UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2503
September Term, 2014

RAOUF B. ABDULLAH

v.

TONEKA S. ABDULLAH

No. 1000
September Term, 2015

RAOUF B. ABDULLAH

v.

TONEKA ABDULLAH

Meredith,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: February 5, 2016

In these consolidated appeals, Raouf Abdullah, appellant ("Father"), contends that the Circuit Court for Prince George's County erred in various rulings it made with respect to his custody and child support disputes with Toneka Abdullah, appellee ("Mother").

QUESTIONS PRESENTED

Appellant presents the following questions for our review in Appeal No. 2503, Sept. Term 2014:

1. Can the court exclude relative [sic] evidence in a determination of custody and parental access case when there is no motion to compel and [sic] is made available for review and copying?

2. Did the Court err in its ruling to maintain the status quo, when all the testimony and tangible evidence showed the Appellee as being the antagonist, the individual withholding information pertaining to the minor child, and the individual denying parental access in excess of fifty (50) times, to include but not limited to, denying father's day and refusing to allow the minor the opportunity to attend his grandfather's funeral?

3. Was there a material change in circumstances relating warranting [sic] a modification of custody, when the parties did not have any disputes between them prior to 2011 and since 2011 the parties' minor child have [sic] been to two court proceedings involving the parties?

4. Can the court deviate from the Maryland Child Support Guidelines without adhering to Md. Family Law § 12-202?

5. Can the court award attorney's fees in a modification of custody case when the moving party has substantiated the allegations therein [sic] his motion for modification, there was no corroborating evidence offered by the non-moving party that she was not in violating [sic] the mandates of the parties' custody order, and the moving party makes one third (1/3) of the income compared to the non-moving party?

Appellant presents the following questions for our review in Appeal No. 1000, Sept. Term 2015:

1. Can the Court award advanced appellant [sic] fees pursuant to Maryland Family Law Code § 12-103, without applying the statutory factors?

2. Did the Court err in refusing to recuse itself when the Appellant filed a motion to recuse and therein alleges the Court sanctioned him for utilizing the Maryland Rules, the parties were not treated equally, the Appellant was admonished for presenting an unambiguous and clear case, the refusal to apply the law, and the misstatement of the facts, inter alia?

Preliminarily, appellee has filed a motion to dismiss appeal, citing appellant's general disregard of the appellate rules of procedure embodied in Maryland Rules 8-503, 8-504, 8-602(a)(6), and 8-602(a)(8). Appellee correctly asserts that appellant's briefs in these appeals suffer some of the same infirmities as did the brief in *Rollins v. Capital Plaza Associates, L.P.*, 181 Md. App. 188 (2008). Mindful, however, that it is "always a preferred alternative" to decide a case on its merits, *Joseph v. Bozzuto Mgmt. Co.*, 173 Md.App. 305, 348 (2007), we will exercise our discretion not to dismiss the consolidated appeals here.

Perceiving no reversible error, we shall affirm.

FACTS AND PROCEDURAL HISTORY

Appellant and appellee were married on July 28, 2001, and are the parents of one child, who shall be referred to in this opinion as "Son." The parties were divorced on November 21, 2005, by Judgment of Absolute Divorce entered on the docket of the Circuit Court for Prince George's County. On the same day, the parties' Consent Agreement was docketed. That agreement provided that the parties would share joint legal custody of Son, with Mother having primary physical custody, and Father having reasonable and liberal visitation. Specifically, the Consent Agreement established that Father would have overnight

visitation with Son every Wednesday from 6 p.m. until 9 a.m. Thursday morning, and alternating weekends (6 p.m. Friday until 8 p.m. Sunday). Father was also to have ten days' visitation with Son every year in June, and two weeks each in July and August. Father was also ordered to pay $896 per month in child support.

On July 10, 2007, Father filed, *pro se*, a motion to modify custody, seeking "joint physical custody along with the joint legal I already have." On February 21, 2008, Father filed an amended motion to modify custody, seeking the same relief. He also sought a reduction in the required child support. On April 7, 2008, Mother filed an answer asking that the court "dismiss/deny" the motion to modify custody. On a separate sheet of paper attached to her answer, she asserted that Father exerted "negative influences . . . on our son, such as his language and aggressive behavior. When in his father's care, [our Son] misses a lot of days from his pre-K class. [Father] also drives his SUV on suspended registration."

On May 6, 2008, the parties and their counsel appeared before a master of the Circuit Court for Prince George's County for a hearing on Father's amended motion to modify custody. Finding that there had been no material change in circumstances justifying a change in the Consent Agreement, the master denied Father's motion, but granted Father's request for a downward modification of his child support obligation. He was ordered to pay $611 per month in child support going forward. The Consent Agreement was otherwise unchanged. On May 23, 2008, a judge of the Circuit Court for Prince George's County signed an order that embodied the master's partial grant of and partial denial of Father's amended motion to modify.

On September 29, 2011, Mother filed, *pro se,* a motion to modify visitation, asking that Father's weekly Wednesday overnight be eliminated because "Father constantly complains about [the] commute to pick up son on Wednesdays and return to school on Thursdays. He is harassing and belligerent about the issue and has threatened [Son's] caregiver. [Father] flat out refuses to coordinate a meeting place on Sunday, [and] I don't feel comfortable coming to his home." She also requested a change in the child support order. On the same day, Mother also filed a motion and affidavit for an emergency hearing in which she represented that Father was "refusing to return child." On September 30, 2011, a judge of the Circuit Court for Prince George's County signed an order reflecting "that the matter before the Court is determined not to be an emergency and this case shall proceed in due course."

On September 30, 2011, Father filed, *pro se,* a "counter motion to modify custody and visitation," in which he asserted that Mother had "shown continued judgment that is not in the best interest of the child, including changing his school and living situation without consulting me, and unlawfully leaving him at home without adult supervision. She also makes repeated attempts to deny my visitation rights. She also has him in an unsafe environment." Father asked to be granted full custody, with visitation to Mother. He did not ask for a change in the child support order at the time of this filing.

On November 21, 2011, the parties appeared for a master's hearing on the cross-motions for modification then pending. On December 9, 2011, the court filed an order denying Father's motion to modify custody, finding that there had been no material change

of circumstances. The order modified slightly the Consent Order in that it put the responsibility on Mother for transporting Son on the weekends, and specified that the parties meet at a McDonald's near Father's home. The order further required that Father be responsible for transportation of the child for the Wednesday overnight visitation.

On December 1, 2011, Mother filed, *pro se,* a motion for modification, requesting either that the parties' meeting point for exchange of their child be changed from the McDonald's near Father's house to a police station or that Father be ordered to pick the child up directly from his school "to avoid violent confrontation." On December 12, 2011, the court filed a line noting that it regarded this correspondence as a motion for reconsideration, and denied it.

On January 20, 2012, Father filed, *pro se,* a motion to modify custody, representing that it had come to his attention that Mother was "in the hospital on bed rest for the next four months and [is] not able to care for [Son]." He asked for full custody and a change in the child support order "during this time."

On July 3, 2012, Father filed, *pro se,* a motion for modification and/or contempt, making various allegations about Mother having "wilfully and maliciously refused to comply with the visitation orders on multiple occasions." He asked for full custody, and also asked that the court find Mother in contempt and award him money damages for, *inter alia*, "lost time with minor child, traveling expenses, and lost wages due to last minute unauthorized changes to the current visitation order." He also asked for a reduction in child support because he had "lost his employment."

Mother was served with a show cause order, and ordered to file a response on or before October 4, 2012, and to appear for a hearing on October 10, 2012. On October 5, 2012, Mother notified the court that she was requesting a continuance because she was trying to engage counsel and was unable to miss work on October 10. No continuance was granted.

On October 10, 2012, the scheduled hearing before a master proceeded without Mother. Father appeared with his counsel. Although the master's proposed order found Mother in contempt for denying visitation to Father, it denied Father's motion to modify custody "due to no material change in circumstances." Father filed exceptions at 4:29 p.m. on October 24, 2012, and "revised exceptions" later the same day.

In the meantime, on October 18, 2012, Mother had filed a letter asking for a "chance to have my side heard." She noted that she was not able to be in court on October 10 because she had exhausted all of her leave when she was on extended bed rest. She represented that she had requested a continuance but it had been apparently mis-filed. She asserted that Father was "constantly badgering my family and me," and that "[a] false picture ha[d] been painted of [Son's] environment."

On November 14, 2012, Mother, through counsel, filed "Supplemental Exceptions" to the master's proposed order and requested a hearing. She asked that the court consider her October 18, 2012, letter to be her original exceptions. Mother represented that she had never been served with the master's proposed order, and asserted that the master erred in his findings. She also represented that Father consented to the filing of her exceptions.

On December 3, 2012, Father, through counsel, filed a motion to strike Mother's supplemental exceptions, indicating that although he had originally consented to the filing of the exceptions, he had changed his mind. He requested attorneys fees. Mother filed a response on December 21, 2012, pointing out that the Father's change of mind regarding the exceptions had not been timely communicated to her.

On March 8, 2013, Mother filed a petition for contempt, noting that, as of that date, Father was approximately $2,200.00 in arrears on his child support obligation.

After further filings not relevant here, the hearing on the exceptions occurred on May 3, 2013. The court filed an order on May 7, 2013, finding Mother in contempt for denying visitation. It ordered that Father be given visitation during the entire months of July 2013 and July 2014 to make up for the lost visitation. The order denied Father's motion to modify custody (due to finding no material change in circumstances), denied Father's motions to strike Mother's supplemental exceptions and for attorneys' fees, and denied Mother's exceptions.

Three weeks later, on May 29, 2013, Father filed another petition for contempt of court and another motion for modification of custody. He sought sole legal and physical custody of the parties' Son, child support, attorneys' fees, and costs.

On July 10, 2013, Mother filed a counter-complaint for modification of custody, and a motion to appoint a Best Interest Attorney ("BIA") for the minor child. On July 22, 2013, Mother filed an answer to Father's latest petition for contempt and motion to modify custody. On August 22, 2013, the court denied Mother's request for the appointment of a BIA.

On August 29, 2013, the parties appeared before a specially-assigned judge of the Circuit Court for Prince George's County for what would be the first in a series of hearings giving rise to the instant appeal. After reviewing the relevant procedural history, the trial judge established that the hearing was to consider Mother's March 8, 2013, petition for contempt, and the parties' cross-motions to modify custody in which Mother was seeking to have sole legal and physical custody of their child, and Father was seeking primary physical custody and joint legal custody.

As the party who had filed first, Mother presented her case first. Mother's first witness was her fiancé, Robert Spears. Mother herself was the second witness. Upon Father's cross-examination of Mother, appellant's first issue on appeal arose as follows.

Father's counsel began by questioning Mother about an e-mail chain of communications among Father, Mother, and Father's wife. Counsel then attempted to question her about two exhibits which had been marked as Father's Exhibits 3 and 4. Mother's counsel objected, and explained that the documents had not been disclosed during discovery:

> [BY COUNSEL FOR MOTHER]: Your Honor, I would object and have an ongoing objection. In interrogatories, Interrogatory 19, I asked if you intend to rely on any documentary evidence in this case identify and set forth the nature and content of each document together with the name and address and telephone number of the custodian. [Father's] answer was [he] objects to this interrogatory on the grounds that the information sought is protected by work product.
>
> [BY THE COURT]: Okay. If it wasn't given in discovery you can't get it in now. It's not work product. It's not a document prepared by you. And it's a document you're now offering. And it needed to be provided ahead of time in discovery.

[BY COUNSEL FOR FATHER]: Well, Your Honor, there was never a motion or a letter (indiscernible).

[THE COURT]: Doesn't even need it. That's exactly what the sit, wait and object when you come to trial if you haven't given discovery.

[COUNSEL FOR FATHER]: Your Honor, it is work product as to what do you intend to do. It's what I intend to introduce at trial. She can rephrase and ask if it is relevant if she would have gotten it but once —

[THE COURT]: Not relevant. And this document is not your work product. It's not anything that you prepared. It's a document between the parties. You're offering it now as evidence. It's not a memorandum; it's not your legal research. The fact that you just made a decision to look at it and you'd like to offer it does not mean you get to keep the secrets until you get to trial. So three and four will not be admitted.

[COUNSEL FOR FATHER]: Court's indulgence. As well as well, Your Honor, she had also asked for these documents and I made them available to her for inspection as well as copies. And these documents were made available to —

[THE COURT]: Oh, I'm sorry. I'm sorry, you know, nobody ever files their discovery with the Court. Which is a good thing. 'Cause then you guys can do all the heavy lifting. But you can file, if you maintain that that has been provided, if I can see your response to their request for documents, we'll –

[COUNSEL FOR FATHER]: It was an email and the email stated that she could come 'cause she asked for everything and this is our binder and I say that counsel can come or I can meet her somewhere and she can make copies. It's so voluminous that I did not feel that my client should bear the costs. I said that we could copy it but it would be 25 cents a page or she could proceed to come in herself. I said that I would meet her or send a member of my staff to meet her.

This entire binder here was available to —

[THE COURT]: Counsel, that is not discovery that is so onerous as it would allow you to take no responsibility for providing it over and merely saying I'll meet you someplace and do it, that's not, that's not even professional. So I'm not going to play that game.

Mother's counsel requested a continuing objection to any documentary evidence, and the court replied that it would take each document as it came. The issue recurred on August 29, 2013, with respect to Father's proffered Exhibit 12. Mother again objected, and the court excluded the evidence on the basis that it had not been provided in discovery. At no time on August 29, 2013, did Father ever argue that the documents were admissible for impeachment purposes, as he does on appeal.

Following the testimony of Mother, Mother concluded her case. Father was his own first witness. The case had been scheduled for only one day, and the direct examination of Father had not concluded by the end of the day. The court stated to counsel for Father: "You have one minute. What's the most important thing you've got to tell me?" Counsel responded: "Nothing further, Your Honor." At that point, the court announced that it would take the matter under advisement, review the prior orders and testimony, and contact the parties to return on another date for closing arguments and the court's ruling.

On September 26, 2013, Father filed a "motion to allow continued testimony and request for hearing," complaining that he had "not had the opportunity to put on his case-in-chief and without the opportunity to do so" he would be "severely prejudic[ed]." In support of this motion, Father attached twelve exhibits, including photographs, a partial transcript of an earlier master's hearing, and e-mail exchanges subsequent to the August 29 hearing. He asked for additional five hours to complete his case-in-chief.

On the same day, Father filed a "motion to revise exclusion of evidence and request for hearing." In this document, Father argued that Mother had unclean hands; that

"discovery was made available pursuant to Md. Rule 2-422"; and that the excluded exhibits were impeachment evidence that were "not discoverable." He also asserted that the "doctrine of latches [sic]" applied because Mother had failed to file a motion to compel discovery or a motion in limine to preclude documents that she had requested in discovery, after Father had refused to produce the documents on the basis of "attorney work product." Father asked that the court "cure the erroneous ruling by admitting [his] exhibits 1-12, 14, 16, and 17."

On October 15, 2013, Mother filed a response. She reiterated that the documents at issue were properly excluded because they were not provided in discovery, and that they were not attorney work product. In response to Father's assertion that Mother had "unclean hands" because she failed to respond to his discovery, Mother's response noted that she was "perplexed by this allegation as no discovery was ever propounded by [Father]." In response to Father's assertion that he had complied with his discovery obligations by informing her that she was welcome to come and copy the documents at her expense, Mother noted that Father did not even make this offer until August 28, 2013, *i.e.*, less than 24 hours prior to the merits hearing.

On October 15, 2013, Mother also filed an opposition to Father's "motion to allow continued testimony," and she moved to strike the paragraphs of Father's motion dealing with the post-hearing activities of the parties and all of Father's attached "exhibits." Mother noted that the case had been scheduled for five hours; that she was under the same time constraints as Father was; that Father should have known he would need more time for his

case, and asked the court for such relief at trial, not in a post-trial motion; and that it was "outrageous and an affront to [the] court" for Father to attempt to present evidence after trial.

Filed out of order in the three-volume court file of this case is an Order of Court, "mailed on 12/4/13," granting Father's motion to allow continued testimony because "Counsel for [Father] misjudged his time[.]"

The court file reflects no further activity until January 15, 2014, when Mother filed, *pro se*, a handwritten document asserting that Father was in contempt of the child support order and was voluntarily impoverishing himself.

On February 11, 2014, Father filed a motion for contempt, along with a motion to shorten time. He represented that "the instant action is currently scheduled for a merits hearing on February 20, 2014, on the issues of contempt and modification of custody," and noted that the court had granted his request for five additional hours of time. As to the contempt, he asserted that Mother had committed "two additional acts of contempt" since the August 29, 2013 hearing. The contempt petitions were consolidated with the other issues to be presented at the February 20, 2014, hearing.

The February 20, 2014, hearing was rescheduled for, and conducted on, March 19, 2014. Another hearing was convened on April 9, 2014, at which counsel made closing arguments and the court rendered its ruling. As relevant to this appeal, the court ruled as follows:

The court denied Father's motion seeking sole legal and shared physical custody, finding that Father — while he "unquestionably loves his son" — "has hugely contributed

to the storm of alienation and has made any real co-parenting unobtainable." The court also noted that "there has been absolutely no testimony as to how the parties could begin to handle matters regarding academics or extracurricular activities, medical decision, if this child was moving household to household, week to week."

The court denied Mother's motion seeking sole legal and physical custody, or tie-breaking authority, finding that Mother was "also responsible for this custody impasse and this dysfunction." The court found neither party in contempt, modified the access schedule by expanding Father's alternating weekend access until Mondays at 8 a.m., adjusted Father's child support obligation from $611 per month to $313 per month, and ordered Father to pay $3,750.00 toward Mother's legal bills. An order documenting these decisions was filed on April 18, 2014. Appellant's specific allegations of error arising from this order will be discussed later in this opinion.

On April 22, 2014, Mother filed, *pro se*, a motion to reconsider in which she asked the court to change the exchange time on alternating Friday nights from 6 p.m. to 7:30 p.m. On May 12, 2014, Father, through counsel, filed an opposition and request for hearing. On August 22, 2014, the court held a hearing, after which it denied Mother's motion. The docket entries for the hearing, filed August 27, 2014, note "The 30 day appeal period from the 4/16/14 order starts today."

On September 5, 2014, Father filed a lengthy motion to revise, contending that the trial court "did not properly weigh the evidence against [Mother]." On September 19, 2014, Mother's counsel filed a motion to withdraw appearance, representing that Mother could no

longer afford to pay for her services. Father filed an opposition and request for hearing. The court permitted Mother's counsel to withdraw pursuant to an order entered on October 21, 2014.

On October 15, 2014, Father filed a motion requesting a ruling on his motion to revise. On October 22, 2014, Mother's new counsel entered his appearance, and filed an opposition to Father's motion to revise, and a counter-motion for attorneys' fees. On November 10, 2014, Father filed an opposition and request for hearing.

On December 22, 2014, the court filed an order denying Father's motion to revise, and awarding Mother $660.00 in attorneys' fees, to be paid by Father. Because this order is also at issue on appeal, it will be discussed more fully herein. On January 21, 2015, Father noted his appeal to this Court.

On January 26, 2015, Mother filed a motion for advanced appellate attorneys' fees, noting that, while she was forced to pay for her own attorneys' fees and defend against a seemingly-endless series of filings and two appeals to this Court, Father's litigation was being conducted by Father's father's law firm, and Father was incurring no attorneys' fees. Mother's motion argued that Mother "cannot afford to continuously defend against [Father's] abusive legal conduct," and Mother requested that the court grant her $10,000.00 in advanced appellate fees. Mother also took action to execute on the judgment against Father by garnishing his wages.

On February 13, 2015, Father filed an opposition. On the same day, Father filed a "motion for order of protection and request for hearing." The motion described what

protective orders are in the discovery context, recited that Mother's "efforts to collect on [the judgments against Father for $3750.00 and $660.00 in attorneys' fees] are [Mother's] attempts to harass and burden [Father]," and asked the court to "grant[ ] this motion" and "issue and [sic] order of protection," without specifying what it is that the order of protection would entail. Mother filed an opposition, pointing out that Father had failed to file a supersedeas bond, and was therefore not entitled to have the judgments against him stayed. On March 9, 2015, Father posted a supersedeas bond in the amount of $4,851.00.

On March 16, 2015, Father filed his own motion for advanced appellate attorney's fees and request for hearing. The court entertained the parties' motions for advanced appellate attorneys' fees at a hearing on March 27, 2015, after which it denied Father's motion, and granted Mother's motion, ordering Father to pay Mother $5,000.00 toward her anticipated appellate fees.

On April 11, 2015, Father filed a motion to recuse Judge Julia Weatherly, arguing that she was biased against him. This was followed, on April 29, 2015, by Father's amended motion to recuse. Father also filed a motion to reconsider the court's order that he pay $5,000.00 in advanced appellate attorneys' fees to Mother. Both the motion to recuse, and the motion for reconsideration, were denied by order docketed on May 27, 2015. Father noted a second appeal to this Court on June 26, 2005, and it is this appeal that was docketed as Appeal No. 1000, Sept. Term 2015. On June 26, 2015, the same day he noted his appeal to this Court, Father (now *pro se*) also filed, in the circuit court, a "Memorandum in

Furtherance of Motion to Recuse," which motion had already been denied and was one of the subjects of the appeal Father noted here.

STANDARD OF REVIEW

Maryland Rule 8-131(c) governs an appellate court's review of a non-jury trial, and it provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Rule 8-131(c) applies to the review of factual findings made in custody cases. *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000).

In *Gillespie v. Gillespie*, 206 Md. App. 146, 170-71 (2012), this Court noted:

> This court reviews child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586, 819 A.2d 1030 (2003). The Court of Appeals described the three interrelated standards as follows:
>
> > We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8–131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.
>
> *Id.* at 586, 819 A.2d 1030. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id*. at 584, 819 A.2d 1030. We recognize that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear

> showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [the trial judge] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id*. at 585–86, 819 A.2d 1030.

DISCUSSION

> 1. Can the court exclude relative [sic] evidence in a determination of custody and parental access case when there is no motion to compel and [sic] is made available for review and copying?[1]

This contention relates to the exclusion of the documents that were the subject of one of Mother's interrogatories which Father refused to answer. At trial, Father maintained his position that the identity of proffered exhibits was attorney work product, and not discoverable. He also argued that he "made them available to [counsel] for inspection as well as copies." He did not argue at trial that the proffered exhibits were not discoverable because they were to be used only as impeachment evidence.

The interrogatory from Mother and response from Father that led to the exclusion of the documents were the following:

> INTERROGATORY NO. 19: If you intend to rely on documentary evidence in this case, identify and set forth the nature and content of each such document, together with the name[,] address and telephone number of the custodian.
>
> ANSWER NO. 19: The Plaintiff objects to this interrogatory on the ground that the information sought is protected by work product. *Pleasant v. Pleasant*, 97 Md. App. 711 (1993).

[1]We assume "relative evidence" should actually be "relevant evidence."

Although Father objected to the form of the interrogatory, it is not materially different from the form included as Form No. 3, General Interrogatory 3., in the Committee Note that appears in the Maryland Rules at the end of Title 2, Chapter 400, which reads:

> 3. If you intend to rely upon any documents, electronically stored information, or tangible things to support a position that you have taken or intend to take in the action, including any claim for damages, provide a brief description, by category and location, of all such documents, electronically stored information, and tangible things, and identify all persons having possession, custody, or control of them. (Standard General Interrogatory No. 3.)

Mother's interrogatory was not improper. Father's refusal to provide the requested discovery in his answer was improper. The trial judge did not abuse her discretion in fashioning an appropriate remedy.

In his brief, Father argues that a trial court "cannot sanction (i.e. exclude evidence) a party when documents are made available for pick-up and motion to compel or for sanctions has be filed [sic] prior to trial." He cites Rules 2-421(c), 2-431, and 2-433 in support, and cites *Butler v. S & S Partnership*, 435 Md. 635 (2013), for the proposition that Mother was required to first file a motion to compel or for sanctions before the court could exclude the evidence. Father also argues in his brief that the proferred exhibits were admissible as impeachment evidence, but that argument was not made at the time the documents were excluded, and is not preserved for appellate review. Rule 8-131(a).

Mother asked in discovery for any documents Father intended to rely upon at trial. Father objected on the basis of "attorney work product." He did not identify the documents he was withholding on the basis of this claimed privilege, and we see no way Mother would

have been able to guess what the withheld documents were, such that she could file a motion to compel Father to divulge them.[2] He did not explain, at trial, how emails between the parties and Father's wife were attorney work product. "The work product doctrine protects from discovery the **work of an attorney** done in anticipation of litigation or in readiness for trial." *E. I. DuPont du Nemours & Co. v. Forma-Pak, Inc.*, 351 Md. 396, 407 (1998). (Emphasis added.) Rule 2-402(d) provides, in pertinent part:

> [A] party may obtain discovery of documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney [. . .]) only upon a showing that the materials are discoverable under section (a) of this Rule and that the party seeking discovery has substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[3]

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[2]Rule 2-402(e)(1) provides:

> A party who withholds information on the ground that it is privileged or subject to protection **shall describe the nature of the documents, electronically stored information, communications, or things not produced or disclosed in a manner that, without revealing the privileged or protected information, will enable other parties to assess the applicability of the privilege or protection**. (Emphasis added.)

[3]Rule 2-402(a) provides:

> A party may obtain discovery regarding any matter that is not privileged, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, and tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party

(continued...)

The burden is on the party claiming the privilege "'to substantiate its non-discovery assertion by a preponderance of the evidence[.]'" *DuPont, id.* at 409 (quoting *Kelch v. Mass Transit Administration*, 287 Md. 223, 229 (1980)). No such attempt was made here.

Nor do we agree with Father's contention that Mother was not entitled to the exclusion of his evidence because she had failed to first file a motion to compel or for sanctions. The trial judge did not exclude Father's proffered evidence *sua sponte*; it sustained the objection of Mother's counsel on the grounds that Father had refused to disclose the documents on the basis of "attorney work product," which claim Father then failed to justify at trial. Father's gamesmanship in refusing to answer a standard request to identify pertinent documents should not be rewarded. We see no abuse of discretion in the trial judge's decision to refuse to admit documents that had been unreasonably withheld.

> 2. Did the Court err in its ruling to maintain the status quo, when all the testimony and tangible evidence showed the Appellee as being the antagonist, the individual withholding information pertaining to the minor child, and the individual denying parental access in excess of fifty (50) times, to include by not limited to, denying father's day and refusing to allow the minor the opportunity to attend his grandfather's funeral?

[3](...continued)
seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought is already known knowledge of obtainable by the party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. An interrogatory or deposition question otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

In this question, Father seeks to have this Court re-weigh the evidence that was presented to the trial court, which is not this Court's role. "Appellate review of a trial court's custody determination is limited. The standard of review in custody cases is whether the trial court abused its discretion in making its custody determination." *Barton v. Hirschberg*, 137 Md. App. 1, 24 (2001). "It is not the function of this Court to weigh evidence, nor the credibility of witnesses." *Ritter v. Danbury*, 15 Md. App. 309, 313 (1972). "In a non-jury case, the appellate court does not evaluate conflicting evidence but assumes the truth of all evidence, and inferences fairly deducible from it, tending to support the findings of the trial court, and, on that basis, simply inquires whether there is any evidence legally sufficient to support those findings." *Weisman v. Connors*, 76 Md. App. 488, 500 (1988). Father fails to identify any *factual* rulings made by the trial court that were "clearly erroneous." Father is unhappy with the court's custody decisions, but we find in them neither error nor abuse of discretion.

> 3. Was there a material change in circumstances relating warranting [sic] a modification of custody, when the parties did not have any disputes between them prior to 2011 and since 2011 the parties' minor child have [sic] been to two court proceedings involving the parties?

Father again asks this Court to re-weigh the evidence that was before the trial court relative to change. He argues in his brief that "the evidence was clear that there had been a material change in circumstances since the parties' last custody order." In *Gillespie, supra*, 206 Md. App. at 171-72, we said:

> A material change of circumstances is a change in circumstances that affects the welfare of the child. *McMahon* [*v. Piazze*], supra, 162 Md. App. [588] at 594, 875 A.2d 807 [(2005)]. The Court of Appeals has explained that although

courts must engage in a two-step process in evaluating a petition to modify custody, the two-steps are often interrelated. The Court explained:

> [I]n the more frequent case . . . there will be some evidence of changes which have occurred since the earlier [custody] 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, 593 A.2d 1128 (1991). "In [the custody modification] context, the term 'material' relates to a change that may affect the welfare of a child." *Wagner* [*v. Wagner*], 109 Md. App. [1] at 28, 674 A.2d 1 (1996). "**The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed**." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344, 950 A.2d 848 (2008).

(Emphasis added.)

Father failed to carry his burden of production and persuasion in this regard. He identifies no factual errors, and this Court does not re-weigh the evidence that was before the trial court. Rather, we will affirm if there is evidence legally sufficient to support the court's findings. In this case, there is legally sufficient evidence to support the court's finding that there had been no material change in circumstances sufficient to warrant a change in custody.

4. Can the court deviate from the Maryland Child Support Guidelines without adhering to Md. Family Law § 12-202?

As noted above, the court held a hearing on April 9, 2014, to permit the parties to deliver their closing arguments and to render a ruling. During Father's closing argument, the following colloquy between the court and Father's counsel occurred:

[BY THE COURT]: [Counsel for Father], you also have a Motion to Modify Child Support before the Court?

[BY COUNSEL]: Yes.

Q. Do you have a proposed child support guidelines worksheet?

A. Court's indulgence.

Q. Or do you just have —

A. I'm sorry?

Q. — the amounts that you want the Court to use in preparing a guidelines worksheet?

A. Well, we would — I believe the pay stubs have already been entered into evidence. I think I may have left my guidelines in the office. [Mother's] income was seventy-eight [thousand dollars per year] and [Father's] was — Court's indulgence.

[Father] testified that his income was twenty-six [thousand dollars per year.] I have the — I believe his 1099 is in evidence. [Mother] testified it's seventy-eight. We'll stipulate to seventy-eight. The medical insurance was for the family rate was $167.

[BY MOTHER'S COUNSEL]: Your Honor, I would object to the inclusion of any medical rate. There was no testimony about the amount and the only testimony was that [Father's wife] pays for the medical insurance.

[BY THE COURT]: That is correct. There was also testimony there's no more daycare expense. All right. **So these are the numbers you want me to use?**

[BY FATHER'S COUNSEL]: **Yes, Your Honor**.

(Emphasis added.)

When it rendered its ruling on this issue, the Court stated:

[BY THE COURT]: With respect to child support modification and contempt. [Father] is currently under court order to pay $611 from ongoing child support plus $224 per month towards the arrears.

The Court finds that the arrears are $5,406.18 as of the March 19, 20[1]4 hearing. It was like pulling teeth to get [Father] to come up with financial documents, but we did get a 2013 W-2 showing income of $26,457.60, which accounts, according to his testimony, for eleven months of employment, giving an average monthly income of $2,405 per month.

There's no longer any daycare expense. There was no evidence of any health insurance cost, but there was testimony that [Father] now — that his wife now provides health insurance for their entire family.

There was no evidence of what [Mother] was earning presently. There's no pay stub. There's no tax return. There's no W-2. The last income information — there is now in closing argument a representation of what she makes. There was no questions that were asked by the [Father] in their case in chief or was otherwise provided in the [Mother's] testimony, in her case in chief. The last income information that the Court has available is from the May 2008 modification hearing. At which time the Court found she earned $6,958 per month.

The Court has calculated the Maryland Child Support Guidelines, then based upon the mother earning $6,958 and the father earning $2,405 and that would give him 25.6 percent of their combined income of $1,224 a month, indicating then that the support amount would be $313.

The Court also reworked the May 2008 calculation of the guidelines, merely eliminating the $550 of daycare expense that the parties had at that time. Based upon the seventy-some thousand dollars that [Father] was earning at that time and based upon the calculation under those guidelines, the support obligation would be $350 a month.

There is an argument that [Father] is voluntarily impoverished, not because he lost his job, but rather because he seems to have little motivation to replace the level of income he once earned. He testified very vaguely that he's considering going into some kind of start-up business. He testified that his wife's income is sufficient to support their family at this time and he does have this job earning ten dollars and so per hour, although his W-2 shows a greater income than that.

* * *

> The Court finds that either by using the current income or by imputing a higher income that he had in 2008 and eliminating the daycare does suggest a modification is appropriate.
>
> **So the Court finds that it is most appropriate to use the current income calculated under a sole custody formula in which support is $313 per month. And the Court will order that that is retroactive to August 1st of 2013.**
>
> The difference between the prior court order and the current amount is $298 per month and making it retroactive gives him a credit of $2,682. The Court will assess the arrears at $3,022.18 as of March 19, 2014. And the [Father] is to pay an additional $78 per month on the arrears through the Office of Child Support Enforcement by way of an earnings withholding order.

(Emphasis added.)

On appeal, Father complains that the court erred in calculating child support based on sole custody, rather than on shared custody. Father failed at trial to supply the court with any Guidelines, and has not informed us on appeal what he thinks the proper amount under the Guidelines would be. He informed the court at trial that the numbers it recited were the numbers it should use. He did not object when the court, in its ruling, indicated that it was calculating the child support obligation on a sole-custody basis. The section of Father's brief devoted to this argument is devoid of any citation to the record. We regard his argument on appeal on this point as not compliant with Maryland Rule 8-504(a)(4), and will not consider it further. "As we have often pointed out, the party making an argument bears the burden of finding and indexing factual support in the record or extract under Rule 8–504(a)(4). See *Clarke v. State*, 238 Md. 11, 23, 207 A.2d 456 (1965)." *Reynolds v. Reynolds*, 216 Md. App. 205, 225 (2014).

> 5. Can the court award attorney's fees in a modification of custody case when the moving party has substantiated the allegations therein [sic] his motion for modification, there was no corroborating evidence offered by the non-moving party that she was not in violating [sic] the mandates of the parties' custody order, and the moving party makes one third (1/3) of the income compared to the non-moving party?

This contention again asks that this Court to re-weigh the evidence before the trial court, and substitute its judgment for the judgment of that court. As has been previously explained, this is not the role of this Court on appeal. In *Gillespie, supra*, 206 Md. App at 176, we said:

> We review the award of counsel fees under the abuse of discretion standard. *Meyr v. Meyr*, 195 Md. App. 524, 552, 7 A.3d 125 (2010). The circuit court's decision regarding the award of 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, 648 A.2d 1016 (1994).

The court's award to Mother of a contribution toward her attorney's fees from Father in the amount of $3,750.00 was not an abuse of discretion. The evidence supported the court's finding that Father could afford to wage war by litigation because he was not paying for his attorney. Mother could not afford to pay counsel to respond to the barrage of Father's filings. Father supplied the trial court with no evidence that he was being billed by his attorney, let alone had actually paid attorneys' fees. Mother did supply such evidence. Furthermore, the record shows that the court did engage in the analysis required by Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 12-103(b). We affirm the attorney's fees award.

In Appeal No. 1000, Sept. Term 2015, Father presents two questions for our review:

> 1. Can the Court award advanced appellant [sic] fees pursuant to Maryland Family Law Code § 12-103, without applying the statutory factors?

In this appeal, Father argues that "[i]t was outside the authority of the Court to award advanced appellant [sic] fees to the Appellee without considering the factors expounded in [FL] § 12-103," and that there was no basis to award "advanced appellant fees pursuant to [FL] § 12-103." He argues that Maryland law "is clear . . . that attorney's fees can only be award [sic] to [sic] pursuant to a statute." The court did not abuse its discretion in awarding Mother advanced appellate fees.

The award of advanced appellate fees in a custody case has been long recognized in this State. FL § 12-103 provides for such an award:

> (a) The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or
>
> (2) files any form of proceeding:
>
> (i) to recover arrearages of child support;
>
> (ii) to enforce a decree of child support; or
>
> (iii) to enforce a decree of custody or visitation.
>
> (b) Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;

(2) the needs of each party; and

(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

(c) Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

In 1970, the Court of Appeals considered the question of whether a trial court could award a party advanced appellate fees in the context of Art. 16, § 5A, a precursor to modern-day FL § 12-103, in *Rhoderick v. Rhoderick*, 257 Md. 354. In that case, the Court reversed a decision of the trial court disallowing such fees, and remanded to that court for consideration of appellate fees, directing the court on remand to "take further testimony in regard to the services rendered, their reasonable value and the usual economic considerations arising from the needs of [Mother] and [Father's] ability to pay." *Id.* at 362.

Other cases are in accord with *Rhoderick*: *Staley v. Staley*, 25 Md. App. 99, 112 (1975) (in which this Court, discussing *Rhoderick*, noted that the Court of Appeals established in that case that "a person seeking child support payments is a privileged suitor; [and] that she is entitled to counsel fees and costs, not only for the trial, but also for the prosecution of her appeal"); *Randolph v. Randolph*, 67 Md. App. 577, 581 (1986); and *Ridgeway v. Ridgeway*, 171 Md. App. 373, 388-89 (2006). Father cites no cases in opposition to the principle outlined in these cases, that FL § 12-103 "contemplate[s] an award of appellate attorney's fees when an appeal is taken from a decision resolving . . . child custody issues." *Ridgeway, id.* at 388.

In his brief to this Court, Father contends that the trial court erred in awarding advanced fees because it "could not and did not consider factor [(b)] (3)," but the record belies that contention.[4] In rendering its ruling, the trial court specifically said:

> The issue of attorney's fees certainly does seem financially unappealing to appeal an award of attorney's fees that will cost[ ] — where the attorney's fees cost much less than what the appeal will cost[ ]. But [Father] has posted the supersedeas bond. Now to ensure that the payment of attorney's fees as ordered by the Court is available there to be disbursed if he does not prevail in his appeal.
>
> Certainly issues regarding custody and access are not determined by the economic value and are important matters to the Court. When these custody and access issues though are being appealed, it — it's often difficult to prevail because you can prevail only if the trial Court did not – did not apply the correct law or make clearly erroneous findings of fact. And certainly much is left to the Court's discretion to do what they believe is in the best interest of the child and to — to based that upon the credibility of the witnesses and parties and the reasonableness of the parties.
>
> I do not believe that [Father] is likely to prevail but I also would recognize always that that would ultimately be decided by the Court of Special Appeals.
>
> The concern certainly for the Court with respect to this issue of litigation expenses is that it is — it is hard to divide up the costs of any single amount of attorney's fees because there have been so many cases filed in so many different filings. We've had civil cases, and criminal cases and peace orders and DV cases as well as the custody case. And certainly it is the enormity of all of those litigation expenses that has been a concern and so when we talk about waging war by litigation, that's really what it — the Court refers to.
>
> And in this case, [Father] who is represented by his father's law firm and has never proven any indication that he pays attorney's fees for that, I do

[4]Father made no argument in his brief that the trial court failed to consider the financial status and needs of each party. FL § 12-103(b)(1), (2). Such a contention would also have been belied by the record.

> not believe [he] has ever paid any attorney's fees regardless. And I'm sure, it would make perfectly good sense for that firm to keep track of the amount of time they spent in billing [Father's] family regardless of whether they are paid. But [Mother] does pay attorney's fees and has throughout these proceedings.
>
> The Court also recognizes that [Mother] earns substantially greater income than [Father]. She earns approximately $104,000 now. [Father's] earning about $30,000. But also [Father] having much smaller wages, pays a much smaller percentage of their son's expenses. I think his current Court Order is about $300 — $313 a month. So, [Mother] is then responsible for the vast majority of the child's expenses. In this diversion of — of available money to pay for litigation expenses instead of children's expenses, his, uh — puts the family into financial distress. It greatly concerns the Court that the litigation has deprived this family of money to support their son. It has resulted also in a lot [of] harm to the parties[']ability to co-parent their child and yet the filings continue.
>
> The Court has considered the reasonableness in filing the appeal, the economic circumstances of the parties, and are hearing in — generated the April 2014 Order. The Court had to determine child support, and so we looked at expenses as well. The Court has looked at the costs of the appeal and the parties[']ability to pay.
>
> In considering all, the Court will order that [Father] pay to [Mother], $5,000 towards her attorney's fees. [. . .]

In his brief, Father has assailed the court for failing to consider "factor [(b)] (3)," arguing:

> There was never any testimony offered by the [Mother] regarding *any* defense to the grounds for the Appellant's appeal or allegations of contempt. Moreover, the Appellant expressed to the Court that the Appellee had made no proffer regarding factor (3), and the Court did not consider this factor. Without so much as a proffer to the merits of the appeal the Court could not and did not consider factor (3), and without a consideration there can be no award of advanced appellant [sic] fees pursuant to Maryland Family Law Code § 12-103.

(Emphasis in original.)

This argument fails on two fronts. First, as excerpted above, the trial court clearly considered all the requisite factors prior to making its award of advanced appellate fees. Second, Father's argument about Mother's lack of a "proffer to the merits of the appeal" loses sight entirely of whose appeal it was. Mother was not seeking an advance of funds to pursue her own appeal. Mother was seeking advanced appellate fees to defend against Father's appeal to this Court (about which the trial court expressed its belief that he was not "likely to prevail"). Furthermore, common sense dictates that, if Mother had been asked to proffer her thoughts on the merits of *Father's appeal*, she would have indicated that Father's appeal was lacking in merit, but that is distinct from the concept that Mother was going to defend against the appeal regardless. Mother had no reason to make a proffer as to the merits of Father's appeal.

As noted above, the trial court was empowered by FL § 12-103 to award Mother advanced appellate attorneys' fees to defend against Father's appeal. The court considered the required factors, and did not abuse its discretion in making its award.

> 2. Did the Court err in refusing to recuse itself when the Appellant filed a motion to recuse and therein alleges the Court sanctioned him for utilizing the Maryland Rules, the parties were not treated equally, the Appellant was admonished for presenting an unambiguous and clear case, the refusal to apply the law, and the misstatement of the facts, inter alia?

In his brief, appellant cites no cases in support of this argument. Instead, he asserts that he was "admonished for presenting unambiguous [sic] and intelligible case"; "sanctioned for utilizing the rules promulgated by the Legislature"; and not treated equally, in comparison with Mother. We review the denial of a recusal motion for abuse of

discretion. *Surratt v. Prince George's County*, 320 Md. 439, 465 (1990). Judges are presumed to be impartial, and "[t]he person seeking recusal bears a 'heavy burden to overcome the presumption of impartiality.'" *Karanikas v. Cartwright*, 209 Md. App. 571, 579, 61 A.3d 69 (quoting *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 297, 818 A.2d 219 (2003)), *cert. dismissed*, 436 Md. 73, 80 A.3d 1045 (2013).

In *Reed v. Baltimore Life Ins. Co.*, 127 Md. App. 536, 554 (1999), this Court articulated what must be present in a record on appeal to enable a reviewing court to evaluate a claim that a motion to recuse was wrongly denied:

> In order to obtain review of the trial judge's conduct, the record must contain the following elements:
>
> > (1) facts are set forth in reasonable detail sufficient to show the purported bias of the trial judge; (2) the facts in support of the claim must be made in the presence of opposing counsel and the judge who is the subject of the charges; (3) counsel must not be ambivalent in setting forth his or her position regarding the charges; and (4) the relief sought must be stated with particularity and clarity.
>
> *Braxton* [*v. Faber*], 91 Md. App. [391] at 408–09, 604 A.2d 543 [(1992)]. Absent each of these elements, we will not review a party's assertion of prejudice.

Here, appellant's efforts have come up short. Distilled to its essence, appellant's complaint is that the trial judge was biased against him because, had the court not been biased against him, he would have won the case. Appellant overlooks the many instances in the record in which the trial court extended him courtesies, including its grant to him of extra time to present his case. We see no indication anywhere in the voluminous record of proceedings before the trial court that would persuade us that appellant has successfully

shouldered his "heavy burden to overcome the presumption of impartiality," *Karanikas*, *supra*, 209 Md. App. at 579, and detect no abuse of discretion in the denial of appellant's motion to recuse.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.