Circuit Court for Anne Arundel County
Case No. C-02-FM-15-001046

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2

September Term, 2017

DEBORAH COOK

v.

EDWARD COOK

Woodard, C.J.,
Kehoe,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: October 16, 2017

This is an appeal from a judgment of the Circuit Court for Anne Arundel County, the Honorable Alison L. Asti, presiding, which granted appellee/cross-appellant Edward Cook ("Husband") an absolute divorce from appellant/cross-appellee Deborah Cook ("Wife"). Relevant to this appeal, the judgment also: (1) awarded the parties joint custody of their two minor children, subject to several provisos, one of which we will presently discuss; (2) ordered that the marital home be sold and the net proceeds divided equally between the parties; (3) ordered Husband to make the monthly mortgage payments and Wife to pay all other household expenses; (4) granted Wife use and possession of the marital home until it is sold, not to exceed three years from the date of the judgment of divorce; (5) awarded Wife both rehabilitative and indefinite alimony; (6) divided the parties' marital property and made a monetary award to Wife; (7) ordered Husband to pay child support; and (8) denied Wife's request for an award of attorney's fees. Neither party was satisfied with the court's judgment.

On appeal, Wife raises five issues, which we have reworded:

> 1. Did the trial court abuse its discretion by ordering that the parties' children could visit households or places where another minor child was present, as long as that contact was supervised by an adult?
>
> 2. Did the trial court clearly err by finding that Wife is voluntarily impoverished, and abuse its discretion in its finding regarding her maximum future income potential for purposes of child support and alimony?
>
> 3. Did the trial court err in determining Husband's income when making its alimony award?
>
> 4. Did the trial court err by finding that Wife dissipated $85,000?
>
> 5. Did the trial court abuse its discretion by failing to award Wife a reasonable amount of attorney's fees?

For his part, in addition to opposing each of Wife's contentions, Husband presents the following issues in his cross-appeal, which we have also reworded:

> 1. Did the trial court err in awarding Wife $4,000 per month in rehabilitative alimony when the evidence showed that Husband's income was lower than the trial court's calculation, but that his monthly expenses were significantly higher than the trial court's calculation?
>
> 2. Did the trial court err in issuing an order, which reversed its previous ruling, less than twenty-four hours after receiving an ex parte e-mail communication from Wife's counsel, without receiving a formal motion or a response from Husband's counsel?
>
> 3. Did the trial court err in awarding Wife indefinite alimony in the amount of $2,000 per month, in light of its finding that Wife could become self-supporting at the end of the rehabilitative alimony period with the ability to earn a six-figure salary?
>
> 4. Did the trial court err in awarding Wife a majority of the parties' marital assets?
>
> 5. Did the trial court abuse its discretion by awarding Wife $3,000 per month in child support in an above-guidelines case, since it used an artificially inflated figure for Husband's income and did not properly calculate the children's expenses?

Although most of the parties' assertions of error are not persuasive, we conclude that the trial court erred when it found that Wife had declined a full-time offer of employment from her employer. Additionally, both parties point out that there is an internal inconsistency in the trial court's opinion regarding the amount of Husband's income. Therefore, we will affirm the judgment in part, vacate in part, and remand the case so that the trial court can clarify or modify its judgment.

Background

The trial court granted the parties' joint motion to seal their written final arguments and its findings of fact and conclusions of law. There were very good reasons for this, as

this appeal involves minor children, including a child whose parents are not parties to this litigation. The trial court, the parties, and their counsel are familiar with the facts and, in this particular case, the interests of the minor children will not be served by setting some of them out in this opinion.

The Visitation Dispute

During the trial, the court entered a consent judgment regarding physical custody arrangements for the parties' two minor children. As part of its judgment, the court awarded the parties joint legal custody with "joint decision making power with each other regarding the emotional, . . . physical and general welfare of the [c]hildren." There has been one issue about which the parties have been unable to agree.

For our purposes, it is sufficient to say that the dispute involves whether the parties' children should have contact with a member of their extended family. Wife believes that there should be no contact. Husband thinks otherwise. The court resolved the dispute by imposing a requirement that contact between the parties' children and the other child be supervised by an adult. Wife argues that this decision constituted an abuse of the court's discretion.

In child custody and visitation disputes, the best interest of the child "is always determinative[.]" *Santo v. Santo*, 448 Md. 620, 626 (2016) (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977). An appellate court reviews "a trial court's custody determination for abuse of discretion." *Santo*, 448 Md. at 625. "This standard of review accounts for the

trial court's unique 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Id*. (quoting *Petrini v. Petrini*, 336 Md. 453, 470 (1994)).

"A court can abuse its discretion when it makes a decision based on an incorrect legal premise or upon factual conclusions that are clearly erroneous." *In re Adoption of Ta'Niya C*., 417 Md. 90, 100 (2010). We will disturb a trial court's findings of fact only if they are clearly erroneous, but we exercise de novo review over the court's legal conclusions. *Id.*

When, as in this case, the action has been tried without a jury, we must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). We cannot conclude that a trial court's findings are clearly erroneous if there is any competent evidence that supports the court's findings. *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010); *Solomon v. Solomon*, 383 Md. 176, 202 (2004). Moreover, we must consider the evidence "in a light most favorable to the prevailing party." *Ryan v. Thurston*, 276 Md. 390, 392 (1975).

Finally, "a court can abuse its discretion by reaching an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous." *Guidash v. Tome*, 211 Md. App. 725, 736 (2013). This Court summarized the appropriate appellate approach in *North v. North*, 102 Md. App. 1, 15 (1994):

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark

> imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

Returning to the case before us, there was conflicting evidence before the court as to the appropriate way to address the difficult issue confronting the parties. One of Husband's siblings testified that she believed that supervised contact was appropriate. This witness has a master's degree in counseling psychology and is a licensed professional counselor with thirteen years of mental health counseling experience. This was competent evidence to support the court's decision. The trial court's decision to require an adult to be present under certain circumstances was a reasonable one in light of the parties' concerns and the evidence.

Wife also asserts that the court made a legal error because it failed to make the findings required by FL § 9-101.[1] The argument is misplaced. By its terms, the statute

[1] Section 9-101 states (emphasis added):

> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected *by a party to the proceeding*, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect *by the party*, the court shall deny custody or visitation rights *to that party*, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

applies to abuse or neglect by *parties* to a custody proceeding, There was no allegation that Husband abused or neglected either of his children.[2]

We hold that the custody provisions of the judgment were not an abuse of discretion by the trial court.

The Economic Relief Granted or Denied to the Parties

The parties' remaining contentions concern the trial court's decisions regarding its award of rehabilitative and indefinite alimony; its division of marital property and the monetary award to Wife; Husband's obligation to pay child support; and Wife's request for an award of attorney's fees. The parties' contentions fall into three categories.

The first category consists of arguments that the certain findings of fact made by the trial court were clearly erroneous. Specifically, Wife contends that the court erred when it found that: (1) she had dissipated $85,000 in marital assets; (2) she voluntarily impoverished herself prior to trial; and (3) she had a current annual income capacity of

[2] Wife also asserts that the trial court abused its discretion by failing to follow the recommendation contained in the post-hearing memorandum filed by the children's best interest attorney ("BIA"). The fatal difficulty with this argument is that Wife presents no authority to support her assertion that the trial court was required to afford any particular weight to the recommendations made by a BIA.

Md. Rule 8-504(a)(5) requires a brief to include legal argument in support of the party's position. We will not further address the contention. *See HNS Development v. People's Counsel for Baltimore County,* 425 Md. 436, 459 (2012) ("After reviewing HNS's brief, we are disinclined to search for and supply HNS with authority to support its bald and undeveloped allegation[.]" (citing, among other authority, *Rollins v. Capital Plaza Assocs.,* 181 Md. App. 188, 202, (2008) and *Konover Property Trust v. WHE Assocs.,* 142 Md. App. 476, 494 (2002)).

$41,500 and a maximum capacity of $100,000. Next, both Wife and Husband take aim at the court's findings as to his present and future earnings: Husband contends that the court's findings regarding his present and future capacity were too high and his current expenses too low. Finally, both parties assert that there is an inconsistency in the court's memorandum opinion regarding the amount of Husband's income.

The second category is comprised of assertions that the trial court abused its discretion. Husband takes aim at the court's alimony, monetary, and child support awards. For her part, Wife argues that the court abused its discretion by denying her request for attorney's fees.

The third category consists of Husband's contention that the trial court erred by modifying the judgment based upon what the Husband characterizes as an ex parte communication between Wife's counsel and the court's chambers. At oral argument, Husband's counsel argued that the court's lapses in this regard were so grave that we should direct the Administrative Judge of Circuit Court for Anne Arundel County to assign this case to a different judge.

1. Dissipation

In its memorandum opinion, the trial court found that Wife had dissipated $85,000 of marital assets. The court stated:

> The parties both acknowledge that on or about September 9, 2016, Mr. Cook divided the $170,000 balance [of a bank account that was indisputably marital property] between Husband and Wife, totalling $85,000 each. Husband assumes Wife deposited her $85,000 [in an account titled in Wife's sole name]. . . . Wife

> asserts that she has not cashed the $85,000 check. . . . The Court . . . finds that Wife has an additional $85,000 which is not shown in any account.

The court returned to this issue later in its opinion:

> It is undisputed that Husband transferred $85,000 to Wife on September 9, 2016. Wife has no explanation as to the status of the funds, but said that the check was not deposited.
>
> Husband asserts that he was paying all household expenses, plus $2,000 in additional support so Wife did not need to expend these funds.
>
> The Court finds that Husband proved by a preponderance of evidence that Wife dissipated assets because she . . . has no explanation for the missing $85,000 in marital assets. Wife either still has the $85,000 or she spent the funds without agreement from Husband. The Court finds that Wife did not meet her burden of showing that the money was used for marital or family expenses. Therefore, the Court finds that the $85,000 is extant property.

To this Court, Wife argues that the trial court erred. First, she asserts that the issue was not properly before the trial court because Husband did not raise the issue in his pleadings. Wife is wrong on this point. Her argument relies on this Court's decision in *Huntley v. Huntley*, 229 Md. App. 484, 494 (2016), in which we held that a trial court was without authority to grant an equitable division of a spouse's retirement accounts when the moving party did not request a division of marital property or a monetary award in his pleadings. *Huntley* is different from the present case because the division of marital property is a specific statutory remedy, *see* F.L. § 8-205. Husband was not required to plead dissipation because a finding of dissipation is not in and of itself a substantive remedy but merely a factor that the court may consider in fashioning an award. *See* F.L. § 8-205((b)(11) (A court is to consider "any other factor . . . necessary or appropriate . . .

in order to arrive at a fair and equitable monetary award or transfer of an interest in [marital] property.").

Turning to Wife's substantive contentions, "dissipation occurs where one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown." *Omayaka v. Omayaka*, 417 Md. 643, 651 (2011) (bracketing, quotation marks and citation omitted). When "property [is] intentionally dissipated in order to avoid inclusion of that property towards consideration of a monetary award, such intentional dissipation is no more than a fraud on marital rights, and the chancellor should consider the dissipated property as extant marital property . . . to be valued with the other existing marital property." *Sharp v. Sharp*, 58 Md. App. 386, 399 (1984) (citation omitted).

Wife argues that the court's dissipation finding was clearly erroneous because she "testified . . . [that] she never cashed the $85,000 [check], [she] simply never took possession of the $85,000 that the court found to be extant." The distinction that Wife attempts to draw between a check and the proceeds of a check is not persuasive and, in any event, is inconsistent with Wife's testimony that she did, in fact, cash the check.

The trial court's dissipation finding was nothing more than a recognition of the obvious, namely that Wife could not claim that she didn't have the $85,000 merely

because she had not yet cashed the check. In light of this, even assuming that the court erred in its dissipation analysis, any error would have been harmless.[3]

2. Voluntary Impoverishment

As part of its analysis regarding child support, the trial court found that Wife had voluntarily impoverished herself. Specifically, the court stated (emphasis added):

> Mrs. Cook quit her part-time job immediately prior to this trial.
>
> . . .
>
> The Children are in school for a full day which would enable Mother to seek full-time employment. Mother had the ability and resources to obtain employment, but *has voluntarily and freely made a conscious choice to be unemployed despite the offer of full time employment from her former employer.*
>
> . . .
>
> Mother has made no efforts to obtain training but has expressed an interest in medical devices sales and has stated plans to secure the necessary training.

To this Court, Wife argues that the trial court's finding was clearly erroneous. We agree.

F.L. § 12–201(h) defines "income" to include "potential income of a parent, if the parent is voluntarily impoverished." A court may impute potential income to a parent

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[3] In her reply brief, and for the first time, Wife presented a different theory as to why the trial court erred. She notes that, in September, 2016 she testified that she did not cash the check but that when trial resumed in November, "Mrs. Cook testified that she needed to use a portion of these funds to purchase a new car and [to] repay a loan from her mother."

There are problems with this contention. The first is that Wife waived the contention because she did not raise present it in her initial brief. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003). Second, although purchasing a new automobile was a marital expense, repaying the loan to her mother was not. Wife's testimony was unclear as to how much of the $85,000 was used to purchase her automobile and what portion was used to repay her mother.

who is voluntarily impoverished. F.L. § 12-204(b)(1). "Potential income" is "determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." F.L § 12-201(j). A parent is 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.'" *Lorincz v. Lorincz*, 183 Md. App. 312, 331 620–22 (2008) (quoting *Goldberger v. Goldberger*, 96 Md. App. 313, 327, 624 A.2d 1328 (1993). As we noted in *Lorincz*, Maryland courts typically apply a multi-step analysis in assessing whether a parent is voluntarily impoverished:

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

Id. at 331 (quoting *John O. v. Jane O.*, 90 Md. App. 406, 422 (1992)).

Returning to the case before us, after the parties separated in 2015, Wife went to work on a part-time basis for a local dental practice. Wife testified that her employer

"didn't want me to work 40 hours a week, because then they would have had to pay me benefits and stuff." Ann Daly, who was the office manager and a co-owner of the practice, testified that she hired Wife to "help me out, organize the accounts, and kind of get [the office's billing procedures] back on track." The purpose of Wife's efforts was to straighten out the practice's records and procedures so that it could hire a dental insurance manager, who would have "the knowledge of the coding, and dental examination, and insurance claims." Ms. Daly further testified:

> [I]n October of [2016], we added new providers, and so I needed a full time dental insurance manager, who actually has the experience of the . . . coding. And there's been a lot of change in the health care system, so we actually—you know, normally you get a dental assistant or somebody who actually has true experience of knowing the procedures to handle that type of work.

Ms. Daly explained that dental insurance managers typically have previous experience as dental assistants, which requires "a good six months" of academic preparation, or as dental hygienists, which requires "a two-year program after college." On cross-examination, she testified that it would take "a couple of years at least" for Wife to accumulate the professional experience that would qualify her to function as a dental insurance manager. Moreover, Ms. Daly testified that Wife's work with her practice did not constitute the appropriate professional experience because she did not personally observe dental procedures. When asked about how many hours Wife worked per week, Ms. Daly responded:

> Twenty-five, maybe, but I didn't need her all that —. I mean she didn't have the experience for the job. She was helping me get organized.

Absent from this testimony is any indication that Wife was qualified for any full-time position with Ms. Daly's practice, or that the practice offered her a full-time job, or that Wife declined such an offer. The trial court's finding that Wife refused "the offer of full time employment from her former employer" was erroneous.

To be sure, employment history is only one of the *John O.* factors that a court should consider in deciding whether there has been voluntary impoverishment. Husband points to evidence pertinent to some of the other factors to support his position that the trial court's ultimate conclusion was not erroneous. But the process of reweighing the remaining *John O.* factors in light of our holding is a matter for the trial court.

3. Wife's Potential Income

In its memorandum opinion, the court concluded that Wife "has the ability to earn $100,000 as a medical device salesman within five years and will eventually be self-supporting." The court utilized this figure for the purposes of deciding the appropriate monetary, child support, and indefinite alimony awards. On appeal, Wife argues that the $100,000 annual income finding was not based upon "competent or credible evidence" but was rather based on a speculative assertion by one, non-expert, witness. This contention is not persuasive.

The relevant evidence was generated through three witnesses, who testified in the following order: (1) Susan Delawder, a friend and former neighbor of Wife, who had been employed by a medical device sales distributorship for sixteen years prior to trial and began her own independent medical equipment distributorship a few months prior to

trial; (2) Steven Shedlin, a rehabilitation counselor called as an expert witness by Wife; and (3) Wife herself.

Ms. Delawder testified that she and Wife had discussed the possibility of the latter's joining her distributorship as a sales person, and that she was familiar with Wife's educational background and professional abilities. She believed that after a training and period of about four years (during which her compensation would be rather limited), Wife could earn "six figures" as a sales person.

In relevant part, Mr. Shedlin testified that, if Wife obtained a job as a dental billing manager, she could initially earn between $37,800 and $41,500 and about $46,400 to $48,500 after three to five years. In his view, the barriers to Wife's becoming employed as a medical equipment sales representative were primarily age-related because entrants into that field tend to be younger, but "that's a hurdle she can overcome." He conceded that he had not performed an analysis of the median income for a medical sales representative for the purposes of the Cook litigation but that "it would likely be in the 40's at the low end . . . to perhaps in the 80's at the high end . . . but I would not be surprised if I was corrected after doing the research." Finally, Wife testified that she was interested in pursuing a career in the medical sales field and, that, in addition to her discussions with Ms. Delawder, she had also contacted another medical equipment distributor regarding employment.

"We review the court's findings as to a party's earning capacity under the clearly erroneous standard. Under that standard, '[i]f there is any competent evidence to support

the factual findings [of the trial court], those findings cannot be held to be clearly erroneous.'" *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (citation and quotation marks omitted). The testimony that we have summarized is more than sufficient to satisfy that requirement.

Wife also asserts that Ms. Delawder's testimony was not competent and that the court should have been guided by Mr. Shedlin's opinion because he was an expert witness in the field of vocational rehabilitation. However, as Husband points out in his brief, the law is to the contrary— a lay witness may opine "on matters as to which he or she has first-hand knowledge." *Goren v. U.S. Fire Ins. Co*., 113 Md. App. 674, 685 (1997) (quotation marks and citation omitted). Ms. Delawder's sixteen years of experience in the medical equipment sales field, together with her first-hand knowledge of Wife based on their long-standing relationship, provided a basis for her opinion. The court was not required to accept Mr. Shedlin's testimony, especially in light of the caveats he expressed as to his forecast of Wife's earning capacity as a medical equipment salesperson.[4]

[4] Wife also asserts that the court's finding was inconsistent with the court's decision to accept Mr. Shedlin's conclusion that she had a current annual income-earning capacity of $37,800 to $41,500 for purposes of determining rehabilitative alimony. We do not agree. A trial court is not required to afford equal probative weight to all portions of a witness's testimony. *See Della Ratta*, 414 Md. at 583-584 ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder.") (citation and quotation marks omitted).

4. Husband's Income

Among the factors that a court must consider in deciding whether to award alimony are "the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony,"[5] and "the financial needs and resources of each party, including: "all income and assets. . .and the nature and amount of the financial obligations of each party."[6] In its analysis, the court made findings as to Husband's income and expenses. Both parties argue that the court erred in its income analysis. Additionally, Husband contends that some of the court's findings with regard to his expenses were clearly erroneous. These contentions are not persuasive.

Although there is a discrepancy in the court's opinion that we will address later, we read the court's memorandum opinion as including a finding by the trial court that Husband's current income was $28,879 per month, or $346,551 on an annual basis. Husband argues that the court's finding was clearly erroneous because it was contrary to the testimony of Husband and Scott Bernsteil, Husband's manager at his employer, Deutsche Asset Management. Both testified that Husband's income for 2016 was likely to be $275,000. For her part, Wife contends that the correct number should have been $463,158, which was the average of his last five years of compensation.

[5] FL § 11-106(b)(9).

[6] FL § 11106(b)(11).

As the sole basis of her contention, Wife points out that FL § 12-203(b) permits five year income averaging in cases where, as in this case, a party's annual income has varied by more than 20% in any of the three years prior to trial. Wife's reading of the statute is correct but nothing in it *requires* a court to use a five year income averaging analysis to calculate income and a trial court is free to use other methods. *Tanis v. Crocker,* 110 Md. App. 559, 572 (1996). We turn to Husband's arguments.

As we have discussed, we will not disturb a court's finding as to a party's earning capacity unless the finding is clearly erroneous. *St. Cyr*, 228 Md. App. at 180. In this exercise, we bear in mind that, in cases tried without a jury, an appellate court must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). Further, a trial judge is "entitled to (1) accept—or reject—*all, part*, or *none* of the testimony of any witness, including testimony that was not contradicted by any other witness, and (2) draw reasonable inferences from the facts that it found to be true." *In re Gloria H.*, 410 Md. 562, 577 (2009) (emphasis in the original).

The evidence before the court was that Husband was, and will remain, a very successful, and highly compensated, investment professional. Between 2011 and 2015, his annual earned income varied between $405,000 and $684,734, with the latter figure being somewhat of an outlier. In 2016, however, his income was lower, averaging $28,879 per month, or $346,551 on an annual basis. Mr. Bernsteil testified that Husband's 2016 income was inflated because he received a $53,683 bonus early in the

year based on his 2015 job performance, and that Husband was on pace to earn $275,000 in 2016.

Mr. Bernsteil also identified two factors that suggested that Husband's future income would be lower. He stated that concerns about the Brexit process was causing international financial companies to increase their liquid assets, and thus limiting the amount of money available for investment in the kinds of vehicles offered by Deutsche Asset Management. The second was that pending Department of Labor regulations will require Deutsche to disclose fees that are included in many of its investment products thus motivating Deutsche to lower its fees to be in line with those of its competitors.

The court discussed this evidence in its opinion. The court stated that it "was unable to predict the impact of the pending DOL regulations, which may or may not be reevaluated under the administration of the new president"[7] and that the court had not received sufficient evidence "to opine as to Husband's future commission and bonus potential." The court did not err because it found Husband's evidence to be unpersuasive. *In re Gloria H.*, 410 Md. at 577.

[7] The court's concern was well-founded; the current administration has directed the Secretary of Labor to reconsider the regulations. *See* United States Department of Labor, Employee Benefits Security Administration, *Conflict of Interest FAQs (Transition Period) May 2017*, available at https://www.dol.gov/sites/default/files/ebsa/about.../coi-transition-period-1.pdf (last visited September 23, 2017).

5. Husband's Expenses

Husband also asserts that the trial court erred because it reduced the amount of some of the expenses claimed by him.

Husband first takes issue with the court's decision not to treat monthly mortgage payments on the marital home as an expense, even though the court ordered him to make those payments. The court's opinion stated that the marital home was to be "promptly listed for sale," and the proceeds divided between the parties. Because the mortgage expense was a short-term expense, the court did not err in excluding it from its assessment of Husband's ability to pay rehabilitative and indefinite alimony.[8]

Second, Husband argues that the court erred in reducing his monthly medical expenses from $842.50 to $401. His argument is based upon the figures contained in his financial statement, which stated that Husband's medical, dental and vision insurance totaled $842.50 per month and that Husband incurred an additional $315 per month in otherwise undescribed medical expenses.

[8] Moreover, the court's judgment permits Husband to credit 50% of the monthly mortgage payments against his alimony obligation.

Additionally, Husband contends that, after the judgment was entered, Wife dragged her feet regarding taking the steps necessary to put the marital residence on the market. Even if these contentions are correct—and we note that the trial court denied Husband's request for an immediate appointment of a trustee to sell the property—this is not a basis for us to conclude that the court's decision regarding the mortgage payments was erroneous.

There is a procedural problem with this contention. The argument in Husband's brief is based upon his pre-trial financial statement, a copy of which is included in the appendix to Husband's brief. However, the trial court's analysis was based in large part upon a statement from Husband's employer as to his coverage. The latter document was introduced as an exhibit by Husband at trial but a copy is not included in either the record extract or the appendix.[9] It is impossible for us to evaluate Husband's contention. *See Konover Prop. Trust v. WHE Associates,* 142 Md. App. 476, 494 (2002).

Finally, Husband asserts that the court erred in refusing to treat as expenses his payroll deductions for his retirement account and for insurance because those expenditures were discretionary on his part. Husband argues that his contribution to his IRA account serves to decrease his taxable income, "which actually leaves him with a higher amount of discretionary income . . . to support his children." However, Husband doesn't explain how his *pretax* contribution to his IRA will increase the amount of Husband's *post-tax* income available for discretionary spending.

6. The Discrepancies in the Court's Opinion as to Husband's Income

As we have explained, we read the court's opinion as including a finding that Husband's present annual income was $346,551. The court used this figure in calculating child support. However, when deciding the appropriate amount of indefinite alimony, the

[9] Nor, for that matter, was the exhibit included in the record electronically transmitted to this Court.

court stated that Husband's income was $285,774.[10] The court adopted its alimony analysis by reference (without specifying which figure it was using for Husband's income) when it addressed Wife's claim for a division of marital property, a marital award and attorney's fees. We are unable to reconcile the different figures for Husband's income and we must vacate the alimony award as well as the other parts of the court's judgment granting or denying economic relief to the parties. *See, e.g., St. Cyr*, 228 Md. App. at 198 ("A court's determinations as to alimony, child support, monetary awards, and counsel fees involve overlapping evaluations of the parties' financial circumstances. The factors underlying such awards are so interrelated that, when a trial court considers a claim for any one of them, it must weigh the award of any other." (Quotation marks and citations omitted.)). To avoid possible hardships to the parties, and consistent with our practice in similar cases, "[u]ntil the circuit court completes the proceedings required by this opinion, the existing orders for alimony and child support will continue to have the force and effect of a pendente lite award." *Id.* (quoting *Simonds v. Simonds*, 165 Md. App. 591, 613 (2005) (quotation marks deleted).

7. The Correction to the Court's Judgment

Husband contends that the trial court erred in issuing an order reversing a prior ruling less than 24 hours after receiving what Husband terms an "ex parte" email from wife's

[10] Specifically, the court stated: "Wife's future earning potential of $100,000 is only 35% of Husband's $285,774 income."

counsel. During oral argument, Husband's counsel asked us to instruct the administrative judge of the Circuit Court for Anne Arundel County to assign this case to a different judge on remand. We do not agree with Husband's contentions. Some additional background information will be helpful in explaining why.

In the trial court's memorandum opinion, the court granted Wife both rehabilitative and indefinite alimony. As originally filed, the opinion stated in pertinent part (emphasis added):

> The Court finds that Wife is entitled to rehabilitative alimony in the amount of $4,000 per month *for a period of approximately five years* from the date of the Judgment of Absolute Divorce *until May 20, 2022* ("the Rehabilitative Alimony Period") *at which time it is expected that* [the parties' older child] *will have graduated from high school.* The Court finds that this amount will enable Wife to cover her monthly expenses while receiving the training and experience necessary to become self- supporting.
>
> The Court finds that Wife is also entitled to indefinite alimony. . . .

After the judgment was entered, Husband filed a motion to alter or amend. He presented several contentions as to why the court should reduce the amount of rehabilitative alimony and eliminate the award of indefinite alimony. These arguments were based on Husband's assertions that the court's findings as to Wife's earning capacity and Husband's income were erroneous, and that the court had erred by focusing on the disparity between the parties' incomes as opposed to their lifestyles. As a separate basis for modification of the rehabilitative alimony award, Husband pointed out that the wording of the court's order resulted in an "unforeseen tax consequence" to Husband.

Specifically, and after discussing the pertinent provisions of the Internal Revenue Code, Husband stated:

> By linking the reduction in alimony from $4,000 per month (rehabilitative) to $2,000 per month (indefinite) to [the older child's] graduation from high school, the Court inadvertently converted the [Wife's] award of alimony to child support, which makes the difference between the rehabilitative alimony and indefinite alimony a nondeductible expense for [Husband] for income tax purposes."
>
> Based on the foregoing, [Husband] requests that this Court amend the Judgment of Absolute Divorce to terminate [Wife's] rehabilitative alimony on a date that is unrelated to [either of their children's] birthdays.

In response, the court filed an order granting Husband's motion in part and denying it in part. The order stated in pertinent part (emphasis added):

> ORDERED that *The Alimony Award section of the Court's Memorandum Opinion is amended to read*:
>
> "The Court finds that Wife is entitled to rehabilitative alimony in the amount of $4,000 per month for a period of approximately five years from the date of the Judgment of Absolute Divorce *until May 20, 2022* ("the Rehabilitative Alimony Period"). The Court finds that this amount will enable Wife to cover her monthly expenses while receiving the training and experience necessary to become self-supporting.
>
> ORDERED that all other relief requested in [Husband's] motion is DENIED; and it is further
>
> ORDERED that this Amendment shall modify the Memorandum Opinion entered February 3, 2017 only as to the above referenced section pertaining to The Alimony Award . . . .

This order was filed on March 22, 2017. On April 24th, Wife's counsel sent the following email to Judge Asti's law clerk with a copy to Husband's lawyer:

> I tried to swing by chambers today since I was already in Court. . . but by the time we were done, everyone had broken for lunch.

> Can you ask if the Court can clarify one portion of the recent ruling regarding the Motion to Alter or Amend filed by Mr. Cook? Did the Court eliminate the indefinite alimony portion of the award? Based upon the recent Order and weighing that with the old Order, I am unclear if this was the intent of the Court.
>
> If the Judge prefers, I can present a formal motion, however, in light of the extensive costs of the litigation, I was hoping a quick answer could be had.

On April 28th, the court filed an "Order Clarifying Amendment to Memorandum Opinion." That order stated in pertinent part (emphasis added):

> WHEREAS, in [its prior Amendment to Memorandum Opinion] . . . The Court only included the one paragraph which was modified and not the remaining parts of the Alimony Award section, which created some confusion as to whether the remaining parts of the Alimony Award section of the Opinion had been eliminated or continued in effect; and
>
> WHEREAS, the Court desires to clarify its Amendment by including the entire Alimony Award section; and
>
> NOW THEREFORE, *on the Court's own initiative and pursuant to Maryland Rule 2-535(d)*, it is this 25th day of April, 2017, by the Circuit Court for Anne Arundel County, hereby
>
> ORDERED that the Alimony Award section of the Court's Memorandum Opinion reads in its entirety as follows: . . . .

The remainder of the order set out the court's award of rehabilitative and indefinite alimony verbatim from the court's original order except that it deleted the reference to the anticipated graduation date of the parties' elder child as the termination date. Husband cries foul as to both the procedure followed by the court and the substance of the order. At this point, we will address his procedural concerns.

We begin with the inarguable. The email from Wife's counsel to the court's law clerk was inappropriate. In the procedural context of the case at the time the email was sent,

there was one, and only one, remedial path by which Wife could seek a clarifying order from the trial court, and that was by asking for it in a motion. *See* Md. Rule 2-311 ("An application to the court for an order shall be by motion. . . ."). At the risk of belaboring the obvious, neither an email nor visiting a judge's chambers is a motion. Sending the request for judicial relief to the law clerk didn't remedy the problem because that merely shifted to the clerk the dilemma of resolving how to deal with problems created by counsel's shortcut. The email was procedurally inapt and, in our view, was also a professional discourtesy to the law clerk, the court, and opposing counsel.[11]

However, our focus is not on counsel, but upon the court. As this Court has explained:

> Only a judge can commit error. Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. The Fates do not commit error. Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling.

Apenyo v. Apenyo, 202 Md. App. 401, 425 (2011) (quoting *DeLuca v. State,* 78 Md. App. 395, 397-98 (1989)).

The court issued its Order Clarifying Amendment to Memorandum Opinion, "of its own initiative and pursuant to Maryland Rule 2-535(d)." Rule 2-535(d) permits a court to revise a judgment to correct "clerical mistakes . . . at any time on its own initiative, or on

[11] It was not however, an ex parte communication. *See* BRYAN A. GARNER, BLACK'S LAW DICTIONARY 697 (10th ed. 2014) (Defining "ex parte" as "Done or made at the instance and for the benefit of one party only, *and without notice to*, or argument by, anyone having an adverse interest.") (emphasis added).

motion of any party after such notice, if any, as the court orders." The unintended ambiguity in the court's order granting Husband's motion to alter and amend in part and denying it in part is an example of the kind of "mistake" that is contemplated by Rule 2-535(d). The court had the authority to correct its judgment on its own initiative, and without notice to the parties if it chose to do so. There was no error on the trial court's part.

We will briefly address Husband's request that we order this case to be assigned to a different judge on remand. We do so not to offer advice to Judges Kiessling and Asti but rather to explain to the parties how judges decide motions to recuse.

Generally speaking, whether a judge should recuse him/herself from a pending case is a matter for the judge's discretion. How a judge should exercise that discretion in a particular case is governed by a combination of substantive law developed by the Court of Appeals and the pertinent provisions of the Maryland Code of Judicial Conduct. A judge should recuse if presiding over an action "would create in reasonable minds a perception of impropriety." Md. Rule 18-101.2. Comment [5] to Rule 18-101.2 explains that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with competence, impartiality, and integrity is impaired." The Court of Appeals has made it clear that, in the context of a request for a judge to recuse in contexts such as this:

> "the test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts. . . . Like all legal issues, judges determine appearance of impropriety—*not by considering what a straw poll of*

> *the only partly informed man-in-the-street would show*—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding *all* the relevant facts would recuse the judge."

Boyd v. State, 321 Md. 69 (1990) (emphasis in original) (quoting *In re Drexel Burnham Lambert Inc*., 861 F.2d 1307, 1313 (2d Cir. 1988)); *see also Bishop v. State*, 218 Md. App. 472, 492–94 (2014) (applying same standard). Among the elements of the "law" that Judge Asti, or another judge in a similar situation, might consider is Rule 2-535(d), which permits the court to correct mistakes at its own initiative and without notice to the parties.

The parties must also bear in mind that judges have an ethical duty to decide cases that are assigned to them. Md. Rule 18-102.7. As the Court noted in *In re Turney*, 311 Md. 246, 253 (1987), "a judge's duty to sit where not disqualified is equally as strong as the duty not to sit where disqualified."

7. Proceedings On Remand

As a result of our holdings, the trial court must do two things on remand.

First, the court must revisit its finding that Wife voluntarily impoverished herself in light of our holding that the court erred when it found that Wife had quit her job with the dental practice even though she had an offer of full-time employment. As we previously observed, employment history is only one of the factors that a court should consider in deciding whether there has been voluntary impoverishment. *See John O*., 90 Md. App. at 422. If the trial court concludes that the evidence in light of our holding does not support a conclusion that Wife voluntarily impoverished herself, the court must revisit those parts

of its opinion that are based in part upon the court's finding. This would include, at a minimum, the court's conclusions as to alimony and child support, and, perhaps, the court's disposition of marital property and its decision on Wife's request for an award of attorney's fees.

Second, the trial court must resolve the discrepancy in its opinion regarding Husband's income. As we've stated, we read the court's opinion as finding that Husband's income was $28,879 per month or $346,548 annually. In our view, this finding is not erroneous. If this interpretation of the opinion is correct, then the court must revisit its alimony awards because it imputed a lower annual income to Husband, namely, $285,774, in its alimony analysis. If the alimony award changes, then the court must revisit the marital property award and the child support award. In any event, the court must reconsider its decision as to Wife's request for attorney's fees because the court used two different income figures for Husband. *See Simonds v. Simonds,* 165 Md. App. 591, 616 (2005).

Procedurally, the court should have a hearing to consider arguments of counsel. It may, but need not, hold an additional evidentiary hearing.[12]

[12] Our abbreviated discussion of the court's decisions as to financial relief should not be interpreted as an implied disapproval of the court's reasoning. Some of the parties' contentions that the court abused its discretion are based on assertions that specific findings by the court were clearly erroneous. We have addressed those arguments. The remaining contentions boil down to arguments that the court placed insufficient, or sometimes too much, weight on various statutory criteria in reaching its ultimate

Conclusion

We vacate the court's alimony, marital property, and child support awards as well as its decision to deny Wife's request for attorney's fees and litigation expenses for reconsideration in light of this opinion. The alimony and child support provisions of the court's judgment shall remain in effect as pendente lite orders.

We affirm the portion of the court's judgment relating to custody in its entirety.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS VACATED IN PART AND AFFIRMED IN PART. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

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conclusions. These kinds of arguments are not the basis for appellate relief because the court's decisions as to financial relief were matters of the court's discretion.

On the whole, the court did a commendable job of resolving the parties' disputes in a fair and equitable manner in light of, where relevant, the court's finding as to the cause of the parties' estrangement, the reality of the parties' present and foreseeable future financial situations, and the parties' decision that Wife would stop working in order to care for their children. As the Court of Appeals noted in *Boemio v. Boemio*, 414 Md. 118, 145–46 (2010):

> The family model of one parent serving as the primary caregiver and the other serving as the primary breadwinner can work well, with benefits to all, until divorce. But when divorce occurs, the primary breadwinner is likely to suffer less monetary loss than the caregiver parent, while both will share in the priceless benefit of having children. This asymmetry is certainly a legitimate consideration in determining unconscionability.

But for the discrepancy in the court's opinion as to the amount of Husband's income, and the error regarding voluntary impoverishment, we would conclude that the court did not abuse its discretion with regard to its awards of alimony, marital property, and child support, as well as its decision not to grant Wife an award of attorney's fees.