Circuit Court for Montgomery County
Case No. 79745FL

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1486

September Term, 2017

WILLIAM F. FELLER, III

v.

ROBIN J. FELLER

Graeff,
Leahy,
Friedman.

JJ.

Opinion by Leahy, J.

Filed: November 30, 2018

Appellant William F. Feller, III ("William")[1] appeals from an order entered in the underlying custody and child support case in the Circuit Court for Montgomery County that resolved several motions filed by William and his former spouse, Appellee Robin J. Feller ("Robin"). In the order dated May 30, 2017, the circuit court maintained Robin's legal and physical custody of their two children under a 2015 consent custody order; modified the visitation schedule; found William in contempt for failure to pay child support; assessed child support arrears against William in the amount of $18,043.65; increased child support payable by William to Robin to $2,087 per month; and, granted Robin $10,000 in attorney's fees. Within ten days of this order, William filed a motion to alter or amend, which was denied. William presents five questions on appeal which we have rephrased and consolidated as follows:[2]

[1] We refer to the parties by their first names for ease of reference and intend no disrespect.

[2] The questions presented by William in his brief on appeal are:

> A. Whether the Increased Access of the Appellant with the Parties' Minor Children was Inconsistent with the Children's Best Interests and Constituted an Abuse of Discretion, Where the Evidence Established that the Children's Best Interests Mandated Every Wednesday Overnight During the Summer but Failed to Award Wednesday Overnights during the School Year.
>
> B. Whether the Award of Sole Legal Custody to Appellee Constituted an Abuse of Discretion, Where the Evidence Established that Joint Legal Custody with Tie-Breaking Authority Order was in the Children's Best Interests.
>
> C. Whether the Finding that Appellant was in Contempt of Court for Failing to Pay Child Support was an Abuse of Discretion or an Error of Law Where No Evidence Established that Appellant Had the Estate or Ability to Pay the Purge Amount.

1. Did the trial court abuse its discretion when it awarded sole legal custody to Robin and failed to award William physical custody overnight on Wednesdays during the school year?

2. Did the trial court abuse its discretion by increasing William's child support obligation to $2,087 per month?

3. Did the trial court clearly err or abuse its discretion by holding William in contempt of court for failing to pay child support?

4. Did the trial court abuse its discretion by awarding $10,000 in attorney's fees to Robin?

We hold that the trial court acted within its sound discretion in each of the rulings that William challenges on appeal.

BACKGROUND[3]

William and Robin were married for nine years, during which time they had two children: D.F., born 2007, and W.F., born 2005. The Fellers separated in 2009 and divorced in 2011. William is a licensed commercial real estate broker and has a degree in American government from Georgetown University. Robin is a resource counselor for the

---

> D. Whether the Order Increasing Child Support to $2,087 Per Month Was an Abuse of Discretion or an Error of Law Where Appellant's Past Income Failed to Support the Court's Findings and Where the Trial Court Failed to Consider Appellant's Past Income in Calculating His Present Income.
>
> E. Whether an Award of Attorney's Fees in the Amount of $10,000 to Appellee Constituted an Abuse of Discretion or an Error of Law When Appellant Prevailed and the Trial Court had no Evidence of Appellee's Financial Circumstances but had Evidence of Appellant's Poor Financial Status." (Capitalization edited.).

[3] The following facts are drawn from the testimony that was presented as well as the documents that were before the circuit court over the course of the three-day motions hearing held on May 3 through 5, 2017.

Housing Opportunities Commission of Montgomery County and has a Master's Degree in social services from the University of Maryland. William currently lives with his mother in Bethesda, Maryland, and Robin lives in the former family home in Chevy Chase, Maryland.

Initial Marital and Custody Agreements

Robin and William entered into several agreements during their separation and after their divorce. On April 27, 2010, the parties entered into a Custody and Parenting Agreement which provided for joint legal and physical custody of the children. Pursuant to this agreement, the parties were to jointly decide issues related to the children's education, non-emergency medical decisions, and extracurricular activities. They appointed a Parent Coordinator, Kate Scharff, LCSW-C, with tie-breaking authority, who would help the parties reach joint decisions should they not be able to on their own. Ms. Scharff's decisions were binding. The agreement set forth the school, holiday, and summer custody schedules, and postulated that "[n]either parent shall do anything that would estrange either child from the other parent, or impair either child's love, respect and affection of the other parent."

On September 29, 2010, William and Robin entered into the Marital Settlement Agreement, which incorporated the provisions of the Custody and Parenting Agreement, and separately addressed, among other things, issues of child support and property distribution. The agreement stated that neither party was liable to the other for child support, and each party would cover the child-related expenses while the children were in his or her care. Both parents were equally responsible for health and dental insurance, and

both agreed to "divide on a 50/50 basis any mutually-agreed upon education-related expenses for either child[.]" Each year on March 15, the parties were to exchange documentation "evidencing their 'actual income,' . . . for the previous year, including, but not limited to their tax returns[,] . . . end-of-year paystubs, W-2s, . . . and bank statements for all personal and business accounts[.]"

Allegations of Child Abuse

Despite the optimistic language of the marital and custody agreements, the parties' relationship was fraught with problems. Robin had contacted Montgomery County Child Protective Services (CPS) several times alleging a range of abuses by William against the children, although no investigation of these earlier reports yielded a finding of child abuse.[4] Then on January10, 2015, Robin called the police to William's home. William was hosting a sleepover for the boys and disciplined D.F., then seven years old, for grabbing the friend's "Xbox controller and running around the house." William put D.F. in time-out in his room. While D.F. was alone, he called his mother. Robin testified that D.F. "said his father had carried him up the stairs, had thrown his head into the wall, and that his father had [] taken his face and pushed [] his face into [D.F.'s] face, pushing him into the wall, and was screaming into his face." Robin stated that D.F. "was very emotional[.]" She immediately called the police, which prompted the involvement of CPS.

[4] In June of 2009, Robin called CPS alleging William had locked the children in the garage, in the dark, as a form of punishment. In 2015, Robin informed the children's psychiatrist that William had bought a pellet gun for D.F., then 7 years old. Dr. Zuckerman, the director of the Fellers' parent coaching program, reported that Robin called CPS because the children were riding bicycles without their helmets. (At the hearing, Robin denied calling CPS regarding the bicycle helmets.).

William testified that after the time-out, D.F. "told me that he had called his mom and that somebody was coming over to visit. So I said okay," and the children continued to play a game of basketball with an over-the-door basketball hoop. William stated that he was surprised by the arrival of the police. The police found scratches on D.F.'s arm, which William surmised came from the over-the-door basketball hoop that had fallen on D.F. After the police left, the sleepover carried on. After the incident, D.F. and W.F. spent the rest of the weekend with William.

The boys attended school on Monday, January 12, but at some point, a school counselor informed Robin that D.F. "was in distress." The next day, Robin took D.F. to the pediatrician. Robin described D.F.'s symptoms to the doctor, which included "soreness on his head, of his scalp"; "G.I. symptoms" including "[s]tomach upset, stomach pain, [and] diarrhea"; and that D.F. "wasn't sleeping well." Robin described certain behavioral changes in D.F.: he "was sullen, particularly clingy when normally, he'[d] play by himself, he'[d] go outside. He was very clingy with me." The doctor met with D.F. privately. The doctor's notes indicated that D.F. complained of "head injury on 1/10/15[;] pushed into wall" and that "his father 'chokes [D.F.].'" The doctor recommended that D.F. ice his head. The doctor's primary diagnosis, however, was "suspected child abuse."

On Wednesday, January 14, 2015, Robin met with CPS, and then on Thursday, January 15, she filed an emergency *ex parte* motion to modify custody. At the hearing, Robin characterized CPS's involvement as follows:

> Child Protective Services visited my home yesterday evening. They presented me with a safety plan whereby they were—I don't know the right

> terminology—revoking—I don't know the right terminology—revoking their father's custodial rights.

The order ("January 15 Order") provided Robin with sole legal and physical custody of the children and provided William with supervised access. William believed that the judge granted the *ex parte* emergency order because Robin confused "revocation of custodial rights" with "suspension of visitation," the latter being the correct characterization of what CPS recommended. Robin's mischaracterization has been a consistent source of acrimony and conflict. Against the advice of the parent coordinator Scharff, William filed a motion to find Robin in contempt of court, and filed a separate criminal complaint for perjury associated with Robin's January 15 testimony. Robin, during the underlying hearing, acknowledged her mistake at the January 15 hearing, stating, "[I] clarif[ied at the hearing] that I, I did not have knowledge as to the appropriate terminology."

2015 Consent Custody Orders

Before the hearing on Robin's pending motion to modify custody, William and Robin entered into a temporary consent custody order on February 23, 2015 ("February 23 Order"). According to the order, the parties were to provide Dr. William B. Zuckerman access to all medical records and treating doctors so that he could evaluate the parties and the minor children and provide a recommendation on custody and access. William was allowed visitation with the children for two hours every week under the supervision of Dr. Mark Sweeney, a licensed professional counselor. Robin was granted sole legal and physical custody of the children. The order further provided that all fees and costs

associated with Dr. Zuckerman's evaluation "shall" be paid for by William unless the parties agreed, the court ordered otherwise, or Robin were to withdraw from the evaluation process or dismiss the pending action before Dr. Zuckerman completed his evaluation. Finally, the parties were ordered to authorize their counsel to choose a child's privilege attorney pursuant to *Nagel v. Hooks*, 296 Md. 123 (1983).[5]

Not long after the parties consented to this order, a controversy arose after William purchased a pellet gun for D.F. during a supervised visit. Dr. Sweeney testified about the incident. First, he clarified that he, and the people who directly supervised the visits and reported to him, never observed any physical abuse directed at the boys. Instead, he "observed [William] to be inclined to be more permissive than the average parent[.]" He explained that there were concerns about William's judgment as a parent, especially "around allowing the children to have things or participate in activities that they were not ready to do." He testified that William bought the pellet gun because D.F. was "melting down emotionally and [William] felt compelled to purchase the pellet gun in order to stabilize the situation."

[5] In a case in which the Court of Appeals considered whether a custodial parent may refuse to waive, on behalf of a minor child in a custody proceeding, the statutory psychiatrist-patient privilege, the Court held that "when a minor is too young to personally exercise the privilege of nondisclosure, the court must appoint a guardian to act, guided by what is in the best interests of the child. *Nagel*, 296 Md. at 125, 128. Thus, an attorney, commonly referred to as a "child's privilege attorney," must also be appointed by the court in any case in which a child's therapist is going to testify regarding privileged communications. *See* Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 9-109 (c).

Robin also struggled with parenting to the point of needing professional intervention on at least one occasion. In April, Robin called the police while the children were in her care because D.F. had threatened to hurt "Robin and/or Scott" with a hammer. An ambulance took D.F. to Children's Hospital. Robin informed William about the episode the following day.

In July 2015, the parties signed a new Consent Custody Order (entered July 29, 2015) ("July 29 Order"). The order provided that Dr. Ruth Zitner, Psy.D., a clinical and forensic pathologist, would act as the parties' parenting coordinator, and that each party would be responsible for the costs of their individual communications with her. William was ordered to participate in a parent coaching program with Dr. Sweeney, and Dr. Zuckerman would continue to act as an on-going evaluator of William's progress in the parent coaching program along with Dr. Sweeney. The order also provided that Dr. Zuckerman may recommend that William's access to the minor children under the order be expanded.[6]

According to the order, Robin maintained sole legal and primary physical custody of the children, and William was given unsupervised access "every other weekend from pick up after school or camp on Friday, or pick up at 3:00 p.m. if school or camp is not in session, until Sunday at 7:00 p.m." William was also given a one-week period with the children in August. The order left for Dr. Zuckerman to determine whether and when to

[6] The circuit court later observed that the order incorporated Dr. Zuckerman's June 2015 psychological evaluation of William, Robin, and the children, and that that was a "highly unusual" feature of a custody order that the court "hadn't seen [] before."

re-implement the holiday and vacation timesharing schedule that the parties had outlined in previous agreements. Finally, the order stated that "the specific provisions of the parties' previously executed Custody and Parenting Agreement dated April 27, 2010 and Marital Settlement Agreement . . . shall remain in full force and effect, except where the terms of said agreements are contradictory to the terms and provisions of this Consent Custody Order [.]"

Robin testified that she agreed to William's unsupervised access to the children because other protections were in place: Dr. Zuckerman was to supervise the parties' parent coaching program; Dr. Ruth Zitner worked under Dr. Zuckerman as the parties' parent coordinator; and, Dr. Sweeney worked under Dr. Zuckerman as the parties' parent coach.

Communications Continue to Fail

Notwithstanding the parties' consent to the July 29 Order, the parties were unable to communicate. The Fellers did not meet with Dr. Zitner, the parent coordinator, for nearly a year because of several conflicts. William filed a petition for contempt because Robin missed the first parent coordination meeting with Dr. Zitner. Robin testified that she missed the first meeting because William never confirmed the appointment via email. Robin filed for child support, and then refused to attend parent coordination meetings while litigation was ongoing. As a result, the parties met with Dr. Zitner in October, but then did not meet with her from November 2015 to September 2016. In October, William wanted to discuss more time with the children, which Dr. Zitner refused, as the topic did not fall under the purview of her limited role as a parent coordinator focusing on parental communication. Neither party wanted to discuss communication issues. Dr. Zitner did

not return the retainer paid for by William, and recommended the parties discuss custody issues with Dr. Zuckerman, who had resigned by that time.

Dr. Zuckerman

Dr. Zuckerman resigned on December 18, 2015, as problems coalesced between him and William. Shortly before or shortly after the July 29 Order was granted, William emailed Dr. Zuckerman to ask for a less expensive counseling alternative. William claimed that Dr. Zuckerman was unresponsive. Then, William contacted Dr. Zuckerman about taking an August vacation with the children, permitted under the July 29 Order. Dr. Zuckerman responded that he could not approve the vacation because he had no reports from Dr. Zitner, despite no such precondition for visitation in the agreement. In August, William discovered a discrepancy in Dr. Zuckerman's bill: an improper charge of approximately $250 out of a bill for approximately $1,900. Dr. Zuckerman acknowledged the problem. William, expecting Dr. Zuckerman to send a corrected bill that would prompt him to pay the balance, sent him a check only for $100. William never received a corrected bill and thus never paid Dr. Zuckerman the balance. At the time of the billing issue, William had already paid Dr. Zuckerman $22,100. In September 2015, William discovered that Dr. Zuckerman was not licensed in Maryland. William stated in a response motion that Dr. Zuckerman said he would apply for a Maryland license; William nevertheless contacted the Maryland Board of Examiners by phone, and allegedly the Board suggested William report Dr. Zuckerman. William also alleged Dr. Zuckerman threatened to obstruct his access to his children and that Dr. Zuckerman resigned shortly thereafter.

Dr. Sweeney

After counseling with Dr. Zitner and Dr. Zuckerman stopped, William continued to undergo parent coaching with Dr. Sweeney, to great results. Dr. Sweeney testified that William and the children were prodigious learners, and that his parent coaching "was actually very effective." Dr. Sweeney noted that "it was uncommon how quickly both [W.F.] and [D.F.] responded to the changes that we were making. I was particularly impressed with how [William] and the children were problem solving issues that were historically happening to the point where those issues were being eliminated or very infrequently observed[,]" and that with other families, coaching sessions need to happen "10, 15, 20 times before we start to see those results." Dr. Sweeney gave several examples of times he observed William effectively handle challenging situations with the children. He "observed William to be more hands-on in what the children were doing[.]" Dr. Sweeney discontinued his parent coaching with William, explaining at the underlying hearing that

> I felt that [William] and [D.F.] and [W.F.] had reached a point where [their] . . . visits were safer. Critical incidents were not being reported as frequently or at all. . . . I felt like we had successfully worked through a number of issues that had been presented to me. I felt strongly that they worked those issues to resolution and I felt confident in [William]'s ability to handle future issues.

Dr. Sweeney did transmit his reports to Dr. Zimmerman, but William's progress never led to more time with the boys.

Meanwhile, the children thrived under Robin's care, although they also expressed a desire to spend more time with their father. W.F.'s symptoms so improved that he no longer saw his doctors except for maintenance appointments, and the trouble that he had

experienced reading at grade level completely resolved. The circuit court attributed W.F.'s progress to his more regular schedule with Robin. D.F.'s symptoms also improved to the point where he saw his therapist only once per month.

The Financial Circumstances of the Parties

The circuit court heard testimony concerning both parties' income in 2016; Robin made $76,899.15 and William made $91,921.17. William has maintained throughout the proceedings below and on appeal, that his work is commission-based, his income payments are irregular, and that 2016 represented a particularly anomalous year.[7] He testified that he receives commission income only when payments are collected; sometimes, he does not receive income for quite some time after a real estate deal. Given the unpredictability of his income, William argued below, and contends on appeal, that an appropriate calculation for child support would average his 2014, 2015, and 2016 gross income ($52,671 in 2014 + $52,677 in 2015 + $91,921 in 2016 = 197,275 / 3 = $65,758.33). The circuit court ultimately disagreed and calculated William's child support payments based on his 2016 income and invited William to file a motion if his 2017 gross income is drastically less than his 2016 gross income.[8]

The parties also testified as to their liabilities. William owed $35,000 in credit card debt and he had borrowed against his mother's $170,000 home equity line of credit. The

[7] William also owns a business, Unlimited International Corporation, from which, the parties stipulated, he only receives about $5,000 a year in income.

[8] William testified that he had between $5,000 and $7,000 in his Broad Street retirement account, no savings accounts, and about $450 in his checking account.

court found William to be $18,043.65 in arrears for child support. William alone was responsible for Dr. Zuckerman's therapy under both the February 23 Order and July 29 Order, for which he paid a total of $22,100. In April of 2016, for the children's birthdays, he bought Apple watches, which retailed for about $399 each. Since March 15, 2016, he expended $22,500.31 in attorney's fees.

Robin owed $123,000 on a home equity line of credit. She pays $535 per month in after-school care for the children, and spends $364.00 per month on health insurance for herself and the boys. She also accumulated significant credit card debt to pay for legal fees, which, since September 1, 2016, totaled $64,011.77. Robin requested attorney's fees in the underlying action in the amount of $20,000.

Per the July 29 Order, the parties split the cost of the boys' extracurriculars and the $1,300 cost of summer camp.

The Circuit Court's Decisions

At the end of the third and final day of the hearing on May 5, 2017, the circuit court, the honorable Joseph A. Dugan presiding, issued a comprehensive oral ruling. The court set forth, in significant detail, the testimony and other evidence considered under the applicable statutory and decisional law. At the outset, the court determined that there was a material change in circumstances since the July 29 Order. The court began this part of the analysis by reviewing the purposes of the July 29 Order, stating that the parties

> carefully crafted [the] order with an eye towards giving [William] more time with his boys, provided that he made certain changes. []. The[re were] supposed to be real changes and that was the purpose of having Zuckerman there, [] to quarterback this whole thing, to see whether or not there had been

> a real change in mental attitude . . . [in William's] communication, his discipline. . . [.]

The court then observed that "essentially nothing changed regarding the parties' ability to communicate. Nothing." The court continued,

> In fact, at almost every turn, [William] acted contrary to [Dr. Zitner's] advice. Rather than communicate and talk about some of these things, she'd give him advice and he'd go contrary to whatever her recommendation was. Specifically filing a number of meritless contempt cases and repetitive contempts.
>
> Finally, he draws the line and he says, 'Well, I'm only going to speak to our parent coordinator if it's about increased time for the kids.'

After explaining why the reasons William provided for not paying Dr. Zuckerman's bills were not credible, the court observed:

> [William] doesn't even know what it is he didn't want to pay. That's preposterous. That reflects an intent not to abide by the order, a purposeful attempt to blow this thing up. This thing that was carefully crafted by the parties, by the attorneys, by Zuckerman, by the parent coordinators, specifically compartmentalized to make corrections so that [William] could get increased time with the boys.

The court, therefore, found a material change in William's failure to make progress under the July 29 Order. The court surmised that William didn't make progress because "he was so angry that he didn't get his 50-50 right from the get-go." The court pointed out that, although there was nothing in the order to suggest that the parties would go back to 50/50 custody, the order did contemplate expanded visitation. The court observed that Dr. Zuckerman "starts out from the very beginning looking to recommend more time with [William]. But again, [William] refuses to pay him, challenges his license [and] reports him to the board in Maryland." The court also found material the fact that, in the two years since Robin had primary physical and sole legal custody of the children under the January

15 Order, they had begun to thrive in school and were doing very well overall under a regular schedule.

Applying the factors in *Montgomery County DSS v. Sanders*, 38 Md. App. 406 (1977), and *Taylor v. Taylor*, 306 Md. 290 (1986), the court determined that both William and Robin are fit parents and that both have excellent characters and reputations. The court made generally positive findings in regard to many other factors, until it reached the factor concerning length of separation from the natural parents. The court stated, "the big fight over this case is with respect to [William]. He insists that 50-50 custody is the only thing that's going to work in the best interest of the children." After quoting a passage from *Taylor*, 306 Md. at 304, concerning the principle that the parents' ability to communicate effectively is the "most important factor" in the custody determination, and after restating some of the expert testimony by Dr. Zitner, the court opined, "[t]here's absolutely no way I could find that here." The court found it "absolutely incredible" that William ignored all the advice he received not to file contempt petitions against Robin and not to go to "the State's Attorney's Office and try and get Mom locked up." However, the court also admonished Robin for calling CPS to complain about issues like bike helmets. And after reciting a series of examples of how poorly the parties communicated, the judge concluded by expressing his concern that William had "absolutely no insight . . . [into] the problems" his actions had on the children.

In reaching his determinations, Judge Dugan relied upon Dr. Zuckerman's evaluation incorporated into the July 2015 order, reading aloud long excerpts. For example, he quoted Dr. Zuckerman's report that William

> is not always well-attuned to his own negative feelings, either sadness or anger.
>
> * * *
>
> Thus, for example, if he behaves in a way that would frighten the children, or frighten Robin, he is likely to be less aware of that anger than is optimum. And he may not appreciate the degree to which his behavior has been upsetting.
>
> * * *
>
> [William] can be quite reactive to others' criticism. A reactivity that has manifested itself in some angry outburst, both toward Ms. [Scharff] and towards CPS workers. Some findings suggest that he might be seen as at times egotistical and arrogant, supporting Robin's contention that he says yes to advice offered by such people as Ms. [Scharff], but disregards the advice as though he feels he is doing nothing wrong.

The court noted that there was absolutely no question that William cares about his children but agreed with Dr. Zuckerman's observation that he fails to sufficiently supervise the children. The court added, "my belief is that the [pellet] gun was done intentionally with no concern for what effect it would have when Mom took the gun away."

The court also quoted from Dr. Zuckerman's evaluations of Robin:

> Robin has made more effective use of outside help. She is more oriented toward looking at her role. She is likely to make good efforts to improve her own understanding and approach. . . .
>
> My findings support the view that Robin, while clearly overwhelmed, while also over-reactive, tending to view [William's] parenting weaknesses overly harshly, is in a better position to manage day-to-day childrearing, a position that is consistent with the schedule reached in the fall of 2014 by Ms. [Scharff].

The court concluded that the graduated plan contemplated under the July 29 Order for more custodial involvement by William had not worked and awarded Robin sole legal and primary physical custody. The court denied William's request for 50-50 custody, but stated that "I do find it's in the children's best interest to spend additional time with their father. They want to do it. He is certainly capable of handling it."

As reflected in the final written order issued by the court, the court expanded William's visitation to include Monday mornings following William's regular weekend, and to include Wednesdays after school until 7:30 p.m. The court also expanded the summer visitation schedule significantly, ordering that the parties would follow a one week on and one week off schedule, and each would also have two non-consecutive weeks of vacation with the children. The court divided holiday visitation equally between the parties.

As to the financial issues, the court found William in contempt of court for "intentionally, willfully fail[ing] to pay his child support since the time that the order was entered on December the 30th of 2016." The court provided that William could purge himself of the contempt upon payment of his child support arrearage, assessed at $18,043.65, within ten days of the court's order. William's monthly child support obligation was increased from $1,667 to $2,087 per month. The court reminded William that he must pay the full amount of the child support obligation, even though his monthly earnings withholdings amounted to less than half of his total obligation, and that William must pay the difference to Robin.

The court awarded Robin $10,000 in attorney's fees, based on the fact that William's petition for custody lacked substantial justification and that his petition to hold Robin in contempt for failing to keep him informed was frivolous. Finally, after noting the parties could no longer afford parent coordinators, the court ordered the Fellers to

communicate through Our Family Wizard.[9]

Judge Dugan's final order was entered on May 30, 2017. William filed a motion to alter or amend judgment on June 9, 2017, which the court denied on September 1, 2017. He then filed his timely notice of appeal on September 28, 2017.

DISCUSSION

I.

Custody

In *Santo v. Santo*, Judge Adkins reiterated the standard of review a Maryland appellate court should apply in an appeal of a child custody case:

> We review a trial court's custody determination for abuse of discretion. This standard of review accounts for the trial court's unique "opportunity to observe the demeanor and the credibility of the parties and the witnesses." *Id.* Though a deferential standard, abuse of discretion may arise 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.'" Such an abuse may also occur when the court's ruling is "'clearly against the logic and effect of facts and inferences before the court' or when the ruling is 'violative of fact and logic.'" Put simply, we will not reverse the trial court unless its decision is "'well removed from any center mark imagined by the reviewing court.'"
>
> The light that guides the trial court in its determination, and in our review, is "the best interest of the child standard," which "is always determinative in child custody disputes."

448 Md. 620, 625-26 (2016) (citations omitted).

William, in this appeal, challenges the circuit court's award of both physical and legal custody. Before we consider the merits of those decisions, we will briefly recount

[9] "Our Family Wizard is a subscription-based website which is designed as a medium for divorced or separated parents to communicate and manage issues regarding shared parenting." *Wilcoxon v. Moller*, 132 So. 3d 281, 284 (Fla. Dist. Ct. App. 2014).

the distinctions between physical and legal custody, which Judge McAuliffe set out in *Taylor v. Taylor*:

> Embraced within the meaning of "custody" are the concepts of "legal" and "physical" custody. Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare. . . . Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other.
>
> Physical custody, on the other hand, means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody. Joint physical custody is in reality "shared" or "divided" custody. Shared physical custody may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights.

306 Md. at 296–97 (some citations and footnotes omitted).

Roughly a decade earlier, in *Montgomery County DSS v. Sanders*, this Court considered a custody dispute between the natural mother and the department of social services. 38 Md. App. at 408-09. The *Sander* case concerned an infant who had been in the care of child protective services because of child abuse inflicted by the father. *Id.* at 409. The issue was whether the best interests of the child would be served by either returning the infant to his natural mother or keeping him in the care of his foster parents. *Id.* at 407-09. The trial court awarded custody to the natural mother, noting that she had divorced the father, attended therapy, and moved back in with her parents. *Id.* at 410. The Montgomery County Department of Social Services challenged the award under a theory of "psychological parent[hood]," espoused by a contemporary socio-psychology book,

arguing that the infant should remain with its foster parents who had become its "psychological parent[s]." *Id.* at 408; 412.

In this Court's opinion affirming the circuit court, we "neither sweepingly commend[ed] nor condemn[ed] the 'psychological parent' concept in custody proceedings," but instead provided a non-exclusive list of factors that should be considered in a determination of the best interests of a child in a custody dispute:

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. Age, health, and sex of the child;
8. Residences of parents and opportunity for visitation;
9. Length of separation from the natural parents;
10. Prior voluntary abandonment or surrender.

Id. at 408; 420. This Court explained that none of the above factors should be weighed to the exclusion of others, but instead, "[t]he court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, or the length of separation." *Id.* at 420-21 (citations omitted).

In *Taylor*, the Court of Appeals considered an atypical award of joint custody between natural parents, and set out its own list of factors a trial court should consider in awarding joint physical and legal custody. 306 Md. at 307-11. In *Taylor*, the divorced mother and father, both teachers, had worked out a "visitation agreement" that the trial judge characterized as "'a sort of joint custody,'" whereby the children lived in the marital home with the father, the mother cared for the children during the day in the marital home,

and the children visited the mother's home on Tuesday evenings and alternate weekends. *Id.* at 295, 311-12. The Court of Appeals granted certiorari to determine whether the trial court had the authority to order such an arrangement and concluded that it did. *Id.* In rendering its determination, the Court explained that "[a] court faced with a question of child custody . . . may continue the joint custody that has existed in the past, or award custody to one of the parents, or to a third person, depending upon what is in the best interest of the child." *Id.* at 301. It enumerated the following 14 factors to consider when rendering a joint physical and legal custody determination, many of which overlap with the *Sanders* factors:[10]

1. Capacity of the parents to communicate and to 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 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.

Id. at 304-11. Given the unique character and circumstances of each case, the Court in *Taylor* clarified that "[t]he best interest of the child is therefore not considered as one of

[10] Some of the enumerated factors in both *Sanders* and *Taylor* speak to consideration of physical custody, and some are apropos of both physical and legal custody. *Taylor*, 306 Md. at 304-1; *Sanders*, 38 Md. App. at 420.

many factors, but as the objective to which virtually all other factors speak." *Id.* at 303. The Court explained that no single factor "has talismanic qualities, and that no single list of criteria will satisfy the demands of every case." *Id.*

Although no factor is talismanic, Judge McAuliffe clarified that one factor ranks supreme. *Id.* at 304. The "[c]apacity of the parents to communicate and to reach shared decisions affecting the child's welfare" is

> clearly the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant as well to a consideration of shared physical custody. Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.

Id.

A. Physical Custody

Before this Court, William argues that the circuit judge erred when he "granted [William] a material increase in access to his children, but failed to award Wednesday overnights." William reasons that if the court found him capable of caring for the children for extended periods of time during the summer, then he should be able to care for them for extended periods of time during the school year. Referring to the provisions of the 2010 Joint Custody and Parenting Agreement, he asserts that the court failed to afford the proper weight to the third factor—"desire of the natural parents and agreements between the parties"—discussed in *Sanders*, 38 Md. App. at 420.

Robin counters that the circuit court properly considered all the relevant factors denoted in *Sanders* and *Taylor* in rendering its decision to award her primary physical and

sole legal custody of her children. She asserts that the court assigned her primary physical custody, in part, because of the parties' inability to communicate, but also because the court specified that "it's in the best interest of the children to remain with their mother in a stable and consistent schedule and the discipline they have there."

A determination of physical custody must be based on the facts of the case. *Taylor*, 306 Md. at 303; *Sanders* 38 Md. App. at 414-15. Many factors outlined by *Sanders* and *Taylor* speak specifically to the issue of physical custody. *Id.* A trial court should consider whether the parents are willing to share physical custody, and any prior agreements between the parties. *See Sanders*, 38 Md. App. at 420. The psychological and physical capabilities of the parents, and their rapport with the children, must be considered by the trial court. The trial court should consider the relationship between the parents and the children, and whether the parents are perceived as sources of security and love, which would weigh in favor of shared physical custody. *Taylor*, 306 Md. at 308. The trial court should also consider the wishes of the children, mindful that children sometimes do not express their genuine wishes. *Taylor*, 306 Md. at 308; *Sanders* 38 Md. App. at 420. Children can fear hurting the "weaker" parent or exhibit a preference for the parent who subjects them to fewer rules and discipline. *Taylor*, 306 Md. at 308 n.12.

The trial court should also consider the mechanics of joint physical custody, and in doing so, consider the parents' work schedules and whether certain shared physical custody arrangements are feasible given the location of the parental homes and their distance from the schools. *Id*. at 309. Lastly, trial courts should consider the totality of the circumstances and any other factors it finds relevant. A best-interests determination regarding physical

custody should not hinge on any one factor, and the lists espoused by *Taylor* and *Sanders* are non-exclusive. *Id.* at 311; *Sanders*, 38 Md. App. at 400-21.

Accordingly, we have upheld physical custody decisions justified by the trial judge on a variety of grounds appropriate for the exigencies of the particular case. In *McCready v. McCready*, we upheld the trial court's award of primary physical custody to the father based on the trial court's comparative psychological assessment of the parents. 323 Md. 476, 484-86 (1991). The trial court concluded that the mother, pregnant by her new fiancé, unfairly ostracized the child's natural father after starting a new nuclear family. *Id.* at 485. It further found the mother's reduction of the father's role to "visitor" was motivated by a selfish interest in her new family arrangement, rather than by a consideration of the child's best interest. *Id.* The trial court found the mother to be "less mature[,]" "less realistic in her approach to life[,]" and "somewhat selfish and narcissistic," and the father to be "sincere and very credible." *Id.* at 485. We affirmed the trial court, finding no abuse of the trial court's broad discretion. *Id.* at 486.

In *Viamonte v. Viamonte*, we upheld a chancellor's award of primary physical custody to the father based on the parents' respective work schedules. 131 Md. App. 151, 157 (2000). The chancellor considered whether the child's relationship with his half-brother, for whom the mother had exclusive physical custody, warranted a grant of primary physical custody of the child to the mother. *Id.* at 160-61. The chancellor weighed the fact that the father's job allowed for greater day-to-day presence in the child's life, against the fact that the mother had "suffered. . . [a] stress-related illness, . . . remain[ed] at the helm of her own business with all the attendant responsibilities, *and* she [was] the custodial

parent of another child[,]" and concluded that the father had the greater ability "to manage the challenges of raising a five-year old." *Id.* at 161. We affirmed, noting that the chancellor had justified the award of physical custody on extensive factual predicate. *Id.* at 162.

The circuit judge in the instant case likewise justified the award of physical custody on an extensive factual predicate and analysis of the relevant *Sanders* and *Taylor* factors. *Taylor*, 306 Md. at 304-11; *Sanders*, 38 Md. App. at 420. The court considered the potentiality of maintaining natural family relations, the geographic proximity of the parental homes, and the opportunity for parental visitation, and decided these factors were not at issue, given the proximity of Robin's home in Chevy Chase to William's home in Bethesda. *Taylor*, 306 Md. at 308; *Sanders*, 38 Md. App. at 420. The court addressed the preferences of the children, noting that in the summer of 2015, D.F. "indicated that he wanted 50-50 with his father and that he wanted make-up time for the time his father didn't get," and that W.F. "indicated to the pediatrician more recently that he wanted to spend more time with his dad." The court considered the material opportunities affecting the future life of the children and the financial status of the parties, noting that the parties' financial statuses were "about the same" and that neither party was "on Easy Street here" or "rolling in dough." *Taylor*, 306 Md. at 310; *Sanders*, 38 Md. App. at 420.

Because Dr. Zuckerman's psychological evaluation was incorporated into the July 2015 Order, the court in the instant case was supplied with granular details about the parties. The judge was guided by Dr. Zuckerman's in-depth evaluation of the Fellers, in

addition to his own observation of the parties and weighing of the evidence. We conclude that the circuit court met its obligations under *Sanders* and *Taylor*.

The court was well within its discretion to reject William's contention that a 50/50 shared custody arrangement is the only arrangement that is in the best interest of the children. The circuit court in the instant case found the parties to be incapable of effectively communicating to reach shared decisions. Moreover, not only did the parties' communication remain unimproved, failing to abide by the mandate of the July 2015 Order, but there was also "absolutely no way [the trial court] could find" a record of conduct "evidencing an ability to effectively communicate" required for an award of joint custody under *Taylor*.

The circuit court's physical custody determination is soundly grounded in the best interests of the children in this case. It is unfortunate that William is unable to recognize this or appreciate the considerable expansion of time and access that the judge awarded him under the circumstances of this case. We conclude that William's argument that the judge abused his discretion by not awarding him overnight custody on Wednesdays during the school year is without merit.

B. Legal Custody

William contends that the trial judge erred as a matter of law when he assigned sole legal custody to Robin based on the parties' inability to communicate. He points out that the judge, in rendering his decision, "admonished" Robin by stating that she was "to keep [William] apprised. He's got the right to all school information, everything else." Relying on *Santo*, 448 Md. at 646, William contends that, under the circumstances, "a joint legal

custodial order with tie breaking authority to the Appellee would have been consistent with the law as such an arrangement would have guaranteed communication by Appellee to Appellant."

Robin challenges William's argument concerning legal custody on two fronts. First, she points out that neither party requested a joint legal custodial order with tie-breaking authority to Robin. William, she notes, requested joint legal custody, or in the alternative, that *he* be granted tie-breaking authority. Second, she argues that William's reliance on *Santo* is misplaced because the special circumstances of that case permitted joint legal custody to parents who could not communicate, and the case does not stand for the proposition that a court must award joint custody with tie-breaking authority to one parent when parents have difficulty communicating. She notes that the *Santo* Court instructed that the best evidence to determine the behavior of the parties is "past conduct or track record of the parties," 448 Md. at 628, and that William has repeatedly created situations making communication impossible, including his unrelenting efforts to bring criminal charges against Robin.

As with physical custody, a determination of legal custody must be based on the facts of the case. *Taylor*, 306 Md. at 303; *Sanders* 38 Md. App. at 414-15. There is considerable overlap among the factors considered for a determination of physical custody and those considered for legal custody. *See Viamonte*, 131 Md. App. at 160. The most important factor is the ability of the parents to communicate, as "there is nothing to be gained and much to be lost" by ordering "severely embittered" parents whose "relationship

[is] marked by dispute" to make decisions affecting the child's welfare. *Taylor*, 306 Md. at 305.

In addition to the ability to communicate, the trial court should consider the willingness of the parents to share legal custody, as well as any prior agreements between the parties. *Id.* at 308; *Sanders*, 38 Md. App. at 420. The psychological fitness of the parents should also be considered. *Taylor*, 306 Md. at 309; *Sanders*, 38 Md. App. at 420. The court should consider the parents' wishes and feelings, and assess the parents' sincerity; a request for legal custody can be abused as a bargaining chip during acrimonious proceedings, just as a request of physical custody can. *Taylor*, 306 Md. at 307-10; *Sanders*, 38 Md. App. at 420. Finally, a trial court should contemplate any other factors it finds relevant. *Taylor*, 306 Md. at 311; *Sanders*, 38 Md. App. at 420-21.

In *Santo*, the Court of Appeals granted certiorari to answer the question as to whether, considering *Taylor*, the trial court abused its discretion in awarding joint custody with tie-breaking authority to the father when the two parents could not effectively communicate. 448 Md. at 625-40. The trial court in *Santo* awarded joint legal custody to the children's natural mother and father, despite a finding of "unvarnished hatred" between the parents. *Id.* at 640. The court awarded decision-making authority over certain aspects of the children's lives to the father; e.g., the father had decision-making authority over the children's education, and the mother had decision-making authority over the choice of the children's therapist. *Id.* at 644. This Court affirmed, as did the Court of Appeals, reasoning that the circuit court predicated its determination "on its thorough review of the *Taylor* factors, deliberation over custody award options, sober appreciation of the difficulties

before it, and use of strict rules including tie-breaking provisions to account for the parties' inability to communicate[.]" *Id.* at 646.

Here, the circuit court found ineffective communication between the parties, and made its decision after a thorough analysis of the *Taylor* and *Sanders* factors relevant to legal custody. After hearing extensive testimony from the parties, their parent coordinator, and parent coach, the court found the parties to be incapable of communicating to reach shared decisions. Not only did the parties' communication remain unimproved after the counseling and coordination services, but the judge found there was also "absolutely no way" it could find either "mature conduct on the part of the parents evidencing an ability to effectively communicate" nor "a strong potential for such conduct in the future." *See Taylor*, 306 Md. at 304.

The court also considered other factors, including the character and reputation of the parties, finding "both [to be] well-educated," "employed for a long period of time," "responsible," and thus of "excellent character and reputation." *Sanders*, 38 Md. App. at 420. In regard to the desire of the parents and any agreements between them, the judge noted that while there was an agreement (the July 29 Consent Order), William did not abide by it. *Id.* The court considered the age, health, sex, and number of the children, stating that "[t]wo boys, 10 and 12, are both in good health with the exception of . . . some . . .problems that D.F. still receives some counseling for about once a month." *Taylor*, 306 Md. at 309; *Sanders*, 38 Md. App. at 420. The court considered the length of separation from the natural parents, noting that there had been no voluntary abandonment or surrender of the children.

William asks this Court to impose an inflexible template: that if parents have not demonstrated a capability to communicate, the *only* remedy is joint custody with tie-breaking authority. *See* 448 Md. at 629. Trial courts, however, are not bound by such an inflexible template. As the Court made clear in *Santos*, "a trial court should carefully set out the facts and conclusions that support the solution it ultimately reaches." *Id.* at 630. That is exactly what the trial judge did here: the judge described his findings under *Taylor* and *Sanders*, which informed his award of sole legal custody to Robin. The court noted that the children had been in Robin's sole physical and sole legal custody for over two years, were "doing fine" in her care, and that the children's best interests were served "with their mother in a stable and consistent schedule [with] the discipline they have there."

Here the circuit court found that the parties could not effectively communicate—the most important consideration under *Taylor*. Therefore, based on the unique circumstances of this case, considered in full detail by the court, we hold that the court was well within its discretion to award sole physical and legal custody to Robin, with a right of visitation to William.

II.

Child Support

William argues that the circuit court improperly increased his child support obligation because its calculation was based "solely upon" his anomalous 2016 earnings. He contends that because his income is commission-based, a more proper and accurate account of his income would be to average his income over three years: 2014, 2015, and 2016. William avers that he received a commission of $50,000 in October of 2016, and

that "[t]here was no indication or evidence that he would receive a like commission in 2017, or that 2017 income would be any different than the income which [William] had earned in 2014 and 2015." He insists that the court must consider a parent's past income when deciding the parent's child support obligation under the Family Law Article. Maryland Code (1999, 2012 Repl. Vol.), Family Law ("FL"), § 12-203.

Robin responds that the court's calculation of William's child support obligation was proper, and disagrees with William's interpretation of FL § 12-203. She contends that the statute specifies the type of income documentation litigants may be required to supply to the court. She asserts that the child support obligation should not be held static from the time of the divorce; rather, it should fluctuate along with the parent's income because the purpose of child support is to ensure that the children enjoy the same standard of living as the parents.

We generally review the trial court's modification of child support for an abuse of discretion. "[A] trial court may modify a party's child support obligation if a material change in circumstances has occurred which justifies a modification. Whether to grant a modification rests within the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Ley v. Forman*, 144 Md. App. 658, 665 (2002) (citing *Dunlap v. Fiorenza*, 128 Md. App. 357, 363 (1999).

A trial court is required to use the child support guidelines provided in FL § 12-204(e) "in any proceeding to establish or modify child support[.]" FL § 12-202(a)(1); *see also Petrini v. Petrini*, 336 Md. 453, 460 (1994). The guidelines establish a rebuttable

presumption: a successful challenger must furnish evidence that the obligation mandated by the guidelines would be unjust or inappropriate under the circumstances. *Id.* at 460-61; FL § 12-202(a)(2)(i). The guidelines calculate a child support obligation "proportionately between the parents in relation to their 'adjusted actual incomes.'" *Id.* at 461. FL § 12-203(b)(2)(ii) states that "[i]f a parent is self-employed or has received an increase or decrease in income of 20% or more in a 1-year period within the past 3 years, the court may require that parent to provide copies of federal tax returns for the 5 most recent years."

The Family Law Article defines "income" as "(1) *actual income of parent, if the parent is employed to full capacity*; or (2) potential income of a parent, if the parent is voluntarily impoverished." FL § 12-201(h) (emphasis added). "Actual income" is "income from any source." FL § 12-201(b). FL § 12-201(b)(3) enumerates sixteen sources of "actual income" including "salaries;" "wages;" "bonuses;" and, importantly here, "commissions." The court must verify the parents' income with "documentation of both current and past actual income." FL § 12-203(b). "[S]uitable documentation of actual income includes pay stubs, employer statements otherwise admissible under the rules of evidence, or receipts and expenses if self-employed, and *copies of each parent's 3 most recent federal tax returns*." FL § 12-203(b)(2)(i) (emphasis added).

Under FL § 12-202, when a parent avers that the application of the guidelines would be unjust or inappropriate in his or her particular case, a trial court may consider only

> 1. the terms of any existing separation or property settlement agreement or court order, including any provisions for payment of mortgages or marital debts, payment of college education expenses, the terms of any use and possession order or right to occupy the family home under an agreement, any direct payments made for the benefit of the children required by

agreement or order, or any other financial considerations set out in an existing separation or property settlement agreement or court order; and

2. the presence in the household of either parent of other children to whom that parent owes a duty of support and the expenses for whom that parent is directly contributing.

FL § 12-202(a)(2)(iii). If, based on the above factors, a court determines that application of the guidelines would be unjust or inappropriate, it must make specific findings on the record describing its reasons for departing from the guidelines. FL § 12-202(a)(2)(v)(1). The court's findings must state "(A) the amount of child support that would have been required under the guidelines; (B) how the order varies from the guidelines, [and] (C) how the finding serves the best interests of the child[.]" FL § 12-202(a)(2)(v)(2); *Beck v. Beck*, 165 Md. App. 445, 451-52 (2005); *Tannehill v. Tannehill*, 88 Md. App. 4, 15 (1991).

This Court has reviewed child support obligations for parents with non-traditional, non-salaried incomes on many occasions. In *Johnson v. Johnson*, for example, the trial court ordered the non-custodial father to pay $1,860.00 per month in child support based on a calculation of income that included a large, one-time bonus. 152 Md. App. 609, 610-12 (2003). We affirmed, despite the fact that it was unknown whether the father would earn a bonus the following year. *Id.* at 622. We held that "Maryland law is clear that, when a court calculates a parent's financial obligations under the child support guidelines, the central factual issue is the 'actual adjusted income' of each party, and the court must consider the 'actual income of a parent, if the parent is employed to full capacity." *Id.* (quoting *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994))). We rejected the father's position—that the bonus should not factor into his child support obligation because he may

not earn another in the future—because it would "produce an absurd result. It would require the court to engage in the fiction that appellant earned $81,500 annually, when, in fact, he received over fifty percent more. And, such a result would violate a basic principle, *viz*: a 'child is entitled to a standard of living that corresponds to the economic position of the parents.'" *Id.* at 620 (quoting *Smith v. Freeman*, 149 Md. App. 1, 23 (2002)).

We specifically considered the issue of commissions as income in *Walker v. Grow*. 170 Md. App. 255, 286 (2006). In *Walker*, the father, who challenged his child support obligation, had an ownership interest in an S corporation and had multiple other sources of income, whereas the mother earned a comparatively modest salary as an attorney for the Montgomery County *Pro Se* Project. *Id.* at 262-65; 282-87. We held that the trial judge should have factored "a one-time 'real estate management fee'" into the calculation of the father's actual income, as is required under FL § 12-201(b)(3)(iii). *Id.* at 286. "It is immaterial whether this was a one-time fee, *or represents a likely source of future income*." *Id.* (emphasis added). By statute, commissions constitute "income," and must be included in the computation of "actual income," regardless of the probability of future like commissions. *Id.*

Commissions, like bonuses, are earned income. FL § 12-201(b)(3). That "[t]here was no indication or evidence that [William] would receive a like commission in 2017, or that 2017 income would be any different than the income which [William] had earned in 2014 and 2015" as William argues, does not necessarily factor into the trial court's calculation of his child support obligation. *Johnson*, 152 Md. App. at 622. William earned the commission, and thus the children are entitled to share in it. *Id.* at 620.

William insists that the circuit court should have considered his income in prior years, but we have held that it is within the discretion of the trial court to either consult or not consult the previous three or five years' tax returns under FL § 12-203(b). In *Tanis v. Crocker*, the mother argued that because the father was self-employed, FL § 12-203(b)(2)(i) required the trial court to consider his pay stubs, receipts and expenses, and his most recent three years of tax returns. 110 Md. App. 559, 572 (1996). We disagreed, noting that

> Section 12-203(b)(2)(i) simply lists several documents that are suitable documentation of a parent's actual income. In order to establish his or her actual income, *a party to a child support case could produce any one, two, or all three of the items* listed in § 12-203(b)(2)(i). Additionally, § 12-203(b)(2)(ii) states that a trial court *may*, when certain criteria are met, require a party to produce income tax returns for his or her last five years. It is not mandatory. *Section 12-203(b) does not require that a parent's income tax returns be considered in order to resolve a dispute concerning that parent's income.*

Id. (emphasis added). Indeed, the circumstances of *Tanis* led us to provide an example of when a party's tax returns may not be consulted at all when determining a party's income: if a protective order had been granted for good cause, they need not be revealed during discovery for the purpose of calculating child support. *Id.* at 573-74.

The circuit court in the instant case appropriately calculated William's child support payment using the FL § 12-204(e) guidelines. The court considered both parents' gross pay, noting in its oral ruling that Robin's income was about $78,000 and William's was about $92,000. The court's determination of William's income properly included the large commission William earned in October, as is required under FL § 12-201(c)(iii). The court heard evidence on William's income from the previous three years, and declined William's

request to base his child support obligation on his average income over the previous three years, stating

> I'm not going to average it out. I don't believe that's appropriate. You've already made your argument, I believe, as to his current income and that's what we're going to go with. If he makes 20 grand next year, well then I guess he can come in and file a motion [].

We conclude that the income from William's boon year constitutes actual income properly factored into the child support award by the court. William's suggested calculus of averaging the three previous years is premised on the idea that he will not earn as much in the future as he earned in 2016. It is not appropriate "for a court to make a child support determination on the basis of events that have not yet occurred. Life is, after all, full of uncertainty." *Smith v. Freeman*, 149 Md. App. 1, 35 (2002). In fact, that William may earn less in the future is a strong argument in favor of the current increase in his support obligation: "given that the appellee's resources may, indeed, diminish in the future, it is appropriate for the court to allow the child to share the father's wealth while it exists." *Id.*

The court should not speculate as to what William *will* make; under FL § 12-201, the "central factual issue is the *actual* adjusted income" of each party. *Reuter*, 102 Md. App. at 221 (emphasis added) (internal quotations omitted). A trial court can inquire as to prospective income, in addition to actual adjusted income, only in a narrow set of circumstances: "[b]efore an award may be based on potential income, the court must hear evidence and make a specific finding that the party is voluntarily impoverished." *Id.* Such are not the circumstances in this case, as the judge made no finding of voluntary impoverishment.

As correctly noted by Robin, FL § 12-203 requires litigants to support their income with certain documentation. *Reuter*, 102 Md. App. at 226-27. The statute deals with the proper documentation required of parents with fluctuating incomes, and states that "the court *may* require" the parent to provide copies of past federal tax returns. FL § 12-203(b)(ii) (Emphasis added). A consideration at all of William's tax returns was not mandatory, let alone the precise treatment requested by William. *Tanis*, 110 Md. App. at 572. Moreover, FL § 12-203 does not expressly authorize the averaging of previous incomes.

William is correct that the trial court "must consider a party's past income in determining the party's present income for child support purposes," a principle routed in case law and the Calculation of Support Guidelines, and that is exactly what the court did here when it based William's child support obligation on his past income from 2016. FL § 12-204; *Johnson*, 152 Md. App. at 622.

We affirm the circuit court's assignment of William's child support obligation.

III.

Contempt of Court

On December 30, 2016, the court ordered William to pay Robin $1,667.00 per month in child support. He paid $793.55 in January and $1,850 in April of 2016. William testified that in February 2016, he and Robin arbitrated the matter of child support, and the arbitrator decided that he should pay $613 per month, plus half of the cost of the children's health insurance, which William paid via earnings withholdings. William testified that he earned $50,000 in October 2016 because of a large commission, and that he used the funds

to repay credit card debt rather than his child support arrearage. He also testified about his income, generally, and supplied the court with his W-2s. The W-2s show that William made $52,671 in 2014; $52,677 in 2015; and $91,921 in 2016. With that information, the circuit court concluded that William could have paid the child support he owed from the date of the December 30 order to the date of May 3 hearing. On the arrearage, the judge stated

> The [c]ourt is going to find that [William] has the ability to pay those arrears; that in the past when he got a big commission, he chose to spend none of it on his child support. That's how some of those arrears accumulated. I find that maybe he doesn't have the ability to pay them right at this very instant, but in his business that's the way money sometimes comes in.

The court concluded, nevertheless, that William had the ability to pay a purge provision because William had no expenses "[b]eyond buying groceries," and he had "funds available through his mother because he seems to get them whenever he needs them or whenever he wants them" and because William could "work a little harder and bring in one of those big commissions." Accordingly, the court found William in contempt of court for failure to pay child support. The judge established that William was in arrears in the amount of $18,043.65 and he ordered that William pay the full amount within 10 days from the date of entry of the order to purge the contempt. Any amount remaining unpaid after ten days would be reduced to a judgment in favor of Robin, with interest.

On appeal, William avers the court's contempt order was in error because there was no evidence before the circuit court that established his present ability to pay the arrears ordered and to purge the contempt. Further, relying on *Elzey v. Elzey*, 291 Md. 369 (1981), and *Lynch v. Lynch*, 342 Md. 509 (1996), William argues that the purpose of civil contempt

orders is coercion, and "if the responsible party does not have the money, or any means of obtaining it, payment cannot be coerced."

Robin counters that the burden is on the contemnor to show an inability to pay a purge, and nothing in the record suggests that William is unable to pay. She explains that the cases on which William relies are inapposite because they deal with contemnors who were incarcerated despite their present ability to comply with a court's purge provision. Because the court did not incarcerate William, she argues that the court was not required to ensure William's present ability to meet the purge.

The decision to hold a party in contempt is vested in the trial court. *Marquis v. Marquis*, 175 Md. App. 734, 746 (2007); *Droney v. Droney*, 102 Md. App. 672, 683-84 (1995). We review a trial court's decision to hold a party in contempt because of his or her conduct for an abuse of discretion. *Marquis*, 175 Md. App. at 746; *Droney*, 102 Md. App. at 683-84. We review the findings of fact on which the contempt was imposed for clear error. *Marquis*, 175 Md. App. at 746; *Droney*, 102 Md. App. at 683-84.

Maryland Rule 15-207(e) applies to constructive contempt in civil proceedings associated with failure to pay child support or alimony. A trial court may find a party in contempt "if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing." Md. Rule 15-207(e)(2). Subsection (e)(3) provides, however, that the court may not find a party in contempt if the alleged contemnor can prove by a preponderance of the evidence that

> (A) From the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment, or (B) enforcement by contempt is barred by limitations as to each unpaid spousal or child support payment for which the alleged contemnor does not make the proof set forth in subsection (3) (A) of this section.

Once the court finds a party in contempt for failure to pay spousal or child support, the court must enter its finding in a written order that specifies "(A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged." Md. Rule 15-207(e)(4). "*If the contemnor does not have the present ability to purge the contempt*, the order ***may*** include directions that the contemnor make specified payments on the arrearage at the future times and perform specified acts to enable to contemnor to comply with the direction to make payments." *Id.* (emphasis added).

In *Elzey v. Elzey*, the Court of Appeals held that a party must have the present ability to pay a purge before the court may sanction him or her with incarceration. 291 Md. 369, 374-76 (1981). The petitioner worked as a plumber and made weekly payments until retiring at age 75, at which time he apprized his ex-wife of his inability to continue making weekly support payments, prompting her to file several motions to hold him in contempt. *Id.* at 371. At a hearing for the latter motion, the petitioner testified that he owned nothing but his clothes, he was in poor health, and worked only sporadically for his son. *Id.* at 372-73. The circuit court nevertheless sentenced the petitioner to jail for 120 days unless he

purged himself by paying the entire arrearage, reasoning that "the petitioner's financial inability resulted from his own decision to retire[.]" *Id*. at 373. We affirmed. *Id.* at 373.

The Court of Appeals granted certiorari and reversed, concluding that "the trial court made no finding that the petitioner was, at the time of the hearing, able to work enough to pay his former wife" the weekly payments or the arrearage. *Id.* at 376. "As [the petitioner] was financially unable to comply with this purging provision, the jail sentence was improper[,]" because "[i]n all civil contempt proceedings, any order imposing a penalty upon the defendant must contain a purging provision with which the defendant has the ability to comply." *Id.* at 374; 376. In other words, "[t]he choice must be the defendant's as to whether he can comply." *Id.* at 374 (quotation marks, citation, and parentheses omitted).

In *Lynch v. Lynch*, the Court of Appeals went a step further, ruling not only could a party avoid incarceration if he or she could demonstrate at the hearing an inability to comply with the purge provision, but that the party could also avoid a finding of contempt. 342 Md. 509, 519 (1996). The trial court found the respondent mother $5,680 in arrears in child support payments, held her in contempt, and sentenced her to 20 days' incarceration, which she could purge by paying $500. *Id.* at 516. We affirmed the finding of contempt and reversed the sanction, holding that there was insufficient evidence to prove her ability to comply with the purge. *Id.* at 513-14. The Court of Appeals reversed as to the finding of contempt, holding that because the purpose of civil contempt is compliance, a party could not be found in contempt if he or she had the inability to comply with the support obligation on the day of the hearing. *Id.* at 529-30.

As the Court of Appeals observed in *Arrington v. Department of Human Resources*. 402 Md. 79, 96-97 (2007), backlash from *Lynch* ultimately prompted the adoption of Rule 15-207(e). The Rules Committee created Rule 15-207(e) to solve the problem that "enforcement through civil contempt proceedings [had been] effectively eliminated." *Rawlings v. Rawlings*, 362 Md. 535, 550 (2001) (citing letter of October 31, 1996, from Rules Committee Chair to the Court); *id.* at 96. The *Arrington* Court explained that, after *Lynch*, "[i]mmediate concern was expressed by judicial, prosecutorial, and support enforcement officials" that the case had "changed both the structure of civil contempt proceedings and the viability of that remedy to enforce child and spousal support orders." *Id.* at 95. Under 15-207(e), to avoid a holding of contempt, the alleged contemnor can demonstrate that he or she did not have the ability to pay the purge from the date of the order through the date of the hearing. *Arrington*, 402 Md. at 97. Accordingly, the Court held in the two child support cases before it that the findings of contempt could stand, but that the sanctions must be vacated, given that both records lacked evidence that the petitioners were able to meet their respective purges to avoid incarceration. *Id.* at 107.

In finding William in contempt of court for his failure to pay child support, the proper consideration under Rule 15-207(e)(2) is whether William had the ability to pay "from the effective date of the support order through the date of the contempt hearing" – in this case, December 30, 2016, through May 3, 2017. Consistent with the trial court's finding that William was able to pay his child support obligation during the operative period, William conceded at oral argument before this Court, "[t]here were funds that were available" to William at that time. The circuit court based its finding on the solid factual

predicate of William's own testimony and his W-2s. And, as Robin points out, it was William's burden under 15-207(e)(3) to prove that he "never had the ability to pay more than the amount [he] actually paid." William failed to carry this burden, and we discern no error in the court's finding.

William insists, however, that the court committed an error of law by including in its contempt order a 10-day purge provision without sufficient evidence of his ability to pay the arrearage at the time of court's order. William seems to suggest that, absent sufficient evidence of a contemnor's present ability to pay, the court may not order a contemnor to pay arrearages pursuant to a purge provision. We disagree.

Rule 15-207(e)(4) specifically contemplates that a trial judge may issue a written contempt order even "[i]f the contemnor does not have the present ability to purge the contempt." The rule does permit the court to consider a contemnor's present ability to pay a purge provision as the trial judge exercises his or her discretion to craft a contempt order "direct[ing] that the contemnor make specified payments on the arrearage at future times and perform specific acts to enable the contemnor to comply with the direction to make payments." Md. Rule 15-207(e)(4). We note that William's argument appears to be grounded in his misplaced reliance on cases considering a trial court's authority to *incarcerate* a contemnor despite the contemnor's inability to pay, however the holdings of these cases do not govern the facts of the case before us. When a trial court anticipates incarcerating a contemnor as a sanction for the contemnor's failure to purge his or her contempt, the court must first confirm the contemnor's present ability to pay and set the purge at an amount that "the defendant can immediately meet in order to avoid the

incarceration." *Arrington*, 402 Md. at 103; *see also Rawlings*, 362 Md. at 565 ("[T]he Circuit Court, on this record, erred in setting a purge provision in the amount of $3,367.90, and ordering Petitioner incarcerated, when no evidence was presented to show that Petitioner had the present ability to pay that amount."). This rule exists because civil contempt orders are meant to be coercive, not punitive. *Arrington*, 402 Md. at 403; *see also Lynch*, 342 Md. at 519 (The contemnor "must have the keys to the prison in his or her pocket."). In this case, by contrast, the trial court's order included no such punitive sanction such as incarceration if William failed to meet his purge provision.

We conclude that William has failed to demonstrate that the 10-day purge provision was an abuse of the trial court's discretion, let alone an error of law. *See Arrington*, 402 Md. at 102 ("[T]he burden is on the contemnor to establish his or her inability to meet the purge."). The trial judge recognized that "maybe [William] doesn't have the ability to pay them right at this very instant[,]" but determined that a 10-day purge provision was appropriate given his lack of expenses, the fluctuating nature of income inherent in William's career, and the history of his mother making funds available to him when needed. In so concluding, the court had before it William's W-2s and evidence that, just a few months prior, he earned a commission of $50,000 from a single sale. William's only evidence to the contrary was the amount of money in his checking account on the date of the court's May 3 hearing. Given the discretion we afford trial courts in rendering contempt orders, we discern no abuse of discretion in this case.

IV.

Attorney's Fees

William was ordered by the circuit court to pay $10,000 in attorney's fees to Robin. He argues that the court abused its discretion by failing to consider the financial statuses of the parties, as is required under FL § 12-203. He asserts that "there was simply no evidence, documentation, or testimony" speaking to his ability to pay the award. William also argues that he prevailed in the litigation when the court found that there had been a material change in circumstances, and that his success proves that his pleadings were substantially justified. Because his pleadings were substantially justified under Section 12-203, he argues that the court abused its discretion in awarding attorney's fees.

Robin challenges the notion that William is entitled to attorney's fees, because the key material change in circumstance established at hearing was that William failed to abide by the July 29 Order. She also argues that William's expanded right to visitation does not represent success at trial, because the court found that William's visitation would have likely been expanded under the July 29 Order. Lastly, she argues that the court properly considered the financial statuses and needs of the parties, noting that the court saw evidence of the parties' incomes, W-2 forms, tax returns, pay statements, and liabilities.

We review an award of attorney's fees in domestic relations case for an abuse of discretion. *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002). "An award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citations omitted). Additionally, "[t]he court's exercise of its discretion when awarding attorney's

fees must be based upon the statutory criteria and the facts of the case." *Broseus v. Broseus*, 82 Md. App. 183, 199 (1990) (citing *Jackson v. Jackson*, 272 Md. 107, 112 (1974)) (italics omitted).

Section 12-103 of the Family Law Article governs when attorney's fees may be awarded in child support and custody cases:

> (a) *In general*. 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) *Required considerations.* 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) *Absence of substantial justification.* 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.

FL § 12-103.

Substantial justification is "measured by the issues presented and the merits of the case[.]" *Davis v. Petito*, 425 Md. 191, 202 (2012). Prevailing at trial is sufficient, but not necessary, for a finding of substantial justification. *Id.* at 203. Moreover, under FL § 12-103(b), "substantial justification is but one consideration in the triad, the others being financial status and needs, to support fee shifting." *Id.* at 201. To survive appellate review,

an award of attorney's fees under FL § 12-103 should be supported by adequate testimony or records, the work should have been reasonably necessary, the fee should have been reasonable for the work that was done, and the trial court should have assessed what could reasonably be afforded by each party. *Lieberman v. Lieberman*, 81 Md. App. 575, 601-02 (1990).

In *Petito*, a mother sought sole custody of her daughter, alleging the father sexually abused the child. 425 Md. at 195. The circuit court found the allegations largely unfounded, and ultimately ordered the mother to pay the defendant, the father, $30,773.54 in attorney's fees and costs. *Id.* at 193. The court concluded that the mother was in a better financial position than the father, due to her having received pro bono representation at trial, whereas father had accumulated over $70,000 in attorney's fees. *Id.* at 94. The court also found the father to be "more" substantially justified than the mother in defending the suit. This Court affirmed, holding that the father's "justification in defending himself in the proceeding was more substantial than [the mother's] justification in bringing it, and therefore justified his incurrence of more attorney's fees than [the mother.]" *Id.* at 199.

The Court of Appeals granted certiorari on the question of attorney's fees and reversed. *Id.* at 194-95. The Court held that "the consideration that one party was represented on a pro bono basis, in order to award attorney's fees to the other party who had retained counsel was erroneous under [FL §] 12-103[.]" *Id.* at 195. The Court reasoned that "substantial justification for each party's position . . . is measured by the issues presented and the merits of the case, not the amount of attorney's fees charged." *Id*. at 202. The Court clarified that substantial justification, under FL §§ 12-103(b) and 12-103(c), is

a merit-based assessment pursuant to which the judge "must assess whether each party's position was reasonable." *Id.* at 204. A judge, after finding substantial justification, then must proceed to review the reasonableness of attorney's fees, and the financial status and needs of each party before ordering an award under Section 12-103(b)." *Id.* We remanded to the trial court, noting that if the court determined that the mother lacked substantial justification, then it should proceed to consider the reasonableness of the father's attorney's fees. *Id.* at 206. If both parties were determined to be substantially justified, we instructed that the trial court should then consider the reasonableness of the fees, and assess each party's financial status and needs. *Id.*

We upheld an award of attorney's fees in *Broseus v. Broseus*, after a master found that the appellee mother was substantially justified in a divorce proceeding, and after a careful consideration of the parties' financial needs and statuses. 82 Md. App. at 200-01. The appellant father challenged the chancellor's award of attorney's fees to the mother, arguing that his financial condition was inferior to the mother's, although he had obtained a doctorate and worked for the National Institutes of Health and the mother had stayed home to care for their child, obtaining a part-time job only after separating. *Id.* at 189; 200. Judge Bell, writing for the Court, quoted from the chancellor's "most meticulous" attention "considering each factor" when rendering its award of indefinite alimony, noting that the mother could not be expected to obtain a higher-paying job without detracting from her ability to care for the child, and that at the time of the hearing, the mother was living in "a poverty-level standard, and she [was] entitled to better." *Id.* at 195-96. (internal quotations omitted).

The mother in *Broseus* was substantially justified, given that the father closed all accounts, including a joint savings account when he left the family home, prompting Judge Bell to conclude "[h]e had no cause to complain. She did." *Id.* at 201 n. 9. This led the mother to borrow money from family and friends to cover her legal fees, when the father used marital funds to help pay for his. *Id.* at 201.

In the instant case, Judge Dugan similarly rendered very meticulous findings regarding substantial justification and the financial needs and statuses of the parties when he rendered his oral opinion. He stated, in relevant part:

> I find that there was a lack of substantial justification on the part of [William] for bringing this action seeking to change custody to 50-50 because he hadn't complied with the Court order that he signed, that he agreed to, with the advice of counsel, and after an evaluation, which was attached to the order, which recommended substantially expanded visitation if he did just a few things that they asked him to do to address problems that were in the best interest of the children that he fix.
>
> He didn't do that. He refused to do and abide by a carefully crafted agreement that he signed and I don't believe he intended to abide by it when he signed it. Therefore, I think I have to impose attorney's fees with respect to that.
>
> Also with request that []he had to file an action asking that [Robin] be held in contempt of Court for failing to keep him informed. That absolutely, positively, was frivolous. She was forced to get a number of e-mails and collect them and pull them out. He went on school field trips with the kids. He went to back-to-school night. He went out of his way to talk about all the things he did. He had all the information he needed with respect to those children. He couldn't even articulate what he didn't have. He just said, "Well, I think there were some times when she didn't tell me." That's preposterous. And counsel had to produce all of that.
>
> The only thing he could remember was she didn't tell him specifically about the results of the physical. She told him both boys were in good health. I don't' know that it was required of her—first she told him it was a physical. That's shocking. Most of the time they don't even tell them that. And the fact that the boys are both in good health, I don't know that he needed to know the blood pressure and the blood tests and everything else. But she told him, "Call the doctor if you want to have any other questions."

> There's absolutely no substantial justification for asking that she be held in contempt of Court for that.
>
> * * *
>
> In addition to which, they had to bring an action for contempt to get him to pay his child support, which he still hasn't paid[,] at a time when he had plenty of money and he refused to pay. . . . I find, for all of these reasons, that he should pay attorney's fees in the amount of $10,000.

We note that Robin requested twice as much in attorney's fees than the court ultimately ordered William to pay. To the extent that the court imposed attorney's fees in this case, we hold that the court properly considered the merits of the action in finding a lack of substantial justification.

Indeed, the award of attorney's fees in the instant case is grounded in extensive factual predicate. In regard to the financial status and needs of the parties, the judge noted that he had already considered their financial statuses and stated, "I'm well aware of that and I have already talked about it." Indeed, the court's oral opinion contains a surfeit of discussions on the financial circumstances of the parties. The judge considered the financial needs and statuses of the parties during his *Taylor* and *Sanders* best-interests analysis. *See supra* Section I. The parties' finances were also explored in granular detail when dispensing with William's child support claim, *see supra* Section II, and his challenge to the finding of contempt, *see supra* Section III.

Because the circuit court found that William lacked substantial justification in bringing the suit and considered the financial statuses and needs of the parties, we affirm the lower court's award of attorney's fees.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.