Circuit Court for Baltimore County
Case No. 03-C-16-002324

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 483

September Term, 2022

JENNIFER S. HORNE

v.

ROBERT M. HORNE

Friedman,
Zic,
Wright, Alexander Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: December 8, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

In this appeal, appellant Jennifer Horne challenges the memorandum opinion and orders of the Circuit Court for Baltimore County resolving the financial and property disputes between her and appellee Robert Horne, and granting the parties an absolute divorce. For the reasons that follow, we affirm the judgments of the trial court.

BACKGROUND

Jennifer and Robert married in 2006, separated in 2016, and have been involved in extensive litigation since their separation. The parties have two children, R. and S., ages 13 and 10 respectively, at the time of the trial. Following their separation, both Jennifer and Robert filed complaints for absolute divorce. Shortly thereafter, the parties signed a *pendente lite*[1] consent order addressing the issues of child custody and access, child support, Jennifer's waiver of *pendente lite* alimony, and Jennifer's use and possession of the marital home. In August 2016, following an emergency hearing, the trial court issued an Order stating that, unless Jennifer and Robert signed an agreement otherwise, the children would attend the public schools for which they were residentially zoned. This Order was quickly followed by two additional consent orders stating that the children would be enrolled in private school and that Jennifer would be solely responsible for the tuition.

Also shortly after the parties' separation, Jennifer's mother, Nancy Thompson, filed suit against Jennifer and Robert over funds that the parties' had used to purchase property

[1] The Latin phrase "*pendente lite*" means "during litigation" and refers to the temporary award ordered until the final conclusion of the merits hearing. *Maynard v. Maynard*, 42 Md. App. 47, 49 (1979) (citing *Black's Law Dictionary* (4th ed., 1951)).

and build the marital home. *See Thompson v. Horne*, No. 1353, Sept. Term 2020, No. 0370 Sept. Term 2021 (April 13, 2022).[2] As a result of this pending litigation, the divorce proceedings were bifurcated between child custody and economic issues. The child custody and access issues were tried over seven days in January and April of 2019. Those proceedings are not at issue here.

After the resolution of the separate marital home litigation, trial of the divorce and economic issues commenced. The case proceeded over 13 days from July 2021 through February 2022, and a separate day-long hearing was held to resolve Jennifer's opposition to the petition for fees filed by the children's best interest attorney. In April 2022, the trial court issued a 61-page memorandum opinion making extensive factual findings, granting the parties an absolute divorce, and resolving the contested issues of alimony, child support, disposition of marital property, and allocation of attorneys' fees.

Jennifer now argues that the trial court abused its discretion by: (1) allowing Robert to file an amended pleading shortly before trial; (2) relying on Robert's proposed findings of facts, thereby adopting numerous clearly erroneous factual findings; (3) denying her requests for rehabilitative alimony, a generic monetary award, and an increase in child support; (4) disallowing the testimony of three of her proffered witnesses; and (5) apportioning to her the responsibility to pay a greater share of the fees due to the

[2] In this separate lawsuit, Thompson alleged that Robert committed fraud and converted her money after she provided funds for Robert and Jennifer to purchase unimproved property and build a home. After a bench trial, the Circuit Court for Baltimore County, specially assigned, found in Robert's favor and this Court affirmed.

children's best interest attorney. For the reasons that follow, we affirm the judgments of the circuit court.

DISCUSSION

I. AMENDED PLEADING

In her first issue, Jennifer argues that the trial court abused its discretion by allowing Robert to partially amend his pleadings and raise an entirely new issue—the potential sale of the marital home—two days before trial. Jennifer asserts that because the amendment was filed in violation of Rule 2-341, that option was not properly before the court and, therefore, the court had no authority to order the sale of the marital home. Neither the law nor the record support Jennifer's argument.

Under Maryland Rule 2-341(a), a party may amend a pleading without leave of the court no later than 30 days before trial. MD. R. 2-341(a). Outside of that timeframe, a party must seek leave of court. MD. R. 2-341(b). A recognized limitation to granting late amendments is "'if the amendment would result in prejudice to the opposing party or undue delay.'" *Prudential Sec. Inc. v. E-Net, Inc.*, 140 Md. App. 194, 232 (2001) (quoting *Hartford Accident & Indem. Co. v. Scarlett Harbor Asso. Ltd. Partnership*, 109 Md. App. 217, 248 (1996)). In general, however, amendments to pleadings are "freely allowed when justice so permits." MD. R. 2-341(c); *Crowe v. Houseworth*, 272 Md. 481, 485 (1974) (citing *Earl v. Anchor Pontiac Buick, Inc.*, 246 Md. 653, 656 (1967)) (noting that amendments to pleadings are to be allowed freely and liberally). Rulings on procedural issues, such as the amendment of a pleading, are given great deference in appellate review. *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443 (2002).

On the first day of trial, the court held a hearing on Jennifer's motion to strike Robert's amended answer. Jennifer argued that she was prejudiced by the late amendment because she had prepared for trial with the expectation that the transfer of the marital home to her, as she had requested in her complaint, was the only option before the court. Had she known that sale of the house was possible, Jennifer argued, she would have prepared differently and called additional expert witnesses.

At the conclusion of the hearing, the trial court allowed the portion of Robert's Amended Answer requesting the sale of the marital home to stand. In making its ruling, the court noted that in her own pleadings, Jennifer had listed sale of the house as an alternative remedy to transfer. Thus, the court reasoned, "there is no prejudice to [Jennifer] because [the amendment is] consistent with what [she had] asked for in [her] own complaint."[3]

On appeal, Jennifer again strenuously argues that she only sought transfer of the marital home, and the possibility that the house would be sold introduced a new issue that she was not prepared to argue. To evaluate Jennifer's complaint, we need only to turn to the record. Jennifer's second amended complaint, filed on November 13, 2017, includes in its request for relief:

[3] We note that the trial court did grant Jennifer's motion in part and struck two portions of Robert's amended answer that raised new issues, specifically, Robert's request for a marital monetary award and for costs under Maryland Rule 1-341. This reinforces our view that the trial court was mindful of the Rule governing late amendment and careful to preclude new issues that might have been prejudicial to Jennifer.

> I. That the Court order a transfer of the real property titled in joint names to [Jennifer] and Order [Robert] to cooperate with [Jennifer] to release his name from the lien on the property;
>
> J. That, in the alternative, the Court order a sale in lieu of partition of all real property titled in the joint names of the parties as tenants by the entireties, … and a division of the proceeds of the sale thereof between the parties

In comparison, Robert's answer to the second amended complaint requests:

> Order a sale or other appropriate disposition of the parties' jointly titled, marital interest in 33-A Brett Manor Court; as to the manner of which [Robert] has no specific preference; provided that he is afforded distribution, by title or pursuant to statute, of the full net equity value of his titled interest in said property

As the trial court astutely observed and the above quoted language shows, Jennifer's own pleading indeed listed "sale in lieu of partition" as an alternative to transfer of the marital home. Thus, the trial court had the authority to grant the late amendment under Rule 2-341(b), and the record supports the court's finding that no prejudice to Jennifer would result because the possibility that the marital home would be sold was already at issue. We conclude, therefore, that the trial court did not abuse its discretion.

II. FINDINGS OF FACT

Next, Jennifer complains that the trial court abused its discretion by adopting verbatim many of Robert's proposed findings of fact and conclusions of law. Jennifer argues that the very practice of adopting findings proposed by one of the parties "should weaken this Court's confidence that the findings are the result of considered judgment," and urges us to apply a less deferential standard of review. In conjunction with this argument, Jennifer identifies several findings that she alleges are erroneous and

demonstrate that the court failed to undertake an independent analysis. We are not persuaded.

As an initial matter, we note that it is a common and widely accepted practice in Maryland (and elsewhere) for trial courts to review and rely upon proposed findings of fact and conclusions of law submitted by the parties. Jennifer acknowledges as much in her brief.[4] Moreover, the trial court was transparent in its decision to rely on some of Robert's proposed findings, and clearly explained that it had considered the proposed findings submitted by both Jennifer and Robert, had incorporated and adopted findings where it was appropriate, and did not include any proposed finding that was not consistent with the court's own findings or supported by the record. The court also explicitly stated that despite incorporating proposed findings, it "independently weighed the evidence and conducted its own deliberations." Although the trial court's 61-page memorandum opinion relies heavily on Robert's proposed findings, it also includes sections that were drafted independently by the trial court. There is nothing about the trial court's memorandum opinion that makes us question whether the court independently exercised its discretion. *Green v. Taylor*, 142 Md. App. 44, 59 (2001) (finding no error in the court's adopting Plaintiff's Memorandum as a method of elaborating on his factual findings and legal reasoning).

[4] Indeed, the practice of receiving proposed findings of fact and conclusions of law from both parties is a well-established practice that is of great assistance to trial courts. It would take a lot more than Jennifer's complaints for us to undermine a practice that creates such efficiencies for our trial court colleagues.

We move on to address Jennifer's challenges to the court's specific findings. Because this case was tried without a jury, we review both the law and the evidence. We will not "set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." MD. R. 8-131(c). A trial court's factual findings are subject to two separate standards of review. With regard to baseline or "first-level" facts—such as a party's income or the calculation of a debt—we review the trial court's findings only to determine if they were clearly erroneous. *Bryant v. Bryant*, 220 Md. App. 145, 160 (2014). "Second-level" facts are those findings that rely upon the first-level facts. Because there is a discretionary element to the second-level factual findings—such as how much weight to give to a particular fact—we review them for an abuse of discretion. *Bryant*, 220 Md. at 160-62.

Jennifer raises challenges to both first-level and second-level factual findings. We will address both in turn.

A. First level findings

We review the court's findings of these first-level facts for clear error only.

1. Buyout Price of the Marital Home

We first address Jennifer's challenge that the trial court erred in its calculation of the amount that she would need to pay to buyout Robert's equity in the marital home. Jennifer argues that the trial court erred in two respects: *first*, that the court failed to credit her with an additional contribution of $100,000 of non-marital funds used to purchase the house, and *second*, that the court should have given her credit against Robert's equity for the additional contribution to the reduction of the mortgage during the time that she had

use and possession of the house. Jennifer claims that as a result of these errors, the trial court erroneously found that the buyout price was $522,389. Jennifer argues that based on her calculation, the buyout amount should have been $186,726. Neither of Jennifer's arguments, however, have merit.

First, although Jennifer claims that it is "beyond dispute" that she contributed an additional $100,000 of individual funds towards the purchase of the marital home that the trial court failed to credit to her, she makes no argument to explain or support this assertion, and the only evidence she points to in the record is a photocopy of a check for $100,000 signed by her as part of the purchase of the land that the house would later be built on. That Jennifer simply opposes the trial court's finding is not enough to make it clearly erroneous. Moreover, the record belies her assertion that it is "beyond dispute" as Robert does, in fact, dispute her position and asserts that the $100,000 was a gift from Jennifer's mother to both Jennifer and Robert. Indeed, emails in the record between Jennifer and Robert from around the time that Jennifer's mother transferred the $100,000 suggest that it was to both of them, not Jennifer alone. There is evidence to support the court's finding, and thus, it is not clearly erroneous.

Next, Jennifer argues that the court failed to give her credit for the mortgage payments, taxes, and other expenses that she paid during the time that she had use and possession of the marital home. We note, however, that the *pendente lite* consent order granting Jennifer use and possession of the house also stated that she was required to "pay all expenses thereof, including the mortgage, 'without contribution' from [Robert]." The trial court ordered that any provisions of the *pendente lite* order not explicitly changed or

modified remained in full effect. Jennifer has not identified anything in the record suggesting that the terms of her use and possession were changed or modified. Thus, it was not error for the trial court to exclude contribution from Robert in accordance with the *pendente lite* order.

The financial figures used by the trial court to calculate the buyout amount of the marital home are supported by evidence in the record. That Jennifer disputes the court's calculation and continues to challenge evidence contrary to her position does not invalidate the court's findings. Having reviewed the record, we conclude that there is nothing clearly erroneous about the trial court's calculation of the buyout amount for the marital home.[5]

[5] In the Judgment of Absolute Divorce, the trial court ordered that Jennifer could elect to purchase Robert's interest in the marital home by notifying Robert and the court in writing within thirty days of the order being docketed. Failure to make timely notifications would constitute a forfeiture of her right to purchase Robert's interest. The Order further provided that if Jennifer elected not to purchase Robert's interest—whether through written notice declining the option or forfeiture—the trial court would "without further proceeding" appoint a trustee who would "be authorized to immediately arrange for the commercially reasonable sale" of the marital home. Because Jennifer did not notify Robert or the court that she was electing to purchase Robert's interest in the marital home before the deadline, on August 9, 2022, the trial court appointed a trustee and on October 28, 2022, the court granted that trustee authority to sell the marital home. The trustee entered into a Contract of Sale with John and Sophie Phelps and filed a motion with the trial court seeking permission to convey the marital home. On March 28, 2023, the trial court entered an order approving the Phelpses as purchasers, approving the contract of sale and purchase price, and permitting the trustee to convey the marital home to the Phelpses. Settlement occurred on April 7, 2023, and the trustee conveyed title to the marital home to the Phelpses by way of deed. On April 13, 2023, the trustee filed a Report of Sale.

On April 28, 2023, Jennifer filed a Notice of Appeal to the trial court's March 28th Order approving the contract of sale. A month later, Jennifer filed a "Motion to Deposit Funds in Lieu of Supersedeas Bond" with this Court. This Court entered a Show Cause Order asking why the appeal should not be dismissed as an improper interlocutory appeal.

2. Calculation of Financial Resource and Liabilities

Jennifer next challenges that in its calculation of Robert's liabilities, the trial court used the wrong amounts for Robert's outstanding legal fees and a loan from his parents.[6] Review of the record shows that the court's calculation was based on exhibits and documents submitted by Robert rather than the evidence and testimony upon which Jennifer relies. Although Jennifer disputes the accuracy of Robert's evidence, the trial court was not required to agree with her. *Omayaka v. Omayaka*, 417 Md. 643, 657 (2011). There is nothing clearly erroneous about the court's reliance on Robert's exhibits in making its calculations.

After considering Jennifer's response, this Court dismissed the appeal pursuant to Maryland Rule 8-602(b)(1).

While the above appeal was pending, on May 15, 2023 Jennifer filed with the trial court exceptions to the Trustee's Report of Sale and requested a hearing. In her exceptions, Jennifer argued that title should not have transferred prior to ratification of the sale, and that the Phelpses were not bona fide purchasers. On July 3, 2023, the trial court issued an Order denying Jennifer's exceptions. The trial court found that the sale was fairly and properly made, ratified the sale, and ordered the appointment of an auditor. On the same day, Jennifer filed another notice of appeal which has been stayed pending further order of this Court.

The Judgment of Absolute Divorce made it clear that the marital home would be sold if Jennifer declined or failed to make a timely notification of her intent to purchase Robert's equity. The deadline to notify Robert and the court of her intention to exercise that option expired over a year ago. Under the explicit terms of the Judgement of Absolute Divorce, Jennifer forfeited her right to purchase Robert's interest in the marital home. Moreover, we have explicitly held in this opinion that the trial court did not abuse its discretion in calculating the buyout amount. There is, therefore, no merit to Jennifer's continued objections to the sale of the house based on alleged error in the calculation of the buyout amount or purchase price.

[6] Jennifer also argues that the court erroneously found that she had no outstanding legal fees. To the contrary, the court's memorandum opinion noted that Jennifer had outstanding fees and referred to the same exhibit Jennifer herself relies upon.

Jennifer also argues that the court erroneously found that the monetary assistance she has been receiving from her mother are gifts, contrary to Jennifer's assertion that they are loans that she will have to repay. In its memorandum opinion, the trial court acknowledged Jennifer's assertion, and explicitly rejected it on the grounds that Jennifer had been unable to produce any documentary evidence as to the alleged repayment terms or amount. The court was "'simply not persuaded [by the testimony of Jennifer and her mother], and there was evidence to support that non-persuasion.'" *Omayaka*, 417 Md. at 658 (quoting *Figgins v. Cochrane*, 174 Md. App. 1, 14-15 (2007)). Thus, it was not clearly erroneous for the court to have rejected Jennifer's assertion based on the absence of any evidence to support it.

3. Classification and Division of the Parties' Personal Property

Jennifer next challenges the court's classification and division of the parties' personal property, identifying a laundry list of items that she believes were wrongly classified and valued, including Robert's interest in the Penater Law Firm and his 2013 Acura. Jennifer argues that proper classification and valuation of property should have been based on the testimony and evidence submitted by her and her mother, rather than the evidence and testimony provided by Robert. None of these arguments are meritorious.

In weighing the evidence and assessing the credibility of witnesses, the trial court "was entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence." *Omayaka*, 417 Md. at 659 (emphasis in original). It is "almost impossible for a judge to be clearly erroneous when he [or she] is simply NOT PERSUADED of something." *Bricker*

v. Warch, 152 Md. App. 119, 137 (2003) (emphasis in original). It was "the exclusive prerogative" of the trial judge to assess credibility and weigh evidence. *Bricker*, 152 Md. App. at 138. There was ample evidence presented by both parties. We cannot say that any of the trial court's findings were clearly erroneous.

B. Second-Level Findings

Jennifer next challenges three of the trial court's second-level findings: (1) the denial of her request for rehabilitative alimony; (2) the denial of her request for a generic monetary award; and (3) the calculation of child support. "Second-level" facts are those findings that rely upon the first-level facts. We review the trial court's second-level fact findings for an abuse of discretion. *Bryant*, 220 Md. at 160-62. Jennifer challenges all three of these findings on similar grounds, alleging that the trial court abused its discretion because the court's first-level factual findings were themselves erroneous. None of her challenges have merit.

With regard to the denial of rehabilitative alimony, Jennifer argues that the trial court should have given more credit to her testimony regarding her inability to support herself, should not have given any weight to testimony regarding the financial support she receives from her mother, and should have projected a higher future income for Robert. With regard to the denial of a generic monetary award, Jennifer makes a broad argument that because the court's decision was based on other factual findings that she is challenging as erroneous, the award should be reconsidered along with everything else. And with regard to the trial court's award of child support, Jennifer argues again that the trial court should have projected a more significant increase in Robert's future income, should not have

imputed any income to her in light of her testimony that she is unable to be gainfully employed, and should have increased the amount of child support to account for private school and to offset the court's denial of rehabilitative alimony and a monetary award.

All of these arguments rest on the same foundation—that Jennifer disagrees with how the trial court weighed the evidence and testimony. It is, however, precisely the role of the trial court to evaluate the credibility of the witnesses and weigh the evidence. MD. R. 8-131(c). The trial court's findings are supported by ample, if disputed, evidence in the record. To say that the trial court should have drawn different inferences and weighed the evidence more heavily in Jennifer's favor, we would have to substitute our judgment for that of the factfinder. That is not our role.

III. EXCLUSION OF WITNESSES

Next, Jennifer argues that the trial court abused its discretion by excluding the testimony of Myles Lichtenburg and Richard Weinfeld.[7] Although in her brief, Jennifer designates that she is appealing the trial court's exclusion of expert witnesses, review of the record shows that the trial court's rulings were entirely unrelated to the purported

[7] In her brief, Jennifer also challenges the trial court's ruling limiting the testimony of a third witness, Bart Steven Purdy. Jennifer argues that the court abused its discretion in excluding his expert testimony on the valuation of Robert's interest in the Penater Law Firm. Contrary to Jennifer's assertion, the record shows that the trial court excluded Purdy's testimony on income and ability to pay support. Indeed, the trial court explicitly noted in making its ruling that Purdy's expert testimony on business valuation was admitted. Because the testimony alleged to have been excluded was, in fact, admitted, there is nothing for us to review.

exclusion of expert testimony. We will address the court's ruling on each witness separately.

A. Myles Lichtenburg

On the fourth day of trial, Jennifer made a request to have Myles Lichtenburg appear remotely. Jennifer proffered that Lichtenburg would authenticate an affidavit showing that Robert committed fraud during the parties' purchase of the land on which the marital home was built. Robert objected. The trial court denied Jennifer's request on the grounds that, under then Rule 2-803(c), all parties did not consent to Lichtenburg's remote participation and he was not an "essential participant" because the facts he was expected to testify about were barred by collateral estoppel following the resolution of the previous litigation regarding the marital home.[8] Jennifer now challenges that the trial court erred in taking judicial notice of the previous litigation, and in finding that collateral estoppel applied because the affidavit that Lichtenburg would authenticate was new evidence that was not presented in the previous litigation. Neither argument has merit.

Under the doctrine of collateral estoppel, "'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Colandrea v. Wilde Lake Cmty. Ass'n, Inc*., 361 Md. 371, 387 (2000) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). Jennifer argues that collateral estoppel should not apply because this specific affidavit showing that Robert

[8] Jennifer also argues that judicial notice was inappropriate because her appeal of the marital home case was still pending. Jennifer cites no authority in support of her position, and we have found none.

committed fraud was not part of the previous case. The "ultimate fact" at issue, however, is not the presentation of a new piece of evidence—here, the affidavit—but the finding that Robert had not committed fraud in the purchase of the land. Were we to apply Jennifer's interpretation of collateral estoppel, a party could simply hold back pieces of evidence to allow them to relitigate an ultimate fact if the first result is not in their favor. This would defeat the purpose of collateral estoppel to prevent burdensome successive litigation. *Colandrea*, 361 Md. at 390-91. On the legal question regarding the trial court's application of collateral estoppel, we conclude there is no error. *Browne v. State Farm Mut. Auto. Ins. Co*., 258 Md. App. 452, 471 (2023).

Jennifer's argument regarding judicial notice of the previous litigation is similarly misplaced. A fact is appropriate for judicial notice if it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MD. R. 5-201(b). "'[P]ublic records such as court documents' are some of the most common of the 'types of information [that] can fall under the umbrella of judicial notice.'" *In re H.R.*, 238 Md. App. 374, 401-02 (2018) (quoting *Abrishamian v. Washington Med. Grp., P.C.*, 216 Md. App. 386, 413 (2014)). In this case, the trial court had already taken judicial notice of the memorandum opinion it had issued in the marital home litigation. Indeed, the present case was delayed and bifurcated for the very purpose of awaiting the conclusion of that litigation. To now say that the trial court cannot take judicial notice of the outcome of that litigation would be preposterous. There is nothing

clearly erroneous in the trial court's taking judicial notice of the previous litigation regarding the martial home. *Abrishamian*, 216 Md. App. at 413.

Having determined that the court correctly applied the doctrine of collateral estoppel and that there was no clear error in the judicial notice of the previous judgment on the ultimate fact that Jennifer wished to relitigate, we conclude that the trial court did not abuse its discretion in denying Jennifer's request to have Lichtenburg testify remotely.

B. Richard Weinfeld

Jennifer next asserts that the trial court erred in excluding the testimony of Richard Weinfeld, an expert in "educational consulting and school selection" who would testify as to which school it would be best for each of the parties' children to attend. Jennifer argued that Weinfeld's testimony would support her request that Robert be required to contribute to private school tuition as part of his child support obligation. Prior to considering Weinfeld's qualifications as an expert, the trial court determined that the questions of educational need and school selection were not properly before the court. The court consequently excluded Weinfeld's testimony. Jennifer now argues that the trial court had an independent duty to investigate the children's educational needs to determine the best interests of the children, and therefore should have allowed her to present evidence showing that it would be best for the children to attend the private schools Weinfeld would identify. We are not persuaded.

There are four orders in the record that pertain to school selection for R. and S. First, in the early stages of the parties' divorce proceedings, the court held an emergency hearing to resolve the question of where R. and S. would attend school. As a result of the hearing,

the court entered an order that "[i]n the absence of a written agreement to the contrary, executed by both parties, their counsel and the best interest attorney…[R. and S.] shall attend Mays Chapel Elementary School."

Shortly thereafter, the parties entered into two consent orders to enroll the children in private school. The first consent order provided that R. would attend Jemicy School for the 2016-17, 2017-18, and 2018-19 academic years. The second consent order provided that S. would attend St. Joseph's School throughout her elementary school years. Both consent orders stated that Jennifer was to be solely liable for any and all costs associated with the children's enrollment in private school, without contribution from Robert. The orders further provided that their content and financial arrangements would be "of no precedential or evidentiary value to either party, for any purpose whatsoever herein, now or in the future, and shall not be a factor in the Court's resolution of any other issues herein (e.g. claims for alimony, adjustments to Guideline child support calculations or other establishment of child support, alleged equitable considerations relative to claims for monetary award, etc.)" with the exception only of an action seeking enforcement of the order itself. Both consent orders were signed by Jennifer, Robert, their respective attorneys, and the best interest attorney representing the children. The orders were then presented to and approved by the trial court.

Finally, following the bifurcated trial on the merits of child access and custody, the resulting order issued by the trial court awarded Jennifer tie-breaking authority on the issue of education.

Before a non-custodial parent can be ordered to contribute to tuition for private school, it must be established that a child has a "particular educational need" to attend private school. *See* MD. CODE, FAMILY LAW § 12-204(i)(1) ("FL"). To show an educational need, it is not necessary for a child to be "laboring under some sort of disability or high ability." *Witt v. Ristaino*, 118 Md. App. 155, 169 (1997). Rather, whether a child should attend or remain in private school is based on the child's best interest, determined by weighing factors such as whether and for how long the child has already been attending private school, the child's performance in school, the family history of attending private school, whether the parents had previously made the choice to send the child to private school, and the parents' ability to pay for private school. *Witt*, 118 Md. App. at 169-70.

The trial court heard argument from the parties over the course of two days on the question of whether educational need was an issue before the court such that Jennifer's proffered testimony on school selection was relevant. Although the parties debated the language of the consent orders extensively, we note that the plain, unambiguous language of those orders precludes their use by either party to litigate the question of private school attendance and tuition.[9] Because the consent orders are valid, judicially enforceable

[9] The first consent order, providing for R. to be enrolled at Jemicy School, expired by its own terms at the end of the 2018-19 academic year, prior to the trial. The second consent order, providing for S. to be enrolled at St. Joseph's School, included conditions that had to be met before the terms of the agreement could be altered: non-payment of tuition by Jennifer, expulsion for disciplinary reasons, or a determination by the school that it cannot meet S's educational needs. Jennifer informed the court that St. Joseph's School had determined that it could not provide a class size of less than 15 students. Jennifer argued that this effectively meant the school could not meet S.'s educational needs. The trial court was not persuaded, and neither are we.

contracts between the parties, for Jennifer to seek contribution from Robert for tuition, she must show, independent of their enrollment in private school pursuant to the consent orders, that the children have an educational need to attend. *Kirby v. Kirby*, 129 Md. App. 212, 215 (1999). In support of her request for Robert's child support to be increased to include tuition, Jennifer's primary argument was that although the parties were bound by the consent orders, the court was not and had an independent duty to investigate the best interests of the children. Jennifer therefore urged the court to disregard the parties' agreement that the consent orders would not be used as a factor in the calculation of child support and consider the children's attendance at private school as evidence of an educational need that warranted an increase in Robert's child support obligation. Jennifer presented no evidence of an educational need unrelated to the children's attendance in private school as a result of the consent orders.

We acknowledge, as did the trial court, that the court has continuing jurisdiction to modify orders and agreements in the best interests of the children. FL § 8-103. Whether to exercise that authority, however, is a matter left to the sound discretion of the court, not the whims of the parties. The trial court found that between the first emergency hearing on school selection in 2016 and the trial on the merits of custody in 2019, "the matter of where the [children] should attend school has been finally litigated" before the court. During those proceedings, the trial court heard evidence and considered the best interests of the children, and neither of the resulting orders included a determination that either R. or S. had a particular educational need to attend private school. The trial court found that Jennifer did not present evidence that the children's circumstances had changed. The record supports

that finding, and we see no abuse of discretion in the trial court's decision not to reconsider its previous orders.

Because Jennifer failed to establish that the children had an educational need to attend private school, evidence regarding which private school they should attend was not relevant to any issue before the court.[10] Consequently, we see no abuse of discretion in the trial court's decision to exclude testimony on school selection.

IV. BEST INTEREST ATTORNEY'S FEES

Finally, Jennifer argues that by ordering her to pay sixty percent of the fees for the children's Best Interest Attorney, the circuit court abused its discretion and penalized her for raising legitimate concerns. We disagree.

When a trial court has appointed a lawyer to serve as a best interest attorney on behalf of a child, it is authorized to "impose counsel fees against one or more parties to the action." FL § 1-202(2). Although the statute does not set forth specific factors to consider in apportioning those fees between the parties, Maryland courts often refer to the factors set forth in FL § 12-103(b), which direct a court to consider the financial status and needs of each party, and whether "there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b)(3); *Gillespie v. Gillespie*, 206 Md. App. 146, 177-78 (2012). We review a trial court's order regarding attorney fees for an abuse of discretion and will not reverse the court's decision unless that discretion "'was exercised

[10] Because Jennifer already had tie-breaking authority with regard to educational matters, she was able to decide whether to send R. and S. to private school. She acknowledged to the court that they were each already enrolled at the school of her choice.

arbitrarily or the judgment was clearly wrong.'" *Gillespie*, 206 Md. App. at 176 (quoting *Petrini v. Petrini*, 336 Md. 453, 468 (1994)).

In its order apportioning the BIA's fees, the court specifically found that the BIA's fees incurred during the custody trial were "largely attributable to [Jennifer's] strenuous opposition to the recommendations of the BIA" and that the fees incurred at the hearing on the petition were "entirely attributable to [Jennifer's] opposition" to the Fee Petition.[11] And indeed, review of the BIA's petition for fees and the testimony at the hearing show that a significant portion of the BIA's billed time was spent communicating with and responding to Jennifer or her attorney. Not only did Jennifer oppose the BIA's recommendations during the litigation, but the record shows that Jennifer also filed an attorney grievance against the BIA—that was ultimately dismissed—alleging that the BIA was a liar and was conspiring with Robert and his attorney to deprive Jennifer of her children. Moreover, the need to schedule a hearing on the BIA's petition for fees was solely necessary because of Jennifer's opposition. And although the hearing had only been scheduled for a half-day, it extended into a full-day due to Jennifer's continuing efforts to discredit the BIA's representation of R. and S. Following the hearing, the court found the fees were fair and reasonable, and granted the BIA's petition.

[11] Jennifer also argues that it was premature for the court to apportion attorney fees until after there is a *final* determination of the parties' debts and liabilities, which she insists hasn't happened yet because she believes the court's findings were erroneous. We note that the court did wait until the conclusion of the merits trial and apportioned the BIA fees in conjunction with the resolution of the rest of the financial issues between the parties. There is no support for Jennifer's suggestion that the apportionment of attorney fees must wait until after the appellate process has been exhausted.

The only arguably legitimate concern that Jennifer raises in her brief is that the BIA utilized the practice of block billing that, Jennifer asserts, courts have recognized in the past "[might] tempt the unscrupulous attorney to intentionally obfuscate his or her timekeeping." *Weichert Co. of Maryland v. Faust*, 191 Md. App. 1, 19 n.14 (2010). And yet, even after her more than thorough audit of the BIA's bills, the only allegedly suspicious entries Jennifer could identify were a few that had mistakenly listed telephone and email communications as being with the client (the children), rather than the adversary (Jennifer or Robert). Once the error was brought to the BIA's attention, the entries were corrected.

Whether or not a party had substantial justification for their actions causing the accrual of the attorney fees at issue is one of the factors that courts are required to consider in apportioning those fees. The record shows that many of the fees accrued by the BIA were the result of Jennifer's own unjustified opposition. We therefore see nothing erroneous about the court's decision to apportion a greater percentage of those fees to Jennifer.

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