Circuit Court for Anne Arundel County
Case No. C-02-FM-18-000245

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1284

September Term, 2019

LAUREN BURLEIGH

v.

JAMES BURLEIGH

Graeff,
Nazarian,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 11, 2020

This appeal arises out of a divorce proceeding between Lauren Burleigh ("Mother") and James Burleigh ("Father"). After an eight-day bench trial, the Circuit Court for Anne Arundel County awarded joint legal and physical custody of the four minor children with a week on/week off schedule. The court also ordered Father to pay child support and five months of rehabilitative alimony to Mother and declined both parties' requests for attorney's fees. After trial, but before the court issued its memorandum opinion and entered judgment, Mother moved to reopen the case to take additional evidence on whether the new job Father landed after trial affected custody, alimony, and child support. The court denied Mother's motion.

Mother challenges the circuit court's decisions on custody, child support and alimony and the denial of her request for attorney's fees. She also challenges the court's denial of her Motion to Reopen Evidence and Take Additional Testimony. And she asserts generally that the trial court was biased against her and deprived her of a fair and impartial trial. We affirm the circuit court's decision to award joint legal custody and its decision that Father did not voluntarily impoverish himself. But we agree with Mother that the court abused its discretion when, under these circumstances, it denied her motion to reopen the record to take evidence about Father's new job and its potential impact on physical custody, alimony, and child support, and we vacate the physical custody, child support, alimony, and attorney's fees awards and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Mother and Father were married on July 31, 2005 in a religious ceremony, and they

separated for the final time on December 19, 2017. Four children were born during the course of the marriage: I, born in 2008; D, born in 2009; L, born in 2011; and H, born in 2013. The record is voluminous and reflects high-tension, high-conflict disputes over many issues, especially custody.

During the marriage, Mother served as the primary caretaker of the children while Father worked full-time. Mother homeschooled the children, scheduled and attended their medical appointments, and arranged their extracurricular activities. At the time of trial, I and L were homeschooled by Mother three days a week and they attended a homeschooling co-op the other two. D was homeschooled by Mother for a time, but later attended Arnold Elementary School due to "some attention-deficit related learning and behavioral issues." H was to start homeschooling in the fall of 2019. Father was employed as a financial advisor at Valic and made an average of $250,000 per year, and as much as $350,000, until he was terminated on November 26, 2018. He later took a job as a commercial sales representative at a car dealership selling trucks to businesses, where he expected to make $65,000 a year.

The marriage unraveled over time—Mother testified that Father was absent, dismissive, and controlling, drank to excess, and demeaned her in front of the children, all of which Father disputes—and escalated on December 18, 2017 into a physical altercation. Mother left the marital home that night but returned the next day, where she found a knife and gun on Father's desk. Mother left with the children again the next day and went to Virginia to stay with family. After the holidays, she returned to Annapolis and rented a

home from her relative while Father continued to live in the marital home. They have lived separately ever since.

On January 18, 2018, Mother filed a Complaint for Custody; Child Support; Spousal Support and Other Appropriate Relief. Later, on March 8, 2018, Mother filed an Amended/Supplemental Complaint for Limited/Absolute Divorce. A *pendente lite* hearing was held on June 8, 2018 to address custody, child support, and alimony, and a *pendente lite* order was entered on June 20, 2018. The order awarded the parties joint legal custody of the children and shared physical custody: Mother had the children during the school week and first weekend of every month, Father had them the other weekends during the school year, and they shared a week on/week off schedule during the summer. The order also awarded Mother $3,450 per month in child support and $2,500 per month in alimony.

On March 13, 2019, Mother filed an Amended and Supplemental Complaint for Absolute Divorce and Other Related Relief. Father responded on April 2, 2018 with a Counterclaim for Limited Divorce. Mother asked the court to award her sole legal and primary physical custody of the children on a schedule similar to the *pendente lite* schedule, to find that Father voluntarily impoverished himself and to impute to him an income of $250,000 a year, to award her indefinite alimony or rehabilitative alimony for ten years, and to award her child support and attorney's fees. Father asked the court for joint physical custody with a week-on/week-off schedule year-round; sole legal custody or joint legal custody with tie-breaking authority; to calculate child support based on his income of $65,000; to award Mother rehabilitative alimony for no more than five months; and to

award him attorney's fees.

An eight-day bench trial was held between April 15 and May 1, 2019. At trial, Mother sought sole legal or joint legal custody with tie-breaking authority and primary physical custody. Father sought sole legal custody or joint legal custody with tie-breaking authority, and joint physical custody with a week on/week off schedule. After trial but before the memorandum opinion and order issued, Mother filed a Motion to Reopen Evidence and Take Additional Testimony on June 25, 2019. Mother alleged that within weeks of the trial ending, Father accepted a new job as a financial advisor. The court denied Mother's motion on July 2, 2019.

About a month-and-a-half later, on August 20, 2019, the court issued its memorandum opinion and order. The court granted the parties an absolute divorce and divided the marital property (property division is not challenged on appeal). The court ordered joint legal and physical custody of the children with a week on/week off schedule throughout the year. The court found that although the parties "had great difficulty communicating nicely with each other at times during the breakup of their marriage," they had been able during the marriage to co-parent their children and communicate with each other. The court also found that both parents were fit, that both parents had a close relationship with the children, that neither parent had work demands that would render them unable to spend time with their children, and that both parents were sincere in their requests for custody.

The court applied the child support guidelines and ordered Father to pay a total of

$387 per month in child support. The court imputed income of $33,500 to Mother (based on a stipulation) and used Father's projected income of $65,000. The court found that Father did not fail purposely at finding work and didn't shirk his duty to provide for his children. Father continued to pay the mortgage on the marital home. And the court ordered Father to pay 66% of any expenses related to homeschooling and 66% of any extraordinary medical expenses incurred by the children.

With regard to alimony, the court ordered Father to pay $1,000 per month in rehabilitative alimony for five months. The court found there was no reason Mother could not reasonably be expected to become self-supporting, and credited Mother's stipulation that she could earn at least $33,500 annually within five months of beginning a job search. The court also found that although they had enjoyed a "good" standard of living for most of the marriage, the standard declined when Father lost his job and the parties continued to live above their means. The court reasoned that because Mother has a bachelor's degree and acknowledged an earning capacity of $33,500 per year, and because Father only earned $65,000 per year, an award of indefinite alimony was unwarranted.

Finally, the court denied both parties' requests for attorney's fees. Between them, the parties incurred attorney's fees totaling approximately $500,000. Because of their strained financial situations, grandparents had funded the litigation, but the court found that "[i]t was not reasonable or necessary for the parties to become indebted to the extent they have for the purpose of fighting over these limited issues, all of which could have been resolved long before the litigation costs were incurred."

Mother noted this timely appeal. We supply additional facts below as necessary.

II. DISCUSSION

On appeal, Mother raises five issues that we condense and rephrase.[1] *First*, Mother alleges that throughout the trial, the trial judge was biased against her and that as a result she was deprived of her right to a fair and impartial trial. *Second*, Mother asserts that the circuit court erred in awarding joint legal and physical custody, in finding Father had not voluntarily impoverished himself, in awarding only five months of rehabilitative alimony, and in denying attorney's fees. *Third*, Mother argues that the circuit court erred when it declined to reopen the case to consider evidence that Father obtained a new job between

[1] Mother phrased her Questions Presented in her brief as follows:

> 1. Was [Mother] deprived of her right to a fair and impartial trial because of the Trial Court's apparent predetermined view of custody cases, his attitude toward her and how he repeatedly inserted himself in the trial to [Father's] benefit?
> 2. Was the Trial Court's decision that the parties shall have shall have [*sic*] joint legal custody of the minor children an abuse of discretion and based, at least in part, upon clearly erroneous and improperly allowed evidence?
> 3. Was the Trial Court's decision that the parties shall have shared physical custody of the minor children an abuse of discretion and based, at least in part, upon clearly erroneous and improperly allowed evidence?
> 4. Did the Trial Court err when it found [Father] had not voluntarily impoverished himself and when it failed to allow additional testimony when he accepted a new job?
> 5. Did the Trial Court err in its findings on alimony and attorneys' fees because it erred on the issue of voluntary impoverishment and to reopen the case when [Father] obtained a new job?

the end of trial and entry of the operative order.

We disagree that Mother was deprived of a fair and impartial trial, and we affirm the court's order of joint legal custody and its finding that Father did not voluntarily impoverish himself. We hold, however, that the court abused its discretion when it declined to reopen the record and take evidence regarding Father's post-trial, pre-order new employment. And because Father's new employment bore potentially on physical custody, child support, alimony, and attorney's fees, we vacate the trial court's rulings on those issues and remand for further proceedings consistent with this opinion.

In an action tried without a jury, we "review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses." Md. Rule 8-131(c). In reviewing divorce proceedings, we "accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity . . . ." *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (*quoting Tracey v. Tracey*, 328 Md. 380, 385 (1992)).

A. Mother Was Not Deprived Of A Fair And Impartial Trial.

Mother argues that throughout the trial, the trial judge "repeatedly inserted himself in the trial, engaged in lengthy periods of questioning of [Mother] and her witnesses, disregarded proper testimony by a [c]ourt-appointed expert witness, and repeatedly allowed improper testimony that favored [Father]." She contends that the court, "at times, disallowed some of [Father's] evidence, but [its] treatment of [Mother] and her witnesses

demonstrated the [c]ourt's bias." She requests that the case be assigned to another judge on remand.

1. Mother preserved this issue for appeal.

As a threshold matter, Father contends that this argument wasn't preserved, that Mother "filed neither a written motion requesting recusal nor an affidavit on support." We normally "will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131. "To initiate recusal procedures and preserve the recusal issue for appeal, 'a party must file a timely motion' with the trial judge that the party seeks to recuse." *Conwell Law LLC v. Tung*, 221 Md. App. 481, 516 (2015) (*quoting Miller v. Fitzpatrick*, 377 Md. 335, 358 (2003)). Father reads this proposition as requiring "a written motion requesting recusal []or an affidavit in support," but that's not quite right. Under Maryland Rule 2-311, a motion "shall be made in writing" "unless made during a hearing or trial." And a claim that the trial court departed from its role as a neutral arbiter is also preserved if counsel objects generally to the court's questioning of witnesses. *See Smith v. State*, 182 Md. App. 444, 479–80 (2008).

Mother preserved this issue for our review in two ways. The *first* is when her counsel objected to a line of questioning by the trial judge, then argued to the trial judge that he was "neutering" Mother's case:

> [COUNSEL FOR MOTHER]: Your Honor, am I permitted to object to the Judge's questions?
>
> [THE COURT]: You are.
>
> [COUNSEL FOR MOTHER]: Okay. Well, I know I'll be overruled b[ut] I'm going to object anyway.

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> [THE COURT TO COUNSEL FOR MOTHER]: . . . you are always free to object.
>
> [COUNSEL FOR MOTHER]: I understand. Your Honor, as blunt as I can be you're neutering my case.
>
> [THE COURT]: I'm what?
>
> [COUNSEL FOR MOTHER]: Neutering it. You're getting rid of it. You told me that I could not ask any questions about the alcohol and the drugs because there was no testimony coming in as to—
>
> [THE COURT]: How am I—you said I'm neutering your case?
>
> [COUNSEL FOR MOTHER]: That's my comment, yes.
>
> [THE COURT]: What do you mean by neutering your case? Tell me how I'm neutering your case.

Mother's counsel then explained why he believed the trial judge was "neutering" his case:

> [COUNSEL FOR MOTHER]: With Dr. Santoro I was asking questions about co-parenting and parenting. And you said—you would not allow me to ask the questions because you said she is not here, she did not prepare anything, she did not do a custody evaluation. But then you asked—
>
> [THE COURT]: Well, did you think I was neutering your case then?
>
> [COUNSEL FOR MOTHER]: Your Honor, [] I'm just telling you there's some things going on—I objected, if you remember. I came to the bench and I said, Judge, you said I couldn't ask it but you're asking the questions.
>
> [THE COURT]: Well—
>
> [COUNSEL FOR MOTHER]: Now, on this witness here, I'm turning around and I was asking questions about alcohol and about drugs. And you said, is there anybody that's going to come into court and testify that there is an alcohol or drug evaluation that makes him not fit. And we said, no, there isn't. And then you said I don't want to hear any more. But then the first thing you do is you ask him questions about do you notice any alcohol, do you notice any drugs, after you've already said (indiscernible) up here.

The *second* is when Mother's counsel asked directly that the trial judge recuse himself:

> [COUNSEL FOR MOTHER]: Your Honor, we had a conversation with our client at lunch time, and then we had a conservation with our client after they called the doctor to the stand and we called a quick couple minute break. I've never done this in the middle of a trial before.
>
> But Your Honor, for some reason we believe, my client believes that she can't get a fair trial in front of you, she thinks that you've made up your mind. She believes that with questions that you asked of her father, and I believe the questions that you asked her father—
>
> THE COURT: Let's stop [].
>
> [COUNSEL FOR MOTHER]: Yes.
>
> THE COURT: Do you have a request?
>
> [COUNSEL FOR MOTHER]: To recuse yourself.
>
> THE COURT: Okay. I'm not recusing myself . . . .

Mother's counsel then explained his reasons:

> [COUNSEL FOR MOTHER]: Okay, Your Honor. Let's go back to my client this morning. In the cross examination that you gave her this morning, not the questioning, but the cross examination.
>
> THE COURT: No, the examination, not cross examination.
>
> [COUNSEL FOR MOTHER]: [] okay, whatever you want to call it, Your Honor. But you had her drilled hard, you asked her hard questions. You ask her as if you've made up your mind as to what's going on. If we got the transcript of that and played it back and you heard it I guarantee you, Judge, you would look at that and say what is this judge doing, he's made up his mind, number one.
>
> Number two, when you asked her father the questions the other day on the co-parenting, co-parenting, co-parenting, that was it.
>
> Number three, with [Dr.] Santoro, when I tried to ask her parent questions on co-parenting you said you have no right to do it, you wouldn't let me. And yet you asked her the questions on

> co-parenting that I objected to as you went through.
>
> Number four, this doctor is not listed as an expert, this doctor was up there talking about a diagnosis. This doctor was up there talking about a diagnosis. This doctor's testimony is 100% based upon hearsay. Everything this doctor testified to was nothing but a hearsay situation. He had no right to testify [].

The trial judge then responded that he "ha[d] no bias for or against anyone," and denied Mother's request for recusal. Mother preserved this argument on appeal, and we will address it.

2. The trial judge was not biased against Mother.

Mother is correct that a fair and impartial trial is "no less deserving" in a civil setting than in a criminal setting. *Dinkins v. Grimes*, 201 Md. App. 344, 361 (2011). "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)). Due process guarantees an "absence of actual bias" on the part of a judge. *Murchison*, 349 U.S. at 136. And the Supreme Court explained further in *Litkey v. United States*:

> [O]pinions formed by [a] judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

510 U.S. 540, 555 (1994).

That said, there is a strong presumption "that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Jefferson-El v. State*, 330 Md. 99, 107 (1993). To overcome this presumption, a "party requesting recusal must prove that the trial judge has 'a personal bias or prejudice' concerning him or 'personal knowledge of disputed evidentiary facts concerning the proceedings.'" *Id.* (*quoting Boyd v. State*, 321 Md. 69, 80 (1990)). "Where the bias of a trial judge against a party is alleged as the basis for recusal, the bias must have derived from a 'personal,' rather than judicial source." *Goldberger v. Goldberger*, 96 Md. App. 313, 318 (1993), *cert. denied*, 332 Md. 453 (1993) (*quoting Boyd*, 321 Md. at 69). "Where knowledge is acquired in a judicial setting, or an opinion expressing bias is formed on the basis of information acquired from evidence presented in the course of a judicial proceeding before that judge, neither that knowledge nor that opinion qualifies as personal." *Id.* at 318 (internal quotation marks omitted).

Mother's brief points to no source of personal bias that would warrant the trial judge's recusal, and after a careful review of the record, we can find none. Although the trial judge did play a more active role in questioning witnesses during this bench trial, the court's intervention was not as lopsided as Mother contends, nor quite as slanted in Father's favor. To cite one specific instance, Mother asserted her Fifth Amendment right against self-incrimination when she was asked questions on alleged telephone recordings she made while she was in Virginia and Maryland. The trial judge intervened on Mother's behalf and said he did not want to put Mother in the position to incriminate herself:

> [COUNSEL FOR MOTHER]: The Court advised us at the bench regarding the law, and wiretap laws. That if someone hears a wiretap or uses it, or does something with it that they can be sanctioned, possibly by the Court. And it's a possible criminal penalty. So I'm advising you that anything regarding the wiretap, if you heard it or you disseminated it, or you played it for anybody, you have a right to take the Fifth Amendment, okay?
>
> [MOTHER]: Great.
>
> [COUNSEL FOR MOTHER]: Okay, based on all that, do you prefer to take the Fifth Amendment rather than answer these questions?
>
> [MOTHER]: Yes, please.
>
> [COUNSEL FOR FATHER]: Your Honor, I'm objecting. She's not taking the Fifth Amendment I think that's inaccurate what you stated up [] I think it is inappropriate.
>
> THE COURT: All right. I'm going to sustain the objection. And at this point, **I don't want any questions because I will not allow counsel to ask a question to put somebody [] in a position of even having to take the Fifth, because your question and use of that recording may very well be an illegal act. And it's not going to happen in my courtroom.** So next question, move on.

(emphasis added). In that instance, the court's intervention protected Mother. And although Mother is right that the trial judge engaged in lengthy questioning of her and some of her witnesses, she fails in her brief to mention that the trial judge also questioned other witnesses at length, including Father, whom the court questioned for twelve transcript pages.[2]

[2] As another example, the trial judge also asked the following question of Father's counsel at closing argument, hardly a softball:

> THE COURT: So this side says he hasn't been involved and that mother has done it all. Why is it better for [the children], even as unfortunate as it might be for [Father], why isn't it

This is a high-conflict divorce that was tried by able, and ably aggressive, counsel. The court was required to rule frequently on objections of all sorts, called and consented to frequent bench conferences, and had at times to reign in and re-focus both sides' presentations. The trial judge reacted throughout to the evidence and the tactics employed by both sides, and although we have not attempted to calculate a precise score of the court's reactions, that score wouldn't have had to come out even in any event for the trial to be fair to both sides.

Any of us sitting in the trial judge's position might have handled individual questions or the entire case differently, and may well have reached different results. And a judge who is more active in questioning witnesses or intervening during a trial risks conveying a sense that their intervention is motivated to achieve or support a result. *Cf. K.B. v. D.B.*, __ Md. App. __, No. 2860, Sept. Term 2019 (filed Apr. 29, 2020). But Mother's argument here, framed in the broadest terms, asks us to find in the conduct of this trial a bias that led unfairly to a decision to grant *joint* legal and physical custody. In a family where, as we discuss below, both parents are indisputably fit and both testified under oath to their desire and commitment to parent, that is a tall order. To rule in Mother's favor, we would need to find that the trial judge harbored a personal bias that caused him, on a record that otherwise would compel an award of sole legal or physical custody, to order joint custody instead. This record and this trial do not reveal a bias of that magnitude.

better they continue to stay with Mom and thrive?

B. The Decisions Regarding Custody, Child Support, Alimony, and Attorney's Fees Were Not Unreasonable On The Trial Record.

Beyond her broader challenge to the fairness of the trial, Mother raises several challenges to the court's individual decisions. She argues that in awarding joint legal custody, the circuit court "repeatedly allowed improper evidence[,] made clearly erroneous findings . . . . [and] did not properly apply the evidence to the factors." She makes the same argument with regard to the court's decision to award joint physical custody, but adds that the circuit court "based its decision on [its] belief that it was not fair to [Father] that he only had six overnights a month during the school year, even though the [c]ourt referenced both parties," and that the court "did not even consider, in its desire to ensure that the children have more time with their father, anything between 'six overnights' and week on/week off." She contends that as to voluntary impoverishment and child support, the circuit court erred because it "failed to address [Father's] lack of efforts to become re-employed and the curious timing of his accepting a much lower paying job," and she makes similar arguments with regard to alimony and attorney's fees.

1. The circuit court did not abuse its discretion in awarding joint legal and physical custody.

Although Mother doesn't challenge Father's fitness as a parent, she contends that the court erred in deciding not to award her sole legal and physical custody. This analysis starts with the Fourteenth Amendment of the United States Constitution, which protects a parent's fundamental right to raise his or her children. *In re Yve S.*, 373 Md. 551, 565 (2003); *see also Stanley v. Illinois*, 405 U.S. 645 (1972) (right to raise children). The right

to rear a child is "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and encompassed within a parent's "basic civil rights." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Maryland courts have agreed consistently and held repeatedly that a person's liberty interest in raising a child is fundamental and cannot be taken away unless clearly justified. *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 112 (1994); *In re Adoption/Guardianship Nos. CAA92-10852 & CAA92-10853*, 103 Md. App. 1, 12 (1994). What's at stake for both parents is their "interest . . . in the companionship, care, custody, and management of [their] children," which is "[f]ar more precious . . . than property rights," and "essential to the orderly pursuit of happiness by free men . . . ." *In re Guardianship No. 10941*, 335 Md. at 113 (*quoting Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 38 (1981) (Blackmun J., dissenting)).

Custody disputes are among "the most difficult and demanding tasks of a trial judge." *Taylor v. Taylor*, 306 Md. 290, 311 (1986). They require "thorough consideration of multiple and varied circumstances, full knowledge of the available options, including the positive and negative aspects of various custodial arrangements, and a careful recitation of the facts and conclusions that support the solution ultimately selected." *Id.* In child custody disputes, "the power of the court is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interest of the child." *Id.* at 301–02.

When reviewing a child custody determination, we employ three interrelated standards of review:

> [First], [w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. 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 factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Reichert v. Hornbeck, 210 Md. App. 282, 304 (2013) (*quoting In re Yve S.*, 373 Md. at 586). We give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *In re Yve S.*, 373 Md. at 584. Because the trial judge is in the best position to see the witnesses and parties, weigh the evidence, and determine an outcome meeting the best interests of each child, "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion." *Id.* at 585–86. An abuse of discretion occurs when "no reasonable person would take the view adopted by the trial court" or when the court acts "without reference to any guiding rules or principles." *Id.* at 583 (cleaned up).

When the court makes a custody determination, "[t]he best interest of the child standard is the overarching consideration[.]" *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013). To determine the best interest of the child, a court must "evaluate each case on an individual basis." *Reichert*, 210 Md. App. at 304. The best interest standard is fluid, varies with each individual case, and obliges the court to "evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better

off in the future." *Karanikas v. Cartwright*, 209 Md. App. 571, 589–90 (2013) (*quoting Montgomery Cty. Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 419 (1977)). The best interest standard is not "simply . . . that one environment or set of circumstances is superior to another." *In re Yve S.*, 373 Md. at 565.

Sanders and *Taylor* set forth the factors that guide a court's analysis of custody disputes. *Sanders* identified ten non-exclusive factors: (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) the age, health, and sex of the child; (8) residences of the parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender. *Sanders*, 38 Md. App. at 420. *Taylor* identified fourteen factors that are particularly relevant to awarding joint custody, some of which overlap with those in *Sanders*: (1) capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of the child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11) financial status of the parents; (12) impact on State or Federal assistance; (13) benefit to parents; and (14) other factors. *Taylor*, 306 Md. at 304–11.

Based on our review of the record, the court properly applied the evidence to the *Sanders* and *Taylor* factors to determine the best interests of the children. The court discussed the children's close relationship to each of the parties and the sincerity of both parties' requests for custody, legal and physical. The court found that both parents were fit (a point nobody seriously disputes), both parents had the ability to work with each other to decide the best interests of their children, and that the best interests of the children would be served by having the parties be joint legal custodians and for the children to have equal time with each parent.

Mother cites several reasons why she believes the court erred in awarding joint legal and physical custody. She argues that there was no evidence to support a finding that she and Father could cooperate and communicate. She reiterates her contention that the trial judge was biased against her, and that the court, in its memorandum opinion, "cited two instances where it felt she was controlling e-mails and when she did not immediately inform [Father] that the children were reporting inappropriate activity as his house" and "ignored that during this time, [Father] kept [D] for four days in January 2018 without discussing with [Mother]." She contends that the court abused its discretion by "disregard[ing] the testimony of Dr. Gina Santoro, the Court appointed psychologist, [by] stating in a footnote that her testimony did not cause the Court to find that [Father] is an unfit parent." And she argues that the court abused its discretion when it allowed Father's therapist "to testify regarding what [Father] had told him and allowed him to give opinions."

We disagree. A court does not err by awarding joint custody simply because the parents struggle to communicate effectively with one another. *Santo v. Santo*, 448 Md. 620, 630 (2016) ("[W]e decline to hold as a matter of law that a court errs if it awards joint custody to parents who fail to communicate effectively with one another."). The trial judge, sitting as fact finder, is free to accept or reject the testimonies of the witnesses and assess their credibility. *See* Md. Rule 8-131; *In re Yve S.*, 373 Md. at 584. The trial court's memorandum opinion walked through the relevant factors and offered thorough explanations of how each factor contributed to its decision to award joint legal and physical custody. Unlike appellate courts reviewing a cold record, the trial judge is in the best position to see, hear, and evaluate the witnesses and evidence first-hand:

> [W]here custody might well have been awarded to either parent, [it] aptly demonstrates the advisability of leaving to the [circuit court] the delicate weighing process necessary in child custody cases; to disturb the award here would require that we substitute our judgment for that of the [circuit court], and an appellate court sits in a much less advantageous position to assure that the child's welfare is best promoted.

McCarty v. McCarty, 147 Md. App. 268, 273 (2002) (*quoting Davis v. Davis*, 280 Md. 119, 131–32 (1977) (emphasis omitted)). The circuit court's conclusions were reasonable, and we perceive no abuse of discretion in the court's decision to award the joint legal and physical custody.

2. The circuit court did not abuse its discretion when it found Father had not voluntarily impoverished himself.

Mother argues that Father voluntarily impoverished himself when he was "terminated in November 2018, during the middle of litigation, and only applied for a

minimal number of jobs thereafter." At trial, and here as well, Mother argues that Father's "failure to work to save his job, the timing of his termination and the timing of the job at Apple Ford constituted voluntary impoverishment." She concedes that although the circuit court could find the evidence sufficient to support that Father's termination was a result "from the stress in his life," she argues that the Court "failed to address his lack of efforts to become re-employed and the curious timing of his accepting a much lower paying job."

It's "well established that parents have an obligation to support their children." *Gordon v. Gordon*, 174 Md. App. 583, 644 (2007). Parents voluntarily impoverish themselves "whenever [they have] made the free and conscious choice, not compelled by factors beyond [their] control, to render [themselves] without adequate resources." *Digges v. Digges*, 126 Md. App. 361, 381 (1999) (*quoting Goldberger*, 96 Md. App. at 327), *cert. denied*, 356 Md. 17 (1999). Courts consider a variety of factors that look to the parent's personal and professional circumstances and history:

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

Sieglein v. Schmidt, 224 Md. App. 222, 248 (2015); *see also Lorincz v. Lorincz*, 183 Md. App. 312, 331 (2008); *Gordon v. Gordon*, 174 Md. App. 583, 645 (2007).

"A trial court's factual findings on the issue of voluntary impoverishment of a parent, for child support purposes, are reviewed under a clearly erroneous standard, and the court's ultimate rulings are reviewed under an abuse of discretion standard." *Sieglein*, 224 Md. App. at 249 (*citing Long v. Long*, 141 Md. App. 341, 351–52 (2001)). As long as "the factual findings are not clearly erroneous, 'the amount calculated is 'realistic,' and the figure is not so unreasonably high or low as to amount to an abuse of discretion, the court's ruling may not be disturbed.'" *Durkee v. Durkee*, 144 Md. App. 161, 187 (2002) (*quoting Reuter v. Reuter*, 102 Md. App. 212, 223 (1994) (internal citation omitted)).

We see no abuse of the circuit court's discretion in declining to find that Father voluntarily impoverished himself. During trial, Father testified that he searched for employment after he was terminated from his position as a financial advisor at Valic:

> [COUNSEL FOR FATHER]: Now, how soon after you were terminated, if ever, did you begin your employment search.
>
> [FATHER]: The following day.
>
> [COUNSEL FOR FATHER]: And you testified that you applied for several jobs in the financial planning field; is that correct?
>
> [FATHER]: I did.
>
> [COUNSEL FOR FATHER]: And why do you believe you have been unsuccessful to this point getting a job in that field?
>
> [FATHER]: I think that even though I had nine years of experience and all the licenses, because I don't own the book of business, I'm not bringing anything with me other tha[n] intangible experience, [] so, [] I'm essentially coming on as a junior advisor somewhere.

Father also offered documentation demonstrating he had applied for various jobs in the financial services industry. The record contained evidence sufficient to ground a finding

that Father did not make a free and conscious choice to find a job only making $65,000 when he had been making an average salary of $250,000, or that he purposely avoided seeking or accepting more lucrative work. Based on Father's testimony, it was reasonable for the court to conclude that Father's failure to find a job as a financial advisor making the same or similar amount of income while he was at Valic was compelled by factors beyond his control.

3. The circuit court's findings regarding the parties' earning capacities was not clearly erroneous.

"We review the court's findings as to a party's earning capacity under the clearly erroneous standard." *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016). Under that standard, "[i]f there is any competent evidence to support the factual findings [of the trial court], those findings cannot be held to be clearly erroneous." *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (citation and quotation marks omitted). We "give due regard to the opportunity of the trial court to judge the credibility of witnesses." Md. Rule 8-131.

"In Maryland, the principal function of alimony is 'rehabilitation of the economically dependent spouse.'" *St. Cyr*, 228 Md. App. at 184 (*quoting Whittington v. Whittington*, 172 Md. App. 317, 336–36 (2007)). Rehabilitative alimony is favorable "where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently." *Solomon*, 338 Md. at 195 (*quoting Tracey v. Tracey*, 328 Md. 380, 391 (1992)). Put differently, the purpose of alimony "is to provide an opportunity for the recipient spouse to become self-supporting." *Tracey*, 328 Md. at 391 (citations and quotation marks omitted). Maryland Code (1984,

2019 Repl. Vol.), § 11-106(b) of the Family Law Article ("FL") sets forth the monetary and equitable factors a court must consider when determining the amount and period of an alimony award.

In her brief, Mother offers no argument as to why she should receive a greater amount in alimony other than the circuit court erred in finding that Father did not voluntarily impoverish himself. And in its memorandum opinion, the circuit court considered all the factors set forth in FL § 11-106(b) and thoroughly discussed each. The court noted that Mother stipulated that she was capable of making $35,000 annually within five months of beginning her job search. The court also noted that Mother was currently self-supporting and obtained a bachelor's degree from Vanderbilt University. It found no reason that mother would be unable to be self-supporting due to age, illness, infirmity, or disability, nor that an indefinite alimony award would result in an unconscionable disparity in the parties' living standards after divorce. *See, e.g.*, FL § 11-106(c). On the record before it, the circuit court did not err in awarding Mother five months of rehabilitative alimony in the amount of $1,000 per month. *Contra K.B. v. D.B.*, __ Md. App. __, No. 2860, Sept. Term 2019 (filed Apr. 29, 2020).

4. The circuit court did not abuse its discretion when it denied Mother's request for attorney's fees.

The decision to award attorney's fees "rest[s] solely in the discretion of the trial judge. The proper exercise of such discretion is determined by evaluating the judge's application of the statutory criteria . . . as well as the consideration of the facts of the particular case." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citations omitted). However,

"[c]onsideration of the statutory criteria [set forth in FL § 12-103(b)] is mandatory in making the award and failure to do so constitutes legal error." *Id.*

Under FL § 12-103(a)(1), a "court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person" "applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties." When deciding whether to award attorney's fees, the court is required to consider "the financial status of each party;" "the needs of each party; and" "whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b). As long as the parties were substantially justified in bringing, maintaining, or defending the proceeding, the trial court is vested with significant discretion in applying the factors set out in FL § 12-103(b) when deciding "whether to award counsel fees and, if so, in what amount." *Malin v. Mininberg*, 153 Md. App. 358, 435–36 (2003).

Here, as above, Mother offers no argument as to why she should receive attorney's fees beyond arguing that the circuit court erred in finding Father did not voluntarily impoverish himself. Either way, the circuit court offered a thorough explanation of its decision not to award attorney's fees to either party, and its analysis and incorporated the FL § 12-103(b) factors:

> [Father] earns approximately twice as much as [Mother's] imputed income. Additionally, based on his work and experience, he has the potential to make far more than [Mother] does and the Court hopes he is able to get back into his field of expertise, as he testified he intends. However, [Mother] will be getting a monetary award and a small amount of alimony for a

> limited period of time. The Court does not find any of the relevant factors to be a compelling reason to award attorney's fees to either party.
>
> Although both parties may have had a substantial justification for bringing, maintaining or defending these proceedings to begin with, in view of the parties' financial circumstances, it appears to the Court that neither party did a basic cost-benefit analysis before deciding to head full speed ahead down this extremely expensive adversarial path. This case was not complicated. The amount of money available to distribute or protect from distribution was not vast. It was not reasonable or necessary for the parties to become indebted to the extent they have for the purpose of fighting over these limited issues, all of which could have been resolved long before the litigation costs were incurred. [Father] argues that [Mother] took many unreasonable positions during the course of the litigation that drove up the costs for everyone. Specifically, [Father] highlights [Mother's] insistence that [Father] was a violent alcoholic and drug-abusing sufferer of psychological disorders. The Court agrees that these issues were exaggerated for the purpose of creating a litigation narrative. However, [Mother] was not alone in creating or magnifying false narratives. [Father's] claim that the money he dissipated was originally a loan and not a gift was also unpersuasive in view of the gift letter and the [Father's] actions thereafter. No one involved in this has clean hands. . . . The Court has considered all of the relevant factors for making an award of attorneys' fees in this case and has decided such an award is not warranted.

We see no abuse of discretion on this record in the circuit court's decision not to award Mother attorney's fees.

C. The Circuit Court Abused Its Discretion When It Refused To Reopen Testimony On Father's New Employment Before Issuing Its Order.

Everything we have said above about the circuit court's decisions in this case flows from our analysis of the record as developed at the close of the trial. In this case, though, that's not when the story ends. Shortly after the end of trial, Father got a new job—

importantly, a new job in the financial services industry, where he previously had earned an income five times the $65,000 per year that served as the basis for the court's alimony and child support decision. In light of this development—and there is no suggestion that this could have been raised during trial—Mother filed a Motion to Reopen Evidence and Take Additional Testimony and proffered the information she had at that point about Father's new position and circumstances, which also raised questions about physical custody:

> 5. . . . within weeks of the trial concluding, [Father] informed [Mother] that he had accepted a job with Prudential as a Financial Advisor. His listed work address is **Hunt Valley, Maryland.** Attached hereto and incorporated herein as Exhibit A is a copy of [Father's] bio page from the Prudential website as of June 20, 2009.
>
> 6. [Mother's] counsel has attempted to address this issue with [Father's] counsel and requested information regarding [Father's] current pay and benefits documentation by letter dated June 13, 2019, a copy of which is attached hereto and incorporated as Exhibit B.
>
> 7. [Father's] counsel responded to the inquiry but gave no substantive reply.
>
> 8. [Father's] change of employment not only impacts the issues of child support, alimony and attorney's fees, but, more importantly, bears on this Court's determination regarding physical custody and access. **If, in fact, [Father] is working in Hunt Valley, that would be directly contradictory to his testimony that he is able to work from home and could provide care for the parties' minor children on an equal access basis.**

Mother asserts that the circuit court abused its discretion when it declined to reopen the case to take testimony and evidence on Father's new job he obtained after trial and before the order was issued. She argues that the consideration of Father's new job is critical to

child support, custody, alimony, and attorney's fees. We agree.

The trial court's discretion to receive or reject additional evidence once trial is over "is very broad." *Della Ratta v. Dyas*, 183 Md. App. 344, 374 (2008). When considering whether to reopen a case and take additional testimony, the court takes into account the following factors: "whether the proffered evidence is 'essential' to a party's case or 'supplemental,' whether a party will be improperly prejudiced, and whether the omission was inadvertent." *Id.* (citations omitted). We have held that it is an abuse of discretion not to reopen a trial when the evidence a party is seeking to introduce is material to the party's case. *Valerino v. Little*, 62 Md. App. 588, 601 (1985); *accord Cooper v. Sacco*, 357 Md. 622, 639–40 (2000). And in family law cases, facts that arise before the operative order are precluded from being re-litigated upon modification. *Slacum v. Slacum*, 158 Md. 107, 110–11 (1930) ("The provisions of the chancellor's decree with respect to the custody and maintenance of the infant are . . . res judicata with respect to these matters and conclusive upon both husband and wife so far as concerned their rights and obligations at the time of the passage of the decree.").

Here, the evidence Mother was seeking to introduce was material to the case, and the trial judge should have taken that into account before locking in physical custody, alimony, child support, and attorney's fees. Father had long been employed in the financial services industry, where he was making an average of $250,000 a year. Before trial, he lost his job and switched to a trucking sales position, where his income plummeted to $65,000, and the calculation of child support and the court's analysis of alimony all were grounded

in that much lower, indeed outlier, figure. Father's return to the financial services industry created at potential, as yet unexplored, to return to the compensation level of his previous job, and to alter dramatically the outcome of the child support and alimony calculations. Moreover, Father's new place of employment is in Hunt Valley, a completely different geographic location than that of the truck dealership where he was employed previously. It may be, as Father's opposition to the motion to reopen suggested, that he could and would work remotely. But that too would need to be explored in order to ensure that his new circumstances didn't work a substantial change from the circumstances on which the court made its child support, alimony, and custody decisions.

We do not mean to suggest that all post-trial changes in employment would require courts to re-open the evidence in divorce cases and custody disputes. For example, a switch from one truck dealership to another, where the geographical location and salary didn't change much, might not warrant reopening the evidence. But here, Father's new employment is significantly different from his old employment, and there's a potential that Father's new employment is more similar to his old employment as a financial advisor at Valic.

And the timing matters tremendously. This judgment is meant to establish the custody and financial terms of this divorcing couple and family going forward. Yes, it's possible for those terms to be modified in the future as appropriate. But in order to modify this judgment, Mother would be required first to establish a material change in circumstances, measured from the judgment before us now. And the timing of this trial and

job change create two problems in that regard. *First*, the terms of the judgment—especially the child support award, the scope and amount of alimony, and the terms of their joint physical custody—are grounded entirely in the trial record, but Father's new job circumstances pre-date the entry of the judgment itself. We can't know whether Father's new job circumstances would cause the court to alter any of these decisions, but we can't know that they wouldn't. If they did change the analysis, the court's decisions would be out of sync with the parties' reality before they even took effect. *Second*, although this judgment doesn't reflect Father's new job substantively, it was entered after Father's new job began. When courts consider motions to modify the terms of divorce judgments, though, they generally refuse to look at any circumstances pre-dating the judgment they're seeking to modify. *McCready v. McCready*, 323 Md. 476, 481–82 (1991) ("An order determining custody must be afforded some finality, even though it may subsequently be modified when changes so warrant to protect the best interest of the child.").

The effect of this particular timing squeeze is that Father's new job is baked into this judgment even though the court expressly declined to consider it, and that artificially steepens Mother's future burden of proof were she to seek later to modify it. Again, this timing problem wouldn't compel the court to reopen the record in every case. But in this case, critical decisions are grounded in job circumstances that were an outlier for Father and have already been superseded. And, importantly, Father's new job returned him to the industry where he previously made as much as five times his truck sales salary.

Because the terms and circumstances of Father's new job bear potentially on child

support, alimony, and the terms of physical custody, we vacate those elements of the judgment. And because a decision to vacate on any of the financial components of a divorce judgment requires us to vacate all of them, *St. Cyr*, 228 Md. App. at 198, we vacate the court's decision on attorney's fees as well, and we remand for further proceedings consistent with this opinion. On remand, the circuit court should proceed as though it had granted Mother's motion to reopen the record, and should take testimony and evidence relating to Father's new employment and decide whether and to what extent the changes affect physical custody, child support, and alimony. We leave it to the court to decide whether, and if so to what extent, the court wishes to hear any other evidence, testimony, or arguments relating to those issues.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.