>
> (c) Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

attorneys' fees and costs, as well as $39,000.00 in expert fees, and that he had withdrawn almost all of his retirement savings (and incurred tax penalties) to pay those expenses. The court did not discuss the undisputed evidence that at the time of trial Ms. Bridgers's liquid assets totaled only about $15,000.00.

In light of the errors that we have identified in the circuit court's opinion, it is apparent that Ms. Bridgers had substantial justification for defending the proceeding. For that reason, we must vacate the award of fees.

On remand, the court should expressly consider Ms. Bridgers's ability to pay a substantial attorneys' fee award. *See Davis v. Petito*, 425 Md. 191, 205-06 (2012). It is regrettable that Mr. Cherry spent so much of his savings in the pursuit of this case, but Ms. Bridgers cannot be required to pay money that she does not have.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED; APPELLEE TO PAY COSTS.

Circuit Court for Baltimore County
Case No. 03-C-09-9367

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 786

September Term, 2017

ELESHA CHERRY BRIDGERS

v.

ELMER CHERRY

Berger,
Arthur,
Shaw Geter,

JJ.

Concurring Opinion by Shaw Geter, J.

Filed: August 5, 2019

*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.

I join the Court's judgment because I agree that the trial court erred in calculating Bridgers' actual income. However, I disagree with the Court's characterization and treatment of the distributions from the Elesha Trust and Bridgers' withdrawals from the LLC. I must conclude that the applicable statutes and case law, from this as well as foreign jurisdictions, places the decision as to whether said distributions and withdrawals are "actual income" to Bridgers within the sole discretion of the trial court. Accordingly, I would remand this case to allow the trial court to determine whether the distributions of trust principal and withdrawals of capital should be included in Bridgers' "actual income" for purposes of calculating her child support obligation.

I. For purposes of F.L. § 12–201(b)(4), inheritances constitute "gifts" includable in a party's actual income.

F. L. § 12–201(b)(4) provides that "[b]ased on the circumstances of the case, the court may consider the following items as actual income: (i) severance pay; (ii) capital gains; (iii) gifts; or (iv) prizes" in determining a party's child support obligation.

Several states have held, pursuant to child support statutes or guidelines similar to Maryland's, that an inheritance constitutes "gift" to an individual. In *Goldhamer v. Cohen*, Virginia's child support statute defined gross income for the purposes of determining child support as "income from all sources, and shall include, but not be limited to income from . . . gifts, prizes or awards." 31 Va. App. 728, 735–36 (2000). The Court of Appeals of Virginia held that "any inheritance is a gift, whether by will or intestate succession[,]" reasoning that "[a] gift is property that is voluntarily transferred to another without compensation" and that "[a] testamentary gift is a 'gift made in a will.'" *Id.* at 736–37

(citing BLACK'S LAW DICTIONARY 696–97 (7th ed. 1999)). Similarly, Indiana, Oregon, and Colorado have all, respectively, considered a party's inheritance a gift to the party. *See*, *Gardner v. Yrttima*, 743 N.E.2d 353, 358 (2001) ("For purposes of child support calculation, we can discern no appreciable difference between one who receives property by an inter vivos gift and one who receives the same or similar property by testamentary transfer, nor can we discern a logical reason to include one and exclude the other."); *In re Marriage of Leif*, 246 Or. App. 511, 516 (2011) ("[The Oregon child support guidelines] includes 'income from any source.' The definition of gross income does not specifically include 'inheritances,' but it does include 'gifts.' An inheritance is a gift given at death.") (internal citations omitted); *In re A.M.D.*, 78 P.3d 741, 743 (2003) ("[The Colorado child support statute] specifically includes 'monetary gifts' in gross income. A monetary inheritance is a particular form of a 'monetary gift'—it is simply testamentary, rather than inter vivos, in nature.").

This logic is consistent with the case law of this state. *See Petrini v. Petrini*, 336 Md. 453, 463 (1994) (defining gift as "something that is voluntarily transferred by one to another without compensation" or "a voluntary transfer of property another made gratuitously or without consideration."); *see also Taylor v. Henry*, 48 Md. 550, 559–60 (1878) ("[W]here a person intends to give property to another, and vests that property in trustees, and declares a trust upon it in favor of the subject of his bounty, by such acts, the gift is perfected, and the author of the trust loses all dominion over it[.]"). Thus, assets that

Bridgers received through an inheritance constitute "gifts" for purposes of F.L. § 12–201(b)(4).

Further, there is no regularity or recurring prerequisite to gifts being included within a party's actual income for calculating child support. "[A]ny type of gift is irregular and, therefore, may or may not extend into the future." *Goldhamer v. Cohen*, 31 Va. App. 728, 737 (2000). F.L. § 12–201(b)(4) clearly contemplates the inclusion of irregular and non-recurring income in a party's actual income as the statute provides that prizes and bonuses may be included in a party's actual income. *See* F.L. § 12-201(b)(3)–(4); *see also Johnson v. Johnson*, 152 Md. App. 609, 620 (2003) (holding trial court did not abuse its discretion in including full amount of bonus husband received in his income where it was unknown whether husband would receive a similar bonus in the future).

II. Pursuant to § 12–201(b)(4), the distributions of principal from the Elesha Trust and withdrawals of capital from the LLC are "gifts."

The principal of the Elesha Trust and the capital of the LLC were funds which Bridgers either inherited or was gifted, and, accordingly, constitute "gifts" for purposes of F.L. § 12–201(b)(4). *See* Black's Law Dictionary 903 (10th ed. 2009) (defining inheritance as "[p]roperty received from an ancestor under the laws of intestacy" or "by bequest or devise."). On December 15, 2011, the EGE Trust, upon Edwards' death, funded the Elesha Trust in the amount of $177,800 pursuant to her wishes, the whole of which was to be distributed, at some point, to Bridgers or her beneficiaries. Upon Bridgers' father's death, additional assets valued at $109,779.50 were transferred to the Elesha Trust. A portion of

these gifted funds were then distributed to Bridgers in varying amounts between 2013 and 2016.

Likewise, the capital in the LLC was a result of either a gift to Bridgers or her inheritance. Bridgers was gifted her initial 2.128% membership interest in the LLC from Edwards in December 2006. Then, upon her father's death, Bridgers inherited a 1.58% membership interest in the LLC. Her membership interest in the LLC represented the capital within the LLC with a value of hundreds of thousands of dollars. Bridgers withdrew this capital during 2013 and 2016.

Consequently, the distributions of trust principal and withdrawal of capital were "gifts" under F.L. § 12–201(b)(4).

III. It is within the discretion of the trial court to include the distributions of principal and the withdrawals of capital in Bridgers' actual income "based on the circumstances of the case."

Maryland's Child Support Guidelines were "intentionally designed" by the General Assembly to "place decisions concerning whether 'gifts' to a parent should be considered part of that person's 'actual income, and the items properly to be considered 'gifts,' within the sound discretion of the trial court." *Petrini v. Petrini*, 336 Md. 453, 462 (1994). The trial court, in its sole discretion, must take into "account the totality of the circumstances" and decide "whether certain contributions to a person's well being should be considered part of that party's 'actual income[.]'" *Id.* "Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts[.]" *In re*

Adoption/Guardianship No. 3598, 347 Md. 295, 312 (1997) (quoting *Northwestern National Insurance Co. v. Samuel R. Rosoff, Ltd.*, 195 Md. 421, 436 (1950)).

Accordingly, this case should be remanded to the trial court for that court's determination as to whether the distributions of principal and withdrawals of capital were "gifts" to Bridgers. Then, if necessary, the trial court should determine, "based on the circumstances of the case," what amount of said gifts should be included in Bridgers' actual income for purposes of calculating her child support obligation.