UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1487

September Term, 2015

DAVID BRANDEEN

v.

JENNIFER BRANDEEN

Berger,
Nazarian,
Alves, Krystal Q.
(Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: March 21, 2016

On June 28, 2013, appellee, Jennifer Brandeen, ("Mother"), was awarded an absolute divorce from appellant, David Brandeen, ("Father") in the Circuit Court for Anne Arundel County. The circuit court amended its judgment on November 6, 2013. Mother later appealed the circuit court's decision to this Court. On appeal, we affirmed the circuit court's judgment except with regard to a question relating to the circuit court's marital property award. Father, sought -- and was granted -- an *en banc* hearing before the circuit court. After the *en banc* proceeding, the circuit court's judgment was affirmed.

Beginning on February 24, 2014, and extending through March of 2015, the parties filed a litany of motions to either enforce or modify the circuit court's judgment in the divorce decree. Namely, Father filed a Petition for Modification of Custody and Additional Relief, an Expedited Motion for Reduction in Child Support, and three Petitions for Contempt. In May of 2014, Mother filed a Petition for Contempt for Father's failure to pay child support.

Over the course of July and early August of 2015, the circuit court held a four-day hearing on the parties' outstanding petitions for modification and contempt. On August 14, 2015, the court denied Father's motion to modify custody, except with respect to an order regarding the exchange of the minor children. The court denied Father's motion to modify his child support obligation. Further, the court found Father in contempt for failure to pay child support. Additionally, the court found Mother in contempt for a missed visitation following the *en banc* hearing in September of 2014. Finally, the court awarded Mother $20,000 in attorney's fees.

On appeal, Father challenges the circuit court's denial of his motion to modify custody, the circuit court's denial of his motion to modify child support, the circuit court's decisions finding him in contempt and failing to hold Mother in contempt, and the circuit court's grant of attorney's fees to Mother. Specifically, Father presents four questions for our review,[1] which we rephrase as follows:

1. Whether the circuit court erred in modifying its child custody order.

2. Whether the circuit court erred in denying Father's motion to modify its child support order.

[1] The issues, as presented by Father, are:

I. Did the trial court err or abuse its discretion when it determined there had been no material change relating to legal or physical custody, yet the trial court modified the physical custody arrangement?

II. Did the trial court err or abuse its discretion when it determined there had been no material change relating to child support, and determined that Appellant had voluntarily impoverished himself?

III. Did the trial court err and abuse its discretion when it failed to award Appellant counsel fees, but awarded Appellee counsel fees and entered an immediate judgment against Appellant and in favor of Appellee?

IV. Did the trial court err or abuse its discretion when it found Appellant in contempt of court, and as a purge provision, entered an order of six months incarceration, suspended upon Appellant's satisfaction of assessed child support arrears in the amount of $120,570.54?

3. Whether this Court has jurisdiction to review the trial court's adjudication of Father's petition for contempt.

4. Whether the circuit court erred in finding Father in contempt for his failure to pay child support.

5. Whether the circuit court erred in awarding Mother attorney's fees.

For the reasons set forth below, we shall affirm the judgments of the Circuit Court for Anne Arundel County.

FACTUAL AND PROCEDURAL BACKGROUND

I. Marriage and the Initial Divorce Proceedings

Mother and Father were married on September 14, 1996, when she was 24 and he was 31. Before the marriage, Father earned his undergraduate degree from the United States Naval Academy. He earned an MBA early in the marriage, and began working as a financial consultant. In 2002, Father accepted a position at Merrill Lynch, where he, along with his twin brother, Douglas, operated the "Brandeen Group." Critically, the Brandeen Group was financed by a $924,000 loan. At the time of the initial divorce, Father was earning approximately $500,000 annually in salary and bonuses.

When the parties married, Mother, who earned her undergraduate degree from Syracuse University, was working for Kaplan Education. In 2000, she received her MBA from Georgetown University, and began working for Deutsche Bank as an investment banker earning approximately $300,000 annually. Together, the couple had three children that were born in years 2004, 2006, and 2009, respectively. Due in large part to the couple's

arrangement with respect to caring for their children, Mother made a number of career changes which resulted in her earning a substantially decreased income. At the time of the initial divorce, Mother was earning $60,000 annually as a consultant for Sylvan Learning, Inc.

In February of 2012, Mother filed a complaint for absolute divorce that arose from Father's alleged cocaine use and his patronage of escort services. After the conclusion of the divorce proceedings, the trial court granted Mother primary physical and sole legal custody of their children. Father was awarded visitation with the children: during the school year on alternate weekends beginning at the end of the school day on Friday, and ending at the start of the school day on Monday; on two evenings a week until 8:00 p.m.; and for two non-consecutive weeks in the summer. The court also established a holiday visitation schedule. The court further ordered Father to pay child support of $9,366 per month. The court later amended its order and reduced Father's child support obligation to $8,000 per month.

II. Post-Divorce Motions

Three-and-a-half months after the trial court issued its amended judgment in the divorce proceedings, Father filed a petition for modification of custody. In support of his motion, Father alleged that since the divorce decree, Mother had failed to take the children to church and engage them in the agreed-upon religious curriculum, and that Mother had otherwise failed to involve Father in important decisions made on behalf of the children. Further, Father alleged that Mother was failing to adequately care for the children by leaving the children with irresponsible childcare providers, that Mother had taken numerous extended

trips while leaving the children with said childcare providers, and that Mother had taken up residence with an unrelated male.

Later, on May 15, 2014, Mother filed a petition for contempt for Father's failure to pay child support. In her motion, Mother alleged that Father had failed to make court-ordered child support payments and that Father's arrearage at that time was equal to or greater than $23,000. Mother prayed that the circuit court would hold Father in contempt. Moreover, Mother sought attorney's fees in the amount of $2,500. Thereafter, on May 28, 2014, Father filed a motion to modify his child support obligation, alleging that Mother's marital property award was based on a loan that Father must pay back, and that Mother used those funds to "hir[e] an army of nannies, tak[e] long trips to exotic locations, and otherwise liv[e] a luxury lifestyle."

On January 15, 2015, Father filed a petition to hold Mother in contempt. In his petition for contempt, Father alleged that Mother took steps to remove Father's name as an "emergency contact" with the children's school, and replace it with the name of her fiancé, Jeff Reichert ("Jeff"), in violation of the June 27, 2013 divorce decree. Additionally, Father alleged that on numerous occasions, Mother refused to allow Father visitation on three-day weekends as required under the divorce decree. Moreover, Father alleged that on September 23, 2014, Mother refused to provide the children to Father in willful violation of the court's visitation order. Finally, Father made a plethora of allegations that Mother was slandering Father in a deliberate attempt to undermine his status as the children's father.

One week later, Father filed another petition for contempt which largely echoed the allegations made in the petition filed the previous week. In addition to reiterating the allegations made in the prior petition, Father also alleged that in the Spring of 2014 (after the couple's separation, but prior to the divorce decree), one of the couple's children had hurt her arm and Mother neglected seek medical attention or notify Father. A week later when Mother took the child to the doctor, it was discovered that the child broke her arm. Father prayed that the court hold Mother in contempt and incarcerate her.

On March 2, 2015, Father filed another petition for contempt in which he alleged that on February 9, 2015, Mother directed that the children's childcare provider pick the children up from school when Father was scheduled to have visitation. The incident allegedly resulted in the involvement of the police and Father being deprived of visitation with his youngest child. Father further alleged that on the following day Mother exchanged the children hours late in violation of the court's order. Father's petition also contained allegations regarding Mother's attempt to undermine Father's status as the children's parent. Such allegations include referring to Father as a "deadbeat father" in the children's presence, directing the children to refer to Father as "Dave," and referring to Jeff as "Daddy." Father prayed that the court hold Mother in contempt and incarcerate her.

III. The Plenary Motions Hearing

Over the course of July 10, 13, 17, and August 14, 2015, the court took evidence and heard argument regarding Father's motion to modify the existing custody order, his motion to modify the existing child support order, and his three petitions for contempt. Additionally,

the court considered Mother's petition for contempt with respect to Father's child support arrearage. In total, the parties called eight witnesses, and the court interviewed two of the couple's children.

At the hearing, Father testified on his own behalf. Father averred that at Merrill Lynch, Father's income was determined based on his ownership interest in the Brandeen Group. In 2013, prior to his termination from Merrill Lynch, Father owned a 41% interest in the Brandeen Group. After the parties' divorce, the group proposed reducing Father's interest in the group to 25%. The group's proposal was rejected because Merrill Lynch was concerned that such a reduction would reduce Father's ability to satisfy his obligation on his $924,000 loan, of which approximately $300,000 was still outstanding. Father's interest, however, was reduced to 35%, which had the effect of reducing Father's income.

In addition to receiving a reduced income, Father also took affirmative steps to alter his tax withholdings for each paycheck he received so that Father's tax related expenses were deducted from his paychecks with priority over his child support garnishment. Indeed, Father's income tax withholding increased from $43,753.66 in April of 2013, to $86,551.03 in May of 2014. Curiously, between the date of Father's divorce and the subsequent termination from Merrill Lynch, there was a negative correlation between Father's income and the amount that Father had withheld from his paycheck for taxes and tax-related expenses. The effect of Father's actions was that no monies were garnished from Father's wages for his child support obligation. In his report and recommendations, the Master

articulated that this phenomenon demonstrated "how far [Father] will go not to pay his child support obligation."

Later in May of 2014, Father was terminated from his position at Merrill Lynch. Father averred that he was terminated because he became unable to make timely payments on the loan he took to finance his business. Jeffrey Lubin and Sean Rippen -- both associated with the Brandeen Group -- testified, however, that Father was terminated not only because he failed to make meaningful payments toward his debt, but also because Father was frequently absent from the office without accounting for his time, and that Father continued to attempt to access a frozen joint Merrill Lynch account. Moreover, Lubin testified that he gave Father multiple written and verbal warnings regarding his conduct at Merrill Lynch. Further, Lubin testified that if Father had paid $1,000 toward his debt, produced a weekly business report, and not attempted to access the frozen account, Father would not have been terminated. Between May of 2014 and June of 2015, Father was unemployed. During this time, Father averred that he sustained himself, in part, by withdrawing funds from his retirement account, and receiving unemployment benefits, while he searched for positions with other financial companies.

In June of 2015, Father eventually started a new venture with his brother and two others called High Line Financial which was affiliated with Wells Fargo. In order to begin his business, Father took a loan in the amount of $425,000. Father further testified that he anticipated a total annual income ranging from $140,000 to $150,000. Throughout this

litigation, Father has continuously resided in a waterfront property for which he pays $3,600 in rent, and he has also remained current on his $1,000 monthly payment for his Land Rover.

With regard to the custody of the children, Father testified that Mother had failed to take the children to religious classes, had been late or absent for the children's sporting events, that Mother routinely left the children with a childcare provider when she went out of town, and that Mother was not taking the children to therapy or keeping him appraised of the children's medical appointments. Mother, for her part, testified that she had taken the children to religious Sunday school, workshops, and retreats. Mother's testimony was corroborated by the fact that Father attended his daughter's first communion which necessarily required her to have attended religious instruction. In the court's opinion, the trial judge referenced the parties' testimony regarding the child's first communion as evidence of Father's lack of credibility.

Additionally, Father gave testimony about an incident on the day of the parties' *en banc* hearing before the circuit court in September of 2014. On that Tuesday, Father was to have visitation in accordance with the court's custody order. Because the parties were in court, arrangements had to be made to pick the children up from school. Accordingly, Mother had the children's childcare provider pick the children up from school, and the parties arranged to exchange the children at the police station following the hearing at 4:30 that afternoon.

Father admitted that he was late to pick up the children because he had to debrief and discuss matters with his attorney after the *en banc* hearing. When Father arrived at the police

station, he testified that he observed the children in the custody of the childcare provider waiving and yelling in a minivan across the street in a Dunkin Donuts parking lot. The childcare provider then drove away, and Father followed in pursuit. Father lost sight of the minivan, but later discovered the childcare provider in the minivan with the children "hiding in a McDonald's parking lot down the street." Father approached the vehicle and discovered that the doors were locked. Father then solicited the assistance of police, and thereafter Mother arrived.

At the conclusion of the incident, the children left with Mother, and Father was deprived of visitation. In describing the incident to the trial judge, the parties' eleven-year-old son explained to the judge in a closed interview that the reason they left the Dunkin Donuts parking lot was because they were waiting for a long time, so they were going to get food quickly and then come back. The son further testified that during this incident, Mother was confused and telling Father that she was trying to get the children something to eat. The son claimed that Father was upset or angry, and accused Mother of manipulating the children.

At the hearing on July 17, 2015, the son further articulated how Father obstructs him from contacting Mother when Father has visitation. Moreover, the son testified that prior to the hearing Mother instructed him to tell the truth, and that Father instructed him to tell the judge that he wanted to spend more time at Father's house. The trial judge also asked the son what he would do if he had supernatural powers, to which the son replied: "I would probably fix my dad sometimes being -- mean to my mom." Thereafter, the trial judge also

interviewed the parties' eight-year-old daughter. The daughter articulated how she was preparing for the third grade, and looking forward to going to a Six Flags amusement park over the summer, among other things.

At the conclusion of the hearing, the trial judge determined that the incident that occurred after the *en banc* hearing in September of 2014 was a material change in circumstance that warranted a modification of the child custody order. Accordingly, the trial judge ordered that if a parent is more than a half hour late to exchange the children, the other parent may retain the children until the following morning. Other than this modification, the trial judge found that the existing terms of the former custody order were still in the best interest of the children, and the judge incorporated the prior order by reference. Moreover, Mother was held to be in contempt for her failure to surrender the children in accordance with the order on that instance, and Father was awarded a make-up visitation session.

With respect to Father's motion to modify his child support obligation, the trial judge found that there was no material change in circumstance warranting a change in child support. Although Father's income had changed since the divorce decree, the court imputed income to Father because the trial judge found that Father could have maintained his income but for his voluntary actions. Further, the court was unpersuaded that an increase in Mother's income warranted a decrease in child support, because although Mother's income did increase, the prior order had imputed income to Mother rendering Mother's increase in income negligible. Accordingly, the court declined to modify Father's child support obligation.

After considering Mother's motion to hold Father in contempt for the failure to pay child support, the trial court found that Father was in arrears of his obligation in the amount of $120,570.54. Moreover, the trial court ordered incarceration for his civil contempt if Father had not paid the purge amount totaling the sum of his arrearages by October 14, 2015.[2] Additionally, after weighing the statutory factors required before making an attorney's fee award, the court made an attorney's fee award in the amount of $20,000 -- or approximately 1/3rd of her attorney's fees -- to Mother.

Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

I. The Circuit Court Did Not Abuse Its Discretion by Modifying the Child Custody Order.

Father contends that the circuit court erred by modifying the court's custody order after finding that there had been no material change in circumstance. Mother, for her part, asserts that the trial court correctly determined that there was no material change sufficient to warrant a change in custody, but that the court did not err in finding a minor, albeit material, change sufficient to modify the custody arraignment to provide a provision relating the exchange of the minor children. We hold that the circuit court did not err in finding the problems that arose during the exchange of the children in September of 2014 constituted a material change in circumstance sufficient to modify the child custody order.

[2] Mother reports in her brief that the review date to determine whether Father has satisfied the purge provision of the contempt order has been postponed until April 12, 2016.

When presented with a petition to modify a child custody award, a court is obliged to undertake a two-step analysis. "First, unless a material change of circumstances is found to exist, the court's inquiry ceases. . . . If a material change of circumstance is found to exist, then the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding." *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). A change with regard to a court's custody determination is material "only when it affects the welfare of the child." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). The reason courts require a material change before considering a modification of child custody is to ensure "that principles of *res judicata* are not violated[,] . . . to preserve stability for the child[,] and to prevent relitigation of the same issues." *Id.* at 596.

Notably, the requirement that a material change in circumstances exists before a custody order may be modified is grounded in the principle of fostering the finality of a court's custody decision. Therefore, it is not appropriate for a trial court to find changes sufficiently material to modify a custody determination with respect to "minor" issues, but not other issues. *See id.* at 596 ("We therefore reject [the] contention that a different standard applies to petitions for 'minor' modification to the terms of a custody order."). Rather, once the trial court determines that a change exists that "affects the welfare of the child," *McMahon*, *supra*, 162 Md. App. at 594, the court is obliged to "consider[] the best interest of the child as if it were an original custody proceeding." *Wagner*, *supra*, 109 Md.

App. at 28. Accordingly, a court may not find a change sufficiently material to reconsider a "minor" aspect of a custody judgement, but insufficient to reconsider the entire custody judgment.

Although we agree with Father that a change in circumstance is either material or immaterial with respect to the entire custody determination, we further hold that the circuit court did not err in finding a material change in circumstances and only making a minor modification to the existing child custody order. After considering all of the evidence presented over the course of the four-day hearing, the trial judge found that:

> Putting all of those things together the Court has not found a material change of circumstances as relates to either legal custody or the physical custody with one minor exception, which is that it has been pointed out to the Court that there is no provision for -- in the Amended Divorce Judgment as to what would happen if either of the parties is ever late.
>
> And I think that that is a problem which has continued in the fact that it did not resolve, is sort of a material change, I would adopt by reference the Court's prior findings which I do not think substantially have changed, as to the factors in the Montgomery County Department of Social Services v. Sanders and Taylor v. Taylor, and I think it is appropriate to fill in that gap so that -- because in the most recent incidents of it, the September 23rd, I guess 2014, is that the police are called against and there is another confrontation in another public place, which is not good for the children.
>
> So, the one item of relief that the Court will provide is that supplement to provide a very minor modification of the current Order is to say that if either parent is late at the time of an exchange the parent who has the children, if the lateness is not an accepted, you know, explanation like I am behind the traffic accident and the ambulance is on the highway and I will be there as soon as I can, if there is not that kind of recognized accepted explanation, if the parent who has the children is waiting more than a half hour than he or she could retain the

> children until the following morning, either returning them to school or returning them at the police station at nine a.m. if it not a school day.
>
> And other than that the Court will deny the relief requested as to modification of legal custody or custody and visitation schedules.

It is apparent from the trial judge's articulate opinion that he did not make inconsistent findings on the issue of whether there was a material change in circumstances. Rather, the judge determined that there was a material change in circumstances and proceeded to find that the existing custody order was largely still in the best interest of the children with the minor modification relating to the exchange of the children.

Initially, we note that much of the confusion as to whether a trial judge is opining on step one or two of the two-step process articulated in *Wagner*, *supra*, is likely attributable to the fact that the issue of whether there is a material change in circumstance sufficient to reconsider the best interest of the children creates a circular tautology because a material change exists when it "affects the welfare of the child." *McMahon*, *supra*, 162 Md. App. at 594. Indeed:

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

McCready v. McCready, 323 Md. 476, 482 (1991). Moreover:

> The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication. The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess.

Montgomery Cnty. Dept. of Soc. Servs. v. Sanders, 38 Md. App. 406, 419 (1977). To complete this circular syllogism, when considering a motion to modify a child custody order, the court will only reconsider the best interest of the children if there is a change that affects the best interest of the child.

In the instant case, when read in context, the trial judge was not using the words "material change of circumstance" as a term-of-art precluding further consideration of the motion to modify when he made the statement on the record that "the Court has not found a material change of circumstances as relates to either legal custody or the physical custody." Rather, the trial judge was merely articulating that in reviewing the best interest of the children, he determined that it was not appropriate to alter the existing physical and legal custody arrangement. Indeed, finding that police involvement during the exchange of the children is a change that "affects the welfare of the child[ren]," was sufficient to permit the court to proceed to the second step and reconsider the best interest of the children anew. *McMahon*, *supra*, 162 Md. App. at 594.

The trial judge then proceeded to issue a new child custody order by considering the best interest of the child. In doing so, the trial judge expressly incorporated the former order

by reference. The judge's statement that there was no change sufficient to warrant a change in physical or legal custody, then, did not erroneously reconsider the child custody award without first finding a significant change in material circumstances. Rather, the trial judge's statement was made in support of his decision to incorporate the former decree by reference. Indeed, the trial judge appropriately determined that the police involvement during the exchange of the children constituted a significant change in material circumstances. Then, in creating a new custody order, after considering the factors articulated in *Taylor v. Taylor*, 306 Md. 290 (1986), and *Montgomery Cnty. Dept. of Soc. Servs.*, *supra*, 38 Md. App. at 419, the trial judge determined that it was in the best interest of the children to retain most of the prior order, and only add a term with respect to the exchange of the children. The trial judge did not abuse his discretion in adding this new term. We, therefore, hold that upon finding a material change in circumstance, the trial court did not err in incorporating its prior custody order into its new order and adding a term relating to the exchange of the children.

II. The Circuit Court Did Not Err in Denying Father's Motion to Modify Child Support.

Father contends that the circuit court erred by denying his motion to modify its child support order. Mother maintains that the circuit court did not abuse its discretion by failing to modify its child support order. We agree with Mother.

Pursuant to Md. Code (1984, 2012 Repl. Vol., 2015 Suppl.) § 12-104(a) of the Family Law Article ("FL"), "[t]he court **may** modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstances."

(emphasis added). Accordingly, in order for the court to modify a child support order, there must be a motion seeking a modification, and a material change in circumstance.

> A change is "material" when it meets two requirements. First, it must be "relevant to the level of support a child is actually receiving or entitled to receive." *Wills* [*v. Jones*], 340 Md. [408,] 488, 667 A.2d 331. Second, the change must be "of a sufficient magnitude to justify judicial modification of the support order." *Id*. at 489, 667 A.2d 331 (citation omitted).

Petitto v. Petitto, 147 Md. App. 280, 307 (2002). In determining whether a change is material, "[a] change 'that affects the income pool used to calculate the support obligations upon which a child support award was based' is necessarily relevant." *Id.* (quoting *Wills*, *supra*, 340 Md. at 488 n.1).

Critically, whether there is a material change in circumstance, and the weight the circuit court affords to the factors articulated in *Petitto*, is a factual question that we review under the clearly erroneous standard. Moreover, even if a litigant demonstrates that there is a material change in circumstance, the court may nevertheless exercise its discretion and decline to modify a child support award. Notably, the statute reflects that it is discretionary by the use of the permissive word "may" embodied in FL § 12-104(a). Indeed, "'although the court has the power to modify [an Agreement] . . . it ought not do so unless it finds (1) that the provision in question does not serve the child's best interest and (2) the proposed modification does.'" *Petitto*, *supra*, 147 Md. at 306-07 (alterations in original) (quoting *Ruppert v. Fish*, 84 Md. App. 665, 676 (1990)).

In this case, we affirm the trial court's decision not to modify its child support judgment for two reasons. First, the trial judge was not clearly erroneous in determining that there was no material change in circumstances. Second, assuming, *arguendo*, that there was a material change in circumstances, the trial court's finding that the existing award was still in the best interest of the children was not an abuse of discretion.

We first conclude that the trial judge did not err by imputing income to Father. Section 12-304(b) of the Family Law Article permits the court to calculate a child support obligation based on a parent's potential income "if a parent is voluntarily impoverished." FL § 12-304(b).

> [A] parent shall be considered "voluntarily impoverished" whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources. To determine whether a parent has freely been made poor or deprived of resources the trial court should look to the factors enunciated in *John O. v. Jane O.*, 90 Md. App. 406, at 422, 601 A.2d 149:
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> 1. his or her current physical condition;
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> 2. his or her respective level of education;
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> 3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
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> 4. the relationship of the parties prior to the divorce proceedings;
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> 5. his or her efforts to find and retain employment;
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> 6. his or her efforts to secure retraining if that is needed;
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> 7. whether he or she has ever withheld support;

> 8. his or her past work history;
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> 9. the area in which the parties live and the status of the job market there; and
>
> 10. any other considerations presented by either party.

Goldberger v. Goldberger, 96 Md. App. 313, 327 (1993).

In the present action, the trial court found:

> [T]hat [Father] could have chosen in essence to keep the job at Merrill Lynch, if he set his mind to it, if he paid the extra thousand dollars, there was more than one way that he could have done that. And [Father] chose not to do it.
>
> I think the exchange that he acknowledged of what will the effect b[e] of my getting fired if, you know, if we are opening a new business or whatever the exact language was, makes clear that Mr. Brandeen acknowledged that he was accepting being fired. He in effect wanted to be fired. I know he did not say he wanted to be fired. The Court is reading between the lines.
>
> And looking at all of the behavior the Court had previously had ratified the findings of Magistrate Gunning or Master Gunning maybe he was at the time, and found that the tax -- manipulation to create more withholding and the 401K, et cetera, had the function of voluntary impoverishment. Basically of making Mr. Brandeen's apparent income in terms of the bottom line of what was not withheld artificially low. And that same evidence was repeated to the Court this time.
>
> And the Court finds that that was his choice. It also, I think, is circumstantial evidence that he has chosen not to file the 2014 tax return to get a refund. The Court agrees with [Mother] that all indications are that he would get a big refund.
>
> . . .

> [T]he Court does not have any reasons to believe if the timing were different that there necessarily would be a huge loss of income if Mr. Brandeen had stayed at the oars and done the transferring in a way not to put himself at low ebb at the time this case was coming to trial. That is what he did.
>
> So, the Court does find voluntary impoverishment.

In declining to modify the child support award, the trial court considered the income imputed to Father. The court's findings with regard to Father's income were supported by the evidence adduced at trial, and those findings were not clearly erroneous. In addition to Father's imputed income, the court also considered several factors including the increase in Mother's earnings, Father ceasing to provide health insurance for the children, and the childcare costs. After considering all of the changes--not material changes, but changes nonetheless--the court determined "that $8,000.00 is still a reasonable and sufficient amount in the best interest of the children and this Court will not grant a modification." The court did not abuse its discretion in making this finding. We, therefore, affirm the circuit court's denial of Father's motion to modify his child support obligation.

III. The Circuit Court Did Not Err in Denying Father's Petitions for Contempt or Granting Mother's Petition for Contempt.

Father further argues that the trial court erred by failing to hold Mother in contempt for violating the circuit court's order with regard to Father's visitation of the minor children. Further, Father alleges that the circuit court erred in finding him in contempt for failing to satisfy his child support obligation. For the reasons that follow, this Court lacks jurisdiction

to consider whether the trial court erred in failing to find Mother in contempt. We further hold the circuit court did not err in finding Father to be in contempt.

A. This Court Lacks Jurisdiction to Consider Whether Mother Should Have Been Held in Contempt.

Father avers that the circuit court erred in failing to hold Mother in contempt. Indeed, Father asserts that "[Mother's] conduct warranted a finding of contempt, and it was erroneous for the trial court to rule otherwise."[3] The scope of our review of the trial court's failure to find Father in contempt is as follows:

> (a) *Scope of review*. –Any person may appeal from any order or judgment passed to preserve the power or vindicate the dignity of the court and adjudge him in contempt of court, including an interlocutory order, remedial in nature, adjudging any person in contempt, whether or not a party to the action.

Md. Code (2006, 2013 Repl. Vol., 2015 Suppl.) § 12-304(a) of the Courts and Judicial Proceedings Article ("CJP"). The language employed in CJP § 12-304, has been interpreted in a manner that:

> [R]equires that two (2) prerequisites be satisfied before an appeal may be successfully maintained in a contempt case. Firstly, there must be an 'order or judgment passed to preserve the power or vindicate the dignity of the court' and, secondly, the appeal must be prosecuted by the person adjudged to be in contempt.

[3] Notwithstanding the jurisdictional deficiencies in this allegation of error, we note that Father filed three petitions for contempt against Mother. Although Father alleges that it was error not to find mother in contempt for some of Father's allegations, the trial court did find Mother in contempt for one instance on September 23, 2014, when Mother violated the court's custody arrangement, and granted Father extra visitation for Mother contempt.

Becker v. Becker, 29 Md. App. 339, 344-45 (1975). The reason we generally limit the appealability of a contempt order to a party that has been adjudged to be in contempt is because "[t]he right to appeal in this State is wholly statutory." *Pack Shack, Inc. v. Howard Cnty.*, 371 Md. 243, 247 (2002). Additionally, the text of CJP § 12-304 provides that one may only appeal contempt orders when the court has "adjudg[ed] him in contempt of court." CJP § 12-304. As such, we do not have the authority to entertain an appeal relating to a contempt brought by someone who has not been adjudged to be in contempt in the absence of statutory authority granting us jurisdiction to hear the appeal. *Pack Shack, Inc.*, *supra*, 371 Md. at 247.

Further, in *Pack Shack, Inc.*, the Court of Appeals determined that this narrow construction of CJP § 12-304--limiting the appealability of contempt cases to those who are adjudged to be in contempt--is in accordance with the common law that predated the promulgation of that article. *Id.* at 257-58. Accordingly, the right to review a decision regarding civil or criminal contempt ordinarily belongs "only to those adjudged in contempt, not to those who unsuccessfully seek to have another held to be contemptuous." *Tyler v. Balt. Cnty.*, 256 Md. 64, 71 (1969).

In *Tyler*, *supra*, the Court of Appeals acknowledged the existence of a narrow exception to the rule limiting the right to appeal a contempt case to an individual held to be in contempt. In *Tyler*, *supra*, the Court of Appeals determined that the general prohibition on appeals of contempt orders brought by individuals other than those held in contempt may be abrogated if:

> [T]he order imposing the punishment for civil contempt or refusing to impose the order for civil contempt is so much a part of or so closely intertwined with a judgment or decree which is appealable as to be reviewable on appeal as part of or in connection with the main judgment.

Tyler, *supra*, 256 Md. at 71. The legitimacy of this exception, however, has subsequently been called into question by the Court of Appeals. Indeed, the Court of Appeals has noted that:

> [T]he continued vitality of this exception, which was a very narrow one to begin with, is highly doubtful. . . . [T]hat exception very likely would not apply when the appeal is filed by a person who was not held in contempt, however closely related and intertwined it is with other orders or judgments also pending appeal. *Tyler* simply does not support affording the losing party to a contempt action the right to appeal.

Pack Shack, Inc., *supra*, 371 Md. at 260; *see also Becker*, *supra*, 29 Md. App. at 345 ("*Tyler* makes it vividly clear that in this State only those adjudged in contempt have the right to appellate review.").

In the instant case, we perceive no jurisdictional basis upon which we may consider Father's challenge to the circuit court's failure to find Mother in contempt. The contempt power is possessed by all courts, and exists as a tool employed to maintain the integrity, independence, and existence of the judiciary. *Muskus v. State*, 14 Md. App. 348, 358 (1972). The contempt power, then, is generally not intended to affirmatively cloak litigants with any substantive rights, but rather to assist the courts in exercising its necessary functions. *Id.* In recognition of this principle, we cannot consider Father's appeal of the denial of his petition for contempt because he "was not held in contempt, however closely related and intertwined

it is with other orders or judgments" in this case. *Pack Shack, Inc.*, *supra*, 371 Md. at 260. Accordingly, we hold that we lack jurisdiction to review the circuit court's failure to hold Mother in contempt.

B. The Circuit Court Did Not Err in Holding Father in Contempt for Failing to Pay Child Support.

Father further alleges that the circuit court erred by determining that Father had an ability to pay child support from his retirement assets, and, therefore, erred in finding Father in contempt. Unlike Father's challenge to the court's failure to hold Mother in contempt, we have jurisdiction to consider whether the court erred in finding Father in contempt. CJP § 12-304(a). On appeal, we will only reverse a finding of civil contempt "'upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous.'" *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 448 (2008) (quoting *Cnty. Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.*, 178 Md. App. 328, 394 (2008)).

Under the clearly erroneous standard, "[o]ur task is limited to deciding whether the circuit court's factual findings were supported by substantial evidence in the record. . . . And, to that end, we view all the evidence in a light most favorable to the prevailing party." *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 456 (2004) (quotations and citations omitted). Moreover, when the circuit court's factual findings are not clearly erroneous, its decision may nonetheless be an abuse of discretion 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." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quotations, citations, and alterations omitted).

"[A] person subject to a court order may be held in contempt for willfully violating that order" in accordance with the court's inherent power necessary to "'protect the orderly administration of justice and the dignity of that branch of government.'" *Gertz v. Md. Dept. of Env't*, 199 Md. App. 413, 423 (2015) (quoting *Usiak v. State*, 413 Md. 384, 395 (2010)). An adjudication of constructive civil contempt is governed by Md. Rule 15-207(e). Under Md. Rule 15-207, one who files a petition for contempt has the burden to "prove[] 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). Once a petitioner makes a *prima facie* showing of contempt, the burden shifts to the defendant to 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.

Md. Rule 15-207(e)(3).

In the instant action, Father does not contest that he was in arrears of his child support obligation. Rather, Father contends that he did not have the ability to pay more than he paid and that he made reasonable efforts to obtain the funds necessary to meet his obligation.

Critically, the court's finding that Father voluntary impoverished himself is immaterial to the question of whether it was proper to hold Father in contempt. This is so because the ability to pay is not an element of contempt under Md. Rule 15-207(e)(2), but rather the inability to pay is an affirmative defense that must be proven by Father if it is shown by the petitioner that "the alleged contemnor has not paid . . ." Md. Rule 15-207(e)(2). Stated differently, although the trial judge's lengthy findings with respect to the intricate methods Father employed to avoid paying child support buttresses his ultimate disposition on this issue, all that is necessary in order to prevail in a petition for contempt under Md. Rule 15-207(e) is a finding that Father had not paid the amount owed, and that the alleged contemnor has not persuaded the judge that he never had the ability to pay more than the amount actually paid and that he made reasonable efforts to satisfy his obligation by a preponderance of the evidence. Md. Rule 15-207(e)(2),(3). The question, here, then, is whether the trial judge was clearly erroneous by failing to be persuaded that Father never had the ability to pay more than he did, and that Father made reasonable efforts to obtain the funds necessary to make his payments.

In finding Father to be in contempt, the circuit court determined that:

> [Father] did have [the] ability to pay more than he actually paid. And also the argument is in effect voluntary impoverishment that he could have chosen in essence to keep

> the job at Merril Lynch, if he set his mind to it, if he paid the extra thousand dollars, there was more than one way that he could have done that. And chose not to do it.
>
> . . .
>
> Mr. Brandeen acknowledge[d] that he was accepting being fired. He in effect wanted to be fired. I know he did not say he wanted to be fired. The Court is reading between the lines.
>
> . . .
>
> And the Court finds that th[is] was his choice. It also, I think, is circumstantial evidence that he has chosen not to file the 2014 tax return to get a refund. The Court agrees with [Mother] that all indications are that he would get a big refund. Which would further enable him to do it.
>
> . . .
>
> So, the Court does find voluntary impoverishment. And for that reasons, in relation to that reason, finds contempt.

Father argues that the trial court erred by finding "that [Father] had an ability to pay, but did not set forth any resources from which [Father] could be expected to pay other than retirement accounts." This argument, however, wrongfully implies that the ability to pay is an element that must be satisfied before a petitioner can make a *prima facie* case for contempt.[4] Rather, the relevant inquiry is whether the trial judge erred in failing to find that Father satisfied his burden in proving his affirmative defense.

[4] Critically, although we hold here that the circuit court did not err by finding Father to be in contempt, when the parties return to court on April 12, 2016 to determine whether Father should be incarcerated the relevant inquiry will be whether Father has "the present inability to purge the contempt." *Jones v. State*, 351 Md. 264, 280 (1998).

Although the degree of deference we afford to the trial court's factual findings is already high, our holding is supported by the fact that it is difficult to find that a judge is clearly erroneous when the judge is not persuaded -- as opposed to being affirmatively persuaded -- of a fact.

> [I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.

Starke v. Starke, 134 Md. App. 663, 680-81 (2000); *accord Pollard's Towing, Inc. v. Berman's Body Frame & Mech., Inc.*, 137 Md. App. 277, 289-90 (2001) ("Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.").

In his brief, Father vigorously challenges the factual findings rendered by the trial judge on his affirmative efforts to undermine the court's child support order. Father, however, presents no argument as to why the court's failure to be persuaded on two issues, namely, Father's inability to pay and whether Father made reasonable efforts to obtain the funds necessary to make payment. We, therefore, hold that the trial judge did not err in finding Father in contempt for failing to satisfy his child support obligation.

IV. The Circuit Court Did Not Err in Awarding Mother Attorney's Fees.

Finally, Father alleges that the circuit court erred when it awarded Mother $20,000 in attorney's fees. Mother asserts that the trial court's award of attorney's fees in this case was reasonable and that there is no support for the argument that the trial judge abused its discretion when making its attorney's fee award. We agree with Mother.

Under FL § 12-103, a court may award attorney's fees to either party in a motion to modify a custody order, in a proceeding to recover an arrearage of child support, or to enforce a child support or visitation order. Prior to making an attorney's fee award, however, the court must 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." FL § 12-103(b). Notably, if the court finds that there was no substantial justification for the litigation articulated in subsection (a), the court's discretion to deny costs and fees diminishes and the court is compelled to award the aggrieved party costs and fees. FL § 12-103(c).

> Decisions concerning the award of counsel fees rest solely in the discretion of the trial judge. *Jackson v. Jackson*, 272 Md. 107, 111-12, 321 A.2d 162 (1974). The proper exercise of such discretion is determined by evaluating the judge's application of the statutory criteria set forth above as well as the consideration of the facts of the particular case. *Id*. at 112, 321 A.2d 162. Consideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error. *Carroll County v. Edelmann*, 320 Md. 150, 177, 577 A.2d 14 (1990). An award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong. *Danzinger v. Danzinger*,

> 208 Md. 469, 475, 118 A.2d 653 (1955). *See also Broseus v. Broseus*, 82 Md. App. 183, 200, 570 A.2d 874 (1990).

Petrini v. Petrini, 336 Md. 453, 468 (1994).

We are confident that the trial judge considered all the necessary factors in rendering an award of attorney's fees, and that the trial judge did not abuse his discretion. In his oral opinion, the trial judge gave a comprehensive recitation of the relevant law regarding an award of attorney's fees and carefully applied that law to the facts of this litigation. Indeed, in the trial judge explained his judgment as follows:

> As to counsel fees, the court recognizes that there are multiple motions here. As to the request to modify custody, as to contempt, as to contempt going both ways. And in each of those requests for counsel fees there are the same three factors that appear sometimes in slightly different words, different titles of the Family Law Article, asking the Court to consider the parties respected needs, resources, and the substantial merits of their claims or defenses.
>
> The Court recognizes that substantial merits does not mean that they won or lost but basically were there good reasons to have brought the case.
>
> In this case the Court recognizes that counsel fees requested on both sides in Exhibit 28 for Ms. Brandeen, in Exhibit H for Mr. Brandeen, the Court that it is appropriate to award a partial contribution of counsel fees to be paid to Ms. Brandeed from Mr. Brandeed, after having weighed those factors.
>
> However, in making it a partial award, the Court recognizes that the total fees claimed are over $60,000.00, however that is for two attorneys where one attorney could have done the job. And also the Court recognizes that there was some merit to the claim on Mr. Brandeen's side recognizing that Ms. Brandeen's income has gone up, recognizes that there were

> actual incidents such as the September 23rd situation where the children were denied him for that visit.

We hold that in awarding Mother attorney's fees, the trial judge did not abuse his discretion. To the contrary, we are convinced that the trial judge appropriately applied the prescribed factors by balancing Father's legitimate grievance regarding Mother's increased income and one instance when Father was deprived of visitation against the seeking of such relief only three months after the divorce. Moreover, Father harbored arrearages of child support in excess of $120,500 after a systematic endeavor to avoid supporting his children in accordance with his obligation. The trial judge further considered the fact that Mother's attorney's fees were inflated due to her retention of an unnecessary second attorney. Indeed, the court's award of one-third of the attorney's fees sought by Mother was plainly the product of a considered and nuanced weighing of all the factors articulated in FL § 12-103(b). We, therefore, hold that the circuit court did not abuse its discretion in awarding Mother $20,000 in attorney's fees.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.