Circuit Court for Montgomery County
Case No.: Family No. 90580

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1835

September Term, 2016

DANIEL SETH BERGER

v.

SHARI HOOKMAN BERGER

Kehoe,
Leahy,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 17, 2018

This case arises from a motion to modify or terminate alimony, to modify child support, and for other relief, filed in the Circuit Court for Montgomery County. Appellant Daniel S. Berger claimed his change in employment, as well as the employment of appellee Shari Hookman Berger and change in custody arrangement, constituted a material change in circumstances necessitating an adjustment of the child support and alimony awards. A two-day hearing was held on appellant's motion. On October 11, 2016, the court issued a Memorandum Opinion and Order denying the motion and ordering him to pay $29,000 towards appellee's attorney's fees.

Appellant presents the following questions for review:

1. Whether the circuit court erred and/or abused its discretion in determining that Appellant is voluntarily impoverished and imputing annual income to him of $240,000.
2. Whether the circuit court erred and/or abused its discretion in denying appellant's motion to modify alimony.
3. Whether the circuit court erred and/or abused its discretion in denying appellant's motion to modify child support.
4. Whether the circuit court erred and/or abused its discretion in ordering appellant to pay $29,000 towards appellee's attorney's fees.

For the reasons set forth below, we shall answer these questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

Appellant, Daniel S. Berger, and appellee, Shari Hookman Berger, were married on October 17, 1998. Two children were born of the marriage. At the time of their divorce,

appellant was working for XL Marketing Corp., a.k.a. Caivis Acquisition Corp. ("XL Marketing"), as general counsel. Appellee was a full-time homemaker.

On November 30, 2011, the parties entered into a Voluntary Separation and Property Settlement Agreement (the "Agreement"), which was incorporated, but not merged, into their Judgment of Absolute Divorce. The Agreement provides:

> 4.2 Monthly Child Support…[U]ntil further agreement by the parties in writing or Order of Court, [appellant] shall pay [appellee] the sum of $2,750 per month as and for child support for the two minor children of the parties.
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> …
>
> 4.4 Educational Expenses. [Son] is currently enrolled in a private specialized school due to his learning disability. For so long as the parties mutually agree that [Son] shall attend private school, [appellant] shall be solely responsible for the timely payment of all fees and expenses associated with [son's] enrollment in private school; including, but not limited to, tuition, books, mandatory fees and assessments, and any charges assessed by the school for transportation. If the parties mutually agree that [Daughter] shall be enrolled in private school, then [appellant] shall be solely responsible for the timely payment of all fees and expenses associated with [Daughter's] enrollment in private school; including, but not limited to, tuition, books, mandatory fees and assessments, and any charges assessed by the school for transportation.
>
> [Appellant] and his family have contributed to a 529 Account for each of the children. If the children attend college or incur other educational expenses that can be paid out of the 529 Accounts the funds in the 529 Accounts shall be used for the same. [Appellant] shall only use the 529 Accounts for the children's college education or any other permissible expense under applicable Internal Revenue Service regulations; provided, however, if the accounts are not depleted as a result of the children's college expenses, any remaining balance shall be distributed to the account holder.
>
> 4.5 Extracurricular Activities and Summer Camp. [Appellant] shall be solely responsible for and timely pay all expenses associated with the mutually agreed upon children's extracurricular activities and summer camps; including any required equipment or materials. In the even that [appellee] advances any costs and expenses in direct connection with a mutually agreed upon expense for summer camp or extracurricular activities, [appellant] shall reimburse her within five (5) days of presentation of invoices for the costs plus payment receipts or check copies for the same.

...

> 6.1 Alimony and Spousal Support. [Appellant] shall pay [appellee] the following payments as Alimony and Spousal Support:
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> …
>
> (a) [Appellant] shall pay unto [appellee] for the support and maintenance of [appellee], as and for alimony…for the calendar years 2012 and 2013,…($8,250) per month…
>
> (b) Beginning on the 1st day of January, 2014, and for the calendar years 2014 and 2015, [appellant] shall pay unto [appellee] for the support and maintenance of [appellee], as and for alimony…($7,250) per month. Said sum shall continue to be paid by [appellant] to [appellee] until modified by agreement of the parties or until entry of an Order of Court that modifies same.
>
> (c) The parties agree that the alimony and child support agreed upon herein shall not be subject to modification by any Court at any time, for any reason, except as provided in this Agreement, accounting from November 1, 2011 through December 31, 2015. The parties agree that the alimony agreed upon herein shall be subject to modification accounting from December 31, 2015.
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> …
>
> (ii) After December 31, 2015, either party may seek to modify or terminate child support and/or alimony in accordance with the laws of the State of Maryland.
>
> …

The Agreement further provided that appellee had primary physical custody of the parties' children, and that appellant would have regular visitation with them five days out of every two weeks. It also provided that appellee have exclusive use and possession of the martial home until December 31, 2015, at which time the home would be listed for sale within 30 days.

On December 2, 2015, appellant filed a motion to modify child support and alimony,[1] alleging several material changes in circumstance had occurred. Specifically, he noted: (1) he had resigned from his position with XL Marketing in 2013 when they requested he move to New York City, and therefore his income had decreased; (2) appellee had begun working, and therefore her income had increased; (3) the marital home, in which appellee had been living, was sold, and therefore her monthly needs would be changing; and finally, (4) that in November of 2014, the parties, by agreement, changed the physical custody arrangement, whereby the parties shared custody of the children on a 50/50 basis, and, given that he and appellee now shared physical custody of the children, his expenses for the children had increased. He also requested an award of attorney's fees.

Both parties, as well as appellant's accountant, testified at the hearing. On October 17, 2016, the circuit court found that although there had been a material change in circumstances, appellant had voluntarily impoverished himself, and therefore valued his earning capacity at $240,000 for a determination of child support and alimony. The court thereafter determined that it was appropriate to keep the agreed upon child and spousal support the same. The court further found that, under both the Agreement and Md. Code Ann., FL §§ 8-214 and 11-110, appellant should pay $29,000 in attorney's fees.

We shall include additional detail in the following discussion as it becomes relevant.

[1] Appellant originally argued the alleged changes in circumstance necessitated a termination of spousal and child support. However, during oral argument, he withdrew his request for termination and moved only for modification.

DISCUSSION

I. The circuit court did not err in finding appellant was voluntarily impoverished and in finding an annual income of $240,000.

Voluntary impoverishment is a parent's "free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources.'" *Long v. Long*, 141 Md. App. 341, 350-51 (2001) (quoting *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993)); *see also Digges v. Digges*, 126 Md. App. 361, 381 (1999) (internal citations omitted). "The intent in question is whether the parent or spouse intentionally became impoverished, for any reason, as opposed to whether the parent or spouse became impoverished with the intent of avoiding support payments." *Long*, 141 Md. App. at 351 (citing *Wills v. Jones*, 340 Md. 480, 494-95 (1995)).

While alimony and child support are separate issues, "[m]ost, if not all, of the voluntary impoverishment factors will be relevant to alimony under FL § 11-106(b)(1) and (b)(2), and so a finding of voluntary impoverishment would ordinarily entail a finding, for purposes of alimony, that the impoverished party *could* support him or herself, but *chooses* not to." *Reynolds v. Reynolds*, 216 Md. App. 205, 220 (2014) (emphasis in original). '"A trial court's factual findings on the issue of voluntary impoverishment of a parent, for child support [or alimony] purposes, are reviewed under a clearly erroneous standard, and the court's ultimate rulings are reviewed under an abuse of discretion standard," *Sieglein v. Schmidt*, 224 Md. App. 222, 249 (2015) (citing *Long*, 141 Md. App. at 351–52). Therefore, the court's findings will not be overturned "if there is competent or material evidence in

the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) (internal citations omitted).

In the case at bar, the court held a two-day hearing, during which both parties and appellant's accountant testified and introduced evidence. The court, in its written opinion, made lengthy findings regarding appellant's current financial situation, and whether he was voluntarily impoverished. The court began by noting:

> The Defendant is currently forty-nine (49) years old and healthy. In 1994, Defendant received his law degree from New York University and his MBA from the Stern School. In 2003, Defendant began to work as a general consultant. From 2008 to 2014, the Defendant was employed with Excel working in business development and as the General Counsel. Defendant left the company because he was asked to move to New York. According to Defendant, staying in Washington D.C. would have meant a demotion resulting in a $10,000 reduction in monthly salary. During Defendant's time at [XL Marketing], Defendant was earning $240,000 per year and working full time.
>
> Defendant is currently employed by Outside GC, LLC. His hours are consistent with part-time work at about 20-30 hours a week.
>
> …
>
> He testified that he only works 20-30 hours per week so he can spend time with his children. However, the only testimony regarding his activities with the children was driving them to and from school and being at home with them after school. Defendant did not present any evidence that he is looking for any other work currently or has made any effort toward client development. Defendant stated that he was unwilling to work in Washington D.C. due to the commute. Additionally, he testified that the last time he applied for employment was 2015….

The court then listed the factors to consider in determining whether appellant had voluntarily impoverished himself, as found in *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993) and FL § 11-106:

> (1) his or her current physical condition;
> (2) his or her respective level of education;

(3) the timing of any change in employment or financial circumstances relative to the divorce proceedings;
(4) the relationship of the parties prior to the divorce proceedings;
(5) his or her efforts to find and retain employment;
(6) his or her efforts to secure retraining if that is needed;
(7) whether he or she has ever withheld support;
(8) his or her past work history;
(9) the area in which the parties live and the status of the job market there; and
(10) any other considerations presented by either party.

Applying those factors to the instant case, the court held:

> First, the Defendant is in good health and physical condition. Second, the Defendant is highly educated with both a JD and an MBA from a top university. Third, the timing of the change in employment was a few years after the divorce, but prior to triggering of the clause which allowed for the parties to revisit the amount of alimony and child support per the agreement. This appears to be a mere coincidence, as this was when the Defendant was requested to move to New York City, by his employer or take a pay cut. Defendant opted to do neither and currently makes $130,000 per year, more than $100,000 less than he made at the time of the divorce.
>
> Fourth, prior to the divorce proceedings, the Plaintiff was a full-time homemaker, while the Defendant was the sole income earner. The Plaintiff was the primary caretaker of the children. This division of labor was mutually decided by the parties.
>
> Fifth, the Defendant did not offer much evidence concerning his job search. He stated that his job search was unsuccessful in 2015 and that he had been working as an outside consultant until taking his current position. When asked whether he intended to seek full time or supplemental employment elsewhere, the Defendant responded he did not intend to do either. Defendant stated that his current hours have been slightly reduced due to the loss of a client; he did not testify regarding any efforts he has made to find new clients. The Defendant also testified that many of his client's bill at a discount, ultimately meaning less take home income for him. Sixth, the Defendant did not mention any continuing education or retraining, especially in connection with his law license.
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> Seventh, neither party testified or offered evidence that the Defendant has ever withheld support. Eighth, the Defendant's past work history was discussed above. Defendant has exhibited an ability to earn $240,000 a year, working full time. However, Defendant is earning about $130,000 in gross wages from his current employment, likely less as he has lost a client and

will be able to bill fewer hours. Defendant is also not currently billing clients at his full hourly rate. Ninth, both parties live in the Bethesda area, an affluent part of Montgomery County, Maryland. Although, Defendant lives within commutable distance to Washington, D.C. where legal jobs and law firms are more plentiful, he testified that he is unwilling to work in the city. Neither party offered testimony regarding the current job market; however, Defendant did testify he had difficulty finding work during his search in 2015, more than a year ago.

Tenth, Plaintiff argues that Defendant is comfortable in his current circumstance due to his outside sources of income. Defendant was unable to counter that sentiment with any testimony. He neither offered testimony or evidence concerning a plan to seek other employment or client development nor offered testimony or evidence establishing a difference in monthly passive income expended whether unemployed or employed. Also noted by Plaintiff was the Defendant choosing to stay home and carpool the children. While it is clear from Plaintiff's testimony that her lifestyle has changed, the same cannot be said of the Defendant. Defendant has elected to stay home in the afternoons with the children, which is admirable, but largely unnecessary, due to the likely independence and age of the children, 13 and 15 respectively. It is probable that they are completing homework or spending time with friends. Despite earned income, it seems from the evidence that Defendant's lifestyle really has not changed since his change in employment or the change in physical custody.

Although doing nothing to increase his employment income, Defendant seeks to use his lowered income as a basis to decrease both spousal and child support. White it is clear that the Defendant is underemployed based upon the above mentioned factors, whether this is a free and conscious choice must be determined. *Will v. Jones*, 340 Md. 480, 490 (1995). Defendant appears complacent and quite frankly, content in his current job situation, with no client outreach, and failing to use his time when he does not have his children to bill more hours, seek other employment, or develop business in any way. He offered no evidence or testimony regarding any efforts he has made to increase his income as would seem necessary for someone who is truly living as a deficit, as Defendant contends. To the contrary, he testified his last job search occurred in 2015 and he does not plan on working a 40 hour week. Defendant is healthy, highly educated and skilled, and woefully underemployed by choice. The Court finds that he is consciously in this position and as such he is voluntarily impoverished. In light of Defendant's voluntary impoverishment, Defendant's earning capacity shall be valued at his past position of $240,000 for child support purposes.

Appellant argues that several of the court's factual findings on which it based its determination were clearly erroneous. Specifically, he argues that the court's determination that it was "admirable, but largely unnecessary" for appellant to be home with the children in the afternoons was in error, and that "there was no evidence to support the [c]ourt's determination that at the time of the hearing Mr. Berger could obtain employment at an annual salary of $240,000," or any of the court's factual findings regarding his job search, hourly rate, or work-load, and must therefore be reversed.

Appellee, conversely, argues the record supports the court's conclusion that appellant was voluntarily impoverished. She contends the court, under *Goldberger*, rightly focused on whether appellant intentionally decided not to work full-time following his departure from XL Marketing, not whether he intentionally resigned to avoid support payments. She also argues that the parties' agreement changing the physical custody arrangement, did not change his support obligations, citing *Petitto v. Petitto*, 147 Md. App. 280, 303 (2002) (internal citations omitted), for the proposition that "[p]arents cannot waive or bargain away appropriate child support." Finally, she contends the court did not err in imputing a $240,000 earning capability to appellant given his testimony.

We find the court was not clearly erroneous in holding appellant had made the "free and conscious choice, not compelled by factors beyond his or her control" to earn much less than he had been. During cross, appellant explained the circumstances of his resignation from XL Marketing:

> [Appellee's attorney]: Okay. So we're clear you don't deny that you voluntarily left your employment at XL. Correct?

[Appellant]: I left my employment because I didn't want to change my job and didn't want to move to New York. Yes.

[Appellee's attorney]: Okay. That was a voluntary decision on your part?

[Appellant]: Yes.

[Appellee's attorney]: All right. And at the time you made that decision, you knew you had a support obligation to your wife and your minor children. Correct?

[Appellant]: Yes.

…

[Appellee's attorney]: So let's back up then because you said that one of the reasons you left XL was because you had to move to New York?

[Appellant]: Yes.

[Appellee's attorney]: And did they actually ask –

[Appellant]: Or change my job or said or suffer a demotion.

[Appellee's attorney]: Okay. Were you given an option?

[Appellant]: Yes.

[Appellee's attorney]: All right. Well, what would the demotion have been?

[Appellant]: Work in the D.C. office supporting my CEO and certain other investment funds that he works for for $10,000 [less] a month.

[Appellee's attorney]: So $120,000?

[Appellant]: Yes.

When asked whether he would be willing to work full-time, appellant said he would not because he "couldn't work full-time and make the obligations meet with the kids." He further testified that, although he had applied to "15 to 20 jobs," he would not be willing

to look for a position in Washington, D.C. because he was unwilling to make the commute from Montgomery County.

Appellant nevertheless argues that this case is similar to *Malin v. Mininberg*, 153 Md. App. 358 (2003), in which this Court held the trial court erred in finding the husband voluntarily impoverished when he left medicine to pursue a degree in business. In *Malin* we held, because husband had long suffered with substance abuse and had subsequently been imprisoned for prescription fraud, we would not fault him "for making a reasoned decision to extricate himself from a career in medicine, because the pressures of such work, coupled with the access to drugs that it affords, make the career detrimental to his health." *Id.* at 403. We further found that it would not be in the child's best interest "for the court to place his father in a situation that might increase the prospect of relapse." *Id.* at 404. Moreover, we found the court had further erred by failing to make any determination at all as to father's potential income in its calculation of support. *Id.* at 407.

Clearly *Malin* is inapposite to the case *sub judice*. Appellant in the instance case has chosen to render himself under-employed in order to be at home more, not because of a health or other disabling concern. The court, further, found that it was "largely unnecessary" for appellant to stay home with the children, given their ages and testimony that the children can and have been left home alone. "A parent is not excused from support because of a tolerance of or a desire for a frugal lifestyle." *Malin*, 153 Md. App. at 395 (internal citation and quotations omitted). "Indeed, the law requires a parent to alter his or

her…lifestyle if necessary to enable the parent to meet his or her support obligation." *Id.* at 395-96 (citing *Goldberger*, 96 Md. App. at 327 (internal quotations omitted)).

On review, we 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). Here, it was not clearly erroneous for the court to find appellant's choice to resign from his position and not seek comparable employment was a "free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources,'" *Long*, 141 Md. App. at 350-51 (quoting *Goldberger*, 96 Md. App. at 327), and, therefore, that he had voluntarily impoverished himself.

Nor was the court clearly erroneous in attributing a $240,000 per annum salary to appellant. "Once the court concludes that a parent or spouse is voluntarily impoverished, the court must ascertain that person's potential income." *Long*, 141 Md. App. at 351-52 (internal citations omitted); *see also Sieglein*, 224 Md. App. at 247-49 (internal citations omitted). "The legislature's purpose in including potential income was to implement state and federal policy of requiring adequate support by precluding parents from avoiding their obligation by deliberately not earning what they could earn." *Goldberger*, 96 Md. App. at 325 (internal citations omitted). Some of the factors the court should consider in determining the amount of potential income include:

1. age

2. mental and physical condition

3. assets

4. educational background, special training or skills

5. prior earnings

6. efforts to find and retain employment

7. the status of the job market in the area where the parent lives

8. actual income from any source

9. any other factor bearing on the parent's ability to obtain funds for child support.

Id. at 327-28. "[A] parent's potential income 'is not the type of fact which is capable of being 'verified,' through documentation or otherwise.'" *Malin*, 153 Md. App. at 406 (internal citations omitted). "Indeed, any determination of potential income must necessarily involve a degree of speculation." *Id.* at 407 (internal citations and quotations omitted). "As long as the court's factual findings are not clearly erroneous, the amount calculated is realistic, and the figure is not so unreasonably high or low as to amount to abuse of discretion, the court's ruling may not be disturbed." *Id.* (internal citations and quotation omitted).

On cross-examination, the following exchange occurred:

> [Appellee's attorney]: Okay, so, all right. And just so I'm, so I'm clear, what was your, the amount that you earned at [XL Marketing] right before your departure?
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> [Appellant]: I think it's in the 225, 230 range. I don't, I believe there may have been some additional monies added on top of that because of healthcare or expense reimbursements or other benefits. I don't [know] what you call them, but it may have taken the W-2 number up to 235 or 240, but I think my salary was 225, I can't be sure.

> [Appellee's attorney]: Well, I can show your answers to interrogatories. When you said 245 –
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> [Appellant]: Okay.
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> [Appellee's attorney]: - and my employer paid 50 percent of my health insurance.
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> [Appellant]: Okay.
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> [Appellee's attorney]: Okay, so was the 245 including the 50 percent health insurance, or is 245 plus 50 percent?
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> [Appellant]: I don't know.

In our view, there was not, as appellant contends, "a complete absence of any evidence" as to his ability to earn $240,000, nor is that figure clearly erroneous, unrealistic, or unreasonably high. By his own admission he was earning somewhere around that amount prior to his resignation from XL Marketing. The court, having already considered the other *Goldberg* factors elsewhere in the opinion, was well aware of them. A "mere lack of an explicit discussion of each of the factors on the record by the trial court does not necessarily mean that the trial court erred in concluding that [appellee] was voluntarily impoverished." *Long*, 141 Md. App. at 351.

We therefore find the court did not err in finding appellant voluntarily impoverished and attributing a potential income of $240,000, as there was credible evidence in the record. The court's findings were not clearly erroneous or an abuse of discretion.

II. The circuit court did not err in denying appellant's motion to modify alimony.

Maryland Code, Family Law Article § 11-107(b) states that "[s]ubject to § 8-103[2] of this article and on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require." "A party requesting modification of an alimony award must demonstrate through evidence presented to the trial court that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification." *Langston v. Langston*, 366 Md. 490, 516 (2001), *abrogated in part on other grounds, Bienkowski v. Brooks*, 386 Md. 516 (2005); *see also Baer v. Baer*, 128 Md. App. 469, 484 (1999).

"In considering a petition for modification, a trial court has discretion to determine the extent and amount of alimony, *see Levin v. Levin*, 60 Md. App. 325, 336 [ ] (1984), and must consider specific factors in exercising its discretion." *Baer*, 128 Md. App. at 484 (1999) (citing Md. Code § 11-106 of the Family Law Article.). Section 11-106(b) lists "all the factors" a court is required to consider for "a fair and equitable award, including:"

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
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> (3) the standard of living that the parties established during their marriage;

[2] Section 8-103 provides exceptions to the court's power under § 11-107 to extend or modify alimony payments where there is either an express waiver of alimony or a stipulation against extending or modifying alimony.

(4) the duration of their marriage;

(5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(6) the circumstances that contributed to the estrangement of the parties;

(7) the age of each party;

(8) the physical and mental condition of each party;

(9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;

(10) any agreement between the parties;

(11) the financial needs and financial resources of each party, including:

i. all income and assets, including property that does not produce income;

ii. any award made under §§ 8-205 and 8-208 of this article;

iii. the nature and amount of the financial obligations of each party; and

iv. the right of each party to receive retirement benefits; and

(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Md. Code, F.L. § 11-106(b).

"An alimony award will not be disturbed on appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Tracey v. Tracey*, 328 Md. 380, 385 (1992) (internal citations omitted). "This standard implies that appellate courts will accord great deference to the findings and judgments of trial judges,

sitting in their equitable capacity, when conducting divorce proceedings." *Id.* (internal citations omitted). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley*, 109 Md. App. at 628 (internal citations omitted).

Appellant again asserts several erroneous factual findings of the court warrant reversal. He first contends the circuit court incorrectly found the parties' agreement provided for indefinite alimony. He also argues that the court erred in failing to properly analyze the amount of alimony needed according to the factors found in F.L. § 11-106(b). Further, he argues, beside the court's incorrect determination of voluntary impoverishment, his monthly withdrawals from his various assets should not count as income for purposes of determining alimony. Appellee, conversely, argues the court properly determined that a reduction in alimony was not appropriate, and contends there was sufficient evidence to support the court's factual findings.

The court below found:

> During Defendant's time at [XL Marketing], Defendant was earning $240,000 per year and working full time.
>
> Defendant is currently employed by Outside GC, LLC. His hours are consistent with part-time work at about 20-30 hours a week. Post-divorce, the Defendant was living in an apartment, but has since purchased a house with a secured mortgage in June of 2012. The Defendant stated he pays only interest on the mortgage and he has not begun to pay much toward principal.
>
> …
>
> Defendant's current financial statement, which per his admittance has left multiple assets out, states that he is currently worth between $3.2 million

to $3.3 million, despite his earning less per month at his current position.[3] (Defendant's Exhibit #3). The Defendant receives distributions from his family's Limited Partnership, the Mandall Investment Limited Partnership (hereinafter "MILP"). He acknowledged that these distributions were not reflected on his financial statement. Defendant testified that at the time of the divorce his net worth was about $3.4 million. (Defendant's Exhibit #7). From the end of 2011 to March of 2016, the distributions averaged $28,572.60 for a total of 16 distributions during that time period. (Defendant's Exhibit #6). Defendant is able to take part in a beach house through MILP. The only expense associated with the beach house is $150 to clean the home after use.

Defendant has stated that he is currently living at a deficit, which his financial statement supports; however, his bank statements do not. While Defendant's financial statement indicates he is spending at a $12,000 monthly deficit, his other income streams appear more than sufficient to make up the difference and he uses them accordingly. Defendant testified he receives monthly distributions (passive income) from his investments which amount to approximately $10,000 per month. The Defendant did not provide any evidence that he has accumulated any debt, nor any evidence of an inability to pay his current alimony, child support, tuition, etc. Defendant's current bank statement does not show him operating at a deficit. (Defendant's Exhibit [#]2). The Defendant's monthly expenses for the children have only increased $242.54, since 2011. (Plaintiff's Exhibit [#]7). What has changed is that the children's trust were paying for $4,966.67 per month of the children's expenses in 2011. (Plaintiff's Exhibit [#]7).

…

Currently, tuition [for the children] amounts to $44,000 annually. During the marriage, the Plaintiff's parents paid for [son's] tuition. The Defendant stated that the funding for the children's 2010 and 2011 tuition and activities was derived from a substantial inheritance that was placed into trusts for each of the children. To date, [son's] trust fund has been expended and [daughter's] is on the verge. Therefore, based upon the Agreement, Defendant bears the brunt of paying the tuition as well as the camp fees. Both parties indicated that they were pleased with [son's] current private school…Defendant did not allege an inability to pay the tuition…

Defendant, in his testimony, admitted that his financial statement was not a complete picture of all the investments he has and the distributions he

[3] The court added in a footnote: "Defendant also owns stock in [XL Marketing]. While it was not valued for this proceeding, at the time of the divorce, it was valued at $750,000. Neither this asset nor the MILP asset has been factored into Defendant's current net worth."

receives. Therefore, the Court has no choice but to estimate his income. To calculate the Defendant's income for child support and alimony purposes, the Court looks first to his base employment income of $10,847. (Defendant's Exhibit #3). Next, the Court factors in his other net income from distributions, which is $8,261 per month. (Defendant's Exhibit #3). Defendant testified he received monthly distributions of $10,000.[4] Therefore, the gross income from these distributions actually amounts to $10,574.08, based on the testimony. Distributions from MILP have not been consistent; however, some value must be added on as he is receiving income from the partnership. Conservatively over 52, he earned $8,792 a month from the Partnership. (Defendant's Exhibit #6). This places his gross monthly income at $30,312.08.[5] This will clearly fluctuate, but it is a fair working average based upon the evidence and testimony presented by the Defendant. This does not account for any other investments testified to by the Defendant that were not given a current value by either party.

The Plaintiff

Plaintiff provided undisputed testimony that her gross monthly wages amount to $3,479.20. Plaintiff testified that she was a homemaker during the marriage. After the divorce, she attended cosmetology school by taking out student loans for which she is still making payments. Plaintiff now works as a contractual cosmetologist and works approximately 40 hours per week.

Plaintiff testified that one of her positions was through a phone app called Style Me Bar, which gives her the ability to pick up more jobs. Plaintiff also works 20-30 hours per week at the Fox Network. In order to work these hours Plaintiff testified that she has paid individuals or relied on friends and family to pick up the children from school or their after school activities. She indicated that she leaves the children at home, generally on Saturdays, so that she can go to work. Also in aid of her full time schedule, a housekeeper comes twice a week at a cost of $500 per month. Plaintiff stated that this one luxury allows her to work the schedule that she does. Due

[4] The court added in a footnote: "In fact, Defendant testified that he took a monthly distribution of $10,000 both when he was unemployed and since he has been employed. The $8,261 additional income reflects the monthly distribution reported on his financial statement. Therefore, the gross monthly distribution is more likely $10,574.08. However, Defendant acknowledged this amount was assuming a 28% tax rate, which may or may not be accurate.

[5] The Court added in a footnote: "The amount utilized in the child support calculation was $20,000 base pay, as discussed below. Therefore, Defendant's income was calculated to be $37,803.

> to her late start at employment, Plaintiff has no retirement in contrast to the Defendant who has $142,357 in retirement; furthermore the only savings Plaintiff has is $103,605 in her bank account, the proceeds from the sale of the marital home. (Defendant's Exhibit #11).
>
> …
>
> Factoring in child support, Plaintiff is also living at a deficit of $2,870.63. Since the divorce, Plaintiff has significantly cut her own expenses as well as the expenses of the children. In 2011, Plaintiff's total monthly expenses were $19,421.96, with $11,684.42 amounting to the children's expenses. (Defendant's Exhibit 12). According to her current financial statement, Plaintiff's monthly expenses are $12,848.10 with $5,945.03 amounting to the children's expenses.[6] However, she did acknowledge that she borrowed much of the information for her current financial statement from her 2011 financial statement, resulting in potential misinformation. Contrary to Defendant, it is clear Plaintiff has significantly changed her lifestyle. She does not live beyond her means.

Regarding the alimony support's time limit, the parties' agreement states the decreased sum "shall continue to be paid by [appellant] to [appellee] until modified by agreement of the parties or until entry of an Order of Court that modifies same" or upon the marriage of the wife, death of the wife, or death of the husband. "[E]ither party *may* seek to modify or terminate child support and or/alimony in accordance with the laws of the State of Maryland." Despite appellant's contention otherwise, then, the court correctly noted that because "[a] definitive end date was not negotiated at the time of the agreement…it was foreseeable in 2011 that the spousal support would be ongoing indefinitely."

Regardless of the length of the support, however, taking the court's opinion as a whole, and considering the testimony and evidence presented, the court properly analyzed

[6] The court added in a footnote: "Plaintiff testified that she paid off the credit card debt listed on her Financial Statement."

the F.L. § 11-106(b) factors in determining a modification was not warranted. The court began the opinion by describing the parties, their ages and physical and mental conditions, the length of their marriage, their respective roles during the marriage, the separation agreement between the parties, and, in great detail, the total financial needs and resources of each party, including "[a]ll income and assets, including property that does not produce income." The court also detailed the parties' relative expenses, finding appellee had experienced "an increase in some expenses, including expenses for the children for which [appellant] is unwilling to pay." As noted above, the court found appellant was voluntarily impoverished and imputed a salary of $20,000 a month.

The court acknowledged appellee's standard of living had changed, including "being able to pay for vacations, as well as borrowing money from her parents to cover her attorney's fees," while appellant's had not. The court further found "[w]hile [appellant's] financial statement exhibits a deficit, the testimony and evidence taken as a whole shows the [appellant] is consciously underemployed and has elected to compensate for the underemployment by drawing on his other significant resources," but that he had not established an inability to pay. "Based upon [appellee's] financial statement and testimony," however, the court found she "is far from becoming financially independent for herself and for the children."

The court further noted that the agreed upon reduction in alimony "presumably contemplated [appellee's] finishing school and beginning employment after more than ten

years out of the workforce."[7] Finally, the court acknowledged and was obviously familiar with the parties' separation agreement, which provides further information regarding the parties' standard of living at the time of their marriage and their separation.

"[T]he court is not required to use a formal checklist, [but] the court must demonstrate consideration of all necessary factors." *Simonds v. Simonds*, 165 Md. App. 591, 604-05 (2005) (internal citation and quotation omitted). The court in this case has done so. Moreover, all of the factual findings of the court are supported by "competent [and] material evidence in the record."[8] We 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 thrust of appellant's argument, then, is with the court's determination of his income. We have already held the court was not clearly erroneous in finding appellant was voluntarily impoverished, and had a potential employment income of $20,000 monthly, which could have been used to determine appellant's alimony payments. *See Long*, 141 Md. App. at 351; *Colburn v. Colburn*, 15 Md. App. 503, 510-11 (1972).

[7] Appellant takes issue with this presumption of the court, and argues that the correct logical presumption would be that "the parties contemplated that modification of alimony, as a result of Ms. Berger's employment or otherwise, might be appropriate by December 31, 2015." Nevertheless, given appellee's ability to seek education to reenter the workforce is a factor under F.L. § 11-106(b), we find the court's presumption was not clear error.

[8] Appellant also takes issue with the court's finding that he "left multiple assets out" of his financial statement. However, the court accepted appellant's contention of his overall net worth, so the error, if any, was harmless.

Appellant asserts, further, the court included the distributions from MILP as income in error. The court found, "assuming a 28% tax rate," his gross monthly income was $30,213.08 by adding $10,847 in base employment income, with the gross income from his distributions of $10,574.08 and the $8,792 in average distribution from MILP.[9] However, F.L. § 11-106(b) allows courts to consider non-income producing assets in their determination of alimony support, which appellant admits.

Appellant, nevertheless, contends these funds were "double counted" by the court in its determination of his monthly income. He argues that, "[t]he distributions Mr. Berger receives from MILP are directed predominantly to Mr. Berger's financial advisors," and that "[w]hen Mr. Berger draws on his assets each month, therefore, the assets being drawn upon include distributions received from MILP." Therefore, he argues, these funds are double counted. Regardless of what appellant chooses to do with the funds once he has received them, they are, nonetheless, available to appellant in addition to the $10,000 for appellant's use, and not distributed solely for the payment of business expenses associated with the partnership or otherwise restricted in use. *See Walker v. Grow*, 170 Md. App. 255, 268-70 (2006). Therefore, we find the court did not err in attributing them to appellant separately as income.

The court's imputed monthly income of $30,312.08 sufficiently covers appellant's monthly expenses of $28,036, including payment of son's tuition. Using appellant's

[9] The court found appellant's monthly income to be $37,803 total, but subtracted the $7,250 in child support to determine alimony.

calculations of appellee's monthly income of $3,479, and expenses of $13,048.84, leaves her, by his own estimation, with a deficit of $9,569.84.

A court is not required to modify an award of alimony simply because of a finding of a material change in circumstances. The court, having been fully briefed on the current financial situation of both parties and having otherwise considered the F.L. § 11-106(b) factors, determined that a modification in alimony was not justified and that appellant had not established an inability not to pay, while appellee had established a need. *See Langston*, 366 Md. at 516 ("A party requesting modification of an alimony award must demonstrate through evidence presented to the trial court that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification."). It was not clearly erroneous or an abuse of discretion for the court to so find.

III. The circuit court did not err in denying appellant's motion to modify child support.

Maryland Code, Family Law Article § 12-104 provides:

> (a) The court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance.

"[A] court may modify an award of child support at any time if there has been shown a material change in circumstances that justif[ies] the action." *Guidash v. Tome*, 211 Md. App. 725, 740 (2013) (internal citations and quotations omitted). The change must be "relevant to the level of support a child is actually receiving or entitled to receive[,]" and "of a sufficient magnitude to justify judicial modification of the support order." *Petitto*, 147 Md. App at 307 (internal citations omitted).

"'[A] material change in circumstances may be based…on a change in…the parents' ability to provide support.'" *Leineweber v. Leineweber*, 220 Md. App. 50, 60 (2014) (quoting *Smith v. Freeman*, 149 Md. App. 1, 20–21 (2002)).

"Ultimately, [w]hether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Leineweber*, 220 Md. App. at 61 (2014) (citing *Ley v. Forman*, 144 Md. App. 658, 665 (2002) (internal citations omitted)). The award of child support, however, should be "reasonably calculated to maintain as nearly as possible the standard of living enjoyed by the child prior to the parent's divorce." *Petrini v. Petrini*, 336 Md. 453, 460 (1994). Section 12-204(b)(1) of the Maryland Code, Family Law Article states, in part, "if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income."

The court in the case *sub judice* began its analysis by noting it was required to not only determine if there had been a material change in circumstance, but also "what level of support the child is entitled to under the guidelines." The court then held:

> As a threshold matter, since the entry of the initial agreement a material change in circumstance has occurred. Both parties have changed employment and employment income; in the Plaintiff's case she went from being a full time homemaker to being employed. The marital home was sold, the custody agreement was voluntarily altered, Plaintiff has moved, and [son's] trust has run out with [daughter's] over 50% expended. Outside support no longer being available can be considered a material change in circumstance. *Petrini v. Petrini*, 336 Md. 453, 467 (1994).

As to the parties' expenses for the children, the court found:

> *The Defendant*

…

The Defendant did not provide…any evidence of an inability to pay his current alimony, child support, tuition, etc….The Defendant's monthly expenses for the children have only increased $242.54, since 2011. (Plaintiff's Exhibit 7). What has changed is that the children's trusts were paying for $4,966.67 per month of the children's expenses in 2011. (Plaintiff's Exhibit 7).

Contrary to Plaintiff, Defendant testified that he never uses outside assistance to transport the children to and from school and their activities. He testified that he only works 20-30 hours per week so he can spend time with his children. However, the only testimony regarding his activities with the children was driving them to and from school and being home with them after school….

Currently, tuition [for the children] amounts to $44,000 annually. During the marriage, the Plaintiff's parents paid for [son's] tuition. The Defendant stated that the funding for the children's 2010 and 2011 tuition and activities was derived from a substantial inheritance that was placed into trusts for each of the children. To date, [son's] trust fund has been expended and [daughter's] is on the verge. Therefore, based upon the Agreement, Defendant bears the brunt of paying the tuition as well as the camp fees. Both parties indicated that they were pleased with [son's] current private school…Defendant did not allege an inability to pay the tuition…

…

The Plaintiff

…

Plaintiff stated she has paid for an additional week of camp as well as extra tutoring when the Defendant was unwilling. Plaintiff also testified that she covered the fees for the children's cell phone bills, paid for their laptops, given the children allowance, and paid for their clothing. Per the agreement, Plaintiff pays for half of [son's] tutoring. Based upon Plaintiff's testimony and her long form financial statement, her monthly expenses for the children amount to $5,786.01. (Defendant's Exhibit 11).

Thereafter, finding appellant was voluntarily impoverished and attributing to him a potential income of $240,000, the court continued:

Based upon Defendant's monthly income, of greater than $15,000, this is an above the guidelines case. Md. Code Ann., Fam. Law § 12-204(e). "If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its

discretion in setting the amount of child support." Md. Court Ann., Fam. Law § 12-204(d). "The court may modify any provision of a deed, agreement, or settlement with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child." Md. Code Ann., Fam. Law § 8-103(a).

"[T]he court should presume…at least in the absence of compelling evidence to the contrary, that the decision or resolution reached agreeably by the parents is in the best interest of the child." *Kierein v. Kierein*, 115 Md. App. 448, 458 (1997). Per the parties' agreement, Defendant pays $2,750 per month in child support. Notably at the time of the entry of the agreement Defendant was aware that the trusts would not be an endless source of funds. In other words in agreeing to pay for the children's tuition, educational needs and other expenses, Defendant knew that at some point those payments would be from his income and not from the trusts. Defendant bargained for and had notice of the exhaustion of the trusts. This matter could have been litigated at the time of the divorce/custody agreement. As such, it could have and perhaps should have been addressed specifically in the agreement. "Any issue that was litigated or could have been litigated in the divorce proceeding may not be relitigated in a subsequent petition to modify the support. The basis of a petition to modify child support may only be an issue that was not and could not have been raised earlier, viz., a change in the circumstances of the parties." *Reese v. Huebschman*, 50 Md. App. 709, 711 [ ] (1982). Primarily the change in circumstance concerns the change in income of one or both parties. *Id.* This is the essence of Defendant's argument that his reduction in earned income warrants a change in both alimony and support.

However, while Defendant's earned income has decreased, his other incomes have made up the difference. In fact, Defendant's net worth has basically remained steady at between $3.1 and $3.3 million. Defendant appears comfortable working less and earning less, as his lifestyle has not seemed to change.[10] While Plaintiff is now earning an income, a material change from 2011, this was clearly contemplated in the agreement as there was a built in decrease in spousal support. Although Plaintiff no longer pays the mortgage on the marital home, she is now responsible for paying for an apartment in the Bethesda school district and other costs associated with the children.

In above the guidelines cases, rather than only consider the guidelines, Courts look to "the best interests and needs of the child with the parents'

[10] The court added in a footnote: "Defendant testified that he no longer belongs to Woodmont Country Club as a result of his decrease in income. However, contrary to Plaintiff, Defendant has been able to purchase a new home and pay for [daughter's] bat mitzvah (utilizing her trust) in its entirety, to name a few significant expenditures."

> financial ability to meet those needs. Factors which should be considered when setting child support include the financial circumstances of the parties, their station in life, their age and physical condition, and expenses in educating the children." *Voishan v. Palma*, 327 Md. 318, 329 (1992). On his financial statement, Defendant lists the cost of Tuition/Books as $3,730 per month. Defendant pays $220 per month for tutoring while Plaintiff pays $360.[11] Based upon each party's financial statement the costs of the children were determined and included as an attachment to this Opinion. Based upon this, Plaintiff is currently paying $1,319.53 per month for the children's care; Defendant is paying $5,717.00 per month, owing Plaintiff $2,750 in child support. Thus, Defendant pays approximately 81% of the costs of care of the children. Similarly, Plaintiff earns 25% of what Defendant earns each month. The parties agreed to this distribution and the Court sees no reason to disturb this distribution. This amount is only $123.00 greater than the calculated guidelines amount, which includes the current alimony[.]
>
> This case follows *Petrini v. Petrini*, 336 Md. 453 (1994), where the father and payor of support was earning less than he was spending working part-time while also receiving supplemental income to cover his shortfalls. "Some of the considerations that might be made by a trial judge include: a parent's actual ability to pay the specified child support award, any lack of liquidity or marketability of a party's assets, the fact that a parent's take-home income is not an accurate reflection of his or her actual standard of living, and whether either party is voluntarily impoverished." *Petrini v. Petrini*, 336 Md. 453, 463-64 [ ] (1994). The Defendant's take home pay is not a clear indicator of his ability to pay support. The motion was brought by the Defendant and it is his burden to show that he has an inability to pay; a burden he has not met. *Guidash v. Tome*, 211 Md. App. 725, 752 (2013).

The court ultimately concluded that, for child support purposes, considering a base potential income of $20,000, appellant's income was calculated at $37,803.

Appellant argues because "[i]n addition to the numerous factual errors upon which the Court's decision was based, its denial of Mr. Berger's Motion to Modify Child Support was based on its erroneous understanding of the law." He contends the court incorrectly

[11] The court added in a footnote: "For tutoring, the agreement states Defendant is to pay for educational expenses of which tutoring should be included, presumably. However, Plaintiff pays for more than half the monthly costs of [son's] tutoring."

assumed "that in order for a material change in circumstance to be the basis of a modification of child support, such material change had to have been unforeseeable at the time the prior order was entered." Moreover, "[i]f Mr. Berger's income figure is further corrected by eliminating the income the Circuit Court incorrectly attributed as a result of Mr. Berger's MILP and other asset distributions…Mr. Berger would have no obligation to pay child support." Finally he argues the court used an incorrect figure in the Child Support Guidelines Worksheet.

Appellee conversely argues that the court was correct in refusing to modify child support because of the parties' agreement. She cites *Petitto v. Petitto,* 147 Md. App. at 306-07 (internal citations omitted), for the proposition that "[a]lthough the court has the power to modify [an agreed upon child support]…it ought not do so unless it finds (1) that the provision in question does not serve the child's best interest and (2) [that] the proposed modification does." She argues that appellant fails to explain "why his voluntar[y] assumption of [the parties' son's tuition] justifies a reduction in his child support obligation," or how the reduction is in the best interest of the parties' children.

Maryland Code, Family Law § 12-201(b)(1) defines "[a]ctual income" as "income from any source." Section 12-201(b)(3) lists what can be considered actual income, including "salaries," "wages," "commissions," "bonuses," "dividend income," "pension income," "interest income," "trust income," "annuity income," "Social Security benefits," "worker's compensation benefits," "unemployment insurance benefits," "disability insurance benefits," and "expense reimbursements or in-kind payments received by a

parent in the course of employment, self-employment, or operation of a business to the extent the reimbursements or payments reduce the parent's personal living expenses." Section 12-201(b)(4) states, "[b]ased on the circumstances of the case," the court may also consider "severance pay," "capital gains," "gifts," or "prizes" as actual income.

We have previously held that, in determining whether distributions from corporations are considered actual income, we must determine whether the distribution was kept as actual income or as pass-through income not available for child support. *Walker v. Grow*, 170 Md. App. 255, 268-70 (2006). In *Walker*, we found distributions from an S corporation were not actual income because "the circuit court considered [the distributions] to be in the nature of ordinary and necessary business expenses required to produce income, rather than a vehicle to manipulate or shield income to avoid child support obligations." *Id.* at 270. "The burden is on the parent seeking to exclude pass-through income from actual income to persuade the court that the pass-through income is not available for child support purposes." *Id.*

In *Petrini v. Petrini*, we held a grandmother's paying of expenses for her grandchildren was properly attributed to father, her son, as income for child support purposes because "if a parent is relieved of some [basic living expenses] through outside contributions, it may be appropriate under certain circumstances to increase the parent's actual income to account for such contributions" because they "may have the effect of freeing up other income that may not have otherwise been available to pay a child support award." *Petrini*, 336 Md. at 463-65. We found these outside contributions "paid for things

he would otherwise have been responsible for paying for himself out of his take-home salary." *Id.* at 464. "[B]ecause [father] always seemed to have resources available to buy whatever he needed or wanted, he could afford to work only when he felt like it" and pay for the difference with these distributions. *Id.* at 465. The Court of Appeals affirmed the conclusion of the court, that father's take-home income was not an accurate measure of his ability to pay child support because he received outside support that enabled him to "only work when he felt like it," and attributed to his income his mother's contributions. *Id.*

In the instant case, appellant had the opportunity to "persuade the court that the pass-through income is not available for child support purposes," but failed to do so. By appellant's own admission, appellant uses the monthly distributions he receives as income to pay his expenses. Appellant's monthly distributions "pa[y] for things he would otherwise have been responsible for paying for himself out of his take-home salary." Therefore, we find the court did not err or abuse its discretion in attributing those monies for child support purposes under F.L. § 12-201(b)(1) and (3).

Nor, contrary to appellant's claim, was it error for the court to find exhaustion of the children's trusts was not, in itself, a sufficient basis for modification. The court found that, "in agreeing to pay for the children's tuition, educational needs and other expenses, [appellant] knew that at some point those payments would be from his income and not from the trusts." The court noted that "[t]he basis of a petition to modify child support may only be an issue that was not and could not have been raised earlier, viz., a change in the circumstances of the parties." *Reese v. Huebschman*, 50 Md. App. 709, 711 (1982).

Appellant "bargained for and had notice of the exhaustion of the trusts." What would occur if and when the trusts were exhausted "could have been litigated at the time of the divorce/custody agreement." Appellant was also aware of the exhaustion of the trusts when he resigned from his position with XL Marketing.

Finally, as the court duly noted in its opinion, this is an above the guidelines case, and therefore the court was not required to adhere to or use the guidelines. "If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support." Md. Court Ann., Fam. Law § 12-204(d). The court noted that it must look to "the best interests and needs of the child with the parents' financial ability to meet those needs." The court fully considered the needs and expenses of the children, and the parents' financial resources. Ultimately, the court found that appellant had not established an inability to pay an amount which both parties had agreed was in the best interest of the children.

Therefore, it was not clearly erroneous or an abuse of discretion for the court to deny appellant's motion to modify child support.

IV. The circuit court did not err in ordering appellant to pay appellee's attorney's fees.

Maryland Code Ann., F.L. § 11-110(b) allows a court to "order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding." "Before ordering the payment [of attorney's fees]," however, the statute requires the court consider:

(1) the financial resources and financial needs of both parties; and

(2) whether there was substantial justification for prosecuting or defending the proceeding.

Maryland Code Ann., F.L. § 11-110(c); *see also* Maryland Code Ann., F.L. § 12-103(b).[12]

"The decision of whether to award attorney's fees is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Ware v. Ware*, 131 Md. App. 207, 242 (2000). "If the court gives proper consideration to the statutory factors and the circumstances of the case, an award of attorney's fees will not be reversed 'unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong.'" *Henriquez v. Henriquez*, 185 Md. App. 465, 476 (2009) (internal citations omitted) (holding that the court may "in its discretion and after considering the requisite statutory factors, award reasonable attorney's fees in a case where a party is represented by a non-profit legal services organization, or a pro bono attorney, irrespective of whether a fee agreement exists between the client and the attorney").

Appellant argues the court erred in its determination of attorney's fees by "bas[ing] its determination that Mr. Berger had the ability to pay all of Ms. Berger's attorney's fees solely on its findings regarding Mr. Berger's income." Given that he argued the court's determination of his income was incorrect, he argues the court's determination of

[12] Maryland Code, F.L. § 12-103(b) states: "Before a court may award costs and counsel fees under this section, the court shall consider:
(1) the financial status of each party;
(2) the needs of each party; and
(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

attorney's fees is therefore also clearly erroneous. Appellee, conversely, argues the court was familiar with the parties' entire financial circumstances and therefore the court's findings were not clearly erroneous.

The parties' separation agreement states:

> 15.0 ATTORNEY'S FEES
> 15.2 …The parties agree that if an action is brought in which the initiating party does not prevail the movant shall bear the expense of court costs and such reasonable attorney's fees for the other party as ordered by the Court.

The court held:

> The Court has reviewed each party's claim for attorney fees and costs guided by Md. Code Ann., FLA §§ 8-214 and 11-110. **Their respective financial resources and circumstances are detailed elsewhere in this Opinion.** Each party was justified in pursuing the relief they sought in this matter.
>
> Plaintiff incurred $29,000.00 in attorney's fees and costs in these proceedings.
>
> Plaintiff had substantial justification in defending against Defendant's allegations. Plaintiff was successful in all respects. Based upon the parties' agreement and balanced fees claim is Defendant's ability to pay fees. The Court's findings regarding the Defendant's income support the conclusion that Defendant has the ability to pay all of Plaintiff's fees. Plaintiff was justified in hiring an attorney with a specialty in tax law based upon the issues presented in this case and the Court finds these fees to be reasonable.
>
> Md. Code Ann., Fam. Law Art. § 11-110 and 12-103 require that the Court make certain findings when considering an award of fees and costs.
>
> 1. The financial status of each party: **The Court adopts its findings regarding the parties' incomes, and notes Plaintiff's salary of $3,479.00 per month. Defendant's income is $29,366.08 per month after the child support payments and alimony to Plaintiff are deducted.**
>
> 2. Each party's needs: The Court adopts its findings as to each party's needs made earlier in the opinion.
>
> 3. Whether there was substantial justification for bringing, maintaining, or defending the proceeding: As noted above,

> Plaintiff was substantially justified in defending this action. Defendant was also substantially justified in seeking modification.

We note first that under the parties' agreement and the circumstances of this case, appellant is required to pay appellees attorney's fees. In addition, appellant does not contend appellee's attorney's fees were unreasonable.

Moreover, contrary to appellant's assertion, the court clearly did not base its determination solely on appellant's income, but on "the financial resources and financial needs of both parties," as required by Md. Code Ann., FL § 11-110(a)(1). As the court noted, the parties' "respective financial resources and circumstances are detailed elsewhere in this Opinion." Although the court stated only "income" in the second recitation of the statutory factors, the court's earlier statement shows it was well aware, and considered, the entire financial resources and circumstances of the parties. *See Meyr v. Meyr*, 195 Md. App. 524, 553 (2010) ("Although the court did not specifically recite the statutory factors in its award of attorney's fees, the court's earlier statements show that it had considered these factors with respect to its other rulings.").

We therefore do not find the court was clearly erroneous, or that it was arbitrary or an abuse of discretion, for the court to order appellant to pay appellee's attorney's fees.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.