Circuit Court for Howard County
Case No.: 13-C-12-090589

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1275

September Term, 2017

EDWARD VERES

v.

KATHLEEN MCLAUGHLIN

Fader, C.J.,
Nazarian,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 4, 2019

On cross-motions to modify child support, the Circuit Court for Howard County increased Edward Veres's ("Father") monthly child support obligations, required him to pay 100% of the children's medical insurance costs, required him to split the cost of the children's private school tuition with Kathleen McLaughlin ("Mother"), and ordered him to pay $50,000 toward Mother's attorney's fees. On appeal, Father challenges the trial court's income calculation for both parents and argues that the court abused its discretion in relying on those calculations to make the other decisions. We disagree and affirm.

I. BACKGROUND

Father and Mother married on September 20, 1997 and had three children: a son born in 1999 and twin boys born in 2002. They divorced in June 2007. When the court issued the judgment of divorce, it granted Mother primary physical custody with rehabilitative alimony of $2,917 per month for three years, child support of $2,813 per month, half of the mortgage payment of $1,400 per month, use and possession of the family home, and a monetary award of $92,887. Father unsuccessfully appealed the trial court's order on July 9, 2009.[1]

Before the marriage, Mother had worked as a family law attorney, but she stopped working when the parties got married. At the time of divorce, Mother was unemployed and Father was the owner and operator of CellComm Inc., a business that sold cell phones, plans, and accessories. In 2011, Father started EVack, Inc., another telecommunications business. That same year, Mother started her own family law practice in Annapolis.

[1] *Veres v. McLaughlin*, No. 1628, Sept. Term 2007 (Md. App. July 9, 2009).

In early 2016, Mother claimed that Father had unilaterally stopped paying the full value of his monthly child support obligation when he reached age 65 and the children began receiving Social Security benefits. She also alleged that his income had increased, and she filed a petition for contempt and a motion to increase and enforce payment of child support. Father responded by opposing Mother's motion and filing his own motion to reduce child support. After discovery, the court held an evidentiary hearing over four days: August 19, 2016, January 19, 2017, March 23, 2017, and April 4, 2017.

In November 2016, while these motions were pending, Father sold EVack, Inc. for $800,000. He testified at trial that the terms of the sale included a $400,000 down payment and the remainder paid to him monthly over a twelve-month period. Father also testified that he had ceased operations with CellComm, Inc., although its $30,000 line of credit with M&T Bank remained intact.

At trial, Father relied primarily on his tax returns to establish his income. In August 2016, Father submitted a long form financial statement to the court that listed $9,692.83 in total net monthly income and $13,266.34 in total monthly expenses. Then, in February 2017, he represented to the court that his total net monthly income had been reduced to $0 while his total expenses increased by more than $5,000 a month. Mother countered with evidence of bank statements and expert testimony that painted a very different picture. Based on Father's bank records, Mother estimated that between January 2015 and June 2016, an average of more than $14,000 a month was paid out of Father's business checking accounts to cover his personal expenditures. She also studied the statements from one of

his company's credit cards and estimated that he had used the card to pay approximately $11,506.56 a month in personal expenses.

Mother, on the other hand, is an actively licensed Maryland barred attorney with a more transparent financial history. Her most recent tax returns reflected her adjusted gross income was $57,322 in 2013, $79,685 in 2014, and $36,447 in 2015, (an average of $57,818), an average monthly adjusted income of $4,818.

On June 7, 2017, the trial court issued a twenty-five page memorandum and opinion and order. The court found that Mother's overall income had stayed about the same; based on her three most recent tax returns, the court found that Mother's law firm income had increased, but she no longer received alimony from Father, and the two essentially washed out. For Father's income, the court agreed with Mother that his tax returns did not reflect his actual income and, following one of the expert's approaches, set his gross monthly income at $21,829.63 by extrapolating from Father's average monthly personal expenses of approximately $14,735.

Because Father's income had approximately doubled since the divorce, the court found a material change in circumstances and increased Father's child support to $4,917.00 per month for the time he was responsible for three children (February 2016–July 8, 2017) and $4,143.00 per month after the oldest child turned eighteen. From November 2016 forward, the court also found that Father was entitled to a set off of $1,665.00 ($555 per child) for the children's Social Security benefits. The court found Father in contempt for failing to pay full child support in the past, calculated arrearages of $26,876.09 from

January 2016 through February 2017, and ordered him to pay an extra $500 per month until the arrearage was paid.

Beyond child support, the court ordered each party (as they appeared in their testimony to agree) to "pay 50% of the children's private school tuition and expenses, including for extra-curricular and recreational activities, [] directly to the children's high school or other source of costs," and directed that if direct payment could not be made in advance, the non-payer would reimburse the other within ten days. The court ordered Father to pay "100% of all health insurance coverage and extraordinary medical expenses" for as long as "legally allowed and available by the insurance provider." The court also ordered Father to pay $50,000 toward mother's attorneys' fees, and in a later order, awarded her $9,000 in advance appellate attorneys' fees.

Father filed a timely notice of appeal.

II. DISCUSSION

This case deals entirely with whether child support should be modified and, if so, to what extent. Before modifying, the trial court first must find a material change in circumstances since the time of the operative award. Md. Code (1999, 2012 Repl. Vol.), § 12-104(a) of the Family Law Article; *Horsley v. Radisi*, 132 Md. App. 1, 21 (2000) ("Once the support award is established, the trial court may only modify child support payments if there is an affirmative showing of a material change in circumstances in the needs of the children or the parents' ability to provide support."). We review decisions to modify child support for abuse of discretion:

> Whether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong. When an action has been tried without a jury, we will review the case on both the law and the evidence. We will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Ley v. Forman, 144 Md. App. 658, 665 (2002) (internal citations omitted). We review the underlying factual findings only for clear error. Md. Rule 8-131(c).

A. The Trial Court Did Not Abuse Its Discretion In Calculating The Parties' Incomes.

Father's *first* argument sets a theme that runs through his others as well: he argues that the circuit court abused its discretion in the way that it calculated his and Mother's incomes. Rather than relying on worksheets prepared by Mother's expert, Joan Leanos (a certified public accountant), he contends that the trial court should have relied on his tax returns. He complains as well that the court erred in using a three-year average of Mother's adjusted gross income, as shown on her tax returns, rather than her unadjusted gross income. Mother counters that the trial court appropriately considered all of the evidence at trial, did not err in finding Father's tax returns unreliable, and calculated her income correctly.

Trial judges have wide discretion to set child support at a level that ensures that children will maintain nearly the same standard of living they enjoyed before their parents' divorce. *Petrini v. Petrini*, 336 Md. 453, 460 (1994). All the more so where, as here, the parties' combined income exceeds the child support guidelines cap of $15,000 per month.

Ruiz v. Kinoshita, 239 Md. App. 395, 425 (2018). "In exercising its discretion, however, the trial court 'must balance the best interests and needs of the child[ren] with the parents' financial ability to meet those needs." *Id.* (*quoting Unkle v. Unkle*, 305 Md. 587, 597 (1986)).

Child support was set in this case when the parties divorced in 2007. Both parties contended in the trial court that incomes had changed over time, that the changes qualified as a material change in circumstances, and that child support should be modified. But we used the passive voice in that sentence intentionally: the parties disagree pointedly about whose income has changed and how support should be modified. Mother contended that Father's income increased substantially in the intervening years while hers remained unchanged, while Father claimed that his retirement and the sale of his businesses reduced his income essentially to zero.

As an initial matter, then, the court needed to figure out both parties' actual income, a task that proved particularly challenging as to Father. The Maryland Code provides that "[i]ncome statements of the parents shall be verified with documentation of both current and past actual income." FL § 12-203(b)(1). Examples of "suitable documentation of actual income include[] 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). But that is not an exhaustive list. *See Tanis v. Crocker*, 110 Md. App. 559 (1996) (FL § 12-203(b) "does not require that a parent's income tax returns be considered in order to resolve a dispute concerning that

parent's income."). And the decisions a court makes about what evidence to credit or disregard in calculating actual income represent an important way that it exercises its discretion. *See Petrini*, 336 Md. at 463 (holding that the trial court did not abuse its discretion when it increased father's actual income by approximately $10,000 based on evidence of "gifts" that the father regularly received from his family, like rent-free lodging, health insurance, and a spending allowance); *see also Walker v. Grow*, 170 Md. App. 255, 276–77 (2006) (affirming the trial court's reliance on expert testimony to verify and accurately determine the Father's actual income). For that reason, appellate courts don't "second-guess" the weight that the trial court gives "[expert] testimony or any other evidence." *Walker*, 170 Md. at 277.

Father lives what might euphemistically be called a complicated financial life, and the court found his financial statements "contradictory and incongruent." On all of his statements, his expenses exceeded his claimed income. In the most egregious example, his long form financial statement of February 17, 2017, he "claim[ed] his gross monthly income from wages to be $0; net monthly income from wages to be $0; net monthly other income to be $0; total net monthly income to be $0; and total monthly expenses to be $18,356.85 ($7,603.82 of which [] for the benefit of the children)." Father also disputed that money he received from his companies was his. This left the court to figure out Father's income on its own, and the record contained evidence both from him and Mother: his financial statements, bank account statements, and tax returns, as well as, his own

personal testimony and the testimony of Mother's expert, Ms. Leanos.[2] Ms. Leanos reviewed Father's personal and business-related financial documents and testified that because he had been using business accounts to cover personal expenses, his income taxes didn't reflect his actual income. She offered the court instead calculations of Father's gross monthly income "based on an assessment of the personal transactions from his various private and professional bank accounts."

In deciding ultimately to accept Ms. Leanos's extrapolation of Father's income from his expenses, the trial court made several findings. Among other things, the court found that Father "did not transparently disclose the sale of EVack, Inc.'s assets on his financial statements or to [Mother]," and that he "presented no credible testimony, documentation, or expert witness to support his ultimate position of $0 income." By contrast, the court found the expert testimony of Ms. Leanos to be "credible, reliable and reasonable based on her professional experience and in Court testimony." And separately from the Ms. Leanos's testimony, the court had and relied independently on evidence—including bank account and credit card statements—that Father used business accounts to pay personal expenses:

> This Court [] finds ample evidence that [Father] comingled funds and used both private and professional accounts for personal expenses, based on the financial documents admitted into evidence and the testimony of the parties . . . .

The court observed correctly that Father bore the burden, as a shareholder of a Subchapter S Corporation to prove that he didn't have access to retained income from the company,

[2] Father couldn't offer his own expert testimony because he had failed to comply with the expert disclosure deadline.

see Walker, 170 Md. App. at 281, and Father couldn't shoulder that burden. To the contrary, he admitted at trial that he paid child support from his EVack, Inc. account. The trial court absolutely had the discretion to consider more than just Father's tax returns, to weigh the evidence it had and, in reliance on expert testimony, to calculate Father's income for child support purposes from his expenses.

Father also contends that the trial court erred in using Mother's adjusted gross income as the basis for her monthly income, that FL § 12-201(b)(3)(v) required the court to use Mother's unadjusted gross income from line 12 of her IRS Form 1040, and that using the adjusted figure left out Mother's interest and dividend income. The Form 1040 itself debunks that theory—adjusted gross income is calculated by subtracting amounts paid from gross income for certain purposes, such as health savings accounts and self-employment taxes, and the beginning figure (on line 22) includes interest and dividends. In any event, the court accounted reasonably for the variability in Mother's law firm income by averaging the adjusted gross income from her 2013, 2014, and 2015 income tax returns, the three most recent filings. Combined with the intervening end to her rehabilitative alimony, the court did not abuse its discretion in finding Mother's income essentially unchanged from the time of divorce.

B. The Trial Court Was Not Required To Find Voluntary Impoverishment.

Father contends *next* that he retired on November 1, 2016 when he sold EVack, Inc., and therefore that the court was required to find that he voluntarily impoverished himself before it could "impute" to him an income of $21,830 per month after that date for child

support purposes. This argument mischaracterizes the court's findings. The court recognized that Father had "retired" as November 1, 2016 and, from that point forward, that he was entitled to a set-off for the Social Security benefits the children then began to receive.

The fact that Father retired, though, doesn't mean that he had zero income. The court found exactly the opposite, in fact, and determined Father's actual income, even after November 2016, from his personal expenditures and his ability to use company accounts and credit cards to pay for them. The court didn't need to find that he had impoverished himself, and if anything found precisely the opposite—that Father had enhanced the income shown on tax returns and more conventional documents with resources from his business.

Father also contends that the circuit court improperly considered the payments he received in the sale of his business in his imputed income and that EVack, Inc. was a non-income producing asset. That's true, but the suggestion that the court considered the sale proceeds in the income calculation misstates the record: the court stated expressly that the sale did not "demonstrate fairly [Father's] actual income," and the court didn't include the sale proceeds when it calculated the child support obligation.

C. The Trial Court Did Not Abuse Its Discretion When It Obligated Father to Pay All of The Children's Health Insurance And Health Care Expenses.

Third, Father contends that the eldest son no longer is a minor and that the court cannot require him to pay the son's healthcare expenses. Therefore, Father argues, the

circuit court improperly ordered him to pay for all of the children's health insurance "for as long as is legally allowed and available by the insurance provider." Mother responds that the court's two separate calculations—one for before July 2017 and one for after—demonstrate that the court properly determined the son's support.

Generally, children are entitled to receive child support until the age of eighteen. Md. Code (2014 Repl. Vol.), § 1-401(a)(1) of the General Provisions Article ("GP").[3] Even so, the court can order either parent to pay a child's health insurance coverage as part of the parent's child support obligation if: "(1) the parent can obtain health insurance coverage through an employer or any form of group health insurance coverage; and (2) the child can be included at a reasonable cost to the parent in that health insurance coverage." FL § 12-102(b).

Here, the trial court included those limitations in defining Father's obligation to pay for health insurance and extraordinary medical expenses:

> The Court finds it to be fair and reasonable to attribute the full costs of healthcare including extraordinary medical expenses to [Father]. [T]he Court finds the financial posture of the parties to be that [Father's] monthly actual income is approximately four times the [Mother's] monthly actual income.
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> **[Father] shall be responsible for maintaining health insurance coverage** for the children **for as long as is legally allowed and available by the insurance provider.** [Father] shall be responsible for 100% of all health insurance coverage

[3] There are exceptions, *see* GP § 1-401(b), including for children who are eighteen and still in secondary school. Because there was no evidence in the record that the eldest is still in secondary school, though, the exceptions do not apply.

and extraordinary medical expenses . . . .

(Emphasis added.)

"There is a strong presumption that trial judges know the law," *Taylor v. State*, 236 Md. App. 397, 414 (2018), and the language of the court's order tracks the statute closely. Once again, this is an above-Guidelines case. The court had the discretion to order Father to pay for all three children's health insurance for as long as § 12-102(b) allows, and given the parties' relative incomes, we see no abuse of that discretion in the court's decisions relating to health insurance and costs.

D. The Trial Court Was Not Required To Find The Children Were Attending A Private High School To Meet An Educational Need.

Fourth, Father argues that the court's order that he pay 50% of the private school tuition and expenses "was without legal or evidentiary basis." He relies on *Witt v. Restanio*, and asserts that there was no evidence before the court demonstrating that the children were attending private high school to meet an educational need. 118 Md. App. 155 (1997). This is a curious argument because, as the circuit court found, "[b]oth parents prefer the Catholic school training the children have been receiving," neither Father nor Mother sought anything other than a 50/50 split of the cost of tuition and extra-curricular activities, and that "based upon an oral agreement the parties made together," they split the cost of the children's tuition and extra-curricular activities. Father also testified in so many words that he did not object to paying half of the children's high school tuition.

Because the court relied on the parties' apparent, if grudging, agreement that they did and should continue to attend private school, it didn't need find that they *needed* to

attend private school to address this expense. Instead, the court found that "the children have been attending private Catholic school, and that the children are entitled to continue to enjoy that particular educational setting to which they have become accustomed." Same for their participation on sports teams. ("[T]he children are entitled to continue to enjoy those forms of recreation.") There was no dispute on these points, and no dispute that the parties could and would split the costs evenly.[4]

E. The Trial Court Properly Considered The Financial Status And Needs Of The Parties In Awarding Attorneys' Fees.

Finally, Father cites *Reichert v. Hornbeck*, 210 Md. App. 282, 369 (2013), FL § 7-107(c) and FL § 12-203(b), and argues that the attorneys' fees award in Mother's favor should be vacated because it was "arbitrary and clearly wrong." He contends that the trial court did not consider the factors listed in FL § 12-103(b): (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding. He's correct that "[c]onsideration of the statutory criteria is mandatory in making [an attorneys' fees] award and failure to do so constitutes legal error." *Petrini*, 336 Md. at 468 (1994)). Once again, though, he's wrong about the record: the court did consider the statutory factors:

[4] Even if we were to take up Father's arguments, we disagree that the trial court erred in requiring Father to pay for half of the children's tuition and extra-curriculars because the *Witt* factors are "non-exhaustive" and need not be listed expressly. 118 Md. App. at 169–70; *see Ruiz v. Kinoshita*, 239 Md. App. 395, 430–31 (2018) (despite not stating the *Witt* factors explicitly, the record reflected that the trial court "heard evidence and considered several relevant factors relating to the children's enrollment in private school—most notably the parents' consent agreement to continue with private school and their ability to pay").

> The financial status of each party has already been analyzed *supra*, with [Father's] monthly actual income as approximately four times [Mother] monthly actual income. [Father's] unilateral withholding of child support prompted [Mother] to file a Contempt Petition to enforce the child support decree and recover child support arrearage. Additionally, with the children's expenses increasing and [Mother] no longer receiving alimony since the last time child support was calculated, and with new knowledge of [Father] selling Evack, Inc.'s assets for profit, [Mother] had substantial justification in seeking an increased modification. Finally, [Father] unreasonably and without substantial justification withheld child support funds, which he could afford, and pursued a downward modification with the premise that he has $0 income per month, which the Court finds neither credible nor argued in good faith.

The circuit court readily could find on this record that Father had substantially greater financial resources, that Mother needed legal counsel (even though she is a family law attorney herself), and that Father's litigation positions weren't substantially justified. Father's complicated and, one might say, unconventional finances required time, discovery, and expertise to untangle, and the court found his positions dubious, if not outright misleading. We cannot say that the court erred in requiring Father to contribute to Mother's attorneys' fees and costs, both in the trial court and on appeal.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.