Circuit Court for Harford County
Case No. 12-C-15-001536

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1212

September Term, 2019

CRAIG FRANCIS CHRISTIE

v.

KAITLIN MARIE CHRISTIE

Graeff,
Gould,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: March 3, 2021

In this appeal, Craig Christie ("Father"), appellant, challenges the order of the Circuit Court for Harford County awarding attorney's fees to Kaitlin Christie ("Mother"), appellee, and modifying the prior child support award. Father presents four questions for this Court's review, which we have consolidated and rephrased as follows:

1. Did the circuit court err in retroactively reducing child support arrears for payments that accrued more than three years prior to the filing of the motion to modify, contrary to the provisions of Maryland Family Law §12-104?

2. Did the circuit court err in its award of attorney's fees to Mother?

For the reasons set forth below, we answer these questions in the affirmative, and therefore, we shall reverse the reduction of child support arrears, vacate the award of attorney's fees, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother were married in a religious ceremony in Towson on May 30, 2009. They had one minor child, K.C., who was born in 2008. On May 26, 2015, Father filed a Complaint for Absolute Divorce in the Circuit Court for Harford County. The parties entered into a Separation and Property Settlement Agreement (the "Agreement"), which was dated June 6, 2015, and executed on June 9, 2016. The Agreement provided that Mother and Father would share joint legal custody of K.C., and Father would have primary physical custody. Mother had physical custody of K.C. every other weekend, as well as on Tuesday nights after school. The Agreement provided that child support would be determined "by the Maryland Guidelines as part of the parties' divorce proceedings." Mother was not represented by counsel when she executed the Agreement.

On August 27, 2015, after receiving no answer from Mother with regard to his Complaint for Absolute Divorce, Father filed a Motion for Order of Default. On September 14, 2015, the circuit court granted the motion and ordered that a hearing by default be scheduled before a magistrate. On December 23, 2015, an uncontested hearing took place. Mother was not present at the hearing. On January 15, 2016, the magistrate issued his recommendations, including that the court grant Father's request for an absolute divorce, incorporate the parties' Agreement, award Mother and Father joint custody of K.C., and require Mother to pay $955 per month based on sole-custody guidelines, backdated to June 1, 2015. In his report, the magistrate noted that, although the separation agreement called for shared physical custody of K.C., Mother had not been using her full time with K.C., and therefore, he recommended that child support be awarded to Father based on sole-custody guidelines.

On March 2, 2016, the circuit court granted Father a Judgment of Absolute Divorce. It incorporated, but did not merge, the June 6, 2015 Agreement, awarded the parties joint legal custody of K.C., with tie-breaking authority to Father, awarded Father primary physical custody of K.C., afforded Mother liberal visitation rights, and ordered Mother to pay Father $955 per month for child support as of June 1, 2015.

On May 17, 2016, Mother filed, with the assistance of legal counsel, a Complaint for Modification of Custody and Child Support. Mother alleged that the Judgment of Absolute Divorce erroneously ordered child support in the amount of $955 per month, "which was calculated based upon the sole guidelines calculation as opposed to the shared

guidelines calculation consistent with the Agreement of the parties." Mother further alleged that, since the court's entry of the Judgment of Absolute Divorce, Mother has been forced to work Tuesday nights, a day where she typically would enjoy visitation with K.C., and Father had been unwilling to agree to an alternative day for Mother to regularly exercise visitation with K.C.

On July 13, 2016, Father mailed Interrogatories and Requests for Production of Documents to Mother, but Mother failed to respond. Thereafter, Mother's counsel filed a Motion to Withdraw Appearance, and he removed himself from the litigation. Following her counsel's withdrawal, Mother failed to appear at the February 23, 2017 trial, and pursuant to Father's Motion to Dismiss, the court dismissed Mother's complaint.

In June 2017, Father notified Mother of his intent to move to Texas with K.C., so Father could be closer to his fiancée. For several months, Father attempted to reach an informal agreement with Mother regarding custody of K.C. At first, Mother seemed inclined to go along with Father's proposal, but informal negotiations subsequently broke down.

After the parties were unable to reach an agreement regarding custody of K.C., Father filed a Motion to Modify Visitation. Father's motion alleged that, despite having considerable parental access pursuant to the Agreement, Mother had "consistently declined to exercise the vast majority of the parental access granted." Father argued, therefore, that it was in K.C.'s best interest for the court to modify Mother's visitation rights so that K.C. could accompany Father to Texas.

Mother, with the assistance of counsel, filed a Counter-Complaint for Modification of Custody on March 8, 2018. Mother argued that circumstances had changed significantly since the March 2, 2016 Judgment of Absolute Divorce, and it was no longer in K.C.'s best interest to remain in Father's primary physical custody. Mother also sought termination of her current child support obligation, as well as attorney's fees and costs for defending against Father's Motion to Modify Visitation.

On September 6, 2018, a three-day trial began. Father testified that, at the time he and Mother entered into the Agreement, Mother was using very little of the time allotted by the Agreement to visit K.C. Mother would see K.C. only "once every two to three weeks for a very short period of time." Although Mother began to see K.C. more frequently after retaining counsel to file her May 17, 2016 Complaint for Modification of Custody and Child Support, once Mother's counsel withdrew from the case, Mother began to see K.C. less frequently. When Mother again retained counsel to defend against Father's Petition for Visitation, Mother began using the time allotted to her by the Agreement to visit K.C. Father testified that Mother exercised only 86 of the 119 days allotted to her to see K.C. in 2016, 102 of the 133 days in 2017, and she consistently visited K.C. throughout 2018, although she often switched Tuesdays for a different day.

Regarding his plan to move to Texas with K.C., Father testified that he informed Mother of his intention, and after meeting in August 2017 for lunch, Father was under the impression that he and Mother had reached an agreement. Following that lunch, however, Mother evaded Father's attempts to discuss the matter further, leaving Father with little

choice but to file the Motion to Modify Visitation in November 2017. Father testified that he later learned that Mother had been feigning agreement so she could buy time to retain legal counsel to defend against Father's efforts to take K.C. to Texas. Father testified regarding the job offers he had received in Texas, the new home he and his fiancée had recently purchased there, and the school system K.C. would attend if the court permitted Father to take K.C. to Texas.

Father's counsel then asked where K.C. resided in the summer of 2015. Father testified that K.C. spent the entire summer in the care of K.C.'s paternal grandparents in Lake Ossipee, New Hampshire. Father spent "a small four-day weekend" there to visit K.C., but Mother did not visit a single time, despite being offered the opportunity. Father stated that K.C. stayed in New Hampshire because "financially it was easier to have [K.C.] somewhere," and "he didn't have to see or deal with the separation."

Father's mother, Suzanne Christie, testified that, in the spring of 2015, it became clear that Mother and Father would be separating. Because Mother was no longer contributing to the household, Ms. Christie offered to take K.C. for the summer "to get [him] out of the middle of the tension of the divorce," and to help Father in any way they could as he was now a "single dad trying to work, save his house, [and] be there all the time for [K.C.]" She and her husband stayed in her brother's home in New Hampshire. Father called K.C. "every day," and Father and K.C. spoke on the phone 23 times in July. Mother, on the other hand, only called K.C. two times throughout the summer.

Mother testified that she signed the Agreement pursuant to Father's ultimatum that she either sign the separation agreement or remain married to him. She stated that she did not enter into the June 6, 2015 Agreement voluntarily. When questioned by Father's counsel as to why she failed to make such an allegation in the divorce proceedings or in her May 17, 2016 Complaint for Modification of Custody and Child Support, Mother pointed to her lack of counsel as an explanation.

Regarding Father's move to Texas, Mother testified that she never felt it was in K.C.'s best interest to move to Texas with Father, although Father continually sought her approval. When questioned by Father's counsel, Mother admitted that she "had no intentions" of letting Father take K.C. to Texas, and the purpose of "stringing" Father along was so Mother had time to secure counsel. Mother testified that, although her work situation had now become less demanding, Father would not allow her to have any additional time with K.C. Mother also testified regarding the summer of 2015, explaining that Father insisted that K.C. be sent to live with his paternal grandparents for the entire summer.

On September 19, 2018, the court gave its oral ruling. The court determined that it was in K.C.'s best interest to remain in Maryland, and it awarded primary physical custody of K.C. to Mother, with joint legal custody, giving Mother tie-breaking authority. The court recognized that, in light of its ruling, Father might wish to reconsider his impending move to Texas. Accordingly, the court stated that it would wait to issue its final written order until Father informed the court whether he was staying in Maryland or moving to

Texas. Because the court awarded Mother primary physical custody of K.C., it went on to reconsider Mother's child support obligation. The court noted that the "current child support amount was set by the magistrate in January of 2016 relying on the [Agreement] which [Mother] and [Father] had reached regarding custody and not having an attorney to represent her." The court stated that backdating the original award to June 1, 2015, was a "miscarriage of justice," and it eliminated the arrears Mother owed for the period of June 1, 2015, to September 1, 2015. The court explained:

> [T]he magistrate was informed by [Father] and his counsel that [Mother], although she had shared custody under the agreement, was not using her full custodial time and that, therefore, child support should be set at the guidelines level which would apply if [Father] had sole custody under the agreement. The magistrate accepted this representation and set the child support at the sole custody level of $955 per month on a stated gross income for [Mother] of $3,600 approximately.
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> The magistrate also established arrears for [Mother] in the amount of $6,685 by backdating the child support obligation to the date of the filing of [Father's] complaint for absolute divorce, which I believe had been the end of May, 2015, and the magistrate backdated the arrears to June 1st, 2015.
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> The magistrate set this date even though, as we now know, from the evidence heard in the last week, that [K.C.] was in his paternal grandparents' physical custody for that entire summer and for the first three months of the child support award he was with neither parent. The Court finds that this is a miscarriage of justice which requires an adjustment downward of any arrears, and we are dealing only with arrears here of $2,865 for that initial three-month period of retroactive child support.

Regarding attorney's fees, which Mother's counsel had requested in her initial pleadings, the court stated that it was "going to reserve on the question of attorney's fees at this point simply because the [c]ourt does not have an exhibit which details the cost of attorney's fees for [Mother]." The court instructed Mother's counsel to submit an itemized

bill to Father's counsel within 10 days, and a hearing on the amount and propriety of attorney's fees would occur at Father's request.

Father ultimately decided to remain in Maryland, and on September 25, 2018, he notified the court of his decision. On September 27, 2018, Mother's counsel filed a payment summary reflecting total arrears of $7,210.32 "as of September 19, 2018," as well as an itemized bill reflecting Mother's attorney's fees. The itemized bill listed Mother's counsel's hourly rate as $250 per hour, and it reflected fees in the amount of $16,420. The itemized bill included invoices from January 10, 2018, to the Court's oral ruling on September 19, 2018, which reflected the total time that Mother's counsel assisted in defending against Father's Motion to Modify Visitation.

On October 5, 2018, Father's counsel filed a Motion to Strike "Correspondence" and Supporting Exhibits, arguing that it was improper for Mother's counsel to submit substantive evidence of attorney's fees as "[n]o evidence or argument regarding the issue of attorney's fees was submitted by [Mother] during the trial." In response, Mother's counsel argued that the court had already awarded attorney's fees at the time of the court's oral ruling, and that it had merely "reserved final determination on the issue pending submission of an attorney's fees invoice to [Father's] counsel and to [the] [c]ourt." Mother's counsel further pointed out that, at the oral ruling, the court stated that, "should [Father] desire a hearing on the issue of attorney's fees, his request for a hearing would be granted." On January 14, 2019, the court denied Father's motion.

The court filed its written order on January 15, 2019. In light of Father's election to remain in Maryland, the court awarded shared physical and legal custody of K.C., with Mother having tiebreaking authority. The court, in line with its oral ruling, ordered a "downward adjustment" of Mother's child support arrears in the amount of $2,865, representing the months during which K.C. was in the care and custody of his paternal grandparents.[1] As to attorney's fees, the court reserved the issue pending a hearing.

On January 24, 2019, Father filed a Motion to Reconsider, or in the Alternative, Request for Further Hearing. Among other things, Father requested the court to reconsider its downward adjustment of arrears, arguing that such an adjustment was in violation of Md. Code Ann., Fam. Law Article ("FL") § 12-104(b) (2012 Repl. Vol.). Father also requested a hearing on the issue of attorney's fees.

On July 16, 2019, the court held a hearing on Father's motion. The parties first discussed the downward adjustment of child support. Father's counsel argued that K.C.'s visitation with his paternal grandparents in the summer had no bearing on the child support award because "[t]here's not a reduction [in the support award] when the child is temporarily in the custody of another party." Father's counsel emphasized that the court's downward adjustment was a modification of past-due arrears, which was contrary to Maryland law.

[1] The court also reduced arrears in the amount $4,746, representing the difference between the amount the court found she should have been paying since the time she first requested a modification of child support in her March 2018 countercomplaint. Father does not dispute this reduction, and therefore, we do not address it.

Mother's counsel argued that, "although the [c]ourt can't modify a child support arrearage, they certainly can set aside old arrears that were entered improperly." She asserted that, because K.C. was not with any parent during the summer of 2015, the backdating of the support order was improper because it required Mother to "repay something that she should not have been ordered to pay in the first place." The court agreed with Mother's counsel and upheld its decision to eliminate child support arrears Mother owed for the summer of 2015.

As to attorney's fees, Father's counsel asserted that, despite the court's oral ruling on September 19, 2018, attorney's fees had not yet been awarded in the case. The court replied that it was clear that attorney's fees would be awarded. Mother's counsel then introduced an itemized bill, over Father's counsel's objection.

Father testified regarding his ability to pay Mother's attorney's fees. He testified that he owed his counsel $12,717, and he had other day-to-day living expenses, including a monthly mortgage. The court stated it was not able to gauge what portion of expenses he was paying, as opposed to his current wife. The court stated:

> I think the fairer way of looking at his ability to pay is to look at his income rather than how he chooses to spend it. I don't know if he lives in a house that has a $6,000 a month mortgage. But if he does, is that because he can afford it himself, or is that because his household can afford it?

Father's counsel stated that the court should "take the expenses that form a part of his daily living and factor that into the ability to repay." He then admitted an exhibit including monthly expenses, and Mother's counsel proffered that her housing expenses were

substantially the same as Father's expenses.[2] Father testified that he had credit card debt in the amount of approximately $36,500, the vast majority of which had been incurred between 2015 and 2016, when he and Mother were separated. Father testified that he could not afford to pay Mother's attorney's fees given his current expenses and liabilities. Counsel argued that Mother and Father have "relatively equal incomes."

Mother's counsel asked whether the court would accept "the proffer as to [Mother's] inability to pay and the extent to which she's borrowed funds." Counsel offered to have Mother testify if necessary, but Father's counsel accepted the proffer that Mother could not afford to pay her attorney's fees and had borrowed funds to cover her legal expenses. Counsel also argued that Mother's income was significantly less than Father's income, and one of the principal reasons why the parties were before the court was Father's refusal to relinquish $4,382.28 in funds that the court had previously ruled belonged to Mother.[3] As such, counsel argued attorney's fees were justified.

With respect to the justification for the court filings, Father's counsel argued that Father was justified in filing the Motion to Modify Visitation because, at the time of filing, Mother was not using all of her visitation time with K.C., and she misled Father into

[2] The court subsequently noted a listing for "$1,500, $1,557.35 on a $223,000 balance for [Father's] monthly mortgage payment."

[3] In its January 15, 2019 written order, the court ordered Father to repay Mother $4,382.28, which represented the amount that had been garnished from Mother's paycheck since the court's September 19, 2018 oral ruling. The written order required Father to repay the amount within thirty (30) days, but as of the July 16, 2019 hearing, Father had still not reimbursed Mother.

believing that she would agree to the modification. Mother's counsel argued that Father "was clearly on notice that [Mother] was not in agreement to the move," and Mother incurred attorney's fees because Father elected to proceed with his move to Texas.

The court found that Mother had properly pled the issue of attorney's fees, and it awarded her attorney's fees in the amount of $21,420, including $16,420 for the cost of defending against Father's Motion to Modify Visitation, and $5,000 for the work Mother's counsel performed due to Father electing to remain in Maryland.

The court explained its rationale, as follows:

> With regard to Defendant's Exhibit 1, the Court is going to order that [Father] pay to [Mother] $16,420, which is the actual amount of time expended; 66 hours to prepare to do all of the discovery, to do a three-day trial and then return for the Court's opinion. All of that is more than fair and reasonable. And the Court finds based on my review of the document and also the proffers made and accepted and also my understanding of the case, having been the judge who presided in the case, I find that all of these expenses were related to the actual preparation to defend and defense against [Father's] demand to take [K.C.] to Texas.
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> * * *
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> All right with regard to Defendant's Exhibit 2, I just want to say this. A significant amount of the time required, both the Court's time and counsel's time in the post-trial stage had to do with the fact that the Court basically had given [Father] the option at the end of the case to make his own election. Was he staying in Maryland, was he going. And the Court, because the whole thrust of the case had been that he would go to Texas, had crafted all of the Court's detailed orders with regard to the Texas plan, as I believe I called it in my opinion and in the attachments to my order, and in the order itself, I added the Maryland plan simply as a possibility that it might be needed in my comments in September, in my oral opinion in September. But then there was a considerable amount of reorganization that needed to be done once it became clear that [Father], once he made his actual election, which I invited him to make, that he would stay in Maryland. So, for that reason in this Court's view, a significant amount of the time expended by

> counsel, both sides, post trial had to do with reorganizing the plan because [Father] was now no longer going to go to Texas, and so, therefore, it was necessary to sort out that aspect as well as to negotiate and to, once that failed to work out on all topics, to deal with the motion to basically revise the Court's judgment.
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> * * *
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> . . . So, what the Court is going to do is order that 20 hours of [Mother's counsel's] time since the rendering of the Court's oral opinion is going to be paid by [Father]. So that's an additional $5,000.

The court issued its written order on August 13, 2019. This appeal followed.

DISCUSSION

I.

Retroactive Reduction of Child Support Arrears

Father contends that the circuit court lacked authority to retroactively modify the child support arrears that Mother owed for the period of June 1, 2015, through September 1, 2015. He argues that FL § 12-104 prohibits a retroactive modification of child support arrears prior to the date of the filing of a motion for modification.

Mother contends that the circuit court properly set aside an invalid child support award. She acknowledges that a "court may not retroactively modify a child support award prior to the date of the filing of the motion for modification" or forgive a valid child support debt. Mother argues, however, that the trial court may "set aside" an invalid child support order, which is what the court did here. She asserts that the court took "action to correct an order that had been procured through fraud" when it determined that Father obtained an award of child support for three months in the summer of 2015 when he did not have

custody of K.C., and the fraud "permitted the trial court to exercise revisory authority to set aside the invalid [child support] award" pursuant to Md. Rule 2-535(b).

The question whether the circuit court improperly modified child support arrears involves the interpretation of FL § 12-104. We review questions of statutory interpretation *de novo*. *Bord v. Baltimore County*, 220 Md. App. 529, 544 (2014).

FL § 12-104 provides:

> (a) The court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance.
>
> (b) The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification.

The parties agree that, pursuant to FL § 12-104(b), a trial court is not permitted to retroactively modify a child support award prior to the date a motion for modification of support is filed. Thus, they agree that, if the court's 2019 order eliminating the child support ordered for the summer of 2015 was a retroactive modification of support, it was improper. The dispute here is whether the court's action constituted a retroactive modification of child support.

In support of their respective arguments, Mother and Father both cite to the cases of *Walter v. Gunter*, 367 Md. 386 (2002), and *Harvey v. Marshall*, 389 Md. 243 (2005). In *Walter*, the Court examined the impact of FL § 12-104 on the modification of child support arrears. 367 Md. at 386. Mr. Walter had consented to a judgment of paternity and was liable for child support, but years later, genetic tests conclusively proved that Mr. Walter was not the father. *Id.* at 389–90. Mr. Walter then sought to eliminate his child support

obligations. *Id.* at 390. The circuit court set aside the paternity judgment, but it denied Mr. Walter's petition to modify child support that accrued prior to the time he filed his petition. *Id.*

The Court of Appeals reversed, holding that the circuit court was without discretion to uphold arrears following the vacatur of the judgment of paternity upon which the arrears were predicated, stating that FL § 12-104 was inapplicable because the court was considering whether the child support order could stand "*after the very paternity declaration, from which the child support order originate[d], ha[d] been vacated.*" *Walter*, 367 Md. at 393. The Court concluded that, in the absence of parenthood status, Mr. Walter could not be obligated to pay child support, including the arrears that accrued prior to his motion to modify child support, as the duty to pay child support could no longer exist. *Id.* at 396. The Court explained that, "[w]ithout paternity, there is no legal duty; without a legal duty, there can be no financial obligation." *Id.*

Walter clearly involves circumstances different from those here, but Mother suggests that the Court of Appeals subsequently interpreted *Walter* as encompassing any invalid child support order. In *Harvey*, 389 Md. at 269, the Court noted that *Walter* held that "when a child support order is premised on an invalid paternity declaration, § 12-104 does not limit a court's discretion to 'set aside' that child support order." In that case, the Court considered, in the context of the facts involved, "whether a court may eliminate completely child support arrearages in light of the statutory prohibition on the retrospective modification of child support orders." *Id.* at 249.

Mr. Harvey's child support obligations, as in *Walter*, arose from paternity decrees establishing him as the biological father of the children. *Id.* at 249–50. After Mr. Harvey obtained sole custody of the children, he moved to set aside child support arrears he owed from a period during which he did not have custody of his children. *Id.* at 253. Mr. Harvey argued that, because he was requesting elimination of his past arrearages, he was not requesting a "modification" of child support, but rather, he was seeking a "set aside," which was permitted under FL § 5-1038(b).[4] *Id.*

In holding that Mr. Harvey was not entitled to a modification of child support arrears, the Court noted that FL § 12-104 "was designed to circumscribe the broad authority delegated to the courts by [FL] § 5-1038(b)." *Harvey*, 389 Md. at 272. Unlike in *Walter*, Mr. Harvey was not arguing that the underlying child support awarded in the paternity decree was invalid, but he sought to modify enforcement of valid child support obligations that affected his current ability to support his family. *Id.* at 263. Thus, he was seeking a

[4] Md. Code Ann., Fam. Law Article § 5-1038 (2012 Repl. Vol.) provides, in pertinent part, as follows:

> (a)(1) Except as provided in paragraph (2) of this subsection, a declaration of paternity in an order is final.
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> * * *
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> (b) Except for a declaration of paternity, the court may modify or set aside any order or part of an order under this subtitle as the court considers just and proper in light of the circumstances and in the best interests of the child.

modification of child support, and FL § 12-104 circumscribed discretion given to the courts pursuant to FL § 5-1038(b). *Id.* at 272.[5]

Here, unlike in *Walter* and *Harvey*, Mother's child support obligation arose, not from a decree of paternity, but from a Judgment of Absolute Divorce. Thus, the ability of a court to modify or set aside a child support obligation in the context of paternity decrees is not applicable. *See Harvey*, 389 Md. at 260 ("[FL] § 5-1038(b) provides authority for a court to both 'modify or set aside' *any* order *in paternity actions*[.]" (emphasis added)). Accordingly, Mother cannot rely on FL § 5-1038(b) to set aside the arrears. Rather, this case is governed by FL § 12-104, which precludes a court from retroactively modifying child support awarded prior to Mother's 2018 motion for modification of custody.

Mother contends, however, that child support awarded for the three months that K.C. stayed with his grandparents in the summer of 2015 was invalid based on fraud, and that fraud "permitted the trial court to exercise revisory authority to set aside the invalid award" pursuant to Md. Rule 2-535. Md. Rule 2-535 provides:

> (a) On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
>
> (b) On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

[5] The Court of Appeals made clear in *Harvey* that modification encompassed elimination of child support. *Harvey v. Marshall*, 389 Md. 243, 269 (2005).

Initially, we note that Mother failed to argue in the circuit court proceedings to modify custody and child support that the child support arrears could be modified pursuant to Md. Rule 2-535. Accordingly, that argument is not preserved for appeal. *See Nalls v. State*, 437 Md. 674, 691 (2014) (Failure to raise an issue at trial generally waives that issue on appeal.).

In any event, even if Mother's argument, that the court could modify the child support arrears pursuant to Md. Rule 2-535 based on fraud, was preserved, we would conclude that it was without merit. Initially, we note that Mother points to no specific evidence of fraud by Father in the divorce proceedings. *See Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008) (Burden of proof in establishing fraud is clear and convincing evidence.). Moreover, for a court to exercise its revisory power under Md. Rule 2-535(b), the fraud must be extrinsic. *Hresko v. Hresko*, 83 Md. App. 228, 231 (1990). "In determining whether or not extrinsic fraud exists, the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the fact finder at all." *Id.* at 233. *See Wells v. Wells*, 168 Md. App. 382, 399 (2006) (Divorce granted by default judgment was obtained by extrinsic fraud because husband prevented wife's participation at trial by, among other things, intercepting notice of divorce proceedings.). In contrast, intrinsic fraud, that which is "founded on a fraudulent instrument, or *perjured evidence*, or for *any matter which was actually presented and considered in the judgment assailed*," *United States v. Throckmorton*, 98 U.S. 61, 66 (1878) (emphasis added), cannot be remedied under

Md. Rule 2-535(b). *Hresko*, 83 Md. App. at 231–32 (Extrinsic fraud, as opposed to intrinsic fraud, is "required to authorize the reopening of an enrolled judgment."). Here, the fraud, if any, constituted fraud of the intrinsic variety, as any fraud that occurred would have occurred during the proceedings.

Accordingly, the modification of child support arrears was not proper pursuant to Md. Rule 2-535(b). The circuit court erred in its "downward adjustment" of child support arrears in the amount of $2,865.

II.

Attorney's Fees

Father next contends that the circuit court erred in its award of $21,420 in attorney's fees to Mother. He asserts several claims of error in this regard.

First, Father argues that, to the extent that the court awarded fees with respect to his effort to correct the retroactive modification of arrears for the period of June 1, 2015, to September 1, 2015, the award of attorney's fees related to that effort must be vacated because he was correct on that issue. In support, Father points to the case of *Malin v. Mininberg*, 153 Md. App. 358, 433–34 (2000), and asserts that, when the underlying basis for the award of attorney's fees has been eliminated, then the attorney's fees also must be vacated.

Second, Father contends that the court failed to properly consider the factors required by FL § 12-103(b). Specifically, he asserts that the court failed to properly consider the financial status and needs of the parties, and instead, the award of attorney's

was based on the outcome of the earlier divorce action, as opposed to the outcome of the proceedings before the court.

Mother contends that the court's award of attorney's fees was a proper exercise of its discretion. She asserts that the record is clear that the court's award of attorney's fees was completely unrelated to Father's efforts to overturn the court's modification of arrears. Moreover, she argues that the court conducted a proper analysis under FL § 12-103, and the fees "were awarded based upon the litigation before the court."

"In a child custody proceeding, '[a]n award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong.'" *David A. v. Karen S.*, 242 Md. App. 1, 23 (quoting *Petrini v. Petrini*, 336 Md. 453, 468 (1994)), *cert. denied*, 466 Md. 219 (2019). "Abuse of discretion 'occurs when a trial judge . . . acts beyond the letter or reason of the law.'" *Id.* (quoting *Garg v. Garg*, 393 Md. 225, 238 (2006)). "[C]ourts 'do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature.'" *Morton v. Schlotzhauer*, 449 Md. 217, 231 (2016) (quoting *Wilson-X v. Dep't of Hum. Res.*, 403 Md. 667, 675 (2008)).

With that standard of review in mind, we address each of Father's claims.

A.

Child Support Arrears

Father first contends that it was unclear what portion of the attorney's fees was based on the litigation regarding child support arrears, and to the extent attorney's fees were

awarded based on that litigation, they were improper because he properly contested the reduction of arrears. This contention is without merit because the record reflects that the court did not award attorney's fees with respect to the challenge to the reduction of child support arrears.

The circuit court was clear regarding the basis of its award of attorney's fees in the amount of $21,420. The court broke its award down into two categories: $16,420 and $5,000. The court explained that the $16,420 of attorney's fees awarded was based on time responding to Father's Motion to Modify Visitation and the three-day trial that resulted. The court explained: "[T]he Court is going to order that [Father] pay to [Mother] $16,420, which is the actual amount of time expended; 66 hours to prepare to do all of the discovery, to do a three-day trial and then return for the Court's opinion."

With respect to the award of $5,000, the court stated that was for 20 hours of the 30 hours listed for work "since the rendering of the Court's oral opinion," which represented the efforts Mother's counsel spent in establishing a Maryland plan after Father changed his mind and elected not to move to Texas. The court recognized that

> a significant amount of the time expended by counsel, both sides, post trial had to do with reorganizing the plan because [Father] was now no longer going to go to Texas, and so, therefore, it was necessary to sort out that aspect as well as to negotiate and to, once that failed to work out on all topics, to deal with the motion to basically revise the [c]ourt's judgment.

The court's explanation of the fees awarded makes clear that they were not related to litigation regarding the reduction of child support arrears. Father's contention to the contrary is without merit.

B.

Improper Considerations

Father next contends that the circuit court's award of attorney's fees was based on an improper consideration, i.e., the outcome of the parties' initial divorce proceedings, as opposed to the litigation then before the court, which involved the motions to modify custody, visitation, and child support. Mother disagrees, arguing that the fees award was "properly based upon the litigation before the trial court, not upon the prior divorce litigation." She asserts that Father takes some of the court's comments "out of context while simultaneously ignoring the trial court's actual ruling regarding attorney's fees." She argues that many of the court's detailed statements that Father references were made when the court was deciding custody, and they had nothing to do with its determination of attorney's fees.

After reviewing the court's statements in their entirety, we agree with Mother. A review of the court's statements relied upon by Father make clear that most of these statements were made in relation to the court's decision to eliminate child support arrears. One statement was made in the context of the court's award of attorney's fees: "I further noted that the history in this case was one in which the defendant's positions have certainly suffered by her inability to afford counsel." This statement was made in the context of Mother's financial need to have assistance with obtaining counsel in this case. It does not support the argument that the court abused its discretion by predicating its award based on prior litigation.

C.

Factors to Assess Award

Father finally contends that the court improperly assessed the relevant factors pursuant to FL § 12-103(b). Specifically, he asserts that the court failed to properly assess "the reasonableness of both parties' counsel fees, as well as both parties' needs and finances."

Mother contends that the court conducted a proper analysis pursuant to FL § 12-103. She asserts that the circuit court "made it clear in both the September 2018 ruling[,] as well as the July 2019 ruling, that [Mother] was substantially justified in defending against [Father's] attempts to relocate [K.C.] to Texas," but the court indicated that Father did not have substantial justification because the move was for Father's own benefit. She argues that the circuit court specifically found that her attorney's fees were reasonable, and Father had not argued to the contrary.

FL §12-103 addresses the award of attorney's fees as follows:

> (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.

As this Court explained in *David A.*, 242 Md. App. at 34–35 (quoting *Henriquez v. Henriquez*, 413 Md. 287, 298 (2010)) (footnote omitted):

> Unlike fee shifting provisions in which a party's eligibility for an award depends on whether it prevailed in the action, § 12-103(a) does not even require consideration of which party prevailed, see Md. Rule 2-702(b) (describing fee shifting provisions in Family Law Article as not requiring that the receiving party "prevailed in the action or on any particular claim or issue in the action"). Instead, the statute provides broad authority for the court to award attorney's fees and costs in a custody, visitation, or child support proceeding "that are just and proper under all the circumstances," subject only to the requirement that the court must first "consider" three things: (1) "the financial status of each party;" (2) "the needs of each party;" and (3) whether each party had a substantial justification for its position in the proceeding.

In assessing the propriety of the court's ruling, we look to comments the court made at the proceedings on September 19, 2018, and July 16, 2019. During the September proceedings, in assessing custody and child support, the court looked to the financial status of the parties. The court found that Father's projected income for 2018 was $79,187.96, and Mother's projected income was $48,449. The court noted that, up until that point, Mother had operated within a "thin financial margin," but at that time she had a "significant

other who presumably" was sharing household expenses. The court also noted that Father's fiancée earned approximately $150,000 a year and offered "significant security for [Father's] household." The court ultimately determined that it was in K.C.'s best interest to stay in Maryland in the primary custody of Mother.

The court then addressed Mother's request for attorney's fees, stating that it would reserve on the issue until it received an itemized list of fees. It noted, however, that it believed that an award of attorney's fees was appropriate because Father's request to move K.C. to Texas was for his own purposes, and given "[Mother's] financial need and [Father's] ability to pay," it was "appropriate for her to have assistance with the cost of her representation." The court discussed its proposed visitation order, but stated that, if Father decided to stay in Maryland, the schedule would change.

On July 16, 2019, after Father elected to remain in Maryland and Mother filed a summary of attorney's fees, the court held a hearing on, among other things, Mother's request for an award of attorney's fees. Mother admitted into evidence the initial submission of fees, as well as a supplemental document indicating fees from the end of trial to the date of the hearing. Counsel for Mother stated her belief that the only issue before the court was the reasonableness of the fees, but if the court was going to entertain testimony about ability to pay, she proffered that Mother had to borrow money from her parents, her grandparents, and her 401(K) plan to pay her attorney's fees. Mother still owed attorney's fees of more than $4,500, which she had no ability to pay, and which represented debt incurred through no fault of her own.

Father then testified regarding his inability to pay Mother's attorney's fees. He stated that he had incurred his own attorney's fees of $12,717. Counsel began to question Father about his mortgage expenses, and Mother's counsel objected to admission of all the exhibits, arguing that he would proffer that the parties had similar living expenses. The court stated that it was aware of Father's wife's income, and commented:

> [H]ow is the [c]ourt to gauge what portion of this is actually being paid by [Father] and his choice of where he chooses to live and how expensive it is in part influenced by his wife's ability to contribute. I mean, we have many factors here.
>
> I think the fairer way of looking at his ability to pay is to look at his income rather than how he chooses to spend it. I don't know if he lives in a house that has a $6,000 a month mortgage. But if he does, is that because he can afford it himself, or is that because his household can afford it? So, these are my questions. How is the [c]ourt to limit this information? How is the [c]ourt to gauge this information?

Ultimately, the court admitted an exhibit showing Father's expenses, including a monthly mortgage in the amount of $1,557.35, a BGE electric bill in the amount of $114.40, an AT&T phone bill in the amount of $122.23, a water and sewer bill in the amount of $194.25, and a Verizon internet bill in the amount of $112.10. Father further testified that he had credit card debt of approximately $36,500, the vast majority of which he alleged was incurred in 2015 and 2016. Given his expenses, he testified that he could not afford to pay Mother's attorney's fees.

Counsel for Mother asked if the court accepted her proffer that Mother had borrowed funds for her attorney's fees and did not have the ability to pay them. The court accepted that proffer after counsel for Father said he had no objection.

The court then addressed the FL § 12-103 factors. It stated that Mother had no choice but to borrow attorney's fees when Father insisted on going to Texas "to begin his new life with his new wife," for his benefit, and that K.C. come with him.

The court then addressed the financial status of the parties. It noted that it had discussed the salaries of the parties in 2018 in connection with child support, stating that Father's salary was in the range of $65,000.[6] With respect to Father's expenses, the court rejected Father's testimony that his credit card debt was due to Mother, and it found that his household expenses would be shared by his wife, who was "well-compensated." Based on Father's income and reasonable expenses, the court found that Father "absolutely has the ability to pay," and "certainly has a superior ability to pay than Mother."

With respect to Mother's financial status, there was no specific evidence submitted regarding her expenses, but court noted that she had not been able to pay for counsel in the past, that Mother had to borrow funds "in order to be able to afford to have an attorney" in this case, and she still had an outstanding balance with her attorney.[7] The court stated that it did not know whether Mother, at the time, had assistance with the household expenses. The court stated that, after looking at "all of the statutory factors," it found it "to be absolutely appropriate and necessary for [Father] to contribute substantially to [Mother's]

[6] The amount discussed in 2018 actually was $79,187.

[7] Counsel for Mother proffered that her household expenses were the same as Father's expenses, but there was no explicit finding by the court accepting that proffer.

attorney's fees." He subsequently stated, as discussed, how he arrived at the award in the amount of $21,420.

Father argues that, although the court considered the reasonableness of Mother's attorney's fees, it "did not conduct a similar analysis for [Father's] counsel fees." Given that there was no challenge to the reasonableness of Father's counsel fees, we cannot find an abuse of discretion by the court in failing to address that issue. Moreover, the implication is that the court assumed that those fees were reasonable, a finding that was beneficial to Father and resulted in no prejudice to him.

We are, however, persuaded by Father's assertion that some of the court's findings with respect to the financial status and needs of the parties were speculative. Neither of the parties presented evidence of their current salary so the court used numbers from the child support hearing ten months earlier. Although that is not necessarily erroneous, the numbers the court used here were not consistent with the findings made in 2018, and the court appeared to rely on Father's "well-compensated" wife as a contributor to the household expenses, but it had no information as to whether she had relocated to Maryland or was currently employed, and the court did not consider whether Mother similarly had a contributor to her expenses, specifically noting that it was unaware of whether she had assistance with household expenses. Given this disparity in the analysis of the parties'

financial status and needs, we conclude that the award of attorney's fees must be vacated and remanded for further proceedings.[8]

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REDUCING CHILD SUPPORT ARREARS REVERSED. JUDGMENT AWARDING ATTORNEY'S FEES VACATED AND REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLEE.

[8] It may be that the court reaches the same conclusion on remand, but the court should give a more explicit analysis of the parties' financial status and needs, using similar factors for both parties.