Circuit Court for Prince George's County
Case No. CAD13-16772

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 445

September Term, 2021

BLYDEN DAVIS

v.

TONI TURNER

Arthur,
Leahy,
Zic,

JJ.

Opinion by Leahy, J.

Filed: January 5, 2022

Appellant Blyden Davis ("Father") and appellee Toni Turner ("Mother") are the parents of two children, Sa. and So. Father appeals from two orders of the Circuit Court for Prince George's County modifying a "Consent Order for Custody, Access, and Child Support" ("Consent Order"), which the court entered on July 15, 2014 prior to his divorce from Mother. The modified custody order provides, among other things, clarification of the parties' access schedule and requires the parties to attend three sessions with a parent coordinator "prior to initiating litigation." Otherwise, the modified custody order leaves the prior Consent Order "in full force and effect." The modified child support order changes Father's child support obligations for several reasons, including certain adjustments in Mother's employment and Sa.'s "particular educational need to attend private school."

Father appealed and raises three issues for our review, which we have recast and consolidated as follows:[1]

[1] The questions presented in Father's brief are:

"I. Where the trial court removed [Mother]'s tie-breaking authority in a clear and reasoned ruling from the bench, did the trial court err by subsequently issuing a written Order that failed to remove [Mother]'s tie-breaking authority?

II. Did the trial court err by accepting and relying upon an improper e-mail from [Mother]'s counsel setting forth a new request for relief and evidence outside the record, nine days after trial had ended and the evidence had closed?

III. Assuming, *arguendo*, that the trial court properly accepted [Mother]'s counsel's e-mail, did the trial court abuse its discretion by including the cost of private school tuition in the Child Support Guidelines when [Mother] did not (a) request a modification of child support, (b)

(Continued)

1. Did the circuit court err or abuse its discretion by stating during the underlying hearing that "the [c]ourt cannot find that either party . . . can handle the responsibility of being tie-breaker," and then issuing a written order that failed to explicitly remove Mother's tie-breaking authority?

2. Did the circuit court err or abuse its discretion when, in rendering its decision to modify the child support order, it relied upon information supplied in post-hearing submissions by Mother that lacked evidentiary support, including the cost of private school tuition?

For the reasons explained below, we vacate the modified custody and child support orders and remand to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

Mother and Father married in 2007 and are the parents of two children, Sa. (born February 2010) and So. (born October 2013) (collectively, the "Children"). The parties separated on June 16, 2013, and a judgment of absolute divorce was entered on August 14, 2014. Prior to the entry of divorce, the parties were able to agree on financial and custody matters as reflected in a "Custody, Support and Property Settlement Agreement" ("Agreement"), signed by the parties on May 20, 2014. The provisions of the Agreement were "incorporated but not merged" into the Consent Order.

Pursuant to the Consent Order, Mother and Father had joint legal custody of the children, and Mother had primary residential custody. The Consent Order required the parties to "consult with each other and reach joint decisions regarding issues related to the Minor Children's health, education, religion, and other matters of major significance

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contend there was a particular educational need, or (c) seek contribution from [Father] before or during trial?"

concerning the Minor Children's life and welfare." To resolve conflict between the parties, the Consent Order granted Mother "final decision-making authority as to all matters related to the education of the parties' Minor Children in the event the parties [we]re unable to reach a joint decision after good faith attempts to do so" and required the parties to consult with a "parent coordinator to resolve the conflict" concerning "issues related to health, religion and other matters of major significance."

The Consent Order further set an access and holiday schedule for the Children. The parties agreed that "beginning on June 1, 2014, [Father] shall pay child support to the [Mother] in the amount of $1,800 per month which is a deviation from the Maryland Child Support Guidelines" and "$200 per month to the [Mother] in payment of the child support arrearage of $15,800 for the period of July 1, 2013 through May 30, 2014."

Motions to Modify Custody and Other Relief

On December 23, 2019, Mother filed a "Motion for Contempt and to Modify Custody, Visitation and for Other Appropriate Relief." Mother averred that "there has been a substantial and significant material changes [sic] of circumstances that have affected the custody, visitation and overall raising and rearing of the minor children that warrant a modification of the [Consent Order]." In her motion, Mother included:

(1) a list of how Father allegedly violated the terms of the Consent Order, including that he told the children that "they do not have to listen to mommy or abide by her rules" and "[d]isparaging [Mother]'s religious beliefs";

(2) examples of how Father purportedly harassed and demeaned Mother;

(3) Father's alleged false accusations that Mother neglected the Children and withheld information from Father regarding the Children; and

(4) a list of Father's alleged violations of the terms of visitation under the Consent Order, including returning the children late without having been fed dinner or having completed their homework; refusing to return the children; and leaving the children "unattended by [Father]."

Mother requested sole legal custody of the Children and that visitation with Father be supervised. Mother further asserted that Father's "conduct constitutes contempt and that he is gainfully employed and able to contribute and pay the [Mother]'s attorneys fees for having to file this Motion and any litigation thereof."

Father answered the motion on September 17, 2020 and filed a "Counter[-]Motion for Modification of Custody and Child Support" the same day. In Father's motion, he averred that there had been material changes in circumstances since the Consent Order. The alleged changes included: (1) that Mother "has engaged in making concerning allegations against [Father] with respect to the minor children"; (2) that Mother "fails to effectively communicate" with Father regarding the minor children; and (3) that Father's income has "significantly decreased," while Father "believe[d] that [Mother]'s income ha[d] significantly increased." Father further asserted that he had "concerns about [Mother]'s ability to provide a stable environment for the minor children while they are in her care." Father requested, among other things, that the court "[m]odify the current custody arrangement to grant [Father] primary physical and sole legal custody of the minor children, or in the alternative tie-breaker authority"; establish a schedule of visitation for Mother; and "[m]odify child support in accordance with the Maryland Child Support Guidelines[.]"

Mother withdrew her motion for contempt on October 29, 2020.

Hearing on Motions to Modify Custody

An evidentiary hearing on the parties' motions commenced on March 17, 2021. Symone Colquitt, "a licensed clinical marriage and family therapist with the state of Maryland," testified first and was admitted as an expert in the field of family counseling and therapy. Ms. Colquitt testified that So. was treated for behavioral issues and anxiety. Ms. Colquitt noted that So.'s issues would manifest in meltdowns, including behavioral problems at his former school, the Barrie School. She opined that So. needed "consistency, clear directives, clear follow through" to help with his behavioral issues. Ms. Colquitt explained that Sa. was also referred to her for anxiety due to school and the family dynamic. Sa.'s anxiety would manifest in stomach aches and trouble sleeping.

Next, Barbara Pulgar, a child psychotherapist at Kaiser Permanente, testified that she had been treating Sa. since May of 2020, either monthly or bi-weekly "depending on [the] severity of symptoms." Ms. Pulgar opined that Sa. had displayed different levels of anxiousness due to school, "all the changes with COVID," and "the situation in the family with the divorce and separation." Ms. Pulgar explained, in reference to the separation and divorce, "both parents react angrily and when they are more angry, [Sa.] gets more angry." Ms. Pulgar noted that "[t]he parents do not seem to get along[,]" and their inability to have "consistency and rules and consequences contribute to the stress and anxiety, the family stress that sometimes triggers the anxiety for Sa[.]"

Dr. Terri Turner, Mother's sister, testified next. She explained that she had seen the Children daily since March 2020. Dr. Turner testified, among other things, that Sa. would experience behavioral problems upon her return from Father and then, after a few days, Sa. would "be her normal self." According to Dr. Turner, So. also displayed "unruly" behavior and would "tell people that he doesn't have to listen" and could "become physically aggressive" but this physical aggression would "calm[] down" a few days after his return from his Father's care. According to Dr. Turner, Father would frequently drop the Children off late and was dismissive of Mother's concerns. Dr. Turner testified that she had not "observed any attempts at a positive co-parenting relationship" from Father.

Next, Mother testified to problems with visitation and difficulties in communicating with Father since the entry of the Consent Order. For the first few years after entry of the Consent Order, until approximately 2017, Father would visit with the Children at Mother's house. After Father began to have visitation outside of Mother's home, Mother explained that Father would return the Children late, which caused difficulties in feeding and bathing the Children.

Regarding So.'s schooling, Mother explained to Father that she "wasn't able to afford their current school for the next level" and was investigating other options. Mother explained that So.'s "troubles" at the Barrie School "started ramping up in the spring of 2018." "So[.] was having tantrums and not cooperating in class." Sa. also "was having issues with crying at school." Mother explained that she enrolled the Children at the Barrie School because it was "the only place [she] could get the two kids together." Mother

attributed So.'s difficulty with the "late time getting home" while in Father's care and inconsistencies with Father's use of visitation.

After testifying about additional concerns that she had with the Children remaining in the Father's care, Mother explained that she decided to seek sole legal custody in the fall of 2019 when So. "was dismissed from the school and when he was fed peanut butter."[2] She explained that "[t]hose were kind of [her] breaking points" because Mother felt that the "co-parenting was nonexistent."

Mother then testified that she was going to begin a new job in late April, 2021, which would be "9 to 5 [] initially, five days a week, no weekends. And then in June or July, . . . a four-week schedule," which would provide Mother with "every Wednesday off and every weekend off."

On cross-examination, among other things, Mother testified to her work history and her interactions with Father concerning the Children's schooling and therapy. Business records from Mother's former employer, the Mid-Atlantic Permanente Medical Group, were admitted into evidence. The records contained Mother's 2020 W-2, which reflected that Mother's annual income in 2020 was $299,571.34.

Regarding the Children's schooling, Mother confirmed that So. was now at a public elementary school and that Sa. was going to attend school in Annapolis in the fall.

[2] Mother testified that she and Father had discussed that So. was allergic to nuts "several times." According to her testimony, Father fed peanut butter cookies to So. in the fall of 2019, and So. became sick.

On re-direct examination, Mother reiterated that Sa. was "going to be in a different school come this fall" and that she had provided Father with a list of schools that she was considering before Sa. was admitted. According to Mother, Father did not inform her that he objected to any of the schools on her list. Ultimately, Mother enrolled Sa. in the Annapolis Area Christian School. Mother noted that Father had not made any contributions towards the children's private school tuition but rather "only pays child support."

Father then presented his case-in-chief. Donn Davis, Father's father, testified first. Mr. Davis testified that Mother had blocked Mr. Davis from contacting Sa. He urged that Father was a fit and proper person to share physical custody, and that it was the "kids' best interest . . . in having both parents in their life." Then Adrian Puryear, Father's supervisor, testified regarding Father's character, noting that he was a "great employee," motivated, "a good leader," and a "[g]ood person to be around." After Mr. Puryear testified, the court continued the evidentiary hearing until April 6, 2021.

When the hearing resumed Father called his significant other, Ms. Nicole Gatewood. She testified to Father's relationship with the Children. Ms. Gatewood explained that Father has a "beautiful relationship" with Sa. and a "very special relationship" with So. Ms. Gatewood opined that Father is "trustworthy, he's loyal, he is extremely hard on himself. He is honest and he is a devoted father who will do everything he can to do the best for his children and himself."

Finally, Father testified that his relationship with Mother was difficult. The difficulties they had in communication were prominent in scheduling visitation. He related an instance in which Mother called the police to perform a wellness check while the children were in his custody.

Regarding private schooling for Sa., Father testified that he was concerned about the "travel time" to the Annapolis Area Christian School, and that he believed that Mother had not made a good faith effort to discuss Sa.'s education options. On the other hand, when So. was removed from the Barrie School for behavioral issues, Father testified that he "was totally against that" and said that he "didn't really have a say so." Father had a paystub and his W-2 entered into evidence showing an annual income of $100,662.19 in 2020.

Mother testified in rebuttal. At the conclusion of testimony, the court requested to speak only with counsel "to see how we're going to proceed." After extensive discussion, the court summarized a possible resolution of the dispute:

> [I]t sounds as if the parties can agree to the parent coordinator, as long [as] at the end of the day if a decision has to be made, mom has the tie-breaking authority which then helps [Father] . . . in the sense that if mom is not participating, that parent coordinator can notify the [c]ourt. And then, you know, after three sessions and a decision has to be made, then the decision just has to be made.
>
> And that does not prevent any party from after that time coming back to the court, but there are steps they have to make.
>
> * * *
>
> So I guess if you want – can talk to your clients and just see if they are amendable [sic] to and let's just make sure that we have all of the things as far as entering into an agreement without any finding of fault on any party, and that they will keep the shared legal custody and the physical – shared physical custody . . . and you all need to talk, because is it Thursday to

> Sunday every other weekend or Thursday to Monday every other weekend? **Then Ms. – Dr. [Turner] has tie-breaking authority; however, the parties must attend at least three sessions with a parent coordinator and . . . that parent coordinator can notify the [c]ourt should a party not actively participate. And then if a decision has to made, she would have that tie-breaking authority.**
>
> I would imagine there would be a change in child support [] for both parties having these new jobs and you all can work that out.

(Emphasis added).

After the parties were unable to reach an agreement as to the visitation schedule, the court clarified that it would "issue a written order as to what the [c]ourt decides is appropriate as to access" and "whether there needs to be a modification of custody and access." Counsel for Father then asked if the court "would like us to submit child support guidelines." The court responded: "Yes, because I thought the numbers were fairly – there wasn't a dispute as to their paychecks today that they're making and the salaries that they're making." The court then noted "as soon as I am able to write [the order], I will e-mail it to the parties." The court then clarified:

> And just so that the record is clear, the [c]ourt has made a determination as to – after weighing the Taylor and Montgomery County factors with respect to physical custody and legal custody, the [c]ourt had found that with both parties agreeing that there was a material change in circumstances, especially in light of . . . Sa[.] being in counseling and that the schooling had changed, the ages had changed, and both parties had agreed to.
>
> So the next step was, based on this material change what is in the best interests of the minor child or children. The court found that both parents both equally love their children, that both parents had – the [c]ourt was concerned with testimony as to both parents.
>
> While it is important that Dr. Turner make decisions when there was no response from [Father,] it was – **it appeared to the [c]ourt that she was making decisions without actually consulting him. And while she had**

> **the tie breaker authority, that does not give someone the ultimate right without consulting the father.**
>
> And with respect to Mr. Blyden while he says that he wanted all this additional access, he for whatever reason was not being proactive in obtaining it. So the [c]ourt found problems as to both the testimony that the [c]ourt heard.
>
> However, even though there are difficulties with communication, the [c]ourt does find that there is a potential that the parties may communicate, and as such it is not the fact that at this juncture the communication may not be as good or it's difficult that legal custody should go to one parent.
>
> * * *
>
> As to physical custody, the [c]ourt will work out the access schedule; however, as to the primary custody, that would be with Dr. Turner[.]
>
> * * *
>
> **As to previously there was a tie-breaking authority and the [c]ourt would find that that tie-breaking authority was not working, and as such, the [c]ourt will order that there would be a . . . parent coordinator that is assigned . . . and all the details regarding that will be provided, but that they must attend at least three sessions in order for – in order to make a determination as to whether they need to come back to the court**.
>
> * * *
>
> And as to child support, the guidelines will be provided by counsel and the [c]ourt will put that, any modification if any to the order.

(Emphasis added)**.** Counsel for Mother then asked the court to clarify whether Mother's tie-breaking authority would remain. The court responded:

> [T]he [c]ourt cannot find that either party . . . can handle the responsibility of being tie-breaker and that after those three sessions then the parties would have been able to flesh out whatever concerns and ultimately make a decision.

After the hearing, the court issued an order modifying custody and access and an order modifying child support.

Order on Custody and Access

On April 16, 2021, the circuit court entered an order, signed two days before, regarding custody and access. In its order, the court noted "[p]reliminarily, there is no dispute among the parties of a material change in circumstances, primarily because the minor children are enrolled in therapy, but also due to the parties' current income." The court concluded, after hearing their testimony, "the parties offered very little evidence to deviate" from the Consent Order. The court explained:

> While it is clear that the parties have difficultly communicating, such struggle does not rise to the [c]ourt awarding either parent sole legal custody. The parties' potential ability to communicate remains, provided additional resources are available. And although the parties maintain that the access schedule and holiday schedule require clarification, upon review of the current [Consent] Order, the [c]ourt finds that the parties must simply comply with the terms of the Order.

Consequently, the court clarified the terms of the parties' access schedule, ordered the Children to continue therapy, and directed the parties to "enroll in and communicate through Our Family Wizard."[3] The order required the parties "to attend three (3) sessions with a parent coordinator prior to initiating litigation." Otherwise, the order dictated that "all other terms of the [Consent Order] . . . shall remain in full force and effect." Finally, the order provided that "any modification in child support shall be held in abeyance pending submission of the child support guidelines worksheet."

[3] "Our Family Wizard is a subscription-based website which is designed as a medium for divorced or separated parents to communicate and manage issues regarding shared parenting." *Wilcoxon v. Moller*, 132 So. 3d 281, 284 (Fla. Dist. Ct. App. 2014).

On April 26, 2021, Father filed a "Motion for Reconsideration, to Alter or Amend, or in the Alternative, to Exercise Revisory Power over the April 16, 2021 Order." In his motion, Father argued, among other things, that the court "clearly noted that [its] order would remove [the] tie breaking authority of the [Mother] for educational matters." Father further requested additional physical access with the Children.

Before any ruling on the motion for reconsideration was issued, Mother filed an opposition to Father's motion on June 12, 2021. In this motion, Mother asserted that the "[c]ourt already **did** remove the [Mother]'s tie-breaking authority and ordered the parties to attend 3 sessions with Parenting Coordinator before filing any further litigation." (Emphasis in original). Mother also noted that the attorneys for Mother and Father "tentatively agreed upon a Parenting Coordinator[.]" However, because Father "does not want to pay/contribute for the costs of the Parenting Coordinator," Mother averred that she "should either have her tie-breaking authority re-instated, or [Father] should be ordered to pay half of the costs for services of the Parenting Coordinator AND attend 3 sessions (as court ordered) to resolve the continuous disagreements and parenting issues in this case." (Emphasis in original). Father filed a reply on June 29, 2021, in which he argued that Mother's opposition was untimely and should be stricken.

The court did not rule on Father's motion for reconsideration, and he withdrew it on September 22, 2021.

Order Modifying Child Support

Proposed Child Support Guidelines

On April 9, 2021, Father's counsel emailed the court Father's child support guidelines worksheet. In the accompanying email, Father's counsel stated: "[Mother] did not present to the [c]ourt any information related to any of the expenses to be included in the guidelines and therefore, no such expenses are included." Based on Father's calculation of the guidelines, the recommended child support order for Father was zero.

Mother's counsel then emailed Mother's proposed child support guidelines. In her supporting email, she explained, in pertinent part:

> I honestly thought that counsel were going to prepare Guidelines as they agreed upon. I did not know the [c]ourt wanted separate guidelines from each side. Nonetheless, [a]ttached are the Guidelines filed on behalf of [Mother].
>
> The [Father's] current obligation is $1,800 per month.
>
> The [Father]'s guidelines were erroneous and failed to provide for tuition as well as [Mother]'s health insurance. I have reviewed the file, [Mother] filed first on December 2019 and did NOT request a Modification of child Support. The first pleading requesting a modification of Child support was filed by [Father] in September of 2020, which would have commenced effective October 1, 2020.
>
> The file showed that the original guidelines were calculated on sole custody guidelines, changing the figures to the current number did NOT result in a Decrease in Child Support as requested by [Father]. **The first Guidelines set from October 2020-January 30, 2021 resulted in an increase HOWEVER – [Mother] never pled or requested an increase in child Support so there would be no change/modification at that time.**
>
> The Second set of guidelines shows [Mother]'s new salary effective in 2021.[4] It further includes her current month payment for health care and daughter's private school tuition as reflected in the comments. Using this time frame, Father's support may decrease to $1,655 per month HOWEVER,

[4] We could not locate anything in the record, prior to Mother's child support guideline worksheet, identifying Mother's new salary.

> in order to establish a material change of circumstances, it would have to be a 25% change which it is NOT.
>
> Thirdly, the last set of guidelines would take effect August of 2021 when the daughter attends Annapolis Area Christian School at a REDUCED amount. Again, please look at the comments on the guidelines, her current school at Barrie has a higher tuition than Annapolis Area Christian. **Therefore, effective August of 2021, Defendant's obligation may decrease to $1,453 per month if the [c]ourt determines this to be a material change of financial circumstances.**

(Bold emphasis and paragraph breaks added).

On April 21, 2021, Father filed his "Objection and Motion to Strike [Mother]'s Improper Filing and Communication." In his motion, Father contended that Mother included information in her worksheet "that was not supported by the record" and "presented facts and closing arguments in her correspondence." Father asserted that Mother was "using this correspondence as a platform to reopen evidence and provide closing arguments" and objected to the "inclusion of any information not supported by testimony or documentary evidence in the record." Accordingly, Father requested that Mother's submission be struck. He requested a hearing on his motion.

In response, Mother contended that the court reserved on child support to allow counsel "together to submit agreed upon guidelines." Because Father submitted his "own guidelines without any communication or attempt to agree upon the calculations," Mother's counsel asserted that she "did exactly" what Father's counsel did— "she ran the Child Support calculations and submitted [her worksheet through] e-mail to the Judge's law clerk." According to Mother's counsel, "there was testimony that the daughter

remained in private school, the tuition associated with private school," and Father did not "oppose or disagree with said private school."

In reply, Father contended that he could not submit agreed upon guidelines because Mother attempted "to include items in the guidelines that were clearly not in the record." According to Father, Mother's "counsel is attempting to cure her own deficiencies at trial by including items such as health insurance and private school tuition."

Order

In an order dated April 21, 2021, but not docketed until May 24, 2021, the court modified Father's child support obligation. In its order, the court found "that the minor children have a particular educational need to attend private school that should be included in determining the child support obligation." The court clarified:

> In making this determination, the [c]ourt contemplated the testimony of . . . Mother and . . . Father, reviewed the trial exhibits, and considered numerous factors including, but not limited to the educational history, number of years attending private or charter school, performance while attending a private or charter school, and the parties' ability to pay for school. The [c]ourt also reviewed the [Consent Order], wherein the parties particularly reflected upon the education of the minor children. The parties agreed that Mother would have "final decision-making authority as to all matters related to education. . . ."
>
> With respect to Mother's and Father's income, the [c]ourt finds that Mother changed employment to allow greater flexibility to care for the minor children. As a result, Mother's salary decreased; whereas, Father's salary remained the same.

The court ordered Father to pay child support in the among of $2,183.00 between October 1, 2020 through April 30, 2021; then, ongoing child support in the amount of $1,557.00, effective May 1, 2021. In calculating this amount, the court included the cost

of private school tuition and Mother's change in income. After entering its order, the court denied Father's motion as moot.

Motion for Reconsideration

On June 3, 2021, Father filed a "Motion for Reconsideration, to Alter or Amend, or in the Alternative, to Exercise Revisory Power over the May 24, 2021 Order." In his motion, Father asserted that Mother "failed to present any evidence at the merits hearing to be included in the Maryland Child Support Guidelines Worksheet, including tuition costs, daycare costs, health insurance, etc." Counsel asserted that Mother improperly used correspondence attaching her guidelines "to reopen evidence and provide closing arguments." According to Father, Mother "never requested that [] [Father] contribute financially to the tuition costs of the minor children and has consistently been responsible for said costs, as she had tie breaking authority." Father contends that "it is in the best interest of the minor children that child support be calculated without the inclusion of the minor children's expenses and that [Mother] be ordered to be solely responsible for those costs."

Mother filed her opposition on June 12, 2021 and asserted that there was "no justifiable reason or basis" for the court to reconsider its ruling. According to Mother, the court "already **did** remove [Mother]'s tie-breaking authority and ordered the parties to attend 3 sessions with [a] Parenting Coordinator before filing any further litigation." Mother asserted that while the "attorneys tentatively agreed upon a Parenting Coordinator," Father "does not want to pay/contribute for the costs of the Parenting Coordinator."

The circuit court denied Father's motion for reconsideration on July 16, 2021. Father filed a notice of appeal on May 27, 2021.

DISCUSSION

I.

Tie-Breaking Authority

A. Parties' Contentions

Father avers that the "trial court committed an oversight when it failed to memorialize the terms of its oral ruling in the April 14, 2021 Custody Order." According to Father, "[i]n light of the trial court's oral opinion, the dicta of its written Order, and [Mother]'s concession that her tie-breaking authority was removed, the record is clear that the trial court erred."

Mother avers that Father's notice of appeal of the Court's Custody Order was untimely.[5] On the merits, Mother contends that the court's determination was not clearly

[5] This Court already denied Mother's motion to dismiss the appeal as untimely on September 17, 2021. Maryland Rule 8-602(a) mandates that this "Court shall dismiss an appeal if: . . . (2) the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202." Rule 8-202(a), in turn, provides: "Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days ***after entry*** of the judgment or order from which the appeal is taken." (Emphasis added). "Rule 8-202(c) provides for an exception that tolls the running of that appeal period while the court considers certain motions, including motions . . . that are filed within ten days ***of entry*** of the judgment or order 'under Rule 2-534 and/or 2-535.'" *Johnson v. Francis*, 239 Md. App. 530, 541 (2018) (emphasis added) (citation omitted). While a motion for reconsideration filed more than ten days after entry of the judgment or order appealed may be considered by the circuit court, "it does not toll the running of the time to note an appeal." *Id.* (citation omitted). Here, Father filed his motion for reconsideration on April 26, 2021 within ten days of entry of the court's custody order. Accordingly, his time to (Continued)

erroneous because the court did not commit "judicial error" and "there were no objections to the [c]ourt's procedure." She further urges that the court "went through its required analysis" under *Montgomery County Dep't of Social Services v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986), "and issued a proper Order."

B. Analysis

The best interests of the child "guides the trial court in its determination, and in our review" and "is always determinative" in a child custody dispute. *Santo v. Santo*, 448 Md. 620, 626 (2016) (quoting *Ross v. Hoffman*, 280 Md. 172, 178 (1977)). Judge Adkins articulated the standard of review an appellate court should apply in reviewing a custody determination in *Santo v. Santo*:

> We review a trial court's custody determination for abuse of discretion. This standard of review accounts for the trial court's unique opportunity to observe the demeanor and the credibility of the parties and the witnesses.
>
> Though a deferential standard, abuse of discretion may arise when no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles. Such an abuse may also occur when the court's ruling is clearly against the logic and effect of facts and inferences before the court or when the ruling is violative

appeal was tolled. The court then entered an order modifying child support on May 24, 2021, and Father filed a motion for reconsideration of this order on June 3, 2021. While both motions for reconsideration were pending, on May 27, 2021, Father filed a notice of appeal. This Court has clarified that "a notice of appeal filed prior to the withdrawal or disposition of a timely filed motion under Rule 2-532, 2-533, or 2-534, is effective" but the processing of the appeal is delayed until the motions are disposed. *Waters v. Whiting*, 113 Md. App. 464, 474 , *cert. denied*, 345 Md. 237 (1997); *see also Edsall v. Anne Arundel Cnty.*, 332 Md. 502, 508 (1993) (concluding that processing of appeal is delayed until withdrawal or disposal of motion). Accordingly, since Father filed timely 10-day motions, his notice of appeal became effective after the court denied Father's motion to reconsider the modified child support order and Father withdrew his motion to reconsider the modified custody order.

> of fact and logic. Put simply, we will not reverse the trial court unless its decision is well removed from any center mark imagined by the reviewing court.

Id. at 625-26 (cleaned up).

When considering a request to modify custody, a trial court engages in a familiar two-step process. First, the court determines whether there has been a "material" change in circumstances. *Id.* at 639. A change in circumstances is material when it affects the welfare of a child. *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). A "court's inquiry must cease" if a material change of circumstances is absent. *Braun v. Headley*, 131 Md. App. 588, 610 (2000). Second, if the court finds a material change in circumstances, the court "then proceeds to consider the best interests of the child as if the proceedings were one for original custody." *McMahon*, 162 Md. App. at 594.

In a joint custody arrangement, "both parents have an equal voice in making those decisions and neither parent's rights are superior to the other." *Taylor*, 306 Md. at 296. The Court of Appeals has described the concept of joint custody in the context of tie-breaking authority in *Santo*:

> In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking provision permit one parent to make the final call. Because this arrangement requires a genuine effort by both parties to communicate, it ensures each has a voice in the decision-making process.
>
> To be sure, the *Taylor* Court's definition of joint legal custody places parents' decision-making rights on an equal footing; indeed, it characterizes their voices as being equal. A delegation of final authority over a sphere of decisions to one parent has the real consequence of tilting power to the one granted such authority.

> But such an award is still consonant with the core concept of joint custody because the parents must try to work together to decide issues affecting their children. . . . We require that the tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children.

448 Md. at 632-33 (cleaned up). By balancing the rights of both parents with the need for a decision, a tie breaker provision "pragmatically reflects the need for *some* decision to be *made for the child* when parents themselves cannot agree. It is the child, after all, whom the court must consider foremost in fashioning custody award." *Id.* at 634-35.

Turning to the case before us, Father asserts, based on the circuit court's statements at the conclusion of the evidentiary hearing and Mother's concession that her tie-breaking authority was removed, that the court's failure to remove tie-breaking authority was a "simple error, omission, and/or oversight." To resolve this issue, we first construe the terms of the court's modified custody order. The Court of Appeals has clarified that "court orders are construed in the same manner as other written documents and contracts, and if the language of the order is clear and unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Taylor v. Mandel*, 402 Md. 109, 125 (2007) (citation omitted). As Judge Battaglia explained in *Mandel*:

> Ambiguity exists, however, if "when read by a reasonably prudent person, it is susceptible of more than one meaning." *Calomiris v. Woods*, 353 Md. 425, 436, 727 A.2d 358, 363 (1999). *See also Cheek v. United Healthcare of Mid–Atlantic, Inc.*, 378 Md. 139, 162-63, 835 A.2d 656, 670 (2003). We have stated that "language can be regarded as ambiguous in two different respects: 1) it may be intrinsically unclear . . . ; or 2) its intrinsic meaning may be fairly clear, but its application to a particular object or circumstance may be uncertain. Thus, a term which is unambiguous in one context may be

> ambiguous in another." *See Liverpool v. Balt. Diamond Exch., Inc.*, 369 Md. 304, 318, 799 A.2d 1264, 1272 (2002). If ambiguous, the court must discern its meaning by looking at the circumstances surrounding the order to shed light on the ambiguity, including the motion in response to which it was made. *See Carpenter Realty Corp. v. Imbesi*, 369 Md. 549, 561–62, 801 A.2d 1018, 1025 (2002); *Balducci v. Eberly*, 304 Md. 664, 670, 500 A.2d 1042, 1045 (1985).

Id. at 125-26.

Here, we conclude that the language of the custody order, when read as a whole, is ambiguous as to whether Mother retained her tie-breaking authority. As we set forth above, the circuit court noted that the parties had "offered very little evidence to deviate" from the Consent Order. The court did stress that the parties continued to have "difficulty communicating" but also found that they could communicate "*provided additional resources are available*." (Emphasis added).

The order provides two additional resources to improve the parties' communications. First, the order requires the parties to enroll and communicate through "Our Family Wizard." Second, the order requires that the "parties are to attend three (3) sessions with a parent coordinator prior to initiating litigation." Significantly, the modified custody order does not explain how Mother's tie-breaking authority granted under the Consent Order would operate in conjunction with this last provision. It does not specify when Mother may exercise tie-breaking authority. It may be that she could exercise tie-breaking authority independently of any required sessions with a parent coordinator. On the other hand, it is equally plausible that the provision was intended by the court to remove

Mother's tie-breaking authority and implement, instead, a new dispute resolution process between the parties.

Because the modified custody order states that "all other terms of the Consent [Order] . . . shall remain in full force and effect," we examine the 2014 Consent Order next. However, the terms of that order do not help us resolve the ambiguity contained in the modified custody order. The Consent Order distinguished between matters relating to education and "health, religion, and other matters of major significance." By its terms, Mother had "final decision-making authority as to all matters related to the education" of the Children. Then, regarding conflicts relating to "health, religion and other matters of major significance," the Consent Order required the parties to consult with a parent coordinator. The provision at issue in the modified custody order does not differentiate between education matters and other matters. Therefore, it is unclear whether the modified custody order amends only that portion of the Consent Order relating to education of the Children, or that portion of the Consent Order pertaining to "other matters"

Because we cannot discern from the plain language of the modified custody order whether it applies to remove Mother's tie-breaking authority or merely operates alongside it, we are directed to "discern its meaning by looking at the circumstances surrounding the order to shed light on the ambiguity." *Mandel*, 402 Md. at 126. We conclude that the ambiguity contained in the modified custody order cannot be resolved on this record.

At the conclusion of testimony, the circuit court summarized a possible resolution of the dispute. In this summary, the court proposed that Mother would still "have that tie-

breaking authority." However, later in the hearing, the court explicitly determined that the court "is not granting any party tie breaking authority" and clarified that neither party "can handle the responsibility of being tie-breaker." Despite this explicit representation, as we note above, it is not clear that Mother's tie-breaking authority was removed in the modified custody order. Then, adding to the confusion, the court favorably referenced Mother's tie-breaking authority some weeks later in its order modifying Father's child support obligation.

Given these conflicting accounts in the record, we do not assign great weight to Mother's "admission" because it is not surprising that she understood at different points in this proceeding that the court had removed her tie-breaking authority. In short, we conclude the court's order as well as the record of the hearing are unclear as to whether the court intended to revoke Mother's tie-breaking authority. Accordingly, we vacate and remand to allow the circuit court to clarify the order. Because we remand to allow the circuit court to clarify its order, we do not prejudge whether the court would have committed error or abused its discretion had it removed or maintained Mother's tie-breaking authority. We leave the court with remedial flexibility to shape its order and structure a custody arrangement in the best interests of the Children.

II.

Child Support Modification

A. Parties' Contention

Father contends that the circuit court erred or abused its discretion in modifying child support in several respects. First, Father notes that Mother did not request a modification of child support but rather "[t]hat request came solely from [Father]." According to Father, Mother did not introduce evidence on the issue of child support until "nine [] days after trial ended." Then, he asserts, the court "erred by accepting and relying upon an improper e-mail from [Mother]'s counsel setting forth a new request for relief and evidence outside the record[.]" (Emphasis omitted). Father points out, however, that Mother "did not attach any documentation to support the numbers" set out in her proposed child support guidelines worksheet.

Father also argues that the trial court abused its discretion by including the cost of private school tuition in its child support calculations. According to Father, the "evidence is insufficient to support a finding" of a particular educational need determined by the factors derived from *Witt v. Ristaino*, 118 Md. App. 155, 169-71 (1997). Moreover, Father contends the circuit court erred in including the higher tuition rate for the Barrie School instead of the rate for the Annapolis Area Christian School.

Mother asserts, to the contrary, that the "issue of child support was before the [circuit c]ourt." She claims that "[c]ounsel agreed to save time and calculate child support consistent with the guidelines and not through testimony." According to Mother, her

counsel did not submit an "improper email," but rather, counsel for both parties submitted their proposed guidelines worksheet in accordance with the court's order. Further, Mother notes that Father's child support obligations decreased under the revised child support order. She contends that Father "never complained about the children being in private school" and never claimed that he "had a financial hardship." Rather, his financial statement referenced an income of $100,662.00. Father's modified child support obligation of $1,557.00, accordingly, is 18% of his income and, in Mother's view, "does not pose a financial hardship."

B. Framework for Modification of Child Support

It is well-established that "we will not disturb a 'trial court's discretionary determination as to an appropriate award of child support absent legal error or abuse of discretion.'" *Kaplan v. Kaplan*, 248 Md. App. 358, 385 (2020) (quoting *Ruiz v. Kinoshita*, 239 Md. App. 395, 425 (2018)). If the trial court's findings of facts are not clearly erroneous and its ultimate decision is not arbitrary, "we will affirm it, even if we may have reached a different result." *Id.* (citation omitted). A trial court's factual findings are not clearly erroneous if those findings are supported by competent evidence. *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016).

Pursuant to Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL"), § 12-104(a), a court may not modify a child support award except upon "the filing of a motion for modification and upon a showing of a material change of circumstances." The Court of Appeals has clarified:

> The "material change of circumstance" requirement limits the circumstances under which a court may modify a child support award in two ways. First, the "change of circumstance" must be relevant to the level of support a child is actually receiving or entitled to receive. Second, the requirement that the change be "material" limits a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order.

Wills v. Jones, 340 Md. 480, 488-89 (1995) (footnote omitted). The party seeking the modification has the burden of proving that a material change of circumstance has occurred. *Leineweber v. Leineweber*, 220 Md. App. 50, 62 (2014) (determining that father failed to meet his burden of proving that he suffered a material change in income).

Upon a properly filed motion and a finding of a material change of circumstances, the court then reviews sections 12-202 through 12-204 of the Family Law Article to "determine the level of support to which the child is currently entitled." *Cutts v. Trippe*, 208 Md. App. 696, 710 (2012) (quoting *Rivera v. Zysk*, 136 Md. App. 607, 619 (2001)).

Section 12-204 of the Family Law Article governs the calculation of a party's child support obligation. The statute provides a mechanism to calculate each party's child support obligations, commonly referred to as the "guidelines," when the parties' combined adjusted actual incomes range between $15,000 and $180,000. FL § 12-204(e); *Kaplan*, 248 Md. App. at 386 (2020). However, in cases where 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." FL § 12-204(d). In these "above-guidelines" cases, the court may refer and extrapolate from the guidelines but must exercise discretion in determining the appropriate amount of child support. *Otley v. Otley*, 147 Md. App. 540, 560-61 (2002).

We recently explained how a trial court should exercise the significant discretion it is afforded in above-guidelines cases:

> [I]n an above-guidelines case, "the court may employ any rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it." In exercising its significant discretion, a court "'must balance the best interests and needs of the child with the parents' financial ability to meet those needs.'" "Several factors are relevant in setting child support . . . includ[ing] the parties' financial circumstances, the 'reasonable expenses of the child,' . . . and the parties' 'station in life, their age and physical condition, and expenses in educating the child[ ].'" While noting the court's discretion, "the general principles from which the schedule was derived should not be ignored."

Kaplan, 248 Md. App. at 387 (cleaned up).

The circuit court must consider the actual income and expenses of the parties. *See* FL §§ 12-201; 12-203. "'Actual Income' means income from any source." FL § 12-201(b)(1). "[D]ocumentation of both current and past actual income" must be verified. FL § 12-203(b)(1). "[S]uitable documentation of actual income includes pay stubs, employer statements otherwise admissible under the rules of evidence, or receipts and expenses if self-employed, and copies of each parent's 3 most recent federal tax returns." FL § 12-203(b)(2)(i). Further, the court "must rely on the verifiable income of the parties," as the "failure to do so results in an inaccurate financial picture." *Ley v. Forman*, 144 Md. App. 658, 670 (2002).

With these precepts in mind, we turn to consider the modified child support order, including Father's two primary challenges on appeal: (1) the court's post-hearing consideration of improper evidence to determine child support and (2) the court's decision to include the cost of private school tuition. For the following reasons, we hold that the

circuit court abused its discretion when, in rendering its decision to modify the child support order, it relied upon information supplied in the post-hearing submissions by Mother that lacked evidentiary support, including the cost of private school tuition.

C. Analysis

1. Reliance on Facts Outside the Record

Father contends that in calculating Mother's income, the court erred by relying on facts proffered by Mother on her child support guidelines worksheet and accompanying email without proper evidentiary support, submitted days after the close of evidence.

As an initial matter, we observe the parties do not dispute that this is an above-guidelines case, allowing the court to "use its discretion in setting the amount of child support." FL § 12-204(d). And, although the court's modified custody order instructed that "any modification in child support shall be held in abeyance pending submission of the child support guidelines worksheet," the record does not contain evidence to support Mother's income as stated on her proposed child support guidelines worksheet. Section 12-203(b) of the Family Law Article requires that income be supported by "suitable documentation of actual income."

This Court explained in *Ley* what constitutes verifiable income for purposes of calculating child support. *Ley*, 144 Md. App. at 670-76. There, the circuit court relied on "approximations and estimations" of the parties' incomes. *Id.* at 665. At the conclusion of a hearing, the judge found a material change of circumstances resulting from "[a]t the very least a $40,000 increase" in Father's income, "if not a $70,000 increase." *Id.* The

judge then eliminated several of the mother's expenses from the calculations and determined that a private school was appropriate for the parties' child. *Id.* at 666. The judge sent a letter to counsel in an attempt to clarify his opinion. *Id.* at 667. In the letter, the trial judge again "demonstrate[d] his reliance on approximations and estimations," by describing the parties' combined income as "approximately $15,000 a month gross income," necessitating "support in the amount of approximately $1600 per month," and calculated the child's college tuition by "rounding it off." *Id.* at 668. We held that the subsections of the Family Law Article governing child support unambiguously required that the court verify the actual income of the parents with documentation of both current and past actual income. *Id.* at 668-69.

Here, although there was one reference at the evidentiary hearing that Mother would begin a new job, there was no testimony about what her salary would be, much less the "suitable documentation" that is required under FL § 12-203. As in *Ley*, the circuit court in this case erred in relying on a calculation of Mother's income without verifiable documentation of Mother's income. Accordingly, we remand with instructions that the court determine Mother's income based on verifiable documentation.

2. Education Expenses

Father argues that the trial court abused its discretion by including the cost of private school tuition without sufficient evidence to support a particular educational need under *Witt v. Ristaino*, 118 Md. App. 155 (1997).

A court may include particular educational expenses in its calculation of child support. FL § 12-204(i). The statute provides:

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

(Emphasis added). In *Witt v. Ristaino*, this Court held that the trial court did not abuse its discretion in assigning a portion of the cost of private school tuition to the father. 118 Md. App. 155 at 178-79. On appeal, father claimed that he could not afford to pay the tuition. *Id.* at 173-74. This Court clarified that a court should consider the following "non-exhaustive list of factors when determining whether a child has a 'particular educational need' to attend a special or private elementary or secondary school":

> (1) the child's educational history, such as the number of years the child has attended the particular school;
> (2) the child's performance in the private school;
> (3) whether the family has a history of attending a particular school;
> (4) whether the parents had made the decision to send the child to a particular school prior to their divorce;
> (5) any particular factor that may exist in a specific case that might impact the child's best interest; and
> (6) the parents' ability to pay for the schooling.

Id. at 169-71. We concluded that the court considered the "particular educational needs of the children, the affordability of the tuition, and the appropriate division of the tuition between the parties." *Id.* at 174. Because it was "clear the trial judge considered all the information he had before him in making his determinations . . . it was reasonable for the

judge to conclude that, by dividing the costs of the children's private school tuition in the manner he did, the costs were affordable." *Id.* at 179.

In deciding whether a child has an educational need to attend a particular school, the trial court need not reference explicitly each factor so long as the record reflects that the court considered them. *Ruiz*, 239 Md. App. at 430 ("the record and the court's oral ruling indicate that the court considered the relevant *Witt* factors—even if it did not refer to them explicitly").

Returning to the case before us, we note that the Consent Order does not reference the payment of private school tuition, and that Mother never requested that this cost be included in the child support calculation before or during the hearing. Accordingly, at the evidentiary hearing, Mother did not present any documentation or evidence of the cost of tuition for Sa. to attend the Annapolis Area Christian School.[6]

Apart from the costs of the private school tuition, we also cannot discern from the record that the court properly considered the other factors enunciated in *Witt.* For example, no witness testified to any particular benefit that Sa. would derive from enrolling in the Annapolis Area Christian School. And aside from limited testimony that Father had attended the Barrie School, there was no testimony that Mother or Father had any history of attending the Annapolis Area Christian School or any other private school. Nor was there testimony regarding Sa.'s performance at the Barrie School. Although Mother

[6] We further note that in the modified child support order the court mistakenly included the proffered cost of the tuition at Sa.'s prior school, the Barrie School, rather than the cost of tuition at the Annapolis Area Christian School.

testified that Father did not object to Sa. or So. attending private school, no testimony was elicited that reflected a decision to send the children to a particular school before the parties' divorce. While the circuit court was required to "balance the best interests and needs of the child with the parents' financial ability to meet those needs," *Kaplan*, 248 Md. App. at 387, the court did not reference any of the factors or evidence relevant to this determination or specify how it set child support.

This case warrants a remand so that the court can make the necessary findings and explain its reasoning. *Otley v. Otley*, 147 Md. App. 540, 562 (2002) ("Because the court did not explain its decision, we vacate the child support award and remand for further proceedings."). These findings would include, but are not limited to, findings on Mother's income level and the cost of Sa.'s tuition, as well as Sa.'s educational needs in accordance with the factors delineated in *Witt*, 118 Md. App. at 169-71. The court may also, in the exercise of its discretion, re-open the hearing for additional evidence to the extent necessary. *See Taylor v. Taylor*, 306 Md. 290, 313 (1986) (observing that, on remand, the trial court "in the exercise of its discretion may receive additional evidence to supplement the existing record"); *Long v. Long*, 141 Md. App. 341, 353 (2001) ("On remand, the circuit court, in its discretion, may receive additional evidence.").

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.