Circuit Court for Frederick County
Case No. C-10-FM-21-000059

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1862

September Term, 2022

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AMY O'CONNOR

v.

DUANE BROWNING

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Beachley,
Zic,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: October 19, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant Amy O'Connor[1] and appellee Duane Browning were granted a Judgment of Absolute Divorce on December 16, 2022, in the Circuit Court for Frederick County. Relevant to this appeal, the court ordered Mr. Browning to pay $545 per month in child support for the parties' eldest child, ordered Ms. O'Connor to pay $1,970 per month in child support for the parties' younger children, and ordered Mr. Browning to pay 25% and Ms. O'Connor to pay 75% of the cost of a custody evaluation. Ms. O'Connor noted this timely appeal and presents the following two questions for our review, which we have slightly rephrased:[2]

1. Did the trial court err as a matter of law and/or abuse its discretion in calculating child support?

2. Did the trial court err as a matter of law and/or abuse its discretion in requiring Ms. O'Connor to pay 75% of the custody evaluator's fees?

We answer the first question in the negative, and the second question in the affirmative. We shall therefore affirm the trial court's child support award, but vacate the court's allocation of the custody evaluator's fees, and remand on that issue.

## FACTUAL AND PROCEDURAL BACKGROUND

Ms. O'Connor and Mr. Browning were married on April 7, 2001. The parties had four children as a product of their marriage. During the course of their marriage, Mr.

[1] As part of its Judgment of Absolute Divorce, the court restored Ms. O'Connor to her former name, Amy Melissa O'Connor. We shall therefore refer to appellant as "Ms. O'Connor" in this opinion.

[2] Ms. O'Connor also presented a third question: "Did the [t]rial [c]ourt abuse its discretion when it based child support and costs on clearly erroneous factual conclusions?" We shall treat this question as subsumed within the two questions set forth above.

Browning derived his income from two businesses: Dun-Rite Plumbing and Heating, and Alliance Property Management, a business engaged in both long-term and short-term rentals of residential properties owned by Mr. Browning. In October 2020, the parties bought a large property containing the marital home and several other buildings, including a pool house. The parties separated in January 2021.

Through mediation, the parties entered into a separation agreement. The agreement provided that the parties would have physical custody of the children on alternating weeks. The separation agreement set forth a "nesting arrangement" whereby one party would live in the marital home and the other would live in the pool house. The parties agreed to alternate this living arrangement each week to enable the children to continue to live in the marital home. The agreement further provided that Mr. Browning would provide health insurance for the children and pay their private school tuition. Finally, the agreement contained a section titled "Maintenance and Child Support," which required Mr. Browning to pay Ms. O'Connor $5,000 per month in alimony. The amount of alimony was to be reduced each time one of the children reached 18 years of age, with alimony terminating when the youngest child reached age 18. This section of the agreement further stated: "In consideration of the nesting arrangement and Father's agreement with regard to the payment of expenses, no direct child support shall be paid by either party."

Within two months of signing the separation agreement, Ms. O'Connor moved into

her own residence. Although the parties continued to exchange the children each week,[3] each party subsequently filed amended pleadings requesting sole physical custody of the children.

On June 29, 2021, Ms. O'Connor requested a custody evaluation. In that motion, Ms. O'Connor represented that she had "made arrangements to borrow funds to pay for the evaluation" and asked that "the allocation of fees associated [with the] custody evaluation be reserved." Mr. Browning opposed a custody evaluation, but requested that, in the event the court decided to order a custody evaluation, that Ms. O'Connor be required to "pay all costs associated with the evaluation." The court granted Ms. O'Connor's motion on July 20, 2021, ordering Ms. O'Connor to pay the initial cost, but expressly reserving jurisdiction to apportion costs regardless of whether the custody evaluator ultimately testified at trial.

A four-day trial commenced on November 1, 2022. On the last day of trial, the parties reached an agreement as to custody of the children whereby they agreed to continue the alternating week custodial arrangement for the three youngest children, but permit the oldest child to live with Ms. O'Connor. This left child support, attorney's fees, and costs as the only remaining issues to be resolved. The custody evaluator had not yet been called to testify when the parties reached their child custody agreement.

[3] In May 2021, the eldest child, who was 16 years old at the time, decided she did not want to visit with Mr. Browning. Ms. O'Connor testified that she did not encourage the child to visit Mr. Browning after the child announced her decision.

Edmond Gregory, a certified public accountant who prepared Mr. Browning's tax returns for 2020 and 2021, testified as an expert witness concerning Mr. Browning's income. The documents Mr. Gregory reviewed included various 1099 forms, as well as a summary of the income and expenses and the QuickBooks files for Mr. Browning's businesses. On cross examination, Mr. Gregory testified, "We look at supporting documents for almost every item on the tax return." In preparing the tax returns, if Mr. Gregory encountered "items that we don't understand, or things that we feel are missing or that we need additional information on," he explained that he would contact Mr. Browning for the additional information before completing the tax returns. Mr. Gregory testified that if he had any reason to believe that a client had additional income that was not being reported, he would not sign off on the tax return. Mr. Gregory provided specific testimony regarding his process for preparing Mr. Browning's tax returns:

> To determine his revenue, we would certainly look at his accounting records, which are maintained in QuickBooks.
>
> We might have questions about whether or not he reconciled his bank accounts, and he would tell us yes, he did, or didn't. We'd make sure that they were accurate and complete, and that all of the receipts were recorded in revenue either for Dun-Rite Plumbing, the unincorporated business, but he has other businesses.
>
> Well, and one criticism I would have with Mr. Browning is sometimes he comingles deposits in one bank account or another. That doesn't mean they're not accurately accounted for in the end; it's just that sometimes he makes the deposit in the most convenient way that he can.
>
> But we found that he accurately allocated his receipts between his various businesses properly, between rental activities, the Airbnb activity, which is actually an unincorporated business rather than a Schedule E rental, and Dun-Rite Plumbing and Heating.

. . .

> . . . We may have had questions. He may have presented additional details to us until we were satisfied with the accuracy of the information he provided to us. But it is not within our scope of service to review all of his credit card statements or to necessarily make an inquiry about every credit card expenditure he might have.

Mr. Browning testified that his tax returns were an accurate reflection of his income and expenses. He further testified that he has no income other than what was reported on his tax returns. According to Mr. Browning, when he signed the separation agreement, he knew he was "going to be running deficits," and planned to "sell off a couple assets" to pay the agreed alimony. He stated: "I've liquidated a lot of assets to maintain my financial ability," specifically mentioning that he sold some of his rental properties.

Numerous documents were admitted into evidence relating to Mr. Browning's income, including: tax returns for 2019 through 2021; bank statements for Mr. Browning's business and personal accounts for 2021 and part of 2022; and credit card statements for two different accounts from 2021. We shall discuss these documents in more detail as necessary to our analysis.

In its decision regarding the custody evaluator's fees, the court placed great emphasis on a video recording that was entered into evidence. According to both parties' testimony, the video depicts the events immediately after the parties, the children, Ms. O'Connor's sister and niece, and the parties' parents had dinner at a restaurant to celebrate one of the children's first communion. Under the parties' separation agreement, the children would normally have stayed with Mr. Browning on the day of the first

communion, but Mr. Browning allowed Ms. O'Connor to prepare the children for the ceremony, with the understanding that the children would return to him afterward. The parties' eldest child recorded the video, which shows the parties, the children, and Ms. O'Connor's parents in the parking lot of the restaurant. A heated discussion occurred while the two youngest children were resisting being placed in Mr. Browning's car. Although the children were supposed to stay with Mr. Browning that night, Ms. O'Connor's father told Mr. Browning, "If you knew what was right for the children, you would let them go with their mother right now." Ultimately, Mr. Browning agreed to allow the children to stay with Ms. O'Connor that night.

The court ordered Mr. Browning to pay $545 per month in child support for the eldest child living with her mother, and ordered Ms. O'Connor to pay $1,970 per month in child support for the three younger children. The court also ordered Mr. Browning to pay 25% and Ms. O'Connor to pay 75% of the custody evaluator's fees.

Ms. O'Connor noted this timely appeal.

## DISCUSSION

### I. Child Support

Ms. O'Connor argues that the court erred in its calculation of Mr. Browning's income, and thereby erred in its child support award. She asserts that, because the statements for Mr. Browning's personal checking account (ending in 4767) showed an average of more than $20,000 being deposited per month, the court should have found that Mr. Browning's monthly income was over $20,000. In her view, Mr. Browning's tax

returns are not an accurate measure of his income because, if they were accurate, Mr. Browning's "gross monthly income totaled less than just three of his fixed monthly expenses (alimony, mortgage and tuition) and . . . he ran a deficit of approximately $50,000 a year" without accruing any significant debt.

Mr. Browning responds that an analysis of the deposits into his personal checking account is not an appropriate methodology to calculate his income for child support purposes because a large number of those deposits represented proceeds from sales of rental properties. He also indicated that he used money in his personal account to pay for certain business expenses. He argues that his tax returns and the testimony of his accountant fully account for the liquidation of assets and business expenses, and are therefore the most accurate sources for determining his income.

The trial court provided the following analysis regarding its child support calculation:

> [F]irst let me say, yes, I went through all of the exhibits, the bank statements for the real estate company, the personal bank statements, the plumbing and heating . . . business, as well as the credit card statements, trying to decipher the income here, and it all sounded like a guess because I can't tell what money is coming from where for what.
>
> There are expenses for things like Home Depot that I don't know if they are personal expenses, or are they businesses [sic] expenses. I don't know if getting gas at High's . . . is for a truck that relates to the business, or if it's a personal expense.
>
> Looking through their statements, I cannot come to the conclusion that [Ms. Browning's counsel] came to, the number that [Ms. Browning's counsel] came to. I think that was $23,000 a month for income that she suggested. I can't, I can't find that. . . . [T]hen I went to the . . . financial statements. I went to the tax returns. We have, I believe it was three sets of

tax returns. 2021 was 110,486 adjusted gross income. If I, which would include both the . . . real estate income, and the business income. If I divide that by 12 I come up with 9,207.17, which is right in line with the number [Mr. Browning] had on his financial statement.

I have 2020 and 2019. 2020, I believe was $56,087 of adjusted gross income, and 2019 was 87,615, I believe, and those were the two returns prepared by, everyone acknowledges, prepared by [Ms. O'Connor], and also included the real estate and the . . . plumbing and heating business.

So, I don't think I have any choice here, really, from the evidence presented, without doing guess work, which I am not allowed to do, but to take -- I didn't average the three years because I think that COVID year was an off, but to attribute 110,486, I feel like that's more representative of what the income actually is. So, that gets me to his income being 9,207.17. It's the only evidence I had of his income. After, may have $1,000,000 or a million two of income, but then we have to account for expenses, which are accounted for on the tax returns. So, it's truly the best that I could do with what was given.

. . .

I think everyone agreed there wasn't any dispute that the St. John's tuition payment is $1287.25 per month, and that his total health care expense for the children, health insurance expense for all four children was $325 per month.

. . .

Then we have the child support, and the child support is really, I ran this so many different ways. So, for [the eldest child] . . . , from July 1, 2022 to date, until she turns 18 and graduates from high school, which I believe will be this June 2023. So, it's $545.

I am not going to award retroactive child support in this regard. I recognize that Mr. Browning has been paying considerable expenses that are outlined on here for all of the children, and [given the terms of the separation agreement,] . . . I just don't find that it, a retroactive child support award is appropriate given that.

Now, that looks to [Ms. O'Connor's] benefit on this end because when I run the child support guidelines for -- and by the way, that 545 includes $81 for health insurance expense. I took the total divided by four children and

> apportioned that accordingly. So, just to be clear, I have mother's income at $4594 plus 5000 in alimony to get her to $9594. . . .
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> . . .
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> . . . Then we have father's income at 9,207. He loses 5,000 for alimony awarded in this case to take him to 4,207. That, then he pays, and everyone agreed on this, . . . $1,287 for the children's education, that was agreed by the parties, and 243 for health insurance for the three children included on this computation, and therefore, we arrive, and this is a shared 50/50, essentially, 50.1 to mom, 49.9 to dad percentage of each parent.
>
> . . . Under the 2022 it's 1,970. I am not awarding a retroactive fee because it doesn't seem to the [c]ourt that's what anybody ever anticipated under this agreement, and the parties have been sharing expenses to the children during this time period, but the award going forward will be 1,970 under the current guidelines[.]

With regard to a child support award, "[a]s long as the trial court's findings of fact are not clearly erroneous and the ultimate decision is not arbitrary, we will affirm it, even if we may have reached a different result." *Kaplan v. Kaplan*, 248 Md. App. 358, 385 (2020) (quoting *Malin v. Mininberg*, 153 Md. App. 358, 415 (2003)). "Under the clearly erroneous standard, we look at the record in the light most favorable to the prevailing party, and if there is any competent, material evidence to support the circuit court's findings of fact, we cannot hold that those findings are clearly erroneous." *Sieglein v. Schmidt*, 224 Md. App. 222, 252 (2015) (quoting *Fitzzaland v. Zahn*, 218 Md. App. 312, 322 (2014)).

Calculation of child support is based on the "actual income" of the parents. Md. Code (1984, 2019 Repl. Vol., 2022 Supp.), § 12-201(e), (f), (i) of the Family Law Article ("FL"). FL § 12-201(b)(2) provides that "actual income" for self-employed individuals "means gross receipts minus ordinary and necessary expenses required to produce income." Although the court may consider capital gains as "actual income," FL § 12-

201(b)(4)(ii), money received as a result of the liquidation of assets is not included in the statutory definition. Documentation of actual income may include "pay stubs, employer statements . . . , or receipts and expenses if self-employed, and copies of each parent's 3 most recent federal tax returns."[4] FL § 12-203(b)(2)(i).

Although Ms. O'Connor's theory of calculating actual income based solely on deposits to a parent's account could be viable in a proper case, that methodology is not persuasive in light of the evidence presented in this case. Mr. Browning testified that after the parties separated, he sold multiple properties he had been using as rentals and used those funds to pay his personal expenses. Mr. Browning's expert accountant, Mr. Gregory, confirmed that Mr. Browning sold a house in 2021, resulting in a gain of $137,000, and our review of Mr. Browning's bank statements reveals that a deposit of $172,473.73 from Metropolitan Title, LLC on November 8, 2021, to an account ending in 3151 is clearly attributable to the sale of real estate. Moreover, the records reflect numerous other large deposits as well as frequent transfers of money between all of Mr. Browning's accounts. Other than the Metropolitan Title deposit, the bank statements do not indicate the source of any of the large deposits, labelling them as either "Deposit" or "Remote Deposit." No other evidence was provided to shed light on the source of these large deposits, but at least some of the funds likely came from property sales. Additionally, there were a multitude

[4] FL § 12-203(b)(2)(ii) states that when a parent is self-employed, "the court may require that parent to provide copies of federal tax returns for the 5 most recent years." Ms. O'Connor does not argue that the court erred by failing to consider additional tax returns.

of smaller unlabeled deposits and transfers between all of the accounts nearly every month.

As previously noted, the funds received from real estate sales, other than capital gains,[5] cannot be included in the calculation of Mr. Browning's "actual income" for child support purposes. More importantly, the record is clear that Mr. Browning's personal checking account ending in 4767 received substantial deposits from his other three bank accounts that cannot be identified as "actual income" as defined by the statute. Most deposits into Mr. Browning's accounts are described on the bank statements as merely "Deposit" or "Remote Deposit," and there was no testimony or other evidence concerning the source of the deposits. In light of the hundreds of thousands of dollars transferred between four separate bank accounts, including Mr. Browning's personal checking account, one cannot reasonably conclude that all of the deposits into the personal checking account constituted "actual income" as contemplated by the statute. Moreover, to the extent that deposits represented self-employment business revenue, the court would have had to determine which expenses from Mr. Browning's personal checking account and credit cards were attributable to his businesses and subtract that amount from the deposits. *See* FL § 12-201(b)(2). This would be a formidable, if not impossible, task because the parties did not provide sufficient information to determine which expenses are personal and which are business-related. We therefore agree with the trial court that the evidence is insufficient to support Ms. O'Connor's contention that Mr. Browning's actual income can

[5] The only evidence regarding the amount of capital gains was contained in Mr. Browning's 2021 tax return.

be determined by merely adding all of the deposits to Mr. Browning's personal checking account.

Our conclusion that the court did not err is bolstered by the expert testimony. Mr. Gregory testified that he reviewed Mr. Browning's accounts and verified the business expenses and real property liquidation proceeds in preparing Mr. Browning's tax returns in accordance with standard accounting practices. Mr. Browning testified that he, his secretary, and his accountant engage in multiple levels of review of his income and expenses before submitting his tax returns. The court did not err in relying on the income reported on Mr. Browning's financial statement and tax returns, especially considering that the income reported in those documents was supported by the testimony of an expert accountant.[6] *Cf. Walker v. Grow*, 170 Md. App. 255, 276–77 (2006) ("Because the evidence included Grow's financial statement and his tax returns, it was certainly appropriate for the court to consider [the testimony of a tax preparer testifying as an expert witness] on the issue in verifying Grow's income.").

Simply put, the court was correct in its assessment that the evidentiary record was insufficient for the court to determine Mr. Browning's income under the methodology proffered by Ms. O'Connor. Our review of the record reveals that the court relied on "competent, material evidence to support [its] findings of fact," *i.e.,* Mr. Browning's tax

[6] We note that, prior to 2021, Ms. O'Connor prepared the parties' joint tax returns. Thus, Ms. O'Connor had at least some understanding of Mr. Browning's sources of income and how he maintained his accounts.

returns and financial statement, and the supporting testimony related to those documents. *See Sieglein*, 224 Md. App. at 252 (quoting *Fitzzaland*, 218 Md. App. at 322). Under these circumstances, the court's calculation of Mr. Browning's "actual income" for child support purposes is not clearly erroneous. We therefore affirm the court's child support award.

II. Custody Evaluator Fees

Ms. O'Connor next argues that the court erred in assessing only 25% of the cost of the custody evaluator to Mr. Browning. Specifically, Ms. O'Connor argues that the court did not consider the mandatory FL § 12-103 factors before making its allocation of costs. These factors are: "(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." FL § 12-103(b).

Mr. Browning responds that the court adequately considered all of the FL § 12-103 factors. He avers that the court's analysis of the parties' incomes for its child support determination was sufficient to satisfy the first two factors, and that the court's discussion of the video satisfied the third factor.[7]

In addition to the passages quoted in the above discussion of child support, the court provided the following analysis relevant to the issue of costs:

> Now, also I had [Ms. O'Connor's] income. I think, you know, we recognize she's working part-time, that she is capable of, and that's voluntary. There is no health or mental infirmity that prevents her from

[7] Because both parties agree that the court was required to make an assessment under FL § 12-103, we shall confine our analysis to that statute. We therefore express no opinion as to the relevance of Rule 9-205.3.

working full-time. Quite frankly, she's really smart, there is no doubt in my mind by looking at those tax returns, and that she can earn $22. The job market, everyone knows, is superior right now for employees, unless you're in the construction industry, or mortgages, but for bookkeeping, that type of tax preparation, certainly the market is quite strong, and we know that she earns $22 an hour. The [c]ourt finds that that's a reasonable sum for someone with her level of experience and education.

So, if she were to work 40 hours per week at 22 an hour, that would be $45,760 a year. Divide that by 12 months, we get to 3813.33.

We also have -- and I had two different numbers for the mortgage interest that she receives, or the interest from the farm. [Mr. Browning's counsel], I think had said like 830 or something, and [Ms. O'Connor's counsel], on the financial statement, showed 781. I'm going to take the 781 because that's the best I could do. I couldn't find a note or anything that told me what the interest was, the rate. So, I couldn't separately calculate it. So, 781 additional per month income for that. She also receives $5,000 a month of alimony in this case.

. . .

So, as to the request for attorney's fees, I'll start there, it's easier, I find both parties were appropriate in pursuing this case. I think probably the PL hearing was unfortunately needed, but, because it was clear to the [c]ourt by reading that agreement, that Judge Dwyer's interpretation was the accurate interpretation of that. As to the contribution -- so, based on that I'm going to deny both parties' requests for attorney's fees.

As to the contribution requests for the custody evaluation, I in looking at the agreement that the parties have reached, and what it took to get here today, particularly, you know, I have to say that the behavior on that video was so horrific. It was not mom who did that, although she was a participant to a certain degree, but to blatantly undermine, in front of the children, their father, his time with the children, his role with the children, that was so horrific, and I give dad a lot of credit for maintaining his composure in that moment.

I can't say, strongly enough, how offensive that behavior was, and how hard that is on children to have their parent undermined like that, after being so gracious about you can, it's my time, but, sure. This is a special religious event for you and your family. I will bring her to you. You can dress her up, and fix her up, and have this moment with her, that it's so

> special, and then let, invite your family, and my family, and we will all go to dinner, and I will pay for it. I know in the end he didn't pay for all of it,[8] but, I don't, that was a really bad move, I have to say, and I know we're not here on custody, but I have to say that because that should never happen again, ever. And I also am concerned about what has happened with [the eldest child's] relationship with her father. I don't know where that comes from, but it doesn't sound like it is strictly his doing.
>
> And so, therefore, I find that the custody evaluation was needed, most certainly, but I don't find that a 50/50 split of that is appropriate. It has been fully satisfied and paid for. I have no evidence of that money having to be repaid. So, I think a 75/25 split on that is appropriate. Mr. Browning will be responsible for 25 percent of the total custody evaluation fees. [Ms. O'Connor] will be responsible for 75 percent of that.

As mentioned above, the parties agree that the statute requires the court to consider three factors in determining whether to award costs: "(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." FL § 12-103(b). "So long as the parties were substantially justified in bringing, maintaining, or defending the proceeding, the trial court has significant discretion in applying the factors." *Ruiz v. Kinoshita*, 239 Md. App. 395, 438 (2018) (citing *Malin*, 153 Md. App. at 435–36). "Its failure to consider those factors, however, is legal error." *Id.* (citing *Petrini v. Petrini*, 336 Md. 453, 468 (1994)). The court does not need to "recite any 'magical' words so long as its opinion, however phrased, does that which the statute requires." *Horsley v. Radisi*, 132 Md. App. 1, 31 (2000) (quoting *Beck v. Beck*, 112 Md. App. 197, 212 (1996)).

The court here made adequate findings relating to the third factor, substantial

[8] Mr. Browning testified that he had offered to pay for everyone's meals, but Ms. O'Connor's father insisted on paying for a portion of the meals.

justification for bringing, maintaining, or defending the proceeding. The court considered "the agreement that the parties have reached, and what it took to get here today," specifically focusing on Ms. O'Connor's behavior seen in the video. The court ultimately found that the custody evaluation was "most certainly" needed and that "both parties were appropriate in pursuing this case." Although the court did not use the phrase "substantial justification," the court need not "recite any 'magical' words." *See Horsley*, 132 Md. App. at 31. In our view, the court's discussion sufficiently demonstrated that it considered this statutory factor.

However, the court's application of the first two FL § 12-103 factors—the parties' financial status and needs—was lacking. Although the court stated that it looked at the parties' bank statements, tax returns, and financial statements, the court only made findings relating to the parties' incomes. There was no discussion of the parties' relative assets or their needs, aside from a brief comment that Mr. Browning is paying for health insurance and tuition for the children. The "financial status and needs of each of the parties must be balanced in order to determine ability to pay the award to the other; a comparison of incomes is not enough." *Davis v. Petito*, 425 Md. 191, 205 (2012). This requirement is particularly relevant here where Ms. O'Connor alleges a substantial disparity in the parties' net worth. Because the court made insufficient findings concerning the first two FL § 12-103 factors, we must vacate the circuit court's allocation of the custody evaluator fees and remand for further consideration. On remand, the court may, in its discretion, receive

additional evidence relevant to this issue. *See Guillaume v. Guillaume*, 243 Md. App. 6, 28 (2019).

## CONCLUSION

For the reasons stated, we affirm the trial court's child support award, but vacate the allocation of the custody evaluator's fees and remand that issue for further consideration in accordance with this opinion.

**JUDGMENT ALLOCATING CUSTODY EVALUATOR'S FEES IS VACATED AND CASE REMANDED ON THAT ISSUE. JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY IS OTHERWISE AFFIRMED. COSTS TO BE EQUALLY DIVIDED BETWEEN THE PARTIES.**