Circuit Court for Anne Arundel County

Case No. 02-C-13-178637

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0502

September Term, 2017

MICHAELA ANN GREENE

v.

PETER LAWRENCE GREENE

Wright,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 11, 2018

This case is an appeal from two orders from the Circuit Court for Anne Arundel County regarding cross complaints by appellant, Michaela Greene ("Mother"), and appellee, Peter Greene ("Father"), to modify a Judgment for Absolute Divorce that the circuit court entered on August 12, 2014. The Judgment for Absolute Divorce between Mother and Father incorporated a Marital Settlement Agreement dated June 16, 2014.

On May 5, 2015, Father filed a Petition to Modify Child Support and for Other Relief and Mother filed an answer. On July 23, 2015, Mother filed a Complaint for Modification of Custody and Visitation. In response to Mother's complaint, Father filed a Counter-Complaint for Modification of Custody and Visitation on November 10, 2015.

The circuit court conducted a six day trial from March 6, 2017, through March 10, 2017, that then was continued and concluded on April 5, 2017, with the court issuing an oral opinion on custody and visitation. On April 27, 2017, the court issued two orders, one on child support and attorney's fees, and another on custody and visitation. Mother filed a timely appeal.

Mother asked us ten questions that we have reworded and consolidated for clarity:[1]

[1] In her brief Mother asked:

1. Did the Circuit Court err and abuse its discretion in establishing the child support award?

2. Did the Circuit Court err and abuse its discretion by ordering the Appellant's child support obligation to be retroactive to January 26, 2015?

3. Did the Circuit [C]ourt err and abuse it's discretion by ordering the Appellant's child support obligation to be retroactive?

I. Did the circuit court err in finding a material change in circumstances sufficient to modify the physical and legal custody of the children?

II. Did the circuit court err in establishing the child support award?

III. Did the circuit court err in ordering the appellant to pay $60,000.00 of the Father's attorney's fees and $7,232.50 of the Best Interest Attorney's fee without a hearing or finding of fact?

For the reasons below, we affirm the circuit court's modification of custody. We conclude that the court erred in ordering Mother to pay child support and attorney's fees,

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4. Did the Circuit Court err and abuse its discretion in establishing the child support without a hearing or finding of fact?

5. Did the Circuit Court err and abuse its discretion in finding a material change in circumstances sufficient to modify the physical and legal custody of the children?

6. Did the Circuit Court err and abuse its discretion in granting the Appellee primary and physical custody and sole legal custody of the children?

7. Was the Circuit Court's decision ordering the Appellant to pay $60,000 of the Appellee's attorney['s] fees without a hearing or finding of fact an abuse of discretion and clearly erroneous?

8. Was the Circuit Court's decision ordering the Appellant to pay [and] reimburse the Appellee $7,232.50 of the Best Interest Attorney's fees without a hearing or findings of fact [an] abuse of discretion and clearly erroneous?

9. Did the Circuit Court err and abuse its discretion by failing to admit and consider evidence of expenses for the children's activities paid by the Appellant?

10. Did the Circuit Court err and abuse it discretion by failing to hear a transcript of the District Court criminal trial involving the parties?

and therefore, we vacate and remand the court's Order of Child Support, Arrearages, Attorney's Fees, and Best Interest Attorney's Fees.

BACKGROUND

Mother and Father were married on October 15, 2003, and have three minor children, twin boys, William and Aiden, born on July 22, 2007, and a daughter, Sophie, born June 12, 2009 ("Children"). Mother and Father separated in October 2012 and entered into a Marital Settlement Agreement ("Settlement Agreement") dated June 16, 2014. The Settlement Agreement in pertinent parts addressed custody, child support, and alimony. The Settlement Agreement established monthly child support from Father to Mother for $1,500.00; monthly alimony from Father to Mother for $1,000.00 through May 2017; and joint legal custody and shared physical custody of the children as follows:

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Husband	Wife	Wife	Husband	Husband	Wife	Wife
Wife	Husband	Husband	Wife	Wife	Husband	Husband
Husband	Wife	Wife	Husband	Husband	Wife	Wife
Wife	Husband	Husband	Wife	Wife	Husband	Husband

Mother's and Father's divorce became final on August 11, 2014, by an Order of the Circuit Court for Anne Arundel County. The Judgment for Absolute Divorce was incorporated into the Settlement Agreement. The Settlement Agreement also required that Mother and Father attend mediation to resolve any disputes prior to filing any court action.

When Mother and Father entered into the Settlement Agreement, Father was employed and Mother was not employed. Father was working as an electrical engineer, earning $144,600.00 annually and receiving $131.00 annually for a disability. Mother was retired from the United States Air Force and was receiving a retirement income of $50,556.00.

On or about January 26, 2015, Mother started working for the National Security Agency ("NSA") as a compliance officer. After some trouble on the job, Mother was fired from NSA effective November 14, 2016. Mother appealed the decision and an administrative judge reversed her termination and ordered that she be reinstated and paid back pay. At the time of trial, the matter was still unresolved because Mother was still negotiating a settlement with NSA.

Father contends that he was not aware that Mother had returned to work and "asked her two or three times if she was and she denied [that she was working]." At trial, Father testified that the child support amount agreed upon in the Settlement Agreement with Mother was based on the understanding that she was receiving "income from retirement income only." On May 5, 2015, upon learning that Mother was working, Father filed a Petition to Modify Child Support.

On July 23, 2015, Mother filed a Complaint to Modify Custody/Visitation. In the complaint, Mother contends that there were several material changes to warrant a modification in custody visitation and access including: her new employment; the frequency of custody exchanges during the week, and the impact it had on the Children in school; difficulty contacting the Children when they were not in her custody; issues with

the Father's then fiancé's children; Father's failure to maintain dental insurance for the Children; Father's inability to care for the Children on his scheduled days; and failure to provide Aiden with his Adderall medication. Mother also listed specific examples that she believed demonstrated Father's inability to co-parent. On August 5, 2015, Father filed a motion to dismiss, but the motion was denied on September 11, 2015.

On November 10, 2015, Father filed a Counter-Complaint for Modification of Custody/Visitation. In Father's complaint, he also contended that Mother's employment was a material change, and he further alleged that she did not tell him she returned to work, or hired a care provider for the children. Father also cited difficulty co-parenting with Mother because of her dishonesty about employment, inflexibility during custody changes, and instability in her behavior.

There was no dispute that the parties were experiencing difficulty co-parenting the Children, and the schedule they had devised for physical custody in the Settlement Agreement created problems for the Children. Consequently, the circuit court held a trial to determine what custody arrangement would be in the best interest of the Children.

The circuit court also ordered Katherine Nutile, a Custody Evaluator, to complete a Custody Evaluation. The Custody Evaluator testified that the main difficulty the parties had in co-parenting was the schedule, and that "[Father] probably was the parent who focused more on the kids. [Mother], I felt had a lot of focus on things that were happening in [Father's] home. So, based upon that I recommended that [Father] have some tie-breaking authority for medical and mental health decisions."

The Custody Evaluator also testified that she interviewed the Children. The Children told the evaluator that they could only go to certain activities when they were with their mom or with their dad. One of the Children told the Custody Evaluator:

> "I have to carry these two lunch boxes and remember that, you know, this one can't go to dad's house, it only can go to mom's house. And this jacket has to go in the school locker because we can't bring it to dad's house."

After speaking with the Children, the Custody Evaluator testified:

> "I am recommending that there be sole custody and that one parent have primary custody during the school year and I did recommend that [Father] would be the more appropriate parent for that to happen with."

Father testified at trial that he was concerned that Mother was not following medical advice when administering medicine to the Children. He also testified to difficulty with working with Mother on allowing the Children to take the bus to his house after school instead of going to Mother's house after school, because of conflicts during custody transfers. The principal of the Children's school, Deborah Short, also testified that the school was willing to allow Father to take the children out of school early on his day to avoid the conflict, but Mother would not allow it.[2] The Best Interest Attorney for the Children, Marla Zide, filed a petition with the circuit court to allow the Children to ride the bus to Father's house after school. At the pre-trial conference, Mother consented

[2] Deborah Short also testified that allowing the Children to leave early would not disrupt the school or impact the Children negatively.

to the change and on January 4, 2017, the circuit court issued a Temporary Consent Agreement Order.[3]

Mother testified as to her employment status and how she started looking for work once she was separated from Father. She also testified about the difficulty she faced when she tried to contact the Children, per the Settlement Agreement, when the Children were not in her custody. Mother also testified that she was afraid of Father and cited an incident where Father lost his temper and bashed the hood of Mother's car with the daughter inside.

Danielle Greene ("Danielle"), Father's current wife, testified that Mother was aggressive to her and would yell at her in front of the parties' Children, which Mother denied. Gay Austin ("Gay"), Danielle's mother, also testified to a specific incident in July 2015 when she was at Father's house watching Danielle's two children while Father and Danielle were on vacation. Gay left Father's home and when she returned Mother was in the house uninvited.[4] Mother tried to engage in conversation with Gay but finally left after being asked to leave.

After the close of evidence, the Best Interest Attorney for the Children made her recommendations as follows:

> [The parties'] failure to co-parent is having a negative impact on the children. I think the evidence is clear that the discord between the parties

[3] The Temporary Consent Agreement Order also resolved some disagreements with physical custody and psychologist visits.

[4] Mother had custody of the Children when this incident occurred but they were with a care provider. She also alleged that she went to house to see a baby sitter and that when she entered the home the door was open.

> became exacerbated almost immediately after the divorce. Things have gotten worse instead of better and while I know that this Court looks to make solutions for families and the Court hopes that especially when people read your consent order, that they are going to reach a solution. In this case, that, unfortunately, did not happen.

The Best Interest Attorney had concerns with both Mother and Father. The Best Interest Attorney was concerned that Father was not taking the kids to Tae Kwon Do. Conversely, the Best Interest Attorney had concerns that while the kids were in Mother's care she went into Father's home, while he was out of town, and at the time of trial still did not recognize that it was inappropriate. The Best Interest Attorney initially concluded:

> While there are concerns on both parts, I think when balancing the scale where most of the concern lies, I think it balances where Mr. Greene's concerns -- he still keeps the children focused, other than the Tae Kwon Do issue, I think he keeps -- the evidence was that he keeps it focused on the kids while Ms. Greene seems to focus on negatives in Mr. Greene's household, focus on blaming Mr. Greene's household for the behaviors that the children have that she does not view are appropriate and she does not focus on the needs of the children.

At the close of trial, the circuit court made an oral finding on custody and access, but asked the parties to submit written findings on child support and attorney's fees. The court found that terms of the Settlement Agreement involving the custody schedule were "just totally unworkable" and "in and of itself would be a significant change in circumstances." After making its findings, the court considered the ten factors outlined in *Montgomery Cty. Dep't. of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419-21 (1977) (hereinafter the "*Sanders* factors"). With respect to custody and child access, the circuit court granted Father sole legal and physical custody of the children. The circuit court

granted Mother visitation on alternate weekends and maintained the holiday schedule agreed upon in the Settlement Agreement.[5]

The circuit court requested that both parties submit Proposed Findings of Fact and Conclusions of Law on the issues of child support and attorney's fees. Father submitted a Proposed Findings of Fact and Conclusion of Law. Mother submitted a document titled "Closing Argument Regarding Child Support and Counsel Fees," in which she addresses the issues that the circuit court requested, and it appears that the court accepted this document in lieu of a Proposed Findings of Fact and Conclusions of Law.

The circuit court issued the following Order of Child Support, Arrearage, Attorney's Fees, and Best Interest Attorney Fees, ordering that Mother shall pay accumulated retroactive child support for the period of January 26, 2015, through March 31, 2017, of $40,378.00; $5,126.00 per month for April and May 2017; and $4,880.00 per month starting June 1, 2017. Mother was also ordered to pay Father $60,000.00 towards his attorney's fees and a $7,323.50 reimbursement to Father for the Best Interest Attorney's Fees.

DISCUSSION

Mother asks multiple questions regarding custody, child support, and attorney's fees. Generally, Md. Rule 8-131(c) governs non-jury cases and states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and

[5] The circuit court reduced the oral findings to writing in an Order for Modification on Custody and Visitation filed on April 27, 2017.

> will give due regarding to the opportunity of the trial court to judge the credibility of witnesses.

Additionally, 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 v. Lemley*, 109 Md. App. 620, 628 (1996). "As long as the trial court's findings of fact are not clearly erroneous and the ultimate decision is not arbitrary, we will affirm it, even if we might have reached a different result." *Malin v. Mininberg*, 153 Md. App. 358, 415 (2003). Put differently, the clearly erroneous standard does not mean we sit as a second trial court to determine if an appellant proves his or her case; rather, our task is to search the record for sufficient evidence to support the circuit court's findings. *Lemley*, 109 Md. App. at 628.

I.

We first consider whether the circuit court improperly found a material change in circumstances to justify a modification of the custody order. For the reasons set forth below, we conclude that the court did not err in modifying custody.

Mother avered that the circuit court employed improper legal standards and conducted an incomplete analysis when it awarded Father primary custody and sole legal custody. Mother's argument launches a two-pronged attack. First, she argued that the court erred in finding that a material change existed, and she then argued that the court improperly applied the *Sanders* factors. Father responded that Mother's argument on appeal contradicted her position in the circuit court since she initiated the custody modification, and he further contended that there was sufficient evidence in the record to support the court's custody decision.

When a motion for modification of custody is before the circuit court it employs a two-step process: (1) Whether there has been a material change in circumstances; and (2) what custody arrangement is in the best interest of the children. *In re Deontay J.*, 408 Md. 152, 165-66 (2009); *Gillespie v. Gillespie*, 206 Md. App. 146, 171-72 (2012) (citing *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)); *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). Therefore, we first consider whether the trial court erred in finding that a material change in circumstances occurred. Second, we consider whether the court abused its discretion in modifying custody.

We review child custody determinations using three interrelated standards of review as described in *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the standards as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586.

"The judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the [circuit] court to judge the credibility of the witnesses." *Dave v. Steinmuller*, 157 Md. App. 653, 664 (2004). "Further, we acknowledge that it is within the sound discretion of the [circuit court] to award custody according to the exigencies of each case, and . . . a reviewing

court may interfere with such a determination only on a clear showing of abuse of that discretion." *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013) (internal quotations omitted). Such broad discretion is vested in the [trial court] because only [it] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor child.

A material change of circumstances is a change in circumstances that affects the welfare of the child. *McMahon*, 162 Md. App. at 594. The Court of Appeals explained that although courts must engage in a two-step process when evaluating custody orders, the two-steps are often interrelated. *McCready v. McCready*, 323 Md. 476, 482 (1991) ("[T]he question of 'changed circumstances' may infrequently be a threshold question, but it is more often involved in the 'best interest' determination, where the question of stability is but a factor, albeit an important factor, to be considered"). In the context of modification of custody orders, "material" means that the change may affect the welfare of the child. *Wagner*, 109 Md. App. at 28. Moreover, it is the burden of the moving party to show that since the entry of the final custody order, it is now in the best interest of the child to modify the custody order. *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008).

We hold that there was sufficient evidence to support a finding of a material change in circumstances. It is important to note that it was Mother that first filed for a modification in custody. Mother, in her complaint, listed numerous reasons for a

modification. First, she noted that that she recently secured employment. Mother also stated in her complaint that the custody schedule agreed upon in the custody order "has far too many exchanges, causing significant problems between the parties," which also impacted the Children's schooling. Mother also cited the parties' disagreements as to terms in the Settlement Agreement and a difficulty in co-parenting. Additionally at trial, Mother argued that there was a material change that warranted a change in custody. The circuit court agreed with Mother that there was a material change and stated:

> I think both attorneys, if not explicitly, implicitly agree that the arrangement that was made on August 11th of 2014 is just totally unworkable now. That in and of itself would be a significant change in circumstances and once we get over that hurdle, then I have got to discuss the [*Sanders*] factors and make a determination as was it is best for the children.

Agreeing with Mother, the circuit court found that the Settlement Agreement was no longer working for both parties and needed modification.

Mother contends that the fact that the Settlement Agreement is unworkable is not a sufficient reason to be considered a material change. We disagree. A Settlement Agreement does not take precedent over what the circuit court believes is in the best interest for the child because it is of "paramount importance and cannot be altered by parties." *Shrivastava v. Mates*, 93 Md. App. 320, 327 (1992) (citations omitted). Even if an agreement exists, the circuit court "cannot be handcuffed in the exercise of [its] duty to act in the best interests of a child by any understanding between parents." *Stancill*, 286 Md. at 535. Also as we noted in *McMahon*:

> [T]he test of materiality is whether the change is in the best interest of the child. Consequently, if a court concludes, on sufficient evidence, that an

> existing provision concerning custody or visitation is no longer in the best interest of the child and that the requested change is in the child's best interest, the materiality requirement will be satisfied.

182 Md. App. at 812 (citation omitted). Therefore, the circuit court's factual finding that the Settlement Agreement was not working was not clearly erroneous.

The circuit court also cited several other factors, in support of its finding that there was a material change in circumstances. The court found that the Father's remarriage and the increasing intensity of the Children's medical issues were also material changes.[6] Mother relies on *McMahon*, 162 Md. App. at 595-96 (citing *Campbell v. Campbell*, 477 S.W.2d 376, 378 (Tex. Civ. App. 1972)) to argue that the remarriage is not a change in circumstances. Mother's reliance on the dicta in *McMahon* is misplaced. As discussed, *supra*, McMahon supports the circuit court's decision modifying custody due to the unworkability of the Settlement Agreement. Mother misconstrues the court's findings. The material change was not simply that Father was remarried; rather it was that in remarrying the Children now have an extended family that includes the new wife and the new wife's children, which the Children have to live with as a family unit. Even if Mother is correct, the circuit court stated that the unworkability of the schedule alone was sufficient to warrant a modification, and we see no clear error in that finding.

[6] It is unclear why the circuit court found that the "[C]hildren's medical issues are much more intense at the present time." All of the Children's medical conditions were diagnosed before the parties agreed to the Settlement Agreement and evidence at trial and presented by the Custody Evaluator seems to suggest that the Children were participating in ongoing treatment. Mother and Father disagreed about the appropriate course of treatment, but that seems to suggest that the Settlement Agreement was unworkable, not that the Children's medical issues were more intense.

Having found a material change in circumstances, the circuit court then considered if a custody modification was in the best interest of the Children. "When making a custody determination, a trial court is required to evaluate each case on an individual basis in order to determine what is in the best interest of the child." *Wagner*, 109 Md. App. at 39 (citation omitted). Factors the trial court may use in this determination include:

> 1) fitness of the parents, 2) character and reputation of the parties, 3) desire of the natural parents and agreements between the parties, 4) potentiality of maintaining natural family relations, 5) preference of the child, 6) material opportunities affecting the future life of the child, 7) age, health and sex of the child, 8) residences of parents and opportunity for visitation, 9) length of separation from the natural parents, and 10) prior voluntary abandonment or surrender.

Montgomery Cty. Dep't. of Soc. Servs., 38 Md. App. at 419-21 (citations omitted). "In determining if joint custody is appropriate, the capacity of the parties to communicate and reach shared decisions regarding the children's welfare is of paramount importance." *Gillespie*, 206 Md. App. at 173 (*citing Taylor v. Taylor*, 306 Md. 290, 303 (1996)).

As required, the circuit court went through all ten of the enumerated *Sanders* factors. Mother argues that the court improperly applied the factors by weighing some factors more than others instead of examining the totality of the circumstances. In Mother's brief, she attempts to explain why she disagrees with the court's findings on various factors. This argument is unavailing, as the reviewing court, we will not set aside the circuit court's findings of fact, unless the findings are clearly erroneous.

The court expressly stated that it was taking into account the first eight *Sanders* factors and concluded that the last two factors did not apply. While helpful, the factors

aid the court in making a determination on custody, but the circuit court is not constrained to rely exclusively on those factors, because the court must evaluate each custody case individually. Further, there is nothing in the record that demonstrates that the circuit court only made it's finding by relying on one factor; on the contrary, the circuit court's thorough application of the *Sanders* factors demonstrates the court's willingness to give each factor equal weight in coming to a custody determination.

The circuit court awarded sole legal and physical custody to Father based by evaluating the necessary factors, reviewing evidence presented and testimony taken at trial; and nothing in the record suggested that one factor was weighed at the expense of another. In making its ruling on custody, the court also stated, "I also heard from roughly 20 witnesses . . . and . . . I think there were over 100 exhibits in this case and I have considered all of that."

Mother avered that, in making its finding, the circuit court improperly relied on testimony about the incident where she entered Father's home while he was away without also admitting the transcript from the district court as relevant evidence on that matter. We disagree. We generally review the admissibility of evidence applying the abuse of discretion standard. *Gillespie*, 206 Md. App. at 165. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Mother contended that the circuit court gave this incident greater weight when making the custody determination without considering the transcript. Mother is mischaracterizing the circuit court's ruling on this evidence and

isolates one line from the trial transcript where the court says, "I am not going to look at that." The full exchange at trial between the circuit court and Mother's attorney went as follows:

> THE COURT: I am not going to look at that. **You can introduce it** but –
>
> [MOTHER'S ATTORNEY]: I am introducing it.
>
> THE COURT: Okay. **It is admitted**. Do you expect me to listen to the whole criminal trial?
>
> [MOTHER'S ATTORNEY]: I can certainly ask some questions and direct your attention to what I believe is relevant.
>
> THE COURT: **If you [sic] something is relevant, I suggest you isolate it and let me know about it. I am not going to listen to a criminal trial.**
>
> [MOTHER'S ATTORNEY]: Okay. Do you want me to provide something for you in writing at the break?
>
> THE COURT: Whatever you would like to do.
>
> [MOTHER'S ATTORNEY]: Okay. And I would do that so I would just move that in and with that, Your Honor, I do not have any further witnesses or testimony.

(Emphasis added).

The record demonstrated that the circuit court not only admitted the evidence, but also allowed Mother to isolate portions on the trial transcript that she deemed relevant. The circuit court correctly relied on the incident to make a factual finding about Mother's credibility in the context of the second factor, character and reputation, and stated:

> It is beyond me, and I realize that she was charged criminally where there is a different standard, but in my view she committed at least two crimes by going into that house. And then when she gave me the explanation that I

> wanted to meet the babysitter and then, of course, we had the big discrepancy regarding the doorbell, I am absolutely convinced that she lied about it. And if you lie about one thing, it makes you wonder about what you are willing to lie about beyond that because it taints her credibility.
>
> * * *
>
> Second factor, character and reputation of the party. General credibility bears on character and reputation and my view was that Ms. Greene was not credible in the majority of her testimony with this Court. She started out lying about her job and it did not stop there. I cited other examples of where she lied and the biggest lie in my view, which I have already touched on, the reason that she went into his house when Gay Austin was there is totally inexplicable and her explanation was just not credible.

As a trial court, the circuit court is in the best position to make determinations of credibility. When considering the facts, Md. Rule 8-131(c) requires that due regard be given to the opportunity of the court to judge the credibility of witnesses.

The circuit court modified the custody arrangement, providing that the Children would primarily reside with Father and would spend alternate weekends with Mother. The court stressed that it made its ruling "to end this dispute regarding who has decision-making authority and to add a little more stability to the schedules of the [C]hildren." Throughout the trial, the circuit court, Custody Evaluator, and Best Interest Attorney all agreed that ideally Mother and Father would share joint custody of the Children, because both parties have the means and ability to be good parents. However, the court ultimately chose one parent to award sole legal and physical custody to in an effort to protect the best interest of the Children.

We hold that the circuit court did not abuse its discretion in modifying the custody arrangement. After hearing abundant evidence and considering the best interest of the

Children, the court reasonably concluded that Mother and Father could not effectively communicate to co-parent, and that Father was the parent that could better provide for the children's health, education, and welfare. We conclude that the circuit court's findings were not clearly erroneous, and the court's ruling was founded upon sound legal principles. Accordingly, we affirm the circuit court's modification of custody.

II.

We now turn to whether the circuit court erred in establishing the child support award by requiring Mother to pay Father child support and retroactive child support to January 26, 2015. Because the court did not make any findings regarding child support and improperly awarded child support retroactively, we vacate and remand the circuit court's order granting fees and remand for further proceedings.

Md. Code (1984, 2012 Repl. Vol.), § 12-104 of the Family Law Article ("FL") 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.
>
> (b) The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification.

On review, the appellate court must determine whether the circuit court was clearly erroneous in finding a material change in circumstance. *Gordon v. Gordon*, 174 Md. App. 583, 637-638 (2007). "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.

"It is well established that parents have an obligation to support their children." *Gordon*, 174 Md. App. at 644 (internal citations omitted). FL § 12-204(a)(1) requires "[t]he basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes." Additionally, FL § 12-104(a) states a "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 circumstances."

A modification of child support is proper only when there has been "a 'material' change in the circumstances, needs, and pecuniary condition of the parties from the time the court last had the opportunity to consider the issue." *Guidash v. Tome*, 211 Md. App. 725, 742 (2013) (citation 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." *Pettito v. Pettito*, 147 Md. App. 280, 307 (2002) (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)).

Mother avered that the circuit court improperly applied the child support award to a date beyond when Father filed for the modification and erred in making an order without any findings. Father avered that the child support award amount was appropriately applied retroactively to account for the fact that Mother did not disclose she had started working, even when asked by Father. Father also suggested that the award

was appropriate because he would have filed earlier if Mother had told him she was working.

There is no dispute that this is an above the guideline case, therefore "the court may use its discretion in setting the amount of child support." FL §12-204(d). Near the close of trial, the judge stated, "[b]ecause this issue, and we discussed this in Chambers, the child support, I am not going to ask the attorneys to submit their arguments, proposed findings of fact, and conclusions of law just on that issue within the next say 14 days and I will be glad to consider that." After both sides responded, the court failed to hold hearings, and did not make any findings of fact, or conclusions of law. In his final order, the circuit court judge did not adopt one party's submission over the other.

While the circuit court has discretion to set the amount of the award, the court must balance the interest and needs of the children with the parent's financial ability to meet those needs. We have said that the court should consider several factors when making the award of child support including the financial circumstances of the parties, the parties' station in life, the parties' age and physical condition, and the parties' expenses in educating their children. *Frankel v. Frankel*, 165 Md. App. 553, 587 (2005). There is nothing in the record to suggest that the circuit court evaluated any factors in determining the child support award. Remand is required when there are no findings of fact on the record, and it is not clear what the circuit court considered, and if it considered correctly. *Reuter v. Reuter*, 102 Md. App. 212, 236 (1994).

The circuit court also erred as a matter of law in applying the child support award to January 26, 2015, because Father filed for the modification in child support on

November 10, 2015. Father tries to create an exemption to the FL § 12-104(b) by relying on a holding in *Wells v. Wells*, 168 Md. App. 382, 398-400 (2006), where we found that a husband's fraudulent actions prevented the wife from participating in the divorce action, the court should have set aside the default judgment. Additionally, FL § 12-104(b) was not at issue in *Wells*. FL § 12-104(b) does not provide for any exemption, and we will not create one. To do so would be contrary to the clear legislative intent of the statute to limit the retroactivity of child support awards. Furthermore, we do not know if it was the circuit court's intent to award Father child support retroactively to account for Mother's alleged lie to Father about employment, because the court does not give us any findings to review on this issue.

III.

Finally, we turn to whether the circuit court abused its discretion by requiring that Mother pay $60,000.00 of Father's attorney's fees, and that she reimburse Father $7,232.50 of the Best Interest Attorney's fee. Because the court did not conduct the appropriate analysis of the parties' financial resources and needs, we vacate and remand the circuit court's order granting fees and remand for further proceedings.

We review the award of counsel fees under the abuse of discretion standard. *Meyr v. Meyr*, 195 Md. App. 524, 552 (2010). We will not disturb the circuit court's award of attorney's fees "unless a court's discretion was exercised arbitrarily, or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994).

Mother avered that the circuit court's award of attorney's fees was arbitrary, erroneous, and an abuse of discretion because the court opined from the bench that both parties contributed to the cause needing to be litigated, and because the court failed to consider the parties financial circumstances when making the award. Father responded that the court considered the findings in its oral ruling, and asked the court to affirm the circuit court order because he amassed a significant amount of legal fees litigating this case.

The circuit court has discretion to award attorney's fees in a modification of custody or child support only after considering "(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." FL § 12-103(b). The Court of Appeals and this Court have indicated that factors set forth in FL § 12-103(b) are relevant to the analysis of an attorney's fees award. *Meyr,* 195 Md. App. at 555 (citing *Taylor v. Mandel,* 402 Md. 109, 134 (2007).

In the instant case, the circuit court was presented with significant information regarding the financial status of the parties, but there is no indication that the court expressly considered any of the factors listed in FL § 12-103(b). The order of the court did not include any basis for the court's decision, and there is nothing in the record to indicate that the court made any findings to support the order that Mother pay a portion of Father's attorney's fees nor reimburse him for the Best Interest Attorney fee. While, a hearing is not always required to determine the apportionment of fees, the circuit court is required to state a basis for its determinations. Absent a clear basis for the court's

determination, we are unable to properly review the decision. *Ledvinka v. Ledvinka*, 154 Md. App. 420, 432-33 (2003) ("Based on the record we conclude that the trial court failed to make a finding of fact to justify the award of attorney's fees. Absent the court stating the basis for its determination, this Court cannot properly review the decision."); *Painter v. Painter*, 113 Md. App. 504, 529 (1997) ("In a case in which bills for legal services are challenged, [the trial court] ought to state the basis for [its] decision so it can be reviewed, if necessary, on appeal.") Iinternal quotation omitted). Accordingly, we remand for the limited purpose of determining the fees apportionment between the parties.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED FOR FURTHER FACT-FINDING CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 2/3 BY APPELLEE AND 1/3 BY APPELLANT.