Circuit Court for Prince George's County
Case No. CAD17-41098

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 400

September Term, 2019

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MELISSA MILLS

v.

PETER MILLS

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Nazarian,
Arthur,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: June 24, 2020

This appeal arises from a custody dispute between the parents of three minor children. In 2017, the mother moved from Maryland to Utah, taking the children with her. The father brought a custody claim in the Circuit Court for Prince George's County, seeking to make the former family home in Maryland the primary residence of the children. The mother counterclaimed, seeking to make her new home in Utah the children's primary residence.

After a trial on the competing claims, the circuit court awarded "joint physical custody." Under the court's order, the children would reside with their mother in Utah during the school year, and the father would be entitled to visitation, if he wished, every other weekend in Utah. The children would reside with their father in Maryland throughout the summer and during breaks in the school year. In determining child support, the court used the statutory formula for cases of "shared physical custody" and reduced the father's child support obligation to offset travel expenses that he might incur if he exercised the visitation awarded by the court.

The mother has appealed, raising the following two questions:

I. Did the trial court err and/or abuse its discretion in its visitation schedule to [the father]?

II. Did the trial court err in its child support determination?

The answer to both questions is: Yes. For the reasons discussed in this opinion, we shall reverse the judgment and remand the matter for further proceedings.[1]

[1] The Conclusion section of this opinion, beginning on page 49, includes a more detailed summary of the issues that must be addressed on remand.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Separation of the Parents

Peter Mills ("Father") and Melissa Mills ("Mother") married one another in 2006. Their first child, a daughter, was born in January 2010. Their next child, another daughter, was born in November 2011. Their youngest child, a son, was born in May 2016.

Before giving birth to the children, Mother worked as a professor of music education. When the children were born, she stopped working full time outside of the home and became the primary caregiver for the children. Father continued to work full time as a tax attorney. Beginning in 2014, the family lived together in an apartment in Prince George's County.

On June 26, 2017, Mother and the three children travelled for a vacation in Utah, where they planned to visit members of Mother's immediate and extended family. Mother told Father that she planned to return in early August. During July, however, Mother informed Father that she intended to keep the children in Utah indefinitely.

Mother and the children began residing in Farmington, Utah, at the home of Mother's sister. Mother enrolled the two older children in Utah public schools for the fall of 2017. Father began flying from Maryland for occasional visits with the children.

### B. Competing Claims for Custody

On December 21, 2017, Mother filed for divorce in a Utah trial court. Mother sought a divorce based on irreconcilable differences, equitable division of marital property, and alimony. She requested joint legal custody of the children, sole physical

custody of the children subject to Father's entitlement to visitation under Utah law, and child support.

Separately, on December 22, 2017, Father filed a complaint in the Circuit Court for Prince George's County, seeking a limited divorce based on the parties' separation. Father requested joint legal custody, primary physical custody, and child support.

In the circuit court, Father moved for an order establishing the court's jurisdiction to make an initial child custody determination.[2] Mother asked the court to decline to exercise jurisdiction over the custody claims. The court granted Father's motion and denied Mother's motion.

In the circuit court, Mother counterclaimed for joint legal custody, primary physical custody, and child support. Father amended his pleadings, abandoning the claim for divorce, but continuing to pursue his claims for custody and child support. The parties continued to litigate their divorce, property, and alimony claims in Utah, where the court set Father's pendente lite alimony obligation at $1,383 per month.

The parties reached a pendente lite agreement regarding visitation and child support. Under their agreement, the children would visit Father at his parents' home in Idaho for four days over the Thanksgiving holiday and for six days after Christmas. In addition, Father would have access through telephone or a video-chat service while the

[2] Under the Uniform Child Custody and Jurisdiction Act, Maryland courts have "jurisdiction to make an initial child custody determination" if this State "was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]" Md. Code (1984, 2019 Repl. Vol.), § 9.5-201(a)(1) of the Family Law Article.

children were living with Mother in Utah. Finally, Father would pay pendente lite child support of $1,877 per month, without prejudice to either party's claims at trial regarding the proper amount of child support.

The circuit court entered a consent order that embodied the terms of the parties' agreement.

### C. Trial on Custody, Visitation, and Child Support

In January 2019, the circuit court held a two-day trial on the claims for custody, visitation, and child support. Father desired for the children to reside primarily with him at the former family home in Prince George's County. Mother desired for the children to reside primarily with her at the house that she was renting from her sister in Farmington, Utah.

At the time of trial, the oldest child was nearly nine years old, the middle child was seven years old, and the youngest child was two-and-a-half years old. The two older children were attending a public elementary school in Utah and taking karate lessons and music lessons. The children attended weekly church services. Much of the parents' testimony concerned the medical and educational needs of the three children.

Mother testified that the older daughter has been diagnosed with autism spectrum disorder; anxiety disorder, unspecified; ADHD, combined type; mood disorder, unspecified; and a feeding disorder. Mother said that the older daughter met with a psychiatrist every month and a pediatrician every two months, to monitor her medication usage. Both parents mentioned that the older daughter was significantly underweight. Mother stated that the older daughter was undergoing an eight-week feeding therapy

program in Utah. Father stated that she was consuming nutritional drinks daily, at the recommendation of her pediatrician.

Mother testified that the older daughter periodically experienced severe tantrums in which she would scream uncontrollably. Mother had completed training in "parent-child interaction therapy," in which Mother learned techniques to use at home for managing some behaviors associated with autism.[3] In his testimony, Father characterized the older daughter as "very, very mild on the autism spectrum." Father stated that, in his experience, it was "usually not very difficult" to manage her behaviors "by just maintaining a calm, orderly, tranquil, organized kind of environment." Father said that he does not "observe outbursts or fits or anything from her."

Mother testified that the younger daughter suffers from migraines and stomach aches and has been diagnosed with generalized anxiety disorder and ADHD, combined type. Mother said that the younger daughter was taking three types of medication. Father had recently learned of the ADHD diagnosis through reports from Mother. In his testimony, Father opined that some symptoms that Mother described to him "seem[ed] to be more severe or more pronounced than what [he] observe[d] firsthand." Father observed that, when the younger daughter was in his care, she had "no problem doing things such as sitting through church services which are . . . approximately an hour long[.]"

Mother stated that the older daughter had had an individualized education plan

[3] Father had attended at least one session of parent-child interaction therapy.

while she was in school in Maryland and that both daughters had been "flagged for services" at their new school in Utah. The two parents were participating in the process of setting up accommodation plans for both daughters, to address concerns with ADHD. In addition, each daughter was participating in a "social skills group" at school.

Mother testified that she was caring for the youngest child, a two-and-a-half-year-old son, in the home, except for five hours per week when he was with a child-care provider and four hours per week when he was in preschool. According to Mother, the youngest child had recently started to exhibit some behaviors similar to those exhibited by the oldest child. Mother had arranged for him to receive early intervention services, through monthly home visits from a therapist, after a screening indicated that he had a "severe deficit" in "adaptive behaviors." Through Mother's reports, Father had learned that "there was a probability that [the youngest child] might have ADHD."

In her testimony, Mother expressed concern that the children had never been in Father's exclusive care for a significant length of time. Mother stated that, when the family lived in Maryland, she had performed the majority of child care for all three children, including the management of their medical appointments. According to Mother, Father's daily interactions with the children were usually limited to reading them bedtime stories.

Mother called her brother and her cousin to testify about their observations of the parents when the family had lived in Maryland. Mother's brother stated that Father interacted with the children minimally whenever he was at home. Similarly, Mother's cousin stated that Father "never really . . . voluntarily engaged with the children."

Father testified that, during the 18 months since Mother had moved to Utah, he had travelled to visit the children eight times. Father said that "air fares can vary a lot," but he recalled that his plane tickets for those visits had cost him "around seven, eight, [or] nine hundred dollars, in that neighborhood." Father also said that he had paid more than $1,000 for a plane ticket over the Thanksgiving holiday. Father typically stayed in hotels when he visited the children in Utah.[4] He mentioned that his family members had contributed to cover some of his travel expenses. For the two visits in November and December of 2018, Father stayed with his parents in Idaho, about 330 miles from Mother's home in Utah; the parents exchanged the children at a point halfway between the two residences.

Father testified that he had been the primary caregiver for all three children during his visits with them in November and December of 2018. Father said that he "encountered no problems" with feeding the children, diapering the youngest child, getting the children ready for bed, or dispensing their medications according to the instructions. He expressed concern that Mother did not "seem to [him] to be interested in fostering a healthy, ongoing relationship between [him] and the children." "[I]n the first part of 2018," he said, Mother had "kept [him] in the dark about many things related to children's health and the medical care that they were receiving."

The paternal grandfather testified that, during the children's visits, he observed nothing that gave him any concerns about Father's ability to care for the three children.

[4] Father said that, in a few instances, he "had to ask favors of other more distant relatives," such as "second cousins and so forth."

The paternal grandfather described Father as attentive and affectionate and reported that the children consistently appeared to be "happy to be in his presence."

At the time of trial, Father was working full time at a tax-advisory firm, earning a salary of $150,000 per year ($12,500 per month) before taxes. Mother was receiving pendente lite alimony and child support from Father. She was caring for her son at home, but she had no full-time employment outside of the home. Mother reported that her pre-tax income was $219.63 per month at the time of trial.

Mother explained that she had not had full-time employment since 2010, when she worked at the University of Maryland as a visiting assistant professor of music education. Mother later worked part time as an adjunct professor, teaching a course in the "methods of teaching choir . . . to young singers." Mother occasionally worked, up to three times per year, as a judge of choir festivals. Since moving to Utah, Mother had started working a few hours per week teaching private voice and piano lessons.

Mother has three degrees in music education: a bachelor's degree, a master's degree, and a Ph.D. She has taught choir in junior high schools and has conducted large choirs. She wrote a dissertation on the subject of children's choirs, worked on a "ten-year research project" regarding "the philosophies of children's choir conductors," and "published two books on how to work with young singers."

Mother testified that she was in the process of starting a non-profit choir company. She had taken a business course, assembled a board of directors, selected a logo, secured rehearsal spaces, done market research, and identified potential clients. Her company, she said, would be funded by tuition, grants, underwriting, and fundraising events.

Mother expected that the company would not generate revenue until the fall of 2019, after auditions and rehearsals. She did not know what her future income might be at the company, except to say that her salary would be "set by the board of directors."

Father introduced the transcript of the deposition of an expert vocational specialist who had assessed Mother's employment options and earning potential. The expert had interviewed Mother, evaluated Mother's education and experience, and gathered information about salaries in the area near Mother's home. She opined that Mother's "best option[]" for "maximiz[ing] her earning capacity" would be to work as a secondary or middle school teacher.

Based on "salary schedules" published by school districts near Mother's home, the expert opined that Mother could earn a "starting salary" "near [$]59,518" per year as a secondary school teacher, or "in the range of [$]48,449 up to $49,168" per year as a middle school teacher. During cross-examination, she acknowledged that a report from the Utah Department of Workforces showed that, during 2017, the salaries for "inexperienced" secondary school teachers were around $33,281 in the Salt Lake metro area and around $38,752 in the Ogden-Clearfield metro area. According to the expert, the Salt Lake metro area is "about . . . 30 miles from where [Mother] lives" and the Ogden-Clearfield metro area is "probably within 30 miles of where she lives."

The expert estimated that, if Mother "really put a full-time effort into looking for work," she would need "about three or four months" before she could secure a permanent teaching position. She acknowledged that most teaching jobs would not be available to Mother unless she renewed her Utah educator's license, but believed that Mother "could

work as a substitute school teacher" on a temporary basis, while pursuing the license. According to the expert, the renewal process would require Mother to accumulate a certain number of "license points" through "classroom teaching experience" and other professional activities.[5]

In her testimony, Mother did not assert that she was incapable of working full time. Mother disagreed, however, with the expert's suggestion that working at a public school was her best employment option. Mother said that "public schools have a cap on how much [a teacher] can earn[.]" She believed that she could someday earn a "much higher" salary through her choir business. She also believed that she was "uniquely qualified" to operate a children's choir company and that she had identified a "huge demand" for choir participation in the area where she lived. Mother was "inclined . . . to put her heart into the place where [she] c[ould] conceivably make much more money" than she could make as a public school teacher.

### D. Circuit Court's Ruling on Custody, Visitation, and Child Support

After a recess on the second day of testimony, the circuit court announced that it would award the parents "joint legal and physical custody" of the children and set Father's child support obligation at $867 per month.

Both parents had requested joint legal custody. The court granted that request, finding that the parents had demonstrated, during the separation, that they were able to work together to make shared decisions regarding the children.

[5] According to Mother, she could accumulate points toward renewing the license by substitute teaching and by attending conferences, workshops, and clinics.

In discussing the factors relevant to custody, the court found both parents to be fit and sincere in their requests for primary physical custody. The court observed that all three children were emotionally attached to both parents. The court commented that the paternal grandfather's testimony demonstrated that Father has a close relationship with all three children. The court found Mother's brother to be "biased" and deemed his testimony about Father's lack of involvement with the children to be "unreliable." The court voiced similar "concerns" about Mother's own testimony, stating that she seemed to be unwilling "to recognize any . . . contributions of the father."

The court considered the "[p]otential disruption of the child's social and school life" to be a "two-prong[ed]" factor. The court said that there had been "an initial disruption when the mother took them . . . from Maryland to Utah without the father's permission[,]" but that "there would be an additional disruption if they were taken from Utah to Maryland, because they now have developed a new routine and are enrolled in school." The court added:

> And I have to say, and I can't disregard the fact, I'm cognizant of the fact that prior to the mother's unilateral decision to take these children to Utah, that everyone lived here together. And I think the evidence, the testimony, logic and reason is clear, that the mother went to Utah to visit her family – at least that's what she told the father – and she was supposed to come back, and she didn't, and she stayed in Utah. For whatever reasons she did, she did that without the father's permission, and now it results in this distance between the father and the children.
>
> So even recognizing that, the question isn't, you know, can there be a punishment for that, because that wouldn't be proper. The issue again always remains is what's in the best interest of these children.

The court determined that it was in the best interest of the children to award joint

physical custody to the parents. In making that determination, the court acknowledged that the parents live "a great distance apart," but it considered the distance between them to be only "one factor."

The court proceeded to devise an access schedule that recognized that Father lives in Maryland and that the children attend school in Utah. Under the court's schedule, the children would be "in the mother's care during the school year and with the father" for "the whole summer." In addition, Father was "entitled to see the children during the school year every other weekend, if he chooses." The court noted that travelling from Maryland to Utah and back every other weekend "would be a financial strain" for Father. The court added that it would award Father visitation every other weekend "with the understanding that that is a very cost-prohibitive thing." The court required Father to notify Mother 24 hours in advance (i.e., sometime on Thursday afternoon) whenever he chose not to exercise his visitation rights.[6]

"Additionally," the court said, "father is awarded each spring break," which includes Easter, and "every winter break," which includes Christmas. The court said that the parents would "alternate Thanksgiving." "[R]egardless of the schedule," the court ruled that the children would spend Mother's Day weekend with Mother and Father's Day weekend with Father.

During the oral ruling, Father's counsel told the court that Utah schools provide "a

[6] At Mother's request, the court also granted Mother visitation rights every other weekend during the summer.

four-day weekend" in October, known as the "Utah Educators Association" break. The court responded: "All right. The father shall have the children for the October school break."

Turning to the issue of child support, the court found that Father's actual income was $12,500 per month; that Father was paying alimony to Mother in the amount of $1,393 per month; that Father was paying a health insurance premium of $189 per month for the three children; and that the parents had been sharing extraordinary medical expenses of $500 per month. The court did not mention Mother's work-related child-care expenses.

In determining Mother's income, the court found that Mother had "willfully and deliberately impoverished herself."[7] The court said that Mother "has no physical or mental disability that prohibits her from working" and that "she [was] not [working] because of her desire to pursue this ultimate goal of having this nonprofit, at which she may be able to earn an income." The court determined, therefore, that it would "impute an income to her" for child support purposes. The court said that the testimony from the expert vocational specialist indicated that the "inexperienced salary range" was $33,281 in the Salt Lake metro area or $38,752 in the Ogden-Clearfield metro area.

The court said that it "also relied upon" Mother's testimony about "what she earns currently." "[W]hen [Mother] judged music festivals," the court observed, "she could earn anywhere from $150 up to $200." The court multiplied $150 times five (for the five

[7] Earlier in its ruling, when discussing the parents' financial circumstances, the court said that Mother "appear[ed] to be supported through alimony and child support."

work days in a week), and then multiplied the result by 52 (for the 52 weeks in a year), which "came to $39,000." The court said that this figure was "consistent" with the expert vocational specialist's testimony "as to what the income would be for an inexperienced teacher in that area, $38,752." Ultimately, the court said that it would impute income to Mother of $39,000 per year, or $3,250 per month.

The court said that it had "calculate[d] the child support for three minor children" under the "shared" physical custody formula, which resulted in a "recommended" child support obligation of "$1,367 a month" looking "strictly [at] the guidelines[.]"

The court then said that it "would be derelict in its duties" if it did not "recognize the fact that the father has to travel to visit his children . . . not because he relocated," but "because the mother made a unilateral decision to remove the children . . . to Utah." The court reasoned that, regardless of Mother's motives, the relocation "resulted in . . . an additional expense" for Father. In the court's view, it was "consistent with the best interests of these children that their father . . . be able to maintain a regular relationship over this expanse of . . . distance." "So," the court said, it "believe[d]" that it would be "consistent" with the children's best interests to "consider the fact that the father must travel and pay for these costs to see his children on a regular basis" when calculating child support.

The court relied on Father's testimony that "a plane ticket could be anywhere from $700 to $1,000."[8] The court "took the average of that to be $850 for a ticket." Using that

[8] Some of these tickets may have been for flights to Idaho, where Father's parents live, and not to the more accessible destination of Salt Lake City, Utah.

average, the court estimated that Father would need to spend $20,400 to transport the children from Utah to Maryland on breaks from school. The court estimated that Father would need to spend an additional $17,850 for airfare during the school year if Father chose to exercise his visitation rights in Utah every other weekend.

The court stated that these expenses "must be incurred, if you're going to allow his access to the children consistent with the best interests, and he had to go there because the mother moved there with the children." The court reiterated its view that it was in the "best interests" of the children "to set a child support that allows their father to come and visit them on a regular routine basis." The court said that it would "deviate[] downward by $500" from the amount of $1,367, for a child support obligation of $867 per month.

The court ruled that Father's payment obligations would begin in February 2019, and that his arrears would be "assessed at zero." The court directed Father's counsel to submit a proposed order consistent with the oral ruling.

### E. Judgment of the Circuit Court

On February 6, 2019, the circuit court entered an order awarding the parents "joint legal and joint physical custody" of the three children. The order stated that the children would reside with Mother during the school year. Under the order, Father would have access "if he so desires, every other weekend in Utah," and would need to notify Mother 24 hours in advance "if he does not elect to exercise" his access rights.

The order provided that the children would "reside with Father during the summer break from school," and that Mother would have access every other weekend in Maryland during the summer. The children would "reside" with Father during "each

spring break from school," "every winter break from school," and "every UEA (Utah Educators Association) break from school." The children would be with Mother on Thanksgiving in odd-numbered years and with Father on Thanksgiving in even-numbered years. Mother would have the children every Mother's Day and the day before it, while Father would have the children every Father's Day and the day before it.

Regarding child support, the order stated:

> that child support shall be established at $867.00 per month, accounting from January 1, 2019, which represents a downward deviation from the Maryland Child Support guidelines for travel expenses for [Father] in exercising his access periods with the minor children, as said child support amount is in the best interests of the minor children to afford [Father] the opportunity to have routine and regular contact with the parties' minor children[.]

After the court signed the order, Mother filed a timely motion to alter or amend the judgment.[9] Among other things, Mother asserted that residing in Maryland throughout the summer would disrupt ongoing medical treatment that the two older children were receiving in Utah. Mother offered letters from the children's primary care provider in Utah and from a pediatrician who had treated the children in Maryland. Both doctors opined that switching from one group of health care providers to another would hinder the children's progress. Mother asked for another hearing so that she could present additional evidence to show that a "lack of continuity" in treatment would be adverse to the children's best interests.

[9] Mother filed her motion to alter or amend the judgment before the entry of the order. Under Rule 2-534, "a motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket."

Opposing the motion, Father argued that the additional evidence that Mother proposed to offer was "readily available" to her before trial. The court denied the motion to alter or amend the judgment, without a hearing.

Thereafter, Mother filed a timely notice of appeal. Father did not cross-appeal.

## DISCUSSION

In this appeal, Mother asks this Court to reverse the orders regarding custody, visitation, and child support. Mother contends that the circuit court abused its discretion in establishing the physical custody schedule and that the court committed multiple errors in determining Father's child support obligation. Mother argues that the court's decisions are "not merely unsupportable" but "inimical" to the best interests of the children.

While Mother makes separate challenges to the rulings on custody and child support, she theorizes that those rulings were "interrelated." Mother argues that the court awarded Father substantially more visitation than he might ever actually use, in order to "artificially reduce" his child support obligation. Mother argues that the "net effect and obvious purpose" of these rulings was to "punish" Mother for her decision to relocate from Maryland to Utah with the children.

Father contends that most aspects of the court's rulings should be upheld. Father argues that the court "did not abuse its discretion in fashioning a custody schedule that maximized the amount of time that the [children] spend with [Father], given [Mother's] unilateral decision to move the parties' children to Utah and the trial court's decision to award [Mother] custody during the school year." Although Father has acknowledged at least one computational error in the child support determination, he argues that the court

acted properly in determining Mother's potential income, employing the shared physical custody formula, and "deviat[ing] downward" for Father's travel expenses.

As both parties recognize, "[w]hen an action has been tried without a jury," this Court "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). The trial court is entrusted with discretion in deciding what custody and visitation arrangement will serve a child's best interest. *See, e.g.*, *Boswell v. Boswell*, 352 Md. 204, 223 (1998). Similarly, "[t]he trial court's decision as to the appropriate amount of child support involves the exercise of the court's discretion." *Guidash v. Tome*, 211 Md. App. 725, 735 (2013).

An abuse of discretion can occur when the court "makes a decision based on an incorrect legal premise or upon factual conclusions that are clearly erroneous[,]" or when the court "reach[es] an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous." *Id*. at 735-36. This Court has often explained:

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

*North v. North*, 102 Md. App. 1, 14 (1994); *see Guidash v. Tome*, 211 Md. App. at 736.

In our assessment, the court's decisions regarding physical custody and child

support are far outside the range that this Court would consider acceptable. Both orders will be reversed. This case will be remanded for further proceedings in which the court must establish a realistic physical custody schedule and determine a proper amount of child support in light of the parents' incomes and expenses.

## I. Physical Custody

The circuit court awarded the parents what it called "joint physical custody" of their three minor children. "Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent[.]" *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "Joint physical custody is in reality 'shared' or 'divided' custody." *Id.* at 296-97. "Shared physical custody . . . most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights." *Id.* at 297. "Joint physical custody may seriously disrupt the social and school life of a child when . . . the homes are not in close proximity to one another." *Id.* at 308-09. "In such cases the amount of time each parent has physical custody may be adjusted without interfering with the concept of continued joint custody." *Id.* at 309.

In custody cases, the "'court's objective is not . . . to punish'" a parent, but "to determine what custody arrangement is in the best interest of the minor children[.]" *Burdick v. Brooks*, 160 Md. App. 519, 528 (2004) (quoting *Hughes v. Hughes*, 80 Md. App. 216, 231 (1989)). Factors relevant to this determination include:

(1) The fitness of the parents;

(2) The character and reputation of the parties;

(3) The requests of each parent and the sincerity of the requests;

(4) Any agreements between the parties;

(5) Willingness of the parents to share custody;

(6) Each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest;

(7) The age and number of children each parent has in the household;

(8) The preference of the child, when the child is of sufficient age and capacity to form a rational judgment;

(9) The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;

(10) The geographic proximity of the parents' residences and opportunities for time with each parent;

(11) The ability of each parent to maintain a stable and appropriate home for the child;

(12) Financial status of the parents;

(13) The demands of parental employment and opportunities for time with the child;

(14) The age, health, and sex of the child;

(15) The relationship established between the child and each parent;

(16) The length of the separation of the parents;

(17) Whether there was a prior voluntary abandonment or surrender of custody of the child;

(18) The potential disruption of the child's social and school life;

(19) Any impact on state or federal assistance;

> (20) The benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child;
>
> (21) Any other consideration the court determines is relevant to the best interest of the child.

*Azizova v. Suleymanov*, 243 Md. App. 340, 345-46 (2018) (quoting Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 5-3(a), at 5-9 to 5-11 (6th ed. 2016)), *cert. denied*, 467 Md. 693 (2020).

When explaining its decision, the circuit court identified and discussed many of these factors. The basic contours of that decision are unchallenged. Both parents were willing and able to provide safe and loving homes, but the children's schools, doctors, and activities were now located in Utah. Under the circumstances, the court decided that the children should continue to live with Mother during the school year.

Mother contends that the court abused its discretion by granting Father visitation every other weekend during the school year, as well as physical custody during every major school break and throughout the entire summer. Mother argues that this schedule is contrary to the children's best interests because it is unduly disruptive to their lives. She argues that, although the court's stated purpose "was to maintain a relationship between [Father] and his children, a meritorious goal, there are more appropriate ways" to do so.

Father asserts that the court's physical custody schedule "allows the children to maximize the amount of time that they will spend with [Father], given the fact that [Mother] chose to relocate with the children to Utah and that the trial court awarded

[Mother] physical custody of the children during the school year." Father argues that the court, "[h]aving determined that joint physical custody was appropriate," acted properly in trying to "maximize the amount of time" that the children could spend with him.

In our judgment, the court's effort to "maximize" the children's time with Father whenever the children were out of school caused the court to deviate far from any reasonable physical custody schedule for three young children whose parents live over 2,000 miles away from one another.

"The question of whether to award joint custody" must not be "considered in a vacuum, but as a part of the overall consideration of a custody dispute." *Taylor v. Taylor*, 306 Md. at 303. Even where the children would benefit from spending roughly equal time with both parents, the court is still obligated to assess the feasibility of any joint custody arrangement. *See Domingues v. Johnson*, 323 Md. 486, 492 (1991) (noting that "it is quite often the case that . . . joint custody is not feasible"); *Taylor v. Taylor*, 306 Md. at 303 (noting that "when appropriate, . . . the feasibility of [a joint custody] arrangement is certainly worthy of careful consideration").

In an attempt to defend the custody schedule, Father stresses the importance of visitation between a child and parent. Father quotes *Boswell v. Boswell*, 352 Md. 204 (1998), in which the Court of Appeals recognized that, "in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent." *Id.* at 220. It would be a mistake, however, to construe this "reasonable maximum opportunity" (*id.*) to justify maximizing visitation at all costs. As the Court went on to explain, "the non-custodial parent has a right to liberal

visitation with his or her child 'at reasonable times and under reasonable conditions,' but this right is not absolute." *Id.* (quoting *Myers v. Butler*, 10 Md. App. 315, 317 (1970)). The Court emphasized: "'[A] parent whose child is placed in the custody of another person has a right of access to the child at *reasonable times*." *Boswell v. Boswell*, 352 Md. at 220 (emphasis in original) (quoting 2 William T. Nelson, *Divorce and Annulment* § 15.26, at 274-75 (2d ed. 1961)).

Here, the circuit court noted that the factors relevant to custody include the "residences of [the] parents and opportunity for visitation[.]" *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977); *see also Taylor v. Taylor*, 306 Md. at 309 (listing the "geographic proximity of parental homes" as a factor in evaluating joint custody) (italics and capitalization removed). It should go without saying that the court's assessment of the opportunities for visitation must be realistic, in light of the evidence. The court here repeatedly mentioned the great distance between Maryland and Utah before saying that "the distance between the parties" was merely "one factor."

The distance between the parties, however, necessarily interacts with many other factors. As the court recognized, frequent air travel between Maryland and Utah requires considerable expense. The court accurately described its own visitation schedule as "cost-prohibitive" and a "financial strain" on Father. The family's financial circumstances were comfortable because of Father's income, but by no means could they routinely incur additional four-figure expenses each month without impairing their standard of living. In fact, Father had relied on his family members to help pay the costs of visiting the children just eight times in the 18 months after the separation.

Similarly, the court's schedule was incompatible with the demands of Father's employment and his opportunities for time with the children. Father had been working at a tax-advisory firm since August 2018. Father testified that, "on a typical day," he would be "in the office between 8:30 and 9:00" in the morning and "leave the office between 5:30 and 6:00" in the evening. Father said that his work obligations occasionally required him to remain at the office past 5:30 or 6:00 p.m., but that his employer had assured him that, if he needed to be home to care for his children, the employer would allow him "to be out of the office by a certain time every day[.]" Despite mentioning Father's work schedule, the court granted him visitation, in Utah, every other weekend, "from Friday after school" until "Sunday no later than 8:00" at night. There is no possibility that Father could visit his children in Utah every other weekend throughout the school year without frequent absences from work.

As Mother observes, the court "recognized that it was unlikely" that Father "would, or could, exercise" visitation under such a schedule. In its ruling, the court said that it would grant the every-other-weekend visitation subject to the "caveat" that Father could always choose not to exercise his visitation rights as long as he notified Mother 24 hours in advance. This type of advance-notice provision is appropriate in many circumstances, but it is not appropriate where the visiting parent will need to opt out frequently. The children should not be forced to face uncertainty, twice per month, of not knowing until Thursday afternoon or evening where they will be spending their weekends.

The court's ruling assumes that Father would travel to Utah for most visits, but the

order also requires the three young children to endure frequent air travel. Notably, the order states that the children would "reside" with Father every year during a four-day weekend in October. In addition to the concerns about time and money that Father would need to devote,[10] the children themselves would feel the effects of travelling and then immediately returning to school. This type of disruption should not be imposed lightly. Even where the court seeks to preserve "the concept of continued joint custody[,]" the court has a responsibility to "adjust[]" the "amount of time each parent has physical custody" to mitigate this disruption. *See Taylor v. Taylor*, 306 Md. at 309.

We take the court at its word when it said that it was not seeking to "punish[]" Mother. Nevertheless, the court placed an improper emphasis on what it called Mother's "unilateral decision" to relocate without Father's "permission." The "constitutional right to travel should not be ignored in custody decisions involving the decision of one parent to relocate." *Braun v. Headley*, 131 Md. App. 588, 602 (2000). The right to travel "includes the right 'to migrate, resettle, find a new job, and start a new life.'" *Id.* at 598 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)). Maryland law generally "giv[es] equal status, in determining the child's best interests, to (1) the custodial parent's right to travel, and the benefit to be given the child from remaining with the custodial parent; and (2) the benefit from the non-custodial parent's exercise of his right to maintain close association and frequent contact with the child." *Braun v. Headley*, 131

[10] The court recognized that the children were too young to fly without being accompanied by an adult. The court anticipated that, over a four-day weekend, Father would fly from Maryland to Utah alone, fly back to Maryland with the children, fly back to Utah with the children, and then fly back to Maryland alone.

Md. App. at 608.

When the court discussed the "[p]otential disruption of [the] child's social and school life," the court said that this factor was "kind of two-prong, because there was an initial disruption when the mother took them . . . from Maryland to Utah without Father's permission[,] [b]ut then there would be an additional disruption if they were taken from Utah to Maryland[.]" This analysis was faulty. Past disruption is not the same thing as potential disruption. "[W]hen evaluating what is in the best interest of a child, the determinative factor 'is what appears to be in the welfare of the children at the time of the [custody] hearing.'" *Azizova v. Suleymanov*, 243 Md. App. at 357 (emphasis in original) (quoting *Raible v. Raible*, 242 Md. 586, 594 (1966)). Ordinarily, "a parent's past conduct is only relevant insofar as it is predictive of future behavior and its effect on the child." *Id*. The court did not find, and the evidence did not suggest, that Mother was likely to move again in the near future. To the contrary, she had extensive family ties in Utah and was in the process of starting her own business.

Mother also takes issue with the imbalanced summer and holiday schedule. The court awarded Father physical custody not only for the entire summer, but also the entire winter break and the entire spring break. As Mother explains, the "effect of this ruling is that the children will never get to spend Christmas with their mother or in their home; they will never get to spend Easter with their mother or in their home; and they will never have an opportunity to go on longer than a weekend vacation with their mother." At trial, both parents mentioned that they attended weekly church services of the Church of Jesus Christ of Latter-day Saints with their children. We are at a loss in trying to imagine how

it would be in the best interests of these children for them to never spend Christmas or Easter with their mother and her family until they are adults. The court even seemed to appreciate that the children would benefit from some balance, because the court decided to alternate the Thanksgiving holidays. Nothing in the evidence, the court's ruling, or Father's arguments explains the seemingly arbitrary decision to alternate only Thanksgiving, but not other holidays.

On remand, the court must reevaluate the physical custody schedule. Mother points out that, in Father's testimony, he offered an example of a physical custody arrangement that might be reasonable. Father's counsel asked: "what access schedule . . . do you believe would be in the best interests . . . of the children?" Father answered:

> Yes. I think they would be best served by me having primary physical custody of the children. I certainly want them to have a good, healthy relationship with their mother and with their mother's family, and so while I believe that they would be best served by residing primarily with me, I think that they should have a good amount of time with their mother as well.
>
> So, for instance, if I had primary physical custody, they would be with me during the school year and with their mother for a large part of summer break, spring break, and . . . alternating Christmases or something along those lines, but . . . I do want them to have a healthy relationship with their mother and their mother's family.

Mother faults the court for "disregard[ing]" Father's "propos[al]" that the parent who did not have primary custody during the school year "should have access with the children on alternating major holidays and a large portion of the summer break." The court is by no means required to follow what one parent suggests, but Father's testimony certainly described a physical custody schedule that would be reasonable under the

circumstances. It would not be an abuse of discretion for the court to adopt a schedule similar to the one that Father described, with Mother retaining primary physical custody.

Finally, we must address another concern raised by Mother. Mother accuses the court of failing to consider the effect that spending the summer in Maryland might have on the children's ongoing medical care in Utah. We agree with Father that, in all likelihood, the court did not ignore the children's medical needs, but was unconvinced, based on the evidence, that their needs were as "profound and chronic" as Mother now argues. Moreover, the court was unpersuaded by Mother's attempts to portray Father as somehow unwilling or unable to address their needs. Mother's present assertion that the oldest child requires weekly treatment in Utah is in tension with her own trial testimony and with the apparent suggestion that the children could spend most of the summer in Maryland.

In any event, on remand, the court should consider any specific information about how the summer schedule will affect a particular medical need. Father, of course, should also have a fair opportunity to explain how he might address it. The court should also articulate how the summer schedule that it selects will be consistent with the children's medical needs.

## II. Child Support

Parents have a legal obligation to provide support for their minor children, and their children have the right to receive it. *Goldberg v. Miller*, 371 Md. 591, 603 (2002). This policy is codified in the Child Support Guidelines, Md. Code (1984, 2019 Repl. Vol.), §§ 12-201 through 12-204 of the Family Law Article ("FL"). The Guidelines are

designed to ensure that, when parents live apart, the child "receive[s] the same proportion of parental income, and thereby enjoy[s] the standard of living, [that] he or she would have experienced had the child's parents remained together." *Voishan v. Palma*, 327 Md. 318, 322 (1992).

The Guidelines were enacted "to remedy the unconscionably low levels of many child support awards when compared with the actual cost of raising children, to improve the consistency and equity of child support awards, and to increase the efficiency in the adjudication of child support awards." *Petrini v. Petrini*, 336 Md. 453, 460 (1994). The Guidelines achieve those goals "by stripping the court of most discretion, thereby reducing the decision to a purely mathematical exercise in which support obligations and related expenses are allocated between the parents in proportion to their 'actual income.'" *Lemley v. Lemley*, 102 Md. App. 266, 291 (1994) (citing *Voishan v. Palma*, 327 Md. at 322-23). "The Guidelines reflect the Legislature's plan for determining child support, and the courts must follow that plan." *Gladis v. Gladisova*, 382 Md. 654, 668 (2004).

As explained below, the court made significant errors and abused its discretion when it determined that Father's child support obligation should be $867 per month. The resulting amount is far less than "the amount of support necessary to ensure that the [children's] standard of living does not suffer because of the parents' separation." *Voishan v. Palma*, 327 Md. at 332. We shall address each issue in turn.

### A. Father's Adjusted Actual Income

In calculating a parent's child support obligation, the "central factual issue" is the adjusted actual income of each parent. *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994).

"Alimony must be considered when determining each parent's monthly adjusted actual income." *Scott v. Scott*, 103 Md. App. 500, 521 (1995).

To calculate a parent's adjusted actual income, the court must subtract the alimony actually paid from the payor's actual income. FL § 12-201(c)(2). When the court awards alimony in the same proceeding as the claim for child support, the court must subtract the amount of any alimony awarded from the payor's income. FL § 12-204(a)(2).[11] The standardized child support worksheet includes one line for subtracting "alimony actually paid" and one line for subtracting "alimony awarded" in the same case. *See* Md. Rule 9-206(c)-(d).

In its oral ruling, the court announced many of the amounts that it had used to determine child support. The court said that "look[ing] at strictly the guidelines" for cases of "shared" physical custody resulted in a "recommended support of $1,367 a month." Although the court apparently used the standardized worksheet, the parties did not receive a copy of the completed worksheet.

In her appellate brief, Mother asserted that the amount of child support required by the Guidelines was substantially higher than $1,367. Mother argued that the court's calculations were "simply inexplicable, especially since the court failed to provide a child support guideline worksheet to explain its ruling." In his brief, Father did not dispute the assertion that the court had failed to provide a child support worksheet. Although Father asked this Court to affirm the judgment, Father made no attempt to explain how the court

[11] Similarly, alimony received by a parent (FL § 12-201(b)(3)(xv)) or awarded to the parent in the proceeding (FL § 12-204(a)(2)) must be added to the recipient's income.

had arrived at or near the amount of $1,367 per month.

After the record was transmitted to this Court, we discovered that the circuit court had, in fact, completed and filed a child support worksheet.[12] The worksheet itself had been placed in an envelope marked "Confidential Information" with the handwritten notation: "Guidelines/C/S." The envelope had been stapled to an exhibit introduced at the trial.

Before oral argument, this Court shared copies of the circuit court's worksheet with the parties. A review of the worksheet shows that the court made significant errors that resulted in a reduction of Father's child support obligation. During oral argument, counsel for Father acknowledged that, at the very least, this Court will need to set aside the child support order and direct the circuit court to reassess the amount of child support.

Among other things, the worksheet reveals a clear error in the calculation of Father's adjusted actual income. Father's actual income was $12,500 per month. Father was paying Mother $1,383 per month in pendente lite alimony under the terms of an order from the Utah divorce case. To calculate Father's adjusted actual income, the circuit court used the amount of $1,383 twice, not only on the line for "alimony actually paid" by Father, but also on the line for "alimony awarded in this case." As a result, the court found Father's monthly adjusted actual income to be $9,734 (which is $12,500 minus $1,383 minus $1,383). The correct amount for his monthly adjusted actual income was $11,117 (actual income of $12,500 minus alimony actually paid of $1,383).

[12] A copy of the worksheet is included as an appendix to this opinion.

On remand, the court must correctly assess Father's adjusted actual income, which is his "actual income minus . . . alimony . . . actually paid." FL § 12-201(c)(2).

**B. Mother's Potential Income**

Mother contends that the circuit court "improperly imputed income" to Mother in the amount of $39,000 per year ($3,250 per month). We agree, but only to a limited extent.

As used in the Child Support Guidelines, the term "'[i]ncome' means: (1) actual income of a parent, if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished." FL § 12-201(i). Generally, "if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income." FL § 12-204(b)(1).

A determination of potential income may not be made if the parent: "(i) is unable to work because of a physical or mental disability; or (ii) is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible." FL § 12-204(b)(2). The circuit court determined that neither of these two exceptions applied. At trial, Mother testified that she did not suffer from medical conditions that would render her unable to work. The parties' youngest child had turned two years old more than six months before the trial.

The court expressly found that Mother was voluntarily impoverished. A parent is "'considered "voluntarily impoverished" whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources.'" *Malin v. Mininberg*, 153 Md. App. 358, 395 (2003)

(further quotation marks omitted) (quoting *Wills v. Jones*, 340 Md. 480, 494 (1995)). "In determining whether a parent is voluntarily impoverished, the question is whether a parent's *impoverishment* is voluntary, not whether the parent has voluntarily avoided paying child support." *Wills v. Jones*, 340 Md. at 494 (emphasis in original).

This Court reviews "factual findings on the issue of voluntary impoverishment of a parent . . . under a clearly erroneous standard" and "the court's ultimate rulings . . . under an abuse of discretion standard." *Sieglein v. Schmidt*, 224 Md. App. 222, 249 (2015) (citing *Long v. Long*, 141 Md. App. 341, 351-52 (2001)). Ordinarily, a "finding of voluntary impoverishment will be affirmed if, after viewing the record in the light most favorable to the prevailing party, it is supported by any competent, material evidence in the record." *Dillon v. Miller*, 234 Md. App. 309, 319 (2017) (citing *Sieglein v. Schmidt*, 224 Md. App. at 252).

In her appellate brief, Mother tells us that "working a full-time job would be nearly impossible considering the medical needs" of her children. The evidence by no means compelled that conclusion. At trial, Mother admitted that she had told the vocational specialist that she "could be working at a full-time job." Mother disagreed with the vocational specialist's recommendation that she should work as a teacher, but she did not assert that the children's needs were so extensive as to preclude her from working full time. Rather, Mother believed that she was "uniquely qualified" to run a non-profit choir company and could enhance her long-term earnings by working toward that goal. Mother's testimony did not suggest that her plan to run the non-profit company was something less than a full-time commitment.

It is true, as Mother notes, that "her teaching license had expired and that to have it reinstated would require significant time and effort on her part." The vocational specialist opined that Mother probably would need about three or four months before she might secure a position in Utah as a public school teacher. It is also true that "potential income will be imputed to a parent only for such time as the parent has been properly found to be voluntarily impoverished." *Lorincz v. Lorincz*, 183 Md. App. 312, 335 (2008). Mother could not have been properly found to be voluntarily impoverished while she was at home caring for the parties' youngest child, until that child turned two years old in March 2018. *See* FL § 12-204(b)(2)(ii). By the time of trial in January 2019, however, enough time had passed that the lack of employment, for a person of Mother's education and background, could fairly be attributed to her own voluntary inaction rather than to circumstances outside of her control.

To be sure, this case presented an atypical example of voluntary impoverishment. "The issue of voluntary impoverishment most often arises in the context of a parent who reduces his or her level of income to avoid paying support by quitting, retiring or changing jobs." *Goldberger v. Goldberger*, 96 Md. App. 313, 326 (1993). Here, Mother had been investing her time into building a business. Maryland law "requires a 'parent to alter his or her . . . lifestyle if necessary to enable the parent to meet his or her support obligation.'" *Malin v. Mininberg*, 153 Md. App. at 395-96 (quoting *Goldberger v. Goldberger*, 96 Md. App. at 327). On the other hand, "a parent is not required to forego a long-term improvement in order to obtain a short-term advantage." *Lorincz v. Lorincz*, 183 Md. App. at 340. In this case, however, Mother provided little more than speculation

about how much she might earn in her new business and when she might do so. Under the circumstances, therefore, the finding that Mother was voluntarily impoverished is not clearly erroneous.[13]

"After the circuit court makes a finding that a parent is voluntarily impoverished, the circuit court must determine the amount of potential income that it will impute to the parent." *Dillon v. Miller*, 234 Md. App. at 319-20 (citing *Shenk v. Shenk*, 159 Md. App. 548, 551-52 (2004)). "'Potential income' means income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." FL § 12-201(m). Ordinarily, "[i]f the potential income amount calculated by the circuit court is 'realistic, and the figure is not so unreasonably high or low as to amount to [an] abuse of discretion, [then] the court's ruling may not be disturbed.'" *Dillon v. Miller*, 234 Md. App. at 320 (quoting *Pettito v. Pettito*, 147 Md. App. 280, 318 (2002)).

In challenging the court's finding as to her potential income, Mother tells us that the Utah court in the divorce proceedings had imputed income to her based on Utah's minimum wage. Mother fails to elaborate on her suggestion that the circuit court was required to follow a pendente lite order from the Utah divorce case. Here, the circuit court received expert opinion testimony from a vocational specialist regarding Mother's

[13] We do not agree with the court's statement that Mother had "willfully and deliberately" impoverished herself. This characterization, however, does not mean that the court erred in concluding that her impoverishment was at least voluntary.

potential income. Mother did not object to that testimony on the ground that the issue had already been conclusively determined in another case. The vocational specialist's testimony was more than sufficient to support the conclusion that, in light of Mother's education and experience, she could earn higher than the minimum wage.

Nonetheless, we cannot uphold the court's finding that Mother's potential income was $39,000 per year. That finding is clearly erroneous.

When describing her employment history at trial, Mother mentioned that she occasionally judged choir festivals at high schools. Mother said that she would receive compensation of around $150 or $200 for an "afternoon festival" and up to $500 for a "whole day" festival. Mother said that the highest number of festivals she ever judged in a year "probably would have been three."

In its oral ruling, the court recounted testimony from the vocational specialist indicating that Mother's starting salary range as an inexperienced teacher would be $33,281 in the Salt Lake metro area and $38,752 in the Ogden-Clearfield metro area. The court said that it "also relie[d]" on Mother's testimony that "when she judged music festivals, she could earn anywhere from $150 to $200." The court said:

> So I took -- even the lower amount, I took the $150 and I took that over a five-day period, because that's what a regular work week is, five days. I took $150 times five days times -- excuse me, $150 times five, that gave me $750, times 52, came to $39,000. Which is consistent with the testimony of [the vocational expert] as to what the income would be for an inexperienced teacher in that area, $38,752.
>
> So the Court, having considered both of those, finds this amount income most consistent with her training, her current work history, her current

> testimony about what she can earn, and I found that the most reliable and appropriate amount to impute to her.
>
> So if you take the $39,000, divide it by 12, it comes to a monthly income of $3,250.

On appeal, Mother points out that the method by which the court arrived at an amount of $39,000 is irrational. Mother explains: "Under the court's analysis, [Mother] would need to find and judge 260 music festivals per year, when the undisputed testimony was that she had judged no more than three such festivals in any given year." The court's calculation also assumes that Mother could judge music festivals five days a week, 52 weeks a year, without any time off for holidays, vacations, or illness.

The amount of compensation that Mother received for one day of work judging music festivals a few times per year has no rational relationship to what she might earn working as a public school teacher. By contrast, the vocational specialist did offer an opinion as to Mother's "employment potential and probable earnings level" which was "based on . . . recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." FL § 12-201(m). The court considered and apparently relied on the vocational specialist's testimony that Mother was capable of earning a starting annual salary of around $33,281 or $38,752 as an inexperienced teacher.

When the court determines child support on remand, the court should impute income to Mother in an amount no greater than $38,752 per year ($3,229 per month). The evidence on which the court relied did not support any higher amount.

### C. Use of Shared Physical Custody Formula

Mother also contends that the circuit court erred in using the "shared physical custody" formula to determine Father's child support obligation.

The Child Support Guidelines prescribe one formula for cases where one parent has sole or primary physical custody and a modified formula for cases of "shared physical custody." *Compare* FL § 12-204(*l*), *with* FL § 12-204(m). Both formulas account for the parents' incomes, but the shared physical custody formula also accounts for "the percentage of time the child or children spend" with each parent. FL § 12-204(m)(2).

As used in the Guidelines, "'[s]hared physical custody' means that each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of child support." FL § 12-201(n)(1). The court must use the shared physical custody formula if the court finds that both parents have "actually kept the child for more than 35% of the overnights" at their respective homes. *Rose v. Rose*, 236 Md. App. 117, 136 (2018). To meet this threshold, "a child must stay overnight with each parent for a minimum of 128 nights" of the year. *Guidash v. Tome*, 211 Md. App. 725, 748-49 (2013).

FL § 12-201(n)(2)(i) provides that "the court may base a child support award on shared physical custody: (i) solely on the amount of visitation awarded; and (ii) regardless of whether joint custody has been granted." This provision "*permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than 35% of the overnights[.]" *Rose v. Rose*, 236 Md. App. at 136 (emphasis in

original). The court may do so only "after determining that the order actually *awards* a parent more than 35% of the overnights per year." *Id.* at 135 (emphasis in original).

In its oral ruling, the court announced that it had used the shared custody formula, but the court made no finding about the number of nights that the children would spend with each parent. In her brief, Mother asserted that, even if Father were to exercise all visitation awarded by the court, he still would not keep the children overnight for 128 days in a year.

In response, Father asserted that the order entitled him to keep the children overnight for 129 days, if the total includes the summer break (which he said counted for 67 overnights), as well as "every other Thanksgiving" (four), spring break ("at least seven"), every winter break ("at least eight"), every Utah Educators Association break (four), "every Father's Day from the day before until the day after" (two), and "every other weekend during the school year" (37). In reply, Mother correctly observed that under Father's computations he would reach 129 overnights only in the alternating years when he had the children for Thanksgiving. Mother also pointed out that Father's total included "double counting," because it credited him for overnights on every other weekend in October, November, and December even if he already had the children over those weekends because of the Utah Educators Association, Thanksgiving, and winter breaks.

As mentioned previously, after the record was transmitted to this Court, we found the court's child support worksheet. The worksheet reveals that the court credited Father with 147 overnights, or 40.3 percent of the days in the year. At oral argument, Father's

counsel could not explain how the court arrived at the total of 147 days. Nor can we. The overnight schedule was based on the Utah public school schedule. The parties had not presented evidence about the school schedules used in either Utah or Maryland, possibly because they did not foresee that the court might award anything approaching the threshold for shared physical custody. In fact, the court mentioned that it was "not really familiar with" the Utah public school schedule.

We see no evidence in the record supporting a finding that Father actually kept the children overnight for 147 days per year since the separation or that the court had awarded Father overnight visitation for 147 days per year. That finding, therefore, is clearly erroneous.

Because the record includes no information regarding the Utah public school schedule, we are unable to verify the parties' assertions about the number of days that Father would have been entitled to keep the children overnight under the court's order. Nevertheless, Mother is correct in observing that Father's total of 129 days includes four days every year for Thanksgiving and that it appears to include two weekends in October, November, and December in addition to the school breaks in those months. Even if the order somehow did award Father 129 overnights, the court then would need to exercise "considered discretion" in deciding whether it should determine child support solely on the amount of visitation awarded. *See Rose v. Rose*, 236 Md. App. at 137. It would be an abuse of that discretion to rely on an amount of visitation awarded, barely exceeding the 35 percent threshold, if that amount was substantially lower than any reasonable approximation of the amount of visitation that the parent could ever actually exercise.

On remand, the court will need to establish a realistic physical custody schedule before determining the proper amount of child support. We anticipate that the amount of visitation awarded to Father will be significantly less than the amount awarded under the existing order. Thus, we do not foresee any circumstances in which the court will need to use the formula that is reserved for cases of shared physical custody.[14]

**D. Work-Related Child-care Expenses**

Mother complains that, in its ruling on child support, the circuit court "did not consider the cost of daycare."

On her January 2019 financial statement, Mother reported that she was paying work-related child-care expenses of $370 per month. In her testimony, Mother explained that this amount represented the cost of "five hours per week of child care" and the cost of "preschool" at "the home of a local mom for four hours per week" for her youngest child, who was two-and-a-half years old. Mother testified that she incurred these expenses so that she could work part time, teaching private music lessons and building her non-profit choir business. Mother said that, if she were working a full-time job, then the youngest child would "be in preschool or with a baby-sitter or with probably [her] mother." Mother said that she currently paid "$14 an hour" for child care.

The circuit court did not address the evidence regarding Mother's work-related child-care expenses, either orally or in writing. Father did not mention the issue of work-related child-care expenses, either in his brief or at oral argument.

[14] In her reply brief, Mother asserted that Father has not exercised the visitation awarded to him. Father's counsel did not dispute that assertion at oral argument.

In calculating child support, "actual child care expenses incurred on behalf of a child due to employment or job search of either parent shall be added to the basic obligation and shall be divided between the parents in proportion to their adjusted actual incomes." FL § 12-204(g)(1). Those expenses generally "shall be determined by actual family experience[.]" FL § 12-204(g)(2)(i). But "if there is no actual family experience or if the court determines that actual family experience is not in the best interest of the child," those expenses should be determined by "the level required to provide quality care from a licensed source" unless "the obligee chooses quality child care with an actual cost of an amount less than the level required to provide quality care from a licensed source." FL § 12-204(g)(2)(ii).

Even in cases in which the parents' income exceeds the highest amount listed in the schedule, the decision of whether to account for "child care expenses always fall[s] outside of the [trial court's] discretion[.]" *Chimes v. Michael*, 131 Md. App. 271, 292-93 (2000). Where there is undisputed evidence that the family's experience includes work-related child-care expenses, it is reversible error for the court simply to "eliminate" those expenses. *See Krikstan v. Krikstan*, 90 Md. App. 462, 471 (1992).

On remand, when the court determines child support, the court must determine the amount of Mother's work-related child-care expenses in accordance with FL § 12-204(g)(2). That amount must be "divided between the parents in proportion to their adjusted actual incomes." FL § 12-204(g)(1). In making the necessary finding, the court "may consider additional evidence" (*Horsley v. Radisi*, 132 Md. App. 1, 29 (2000)), such as evidence of Mother's actual work-related child-care expenses since the trial.

### E. Extraordinary Medical Expenses

Mother contends that the trial court erred in its allocation of extraordinary medical expenses. FL § 12-204(h)(2) provides: "Any extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted actual incomes."

On his financial statement, Father reported extraordinary medical expenses of $500 per month. At trial, Father explained that this figure was an "estimate of what [he] thought [those] expenses would be going forward." Father said that the two parents had paid "close to $5000" of extraordinary medical expenses for their children in 2018. "[G]enerally speaking," Father said, "[Mother] would make payments to medical providers," and he would "reimburs[e] [Mother] 50 percent of those costs."

When the court was explaining its child support ruling, it mentioned Father's testimony that the parties were incurring $500 per month in extraordinary medical expenses and sharing those expenses equally. After some brief discussion, counsel for both parties agreed that the court should account for extraordinary monthly medical expenses of "$250" on "each side."

Mother's argument on appeal is not particularly clear, but she appears to contend that the court failed to divide these expenses between the parents in proportion to their adjusted actual incomes. Mother made her arguments under the impression that the court had not completed a child support worksheet. The worksheet in the record shows that the court did, in fact, divide those expenses in proportion to the parents' adjusted actual incomes. As explained previously, however, the amounts that the court used for Father's

adjusted actual income and Mother's adjusted actual income were erroneous.

On remand, after the court determines the parents' adjusted actual incomes, the court should once again divide the extraordinary medical expenses incurred on behalf of the children between the parents in proportion to their adjusted actual incomes.

### F. Reduction of Child Support for Father's Travel Expenses

Mother criticizes the circuit court's decision to reduce Father's child support obligation by $500 a month to offset travel expenses that he might incur under the court's physical custody schedule. Father defends that decision. On remand, the court will need to establish a new schedule before it determines Father's child support obligation. Consequently, many of the parties' arguments regarding the court's "downward deviation" are obsolete.

Yet because this issue might recur on remand, we shall explain why the court lacks authority to reduce a parent's child support obligation to account for travel expenses that a parent incurs in visiting the children. At most, the court may allocate the "expenses for transportation of the child[ren] between the homes of the parents" by dividing those expenses between the parents in proportion to their adjusted actual incomes. FL § 12-204(i)(2).

The centerpiece of the Guidelines is the schedule of basic support obligations at FL § 12-204(e). This schedule "sets forth the basic child support obligation for any given number of children based on combined parental income." *Voishan v. Palma*, 327 Md. 318, 323 (1992). The amounts are "based on estimates of the percentage of income that parents in an intact household typically spend on their children." *Id.* at 322-23. This

basic child support obligation must "be divided between the parents in proportion to their adjusted actual incomes." FL § 12-204(a)(1).

The Guidelines also require or permit the addition of certain other expenses, which are then divided pro rata between the parents. Work-related child-care expenses (FL § 12-204(g)), the cost of health insurance coverage for the children (FL § 12-204(h)(1)), and extraordinary medical expenses incurred on behalf of the children (FL § 12-204(h)(2)) must be added to the basic support obligation. Two types of additional expenses may also be added to the basic support obligation: "(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." FL § 12-204(i).

By its terms, the statute "authorizes the court to supplement the Guidelines obligation only for certain categories of expenses[.]" *Horsley v. Radisi*, 132 Md. App. 1, 26 (2000); *accord Drummond v. State ex rel. Drummond*, 350 Md. 502, 516 (1992). The expenses incurred by a parent in travelling to visit a child are not in any of these categories. "It follows that the court [is] not entitled to add" those expenses into its calculation, even if the court believes that those expenses will fund something "desirable or beneficial" for the children. *Horsley v. Radisi*, 132 Md. App. at 26.

The circuit court seemed to think that it could depart from the amount required under the Guidelines by finding that it was in the "best interests" of the children "to set a child support [obligation] that allows their father to be able to come and visit them on a regular and routine basis[.]" It is safe to say that, in virtually any case, children might

benefit from additional visitation. However beneficial that visitation might be, child support is not a fund for subsidizing additional opportunities for visitation.

The Guidelines permit the court to depart from the presumptively correct amount if the court determines 'that the application of the guidelines would be unjust or inappropriate in a particular case[.]" FL § 12-202(a)(2)(ii). If the court does so, it must "make a written finding or specific finding on the record stating the reasons for departing from the guidelines[,]" and must state, among other things, "how the finding serves the best interests of the child[.]" *Id.* at (a)(2)(v). To the extent that the court may have believed that this provision authorized its departure, the court was mistaken. The types of considerations that might justify such a departure are "financial considerations," such as "direct payments made for the benefit of the children required by agreement or order[.]" FL § 12-202(a)(2)(iii).[15] The desire for additional visitation opportunities is not a "financial consideration[] that ha[s] the same or similar impact as the considerations listed" in the statute. *Tannehill v. Tannehill*, 88 Md. App. 4, 14 (1991).

The court attempted to justify its reduction by saying that it needed to "recognize the fact that the father has to travel to visit his children . . . because the mother made a unilateral decision to remove the children from the State of Maryland to Utah." Quite the

[15] For example, the "application of the guidelines in a particular case [might] force a supporting parent to pay more than the amount of child support dictated by the guidelines," in a case where "the parent has conveyed items of value under the terms of an agreement" with the other parent. *Shrivastava v. Mates*, 93 Md. App. 320, 329 (1992). In those circumstances, the court might justify a departure by "explain[ing] that the best interests of the child are served because the child is, in effect, receiving the amount of support to which it is presumptively entitled under the guidelines." *Id.*

opposite is true. When determining child support payments, the court had a responsibility not to deprive the children of the resources that they were entitled to receive while they were living in Mother's home for most of the year. Father's child support payments represent his financial obligation to his children, not to Mother. *See Lacy v. Arvin*, 140 Md. App. 412, 422 (2001) (citing *Rand v. Rand*, 40 Md. App. 550, 554 (1978)). It was improper for the court to rely on Mother's relocation as a reason to reduce those payments. The law presumes that every dollar that Mother receives in child support will be spent for the benefit of the children. *See* FL § 12-204(*l*)(2).

In attempting to defend the child support order, Father argues that the Guidelines "do not apply" in this case. Father relies on FL § 12-204(d), which provides: "If the combined adjusted actual income exceeds the highest level specified in the schedule . . . , the court may use its discretion in setting the amount of child support." Currently, $15,000 per month is the highest level of combined adjusted actual income listed on the schedule of basic support obligations. *See* FL § 12-204(e).

As explained earlier, the child support worksheet in the record shows that the court erroneously subtracted the monthly alimony payment, twice, when it calculated Father's adjusted actual income. This error caused the court to miscalculate the parties' combined adjusted actual income to be less than $15,000 per month. Hence, the court did not even exercise the type of discretion that is reserved for high-income cases.

In any event, the discretion afforded by FL § 12-204(d) would not justify the reduction here. "[T]he foundational concept that child support should be in an amount consistent with the parents' standard of living cuts across all economic lines, whether the

parents are poor or wealthy." *Smith v. Freeman*, 149 Md. App. 1, 20 (2002). In cases "'calling for the exercise of discretion, the rationale of the Guidelines still applies.'" *Walker v. Grow*, 170 Md. App. 255, 266 (2006) (quoting *Malin v. Mininberg*, 153 Md. App. 358, 410-11 (2003)). For example, even where the parents' combined adjusted actual income exceeds the highest amount listed on the schedule, the court lacks discretion to evaluate income (*see Ruiz v. Kinoshita*, 239 Md. App. 395, 428 (2018)) or child-care expenses (*see Chimes v. Michael*, 131 Md. App. 271, 292-93 (2000)) in a manner that is inconsistent with the statute.

Of particular importance in this case, the Guidelines "establish a rebuttable presumption that the maximum support award under the schedule is the minimum which should be awarded in cases above the schedule." *Voishan v. Palma*, 327 Md. at 331-32. In this case, after income is imputed to Mother, the combined adjusted actual income may be slightly greater than $15,000 per month. Consequently, there is every reason to conclude that the award should be somewhat higher than the award that would be required for the parents of three children, earning exactly $15,000 per month, in the same proportions as these two parents, with the same additional expenses.[16]

Father alludes to FL § 12-204(i) as a possible justification for the court's downward deviation. That provision states, in pertinent part, "[b]y agreement of the parties or by order of court, the following expenses incurred on behalf of a child may be

[16] At trial, Father recommended that the schedule "should be extrapolated" from the Guidelines. At the highest levels on the schedule, the basic support obligation for three children increases by approximately $11.25 for every $50 increase in combined adjusted actual income.

divided between the parents in proportion to their adjusted actual incomes . . . any expenses for transportation of the child between the homes of the parents." FL § 12-204(i)(2). This provision does not authorize what the court actually did in this case.

The court gave no indication that it was dividing expenses between the parents in proportion to their adjusted actual incomes. Furthermore, in its ruling, the court made it clear that it did not limit its consideration to the expenses of transporting the children between the parents' homes; the court also considered the costs that Father would incur in travelling to visit the children throughout the school year. A handwritten notation on the child support worksheet states that the court considered the "expense the father has in visiting the children in Utah."

On remand, the court may not reduce Father's child support obligation to offset the cost of travelling to visit the children. The court may consider only expenses incurred on behalf of the children "for transportation of the child[ren] between the homes of the parents." FL § 12-204(i)(2). Any such expenses "may be divided between the parents in proportion to their adjusted actual incomes." FL § 12-204(i). The court "may consider additional evidence" on this issue (*Horsley v. Radisi*, 132 Md. App. at 29), such as evidence of the actual expenses incurred in transporting the children between the homes of the parents since the trial.

## CONCLUSION

The judgment is reversed to the extent that it concerns physical custody, visitation, and child support. The reversed portions of the judgment are "transformed into *pendente lite* orders that shall remain in force and effect" until the completion of further

proceedings. *Simonds v. Simonds*, 165 Md. App. 591, 599 (2005).

On remand, the circuit court must determine an appropriate physical custody schedule. The court should reconsider the amount and terms of visitation during the school year, as well as physical custody during school breaks and summer vacation. The schedule must be reasonable in light of all relevant circumstances, which include the geographic proximity of the parents' residences and opportunities for time with each parent; the financial status of the parents; the demands of parental employment and opportunities for time with the children; and the potential disruption of the children's social and school lives. The court should also consider the potential effects of the physical custody schedule on the children's medical treatment and explain how the schedule that it selects will be consistent with their medical needs.

After establishing a new custody and visitation schedule, the court must set an amount of child support commensurate with the parents' incomes and their expenses in the categories that the court is required or permitted to consider under the Guidelines. The court must correctly assess Father's adjusted actual income, which is his actual income minus alimony actually paid. The court should impute no more than $38,752 of annual income ($3,229 of monthly income) to Mother. If the combined adjusted actual income exceeds $15,000 per month, the court will need to correctly apply the Guidelines (or a reasonable extrapolation therefrom) to determine the presumptive minimum award.

The court may not employ the formula used in cases of shared physical custody, absent any new evidence that both parties have actually kept the children overnight for at least 128 days per year.

The calculation must include work-related child-care expenses, health insurance expenses, and extraordinary medical expenses. The calculation may not include expenses incurred by a parent in travelling to visit the children, but it may include expenses for transporting the children between the homes of the parents. Expenses in each of these categories must be divided between the parents in proportion to their adjusted actual incomes.

In all likelihood, the parties currently possess more information about their expenses (such as Mother's actual child-care expenses and expenses that Father incurred in transporting the children between the homes) than they did at the time of trial. The court may receive additional evidence that will help the court make accurate findings.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AS TO CUSTODY, VISITATION, AND CHILD SUPPORT REVERSED. PROVISIONS AS TO CUSTODY, VISITATION, AND CHILD SUPPORT SHALL REMAIN IN EFFECT AS PENDENTE LITE ORDERS PENDING FURTHER ORDER OF CIRCUIT COURT. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.**

# APPENDIX

**In the Circuit Court for Prince George's County, Maryland**

**Mills**
Plaintiff
vs.
**Mills**
Defendant

Civil no. **CAD17-41098**

**WORKSHEET A- CHILD SUPPORT OBLIGATION: Shared**

| Children | Date of Birth/Age | Children | Date of Birth/Age |
|---|---|---|---|
| [redacted] | | | |

| | Mother | Father | Combined |
|---|---|---|---|
| **1. Monthly Actual Income-Before Taxes** | 3250 | 12500 | 15750 |
| a.Minus pre-existing child support payment actually paid | 0 | 0 | |
| b.Minus alimony actually paid | 0 | 1383 | |
| c.Plus/minus alimony awarded in this case | 1383 | -1383 | |
| **2. Monthly Adjusted Actual Income** | 4633 | 9734 | 14367 |
| **3. Percentage of Shared Income** (Line 2. Each Parents Income divided by Combined Income) | 32.2% | 67.8% | |
| **4. Basic Child Support Obligation** (Apply line 2 combined to child support schedule) | | | 3244 |
| **5. Adjusted Basic Child Support Obligation** (Line 4 times 1.5) | | | 4866 |
| **6. Overnights With Each Parent** (must total 365) | 218 | 147 | |
| **7. Percentage with each parent** (line 6 divided by 365) | 59.7% | 40.3% | |
| **8. Each Parents Theoretical Child Support Obligation** | 1567 | 3299 | |
| **9.Basic Child Support Obligation For Time Spent with other parent.** (Line 7 times line 8) | 631 | 1970 | |
| **10.Net Basic Child Support Obligation** (Subtract lesser amount from greater amount and place result under greater amount) | 0 | 1339 | |
| **11. Expenses** | | | |
| a.Work-Related Child care expenses Code FL,12-204(g) | 0 | 0 | 0 |
| b.Health Insurance Expenses Code FL,12-204(h)(1) | 0 | 189 | 189 |
| c. Extraordinary Medical Expenses Code FL,12-204(h)(2) | 250 | 250 | 500 |
| d. Cash Medical Support Code FL,12-102(c)(3)(ii) | 0 | 0 | 0 |
| e. Additional Expenses Code FL,12-204(i) | 0 | 0 | 0 |

Instructions: Use this worksheet only if any expenses in lines 11a, 11b, 11c and 11d are paid out or received by the parents in different proportion than the percentage shared income entered on line 3 of worksheet B. Example: If the wife pays all of the day care, or parents split education or medical costs 50/50 and line 3 is other than 50/50. If there is more than one 11d expense, the calculations on lines G and H below must be made for each expense.

| Worksheet for Line 12 Adjustments | Mother | Father |
|---|---|---|
| **A.** Total amount of direct payments made for line 11a times each parents percentage of income (line 3 proportionate share) | 0 | 0 |
| **B.** The excess amount of direct payments made by the parents who pays more than the amount calculated on line A above. (The difference between amount paid and proportionate share) | 0 | 0 |
| **C.** Total amount of direct payments made for line 11b times each parents percentage of income (line 3). | 61 | 128 |
| **D.** The excess amount of direct payments made by the parents who pays more than the amount calculated on line C above. (The difference between amount paid and proportionate share) | 0 | 61 |
| **E.** Total amount of direct payments made for line 11c times each parents percentage of income. (line 3) | 161 | 339 |
| **F.** The excess amount of direct payments made by the parents who pays more than the amount calculated on line E above. The difference between amount paid and proportionate share. | 89 | 0 |
| **G.** * Total amount of direct payments made for line 11d times each parents percentage of income. (line 3) | 0 | 0 |
| **H.** The proportionate share of the total cash medical support that each parent has been ordered to pay.<br>Note, this line only displays the non-custodial parent's proportional amount. | 0 | 0 |
| **I.** Total amount of direct payments made for line 11e times each parents percentage of income. (line 3) | 0 | 0 |
| **J.** The excess amount of direct payments made by the parents who pays more than the amount calculated on line E above. The difference between amount paid and proportionate share. | 0 | 0 |
| **K.** For each parent add lines B, D, F, H and J | 89 | 61 |
| **L.** Subtract the lesser amount from the greater amount in line K above. Place result on this line under lesser amount on line L. Also enter result on line 12 of worksheet B, in the same parents column. | 0 | 28 |

| WORKSHEET A- CHILD SUPPORT OBLIGATION: Shared | | | |
|---|---|---|---|
| | Mother | Father | |
| **12. Net adjustment from worksheet on back if applicable.** (If not continue to line 13) | 0 | 28 | |
| **13. Net Basic Child Support** | 0 | 1339 | |
| **14. Recommended Child support Order** If the same parent owes money under lines 12 and 13, add these two figures to obtain the amount owed by that parent. If one parent owes money under line 12 and the other parent owes under line 13, subtract the lesser from the greater to obtain the difference. The parent owing the greater of the two amounts on lines 12 and 13 will owe that difference as child support obligation. Note: The amount owed in a shared custody arrangement may not exceed the amount that would be owed if the obligor parent were a non-custodial parent (See worksheet A) | 0 | ~~1367~~ #1167 | |

Comments or special adjustments, including any adjustment for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j).

* The Ct deviated downward in the amount of $500. in consideration of the ~~extraordinary~~ expense the father has in visiting the children in UTAH. Court Finds it consistent with the children's best interest that the support be set that permits the Father to see his Children on a regular basis.

Prepared by: **Cotton** Date: **1/7/2019**