UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2148

September Term, 2013

ROBERT EUGENE DAY, JR.

v.

KIM MICHELLE STERRETT

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 15, 2015

In connection with a judgment for absolute divorce, the Circuit Court for Howard County ordered Robert Eugene Day Jr. to pay child support, alimony, and counsel fees to Kim Michelle Sterrett. On appeal, Mr. Day contends that the circuit court erred by imputing income to him of $299,115.00 per year and that the court abused its discretion in determining the awards of child support, alimony, and counsel fees. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Demise of the Parties' Marriage

Mr. Day and Ms. Sterrett were married in 1990. Three children were born of the marriage: one son in 1992, a daughter in 1996, and another son in 1998.

Throughout the marriage, Ms. Sterrett served as the primary child-care provider. She also worked part-time, under 30 hours per week, as a software engineer for the Johns Hopkins Applied Physics Laboratory. The family used her salary of around $60,000.00 per year to cover the cost of private school tuition for the children.

Mr. Day served as the primary wage earner. He worked full-time and traveled extensively as a specialist in marketing and international sales. He eventually became an executive at Smith Micro Software, a California-based software company. He earned a base salary of around $190,000.00, plus commissions, bonuses, stock options, and other compensation, for an average yearly income of $363,000.00 from 2009 through 2011.

The couple began to experience serious marital problems as early as 2004, based in part on conflicts in their approaches to parenting and disagreements about the cost of private school education. Ms. Sterrett became unhappy in the marriage and experienced

depression. Mr. Day was unwilling to engage in counseling or to provide emotional support.

The parties separated in August 2010 when Ms. Sterrett moved out of the family residence. By that point, their oldest son had already reached adulthood. The two minor children initially lived with Ms. Sterrett during the separation, but their teenage daughter returned to live with Mr. Day at the family home a few months later.

B. The Action for Divorce

On October 20, 2010, Ms. Sterrett filed a complaint for limited divorce in the Circuit Court for Howard County. Her complaint included requests for physical and legal custody of the two minor children, child support, alimony, equitable division of marital property, and attorneys' fees. Mr. Day counterclaimed, also seeking sole custody of the two children and child support.

In January 2011, Ms. Sterrett filed a "Motion for Suit Money, Counsel Fees, and Costs." She asked the court to order Mr. Day to pay some of her expenses in prosecuting the divorce action. *See* Md. Code (1984, 2006 Repl. Vol.), Family Law Art. ("FL"), § 7-107(b) (authorizing court to order party to pay expenses of other party, including counsel fees, "[a]t any point" in divorce proceeding). On July 21, 2011, the circuit court awarded Ms. Sterrett $20,000.00 in "interim suit money and attorneys' fees." Mr. Day appealed, but this Court ultimately affirmed the order in an unreported opinion. *Day v. Sterrett-Day*, No. 1300, Sept. Term 2011 (filed Feb. 7, 2013).

In April 2011, the parties reached an agreement to share custody of the two minor children during the pendency of the divorce action and to follow a visitation schedule.

Mr. Day agreed to pay Ms. Sterrett $3,500.00 per month in *pendente lite* child support. In a consent order documenting the parties' agreement, the court noted that it would reserve judgment on the issues of arrearages for child support and alimony.

In October and November 2011, Mr. Day and Ms. Sterrett amended and supplemented their pleadings, asking the court to grant an absolute divorce on the grounds of a one-year separation. Both parties continued to request sole custody of the minor children, child support, and equitable division of marital property. Ms. Sterrett continued to pursue alimony and counsel fees.

A bench trial commenced on January 30, 2012. The trial was originally scheduled for three consecutive days, but it continued for eleven trial days over the course of more than a year. The majority of testimony came from the parties themselves. Ms. Sterrett testified on her own behalf on three days at the end of January 2012 and on three days in June 2012. Mr. Day testified as part of his case on two days in December 2012 and, after the court granted a continuance so that his attorney could address a medical emergency, on two additional days in March 2013.

C. Evidence and Arguments Regarding Mr. Day's Loss of Employment

When Mr. Day resumed his testimony on March 4, 2013, the penultimate day of trial, he testified that he was no longer employed with Smith Micro. He offered into evidence a letter from Smith Micro's corporate controller, dated February 22, 2013, "advising concerned parties of Mr. Day's pending termination date." The letter contained a single sentence: "Please be advised that Rob Day has been given notice and that his final day of employment is February 28, 2013." The letter gave no reason for the

termination of Mr. Day's employment. Mr. Day offered no explanation other than to say that he had been "laid off."

Mr. Day testified that he had not received any compensation package upon his discharge. Mr. Day's attorney asked him to "explain for the Court why [he did] not have a severance package." He responded that he would need to evaluate how a non-compete provision in the severance agreement would restrict his ability to work for other employers. When the court asked for further clarification about his opportunity for severance, Mr. Day responded that, sometime "over the next few weeks," he planned to "negotiate with [his] boss" who had been "out of town when [Mr. Day] got laid off." During cross-examination, Mr. Day added that Smith Micro owed him "probably 6 weeks" of base salary for accumulated vacation days and paid leave. He admitted that his direct supervisor, Mr. Von Cameron, was his "best friend" whom he had known since college.

Mr. Day also testified that he had "filed for unemployment" and that he had "started contacting people" about finding a new job. According to Mr. Day: "the kind of job that I get is very rarely listed . . . , an executive level job. Usually these jobs come from word of mouth." He explained that he had searched online for "entry level positions" in his field, and that the "base salary" for those jobs was "between $100,000.00 and $150,000.00." He said that he was willing to take such a position paying a base salary of $100,000.00, far below his previous base salary of $190,000.00. He testified that, if he were unable to find a job within a short time, he could sustain himself for "eight months to a year" by taking "unemployment plus drawing off whatever

assets," such as stock, that he owned. Based on his prior experiences, he opined that it would take an "average of 6 months to a year" for him to "find similar work."[1]

Mr. Day also testified that, while he was unemployed, he planned to spend more time with his youngest son, who was fourteen at the time. He elaborated further about how he planned to discuss the job search with his children: "It's not the end of the world[.] . . . I've gotten a job in the past, I will in the future. . . . I use it as a learning experience [for the children] because they're all going to have to do it any way."

Ms. Sterrett testified as a rebuttal witness on the final day of trial. She described Mr. Day's boss and friend, Mr. Von Cameron, as the "number two guy" at Smith Micro. She testified that, before working at Smith Micro, Mr. Day had also worked for Von Cameron at two other companies and for "one of [Von's] friends" at another company. Based on her experiences from the previous ten years of the marriage, she commented that Mr. Day "usually has a job lined up so he gets double pay, . . . [severance] compensation plus his salary" and that his later jobs had always paid a "higher amount of money than the previous job that he left." She further testified that Smith Micro's shareholders report from the fourth quarter of 2012 made no mention of anticipated layoffs.

[1] During his testimony, Mr. Day offered a financial statement that he had prepared in January 2013. The statement listed his gross monthly income as $15,974.00, a figure reflecting only the base pay of around $191,000.00 from Smith Micro, without any of his bonuses or other compensation. Mr. Day's counsel asked him a series of questions about the approximately $5,000.00 deficit between his net monthly income and his monthly expenses. He stated that he frequently sold stock to make up for that shortfall. He offered no revised estimate of his projected income during the period of unemployment.

During closing argument, counsel for Ms. Sterrett asserted that Mr. Day's "odd and weird" testimony regarding his termination did not "pass the smell test." Counsel encouraged the court to "connect the dots," based on the timing of the job loss, Mr. Day's close friendship with his supervisor, and Mr. Day's demeanor while testifying. She asked the court to infer that Mr. Day had "another job or another form of compensation . . . waiting in the wings." Counsel suggested that "income needs to be imputed" to Mr. Day, using his average income from the past several years to estimate his potential earnings.

In response, counsel for Mr. Day pointed to the absence of direct evidence "that Mr. Day and his employer" had "conspire[d] to create a false lay off to avoid paying alimony and child support." Mr. Day's attorney argued that the court should believe Mr. Day's testimony about his layoff because it had "not been impeached." She submitted that, if the court were inclined to impute any income to him, the court should use a figure between $100,000.00 and $150,000.00, on the theory that Mr. Day would be "lucky to get an entry level position" making six figures. Counsel argued that the court should discount Ms. Sterrett's testimony regarding the "fantastic employment packages" that Mr. Day had negotiated during his prior job transitions, because "this economy . . . is not 2010, this is not 2009" when "things were great" for Mr. Day.

D. Judgment of the Circuit Court

On August 1, 2013, the court issued an oral opinion on the issues of divorce and custody. The court granted an absolute divorce based upon a finding of a one-year separation. Ms. Sterrett received sole legal custody and primary physical custody of the younger son, then fifteen years old. The court awarded the parties joint legal custody of

their seventeen-year-old daughter, with Mr. Day having primary physical custody. The court formalized those rulings, along with a visitation schedule, in a judgment for absolute divorce entered on August 26, 2013.

The trial court issued its final determinations as to the remaining claims in an order entered on November 18, 2013. The court detailed its findings and conclusions in a 31-page supplemental memorandum opinion, accompanied by a child support worksheet. Regarding the incomes of the two parties, the court noted that it had "reviewed the file, the exhibits, and the testimony presented during the trial, and [] had occasion to observe and determine the credibility of witnesses during the 11 days of trial." Based on Ms. Sterrett's employment history and earnings, the court found her income to be $75,000.00 per year, which was "the most she ha[d] ever earned." That figure represented her 2012 wages from working around 30 hours per week as software engineer.

Turning to Mr. Day's income, the court recited his employment history and commented that Mr. Day "presents himself as an expert on international sales and marketing." The court referred to exhibits in evidence showing that Mr. Day earned $329,556.00 in 2009; $419,022.00 in 2010; $340,422.00 in 2011; and $257,809.00 in 2012. The court then addressed Mr. Day's testimony that he had been discharged from Smith Micro at the end of February 2013. The court characterized the timing and circumstances of Mr. Day's loss of employment as "troublesome." "In this matter [Mr. Day] has been gainfully employed for many years, earning an average of $300,000 a year, . . . and 2 days before [] this case is concluded, [Mr. Day] is terminated by his best friend, and without receiving a severance package." The court commented that it was

"extremely unusual and [] not commonplace" in business to delay severance negotiations until after termination. The court also expressed concern with Mr. Day's "demeanor when testifying, his lack of concern about losing his job[,] and his statement that losing his job is a learning experience for his children[.]"

Consequently, the court concluded "that [Mr. Day's] loss of employment was orchestrated by [Mr. Day] in order to avoid paying child support and/or alimony and the Court will impute income for [Mr. Day]." The court then relied on Mr. Day's tax returns from the three previous years to ascertain his earnings potential. The court ignored Mr. Day's 2010 income, which exceeded $419,000.00, because that figure was substantially higher than his historical averages. The court reasoned that Mr. Day's average income from the 2011 and 2012 tax years represented "the most accurate assessment of [Mr. Day's] actual income and earning capacity." Accordingly, the court concluded that Mr. Day's "income for purposes of calculating child support and alimony, if any, [was] $299,115.00 a year."

After considering the requisite statutory factors, the court determined that Ms. Sterrett was entitled to rehabilitative alimony. *See* FL § 11-106. The court ordered Mr. Day to pay Ms. Sterrett monthly alimony of $3,500.00 for a definite period of seven years, retroactive to November 2010. The court calculated that Mr. Day owed $126,000.00 for three years of alimony arrearages, and then reduced that amount to a judgment in favor of Ms. Sterrett.

In calculating child support based on the parties' incomes (*see* FL § 12-204), the court determined that Mr. Day should pay $2,963.00 per month for support of the parties'

younger son, who was in Ms. Sterrett's primary custody. The court also found that Ms. Sterrett should be responsible for $1,077.00 of monthly support of the parties' daughter, who was in Mr. Day's primary custody. Consequently, the court ordered Mr. Day to pay Ms. Sterrett the net difference of $1,886.00 per month until June 2014, when their daughter turned eighteen, and $2,963.00 per month thereafter.

The court also ordered Mr. Day to make a contribution towards Ms. Sterrett's attorneys' fees. The court noted that the parties owned roughly the same amount of assets, and reiterated that Ms. Sterrett earned approximately $75,000.00 per year and that Mr. Day's employment history showed that he could earn around $300,000.00 annually. The court observed that Mr. Day "filed numerous motions as well as motions to reconsider when the ruling was not in his favor," that he "appealed an award of interim counsel fees" and "subsequently lost the appeal," and that Mr. Day's "lack of compliance to Court orders for counseling, as well as for distribution of assets, caused additional litigation and unnecessary counsel fees." The court also credited Ms. Sterrett's testimony that Mr. Day told her he planned to "financially devastate" her in the divorce proceedings. The court then found that "[a]t least $100,000" of the $175,000.00 in counsel fees incurred by Ms. Sterrett had resulted unnecessarily from Mr. Day's "actions and conduct" during the litigation. Accordingly, the court awarded Ms. Sterrett $100,000.00 for her counsel fees and reduced that award to a judgment in her favor.[2]

[2] The court also issued various orders regarding distribution of the parties' real and personal property. Mr. Day has not challenged those orders on appeal.

More than two weeks after the entry of judgment, on December 5, 2013, Mr. Day filed a "Motion to Reconsider or Alternatively Modify Judgment," pursuant to Md. Rule 2-535. He argued that the court had erred by attributing the delays in the proceedings to him when it ordered him to pay counsel fees. He also asked the court to vacate the child support and alimony orders so that it could "reconsider his current financial standing." He attached two affidavits, one from the corporate controller of Smith Micro and one from his former boss Von Cameron. Both affidavits stated that declining revenues had caused Smith Micro to discharge Mr. Day and other employees. The court denied the motion to revise judgment, without a hearing.

Mr. Day then noted an appeal on December 17, 2013.[3]

ISSUES PRESENTED

In his appeal, Mr. Day now presents four issues for our review:

1. Whether the circuit court erred or abused its discretion in "imputing income" without a finding of voluntary impoverishment and potential income.

[3] Final rulings on all of the claims raised by the parties are set forth in the court's written orders, but not necessarily in the docket entries. The docket entries indicate that a "Judgment of Absolute Divorce" was entered on August 26, 2013, and that monetary judgments for alimony arrearages and attorneys' fees were entered on November 18, 2013, along with an order regarding "support, alimony, use and possession [of the marital home], and marital property[.]" Under these circumstances, the written orders and docket entries were sufficient to effect the entry of a final judgment. *See Rohrbeck v. Rohrbeck*, 318 Md. 28, 46 n.7 (1989) ("Upon the filing of a written order [that satisfies the separate document requirement of Rule 2-601], the clerk need do no more than note on the docket that the order was filed and that judgment is entered in accordance therewith"); Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary* 491-92 (3d ed. 2003).

2. Whether the circuit court erred or abused its discretion in awarding child support.

3. Whether the circuit court erred or abused its discretion in awarding alimony.

4. Whether the circuit court erred or abused its discretion in awarding attorneys' fees.

Mr. Day asks this Court to vacate the awards of child support, alimony, and counsel fees and to remand the case for rehearing on all issues. Ms. Sterrett, representing herself, argues that the court's judgment should be affirmed.

DISCUSSION

I.

Mr. Day's various challenges rest primarily on his assertion that the circuit court erred in determining that his annual income was $299,115.00 for the purpose of evaluating each award. According to Mr. Day, "the circuit court 'imputed income' to him without a required finding of either voluntary impoverishment or potential income." He asserts that the court failed to conduct a proper review of the factors required for a finding of voluntary impoverishment or for potential income. In response, Ms. Sterrett contends that the court did indeed find that Mr. Day voluntarily impoverished himself and that his potential income was $299,115.00. She further argues that the record amply supported the court's determinations and that the court explained its findings and conclusions more than adequately in its opinion. We find her argument persuasive.

A. Trial Court's Finding of Voluntary Impoverishment

When one parent raises a claim for child support against another, the court must determine the combined incomes of both parents. *See Voishan v. Palma*, 327 Md. 318, 322-23 (1992) (explaining rationale and application of income shares model for Maryland's child support guidelines). The guidelines define a parent's income in one of two ways: "'Income' means: (1) actual income of a parent, if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished." FL § 12-201(h). The term "actual income" means "income from any source," including salaries, wages, commissions, bonuses, and many other forms of benefits and compensation. FL § 12-201(b)(1), (b)(3). On the other hand, "'[p]otential income' means income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." FL § 12-201(*l*). "[I]f a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income." FL § 12-204(b)(1); *see also Petrini v. Petrini*, 336 Md. 453, 464 (1994) (stating that considerations in determining income for purposes of calculating child support include "whether either party is voluntarily impoverished").

The Family Law Article does not define the term "voluntarily impoverished." Construing the child support guidelines, this Court has held that "a parent shall be considered '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." *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993). "The issue of voluntary impoverishment most often arises in the context of a parent who reduces his or her level of income to avoid paying support by quitting, retiring[,] or changing jobs." *Id.* at 326. A person who freely reduces his or her resources "with the intention of avoiding child support or spousal obligations" is voluntarily impoverished. *John O. v. Jane O.*, 90 Md. App. 406, 421 (1992); *see also Colburn v. Colburn*, 15 Md. App. 503, 515-16 (1972) (holding that chancellor properly based alimony determination on husband's earning capacity after finding that husband had surrendered lucrative salary "to voluntarily impoverish himself so as to fraudulently deprive his wife of her claim for alimony"). The Court of Appeals has clarified, however, that "a parent who has become impoverished by choice is 'voluntarily impoverished' regardless of the parent's intent regarding his or her support obligations." *Wills v. Jones*, 340 Md. 480, 494 (1995) (citing *Goldberger*, 96 Md. App. at 326-27). Stated differently, "the question is whether a parent's *impoverishment* is voluntary, not whether the parent has voluntarily avoided paying . . . support." *Wills*, 340 Md. at 494.

In challenging the circuit court's determination of imputed income, Mr. Day first contends that the court never actually made a finding that he had voluntarily impoverished himself. With respect to his income, the circuit court wrote:

> The Defendant testified that on February 28, 2013 he was terminated from Smith Micro. When questioned about a severance package, the Defendant testified that he did not have one and that he had to negotiate one with his boss after his boss returned from vacation. The timing of the Defendant's loss of employment is troublesome. As a finder of fact the Court is allowed to use its own experiences, and is aware that it is commonplace in the business industry to award a severance package upon

> the termination of an employee, not after the termination. One consideration when negotiating a severance is ability or inability to compete or seek employment with a competitor. In this matter the Defendant has been gainfully employed for many years, earning an average of $300,000.00 a year, with stock options, commissions and bonuses, and 2 days before was this case is concluded, the Defendant is terminated by his best friend, and without receiving a severance package. The discussion and/or negotiation of a severance package after termination of employment is extremely unusual and is not commonplace. Additionally, the Defendant's demeanor when testifying, his lack of concern about losing his job and his statement that losing his job is a learning experience for his children, adds to the Court's concern. The Plaintiff argues that the Defendant's loss of employment was planned in order to avoid paying alimony and/or child support.
>
> The Court finds that the Defendant's loss of employment was orchestrated by the Defendant in order to avoid paying child support and/or alimony and the Court will impute income for the Defendant.

There is no dispute here that a loss of employment and an elimination or reduction of salary are forms of "impoverishment." *See, e.g., Dunlap v. Fiorenza*, 128 Md. App. 357, 365 (1999) (upholding trial court's finding that wife voluntarily impoverished herself by quitting managerial position); *Wagner v. Wagner*, 109 Md. App. 1, 47 (1996) (upholding finding that wife voluntarily impoverished herself by taking position "at a salary equal to one-third of that which she had been previously receiving"). Moreover, the court's statement that Mr. Day "orchestrated" his job loss sufficiently conveys a finding that his impoverishment was "voluntary." *See Wills*, 340 Md. at 495 (defining "voluntary" in this context as a requirement "that the action be both an exercise of unconstrained free will and that the act be intentional"); *Stull v. Stull*, 144 Md. App. 237, 248 (2002) (to determine party's voluntary impoverishment, court must simply "ask

whether his current impoverishment is intentional, that is, by his own choice, of his own free will").

Mr. Day's argument mistakenly presupposes that the court was required to write the words "voluntarily impoverished" in its opinion. We have previously upheld a child support determination based on imputed income even where the judge "implicitly found that [a party] had voluntarily impoverished herself" by leaving a job. *See Dunlap*, 128 Md. App. at 363-65 (rejecting appellant's contention that court failed to make requisite finding of voluntary impoverishment where trial judge stated that parent "stopped working because she felt [her child] needed her at home" and then concluded that the court "must posit $50,000 to her"); *see also Durkee v. Durkee*, 144 Md. App. 161, 185 (2002) (where trial court did not make express finding of voluntary impoverishment, explaining that "a trial court does not have to follow a script," and holding that "the court implicitly found that appellant had voluntarily impoverished himself" by imputing income while commenting that appellant had not achieved full earning potential by deciding to be self-employed).

By finding that Mr. Day's "loss of employment was orchestrated by him" and by announcing that the court would "impute income" to him, the court sufficiently expressed the conclusion that Mr. Day was "voluntarily impoverished" and therefore that the court would calculate support based on his "potential income." There is no merit to Mr. Day's suggestion that trial courts, who are presumed to know the law, must recite their findings using the exact words of the statute. *See Assateague Coastal Trust, Inc. v. Schwalbach*, 223 Md. App. 631, 657 (2015).

B. Consideration of Voluntary Impoverishment Factors

The related issues of whether a party is voluntarily impoverished and the amount of the party's potential income are "[b]oth . . . left to the sound discretion of the trial judge." *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994). "The trial court's factual findings on the issue of voluntary impoverishment are reviewed under a clearly erroneous standard, and the court's ultimate rulings under an abuse of discretion standard." *Long v. Long*, 141 Md. App. 341, 351-52 (2001) (citing *Reuter*, 102 Md. App. at 221). A finding of voluntary impoverishment will be upheld if, after viewing the record in the light most favorable to the prevailing party, the trial court's finding is supported by any competent, material evidence in the record. *Sieglein v. Schmidt*, 224 Md. App. 222, 2015 WL 5021392, at *15 (Aug. 25, 2015) (citation omitted).

Although it is undisputed that Mr. Day was impoverished at the time of trial, the central factual issue was whether his loss of employment was voluntary or involuntary. "For an action to be 'voluntary,'" in this context, the Court of Appeals has "consistently required that the action be both an exercise of unconstrained free will and that the act be intentional." *Wills*, 340 Md. at 459 (citations omitted). In the instant case, the circuit court relied on circumstantial evidence to infer that Mr. Day's testimony that he lost his job involuntarily was unworthy of belief.

Mr. Day argues, however, that the court did not properly analyze all of the factors required to make a finding of voluntary impoverishment. This Court has frequently directed trial courts to consult the following, non-exclusive list of factors in determining whether a party's impoverishment is voluntary:

> (1) his or her current physical condition;
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> (2) his or her respective level of education;
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> (3) the timing of any change in employment or other financial circumstances relative to the divorce proceedings;
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> (4) the relationship between the parties prior to the initiation of divorce proceedings;
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> (5) his or her efforts to find and retain employment;
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> (6) his or her efforts to secure retraining if that is needed;
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> (7) whether he or she has ever withheld support;
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> (8) his or her past work history;
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> (9) the area in which the parties live and the status of the job market there; and
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> (10) any other considerations presented by either party.

Lorincz v. Lorincz, 183 Md. App. 312, 331 (2008) (citing *John O.*, 90 Md. App. at 422).

"Although the various factors set forth in *John O.* must be considered by the trial court, neither we, nor the statute, require the trial court to articulate on the record its consideration of each and every factor when reaching its determination." *Stull*, 144 Md. App. at 246 (citing *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)); *see Dunlap*, 128 Md. App. at 364 (same proposition). Contrary to Mr. Day's argument, the "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 appellant was voluntarily impoverished." *Long*, 141 Md. App. at 351.

The circuit court's opinion reveals that the trial judge conducted the appropriate inquiry. Within the section of the opinion that explained the court's calculation of the

parties' incomes, the court explicitly discussed Mr. Day's work history and his high level of qualifications in his field. The court placed particular emphasis on the timing of Mr. Day's loss of employment relative to the divorce proceedings. As to the "other considerations" that strengthened the inference that Mr. Day's job loss was voluntary, the court highlighted Mr. Day's close friendship with his supervisor, Mr. Day's apparent lack of concern on the witness stand about losing his job, and his statement that he planned to use the job loss as a learning experience for his children.[4]

Elsewhere in the opinion, the court discussed in greater detail the acrimonious relationship between the parties prior to the divorce and the parties' disparate financial circumstances relative to the divorce proceedings. For instance, the court credited Ms. Sterrett's testimony that Mr. Day had expressed his intention to "financially devastate" Ms. Sterrett in the divorce action. As meticulously set forth in Ms. Sterrett's pro se appellate brief, other evidence in the record, including Mr. Day's own testimony, established that he was in good physical condition, had a high level of education, needed no retraining, and had missed some of his support payments in the past. We are satisfied that the finding of voluntary impoverishment was adequately supported and did not require additional explanation. *See Petitto v. Petitto*, 147 Md. App. 280, 316 (2002); *Dunlap*, 128 Md. App. at 365-66; *Wagner*, 109 Md. App. at 47; *see also In re Joshua W.*, 94 Md. App. 486, 493 (1993) (holding that trial court was not clearly erroneous in finding parent to be voluntarily impoverished where "[m]uch of [parent's] testimony focused on

[4] The trial court seems to have viewed Mr. Day's "learning experience" comment as an indication that he was not particularly concerned about the loss of his job.

the various factors that a court may consider when determining whether someone has voluntarily impoverished himself").

Mr. Day also asserts that, in finding that he was voluntarily impoverished, the court "us[ed] its 'own experience' as evidence." He takes issue with the following statement: "As a finder of fact the Court is allowed to use its own experiences, and is aware that it is commonplace in the business industry to award a severance package upon the termination of an employee, not after the termination." The court went on to say: "The discussion and/or negotiation of a severance package after termination of employment is extremely unusual and is not commonplace."

The trial judge correctly stated the law regarding the role of the factfinder. In civil jury trials, the court typically instructs jurors to consider only live testimony, exhibits, stipulations, certain depositions, and judicially noticed facts as evidence. *See* Maryland Civil Pattern Jury Instructions 1:7 (MSBA 4th ed., 2013 Supp.). "In evaluating the evidence," jurors are instructed to "consider it in light of [their] own experiences," and are permitted to "draw any reasonable conclusion from the evidence that [they] believe to be justified by common sense and [their] own experiences." *Id.* Similarly, when judges serve as finders of fact in a bench trial, judges "are not required to divorce themselves of common sense, but rather should apply to facts which they find proven such reasonable inferences as are justified in the light of their experience as to the natural inclinations of human beings." *State v. Smith*, 374 Md. 527, 539 (2003) (quoting *Commonwealth v. Russell*, 705 N.E.2d 1144, 1146 (App. Ct. Mass. 1999)) (internal quotation marks omitted). "In considering the evidence introduced in a case, [fact finders] are not

required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life, but, on the contrary, to apply them to the facts in hand, to the end that their action may be intelligent and their conclusions correct." *Smith*, 374 Md. at 540 (quoting *State v. Tangari*, 688 A.2d 1335, 1341 (App. Ct. Conn. 1997)) (internal quotation marks omitted).

The trial court did not treat facts outside the record as evidence. Instead, the court acted properly in evaluating the plausibility of Mr. Day's testimony in light of the factfinder's own experiences and common sense. The court was permitted to conclude that it seemed unusual that Mr. Day planned to negotiate a severance package with his former boss weeks after his discharge. Mr. Day's trial counsel apparently believed that Mr. Day's job loss without a severance package deserved some explanation. His attorney asked him to "explain for the Court why [he] [did] not have a severance package" after he had been discharged a week earlier. Mr. Day responded that he would need to negotiate the terms of the severance in the coming weeks with his friend and supervisor, Mr. Von Cameron. The court found this explanation to be unsatisfying and incomplete.[5]

In his brief, Mr. Day also theorizes that, upon a "proper review" of the voluntary impoverishment factors, the court necessarily "would have found . . . that [Mr. Day's]

[5] In any event, Mr. Day's brief overstates the importance of the court's candid admission that it found Mr. Day's testimony regarding his severance to be implausible. The court explained that its skepticism regarding that aspect of Mr. Day's testimony was only one of many factors that led the court to conclude that Mr. Day had "orchestrated" his own job loss.

termination 'had everything to do with performance' and that there were 'wholesale terminations across the company' . . . [and] that Smith Micro 'does not condone terminating employees under false pretenses or contrive[d] grounds[.]'" Mr. Day cites no portion of the trial record to support these assertions. Instead, he quotes from affidavits that he submitted with his motion to revise the judgment, weeks after the court issued its opinion and nine months after the trial.

Mr. Day does not explain how or why the trial court should be expected to have uncovered those affidavits before they came into existence. The trial court could make its determination only by evaluating the evidence offered by the parties. On the issue of voluntariness, Mr. Day submitted only his own testimony and a letter from his employer, neither of which provided a reason for his discharge. He waited until many months later, in his post-judgment motion, to offer evidence to explain the reasons for the termination of his employment. We cannot fault the trial court under circumstances such as these, where an appellant purports to establish error in the underlying judgment by relying on materials first submitted in a post-judgment motion, without differentiating between the submissions or even asserting that the court abused its discretion in denying the post-judgment motion. *See Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 194-95), *cert. denied*, 444 Md. 641 (2015) (citing *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 483-84 (2002)).

C. Court's Determination of Potential Income

Mr. Day asserts, in a conclusory fashion, that the orders for child support and alimony must be vacated because the court "never reviewed the factors required to find

potential income." Once again, we agree with Ms. Sterrett that there is no basis to set aside the court's judgment.

In the absence of clear error, a trial court's determination of a parent's potential income may not be disturbed as long as "'the amount calculated is realistic, and the figure is not so unreasonably high or low as to amount to abuse of discretion.'" *Sieglein*, 2015 WL 5021392, at *13 (quoting *Durkee*, 144 Md. App. at 187). This Court has recognized that a person's potential income is not the type of fact that is capable of being verified through documentation, and any determination of potential income in some sense requires some degree of speculation. *Malin v. Mininberg*, 153 Md. App. 358, 406-07 (2003) (citing *Reuter*, 102 Md. App. at 223-24).

The guidelines establish that potential income should be "determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." FL § 12-201(*l*); *see Wills*, 340 Md. at 490 (explaining that trial court must at least consider factors enumerated in statute's definition). This Court has also set forth a more extensive list of factors that the court may consider: "a person's age; mental and physical condition; assets; educational background, special training, or skills; prior earnings; efforts to find and retain employment; the status of the job market in the area where the parent lives; actual income from any source; and any other factor bearing on the parent's ability to obtain funds for child support." *Petrini*,

336 Md. at 466 n.13 (citing *Goldberger*, 96 Md. App. at 327-28).[6] Moreover, the court "may consider any admissible evidence to ascertain potential income," including evidence of the parent's income from "recent years." *Petitto*, 147 Md. App. at 318 (citing *Reuter*, 102 Md. App. at 225).

In this case, the court made a realistic projection, based on the evidence, that Mr. Day had the capacity to earn $299,115.00 per year. The evidence showed that Mr. Day earned a base salary of $190,000.00 at his former position, and that his total income averaged well over $300,000.00 from 2009 through 2012. The court reasonably concluded that Mr. Day's average income from 2011 and 2012 afforded a realistic approximation of his earning capacity. *See Petitto*, 147 Md. App. at 318-19 (holding that trial court neither erred nor abused its discretion in imputing income based on income parent had earned in previous tax year); *Dunlap*, 128 Md. App. at 365-66 (holding that trial judge was not "clearly erroneous in determining that [parent's past average income] was an adequate reflection of [parent's] potential earning capacity"); *see also Durkee*, 144 Md. App. at 186-87. The court was not required to accept Mr. Day's more pessimistic projection that a person with his background might take an "entry level" position with a base salary between $100,000.00 and $150,000.00. *See Wagner*, 109 Md. App. at 47 (holding that court did not abuse its discretion in "imputing to [parent] an

[6] As Ms. Sterrett accurately observes, most of these potential income factors are identical to the voluntary impoverishment factors. *Compare Goldberger*, 96 Md. App. at 327-28, *with John O.*, 90 Md. App. at 422; *see also Reuter*, 102 Md. App. at 221 (explaining that most of the factors in determining whether a parent is voluntarily impoverished may also be considered when establishing a parent's potential income).

income commensurate with those positions that [parent] previously held and that, the court believed, were still attainable").

II.

After disputing the court's findings of voluntary impoverishment and potential income, Mr. Day contends, as a separately-numbered issue: "The circuit court erred or abused its discretion in awarding child support." He asserts that his employment "situation constitutes a material change in circumstances, justifying a reduction in his child support from the *pendente lite* order and the circuit court's final child support order." As previously mentioned, Mr. Day had consented to pay $3,500.00 per month in child support effective April 2011; the trial court ultimately ordered him to pay $1,886.00 per month effective November 2013, and then $2,963.00 per month effective June 2014.

Mr. Day's argument on this issue is ill-founded. He directs this Court to FL § 12-104(a), which provides: "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." (Emphasis added.) From Mr. Day's brief, we cannot discern the point in time at which he believes that the court denied a request for modification of child support pursuant to FL § 12-104(a). He does not assert that he submitted a motion to modify either the consent order or the final child support order after he lost his job at the end of February 2013. Rather than file and argue such a motion, Mr. Day only gave testimony and made arguments at trial regarding the parties' competing claims for child support.[7]

[7] Although not noted in Mr. Day's brief, he did move to modify the consent order for *pendente lite* child support on February 4, 2013. At that time, he asked (continued…)

In December 2013, Mr. Day did file a motion to revise the court's judgment pursuant to Md. Rule 2-535. But even if a party could move to modify child support within a motion to revise judgment, Mr. Day's submission made no mention of FL § 12-104(a). The post-judgment motion did not assert, and failed to show, any "material change in circumstances" since the trial. His motion merely argued that the court should have made different findings when it determined his support obligations based on the evidence at trial. The attached affidavits from Smith Micro did not even include updated financial information from the preceding nine months, such as whether Mr. Day had received severance or was receiving unemployment benefits.

There is no merit to Mr. Day's vague and unsupported contention that the circuit court erred, at some unspecified point in the proceedings, by failing to find a material change in circumstance justifying a modification of child support that he did not request. *See Horsley v. Radisi*, 132 Md. App. 1, 20 (2000) (citing Md. Rule 8-131(a)). Mr. Day establishes no error. His argument merely seeks to reframe the question of whether the trial court was required to accept his testimony that he involuntarily lost his job as a "change in circumstances," an issue that he failed to raise and that the trial court never decided.

the court to decrease his child support obligation from $3,500.00 to $1,750.00. The motion made no mention of any job loss, because that event did not occur until later in the month. The docket indicates that the court never ruled on his motion, but instead resolved the issue at trial.

III.

In his next challenge, concerning the court's alimony order, Mr. Day incorporates and restates his argument that the circuit court should not have imputed income to him upon a finding that he was voluntarily impoverished.

Unlike the child support statute, which instructs a court to consider the potential income of a voluntarily impoverished parent to calculate the amount of support (*see* FL § 12-201(f), 12-204(b)), the alimony statute more broadly directs the court to "consider all the factors necessary for a fair and equitable award[.]" FL § 11-106(b). Those factors include "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" (FL § 11-106(b)(9)) and "the financial needs and financial resources of each party, including . . . all income and assets[.]" FL § 11-106(b)(11)(i). Thus, whenever a court finds that a party is voluntarily impoverished, the court should consider that party's potential income in determining an alimony award. *See Digges v. Digges*, 126 Md. App. 361, 379-81 (1999); *Colburn*, 15 Md. App. at 514-16; *see also Reynolds v. Reynolds*, 216 Md. App. 205, 220 (2014) ("Most, if not all, of the voluntary impoverishment factors will be relevant to alimony").

Because we leave undisturbed the trial court's findings that Mr. Day was voluntarily impoverished and had a potential income of $299,115.00 per year, we hold that the court did not abuse its discretion when it used those findings to evaluate the amount and duration of alimony.

IV.

As the final issue in this appeal, Mr. Day contends that the circuit court erred or abused its discretion in ordering him to pay Ms. Sterrett $100,000.00 for counsel fees.

In connection with divorce and related proceedings, the circuit court is authorized to "order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding." FL § 7-107(b) (divorce actions); FL § 8-214(b) (proceedings for disposition of property upon divorce); FL § 11-110(b) (proceedings for alimony). Similarly, in a case in which a person applies for an order concerning custody or child support, "[t]he court may award to either party the costs and counsel fees that are just and proper under all the circumstances[.]" FL § 12-103(a). Before ordering such a payment, the court is required to "consider: (1) the financial resources and financial needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the proceeding." FL § 7-107(c); FL § 8-214(c); FL § 11-110(c); *see also* FL § 12-103(b) (requiring court before awarding fees in connection with child support proceedings to "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").[8]

[8] The required considerations for assessing counsel fees in connection with a child support request are numbered differently and "phrased slightly differently" from the comparable provisions regarding expenses in proceedings for alimony and other issues. *Harbom v. Harbom*, 134 Md. App. 430, 464 (2000). Nonetheless, under any of these provisions the trial court "must undertake the same investigation before making an award of attorney's fees." *Id.* (quoting *Lemley v. Lemley*, 109 Md. App. 620, 675 (1996)).

As Mr. Day correctly recognizes, "[t]he trial judge is vested with a high degree of discretion in making" an award of counsel fees. *Lieberman v. Lieberman*, 81 Md. App. 575, 600 (1990) (citing *Lapides*, 50 Md. App. at 251). A fee award in this context "will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Meyr v. Meyr*, 195 Md. App. 524, 552 (2010) (quoting *Petrini*, 336 Md. at 468). Mr. Day does not contest the reasonableness of the fee amount, but instead argues that the court failed to properly consider and balance the requisite statutory factors.

Mr. Day first repeats his contention that the court erred in assessing the relative financial positions of the two parties. With respect to these factors, the court noted that the parties each owned a roughly equal amount of assets, but that Mr. Day had "earned over $300,000.00 a year for the past few years while [Ms. Sterrett] ha[d] earned between $60,000.00 and $75,000.00 a year." As explained previously, the court had a sufficient basis to conclude that Mr. Day had voluntarily impoverished himself and that his potential income was $299,115.00. The trial court may, as it did here, consider the potential income of a voluntarily impoverished spouse in awarding counsel fees to the other spouse. *See Digges*, 126 Md. App. at 384. The court justifiably determined that these factors weighed in favor of shifting fees from Ms. Sterrett.

The circuit court also had reason to conclude that the "substantial justification" factor also weighed in favor of Ms. Sterrett. In essence, an inquiry into the existence of a substantial justification "relates solely to the merits of the case against which the judge must assess whether each party's position was reasonable." *Davis v. Petito*, 425 Md.

191, 204 (2012). The trial court granted nearly all of the relief requested in Ms. Sterrett's amended complaint, except that it denied her requests for indefinite alimony and for primary physical custody of her seventeen-year-old daughter. Unquestionably, Ms. Sterrett had a substantial justification for bringing and maintaining an action in which she largely prevailed on contested claims for alimony, custody, child support, and property distribution. *See Doser v. Doser*, 106 Md. App. 329, 359 (1995) ("[g]iven that the court granted alimony, it follows that [the party seeking alimony] was justified in prosecuting her alimony claim"); *Bagley v. Bagley*, 98 Md. App. 18, 40 (1993) (explaining that "the final factor, whether there was a substantial justification for bringing the proceeding" weighed in favor of spouse who prevailed in action to increase child support because "the court acknowledged the merits of her cause of action" when it ruled in her favor); *Lieberman*, 81 Md. App. at 600 (reasoning that ruling in favor of one party "carries with it an implicit finding of very substantial justification").

An analysis of the substantial justification prong also "may require a consideration of the merits of each party's position, including the non-prevailing party." *Davis*, 425 Md. at 203. Mr. Day argues that the court abused its discretion by failing to give enough weight to his own justifications for defending the action and prosecuting his counterclaims. The circuit court set out detailed findings on this matter, as it concluded Mr. Day caused some unnecessary delay and expense:

> In this case, there is evidence that Defendant filed numerous motions as well as motions to reconsider when the ruling was not in his favor. The Defendant also appealed an award of interim counsel fees of $20,000, and spent approximately $25,000 in counsel fees for the appeal, and subsequently lost the appeal. This case was originally set for a three (3)

> day hearing, however, due to the Defendant's change in counsel, his counsel's unfortunate medical problems, as well as counsel's delays, cause this matter to be unnecessarily extended to 11 days. Additionally, the Defendant's lack of compliance to Court orders for counseling, as well as for distribution of assets, caused additional litigation and unnecessary counsel fees. The Defendant liquidated a joint marital asset without the Plaintiff's consent of approximately $80,000 and paid his counsel. The Plaintiff liquidated approximately $14,000 of a joint asset, and liquidated a pre-marital asset to pay a portion of her counsel fees. The Court found that the Plaintiff's statement that the Defendant was going to "financially devastate" her to be credible. The Plaintiff's counsel fees are in excess of $175,000 for this matter. At least $100,000 of the fees are unnecessary and are due to the Defendant's actions and conduct. Therefore, the Plaintiff shall be awarded $100,000 in counsel fees, which will be reduced to a judgment in favor of the Plaintiff.

Without disputing the court's observation that the multi-year litigation in this highly contentious divorce was unusually protracted, Mr. Day argues that the court should have reached different conclusions about the cause of delays. He asserts that delays during and before trial should have been attributed to the length of Ms. Sterrett's testimony, to neutral reasons such as his "involuntary" change of counsel, or to actions taken by his attorneys "in the normal course of advocacy." In his view of the record there was "no unnecessary work," and there were no "dilatory pleas, or tactics by [Mr. Day] or his counsel in the circuit court."

In her brief, Ms. Sterrett argues that the record supports each of the facts referenced by the court, particularly the court's denial of Mr. Day's multiple emergency and *ex parte* motions and his motions for reconsideration. Ms. Sterrett also points to other actions that increased her legal fees, such as Mr. Day's unilateral withdrawal of the parties' daughter from private school in 2010 that resulted in a judgment against Mr. Day for "$7,073.50 for arrearages of school costs," after a hearing. In addition, she asserts

that Mr. Day caused expense and delay by inadequately responding to her discovery requests.[9]

Trial courts are permitted to consider a party's conduct during the litigation in assessing the existence of a substantial justification for prosecuting or defending the proceedings. *See Doser*, 106 Md. App. at 359-60 (citing *Odunukwe v. Odunukwe*, 98 Md. App. 273, 287 (1993)). "A court has discretion to base its award of attorney's fees on the fact that a litigant has engaged in conduct that produced protracted litigation." *Frankel v. Frankel*, 165 Md. App. 553, 590 (2005) (citing *Welsh v. Welsh*, 135 Md. App. 29, 42 (2000); *Gravenstine v. Gravenstine*, 58 Md. App. 158, 182-83 (1983)).

The trial judge was in the best position to oversee the conduct and tactics of the parties over the course of this litigation. A trial court's finding that the conduct of one party prolonged the litigation will not be disturbed unless it is clearly erroneous. *See Frankel*, 165 Md. App. at 590 (where both parties to divorce blamed one another for length of litigation, upholding trial judge's finding that protracted litigation resulted from husband's conduct). Because the inference that Mr. Day acted to prolong the proceedings has at least a reasonable basis in the record (especially in light of the court's

[9] In affirming the circuit court's interim award for $20,000.00 in counsel fees, we commented upon the history of discovery disputes between the parties at that earlier stage: "The record reflects that the Husband's Ex Parte Complaint for Custody contained the case number for the divorce action, contradicting Husband's assertion that he was unaware of Wife's Complaint for Limited Divorce at the time he filed it. The record demonstrates that the parties engaged in continuous discovery disputes, with Husband failing to adequately respond to Wife's discovery requests and allegedly filing 'exceptions to interrogatories,' resulting in two motions to compel filed by Wife. The court did not err or abuse its discretion in finding that Wife had substantial justification." *Day v. Sterrett-Day*, No. 1300, Sept. Term 2011, slip op. at 11 (filed Feb. 7, 2013).

decision to credit testimony that Mr. Day intended to "financially devastate" Ms. Sterrett), we will not set aside the court's finding.[10]

The circuit court properly exercised its discretion in awarding counsel fees when it evaluated the facts of the case against the required statutory considerations. The court made no clear error in finding that Mr. Day had superior financial resources and that Ms. Sterrett incurred some attorneys' fees because of Mr. Day's actions during the course of the litigation. Because the financial factors as well as the substantial justification factor weighed in Ms. Sterrett's favor, the court did not abuse its discretion in ordering Mr. Day to pay a portion of the fees that she incurred. *See McCleary v. McCleary*, 150 Md. App. 448, 467 (2002) (holding that trial court's reasoning was sound in ordering contribution towards litigation expenses of spouse in relatively weaker financial position where trial court found that much of the extraordinary time and expense of proceeding resulted from actions of other spouse).

[10] Mr. Day also argues that it was improper for the court to consider "dissipation of assets" in evaluating Ms. Sterrett's claim for counsel fees. Mr. Day objects to the court's factual observation that he had "liquidated a joint marital asset without [Ms. Sterrett's] consent" to pay approximately $80,000.00 to his attorneys. Immediately thereafter, the court also noted that Ms. Sterrett had "liquidated a joint marital asset, and liquidated a portion of a pre-marital asset to pay a portion of her counsel fees." He cites two cases that involve challenges to awards for equitable distribution of marital property. *See Allison v. Allison*, 160 Md. App. 331, 339-40 (2004) (holding that when a spouse uses marital property to pay reasonable attorneys' fees, such expenditures do not constitute dissipation of marital assets for purpose of evaluating marital award). Mr. Day apparently confuses the "liquidation" of an asset with the "dissipation" of property. Contrary to his assertion, the circuit court made no finding that Mr. Day had dissipated assets for the purpose of reducing funds available for equitable distribution.

CONCLUSION

Viewed generously, the arguments raised by Mr. Day establish at most that the court could have reached different conclusions based on the record or that it could have explained its conclusions in different terms. There is no basis, however, to disturb the court's fact finding or its exercise of discretion. The circuit court made no clear error in finding, based on the evidence and the requisite factors, that Mr. Day was voluntarily impoverished and that his potential income was $299,115.00. The court did not abuse its discretion when it issued orders for child support, alimony, and counsel fees based upon those findings.

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