UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2390

September Term, 2013

BARNERICO GILMORE

v.

SAMANTHA WADKINS

Eyler, Deborah S.
Graeff,
Hotten,

JJ.

Opinion by Hotten, J.

Filed: December 2, 2015

Appellant, Barnerico Gilmore appealed a decision of the Circuit Court for Anne Arundel County, granting appellee, Samantha Wadkins', Fourth Motion to Modify Child Support. After considering the evidence and arguments submitted by the parties, the court determined that there was a material change in circumstances due to an increase in childcare expenses and an increase in appellant's income, thereby warranting an increase in appellant's child support payments. The court further held that the increased child support payments would be retroactive to October 20, 2011, the date appellee filed her Fourth Motion to Modify Child Support. Appellant noted a timely appeal and presents four questions for our review:

> [1.] Did the circuit court err in finding that there was a material change in circumstances based upon an increase in appellant's income[?]
>
> [2.] Did the circuit court abuse its discretion when it included a one-time $10,000 of overtime pay in finding that there was a material change in circumstances in appellant's income[?]
>
> [3.] Did the circuit court abuse its discretion in determining that there was a material change in circumstances with respect to an increase appellee incurred for work-related childcare expenses[?]
>
> [4.] Did the circuit court err in its child support calculations and abuse its discretion by finding that the increased child support payments will be retroactive to October 20, 2011[?]

For the reasons that follow, we shall affirm in part and reverse in part the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and appellee are the parents of twin daughters, minor child S. and minor child S. (the "children"), who were born in December 2007. The parties were never

married. Appellee has primary physical custody and appellant has visitation on alternating weekends. Appellant also has visitation every Wednesday after childcare until 7 p.m. when he does not have a weekend visit. The parties have shared legal custody, which provided appellee with tie-breaking authority for decisions regarding health care, education, and religion. However, under the terms of a previous custody order, both parties were expected to make joint decisions on all matters regarding daycare, schools, doctors, medical records, and religion.

Appellee filed her initial complaint for child support in the Circuit Court for Prince George's County on June 11, 2008. On January 5, 2009, the court issued a *pendente lite* Order, directing appellant to pay $1,941 per month in child support to appellee through September 2008, and $1,929 per month thereafter. On August, 15, 2009, appellee filed her first Motion to Modify Child Support.[1] During the time between appellee's first motion to Modify Child Support and the relevant motion, filed February 19, 2013, appellee filed three motions to Modify Child Support on July 13, 2010, October 7, 2010,[2] and October 11,

[1] The circuit court issued an order on June 29, 2010, in which appellant's child support payments were adjusted to reflect an increase in daycare expenses and a period where appellant was unemployed, and received payment credits.

[2] Appellee also filed a Petition for Contempt against appellant for failure to make child support payments. On December 16, 2010 the circuit court entered an order denying appellee's motions to modify child support filed on July 13th and October 7th. The court directed appellant to pay child support amounts pursuant to the order issued in June 2010 and found appellant in contempt, thereby assessing arrearage in the amount of $13,476.42. Appellant subsequently appealed the court's order regarding contempt.

2011,[3] respectively. Appellant was served with appellee's fourth Motion to Modify Child Support on March 4, 2012. Thereafter, appellant filed a response and a Motion to Dismiss, asserting insufficient service. On May 3, 2012, this Court remanded the matter to the Circuit Court for Prince George's County, holding that the court erred by concluding that appellant was in contempt, despite the court's finding that appellant was making a good-faith effort to make payments. On November 19, 2012, appellee filed a second Motion to transfer Venue to Anne Arundel County, which was subsequently granted.

A three-day merits hearing was held on August 21, September 16, and October 22 of 2013 regarding appellee's Motion to Modify Child Support. Testimony and evidence was proffered by both parties. Appellant was represented by counsel[4] and appellee proceeded *pro se*.

Thereafter, the circuit court issued a memorandum opinion and order on December 23, 2013. The court concluded that the difference in appellant's income since the order issued in June 2010 to present, and the increased expenses that appellee incurred for work-related childcare expenses, was a material change in circumstance warranting an increase in appellant's child support obligations. As a result, the court directed appellant to pay increased child support retroactively to October 20, 2011, the date appellee filed her fourth Motion to Modify Child Support. The court's December 2013 ordered superseded all prior

[3] Appellee's fourth motion was filed in Anne Arundel County, after her request to transfer venue filed in March 2011, was granted.

[4] Appellant's counsel at the merits hearing is not the current counsel of record.

orders regarding child support. Appellant filed a timely appeal to this Court. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

In *Knott v. Knott*, 146 Md. App. 232, 246 (2002), this Court held that "[c]hild support orders are generally within the sound discretion of the trial court. However, 'where the order involves an interpretation and application of Maryland statutory and case law, [the] Court must determine whether the trial court's conclusions are 'legally correct' under a [*de novo*] standard of review.'" (Citations omitted.)

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

"To comply with federal law, the General Assembly enacted Maryland's Child Support Guidelines . . . contained in [Md. Code (1984, 2012 Repl. Vol.), § 12–201 et seq. of the Family Law Article]. The purpose of the guidelines is: 1) 'to remedy a shortfall in the level of awards that do not reflect the actual costs of raising children; 2) to improve the consistency, and therefore, the equity of child support awards, and 3) to improve the efficiency of court processes for adjudicating child support.' Because the [General

Assembly] regarded the [g]uidelines as 'necessary for the immediate preservation of the public health and safety . . . ,' [ ] the [g]uidelines went into effect on the date of their enactment." *Jackson v. Proctor*, 145 Md. App. 76, 89 (2002) (citations omitted).

The Maryland Child Support Guidelines (the "guidelines") follows an income shares model that "establishes child support obligations based on estimates of the percentage of income that parents in an intact household typically spend on their children." *Id*. at 90. Accordingly, "[w]hen the parents have a combined monthly adjusted actual income of $10,000 or less, use of the [g]uidelines to determine child support is mandatory." *Id.* (citations omitted). However, if the parents' monthly combined adjusted actual income exceeds $10,000, the guidelines do not apply and "the court may exercise 'its discretion in setting the amount of child support.'" *Id*. at 90. *See* Md. Code (1984, 2012 Repl. Vol.), § 12-204(d) of the Family Law Article ("Fam. Law").

Moreover, "[a]lthough there is a 'rebuttable presumption that the amount of child support which would result from the application of the child support guidelines' is the 'correct amount,' if a court finds 'application of the guidelines would be unjust or inappropriate,' it may depart from them." *In re Joshua W*., 94 Md. App. 486, 501 (1993). *See* Fam. Law, § 12–202(a)(2).

DISCUSSION

Appellant avers that "[t]he circuit court abuse[d] its discretion when it included a one-time $10,000 of overtime pay in finding that there was a material change in circumstances in [his] income." Appellant asserts that "[his] overtime income was

speculative and uncertain," and thus, without including overtime pay, "there was no material change in circumstance based on an increase in [his] income." We agree.

In assessing appellant's annual income for the year 2013, the circuit court concluded:

> The [c]ourt finds, based upon [appellant's] testimony, that [he] works contractually nine months out of the year and earns $32 per hour working 40 hours per week or $1,280 per week. Forty weeks multiplied by $1,280 is $51,200. [Appellant] has also earned income from working over-time on a regular basis. The [c]ourt finds that his overtime was regular, and was not uncertain or speculative. The [c]ourt finds that with the $10,000 in over-time included, [appellant] is projected to earn $61,200 per year.

This Court's holding in *Brown v. Brown*, 119 Md. App. 289 (1998), is dispositive. In *Brown*, we considered whether overtime pay constituted actual income for purposes of determining child support payments under Fam. Law, § 12-201(c). Following the parties' divorce, appellee was ordered to pay child support for their two children. *Id*. at 290. Ten years later, appellant sought an increase in the child support payments she was currently receiving to help defray the costs of the children's private school education. *Id*. At that time, appellee worked as a tractor-trailer driver about sixty hours a week during the previous seven or eight years and about fifty hours a week when he and appellant separated. *Id*. Appellee maintained that his child support obligations should only be calculated on a forty-hour work week and not include the extra hours worked, which resulted in overtime pay. *Id*.

In addressing whether appellant's overtime pay constituted actual income for purposes of his child support obligations, we opined:

> Since overtime pay constitutes 'compensation due to an employee for employment,' it is clearly 'wages' under § 12-201(c)(3) of the Family Law Article. Therefore, overtime pay is to be considered as actual income when a court fashions an appropriate award of child support. . . .

Brown, 119 Md. App. at 294. However, we acknowledged that this interpretation is narrow in scope. Thus, we further concluded:

> *Decisions that bring overtime pay into child support calculations stress that this additional income must not be speculative or uncertain. Rather, the overtime must be a regular part of the parent's employment.*
>
> *** * ***
>
> *Appellee in the case now before us has consistently worked substantial overtime for more than seven years*. Even before he and his wife separated, he averaged [fifty] hours a week on the job. Therefore, his current overtime income, averaged on a monthly basis, is to be considered when calculating his child support obligation. If circumstances change, and [a]ppellee no longer earns at the level he has over the years, he can seek a modification of the court's order.

Id. at 295 (emphasis added) (internal citations omitted).

Contrary to appellant's overtime pay in *Brown*, the evidence in the instant case demonstrates that appellant's overtime pay was both speculative and uncertain. Appellant testified as follows:

> [APPELLANT'S COUNSEL]: Mr. Gilmore, what is your current income?
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> [APPELLANT]: I make $32 an hour.
>
> [APPELLANT'S COUNSEL]: And do you regularly have overtime on your job?
>
> [APPELLANT]: No.
>
> [APPELLANT'S COUNSEL]: And so with $32 an hour, 40 hours a week, how much do you make a week?

[APPELLANT]: $1,280.

[APPELLANT'S COUNSEL]: $1,280 a week. Do you work every week of the year?

[APPELLANT]: No.

* * *

THE COURT: Okay, so that is $51,200. So before you were imputed at $45,000, let's say now it is $51,200 and you said that there is no guarantee of overtime, correct?

[APPELLANT]: No.

THE COURT: And have you worked overtime in the last 7 or 8 weeks or whatever?

[APPELLANT]: I haven't worked overtime as from what I can see in my pay stubs, I believe in the last six or seven weeks.

THE COURT: And so overtime is not necessarily guaranteed. The only thing that is guaranteed in your field of work is [ ] — between $30 and $32 at 40 hours a week?

[APPELLANT]: There is only an overtime when there is a push to get documents out the door.

THE COURT: So your testimony is on average, based upon $1,280 a week, at 40 weeks, you might make $51,200, as opposed to the $45,000 that was imputed in 2010?

[APPELLANT'S COUNSEL]: Yes. And that is not a material change.

THE COURT: Okay.

Appellant's counsel proceeded to go through appellant's pay stubs from the end of 2012 through the 2013, which revealed appellant's hourly wages and overtime worked during that period. The evidence, verified by appellant's testimony, demonstrated that appellant worked as a contract attorney for a temporary agency for 15 months, between the months

of January and October 2013. During that time, appellant's overtime was unpredictable and sporadic, and totaled $10,440 in overtime wages. The transcript indicated:

> [APPELLANT'S COUNSEL]: And in addition to that, I do want to bring your attention to the last pay stub, now it does say on here that [ ] you worked for this company the entire year, correct? So from [ ] [ ] January lst this year until October 4, yes?
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> [APPELLANT]: Well, actually until the end of September.
>
> [APPELLANT'S COUNSEL]: Until the end of September. And so for that year, you did make $10,440 in overtime?
>
> [APPELLANT]: Yes.
>
> [APPELLANT'S COUNSEL]: But even though, despite that, is it — was it normal overtime, was it every week or how frequent was the overtime?
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> [APPELLANT]: No, no. What happens is, there is a Government makes a request for new custodian and they want the documents on a certain date. And you have to get these documents reviewed, so if it takes 60 or 70 hours a week, they will tell you[,] you can work 60 to 70 hours a week. You work it because you know next week or the week after that money be offered and you don't know whether the project is still going to be going at that point. . . .
>
> [APPELLANT'S COUNSEL]: So although in this particular instance, some times there was overtime, it wasn't every week was it?
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> [APPELLANT]: No, no.
>
> THE COURT: And I am sorry, you said the total overtime in — on this project is $10,440? $10,440?
>
> [APPELLANT'S COUNSEL]: Yes.
>
> [THE COURT]: For all of 2013?
>
> [APPELLANT'S COUNSEL]: Yes.

* * *

> [APPELLANT'S COUNSEL]: So basically to sum up what you said, the overtime was sporadic?
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> [APPELLANT]: Yes.
>
> [APPELLANT'S COUNSEL]: And basically you didn't know weeks in advance or days in advance or how often or even if you were going to get any overtime?
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> [APPELLANT]: No, there were times when I had left on a Friday and I would get an e-mail or a text from somebody on the project that the — that told me that the staff attorney had just decided we needed to get something done by Monday or Tuesday and that we could come in that weekend for a certain number of hours.

This evidence also demonstrates that appellant's overtime consisted only of extra hours worked during the year 2013. Thus, unlike in *Brown*, appellant's overtime pay was not consistent or substantial over a period of years. In light of this evidence, the court erred when it concluded that appellant's overtime "was regular, and was not uncertain or speculative." Accordingly, the circuit court also erred when it included appellant's overtime pay in the child support calculations and concluded that there was a material change in circumstances as a result of an increase in appellant's income.

Appellant further avers that the circuit court abused its discretion in determining that there was a material change in circumstances with respect to an increase appellee incurred for work-related childcare expenses. Specifically, appellant asserts, "the [r]ecord does not reveal any evidence that the needs of the children changed, rather, the evidence is that [a]ppellee unilaterally made decisions that cost more money than [a]ppellant has been ordered to pay." We disagree.

The circuit court credited appellee's testimony regarding the children's childcare providers, in addition to evidence relative to executed contracts, cancelled checks, and tax statements showing credits appellee received, to support the amounts she paid for work-related childcare expenses. The court determined that there was a material change in circumstances resulting from the increase in appellee's work-related childcare expenses, concluding that the increased expenses were reasonable "based upon the testimony and the evidence presented at trial, and the lack of any evidence as to significantly less expensive alternatives."

Fam. Law, § 12–104(a) provides: "[a] court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." *See also Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014); *Ley v. Forman,* 144 Md. App. at 665; *Smith v. Freeman,* 149 Md. App. 1, 20–21 (2002).

"Ultimately, '[w]hether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong.'" *Leineweber*, 220 Md. App. at 61 (quoting *Ley*, 144 Md. App. at 665). *See also Dunlap v. Fiorenza*, 128 Md. App. at 363. Although Fam. Law, § 12–104(a) does not specifically define a "material change in circumstance," Maryland case law has established that a material change in circumstances may be predicated either on a change in the needs of the children or in the parents ability to provide support. *See Smith v. Freeman,* 149 Md. App. at 20-21.

Of import here, is determining whether there was a material change in circumstances in the children's needs, relative to their daycare and private school expenses.[5] "[A] child should enjoy 'the same proportion of parental income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together.'" *Id.* at 23 (quoting *Voishan v. Palma*, 327 Md. 318, 322 (1992). Thus, the rationale behind child support is to ensure that the needs of the child are met. However, "the concept of 'need' is relative, almost metaphysical, and varies with the particular circumstances of the people involved, as well as their culture, values, and wealth." *Smith v. Freeman*, 149 Md. App. at 32. Accordingly, a change (or lack thereof) in a child's needs is not necessarily synonymous to a material change in circumstances under the guidelines. *See Ware v. Ware*, 131 Md. App. 207, 240 (2000) (holding that appellant's contention that the trial court erred in awarding appellee $1,500 per month in child support when both parties had a "surplus of income and their child had no unmet needs" is without merit). Similar to this Court's holding in *Smith*, other jurisdictions have also refuted the notion that the amount of child

[5] Since the circuit court ordered that appellee use the Open Door Program suggested by appellant for the children's before and after care, we decline to address appellant's argument relative to those expenses. The circuit court held:

> The [c]ourt finds that it is in the [c]hildren's best interest for the [c]hildren to receive childcare through Open Door rather than [Community United Methodist Child Development Center, ("CUMCDC")] as it is at the location of the [c]hildren's current school where they will develop peer relationships and a comfort level with their surroundings, and because [appellant] and his family can make themselves available when there are school closings. Accordingly, for the period effective September 2013 forward the costs of Open Door and not CUMCDC will be included in the child support calculation.

support is necessarily linked to a child's day-to-day "needs." *See generally Smith*, 149 Md. App. at 25-29.

Moreover, appellee's alleged unilateral decisions regarding the type of daycare facility and private school the children attended was reasonable under the circumstances, since they were necessary work-related childcare expenses and less expensive alternatives were not available. *See Smith*, 149 Md. at 30 (noting that courts reject the notion that an unmet need exists when the child's expenses are considered unnecessary and inappropriately extravagant). Thus, appellant's argument that appellee conceded there was no change in circumstances and that her subsequent motions to modify child support were only an attempt to correct an error in an earlier order, is of no consequence.

Appellant further avers that "private preschool tuition is not included as a basic child support obligation under [Fam. Law,] § 12-204(i)," and thus, cannot be a basis for a material change in circumstances. We decline to adopt appellant's narrow view of educational expenses under this rule. We also reject the alternate view that a court has the discretion to depart from the guidelines if the parties demonstrate that the child is either academically challenged or gifted student. *See Horsley v. Radisi*, 132 Md. App. 1, 28-29 (2000) (holding that "a court has discretion to depart from the [g]uidelines in a given case, if it is satisfied that an academically challenged or a gifted student requires remedial tutoring or advanced programming to meet the child's particular educational needs."). Instead, we adhere to the law in Maryland child support cases, where the best interests of the child is the paramount concern. *See Ley*, 144 Md. App. at 680 (adhering to the best

interest standards and rejecting the view that "the child must be laboring under some sort of disability or high ability[]" in order for a trial court to conclude that special or private educational expenses for the child be considered as support subject to the guideline considerations). Thus, "a trial court should consider whether to attend or remain in a special or private school is in the child's best interest and whether and how parents are required to contribute to that expense." *Id*. We will address the factors relative to the best interests of the child under Fam. Law, § 12-204(i), *infra*.

Fam. Law, § 12-204(i) provides:

> (i) By agreement of the parties or by order of court, the following expenses incurred on behalf of a child may be divided between the parents in proportion to their adjusted actual incomes:
>
> > (1) any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child; or
> >
> > (2) any expenses for transportation of the child between the homes of the parents.

We first address whether the language "special or private elementary or secondary school," includes private preschool. "In interpreting the meaning of a statute, it is a fundamental principle that we must effectuate the [General Assembly's] intent by first reviewing the language of the statute. . . ." *Witt v. Ristaino*, 118 Md. App. 155, 162 (1997). In *Witt*, we further opined:

> The fundamental goal of statutory construction is to ascertain and effectuate the intention of the [General Assembly]. [Thus,] [t]he primary source for determining legislative intent is the language of the statute. We will read the statute in a natural and sensible fashion, assigning the words of the statute

> their ordinary and commonly understood meanings, absent evidence that the General Assembly intended a different meaning.
>
> [W]hen there is no ambiguity or obscurity in the language of the statute, there is no need to look elsewhere to ascertain the intent of the legislative body. . . . [However,] [w]hen the language of the statute is ambiguous [ ] courts must look beyond the words of the statute and to other evidence of legislative intent. [Accordingly,] [t]he court should then consider, 'not only the literal or usual meaning of the words, but [also] their meaning and effect in light of the setting, the objectives and purpose of the enactment.' We may thus 'consider the consequences resulting from one meaning, rather than another, and adopt the construction which promotes the most reasonable result in light of' the statute's purpose. In all cases, however, '[c]are must be taken to avoid construing a statute by forced or subtle interpretations.'

Id. at 162-63 (internal citations and citation omitted).

We acknowledge that there are no Maryland cases interpreting the language in the guidelines that are disputed by appellant. We further note that there are also no statutory definitions to aid in interpreting the inclusion of a "special or private elementary or secondary school." A plain reading of Fam. Law, § 12-204(i) may suggest that a private preschool is not the type of educational expense contemplated under this Rule because the meaning of the words "private elementary or secondary school," relative to the word "preschool," are clear and unambiguous. "Pre-school" is defined as "of, relating to, or constituting the period in a child's life that ordinarily precedes attendance at elementary school." Merriam-Webster's Online Dictionary. In contrast, "elementary school" and "secondary school," are defined as, "a school including usually the first four to the first eight grades and often a kindergarten" and "a school intermediate between elementary school and college and usually offering general, technical, vocational, or college-preparatory courses," respectively. *Id*.

However, the difficulty with appellant's interpretation is that he reads "special or private elementary or secondary school," to the exclusion of the other words contained in the Statute. Particularly, the words "to meet the particular educational needs of the child." *See* Fam. Law, § 12-204(i)(1). Although not specifically defined, the words have generally received a more expansive interpretation. *See Witt*, 118 Md. App. at 164-69 (reciting precedent in support of our decision, in which we rejected a narrow interpretation of the words "particular educational need" and adhered to a best interests of the child analysis).

In light of the purpose of the guidelines and specifically, Fam. Law, § 12-204(i), it would be counterintuitive to interpret the Rule to exclude preschool education if it meets the "particular educational needs" of the parties' children relative to their best interests. *See Witt*, 118 Md. App. at 162-63. *See also id*. at 169 ("[i]t would be nonsensical to allow a child to remain in a special or private school after the parents' separation only if he or she qualifies for 'special education' services. . . . [A] trial court should consider whether to attend or remain in a special or private school is in a child's best interest and whether and how parents are required to contribute to that expense.").

Accordingly, in determining whether a child has "particular educational need" to attend private school for purposes of determining a noncustodial parent's child support obligation, trial courts should consider following nonexhaustive list of factors: (1) "the child's educational history, such as the number of years the child has been in attendance at that particular school;" (2) "the child's performance while in private school;" (3) "whether the family has a tradition of attending a particular school;" (4) "whether the parents had

made the choice to send the child to the school prior to their divorce;" (5) "any particular factor that may exist in a specific case that might impact upon the child's best interests;" and (6) "the parents' ability to pay for schooling." *See Witt v. Ristaino*, 118 Md. App. at 170-71. *Accord Ley*, 144 Md. App. at 681.

In the instant case, there is minimal evidence in the record to adequately address these factors. The children's educational history is limited to preschool. To the extent that a history was established, it is confined to a little over a year from April 2011 through June 2012, which was the time period appellee sought an increase in support payments from appellant. There is also no evidence indicating the children's performance while attending St. Andrew's United Methodist Day School ("St. Andrew's") or whether a tradition of attending that particular preschool program existed. Additionally, the facts are silent regarding whether both parties made the choice to send the children to St. Andrew's.

However, as the circuit court noted, the children were not of age to attend public school at the time and childcare "was an unavoidable expense, for which neither party introduced evidence as to any less costly alternatives." Moreover, the evidence demonstrates that the parties are able to pay for the children's preschool expenses. These facts combined impact the best interests of the children. Accordingly, we conclude that the children had a "particular educational need" to attend private preschool, an expense which was appropriately included in determining the increase of appellant's child support obligations.

Thus, appellant's argument that he did not expressly agree to the children attending St. Andrew's, is unpersuasive. *See Witt*, 118 Md. App. at 156 (holding that the court did not abuse its discretion in determining that the children had particular educational needs supporting their attendance in a private school or in determining that the noncustodial parent would be apportioned sixty-five percent of cost, despite appellant's contention, *inter alia*, that the parties had no formal agreement for the children to attend a private school).

Appellant's final contention is that "the circuit court err[ed] in its child support calculations and abuse[d] its discretion by finding that the increased child support payments will be retroactive to October 20, 2011." We agree.

The circuit court concluded as follows:

> The [c]ourt has determined the date of retroactivity, for the determination of any retroactive child support, is October 20, 2011. For the reasons discussed above, the [c]ourt finds that [ ] awarding the requested retroactive child support is appropriate considering the increase in [appellant's] income and the costs of the [c]hildren's childcare and private preschool. The child support Order shall be retroactive to October 20, 2011, and shall be paid in accordance with the attached child support guidelines for the different relevant time periods.

"Under Maryland law, '[t]he court may not retroactively modify a child support award prior to the date of the filing of the motion for modification.'" *Stevens v. Tokuda*, 216 Md. App. 155, 177 (2014) (quoting *Krikstan v. Krikstan,* 90 Md. App. 462, 472–73 (1992). *See also* Fam. Law, § 12–104(b). "However, '[t]he decision to make a child support award retroactive to the filing of the [relevant motion] is a matter reserved to the discretion of the trial court.'" *Id*. at 178 (quoting *Petitto v. Petitto,* 147 Md. App. 280, 310 (2002)).

Appellee's Fourth Motion to Modify Child Support was filed on October 20, 2011. However, the motion expired before appellant was served in March 2012. Appellee then filed a subsequent, fifth motion on February 19, 2013, which was timely served on appellant. Thus, the circuit court had the discretion to increase appellant's child support obligations retroactive only to appellee's most recent motion, filed in February 2013, or retroactive to any other date between February 19th date and the court's final ruling on the motion. *See Stevens*, 216 Md. App. at 178 (holding that the court had the discretion to reduce appellant's child support obligation retroactive to the date the relevant motion was filed "or retroactive to any other date between the date of the filing of [the] motion and the court's final ruling on the motion.").

However, the court erred in making the modification retroactive to October 20, 2011, which preceded the filing of appellee's current motion for modification in February 2013. *See Petitto*, 147 Md. App. at 309, (holding that "the court erred in making the modification retroactive to a date that preceded the filing of the current request for modification.").

The court further held that in addition to $6,476.42 in arrears, "[appellant] owes $15,868 in additional arrears due to the retroactive increase in his support obligation." Since we determined appellant's $10,000 earned in overtime pay during 2013 did not constitute actual income for purposes of increasing his child support obligations, any portions of the $15,868 attributable to such increase should be omitted from that amount.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS SPLIT BETWEEN THE PARTIES, 50% TO BE PAID BY APPELLANT AND 50% TO BE PAID BY APPELLEE.