Circuit Court for Montgomery County
Case No. 169346FL

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0073

September Term, 2024

DONALD WRIGHT

v.

JACQUALENE WRIGHT

Reed,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: April 28, 2026

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

Donald Wright, the Appellant, and Jacqualene Wright, the Appellee, were divorced in early 2022. On October 13, 2022, the Appellant filed for a modification of custody. A hearing on the issue of custody was heard over a five-day trial in December of 2023. Judge Acosta requested a proposed order and findings of facts from both parties. On February 21, 2024, the Circuit Court for Montgomery County released its custody and child support order along with findings of fact and conclusions of law. The court ordered that the Appellee would continue to have sole residential and legal custody. The court ordered that the Appellant pay a higher amount of child support to the Appellee based on a recalculation of the Appellant's income. The court also awarded attorney's fees to the Appellee. On March 13, 2024, the Appellant appealed those orders.

In bringing his appeal, Appellant presents four questions for appellate review, which we rephrase as follows:

I. Did the trial court err as a matter of law in its interpretation of the parties' Marital Settlement Agreement by including the children's expenses in calculating child support fees?

II. Did the trial court abuse its discretion in determining that the parties had the ability to pay for the children's private school tuition?

III. Did the trial court err in its determination of the Appellant's income?

IV. Did the trial court err in its award of attorney's fees to the Appellee?[1]

[1] The Appellant's questions, as originally presented, were:

I. Did the trial court err as a matter of law by ignoring the express language of the Agreement and construing it to require the Appellant to pay for expenses that the parties agreed would be paid by the Appellee, which interpretation was contrary to its plain meaning, contrary to contract principles, and unsupported in the record?

For the following reasons, we vacate and remand the portions of the Circuit Court for Montgomery County's February 26, 2024, Custody and Child Support Order concerning the amount of child support and arrearages and the payment of attorney's fees.

FACTUAL & PROCEDURAL BACKGROUND

The Appellant and Appellee married on April 24, 2004. They are the parents of four minor children. The parties separated in May of 2020. The parties entered into a Marital Settlement Agreement (the "Agreement") on April 10, 2021. The parties were divorced on February 9, 2022.

The Appellee is an administrative assistant who had an annual income of approximately $45,000. The Appellant used to work at Wells Fargo, where his annual income was above $800,000. He was terminated from Wells Fargo in October of 2020. When the Agreement was signed, the Appellant's income was treated as $100,000

II. Did the trial court err as a matter of law by looking to the value of assets held by the parties in determining their ability to pay for private school tuition?

III. Did the trial court err by adopting wholesale the Appellee's Proposed Conclusions and err as a matter of law in determining the Appellant's income by (a) basing it on 2023 financial information instead of 2022 as required by the Agreement, (b) using "gross receipts" instead of "actual income" as required by the Code, and (c) improperly treating transfers as gambling income?

IV. Given that the child support award must be vacated, does the related attorneys' fee award also need to be vacated?

annually. The Appellant then became self-employed, working for Wright Wealth Management. In June of 2021, he reported his income as between $100,000 and $200,000 to Wells Fargo. At trial in December of 2023, he claimed his income was only $1,000 a month.

As part of the separation, the court appointed Dr. Gina Santoro as an independent custody evaluator. She sent in her summary of findings and recommendations on March 1, 2021. Dr. Santoro said that the Appellant "ha[d] engaged in a pattern of domestic abuse of [the Appellee] and the minor children including physical abuse, emotional abuse, and economic abuse." She provided specific examples about the Appellant's behavior, including "criticism, coercion, and control" of the Appellee and the children, behavior that is "vindictive and punitive," "harsh corporal punishment with the children," and "frequent and intense anger." She also determined that her findings supported the concerns raised by the Appellee, which included that the Appellant has been coercive, critical, and controlling of the Appellee and absent or uninterested towards the children, but not the concerns raised by the Appellant, which included accusations that the Appellee had mental health issues and was unable to parent the children independently. Based on her findings, Dr. Santoro recommended that Ms. Wright have sole legal and physical custody of the minor children. She recommended that the Appellant have phased parenting time in coordination with therapy.

The Marital Settlement Agreement developed after Dr. Santoro's report gave the Appellee sole legal and physical custody of the children. In Section V, the Agreement set

out that the Appellant would pay $2,100 a month to the Appellee in child support. That section continued to read that:

> The minor children's private school expenses, work-related childcare expenses, and uncovered and/or unreimbursed medical/dental/therapy/ orthodontia expenses are not included in [the Appellant's] child support obligation of $2100. The parties agree that said expenses shall be paid by [the Appellee] and may be paid from the custodial accounts described in Paragraph VIII.E. of this Agreement. The parties will reassess the obligation for payment of orthodontiaat [sic] the time that child support is recalculated (said recalculation is more fully discussed below).
>
> The parties agree to exchange their prior year tax returns, W-2s, K-1s, 1099s, year-end pay stubs and similar tax reporting documents (for their personal returns and for any business in which either has an interest) on April 16, 2023 and April 16, 2025, to determine whether a modification of child support is warranted. In determining Donald's income for 2021, the parties agree that any debt forgiveness associated with his prior employment with Wells Fargo shall not be considered as "actual income" under Maryland Code, Family Law Article, Section 12-201, for purposes of calculating child support. The parties shall also consider and exchange documentation related to the costs for the minor children's work-related childcare, health insurance, extraordinary medical expenses and additional expenses, i.e. education, pursuant to Maryland Code Section 12-201. After the exchange of documents, the parties will calculate child support using the extrapolated Child Support Guidelines.
>
> If child support is modified, the new child support amount will become effective January 1, 2023 (and January 1, 2025 respectively). If the parties are unable to agree upon the new child support amount which is to be effective January 1, 2023 or January 1, 2025, they will submit their dispute to mediation, with a mutually agreed upon mediator, within 20 days of either party's written request.

The Agreement transferred six custodial accounts held for the benefit of the children to the Appellee. The Agreement said the Appellee shall "use said accounts for the sole and exclusive benefit of the minor children, including for the purposes set forth in Section V above."

Months after the divorce, the Appellant filed for a modification of custody on October 13, 2022. The Appellant requested physical and legal custody of the minor children, along with a modification of child support. The Appellee filed a Motion for a Custody Evaluator, which was granted and led to a second custody evaluation report from the court custody evaluator, Ms. Marilennis Cruz LCSW-C. This second report, completed in March of 2023, also recommended that the Appellee retain sole legal and physical custody and recommended therapeutic interventions for the Appellant.

The case was heard in a five-day bench trial before the Honorable Carlos Acosta of the Circuit Court for Montgomery County between December 11 and December 18, 2023. Judge Acosta requested a proposed order and findings of facts from both parties. On February 21, 2024, Judge Acosta released his custody and child support order along with findings of fact and conclusions of law.

Judge Acosta first ruled on the custody of the parties' children. Analyzing multiple factors, the trial court noted that the experts in the case found the Appellee "to be a fit and proper parent who has positive relationships with the children" while there was "no testimony to support [the Appellant's] fitness as a parent." The court custody evaluator found the Appellee's request for custody to be sincere, but did not find the Appellant's request for custody to be sincere. The trial court concluded there was a material change in circumstances affecting the welfare of the children. The court ordered that the Appellee would continue to have sole residential and legal custody and limited the Appellant's access to the children's school events and activities.

Regarding the Appellant's motion for contempt against the Appellee, the trial court denied it. There was no show cause order so as a matter of law the Appellee could not be held in contempt. Even if the court could have considered the issue, the court said that there was no credible evidence the Appellee "intentionally acted contrary to the terms of the parties' marital settlement agreement."

When ruling on Child Support, the findings of fact included that the "parties agreed the children's medical expenses and school expenses would be included in the intended recalculation." Relying on the Appellee's Financial Statement, and other factors described below the court ordered the Appellant to pay $9,270.00 per month in child support.[2]

Judge Acosta said that the Appellant's claim of an income of $562 a month was not credible, noting that would mean he was earning less than minimum wage. He found that the Appellant's income had increased since the Agreement was signed. This was based on a review of credit card statements that showed the Appellant spending significant funds on multiple trips around the country and his ability to pay a high credit card bill every month. Judge Acosta determined that the Appellant had three sources of income. The first source was rental receipts from a beach home on the Eastern Shore of Maryland, which generated $117,132 in income.

The second source was from gambling. This was based on his bank account records, and Judge Acosta said the total amount of gambling income deposits, along with another

[2] Based on this order, since the Appellant had only been paying $2,100 in child support during the thirteen months of pending litigation, Judge Acosta calculated his arrears to be $93,210.00.

rent payment, was $114,118.03. Judge Acosta also noted that these payments stopped when the trial court entered an order allowing for the Appellee to compel discovery.

The third source of income was his income from Wright Wealth Management, which the court calculated to be $24,099.99. Putting these sources together, the court concluded that the Appellant's income for the eleven months before trial was $255,420.02, which was a monthly average of $23,220. The court said that this monthly average income was "more credible and reliable" than the Appellant's proposed income "considering [the Appellant's] lifestyle, lack of debt, and the ability to fund very valuable financial assets." This was the income the court used to calculate the Appellant's child support payment.

Judge Acosta then turned to the children's tuition at private school.[3] He found that the children had attended a private Catholic school prior to the divorce and one older child graduated to public school while another graduated to a different private school. Judge Acosta noted concern about disrupting any of the children's education, since they were all doing very well in school. Regarding the ability of the parties to pay for private tuition, Judge Acosta concluded the parties had the ability to fund private school education because the Appellant "owns real estate which he values at least 4.8 million according to his last two filed financial statements, as well as significant funds in his financial account" and the

[3] *Witt v. Ristaino* set out non-exhaustive factors for determining whether a child has a "particular educational need" to attend a private school. 118 Md. App. 155, 169–70 (1997). Those factors include (1) the child's education history, (2) the child's performance while in the private school, (3) the family's history or tradition in attending a particular school, (4) whether the parents chose the school prior to the divorce, (5) any particular factor that may impact the child's best interest, and (6) the parents' ability to pay for the schooling. *Id.* at 170–71.

Appellee "has funds in her investment account exceeding one million dollars." The court concluded that there was a particular educational need for the children to remain at private school and those expenses should be apportioned based on the parties' incomes.

The Appellee also made a request for attorney's fees. First, Judge Acosta found the fees the Appellee requested to be fair and reasonable. Judge Acosta then found that there was an absence of justification for the Appellant to bring, maintain, or defend the proceeding. Even if there was not lack of justification, the trial court said that based on the financial statuses of the parties, the award of the fees would be just and proper. Judge Acosta therefore ordered that the Appellant pay $70,000.00 to the Appellee for her attorney's fees. On March 13, 2024, the Appellant timely appealed the circuit court's orders on child support and attorney's fees.

STANDARD OF REVIEW

In reviewing whether the evidence was sufficient in an action tried without a jury "an appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). If the trial court's findings of fact are supported by substantial evidence, then they will not be clearly erroneous. *Abdullahi v. Zanini*, 241 Md. App. 372, 413 (2019) (quoting *Innerbichler v. Innerbichler*, 132 Md. App. 207, 230 (2000)). On appeal, we look at the evidence in the light most favorable to the prevailing party. *Goss v. C.A.N. Wildlife Tr., Inc.*, 157 Md. App. 447, 456 (2004) (quoting *GMC v. Schmitz*, 362 Md. 229, 234 (2001)); *see also Ryan v. Thurston*, 276 Md. 390, 392 (1975) ("The appellate court must

consider evidence produced at the trial in a light most favorable to the prevailing party . . . .").

DISCUSSION

Interpretation of Marital Settlement Agreement

A. Parties' Contentions

On this first issue, the Appellant argues that the circuit court erred by construing the Marital Settlement Agreement so that the Appellant had to pay additional expenses he believes the Agreement excluded from his child support payments.[4] The Appellant specifically objects to paying for the minor children's medical and school expenses, which the trial court included in its recalculation of child support. Relying on the Maryland canons of contract construction, the Appellant claims that the Agreement "plainly states that [the Appellee] has the obligation to pay Additional Expenses." The Appellant argues Section V of the Agreement means that only the obligation for orthodontia would be reassessed for

[4] The Appellant also argued that the Appellee did not properly plead her request to modify child support because the Appellee never filed a motion to modify child support under Md. Code, Fam. Law § 12-104(a). Here, the Appellee's Second Amended Answer sought the modification of child support. "[I]f a claim for relief is placed in the answer, the trial court can still adjudicate that claim as if it had been properly designated as a counterclaim, 'if justice so requires.'" *Lasko v. Lasko*, 245 Md. App. 70, 78 (2020) (citing Md. Rule 2-323(g)) (finding that the answer in the case sufficiently set forth a claim for a monetary award when it said that the defendant "be granted all relief to which she may be entitled pursuant to the Family Law Article of the Annotated Code of Maryland"). Therefore, the request in the answer would have been sufficient. Beyond the answer, the Appellant's own Petition to Modify Custody requested a modification. Additionally, the Agreement set out that modifications to child support would occur in 2023 and 2025 when they are reassessed. The trial court had the authority to determine whether the child support needed to be modified.

modification.

The Appellee argues that additional language in Section V shows that all of the children's additional expenses should be reconsidered when reevaluating child support. Looking at the plain text, the Appellee argues that the documentation Section V says would be considered and exchanged is for the purpose of recalculating child support. Alternatively, the Appellee argues that the trial court was still permitted to modify the Agreement if it was in the best interests of the children. The Appellee argues that the trial court properly considered the Appellant's increased income and the children's expenses and modified the child support accordingly.

B. Standard of Review

"The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law reviewed without deference." *Adventist Healthcare, Inc. v. Behram*, 488 Md. 410, 432 (2024) (citing *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1, 7 (2014)). "When the trial court's order involves an interpretation and application of Maryland statutory or case law, the appellate court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review." *Credible Behavioral Health, Inc. v. Johnson*, 466 Md. 380, 388 (2019) (quoting *Nesbit v. Gov't Emps. Ins. Co.*, 382 Md. 65, 72 (2004)) (quote cleaned up).

A trial court's decision about a modification of child support "will not be disturbed on appeal unless the court acted arbitrarily or its judgment was clearly erroneous." *Lieberman v. Lieberman*, 81 Md. App. 575, 595 (1990) (citing *Tidler v. Tidler*, 50 Md. App. 1, 9 (1981)). Similarly, the amount the trial court determines as an appropriate award

will not be disturbed "absent legal error or abuse of discretion." *Ruiz v. Kinoshita*, 239 Md. App. 395, 197 A.3d 47 (2018) (quoting *Ware v. Ware*, 131 Md. App. 207, 240 (2000)).

Maryland appellate courts have consistently taken the position "that an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court, and that, if legally correct, the trial court's decision will be affirmed on such alternative ground." *Unger v. State*, 427 Md. 383, 405 (2012).

C. Analysis

The parties' Agreement determined the level of child support owed by the Appellant to the Appellee. Under Section V of the Agreement, the Appellant would pay $2,100 a month in child support to the Appellee. Section V then lists that a series of expenses are not included in the Appellant's obligation of $2,100, which was the children's "private school expenses, work-related childcare expenses, and uncovered and/or unreimbursed medical/dental/therapy/orthodontia expenses." The Appellant claims that the specific mention of orthodontia payments when child support is recalculated precludes the trial court from making the Appellant pay for any other expenses.

Section V also makes it very clear that modification of child support would occur in the future, since it sets out times for modifications on April 16, 2023, and April 16, 2025. That paragraph lays out in more detail the exchange of documentation about expenses the parties needed for the calculation of child support. Section V says the parties shall "consider and exchange documentation related to the costs for the minor children's work-related childcare, health insurance, extraordinary medical expenses and additional

expenses, i.e. education . . . .” This is additional explicit and specific language about an exchange of documents related to these other expenses that would be used for a recalculation of child support. The Appellant argued that these documents would be exchanged so the Appellant “stays apprised” of any additional expenses “given its potential impact on the Custodial Accounts.” However, the full phrase in the Agreement is that the parties would “consider and exchange documentation” about the costs. The use of the verb “consider” shows an intent to rely on the documentation about child care and education related to the future reconsideration of child support payments. Therefore, the contract supports the argument that all of the children’s expenses were still on the table at the time child support was recalculated.

The trial court followed this interpretation and ruled that the “parties agreed the children’s medical expenses and school expenses would be included in the intended recalculation.” When the trial court recalculated child support it added onto the basic child support obligation work-related childcare expenses, extraordinary medical expenses, and additional expenses that constituted the children’s tuition. The amount of these expenses came from the Appellee’s financial statement.

The Appellant also points to language in the Agreement that the Appellant claims “plainly states that [the Appellee] has the obligation to pay Additional Expenses.” The Appellant argues Section V means that only the obligation for orthodontia would be reassessed for modification and therefore adding on the medical expenses and school expenses was in error. While the argument above shows that the reconsideration of expenses kept open future obligations for future expenses, the interpretation of the contract

was not binding on the trial court based on Maryland case law and the trial court was permitted to modify child support independently from the terms of the Agreement.

The Maryland statutory codes set out that courts have discretion to modify child support payments. "The court may modify any provision of a deed, *agreement*, or settlement with respect to the care, custody, education, or *support* of any minor child of the spouses, if the modification would be in the best interests of the child." Md. Code, Fam. Law § 8-103(a) (emphasis added). "Unlike certain other aspects of a marital relationship that can be the subject of an agreement, however, provisions relating to the welfare of minor children are, by statute, subject to court modification." *Guidash v. Tome*, 211 Md. App. 725, 740 (2013) (quoting *Ruppert v. Fish*, 84 Md. App. 665, 674 (1990)); *see also id.* ("[C]hild support, regardless of any parental agreement, is always subject to court modification."); *Walsh v. Walsh*, 333 Md. 492, 504 (1994) (citing *Stancil v. Stancil*, 286 Md. 530, 535 (1979)) (describing that "agreements between the parents were not binding on a court ordering child support.").

A parent "may not waive or bargain away a child's right to receive support." *Guidash*, 211 Md. App. at 739–40; *see also Stambaugh v. Child Support Admin.*, 323 Md. 106, 111 (1991) ("[T]he duty to support one's minor children may not be bargained away or waived."). Based on this principle, 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." Md. Code Fam. Law § 12-104(a); *see Damon v. Robles*, 245 Md. App. 233, 240 (2020) (citing same); *Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014) (citing same).

In *Guidash v. Tome*, 211 Md. App. 725 (2013), the parties had a separation agreement that stated that "the parties expressly agree that there shall be no child support in this matter." 211 Md. App. at 731. The court said, "the provision in the Separation Agreement that purported to deprive the circuit court of the authority to address Joseph's need for child support in the light of a change in material circumstances is void as violative of the clearly-established public policy of this State." *Id.* at 741. This was because:

> Unlike certain other aspects of a marital relationship that can be the subject of an agreement, however, provisions relating to the welfare of minor children are, by statute, subject to court modification. Md. Fam. Law Code Ann. § 8–103(a) provides that "[t]he court may modify any provision of a deed, agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child.

Id. at 740 (quoting *Ruppert v. Fish*, 84 Md. App. 665, 674 (1990)). Therefore, "a court may modify an award of child support at any time if there has been shown a material change in circumstances that justify the action." *Id.* (internal quotations and citations omitted).

Here, when ruling on the issue of custody, the trial court found "there's been a material change in circumstances affecting the welfare of the children." The court identified material changes related to the expert witnesses' testimony about the Appellant's abusive behavior, his poor relationship with his children and the Appellee, and his poor communication with the same, along with a change to his income from when the Agreement was signed. At the time the Agreement was formed, the Appellant had recently left Wells Fargo and had a significant decrease in salary. The Appellant's income when making the Marital Settlement Agreement was $8,333 a month. Using this income meant the child support was lower than it would have been at the Appellant's old salary, and the

parties had agreed to recalculate these expenses in 2023 and 2025 as a result. The trial court's recalculated monthly income was $23,220. The Appellant's monthly income increased by over 170%, which would be a material change in circumstances. *See Petitto v. Petitto*, 147 Md. App. 280, 295, 307 (2002) (describing an approximately 50% increase in monthly income from $5,917 to $9,176 as a "material change[] in circumstance"). As a result, given the material change in circumstances, the court was permitted to modify the award of child support and disregard the Marital Settlement Agreement in favor of the facts presented before the court. We address the calculation of the Appellant's income in greater detail below, but the fact that it increased was sufficient for the court to find a material change in circumstances. The trial court was permitted to ignore Section V of the Agreement and determine the amount of child support owed independently.

The Appellant's final argument is that the trial court erred in including medical expenses and school expenses in its calculation. Trial judges are permitted to look at additional obligations to look beyond the basic child support obligations. Maryland code specifically states that "actual child care expenses . . . shall be added to the basic obligation and shall be divided between the parents." Md. Code, Fam. Law § 12-204(g)(1). The Maryland family law statutes outline the expenses that should be considered in child support calculations, which includes "extraordinary medical expenses" and "any expenses for attending a special or private elementary or secondary school to meet the particular education needs of the child." Md. Code, Fam. Law § 12-204(h)–(i). This section goes on to say that "[a]ny extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation." *Id.* at § 12-104(h)(2). Additionally, "any

expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child" "may be divided between the parents in proportion to their adjusted actual incomes." *Id.* at § 12-104(i)(1). Therefore, many of the expenses described in Section V, including "minor children's private school expenses, work-related childcare expenses, and uncovered and/or unreimbursed medical/dental/therapy/orthodontia expenses" can be considered and added to the basic child support obligation under the family law statutes.

Here, the trial court examined the financial statement of the Appellee and found that there were additional child support obligations that should be divided between the parents. This included $1,665 a month in extraordinary medical expenses and $3,407 in monthly tuition for the children's schools on top of the basic $5,549 obligation from a total income of $27,553 with four children. It was within the trial court's discretion to respond to the material change in circumstances and determine that additional childcare expenses should fall within the child support obligation. Section V of the Agreement does not control the court when it comes to the determination of child support. Accordingly, we affirm the decision of the trial court that the Appellant should pay for the children's additional expenses. While we remand on the issue of the total amount of child support, as discussed below, that relates to the determination of the Appellant's income and the total amount of child support due. We do not disturb the determination of the Appellant's responsibility for additional expenses, independent of the parties' Agreement, in this ruling.

Parties' Ability to Pay for Private School Tuition

A. Parties' Contentions

The Appellant contends that the trial court erred by considering the value of the Appellant's assets in determining that he had the ability to pay for private school tuition. The Appellant argues that the value of a party's assets cannot be considered as available resources to pay child support or private school expenses. The Appellant claims that absent a finding of voluntary impoverishment or an insufficient income to maintain the child's standard of living, the trial court could not use the Appellant's assets to determine whether he could pay for private school tuition.

The Appellee claims the trial court properly exercised its discretion in determining that the parties had the ability to continue to pay for private school. The Appellee argues that the court was permitted to look at the parties' assets when making this decision because it is separate from the issue of child support but went towards the common law factors to determine if the child has a particular educational need for private school. As a result, the trial court did not err in analyzing the Appellant's assets.

B. Standard of Review

"Ordinarily, child support orders are within the sound discretion of the trial court." *McMorrow v. King*, 264 Md. App. 708, 720 (2025) (quoting *Reichert v. Hornbeck*, 210 Md. App. 282, 316 (2013)) "Nonetheless, where the order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review." *Id.* (quoting *Reichert*, 210 Md. App. at 316).

C. Analysis

When calculating child support, the trial court may include particular educational

expenses. Md. Code, Fam. Law § 12-204(i). The statute 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.

Id. In *Witt v. Ristaino*, this Court set out a list of non-exhaustive factors for the trial courts to consider when determining whether a child has a "particular educational need" to attend a private school. 118 Md. App. 155, 169–70 (1997). Those factors include (1) the child's education history, (2) the child's performance while in the private school, (3) the family's history or tradition in attending a particular school, (4) whether the parents chose the school prior to the divorce, (5) any particular factor that may impact the child's best interest, and (6) the parents' ability to pay for the schooling. *Id.* at 170–71. The final factor of the parents' ability to pay is what the Appellant takes issue with here. In *Witt*, the court said this is not the primary factor but "it is vital for a court to consider whether a parent's financial obligation would impair significantly his or her ability to support himself or herself as well as support the child when the child is in his or her care." *Id.* at 171.

The trial court, after ruling on the child support amount, turned to the children's tuition at private school. The court cited all of the factors from *Witt* and stated that the court had considered the factors. The court then on the record discussed the children's history at private school, noting that the court was "concerned about potential disruption to their

education setting in consideration of the evidence." Judge Acosta then continued on to discuss the ability to pay for private school tuition, where he said, "The parties have the ability to fund private school education. [The Appellant] owns real estate which he values at least 4.8 million according to his last two filed financial statements, as well as significant funds in his financial accounts." The assets of the Appellant were used to weigh in favor of an ability to pay for private school, not the amount of child support itself.

In *Petrini v. Petrini*, the Supreme Court of Maryland said that the child support statutes "afforded trial courts the latitude to consider all the relevant circumstances in a particular case before making any determination about what should be considered in calculating a parent's support obligation." 336 Md. 453, 463 (1994). They listed examples like "a parent's actual ability to pay the specified child support award, any lack of liquidity or marketability of a party's assets, the fact that a parent's take-home income is not an accurate reflection of his or her actual standard of living, and whether either party is voluntarily impoverished." *Id.* at 464. That is what the trial court was doing here. It was considering the relevant circumstance of the additional assets held by the Appellant and looking beyond just the Appellant's take-home income in the same manner as the court did when recalculating the Appellant income. The Appellant's assets were a proper, relevant circumstance when analyzing the Appellant's ability to pay for private school.

The Appellant argues the trial court was not permitted to look at his assets in making this determination, relying on *Barton v. Hirshberg*, 137 Md. App. 1 (2001). In that case, the appellant Barton argued that the circuit court erred in failing to consider the appellee Hirshberg's total assets as opposed to just his income. *Id.* at 15–16. The court looked to the

child support guidelines set out in the family law statute, which use an income shares model to determine child support obligations. *Id.* at 16–17. The court needed to determine the kind of discretion a court could use if the adjusted actual income exceeded the statutory guidelines. *Id.* at 17 (citing Md. Code, Fam. Law § 12-204(d)–(e)).[5] At higher income levels, the legislative judgment was that judicial discretion was better than a fixed formula to maintain a constant standard of living for children. *Id.* at 18 (quoting *Voishan v. Palma*, 327 Md. 318, 328 (1992)). The court rejected Barton's argument that the trial court erred in not analyzing Hirshberg's assets. *Id.* at 19. The court then wrote:

> Our holding in this case should not be interpreted to mean that the assets of a party will never come into play when making a determination regarding child support. For example, if a parent voluntarily decreases his or her income in order to avoid support payments, a court may find that a parent has become voluntarily impoverished, and impute income based on assets readily adaptable to income production. Alternatively, in instances where the income of a parent is not adequate to provide support to a child sufficient to meet the standard of living established during the marriage, and the parent has assets that could be converted into income-producing assets, a court might look to the parent's assets to determine above-the-guidelines support. We do not agree, however, that the mere ownership of non-income-producing assets alone constitutes a basis for reliance upon those assets in determining child support.

Id. at 20. The court noted that Hirshberg was not voluntarily impoverished and there was no evidence the child would experience a decrease in his standard of living, so the court had no need to look at his assets. *Id.* at 20–21.

Here, there was also no finding by the trial court that the Appellant was

[5] At the time *Barton* was decided, the maximum income in the statutory guidelines was $10,000 per month. The current statute has a maximum income of $30,000 per month. Md. Code, Fam. Law § 12-204(d)–(e).

voluntarily impoverished. The Appellee argues that the Appellant's case falls into the second category outlines in *Barton*, that the income is not adequate to meet the standard of living. We disagree with that application, since the calculated monthly income was still well above the child support obligation assigned by the court, even including the tuition amount.[6]

As a result, neither of the categories outlines in *Barton* apply in this case. But *Barton* does not bar the trial court's actions here because the analysis of a parties' assets differs here. In *Barton*, Hirshberg's assets were used to try to impute additional income to the party to determine the proper amount of child support. That is not the case here, where the assets were used to determine the Appellant's *ability* to pay for child support while performing the analysis of that factor under *Witt*. The amount of child support was set based on the guidelines and Appellee's expenses, as described above. The assets were not used to alter this amount, but rather to determine that the Appellant would still be able to pay the amount the trial court assigned to him.

Barton is not controlling in this case and the trial court was permitted to reference the Appellant's assets in coming to its decision, especially in a case where the Appellant has not been particularly forthcoming in stating his income. As we describe in more detail

[6] The Child Support Guidelines show that the additional monthly expense for tuition was $3,407.08 a month. Given the difference in income, the Appellant was responsible for 84.3% of that total. His recommended child support came in at a total of $9,270, which was still well below his monthly income of $23,220. While this number may change on remand, as discussed in the issues below, the amount owed for tuition being added in still had the child support amount being less than in monthly income.

in the next issue, the trial court found that the Appellant's financial statement and the "suggestion he's learning [sic] less than minimum wage is not credible." The independent custody evaluator had noted that the Appellant had previously engaged in economic abuse against the Appellee and the children. The trial court was permitted to look beyond just the income of the Appellant to his assets in order to evaluate his *ability* to pay for child support. The trial court's decision was not that those assets must be converted into income-producing assets or that they would need to be sold or otherwise used to pay for child support. Instead, it was a consideration for the court to weigh in a case where the Appellant was not forthcoming about his income.

We hold there was no error in looking at the Appellant's assets when determining whether he had the ability to pay for his children's private school education.

Determination of Appellant's Income

A. Parties' Contentions

The Appellant argued that the trial court erred in how it calculated his income.[7] The

[7] We address here whether the Appellant's income arguments were preserved, finding that they are. Ordinarily, we will only decide issues when "it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8–131(a). At oral arguments, the Appellant's counsel said that she could not find a specific citation for preserving arguments relating to the rental income, but acknowledged that these arguments were in post-trial submissions. She acknowledged the issue as "potentially vulnerable for preservation purposes." At trial, there was no objection to the Appellee's conclusion in her oral closing arguments about these income amounts regarding gambling and the rental property. Instead, in the Appellant's proposed findings of fact and law, the Appellant made arguments about both the rental income and gambling income. On the rental income, the Appellant had proposed a different level of expenses and proposed a rental income of $43,666.00. On the gambling income, the Appellant argued that the Appellee mischaracterized the withdrawals from accounts as income. These are the arguments that

Appellant argues that the trial court improperly calculated his income based on his gambling earnings and rental income. Regarding the gambling income, the Appellant alleged that the trial court ignored evidence of a lack of gambling winnings and transfers back into gambling venues that meant his "actual income" from gambling was significantly less. Regarding the rental income, the Appellant argued that the trial court failed to include deductions from fees and expenses and therefore overestimated his income resulting from the rental properties.

The Appellee argued that the trial court properly considered all of the relevant circumstances to determine the Appellant's income. The Appellee argues that there was no clear error because there was substantial evidence in the record to support their calculation of the Appellant's income, which the trial court adopted. Regarding the gambling income, the Appellee argues that the Appellant did not provide evidence that the deposits were transfers and should not be considered evidence of his income. Regarding the rental income, the Appellee argues that the expenses were properly divided between personal and rental use based on the Appellant's personal use of the house.

B. Standard of Review

The determination of the Appellant's income was a finding of fact by the trial court. Findings of fact must be supported by substantial evidence, or else they will be clearly

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the trial court then considered when coming to its final verdict, and that the Appellant now argues makes before this Court. Therefore, these arguments should be preserved since the contention was raised in the arguments and passed upon by the trial court. *Zellinger v. CRC Dev. Corp.*, 281 Md. 614, 620 (1977). We find that the Appellant's proposed findings of fact and law sufficiently preserved this argument for our review.

erroneous. *Abdullahi*, 241 Md. App. at 413 (quoting *Innerbichler*, 132 Md. App. at 230). We look at the evidence in the light most favorable to the prevailing party, which in this case was the Appellee. *Goss*, 157 Md. App. at 456 (quoting *GMC*, 362 Md. at 234).

C. Analysis

The division of basic child support obligations are proportional based on the parents' "adjusted actual incomes." Md. Code, Fam. Law § 12-204(a)(1). "'Actual income' means income from any source." Md. Code, Fam. Law § 12-201(b)(1). The Appellant's income was used to determine the amount of child support he owed under the child support guidelines. *See* Md. Code, Fam. Law § 12-204.

The Appellant's first argument that the circuit court erred is that the court relied on the Appellant's bank statements from 2023 when it should have relied on his tax returns from 2022. We have previously rejected the argument that a trial court is required to use income tax returns to produce income. In *Tanis v. Crocker*, we held that Family Law § 12-203(b) "does not require that a parent's income tax returns be considered in order to resolve a dispute concerning that parent's income." 110 Md. App. 559, 572 (1996). This means the trial court was permitted to look beyond the Appellant's tax returns to determine his income. As for the argument that the trial court was bound by the Agreement to look at documents from 2022 instead of 2023, as we discussed above "agreements between the parents were not binding on a court ordering child support." *Walsh*, 333 Md. at 504 (citing *Stancil*, 286 Md. at 535). The trial court was permitted to look beyond the Appellant's tax records.

When the trial court examined the Appellant's financial statement it concluded that

the "suggestion he's learning [sic] less than minimum wage is not credible." [8] The Appellant's assertions of his low income did not comport with the high amounts of spending shown in the record.[9] Because the Appellant's statements could not be relied on, the Appellee argued it was proper to look at income from the Appellant's company, his income from renting his beach property, and his income from gambling. The trial court adopted this argument in determining the Appellant's income.[10] The Appellant does not challenge the calculation of his income from his company, Wright Wealth Management, which was calculated to be $24,099.99. We now turn to the income from his rental property

[8] The Appellee cites to five different potential incomes. First, the 2020 Agreement set out the actual income at $100,000. Second, the bank account applications from the Appellant reported an annual income between $100,000 and $200,000 in June of 2021. Third, the financial statement submitted for this case asserted a monthly income of $562.00 a month. Fourth, during closing arguments, the Appellant argued he only makes $23,000. Lastly, in the Appellant's proposed findings of fact, he concluded that his income for 2022 "was, at most, $29,940.00."

[9] The Appellant's Bank of America checking account had $293,512.53 in total spending between December 2022 and October 2023. The evidence showed these accounts were paid off every month. This comes out to a monthly average of $26,682.00, which was above the monthly average of $23,220 determined by the trial court. While this fact does weigh in favor of the Appellant's income being higher than the trial court's calculation, for the reasons discussed below the trial court did not have sufficient facts to support its conclusion, which is why we remand for further fact-finding.

[10] The Appellant argued the trial court erred because it adopted the Appellee's findings of fact verbatim on this issue and others. Trial courts are permitted to adopt the statements of facts and law developed by one of the parties. *See Green v. Taylor*, 142 Md. App. 44, 59 (2001) ("We see no error in the court's adopting Plaintiff's Memorandum as a method of elaborating on his factual findings and legal reasoning."); *see also Horne v. Horne*, No. 483, Sept. Term 2022, 2023 WL 8519343, at *3 (Md. Ct. Spec. App. Dec. 8, 2023), *cert. denied*, 487 Md. 42 (2024) ("[W]e note that it is a common and widely accepted practice in Maryland (and elsewhere) for trial courts to review and rely upon proposed findings of fact and conclusions of law submitted by the parties.").

and income from gambling in turn.

Rental Property Income

The next source of income was money made from rentals at a beach home on the Eastern Shore of Maryland, which generated $117,132 in income. The trial court noted that the beach home is used by the Appellant as a personal vacation home and an income generating asset. The trial court calculated the income value by taking the total amount generated from the rental invoices, decreased by his expenses from his 2022 tax return, but not including depreciations, mortgage interests, or cleaning services as expenses.

The Appellant's argument on the income from his rental property is that the trial court erred in not deducting additional expenses, including the cleaning expenses and mortgage interest. The Appellant agreed that the depreciation amount could be deducted, since it is not an expense. Additionally, the Appellant argued the trial court erred in finding that the property was for personal use.

The first issue is whether the trial court properly determined the beach house to be a personal vacation home. Whether a dwelling unit is used as a residence changes the types of expenses an owner can deduct from the property. *See* Topic no. 415, Renting residential and vacation property, *Internal Revenue Service*, https://www.irs.gov/taxtopics/tc415. A dwelling unit is considered to be a residence if it is used for personal purposes for the greater of fourteen days or 10% of the total days it is rented to others at a fair rental price. *Id.*

Regarding the rental property income, there was sufficient evidence, looking at the evidence in the light most favorable to the Appellee, to show that the Appellant was in the

Rehoboth Beach area beyond the IRS maximum for personal use. The Appellant's credit card statements show numerous charges across multiple trips for various purchases in Rehoboth Beach, Delaware and Ocean City, Maryland between April 2023 and September 2023. These purchases occurred across twenty-two days in 2023. There was no evidence presented that the Appellant had stayed at a different hotel or rental property and looking at the evidence in the light most favorable to the Appellee it was reasonable to assume that the Appellant was using his own residence. At least for one stretch, August 4 through August 7, 2023, the beach house was being rented by another party, so those four days must be excluded from the total, leaving eighteen days of personal use. Since that amount of personal use is greater than fourteen days, to avoid being a residence, the property would need to be rented for 180 days during the year (so that the eighteen days of use is 10% of the total days it is rented). The beach house was only rented for 91 days based on the evidence presented so the Appellant's personal use means that the beach house needs to be considered a residence. Based on the available evidence, the Appellant could not claim the beach house was a short-term rental property since it was also used as a residence. The expenses would then need to be divided between the rental and personal use. Therefore, all of the expenses cannot be deducted from the rental property and the trial court was within its discretion to split the rental costs.

However, the trial court's findings completely deducted the cleaning fees[11] and

[11] Regarding the Appellant's cleaning fees, the Appellee argues any error was harmless. The cleaning fees were $215 per contract, which totaled to $2,795 across the

mortgage fees without weighing the time between the rental use and personal use. If the court chooses to use the rental income as a measure of the Appellant's income, then it needs to properly weigh the amount of time it was rented against the time it served as a personal residence when deducting expenses like the mortgage interest. We conclude the trial court did not make sufficient findings of fact to properly calculate the Appellant's income from his rental property and vacate the determination of the Appellant's income coming from that source.

Gambling Income

Judge Acosta, examining the Appellant's bank account records, determined the total amount of gambling income deposits, along with another rent payment, was $114,118.03. This calculation came from the Appellant's Chase Bank statements where there were specific transfers of funds noted coming from gambling venues into the account. The Appellee pointed to eight deposits into the account that totaled to $114,188.03. The Appellant argues the trial court erred in adopting these numbers because the calculation did not include transfers into these gambling venues. The bank records also showed a $12,500 payment to Barstool and a $25,000 payment to American Wagering during the

thirteen rentals in evidence. Given that the trial court deducted $29,338 in expenses, the Appellee argues the difference of $2,795 would have been harmless.

We agree with the Appellant that there was evidence showing that the cleaning fees were included in the total rent, as shown by the invoices entered into evidence. The Appellant then claims the cleaning fees directly related to the necessary and ordinary expense of a rental property. As we vacate on the calculation already, the trial court can analyze the leases further on remand to determine whether the cleaning fees should have been deduced as a necessary and ordinary expense.

same time period.[12] Additionally, the Appellant testified that "[t]here typically has not been any gambling winnings."

Under the family law statute, "[f]or income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, 'actual income' means gross receipts minus ordinary and necessary expenses required to produce income." Md. Code, Fam. Law § 12-201(b)(2). Money won from gambling would most likely fall within the category of royalties, which means we need to look at the gross receipts minus the ordinary and necessary expenses required to produce income. The Appellee's numbers were the gross receipts with the money taken out of the gambling websites. The necessary and ordinary expenses would be the transfers into the gambling venues, so that the actual income is the profit a person makes off of the betting websites.

Here, the Appellee's numbers that the trial court adopted did not include any transfers into the betting venues. The Appellee argued that the $37,500 described in payments to the betting websites described above were not included in the calculation because they were not deposits or disbursements but were instead labeled as a "Card Purchase" and a "Wire Transfer." Using the meaning of "actual income" as gross receipts minus expenses, we would need to subtract the money put into these websites from the

[12] The Appellant asks us to look at evidence outside the record, referring to hypothetical bank statements that had $50,000 more in transfers into the betting websites. As those statements are not in the record, the trial court cannot be considered to have been in error for not considering it, and we cannot consider those facts in this analysis. *See Floyd v. Baltimore City Council*, 241 Md. App. 199, 216 (2019) (quoting *Massey v. State*, 173 Md. App. 94, 125 (2007)) ("In a bench trial, the court may not rely on facts that are not in the record.").

money taken out of them to determine if there was any income from gambling. Gambling winnings, which would be the income someone makes from gambling, is not equivalent to taking money out of an account from a betting website. If someone deposits and then immediately takes out $100, that should not be considered "actual income."

While the Appellant's testimony that there have not been any winnings is undermined by the trial court's findings about the lack of his credibility and underreporting of his income, there is still a lack of evidence presented about what his gambling record looks like and whether $114,188.03 is an accurate reflection of the Appellant's income from gambling. There is not substantial evidence to support the conclusion of $114,188.03 as income from gambling, especially where on the record there are deposits into gambling websites that could be further expenses. As a result, we hold that the trial court erred in its calculation of the Appellant's income using the gambling winnings and also remand for further proceedings on this issue. Gambling winnings are an appropriate form of income that may be used to calculate the Appellant's "actual income," but the evidence presented here was not supported by substantial evidence and was therefore erroneous. On remand, the trial court shall determine the Appellant's net gambling income, if any, by calculating gross receipts transferred out of betting venues into the Appellant's accounts and subtracting the ordinary and necessary expenses required to produce that income—namely, the funds transferred from the Appellant's accounts into those same venues during the relevant period. See Md. Code, Fam. Law § 12-201(b)(2). The court shall not limit its analysis to a subset of months that captures only withdrawals from betting accounts without the corresponding deposits into them. To the extent the Appellant had net gambling losses,

those losses shall not be counted as income. To the extent the Appellant had net gambling gains, those gains shall be included in his actual income. The court shall also consider any tax returns available at the time of the remand proceedings, which may shed additional light on the Appellant's gambling activity and overall income.

On the issue of the Appellant's actual income, we will vacate the trial court's order and remand for further proceedings to determine his actual income.

Award of Attorney's Fees to Appellee

A. Parties' Contentions

The Appellant argues that if the child support is vacated, then the attorney's fee award should also be vacated. He argues that the awards are interrelated and therefore vacating one award should mean we simultaneously vacate the attorney's fees award on remand.

The Appellee argues that the award of attorney's fees is separate from the determination of child support and therefore it should not be vacated. The trial court had determined that the Appellant lacked substantial justification to bring and maintain this proceeding. Based on that determination, the trial court was obligated to give the Appellee child support.

B. Standard of Review

In a child custody proceeding, "[a]n award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *David A. v. Karen S.*, 242 Md. App. 1, 23 (2019) (quoting *Petrini v. Petrini*, 336 Md. 453, 468, 648 A.2d 1016 (1994)); *see also Ridgeway v. Ridgeway*, 171 Md. App. 373, 386

(2006) (quoting *Broseus v. Broseus*, 82 Md. App. 183, 200 (1990)) (stating same).

C. Analysis

Maryland code permits the circuit court to award "the costs and counsel fees that are just and proper under all the circumstances" in a modification of child custody case. Md. Code, Fam. Law § 12-103(a)(1). To do so, 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." *Id.* at § 12-103(b). If the court finds there was an absence of substantial justification and does not find good cause to the contrary, "the court shall award to the other party costs and counsel fees." *Id.* at § 12-103(c).

The circuit court here found that there was an absence of justification for the Appellant to bring, maintain, and/or defend the proceeding. Elsewhere in the trial court's ruling, when analyzing the fitness of the parents, Judge Acosta said there was:

> . . . no testimony to support [the Appellant's] fitness as a parent. Instead, multiple witnesses "all expressed concerns about [the Appellant's] abusive behavior, continuous disparagement of [the Appellee] to the children, his poor relationship with the children, his lack of insight, and the detrimental impact these behaviors had on the children and their emotional well-being.

Additionally, the Appellant's claim of contempt against the Appellee was denied by the trial court, and Judge Acosta noted that there was "no credible evidence" that the Appellee did any of the actions the Appellant accused her of, such as blocking him from contacting the children or attending their activities. The court found that in reviewing the financial status of the parties, the award of fees was "just and proper." As a result, the court ordered the Appellant to pay the Appellee $70,000.00 of the Appellee's attorney's fees.

In *St. Cyr v. St. Cyr*, 228 Md. App. 163 (2016), this Court said:

> [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." *Turner v. Turner*, 147 Md. App. 350, 400 (2002). "Therefore, when this Court vacates one such award, we often vacate the remaining awards for reevaluation." *Id.* at 401 (collecting cases); *see also Hiltz v. Hiltz*, 213 Md. App. 317, 322 n.3 (2013) (citing *Doser v. Doser*, 106 Md. App. 329, 335 (1995)); *Murray v. Murray*, 190 Md. App. 553, 572 (2010).
>
> Because we are remanding this case for a re-evaluation of the amount and duration of alimony, we will also vacate the interrelated orders regarding child support, the monetary award, and counsel fees.

St. Cyr, 228 Md. App. at 198 (citations altered). The Appellee argues that, notwithstanding any error in the child support calculation, the attorney's fee award is independently compelled and cannot be disturbed. We agree in part. The trial court rested its fee award on two separate grounds: first, an absence of substantial justification for the Appellant to bring and maintain the proceeding, Md. Code, Fam. Law § 12-103(c); and second, the financial disparity between the parties, Md. Code, Fam. Law § 12-103(b). These grounds must be analyzed separately. The trial court's finding of an absence of substantial justification rested on the Appellant's conduct throughout these proceedings—his unsupported claims of fitness for custody, his unsubstantiated contempt petition, and the unrebutted evidence of abusive behavior toward the Appellee and the children. None of those findings are disturbed by this opinion. Because the absence-of-justification finding is untethered to the income calculation errors we identify above, the statutory mandate of § 12-103(c) remains operative: upon such a finding, "the court shall award to the other

party costs and counsel fees." That the amount of the Appellant's income may be recalculated on remand does not deprive the fee award of its statutory foundation. Nevertheless, the second ground—the financial disparity between the parties—is inextricably tied to the Appellant's recalculated income. The specific amount of attorney's fees the court awarded, $70,000, was informed by its view of the parties' relative financial circumstances, which in turn depended on the income figures we now vacate. We therefore vacate the fee award and remand for reconsideration of the appropriate amount of fees consistent with the recalculated income, while making clear that the trial court's finding of an absence of substantial justification stands and continues to support a mandatory fee award under § 12-103(c) on remand.

CONCLUSION

Accordingly, we vacate and remand the portions of the Circuit Court for Montgomery County's February 21, 2024, Custody and Child Support Order concerning the amount of child support and arrearages and the payment of attorney's fees.

ORDER OF FEBRUARY 21, 2024, SETTING CHILD SUPPORT PAYMENTS AND GRANTING ATTORNEY'S FEES TO APPELLEE, VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.