Circuit Court for Prince George's County
Case No. CAD21-01171

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1995

September Term, 2021

CORY DIXON

v.

KATHI EDWARDS

Nazarian,
Tang,
Albright,

JJ.

Opinion by Nazarian, J.

Filed: December 6, 2022

Cory Dixon ("Father") and Kathi Edwards ("Mother") are the parents of three minor children. They divorced in 2013, and a 2014 consent order awarded shared custody and required neither party to pay child support to the other.

After a custody dispute in 2020 and an altercation in 2021 that resulted in Father being charged with assault of the children, the Circuit Court for Prince George's County granted Mother's petition for a protective order and barred Father from having any contact with the children for one year. In light of the protective order, Mother petitioned the circuit court for an order requiring Father to pay child support, and Father petitioned for visitation. A trial was held in the circuit court over the course of two days in August and October 2021. Both parties testified and presented evidence.

On December 21, 2021, the circuit court reserved ruling on Father's petition for visitation and ordered Father to pay child support to Mother. The court's child support calculation included two decisions: (1) the court imputed income of $70,000 per year to Father based on his "previous wages as a barber," and (2) the court found that Mother had incurred extraordinary medical child support expenses of $350 per month. The court ordered Father to pay Mother $1,505 per month in child support as well as $40 per month toward retroactive child support dating back to April 5, 2021. Father appeals the child support calculation, and specifically the decisions to impute income to him and to include extraordinary medical expenses in his child support obligation. To her credit, Mother concedes that the decision to impute $70,000 in annual income to Father is not supported by any evidence or testimony in the record, and for that reason alone we vacate the child

support award and remand for further proceedings. We hold as well that the extraordinary medical expenses can properly be included in child support, but that the court's calculation was not supported by evidence of the onset and duration of the expenses, considerations that can be addressed on remand as well.

I. BACKGROUND

A. Pre-Trial Procedural History.

Father and Mother were granted an absolute divorce on October 17, 2013 by the Circuit Court for Baltimore City. A consent order issued by the court on August 26, 2014 awarded the parties joint physical and legal custody of their three minor children and generally charged the parties with the support and maintenance of the children.[1]

Six years later, on August 28, 2020, Mother filed a petition for a protective order in the District Court for Prince George's County against Father on behalf of their children. She alleged that Father had threatened to assault their eldest child during their last visit. The court granted Mother a temporary protective order *ex parte*, and the temporary order was extended through January 12, 2021 through a series of interim and temporary orders.

[1] Prior orders had called for Father to pay child support to Mother. The consent order superseded those orders and terminated and extinguished those child support payments.

As a result of these orders, Mother denied Father access to the children between August 28, 2020 and January 12, 2021.

Father learned of the temporary protective orders in September 2020,[2] and attempted to reestablish his custodial and access rights by filing petitions for contempt and for change in custody in the Circuit Court for Baltimore City. He alleged that Mother had fabricated the charges in her August protective order petition. Mother filed a motion to transfer the custody case to the Circuit Court for Prince George's County, and the Circuit Court for Baltimore City granted that motion on October 22, 2020, before considering Father's petitions.

On January 12, 2021, the District Court for Prince George's County denied Mother's motion for a final protective order against Father and ordered that the children's visitation with Father resume, under the terms of the 2014 consent order, on January 15, 2021. But on January 15, 2021, after Mother dropped the children off at the usual place of exchange, the children refused to go with Father, and an altercation ensued when he attempted to force them into his vehicle. The police arrived and Father was charged with three counts of second-degree assault.

The next day, Mother filed for another protective order against Father on behalf of their children, and the District Court for Prince George's County issued an interim order that eventually was extended through April 5, 2021. On March 12, 2021, this protective

[2] Even so, Father apparently wasn't served properly with the temporary orders until December 2020.

order case was transferred to the Circuit Court for Prince George's County. On April 5, 2021, the circuit court issued a final protective order, with the consent of the parties, that barred Father from all contact with the children until April 5, 2022. Both parties then filed petitions for modification of child custody, access, and support. And on June 21, 2021, the Circuit Court for Prince George's County consolidated this case with the custody case transferred from Baltimore City. The child support issues flowing from these motions are the only issues before us in this appeal.

In a remote hearing on July 28, 2021, the parties came before a magistrate for consideration of Father's September 2020 petitions and both parties' more recent petitions for modification of custody, access, and support, all in light of the April 5 protective order. The parties testified and presented evidence, including financial statements, and the court concluded that Father's monthly income was $2,166, Mother's was $6,691, the total child support obligation was $2,664, and Mother had had sole custody of the children since April 5, 2021 pursuant to the protective order. The magistrate recognized, however, that the case was contested and required more time than had been allotted for the hearing, so he ordered the case continued to August 24, 2021. To cover the interim period, the parties agreed, and the court ordered *pendente lite*, that Father would pay $631 per month in child support to Mother, plus $29 per month towards arrearages (calculated at $1,262).

On August 24, 2021, the parties appeared in a remote trial before a judge in the circuit court. The proceedings began with the parties explaining the relief they sought: Father wanted an order granting him visitation despite the April 5 protective order, and

Mother wanted a final child support order. The parties then testified and presented evidence on August 24 and October 7, 2021.

B. Argument and Evidence Regarding Father's Actual and Potential Income.

In opening, counsel for Mother explained why the court should issue a new order to supersede the magistrate's *pendente lite* order:

> THE COURT: [Father's child support payment] came up to be 631 a month ago. What's going to change that the payment is going to be any different than 631?
>
> [COUNSEL FOR MOTHER]: Your honor, two things. [The magistrate] said his [*pendente lite* order] for formality has to be set in as final. And the other part about it is, **it's our perspective that [Father] is underreporting his income.** He said he's on unemployment, but today **we'll have testimony to the fact** he has a barber's license in Maryland, and **while they were married, he was earning approximately $60,000 a year,** and that's far different from what he represented in court last month. So it's our argument that he's working as a barber right now or has the potential to work as a barber . . . .

(Emphasis added.) But as she agreed at argument in this Court, Mother produced no evidence to support the contention that Father was earning $60,000 per year during his marriage to Mother.

The parties did present some evidence and arguments about Father's current and prior income levels at trial. Father submitted a financial statement that listed his gross monthly income as $2,166. During Father's case-in-chief, he testified on direct examination that he was unemployed and had been since March 2020, when he was laid off due to the COVID-19 pandemic. He stated that at the time of trial, he was collecting $176 per week in unemployment benefits from the state and an additional $300 per week

from the federal government, but the federal funds were set to conclude in September 2021.[3] Father testified that before the pandemic, his annual earnings were $26,000 or $28,000, or "around the same amount" he was collecting annually in unemployment benefits. He claimed that before he was laid off, he was employed as an insurance sales representative making $11 per hour.[4] His W-2 from 2020 was entered into evidence and it showed that his income from January 2020 until he was laid off in March 2020 was $5,661.50.[5] He explained that he had not actively sought additional employment since being laid off because he was studying for his life insurance license, and he did not have clearance to return to his insurance sales job until he obtained that license and his criminal proceedings concluded.

Father also stated that before taking the job as an insurance sales representative in 2019, he had worked as a barber in Baltimore. He claimed that although his barber's license was still current, he had not worked as a barber since March 2020, when barber shops and salons shut down due to COVID-19. He testified that during the pandemic, he had

[3] A weekly income of $476 amounts to approximately $24,752 per year or $2,063 per month, which is approximately consistent with what Father reported on his financial statement.

[4] Someone working 40 hours per week at $11 per hour would earn an annual income of $22,880 or a monthly income of $1,907.

[5] This is consistent with earning wages of $11 per hour for nearly three months.

considered going back to work at his former barber shop, but ultimately decided that the cost of renting a chair there was too expensive given what he could charge per service.

On cross-examination, Father was asked about his expenses. He stated that his monthly rent was $875, his monthly car payment was $500, and his monthly car insurance payment was $175. He explained that he could afford these expenses because his wife of seven years remained employed throughout the pandemic and "helps support" their household. He also admitted that despite the *pendente lite* order, he had not yet paid any child support to Mother.

At approximately 4:30 p.m. on August 24, 2021, the judge ordered the trial continued to October 7, 2021. During the period between August 24 and October 7, Mother submitted an interim trial memorandum in which she argued that "[d]uring Part II of this hearing [Mother] will present testimony that [Father] made in excess of $70,000.00 USD, in 2011 when he worked as [a] licensed Maryland barber." But again, as Mother conceded at oral argument and in her brief in this Court, no such testimony was presented.[6]

Indeed, when the trial resumed on October 7, 2021, the only evidence Mother presented about Father's income was circumstantial evidence that he had been working as a barber. Father was recalled to the stand during Mother's case-in-chief and asked whether

[6] In her brief, Mother states that "[t]he memorandum contained the offer that Appellee would present testimony that Appellant earned an annual income of seventy thousand dollars . . . . Due to time constraints, the testimony did not occur." Additionally, after the trial resumed on October 7, the court asked whether Mother's interim trial memorandum was testimony, and counsel for Mother conceded that "[i]t's not testimony."

he recently had worked as a barber. He replied that he hadn't. Counsel for Mother then called Darryl Pugh, a licensed private detective Mother had hired to investigate Father's employment. Mr. Pugh testified that on September 16, 2021, he saw Father cutting a young man's hair at a barbershop in Baltimore. Photos that Mr. Pugh had taken on that date, and which were entered into evidence, showed Father cutting hair in a barber shop. On cross-examination, Mr. Pugh admitted that he had not talked to the owner of the shop to confirm that Father was employed there. After Mr. Pugh's cross examination, both parties rested.

In closing, counsel for Mother stated that it was their "testimony" that Father could make up to $70,000 per year given that he has an active barber's license and $70,000 is "what a licensed barber can make in this region." Counsel for Father objected, and also noted in closing that no such testimony had been presented:

> [COUNSEL FOR MOTHER]: . . . It's our testimony, Your Honor, that [Father] can make up to $70,000 a year as a licensed barber. He renewed his license for a—he has an active license right now, Your Honor. If I may share my screen and show his active license—
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> [COUNSEL FOR FATHER]: Objection Your Honor. Counsel's offering—
>
> THE COURT: . . . Is that one of the exhibits that's been admitted?
>
> [COUNSEL FOR MOTHER]: No, Your Honor. This is argument so I can—I might use the evidence as argument though, Your Honor.
>
> THE COURT: No, no, no. Objection is sustained.
>
> [COUNSEL FOR MOTHER]: Okay. Well, [Father] has an active barber's license that he testified to that, Your Honor . . . . He renewed it during Covid when he was laid off from his job as an insurance agent, Your Honor. So it's our position that his income should be at $70,000, what a licensed

> barber can make in this region. His income . . . should be 5,384 per month, Your Honor.
>
> * * *
>
> [COUNSEL FOR FATHER]: . . . . There was no evidence or any testimony or any expert that was offered on what a barber in this area makes per year besides [Mother's counsel's] own commentary.

After closing arguments by Father's counsel, the trial concluded.[7]

C. Evidence Regarding Mother's Extraordinary Medical Child Support Expenses.

As additional support for her claim that she was owed more child support than the magistrate had ordered in the July 28 *pendente lite* order, Mother put on evidence of the children's expenses; specifically at issue on appeal is the evidence of the children's extraordinary medical expenses. Mother testified at trial that two of the three children had dental concerns and were "beginning orthodontist cases" to get fitted for braces. She explained that her insurance required her to pay $3,000 per child for the orthodontics, or $6,000 total. As a result, she said, she was on a payment plan with her children's orthodontist and would pay the $6,000 in monthly installments of $350.

The court admitted into evidence an exhibit that Mother claimed was a bill for her first payment toward the orthodontics. The document contained the name, address, and

[7] We note that in addition to the evidence presented at trial, the record before the circuit court included all documents and other evidence admitted in all proceedings in the consolidated cases before it, including the 2013–14 divorce case. Having combed through that record, we have been unable to find (and Mother has not identified) any evidence indicating that Father's income has ever exceeded the income figures he represented to the court at trial, the highest of which was $28,000 per year.

phone number of an orthodontist in Largo; it was marked as a "Payment Receipt" for $350 charged on August 23, 2021; it named Mother as the "Billing Party"; it named Mother and Father's eldest child as the patient; and a comment noted that the payment was for an "Orthodontics Partial Downpayment." Mother explained that although she only had to pay the orthodontist $350 per month total between the two children, the bill was marked with only one child's name because the orthodontist required a "down payment" of $500 per child to be paid before the office would start that child's case. The court also admitted into evidence the financial statement Mother had signed and submitted to the court on July 26, 2021, which listed her monthly income as $6,961, her monthly health insurance premium for the children as $362, and her monthly extraordinary medical expenses for the children as $320. Mother explained that, through her testimony, she meant to "correct[]" her extraordinary medical expenses from $320 to $350.

On cross-examination, Mother testified that the $350-per-month payment plan would be in place until the full $6,000 was paid off. She agreed that this meant she could expect to pay off the orthodontist in approximately seventeen months. She also admitted that she was unsure whether she had the option of paying off the $6,000 over a longer period.

D. Post-Trial Proceedings.

After the trial, on October 15, 2021, Mother submitted to the circuit court her proposed Child Support Guidelines worksheet, which listed the following figures: $6,961 as Mother's gross monthly income; $5,384 as Father's gross monthly income; $320 as

Mother's monthly health insurance premium for the children; $350 as Mother's monthly extraordinary medical expenses for the children; $1,947 as Mother's resulting monthly child support obligation; and $1,505 as Father's resulting monthly child support obligation. The document contained several footnotes, including: in reference to the figure $5,384, "[Father's] imputed income based on [Father's] capability to work as licensed Maryland barber, earning $70,000 annuallym [sic], coupled with monthly support he receives from his wife, and the employment he receives"; in reference to the figure $320, "Health insurance cost for the minor children, undisputed by either party"; and, in reference to the figure $350, "Extraordinary Medical Expenses[:] Cost of braces for the two male minor children."

On December 21, 2021, the circuit court held a remote hearing to announce the court's ruling. Given that Father's criminal proceedings were still pending in Anne Arundel County, the court declined to modify the child custody and access schedule. The court ruled that consistent with the April 5 protective order, Mother should continue to have sole custody and Father should have no visitation, but that Father could "file a request for a hearing on the issue of reunification and access" thirty days after the completion of the criminal proceedings.

With regard to child support, the court found that as a result of the April 5 protective order, there had been a "material change in circumstances" warranting modification of child support. The court explained that it "[did] not find [Father's] testimony that he did not work as a barber credible," but did "find[] that [Mother's] evidence of [Father] working

as a barber credible." The court also noted that Father "testified that he has no physical or mental limitations that prevent him from working as a barber but that he has not sought additional employment." Based on these findings, the court decided to impute to Father his "previous wages as a barber." The court then announced the specific figures underlying Father's new child support obligation:

> The Court finds that [Father's] monthly income is $5,384 and [Mother's] monthly income is $6,961. The Court finds that the monthly health insurance covered by [Mother] is $320. Additionally, the Court finds that the two male children's orthodontics care amounts to $350 per month which [Mother] is also currently paying. [Father's] child support payments will now be $1,505 per month and [Father] shall also pay $40 per month toward an arrearage of $12,040 dating back to the date of the final protective order, April 5, 2021.

When counsel for Father asked for clarification on where these numbers came from, the court stated that they came from the child support guidelines worksheet that the court had prepared, which were based on the court's finding that Father "could make $70,000 as a barber":

> [COUNSEL FOR FATHER]: Yeah, one question, Your Honor. Is it [Mother's] . . . proposed child support guidelines that's going to be attached to the order, Your Honor?
>
> THE COURT: No. The attached to the order is the guidelines that we prepared and I told you the sum. I'll read it to you again. The monthly amount income was the Mother, $6,961. Imputed income to the Father was his $70,000 barber income. The credibility was toward the evidence that was presented that he did in fact have the ability and was practicing as a barber, so his imputed income is $5,384. . . .
>
> [COUNSEL FOR FATHER]: Okay. Your Honor, just a point of clarification in that $5,384, that was the amount that [Mother's] counsel had submitted and he had a footnote that the imputed income was based on his capability to work as a

> licensed barber earning 70,000 annually, coupled with monthly support he receives from his wife and the employment he receives.
>
> THE COURT: I did see that as a footnote, but the testimony was that he could make $70,000 as a barber, so that was the $70,000 as a barber. But I did see the footnote that you're referring to, correct.

The hearing concluded, and the court issued a temporary order requiring Father to pay monthly child support of $1,505 and $40 per month toward arrears totaling $12,040. Attached to the order was a child support guidelines sheet prepared by the judge's clerk on December 15, 2021, which, save for the date, the preparer's name, and the absence of footnotes, was identical to the proposed guidelines submitted to the court by Mother on October 15, 2021. Father timely appealed the order.

II. DISCUSSION

Father argues on appeal that the court erred in two ways in determining his child support obligation: *first*, the court erred when it found that he impoverished himself voluntarily and imputed monthly income of $5,384 to him; and *second*, the court included Mother's alleged extraordinary medical child support obligations—*i.e.*, the orthodontics costs—improperly in its calculation of Father's obligation.[8]

We review a trial court's determination of a child support obligation for abuse of discretion. *Gladis v. Gladisova*, 382 Md. 654, 665 (2004). "'As long as the trial court's

[8] Father phrased his Question Presented as: "Did the trial court commit reversible error and [sic] when it failed to make the necessary findings in deciding Appellant's child support obligation?" Mother stated her Question Presented as: "Did the trial court err when it included certain considerations in calculating Appellant's monthly child support obligation?"

findings of fact are not clearly erroneous and the ultimate decision is not arbitrary, we will affirm it, even if we may have reached a different result.'" *Kaplan v. Kaplan*, 248 Md. App. 358, 385 (2020) (*quoting Malin v. Mininberg*, 153 Md. App. 358, 415 (2003)). The trial court's findings are not clearly erroneous if, when the record is viewed in the light most favorable to the prevailing party, "there is any competent evidence to support the factual findings below." *Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 606 (2019) (cleaned up). In this case, the trial court's findings regarding Father's income were not supported by competent evidence and amounted to an abuse of discretion. We must, therefore, vacate the judgment and remand for reconsideration of child support. And although we agree that the costs of the children's orthodontic treatment were included properly in Father's child support obligation, the calculation on remand should account for the onset and duration of the payments themselves.

A. The Trial Court Abused Its Discretion When It Imputed Monthly Income Of $5,384 To Father.

A parent's support obligation typically is determined by their actual adjusted income. Md. Code (1984, 2019 Repl. Vol.), § 12-204(a) of the Family Law Article ("FL"). But "if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income." FL § 12-204(b)(1). And that apparently is what happened here: the circuit court found Father's stated income not to be credible and imputed additional income to him for purposes of calculating child support. We say "apparently" because, as we discuss below, the court never made the findings necessary to support a conclusion that Father had impoverished himself voluntarily. But the court's

analysis tracks that path and seems to be the justification for its decision to impute additional barbering income to him.

A parent is voluntarily impoverished "'whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources.'" *Digges v. Digges*, 126 Md. App. 361, 381 (1999) (*quoting Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993)). To determine whether a parent is voluntarily impoverished, the court must "inquire as to the parent's motivations and intentions." *Wills v. Jones*, 340 Md. 480, 489 (1995); *see also Goldberger*, 96 Md. App. at 327. The court also must consider a series of additional factors relating to the parent's earning potential and circumstances:

> (1) [their] current physical condition;
> (2) [their] respective level of education;
> (3) the timing of any change in employment or other financial circumstances relative to the divorce proceedings;
> (4) the relationship between the parties prior to the initiation of divorce proceedings;
> (5) [their] efforts to find and retain employment;
> (6) [their] efforts to secure retraining if that is needed;
> (7) whether [they have] ever withheld support;
> (8) [their] 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.

Lorincz v. Lorincz, 183 Md. App. 312, 331 (2008) (*citing John O. v. Jane O.*, 90 Md. App. 406, 422 (1992), *abrogated on other grounds by Wills*, 340 Md. at 480). However, "[t]he trial judge need not articulate each item or piece of evidence she or he has considered" in

making this determination. *John O.*, 90 Md. App. at 429. The court may make an "implicit determination of voluntary impoverishment," which will be upheld so long as "the record provide[s] adequate support for such a determination." *Durkee v. Durkee,* 144 Md. App. 161, 183 (2002) (cleaned up).

If the court finds that a parent voluntarily impoverished themselves, the court may go on to impute potential income to that parent for purposes of calculating child support. FL § 12-204(b)(2); *see also John O.*, 90 Md. App. at 423; *Durkee*, 144 Md. App. at 184. Section 12-201(m)'s definition of potential income includes many of the same factors as the voluntary impoverishment analysis, and allows the court, in essence, to fill the gap the voluntary impoverishment created:

> "Potential income" means income attributed to a parent determined by:
>
> (1) the parent's employment potential and probable earnings level based on, but not limited to:
>
> (i) the parent's:
>
> 1. age;
> 2. physical and behavioral condition;
> 3. educational attainment;
> 4. special training or skills;
> 5. literacy;
> 6. residence;
> 7. occupational qualifications and jobs skills;
> 8. employment and earnings history;
> 9. record of efforts to obtain and retain employment; and
> 10. criminal record and other

employment barriers; and

(ii) employment opportunities in the community where the parent lives, including:

1. the status of the job market;
2. prevailing earnings levels; and
3. the availability of employers willing to hire the parent;

(2) the parent's assets;

(3) the parent's actual income from all sources; and

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

As with the voluntary impoverishment finding itself, the court's determination of a parent's potential income will be upheld so long as it is supported by sufficient evidence in the record. *See Petitto v. Petitto*, 147 Md. App. 280, 318 (2002) ("As long as the 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." (cleaned up)).

Here, the parties dispute whether the court properly found that Father was voluntarily impoverished, but it's far from clear that the court even made such a finding. It certainly didn't do so explicitly. And on this record, we can't presume that the court made such a finding or discern that it did so implicitly. But even if the court did find that Father impoverished himself, there is no evidentiary support for the potential income the court imputed, and we must vacate the child support award and remand for further proceedings.

At no point did the court resolve the parties' contrasting testimony about Father's income and job opportunities. Father testified that he had been laid off from his insurance

job and gave reasons why he hadn't resumed full-time work as a barber. Although the court stated generally that it didn't find Father's testimony credible, especially in light of testimony that he had been sighted cutting hair, the court never found that Father had made a free and conscious choice not to work full-time (as a barber or otherwise), that his stated income wasn't a function of factors beyond his control, that he had rendered himself without adequate resources, or anything of the sort. And without those findings, the court lacked a basis to impute potential income to Father in the first place.

Nevertheless, the court leaped from the conclusion that Father wasn't credible to a calculation that imputed annual income of $70,000 ($5,384 monthly) to him. The court explained that it was "imputing [Father]'s previous wages as a barber" because "[t]he credibility was toward the evidence that was presented that he did in fact have the ability and was practicing as a barber . . . ." But putting aside the absence of the threshold impoverishment finding, there was no evidence presented at trial, nor was there anything else in the record before the court, that could support a finding that Father had ever earned $70,000 per year or $5,384 per month as a barber, or that he (or any barber) could do so now. Indeed, there are only two times the figure "$70,000" appears in the record: (1) in Mother's interim trial memorandum, where she claimed that during the second day of the hearing she *would* "present testimony that [Father] made in excess of $70,000.00 USD, in 2011 when he worked as [a] licensed Maryland barber"; and (2) in Mother's closing argument, when her counsel stated that "[i]t's our testimony, Your Honor, that he can make

up to $70,000 a year as a licensed barber. . . . So it's our position that [Father]'s income should be at $70,000, what a licensed barber can make in this region."

But as Mother admitted at argument in this Court now, the promise of testimony to that number never materialized, and the use of that figure in closing was argument, not evidence. Similarly, the figure "$5,384" arose only twice: (1) in Mother's closing, when her counsel stated, "His income . . . should be 5,384 per month, Your Honor"; and (2) in the proposed child support guidelines worksheet that Mother submitted to the court, after the trial had concluded, where Mother simply listed Father's monthly income as $5,384. The court erred, then, when it stated that "the testimony was that [Father] could make $70,000 as a barber" and then imputed potential income to Father for child support purposes. There *was* no such testimony, only argument, and argument of counsel can't substitute for the evidence that's required to support the finding. *See Shelton v. State*, 207 Md. App. 363, 384 (2012) (agreeing with appellee that "the circuit court properly instructed the jury that *arguments by counsel were not evidence*" (emphasis added)); *Ford v. State*, 462 Md. 3, 33 (2018) ("Opening statements and closing arguments of lawyers are not evidence" (citation omitted)).

Moreover, the monthly number is inconsistent with imputed annual income of $70,000—annual income of $70,000 results in monthly income of $5,833. Indeed, it appears that the circuit court simply copied its child support guidelines figures directly from Mother's proposed guidelines worksheet rather than considering the evidence and

performing its own calculations.[9] And these inconsistencies only bolster the need for a new child support analysis on remand. *See Tannehill v. Tannehill*, 88 Md. App. 4, 15–16 (1991). We vacate the child support award and remand for further proceedings consistent with this opinion. [10]

B. The Trial Court Didn't Err When It Found That Mother Had Incurred Extraordinary Medical Child Support Expenses, But It Did Err When It Miscalculated Their Impact On Child Support.

Based on the evidence Mother presented at trial, the trial court attributed $350 per month of extraordinary medical expenses to her in its calculation of Father's future and retroactive child support obligations. Father raises two issues with the trial court's inclusion of Mother's extraordinary medical expenses in the child support calculation. *First*, he argues that including these expenses in the child support calculation was an abuse of discretion because the evidence didn't support a finding that these expenses had been incurred. *Second*, he argues that even if the evidence supported a finding that Mother had

[9] As we noted above, the child support guidelines sheet attached to the December 21 order was identical to the proposed guidelines sheet Mother submitted to the court on October 15, 2021 save for the date, the preparer's name, and the absence of footnotes. And the court's use of the $5,384 figure is not the only indication that it copied Mother's proposed guidelines worksheet. The court's guidelines sheet also listed Mother's monthly health insurance premium for the children as $320, just as she had listed it in her proposed guidelines worksheet, despite the fact that the only evidence presented at trial for this expense was Mother's testimony that her monthly health insurance premium for the children was $362.

[10] Father also challenges what he characterizes as the trial court's decision to "[i]mput[e] [i]ncome to [him] [b]ased on [h]is [w]ife's [p]ayment of [h]ousehold [e]xpenses." We see no indication that the trial court actually did this, and as we are vacating the trial court's award of child support in any case, we need not and do not decide whether such an imputation would have been appropriate in this case.

incurred extraordinary medical expenses of $350 per month to be paid over the course of 17 months, the court abused its discretion when it included the $350 in its calculation of both Father's arrearages for the period before Mother had made the first payment and his perpetual future obligation. We disagree with Father's first argument but agree with the second. So although we have vacated the child support award, we address this in order to guide the new calculation on remand.

1. The court did not err in finding that Mother had incurred extraordinary medical expenses of $6,000 to be paid in monthly installments of $350.

Section 12-204 requires the court to calculate the "basic child support obligation" and then to divide that obligation "between the parents in proportion to their adjusted actual incomes." FL § 12-204(a)(1). In addition to the basic child support obligation, "[a]ny extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted actual incomes." FL § 12-204(h)(2). "'Extraordinary medical expenses' means uninsured costs for medical treatment in excess of $250 in any calendar year" and includes "uninsured, reasonable, and necessary costs for orthodontia." FL § 12-201(g)(1)-(2).

There is no dispute, then, that the court is obligated to include incurred, out-of-pocket orthodontia expenses in its child support calculations, and Father doesn't argue otherwise. Rather, Father argues that there was insufficient evidence for the court to find that Mother actually incurred any such expenses. Specifically, he claims that the statute only allows "incurred" extraordinary medical expenses in the child support calculation and

that the evidence presented at trial was insufficient to ground a finding that Mother had already incurred charges of $350 per month or that she would with certainty incur those charges in the future.

Under Maryland Rule 8-131(c), when an action is tried without a jury, we "review the case on both the law and the evidence" and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous." We also "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* Mother testified at trial that two of the children were being fitted for braces, that her total out-of-pocket cost for the orthodontic care would be $6,000, and that she had entered a payment plan with the orthodontist that permitted her to pay the balance in monthly installments of $350. She also presented a receipt to corroborate her testimony, and Father did not offer any evidence at trial that refuted Mother's testimony. Father now argues that Mother's "own conjecture" is not enough to support a finding "that treatment was necessary or imminent, how long the treatment would last, or how much that treatment would cost," but he points to no statute or case law that requires extraordinary medical expenses to be proven by specific types of evidence. The trial court was well within its discretion to credit Mother's testimony, which was sufficient to support a finding that she had already incurred extraordinary medical expenses of $6,000 to be paid at $350 per month.

Father then cites *Horsley v. Radisi*, 132 Md. App. 1 (2000), and argues that the court should have ordered that these expenses be divided proportionally among the parties as they come due rather than incorporating the full amount into his child support obligation.

We disagree. In *Horsley*, as here, we dealt with a child support dispute over orthodontic expenses, but in that case the evidence only supported a finding that the expenses were anticipated, not certain. The child was under the care of an orthodontist who testified that she "could not 'predict' an 'exact time'" when the child would be ready for braces, but that it would likely be a year or two in the future. *Id.* at 13. Moreover, "the anticipated orthodontic payment [ ] *was not certain, but anticipated* to be about $100 per month." *Id.* at 16 (emphasis added). The expenses had not yet been incurred, but the trial court there nevertheless ordered the parties to "share and pay the costs of orthodontia care . . . if and when that becomes necessary, in proportion to their adjusted actual income," *id.* at 17–18, and we affirmed because the treatment was "relatively imminent." *Id.* at 30.

In contrast, the testimony in this case established that the children were "beginning orthodontist cases . . . to get fitted for braces" *currently*, not in a year or two. It was within the court's discretion to find that the total cost of $6,000 at $350 per month was certain, not "anticipated," and that Mother had already begun paying it. So although the court in *Horsley* ordered that the *imminent* extraordinary medical expenses should be shared only if and when they are actually incurred, the evidence here supported a finding that the expenses already had been incurred.

2. The trial court erred when it included the extraordinary medical expenses in Father's obligation for the period before Mother was paying them and for the period beyond Mother's payment plan.

Mother testified that the receipt she presented to the court, dated August 23, 2021, memorialized her first payment to the orthodontist. She also testified that her monthly

payment plan would result in the full $6,000 being paid off in approximately seventeen months. There was no evidence that could support a finding that Mother was paying extraordinary medical expenses of $350 per month before August 2021 or that she would have to continue making payments after February 2023. Nevertheless, the court attributed monthly extraordinary medical expenses of $350 to Mother in calculating Father's child support arrears dating back to April 5, 2021,[11] and its order didn't exclude the $350 from the calculation of the parties' child support obligations after February 2023. Since the orthodontia expenses appear to have a finite duration, the court may wish on remand to order the parties to bear their proportional shares of the orthodontic expenses rather than baking that extraordinary expense into the ongoing child support figure.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.

[11] When monthly extraordinary medical expenses of $350 were included in the calculation of Father's child support obligation, his monthly obligation was $1,505. On December 21, 2021, the court calculated Father's total arrears since April 5, 2021 to be $12,040, which is $1,505 multiplied by 8, to account for the 8 months from April to December 2021. Thus, the court clearly did not exclude the $350 in extraordinary medical expenses from its calculation of Father's arrears from April to July 2021, even though it should have.