Circuit Court for Queen Anne's County
Case No. C-17-FM-19-000330

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1416

September Term, 2022

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ANDREW S. LORD

v.

THERESA A. LORD

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Wells, C.J.,
Nazarian,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: June 2, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Andrew Lord ("Father") and Theresa Lord ("Mother") were married in September 2004 and had three children. Mother and Father later separated and were granted a limited divorce in 2020 and an absolute divorce in 2021. During the limited divorce proceedings, the Circuit Court for Queen Anne's County awarded the parties joint legal custody of the children and awarded Mother primary physical custody.

This appeal arises from Mother's motion to modify the child custody and child support order in light of her impending move to Washington State. After a modification trial in August 2022, the court modified child custody (which isn't being challenged) and both Mother's and Father's child support obligations. In calculating Father's child support payment, the court declined to consider Father's 2020 and 2021 tax returns as evidence of his income and instead calculated Father's child support obligation using the income determination it had made in the limited divorce proceeding. Father moved to amend the judgment solely to recalculate his child support obligation using his 2020 and 2021 tax returns. The court denied his motion and Father appeals. We vacate the child support ruling and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

Mother and Father were married on September 18, 2004. They had three children ("the Children"), who were born in 2006, 2008, and 2009, respectively. Mother and Father later separated, and on September 20, 2020, the circuit court granted them a limited divorce. The judgment of limited divorce dictated the terms of child custody and child support. Mother and Father had joint legal custody of the Children, Mother had primary

physical custody, and Father had access to the Children on a specified schedule. The court entered judgment of absolute divorce on October 18, 2021. Throughout the marriage and since, Father has owned and operated a construction business called Tidewater Construction LLC ("Tidewater Construction").

After the limited divorce trial in September 2020, the court determined that based on the documentation presented by Father and Mother, Father had misrepresented his income on his 2019 tax return. Although Father attempted to persuade the court that his income was $83,400 per year, the court determined that his income was closer to $250,000 per year and that Father's representation of his income "was a fiction and designed to limit his income for child support and alimony purposes." The court imputed $175,000 in income to Father and ordered him to pay $2,500 per month in alimony and $2,132 per month in child support.

On October 10, 2020, Father filed a motion to amend the judgment. He asked the court to amend his income to $112,903.08 and to recalculate child support based on that figure. Father argued that the court had relied on bank records from prior years that were inapplicable to the child support calculation, and that there wasn't evidence in the record to support a finding that Father's income is $175,000. The court denied Father's requests for relief on October 20, 2020. Father noted an appeal of the limited divorce judgment and his motion to amend the judgment but dismissed his appeal on May 12, 2021.

On March 21, 2022, Mother filed a motion to modify child custody and child support due to an impending move to Washington State. Mother explained that she had

remarried on March 18, 2022 and that her husband was required to report to Washington by April 1, 2022 for active duty military service. The same day, Mother filed a motion for an expedited *pendente lite* hearing. On March 26, 2022, Father filed a petition for an injunction or temporary restraining order to prevent Mother from moving the Children to Washington before the court ruled on the motion to modify child custody and support. The court entered an order scheduling an expedited *pendente lite* hearing on April 29, 2022 and prohibiting Mother from removing the Children from the State of Maryland pending further court order. After the *pendente lite* hearing, the Magistrate recommended that the Children remain in Maryland pending a merits hearing on the motion to modify child custody and child support.

On August 23, 2022, the court held a trial on the modification of child custody and child support. Both Mother and Father testified on matters related to child custody. Mother also testified that her income is roughly the same as the income imputed to her during the limited divorce proceedings. Although Father's tax returns for 2019, 2020, and 2021 were admitted into evidence, Father did not testify about his tax returns or his finances either on direct or cross-examination. During closing arguments, counsel for Mother urged the court to maintain Father's income at $14,583 per month, the figure the court had assigned during the limited divorce proceedings:

> I will add that although I was present at the trial for the limited divorce or the absolute divorce, it's my understanding from the review of the record and the appellant briefs that the —and as it so often is with self-employed individuals, calculating that number was no small task for this Court or for counsel to argue it. I'm—while I did not object to the entry of Mr. Lord's tax

> returns, I'm sure this Court is well aware that large amounts of depreciation on equipment and vehicles impairs or skews what one's income may be and it also doesn't account for other sources of income that may not technically be on the books.
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> And I know this Court undertook great efforts in determining his income was $14,583 a month. There has been no testimony that his income has gone anywhere, up or down, or stayed the same. I think it would be appropriate to leave that calculation as already determined by this Court and consider that the alimony of $2,500, which was used in that calculation is now no longer part of that calculation. I did consequently do a child support calculation based on those very numbers that I just gave the Court. I'm happy to pass it along if the Court would like.

In response, counsel for Father highlighted that Mother was free to cross-examine Father if she had had any questions about the credibility of his tax returns. He maintained that Father's tax returns from the last three years provided the court with sufficient information to formulate "an appropriate income level."

The court issued a written opinion on August 30, 2022. The court granted Mother primary physical custody of the Children in Washington State and Father physical custody of the Children during summer and Christmas recess. The court also granted Mother and Father joint legal custody. Mother was required to reimburse Father for 100% of the travel expenses for the Children during the summer and Christmas break exchange and Father was no longer responsible for the Children's health insurance so long as the Children were covered through Mother's husband's insurance plan. The court discussed the credibility of Father's reported income, agreed with Mother that the court's determination of Father's

income during the limited divorce proceedings was reasonable, and used that income to calculate Father's child support payments:

> The 2019 figure is in line with what [the limited divorce judge] described in the memorandum opinion and judgment of limited divorce, dated September 29, 2020, as a "fiction." The 2020 and 2021 tax returns reflect a more realistic adjusted gross income but do not include home office/utilities, use of vehicles, depreciation and, most significantly, amounts withdrawn for personal use. Consequently, [the court's previous] calculation and the one utilized by Mother is more than reasonable. Utilizing $14,583 as the monthly income for Father and $2,512/monthly for Mother, without any deductions, will require Father to pay $3,161/monthly for child support and 85.3% for expenses related to the minor children, while Mother shall pay 14.7% of those expenses.

The court attached a worksheet demonstrating its child support calculation.

Father filed a motion to alter or amend the judgment and challenged the court's determination of his child support obligation. Father argued that the court "merely accepted" the income figure for Father from the limited divorce judgment rather than calculating his current income using Father's most recent tax returns. Father argued that contrary to the court's finding, his tax returns included utilities, vehicle costs, and depreciation, and accordingly, he asked the court to recalculate his current annual income to $126,062 rather than $175,000. The court denied his motion on September 20, 2022 without explanation. Father noted a timely appeal.

## II. DISCUSSION

This appeal presents one issue:[1] whether the court erred in using Father's income determination from the limited divorce judgment to calculate Father's child support obligation after the modification trial.

"The amount of actual income that drives the specific amount of the [child] support award under the guidelines is a factual finding that is required in every case." *Walker v. Grow*, 170 Md. App. 255, 284 (2006). We will uphold the factual findings of the trial court unless its findings are clearly erroneous. Md. Rule 8-131(c). We won't find a trial court's factual findings clearly erroneous "'if there is competent or material evidence in the record to support the court's conclusion,'" *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (*quoting Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)), and we "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

### A. The Court Erred In Disregarding Father's 2020 And 2021 Tax Returns For The Reasons It Stated.

Father offered only his 2020 and 2021 tax returns as evidence of his current income, a seemingly risky strategy in light of the court's previous skepticism about their accuracy vis-à-vis his income. Nevertheless, he argues that the 2020 and 2021 returns in fact include many of the expenses that the court states were missing, such as utilities, vehicle expenses,

[1] Father phrased his Question Presented as: "Did the trial court err when it relied solely on the Appellant's 2019 income for the purposes of the 2022 child support calculation?" Mother phrased her Question Presented as: "Did the trial court properly rely in part on its calculation of the appellant's actual income in the limited divorce trial to determine Appellant's income in the modification trial."

and depreciation—they may have been missing from the 2019 return, but the 2020 and 2021 returns included them. As such, Father contends that the court's finding that the "'questioned' items were inaccurate" was not supported by the record. He argues as well that there was no evidence in the record that he ever withdrew funds from his business to pay for personal expenses, and thus that he couldn't have reported any withdrawals on his tax returns. For all these reasons, Father argues that the court erred in refusing to recalculate his current actual income and sticking with the income determination from the limited divorce proceedings.

Mother responds that the court didn't err in questioning the credibility of Father's tax returns and declining to modify his income from the 2020 divorce proceedings. She stresses that the court properly "considered the evidence in the file, the evidence presented at the hearing, and presumably, the credibility of [Father] in reaching its determination." Mother also maintains that because Father never argued that he experienced a material change in circumstances warranting a change in his own income, he failed to put the parties and the court on notice that he was alleging a change in his actual income.

Maryland law allows a court of equity with jurisdiction over "the custody, guardianship, visitation or support of a child" to, "from time to time, set aside or modify its decree or order concerning the child." Md. Code (1984, 2019 Repl. Vol.), § 1-201(c)(4) of the Family Law Article ("FL"). A child support order may be modified when a motion for modification has been filed, FL § 12-104(a), and when "there has been a material change in circumstances, needs, and pecuniary condition of the parties from the time the

court last had the opportunity to consider the issue." *Petitto v. Petitto*, 147 Md. App. 280, 306 (2002) (cleaned up). The burden of proving a material change in circumstances warranting a modification of the child support award is on the party seeking modification. *Id*. at 307.

A critical factor in any child support determination is the party's "actual income," a figure the court must find. FL § 12-201. The term "'[a]ctual income' means income from any source." FL § 12-201(b)(1). Among other types of documentation, the court can rely on a party's three most recent federal tax returns to verify a party's actual income. FL § 12-203(b)(2)(i). "For income from self-employment, . . . proprietorship of a business, or joint ownership of a partnership or closely held corporation, 'actual income' means gross receipts minus ordinary and necessary expenses required to produce income." FL § 12-201(b)(2). But trial courts possess "latitude to consider all the relevant circumstances in a particular case before making any determination about what should be considered in calculating a parent's support obligation." *Petrini v. Petrini*, 336 Md. 453, 463 (1994). Courts can rely on and credit whatever sources of data are available to demonstrate a party's actual income, and the court isn't obliged to defer reflexively to a tax return or any other source. *See Tanis v. Crocker*, 110 Md. App. 559, 572 (1996) ("Section 12-203(b) does not require that a parent's income tax returns be considered in order to resolve a dispute concerning that parent's income."). This is true particularly with parties who have more complicated financial lives, such as people who are self-employed or, in Father's case, operate solely owned businesses where the boundaries between personal and business

income and expenses can get blurry.

Here, the court found, and we agree, that Mother's move to Washington State constituted a material change in circumstances that could support a change in the child custody and child support order. Because the Children were moving out of the state, the court could've found that there was a material change in the Children's needs that required the court to re-evaluate Mother's and Father's child support obligations. Although Mother filed the motion to modify custody and child support, Father had the burden to prove that his income changed if he believed his child support obligation should be lowered.

The only pieces of evidence Father presented about his income were tax returns. Again, this was his choice—he could have offered whatever evidence he liked to support his argument that his actual income was lower than the figure that the court had imputed at the time of the limited divorce. But as the court—in the person of a different judge than the one who entered the limited divorce—analyzed these tax returns, the court appeared to assume that they suffered from the same deficiencies as the 2019 returns. The court stated that Father's 2020 and 2021 tax returns didn't "include home office/utilities, use of vehicles, [and] depreciation," but the record reflects exactly the contrary: Schedule C of Father's 2020 tax returns[2] for Tidewater Construction lists $28,933 for car and truck expenses, $10,375 for depreciation and section 179 expense deduction, $9,233 for vehicles, machinery, and equipment, $7,741 for office expenses, and $15,540 for utilities. Similarly,

[2] Because Father is the sole owner of Tidewater Construction, he filed his taxes as they relate to his company on a Schedule C form and attached it to his personal tax returns (Form 1040).

Father's 2021 Schedule C form lists $27,284 for car and truck expenses, $975 for depreciation and section 179 expense deduction, $2,830 for vehicles, machinery, and equipment, and $8,620 for utilities. The court was free to credit these figures or not, as it saw fit. But we cannot reconcile the stated basis for the court's decision not to consider recalculating Father's income—the absence of these figures from the 2020 and 2021 returns—with the uncontested record (again, Mother didn't challenge or cross-examine these figures or offer anything in response).

The court also concluded that Father's 2020 and 2021 tax returns didn't reflect "amounts withdrawn for personal use." The court came to this conclusion after reviewing Father's 2019, 2020, and 2021 tax returns in addition to the entire record of this case. And after considering Father's current and past income, the court made a finding that in his 2020 and 2021 tax returns, Father failed to disclose his use of business income to pay for personal expenses (a finding the court also had made during the 2020 limited divorce proceedings), and thus that his tax returns were not credible. Because the court possessed "the latitude to consider all the relevant circumstances . . . before making any determination about what should be considered" in deciding Father's income for child support purposes, the court could conclude that Father's tax returns were not credible evidence that his income changed since the limited divorce proceedings. *Petrini*, 336 Md. at 463. It may be that Father didn't make any withdrawals for personal use, and the absence of any disclosures may not have been significant. But we don't discern any independent error in the court's conclusion that Father failed to disclose "amounts withdrawn for personal use,"

although it may have compounded the court's skepticism about the figures the returns did contain.

Father also argues that the court should have considered the testimony given at the 2020 limited divorce proceedings explaining that Father was "transitioning his business and accounting practices at the time of the separation, divorce, COVID pandemic and the financial upheaval that was attending those significant events" when it formulated his child support obligation. We disagree. The parties already had litigated—and the court already had resolved—these issues in the limited divorce judgment. And although the court could consider the findings made in the limited divorce proceedings, the court wasn't required to make its own findings on those circumstances after they had already been resolved. *See Lieberman v. Lieberman*, 81 Md. App. 575, 597 (1990) ("[T]he doctrine of res judicata applies in the modification of alimony and child support and the court may not 'relitigate matters that were or should have been considered at the time of the initial award.'") (*quoting Lott v. Lott*, 17 Md. App. 440, 444 (1973)).

The court had the discretion to defer to the 2020 income determination if it found no credible evidence that Father's income had changed since then. But in determining that there was no credible evidence of a change in Father's income, the court relied on its apparent finding that Father didn't report expenses such as depreciation, vehicle expenses, and utilities on his tax returns, when he unambiguously had. We feel constrained, therefore, to vacate the child support order and remand to the circuit court to consider Father's income and child support obligation. We express no views on whether the court must reach a

different conclusion about Father's income or, if it does, what that income calculation should be—we hold only that the stated reasons for the court's decision to disregard Father's 2020 and 2021 tax returns conflict with the contents of the returns themselves, and thus that the court erred in reaching its conclusion for that reason.

**JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.**