Circuit Court for Charles County
Case No. 08-C-13-002430

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1159

September Term, 2019

AMANDA CAPOEN

v.

BRENDON CAPOEN

Kehoe,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: November 5, 2020

Appellant Amanda Capoen ("Mother") and Appellee Brendan Capoen ("Father") were divorced pursuant to a Judgment of Absolute Divorce (the "Judgment") entered in the Circuit Court for Charles County. The Judgment granted legal and physical custody of the parties' minor child, V., to Mother and provided a visitation schedule for Father. The Judgment also required Father to pay child support to Mother.

Four years later, Father filed a consolidated motion to modify custody, visitation, and child support. Mother filed a cross-motion to modify child support. After a two-day evidentiary hearing, the court modified the custody by granting Father and Mother joint legal custody over V. while increasing Father's visitation rights, leaving Mother dismayed. The court granted Mother's motion for an increase in Father's child support obligations, leaving Father dismayed.

Mother appealed, and Father cross-appealed. We reverse the order modifying V.'s legal custody, affirm the order modifying visitation, vacate the order modifying child support, and remand for further proceedings consistent with this opinion.

BACKGROUND

Father and Mother married in June 2010. Their son, V., was born on July 13, 2011. The parties separated in September 2013, and divorced the following year, in November 2014. The circuit court issued a Judgment, which granted Mother sole legal custody and primary physical custody of V., then three-years-old, and established a gradually increasing "parenting time" schedule for Father. The Judgment also provided that "the parties may, *by agreement*, modify the . . . visitation and exchange orders." The court established monthly child support in the amount of $1,269.

One month later, Father moved to modify or reconsider the Judgment, requesting that the court change V.'s custody to joint legal custody and change V.'s visitation with Father to a "more typical and expanded visitation schedule[.]" Father contended that his requests were justified because he and V. had a wonderful time together and because V.'s baby teeth had at least eight cavities and therefore Father wanted to more easily tend to V.'s medical needs. Father alleged that these changes were in V.'s best interests.

Although the court denied Father's motion to reconsider, it modified the Judgment pursuant to Father's motion to modify, and ordered both Mother and Father to "keep each other informed of any major activity pertaining to [V.], including but not limited to any medical appointment, dental appointment, any appointment with any health care provider, and any school activity."

At the time of the parties' divorce, V. was living with Mother at her parents' home in Mechanicsville, Maryland. He attended a part-time preschool, St. John Vianney Church, in Prince Frederick, Maryland. For the next school year, Mother and V. moved to Edgewater, Maryland, to enable V. to attend a full-time preschool there. One year later, when V. was ready to start kindergarten, they moved back into Mother's parents' home, and V. enrolled at St. John's Catholic School in Hollywood, Maryland, where V. has attended ever since.

In June 2018, Father filed a Motion to Modify Custody, Visitation, and Child Support, requesting joint legal custody and increased visitation with V. Father alleged that there had been a "material change of circumstances" since the Judgment, as follows:

1. V. was currently attending private school at St. John's in Hollywood, Maryland, and Father could pick him up and drop him off at school;
2. V. had expressed a preference to spend more time with Father;
3. Mother continued to deny Father any extra time with V.;
4. Mother did not provide Father with timely information regarding V.'s school activities or appointments to enable Father to attend;
5. Father was not allowed to take V. to doctor appointments;
6. Mother refused to add Father to the list of people authorized to pick up or drop V. off at school; and
7. Mother moved to Annapolis in 2016 and then moved back to St. Mary's County and was living with her parents as of September 2017.

Father also requested that the child support be modified to account for both parties' changes in income.

Mother countered with a motion to modify the child support, alleging that both parties' income had increased. Mother requested that the monthly child support award be increased to $2,053.

After a two-day evidentiary hearing during which the court heard testimony from twelve witnesses, including Father and Mother, the court announced its decision in court, after which a written order reflecting the decision was entered. The court awarded: (1) Mother primary residential custody; (2) Father "reasonable rights of visitation and access"; and (3) Mother and Father joint legal custody.

The court also increased Father's child support obligation to $2,686 per month.[1]

Both Mother and Father timely appealed.

[1] The order states that the child support is $2,686. At the hearing, the court said that the support award would be $2,687. We presume the discrepancy was inadvertent.

DISCUSSION

Mother presents one question for our review:

> Did the trial court err when it found a change of circumstances that warranted changing both legal and physical custody?

Father presents four questions for our review, which we have rephrased as follows:

1. Did the court err by modifying child support without including child support guidelines and a written order?
2. Did the court err by requiring Father to contribute to the private school expenses for V.?
3. Did the court err by modifying the child support award without a finding of a material change in circumstances?
4. Did the court err in determining that there was a material change in circumstances that warranted changing the custody?
5.

I.

CUSTODY

We review a child custody determination using three interrelated standards of review, which we have described as follows:

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

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

A circuit court engages in a two-step process in its consideration of a motion to modify custody. *McMahon v. Piazze*, 162 Md. App. 588, 593-94 (2005). First, the court

determines whether there has been a "material" change in circumstances since the previous custody order. *Id.* (citation omitted). As we have previously explained:

> The "material change" standard ensures that principles of *res judicata* are not violated by requiring that such a showing must be made *any time* a party to a custody or visitation order wishes to make a contested change, even if it is to an arguably minor term. The requirement is intended to preserve stability for the child and to prevent relitigation of the same issues.

Id. at 596. A change is considered to be "material" only if it affects the welfare of the child. *McCready v. McCready*, 323 Md. 476, 481-82 (1991).

If a material change is found, the court then considers the best interests of the child. *McMahon*, 162 Md. App. at 593-94. "The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Gillespie*, 206 Md. App. at 171-72 (citation omitted).

The two steps of this analysis focus on the child's best interests:

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

Gillespie, 206 Md. App. at 171 (quoting *McCready*, 323 Md. at 482).

In determining the best interests of the child, courts may, and regularly do, consider the following factors:

> [A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health

> of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rationale [sic] choice, the preference of the child.

Reichert v. Hornbeck, 210 Md. App. 282, 305 (2013) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996)); *accord Braun v. Headley*, 131 Md. App. 588, 610–11 (2000) (citing *Montgomery Cnty. v. Sanders*, 38 Md. App. 406, 420 (1977)) (noting similar factors). These factors are not an exhaustive or mandatory list for courts to consider; courts are instead vested with wide discretion in making decisions concerning the bests interest of the children. *Bienenfeld v. Bennett–White*, 91 Md. App. 488, 503–04 (1992) (citation omitted); *see also Taylor v. Taylor*, 306 Md. 290, 303 (1986) (internal citation omitted) (in noting "transcendent importance" of child's best interests, stating that no one factor "has talismanic qualities, and that no single list of criteria will satisfy the demands of every case").

Here, the circuit court's explanation of its decision regarding custody was as follows:

> The Court finds that there has been a material change of circumstances. As both parties know, I'm sure their attorneys have advised them, the guiding principle and standard in cases in Maryland like this are the best interests of the child.
>
> Throughout all of the hearings in this case, the Court has recognized that both the Plaintiff and the Defendant love their minor child, [V.], very much. It is also evident to the Court that [V.], as his teachers call him, has done extremely well, excelled, flourished, and thrived at the St. John's School in Hollywood, Maryland.
>
> The Court finds that the Plaintiff intentionally denied the Defendant any extra time with the minor child, kept the Defendant off the pickup and drop-off list at school. The minor child is now attending private school at St. John's in Hollywood, Maryland, and the Defendant can pick up and drop off the minor child to and from school.

> The Defendant's income has substantially changed since child support was previously calculated on November 20th, 2014. As such, as the Court indicated, the Court is granting the Defendant's motion to modify custody, visitation, and child support.
>
> The parties are hereby awarded joint legal custody of the minor child. The Plaintiff is awarded primary physical custody of the minor child and the Defendant has reasonable rights to visitation. . . .

The court then established a detailed visitation schedule that increased Father's visitation with and access to V.

Mother argues that the circuit court erred in finding a change in circumstances sufficiently material to justify modifying V.'s legal and physical custody. As to physical custody, Mother remains V.'s primary physical custodian. To the extent Mother is referring to Father's increased visitation, we find no abuse of discretion. Clearly the court believed that spending more time with Father would be in V.'s best interests as he gets older and that the adjusted schedule might avoid some of the acrimony between the parties in the future.[2] In that regard, as stated above, the court found that Mother intentionally denied Father any extra time with V. and kept him off the pickup and drop-off list at school, even though Father was able to take V. to and from school. The evidence showed that V. was only three years old when the original order went into effect and seven at the time of

[2] Indeed, after the court spoke to Mother about the best interests of V., she responded to Father's attorney's question as follows:

> [FATHER'S COUNSEL]: All right. Do you feel that Vincent would benefit from additional time with his father?
>
> MOTHER: He could.

the hearing, and that Father moved to Lexington Park to live closer to V.'s school, which was only 2.9 miles away. This evidence coupled with Mother's intentional denial of any extra time with Father, supported the court's finding of a material change of circumstances sufficient to justify a change in the visitation schedule. As such, we perceive neither error nor an abuse of discretion.[3]

[3] We are mindful that Mother was under no legal obligation to modify the visitation established in the Judgment, as the Judgment provided only that Mother and Father "may, *by agreement*, modify the above visitation and exchange orders." We don't believe the court's finding was meant to suggest that Mother violated a prior court order by intentionally depriving Father of increased visitation. Instead, to us, it seems that the court was simply observing that Mother had no intention of taking advantage of the flexibility afforded by the Judgment, and thus the court had to step in and modify the visitation to accommodate V.'s change in circumstances. In that regard, we note that the court expressed this concern to Mother during her testimony:

> You, at 34, are very, very different than you [were] at [V.]'s age, right? Okay? So part of what my job is – and Mr. Capoen's attorney is trying to get me as much information about your opinion about this as possible – is [V.] at this age is going to be very different than [V.] at 13, [V.] at 15, and [V.] at 18. So in a perfect world, at the conclusion of this proceeding, we would have an order that would, one, govern you and Mr. Capoen in reference to [V.] and it would carry you through so that in the unfortunate circumstances, if you could not communicate, you would at least have an order to abide by, okay?
>
> The Court highly – and this is why she asked you ["You don't think that [V.] would benefit from additional time with Mr. Capoen?"] The Court highly encourages people to grant more access. It is obvious to the Court that you love [V.] very much. He's crying, too. Both of you are crying. It's obvious that both of you love [V.]. It's obvious that you are conflicted. It is okay to say that you're conflicted because you have issues with him. But, yet, you love your son and you want your son – I know you want your son to be a healthy, fully-functioning adult male. I know you do. And you recognize that part of that development is him having time with his father. I understand that, okay?
>
> So try to put your feelings aside in reference to how you feel about him and you have to help me because I really – I want to get this right, okay?

We reach the different conclusion as to the court's decision to grant the parties joint legal custody over V. "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *See Taylor*, 306 Md. at 296. Father's evidence, viewed in the light most favorable to him, failed to establish a material change in circumstances that related to Mother's sole authority and ability to make these important decisions for V.; nor did the evidence show that such a change would be in V.'s best interests.

Rather, Father provided evidence that V. had moved and switched schools, that V. needed to repeat kindergarten, that he and V. wanted more time together, and that Mother intentionally denied him additional visitation, impeded his ability to pick up and drop off V. at school, and refused to provide him with information about V. Father did not contend

> And I want to get it right so that nobody has to come back to court anymore. So I need you to help me and I need you to tell me if – if you are going to allow things to change because they cannot stay like this. Because, also, [V.] knows. [V.] knows you don't like his dad. He knows it. Even if you've never said it. Because I know that you have a close bond with your son by the way you're reacting. So he feeds and he picks up on your nonverbal behavior.
>
> The same thing with him over there, his dad. The same thing. [V.] already knows you guys don't like each other, but he's just a little guy and we want him to get beyond that, right? We want him to be fully functioning. So you have to help me under – you have to help me understand. So take your time. Don't feel like you have to respond in a conversation. Just think about it and if you say – attorneys do it all the time, they say, "Court's indulgence." So if you need more time to answer, please. Because I really want to get this right. Okay?
>
> So just take as much – and I didn't mean to make you upset. Just take as much time as you need and just think about it. I'm going to ask you – Counsel, just ask your question one more time. Okay?

that Mother made an ill-conceived school choice for V., nor did we see any evidence in the record to support such a notion. As to education, at least, there is no dispute that Mother made a good decision. That V. repeated kindergarten, an event that occurred more than one year before Father's motion was filed, does not change that fact.

. The court's findings that Mother intentionally denied Father additional visitation and impeded his ability to take V. to school and pick him up did, as held above, justify a modification of visitation. But nothing presented to the court would have supported a finding that changing legal custody to make Mother and Father jointly responsible for all decisions involving V.'s education, religious training, and the like, would be in V.'s best interests. In fact, the circuit court made no such findings, and if anything, the findings the circuit court *did* make suggest that the parties' ability to communicate, a requisite for an award of joint legal custody, is wanting in this case. *Taylor*, 306 Md. at 304 (joint legal custody rarely awarded in absence of effective communication between the parents).[4] The circuit court's award of joint legal custody was, therefore, an abuse of its discretion.

II.

CHILD SUPPORT

"Child support orders are generally within the sound discretion of the trial court." *Knott v. Knott*, 146 Md. App. 232, 246 (2002). Though we review a child support award for an abuse of discretion, the factual findings underpinning an award are reviewed for

[4] When a court grants legal custody notwithstanding an inability to communicate effectively, the court must "articulate fully" why there is a strong potential for effective communication going forward. *Taylor*, 306 Md. at 307.

clear error and will be upheld where any competent evidence supports them. *Reynolds v. Reynolds*, 216 Md. App. 205, 218-19 (2014); *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002); Md. Rule 8-131(c).

In 1989, the General Assembly enacted guidelines (the "Guidelines") to compute child support obligations "based on specific descriptive and numeric criteria."[5] *Voishan v. Palma*, 327 Md. 318, 322 (1992) (quotation omitted). To use the Guidelines, the court must first determine the adjusted actual income of each parent as well the expenses incurred in raising the child, and then apply those numbers within its framework. *See Reuter v. Reuter*, 102 Md. App. 212, 235 (1994). Maryland law favors using the Guidelines to calculate child support obligations.[6]

[5] The Guidelines are set forth in FL § 12-204 and a schedule of basis child support obligations is contained in subsection (e).

[6] Md. Code Ann. (1984, 2019 Repl. Vol.) Fam. Law ("FL") § 12-202 provides:

> (a) (1) Subject to the provisions of paragraph (2) of this subsection, in any proceeding to establish or modify child support, whether pendente lite or permanent, the court shall use the child support guidelines set forth in this subtitle.
>
> (2)(i) There is a rebuttable presumption that the amount of child support which would result from the application of the child support guidelines set forth in this subtitle is the correct amount of child support to be awarded.
>
> (ii) The presumption may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case.
>
> * * *

A "court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change in circumstance." FL § 12-104(a). As the Court of Appeals stated:

> The "material change of circumstance" requirement limits the circumstances under which a court may modify a child support award in two ways. First, the "change of circumstance" must be relevant to the level of support a child is actually receiving or entitled to receive. Second, the requirement that the change be "material" limits a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order.

Wills v. Jones, 340 Md. 480, 488-89 (1995) (internal footnote omitted). "In making this threshold determination that a material change of circumstance has occurred, . . . a court must specifically focus on the alleged changes in income or support that have occurred since the previous child support award." *Id*. at 489; *see also Petitto v. Petitto*, 147 Md. App. 280, 307 (2002) (quotation omitted) (the changes that the court focuses are on "the

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> (v) 1. If the court determines that the application of the guidelines would be unjust or inappropriate in a particular case, the court shall make a written finding or specific finding on the record stating the reasons for departing from the guidelines.
>
> 2. The court's finding shall state:
>
> A. the amount of child support that would have been required under the guidelines;
>
> B. how the order varies from the guidelines;
>
> C. how the finding serves the best interests of the child; and
>
> D. in cases in which items of value are conveyed instead of a portion of the support presumed under the guidelines, the estimated value of the items conveyed.

alleged changes in *income or support*"). The party seeking the modification bears the burden of proving that a material change in circumstances has occurred. *See Leineweber v. Leineweber*, 220 Md. App. 50, 62 (2014); *Corby v. McCarthy*, 154 Md. App. 446, 477 (2003).

In cases where the parties' combined income exceeds the highest level on the Guidelines provided under FL § 12-204(e), known as "above-guidelines" cases, "the court may use its discretion in setting the amount of child support." FL § 12-204(d); *Kpetigo v. Kpetigo*, 238 Md. App. 561, 583 (2018). In doing so, the court can refer to and extrapolate from the Guidelines, but in the end, must exercise its discretion in accordance with the best interests of the child. The Court of Appeals stated:

> To effectuate the legislative intent to improve the consistency of child support awards, trial judges should bear in mind the guidelines' underlying principles when deciding matters within their discretion. Extrapolation from the schedule may act as a "guide," but the judge may also exercise his or her own independent discretion in balancing the best interests and needs of the child with the parents' financial ability to meet those needs. Factors which should be considered when setting child support include the financial circumstances of the parties, their station in life, their age and physical condition, and expenses in educating the children.

Voishan, 327 Md. at 328–29 (cleaned up).

Father contends that the court failed to attach its Guidelines worksheet to its order and did not make the requisite findings to sustain a deviation from the Guidelines. Such findings, Father contends, should have included (i) that the Guidelines would produce an unjust or inappropriate result; (ii) the amount of child support that would result from application of the Guidelines; and (iii) an explanation of whether and to what extent the award deviates from the Guidelines, and if so, why the variance would serve the best

interests of the child. Father also argues that the court factored into its child support award the private tuition of V.'s school without any analysis of his educational needs as required by FL § 12-204(i)(1).[7] Finally, Father argues that the court failed to make the requisite finding of a material change in circumstances—both in the parties' income and the child's needs—to justify a change in the child support amount.

Mother counters that the evidence showed that both Mother and Father had a substantial increase in income since the child support amount had been established. Mother contends that the Guidelines worksheet that she submitted to the court calculated Father's support obligation to be $2,687, which is "the precise amount this Court ordered [Father] to pay." As to Father's complaint that the court did not make the necessary findings regarding V.'s educational needs so as to justify including the private school tuition in the calculations, Mother contends that Father waived that issue by not raising it in the circuit court and, in any event, the evidence clearly showed that V. was thriving at school.

The court's ruling on child support consisted of the following:

> The Court grants the Defendant's motion to modify custody, visitation, and child support. The Court finds that there has been a material change of circumstances. As both parties know, I'm sure their attorneys have advised them, the guiding principle and standard in cases in Maryland like this are the best interests of the child.
>
> * * *
>
> Child support for purposes of the guidelines are calculated based upon the monthly income of the mother at $6,523 and the father at $15,416. The

[7] FL § 12-204(i) provides: "By agreement of the parties or by order of court, the following expenses incurred on behalf of a child may be divided between the parents in proportion to their adjusted actual incomes: (1) any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child . . . "

> father's total child support obligation is $2,687 per month and will begin on September 1st, 2019. And both parties' requests for attorney's fees is denied.

We conclude that the court's ruling does not include sufficient findings to enable us to properly review its decision. We agree with Mother that the court apparently used her Guidelines worksheet in determining that the child support award should be $2,687. But Mother's Guidelines worksheet are not without issue. The Guidelines schedule in FL § 12-204(e) provides the basic child support obligation for a combined monthly income of up to $15,000. Mother's worksheet showed a combined income of $21,939, which would make this an above-guidelines case, and thus requires the court to exercise discretion in determining the appropriate amount. *Otley v. Otley*, 147 Md. App. 540, 560-61 (2002).

Mother's worksheet also states that the "basic child support obligation" is $2,842, but she did not explain how she got that number. At an income level of $15,000—the highest amount on the Guidelines' schedule—the child support for one child is $1,942, and for two children, it is $2,847.[8] Assuming Mother's figure mistakenly came from the latter, we cannot tell whether the court accepted Mother's figure and didn't catch the mistake, or whether the court concluded that Father's child support obligation should be calculated as if the parties had two children instead of one.

In *Otley v. Otley*, 147 Md. App. 540, we vacated a child support award in an above-guidelines case because the court did not explain its decision. As we stated there:

> In the case before us, the child support guidelines were not applicable. Consequently, the amount of child support rested in the sound discretion of

[8] At the hearing, Mother argued that "there's no reason to deviate" from the Guidelines. This indicates to us that Mother mistakenly applied the Guidelines for two children instead of one. We also assume that Mother's insertion of $2,842 was a typographical error, and that she meant to insert $2,847.

> the trial court. Additionally, the determination as to whether child support should be retroactive rests in the sound discretion of the trial court. Because of the rebuttable presumption articulated in *Voishan*, however, it was incumbent upon the court to fully explain the reasoning for its decision as to the amount of child support, because the amount awarded was below the maximum support award under the guidelines.

Id. at 562 (internal citations omitted); *see also Knott*, 146 Md. App. at 256-57. So too here.

Similarly, in *Kpetigo*, "[b]ecause the court did not specify why it chose Parent's dated salary in the calculation[,]" we remanded the case for the court to recalculate the child support using the proper income figures. 238 Md. App. at 583-84; *see also Meyer v. Meyer*, 193 Md. App. 640, 663-64 (2010) ("In light of the sparse record and the absence of any pertinent findings by the circuit court, we will remand this portion of the case for the court to make appropriate findings of fact and conclusions of law.").

Like *Otley* and *Kpetigo*, this case warrants a remand so that the court can make the necessary findings and explain its reasoning. That would cover, as applicable, findings on income levels, V.'s educational needs using the factors identified in *Witt v. Ristaino*, 118 Md. App. 155 (1997), deviations from the Guidelines, and the exercise of the court's discretion if it determines this is an above-guidelines case. The court may also, in the exercise of its discretion, re-open the hearing for additional evidence to the extent the court deems it necessary. Because we are remanding for further proceedings as to child support, we need not decide the other issues raised by Father.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED IN PART, REVERSED IN PART, AND VACATED IN PART; JUDGMENT MODIFYING FATHER'S

VISITATION IS AFFIRMED; JUDGMENT GRANTING JOINT LEGAL CUSTODY IS REVERSED, SUCH THAT MOTHER SHALL RETAIN SOLE LEGAL CUSTODY OF THE MINOR CHILD; JUDGMENT REGARDING CHILD SUPPORT VACATED AND REMANDED TO THE CIRCUIT COURT FOR CHARLES COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.