Circuit Court for Allegany County
Case No. C-01-FM-20-000652 and
C-01-FM-20-000379

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1422

September Term, 2022

ZHULDYZ ANATOLEVNA MIZINA

v.

DOUGLAS TICE

Friedman,
Zic,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: July 14, 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 its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** 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 case arises from a modification of child support hearing involving Zhuldyz Anatolevna Mizina, appellant, and Douglas Tice, appellee. An initial child support order was entered on September 15, 2021 and required Dr. Tice to pay $2,962 per month in child support and $250 per month towards a total arrearage amount of $38,506. In February 2022, Ms. Mizina filed a motion to modify child support and a hearing was held on September 16, 2022. The circuit court denied the motion finding there was "no materially significant change in the parties' respective incomes to justify the requested increase." Ms. Mizina timely appealed.

QUESTIONS PRESENTED

The issues on appeal have been rephrased and reframed as follows:[1]

[1] Ms. Mizina phrased the issues as follows:

> 1. Did the trial court err[] in determining whether the increase in the father's income constitutes a material change of circumstances?
>
> 2. Did the trial court err[] [when it] factor[ed] in the father's other children as a reason not to increase child support to the child in this matter, yet the father was given credit for the child support being paid to his other children?
>
> 3. Did the trial court properly exercise its discretion to determine child support in this matter?
>
> 4. Did the trial court err[] by not awarding attorney fees to Ms. Mizina?
>
> 5. Did the trial court err[] by not assessing the proper amount of arrears due to Ms. Mizina?
>
> 6. Did the Chancellor err[] in changing the pre-existing amount paid in child support by Dr. Tice even though this issue was thoroughly litigated in establishing child support at the hearing dated July 8, 2021?

1. Did the circuit court err when it declined to modify Dr. Tice's child support obligations?

2. Did the circuit court err when it declined to award attorneys' fees to Ms. Mizina?

3. Was the circuit court biased?

For the reasons that follow, we reverse the circuit court's judgment and remand for further proceedings not inconsistent with this opinion.

BACKGROUND

Ms. Mizina and Dr. Tice have one child in common who was born in February 2010. The child is in the sole care and custody of Ms. Mizina.

July 8, 2021 Hearing

On July 8, 2021, a hearing to establish child support was held before a family law magistrate in Allegany County. Dr. Tice, an orthopedic surgeon, testified at the hearing that he "currently ha[d] a short[-]term . . . contract with Aspirus Healthcare . . . [in] Larium[,] Michigan." Upon beginning his employment there in December 2020, Dr. Tice received a $75,000 bonus. Dr. Tice confirmed that he earned $50,000 per month at Aspirus no matter how many hours he worked, resulting in an annual income of $600,000. When asked by Ms. Mizina's attorney whether he "ha[d] any other income besides Aspirus[,]" Dr. Tice stated, "I do not." Upon cross-examination, however, Dr. Tice testified that he had a new job and "[t]he place of employment is Greenbrier Valley Hospital in Lewisburg, West Virginia" but that his employer was Ronceverte Physician

7. Was the trial court biased in determining the rulings throughout [t]his matter?

Group LLC ("Ronceverte"). Ms. Mizina's counsel objected to this line of questioning because "[a]ll this is speculative . . . it wasn't provided in discovery[.]" The magistrate sustained the objection.[2] The line of questioning, however, continued:

> [COUNSEL FOR DR. TICE]: When do you start your new position?
>
> [DR. TICE]: I'm supposed to be there right now as we speak.
>
> [COUNSEL FOR DR. TICE]: (inaudible) officially?
>
> * * *
>
> [DR. TICE]: It was supposed to be last Friday.
>
> [COUNSEL FOR DR. TICE]: So you're going to be going there on Monday?
>
> [THE COURT]: Okay you're employed . . . okay sir you're employed there as we speak?
>
> [DR. TICE]: As we speak.
>
> [THE COURT]: Okay. So this is your current employment?
>
> [DR. TICE]: (no response)
>
> [COUNSEL FOR DR. TICE]: And how much will you be earning at that job?
>
> [DR. TICE]: So that salary is $350,000.
>
> [COUNSEL FOR DR. TICE]: Okay, did you sign a[n] employment contract?
>
> [DR. TICE]: I did a three[-]year employment contract.

[2] At some point following the hearing, Ms. Mizina's attorney alleged that the magistrate winked at Dr. Tice's attorney leading the magistrate to recuse himself from future hearings in the matter.

Ms. Mizina's attorney again objected stating that he never received any document indicating this new employment or salary. The magistrate sustained the objection. While attempting to clear up whether Dr. Tice was currently employed at Greenbrier Hospital or Aspirus the following exchange ensued:

> [COUNSEL FOR MS. MIZINA]: Well the [testimony has] changed, but I didn't receive this document until this right now.
>
> [THE COURT]: Okay, well . . . are you saying that the doctor is not working there . . . his [testimony is] false?
>
> [COUNSEL FOR MS. MIZINA]: I think the doctor is still working at Aspirus. (inaudible)
>
> [THE COURT]: Okay, [Dr. Tice] where are you working?
>
> [DR. TICE]: Yes sir, I am fully gainfully employed and fully credentialed with Greenbrier Valley Hospital and I finished at Aspirus and I'm driving home for the last time.
>
> [THE COURT]: Okay, so you are no longer working at Aspirus at all?
>
> [DR. TICE]: That is correct.

When asked about his prior employment, Dr. Tice testified that in 2020 he worked "for Robert C Byrd Healthcare West Virginia Osteopathic School . . . through December when [he] was able to obtain a surgical position at Aspirus." He testified that his "salary at Robert C Byrd was $200,000 [per] year." Dr. Tice also testified that prior to a 2018 car accident, he "made somewhere in th[e] range of $600,000 to $625,000" per year.

Dr. Tice also testified about his tax filing status:

> [COUNSEL FOR MS. MIZINA]: Okay, I need to go on with some questions. In discovery you said that you had not filed taxes for the past five years, is that correct?

> [DR. TICE]: That is correct, and that is under oath.
>
> [COUNSEL FOR MS. MIZINA]: Okay, when was the last time you filed taxes?
>
> [DR. TICE]: 2015.

When asked if the IRS had contacted him about not filing taxes for the last five years, Dr. Tice testified that he "ha[d] not heard a single thing from the IRS." Dr. Tice also testified that he did not provide any financial support to the child or Ms. Mizina for the past ten years.

Dr. Tice also testified about his other children and prior child support obligations. For one child, Dr. Tice testified that he is "court ordered" to pay $2,300 per month and a "small amount" of arrears. Dr. Tice is also the father to one set of twins for which he testified to paying "$2,000 [per] month for each child." Dr. Tice also has an adult child that is "fully supportive of himself."

At the same hearing, Ms. Mizina testified that she earned $9,908 in 2020 as an independent contractor renting homes and she submitted her tax return accordingly. Ms. Mizina also testified that she just finished law school after being enrolled for seven years and was preparing for the California bar exam. Ms. Mizina explained that she "never asked for the child support because [Dr. Tice] said he has cancer and he's dying."

September 15, 2021 Order

Following the hearing, the magistrate issued a report and recommendations. The magistrate found that Ms. Mizina made $9,908 per year, while Dr. Tice made $350,000 per year. According to the magistrate, the testimony indicated that "[Dr. Tice] had

already taken employment at Ronceverte Physician Group and had been on their payroll for two days." Additionally, "[n]o testimony or evidence was ever produced showing that [Dr. Tice] was still employed by the employer Aspirus." As a result, the magistrate indicated that he would "use [Dr. Tice's] current income from Ronceverte to calculate child support." The magistrate also found that Dr. Tice was paying $6,300 per month in child support for his three other minor children.

Based on these findings, the magistrate recommended following the Maryland Child Support Guidelines and calculated a figure of $2,962 per month to be paid by Dr. Tice to Ms. Mizina, retroactive to July 1, 2020. In addition to the monthly amount, the magistrate recommended that Dr. Tice pay $250 per month towards the arrearage amount.

As for attorneys' fees, the magistrate recommended an award of $4,000 of the $10,930.89 requested because "some assistance should be granted to her" due to Dr. Tice's "financial status" and "the disparity of incomes." The magistrate did not recommend granting the full amount because the magistrate was "not fully convinced that [Ms. Mizina] could not contribute to her legal expenses." Further, the magistrate opined that "[t]he fact that [Ms. Mizina] refused the assistance of the State and employed private [counsel] indicates to me that her financial status was not as desperate as portrayed."

After considering the testimony at the July 8, 2021 hearing and the recommendations of the magistrate, the circuit court entered an order on September 15, 2021. That order required Dr. Tice to pay $2,962 in child support per month. The order also required Dr. Tice to pay $250 per month towards a total arrearage amount of

$38,506. Additionally, the order granted an Earnings Withholding Order and imposed it "on [Dr. Tice's] present employer and any future employer(s) in the amounts stated above."

Procedure Between Hearings

On September 18, 2021, Ms. Mizina filed a motion to revise judgment alleging that Dr. Tice misrepresented his income. Attached to the motion was a letter from Greenbrier Valley Medical Center (Ronceverte) indicating that "Dr. Tice only worked [one] day (July 12, 2021) at [the] facility." A hearing was held on February 7, 2022, and an order was issued by the court on February 11, 2022 denying the motion to revise judgment. On February 8, 2022, Ms. Mizina filed a motion to modify child support, but the motion was dismissed for insufficient service of process.[3] On February 24, 2022, Ms. Mizina filed another motion to modify child support. Dr. Tice filed three motions to continue on June 24, 2022, July 28, 2022, and August 10, 2022. Each motion was granted.

September 16, 2022 Hearing

On September 16, 2022, a hearing for modification of child support was held in the Circuit Court for Allegany County. Ms. Mizina testified that she earned $27,000 in 2021. Ms. Mizina's tax return for 2021 indicates that her adjusted gross income was

[3] Ms. Mizina initially attempted to serve the Motion to Modify Child Support on Dr. Tice's counsel instead of Dr. Tice.

$27,483.[4] Ms. Mizina stated that she filed for a modification of child support because she believed that the last child support calculation was based on a job Dr. Tice had for two days. During this time, Ms. Mizina earned her income through selling items online and collected unemployment benefits in the amount of $1,800. Ms. Mizina also had a massage therapist license, but was unable to use it because "there [was] just no place to work" and she was spending eight to ten hours a day studying for the California Bar Examination. When asked if she was "collecting any temporary cash assistance or any other welfare benefits in the State of California or anywhere else[,]" Ms. Mizina said she was not.

Dr. Tice testified that he ended his employment with Ronceverte after working there for "about two weeks" and receiving pay for "two days" because he "had a better offer from Penn Highlands Healthcare." Dr. Tice testified that he worked at Penn Highlands Healthcare in Dubois, Pennsylvania earning $600,000[5] per year from August 2021 to July 2022. As noted by the circuit court, Dr. Tice's employment ended two

[4] Ms. Mizina testified that she has one other child. Her income and household size indicate that she earned about $5,500 above the federal poverty level in 2021. *Annual Update of the HHS Poverty Guidelines*, FEDERAL REGISTER, https://www.federalregister.gov/documents/2021/02/01/2021-01969/annual-update-of-the-hhs-poverty-guidelines (last visited June 5, 2023).

[5] The contract between Dr. Tice and Penn Highlands Healthcare indicates that Dr. Tice was to be paid a salary of $620,000 per year and a sign-on bonus of $25,000. Paystubs from Penn Highlands Healthcare indicate that Dr. Tice earned a gross pay of at least $545,338.44 from July 26, 2021 to June 12, 2022. Dr. Tice continued to receive income from this job through August 21, 2022. Dr. Tice's gross pay during this time cannot be discerned due to the poor copy quality of paystubs, but Dr. Tice did receive an additional net pay of $49,767.55 from June 13, 2022 through August 21, 2022.

months before the modification hearing even though he was contracted to work there through July 31, 2024. Dr. Tice testified that his employment ended because the "contract was at a point where [Dr. Tice and Penn Highlands Healthcare] mutually agreed that the contract would end, because [Dr.Tice] had another job."

Although Dr. Tice testified that his signing bonus at Penn Highlands Healthcare was submitted as evidence in the July 8, 2021 hearing and that he received the bonus before that hearing, the record does not reflect that the bonus was mentioned nor submitted as an exhibit. Dr. Tice later clarified that the signing bonus he was referring to was his bonus from Aspirus:

> [COUNSEL FOR MS. MIZINA]: So that signing bonus is from Aspirus, correct?
>
> [DR. TICE]: Aspirus, yes.
>
> * * *
>
> [COUNSEL FOR MS. MIZINA]: We are not talking about the sign on bonus for Penn Highlands, correct?
>
> [DR. TICE]: That is correct.

Dr. Tice testified that he began working with Surgical Colleagues on August 1, 2022 at Day Kimball Hospital in Connecticut. In this role, Dr. Tice is an independent contractor and earns $3,500 per 24-hour shift. Although contracted to work 12 shifts per month, Dr. Tice testified that he worked 14 shifts in August and was scheduled for 16 shifts in September. He explained that he took on extra shifts to fill in gaps in the schedule but that this was beyond what his average month would look like, and he expected to work 12 shifts per month in the future. Dr. Tice testified that he was

scheduled to work 12 shifts in October, November, and December. Paystubs from Surgical Colleagues show that he earned $30,230.77 for working eight shifts in two weeks from July 31, 2022 to August 13, 2022. As a medical director, Dr. Tice additionally earns $38,000 per year. Dr. Tice also receives $20,000 per year as a benefit allowance, although this money is limited to being used on certain expenses like health insurance and fees or classes required to maintain licenses and certifications.

If Dr. Tice worked 12 shifts per month at a rate of 3,500 per shift and earned the $38,000 medical director bonus and the $20,000 benefit allowance, as his contract sets forth, Dr. Tice's yearly income would be $562,000. If Dr. Tice repeated working the eight shifts in a two-week period resulting in the same income as the paystub provided, like he was scheduled to do in September 2022, his yearly income would be about $786,000. Despite these numbers, Dr. Tice testified that he expected to make "$400,000[], $425,000[], to $450,000[], somewhere in that range" per year while working at Surgical Colleagues.

Dr. Tice again testified that he could not provide information from tax returns because he had not filed taxes since 2016. Dr. Tice testified that he "fell behind in everything in [his] life" because he "couldn't get a job" and "ha[s] spent the vast majority of [his] entire waking hours trying to recover from an accident that should have killed [him]." After clarifying that he is now a 1099 employee at Surgical Colleagues and that taxes are not currently being taken out of his paycheck, Dr. Tice stated that he plans to file his taxes.

Dr. Tice testified that he continues to pay child support for three of his other children. For Dr. Tice's eight-year-old child, Dr. Tice pays $4,560.38 per month. For Dr. Tice's seven-year-old twins, Dr. Tice pays $2,000 per month for each child, for a total of $4,000 per month.

At the close of the hearing, the circuit court stated: "You don't have to file any memorandums if you don't want to, but if you wish to file anything, do that within [15] days." Both parties filed memorandums. In Dr. Tice's Proposed Findings of Fact and Recommendation, Dr. Tice asserted that his income should be assessed at $42,000 per month, calculated as Dr. Tice working 12 shifts per month at a rate of $3,500 per shift.[6] He asserted that his prior child support obligation should be assessed at $8,560.38, making Dr. Tice's adjusted actual income $33,439.62. Previously, Dr. Tice's income was assessed at $29,167 per month and his prior child support obligation was assessed at $6,300 per month, resulting in an adjusted actual income of $22,866.67. The memorandum also states that "[Dr. Tice's] income has not increased by 25% since the last court order, but [Ms. Mizina's] income has, which would support a decrease in [Dr. Tice's] child support obligation."

Using Dr. Tice's recommended numbers, his monthly adjusted actual income has actually increased by $10,572.95, a 46% increase. The parties agree that Ms. Mizina's income increased from about $825.67 per month to about $2,290.25 per month, an

[6] This number is based on Dr. Tice's employment at Surgical Colleagues and does not consider his employment with Penn Highlands Healthcare. It also does not include the income Dr. Tice earned under his medical director bonus or benefit allowance.

increase of $1,464.58, or 177%.[7] Again using the income recommended by Dr. Tice, the disparity between the parties' incomes increased from $22,041 to $31,149.37, a $9,108.37, or 41%, increase in disparity.

During the hearing, Ms. Mizina requested $10,700 in attorneys' fees from Dr. Tice. In her written memorandum, filed after the hearing, Ms. Mizina requested $12,277.29 in attorneys' fees.

October 19, 2022 Order

In denying Ms. Mizina's motion to modify child support, the circuit court stated the following:

> The income of these parties makes this an "above the guidelines" case. As such, the Court needs to exercise its discretion to determine child support.
>
> It appears that both parties have had increases in income in the past year. The increase in [Dr. Tice's] income is well less than the twenty-five percent normally required to constitute a material change. It is also noted that the current level of child support used an erroneous level of child support being paid by [Dr. Tice] for his three other children. That is, [Dr. Tice] is paying $8,560.38 per month for three other children. In this case he was erroneously credited with paying $6,300.00 per month. Thus, the income available to [Dr. Tice] to pay child support to [Ms. Mizina's] child is actually less than the income this Court used last year to set child support in this case.
>
> In all, the Court will apply its discretion in this case to keep child support the same. The award was calculated only a year ago and there has been no materially significant change

[7] Dr. Tice uses $826.00 and $2,290.00.

> in the parties' respective incomes to justify the requested increase.

Contempt Petition

On October 6, 2022, Ms. Mizina filed a Petition of Contempt for Non-Payment of Child Support alleging that Dr. Tice had not been paying his child support since he started working at Surgical Colleagues. The petition also alleged that Surgical Colleagues "refused to garnish Dr. Tice's wages because he did not consent to it." A show cause order was issued on October 11, 2022 and, after a request for a continuance from Dr. Tice, was ultimately scheduled for March 20, 2023. On February 2, 2023, the petition was withdrawn without explanation.

STANDARD OF REVIEW

> [T]he question of whether to modify an award of child support is left to the sound discretion of the trial court, so long as the discretion was not arbitrarily used or based on incorrect legal principles.
>
> Where the order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review.

Walker v. Grow, 170 Md. App. 255, 266 (2006) (citations and quotation marks omitted).

DISCUSSION

I. THE CIRCUIT COURT ERRED WHEN IT DECLINED TO MODIFY DR. TICE'S CHILD SUPPORT OBLIGATIONS.

According to Ms. Mizina, the circuit court erred when it: (1) did not find a material change in circumstance, (2) considered Dr. Tice's previous child support

obligations when determining his income, (3) did not grant Ms. Mizina arrears, and (4) did not provide written or specific findings.

A. Material Change in Circumstance

Ms. Mizina argues that the circuit court erred when it found no material change in circumstance to warrant modification of Dr. Tice's child support obligations. According to Ms. Mizina, the circuit court undermines the fundamental rule that "the child should be entitled to a standard of living that corresponds to the economic position of the parents." Dr. Tice argues that the circuit court correctly exercised its discretion in concluding that there was not a material change in circumstance.

Section 12-104(a) of the Family Law Article allows a court to "modify a child support award . . . upon a showing of a material change in circumstance." A court can only modify a child support award when "(1) there has been a change in circumstance and (2) the change is material." *Drummond v. State*, 350 Md. 502, 509 (1998). The circumstances under which a court can modify a child support is limited in two ways. *Id.* "First, the 'change of circumstance' must be relevant to the level of support a child is actually receiving or entitled to receive. Second, the requirement that the change be 'material' limits a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order." *Id.* (citing *Walsh v. Walsh*, 333 Md. 492, 503 (1994)). A "common change in circumstance relevant to a modification of child support is a change in the income pool from which the child support obligation is calculated." *Drummond*, 350 Md. at 510-11. "In making this threshold determination that a material change of circumstance has occurred . . . a court must

specifically focus on the alleged changes in income or support that have occurred since the previous child support award." *Wills v. Jones*, 340 Md. 480, 489 (1995).

Here, the circuit court concluded that "there ha[d] been no materially significant change in the parties' respective incomes to justify the requested increase." To support this conclusion, the circuit court stated that both Ms. Mizina and Dr. Tice experienced an increase of income and the increase in Dr. Tice's income was "well less than the [25%] normally required to constitute a material change." The circuit court also found that Dr. Tice was credited with $6,300 per month in pre-existing childcare obligations in the last hearing when he should have been credited with $8560.38 per month. As a result of the erroneous calculation, "the income available to [Dr. Tice] to pay child support to [the child] is actually less than the income this [c]ourt used last year to set child support in this case."

First, the circuit court abused its discretion because it based its findings on an incorrect legal principle. A 25% standard appeared in an earlier version of § 12-202(b)(2) of the Family Law Article. The section stated that "[t]he adoption of the guidelines set forth in this subtitle may not be grounds for requesting a modification of a child support award based on a material change in circumstances unless the use of the guidelines would result in a change in the award of 25% or more." Md. Code Ann., Fam. Law § 12-202(b)(2) (1984, 2006 Repl. Vol.). In 2010, that section was repealed and replaced with the following: "The adoption or revision of the guidelines set forth in this subtitle is not a material change of circumstances for the purpose of a modification of a child support award." Chapter 262, Laws of Maryland 2010. The circuit court erred in

using a 25% standard because the statute presenting it is no longer in effect and only applied to awards existing at the time the guidelines were adopted. *Walsh v. Walsh*, 333 Md. 492, 499-200 (1994) (concluding that the previous version of Family Law § 12-202(b) "was intended as a transitional statute clarifying when the child support guidelines are applicable to pre-guidelines orders" and was not applicable to child support orders granted after the adoption of the child support guidelines). Additionally, the statute referred to a 25% change in support award, not a 25% change in the incomes of the parties.

Second, even if a 25% increase in income was the amount required to find a material change of circumstance, the increase in Dr. Tice's income significantly exceeded that percentage. The original child support order was based on the finding that Dr. Tice was earning an annual salary of $350,000 with Ronceverte. At the hearing on September 16, 2022, Dr. Tice testified that he worked at Penn Highlands Healthcare from August 2021 to July 2022 and his contracted annual salary was $620,000. Dr. Tice also began working at Surgical Colleagues in August 2022 and his annual income ranged from $562,000 to $786,000 depending on how many shifts he worked per month. According to the documentary evidence and testimony, Dr. Tice's income increased by a minimum of 60% and a potential maximum of 124%. Even by his own filing, which requested the circuit court to find that Dr. Tice was making $504,000 per year at Surgical Colleagues,[8]

[8] This number is based on Dr. Tice working 12 shifts per month at a rate of $3,500 per shift. It does not include the income Dr. Tice earned under his medical director bonus or benefit allowance.

Dr. Tice's income increased by 44%. Accordingly, the circuit court's finding that Dr. Tice's income did not increase by more than 25% was clearly erroneous.

Although the circuit court found that Dr. Tice's income did not increase by more than 25% and that "the income available to [Dr. Tice] to pay child support to [the child] is actually less than the income this [c]ourt used last year to set child support in this case," the circuit court did not make specific findings as to the income of the parties. Even so, the record shows that Dr. Tice's annual income increased from $350,000 to anywhere between $562,000 to $786,000. An increase this large is a change of circumstance material enough to justify a modification of the child support award. *See Sczudlo v. Berry*, 129 Md. App. 529, 537-38, 544 (1999) (finding a material change in income when a party's income decreased from more than $170,000 to zero). An increase in income by at least 44%, and potentially up to 124%, constitutes a material change in circumstance and the circuit court erred in concluding otherwise.

We therefore reverse the judgment of the circuit court and remand for further proceedings not inconsistent with this opinion. Upon remand, the circuit court shall make findings as to the incomes of the parties and determine what portion of Dr. Tice's increased income should be provided in increased child support. We leave to the discretion of the circuit court whether it can properly assess the income based on the evidence already provided or if a new evidentiary hearing is necessary.

B. Consideration of Dr. Tice's Child Support Obligations to His Other Children

Ms. Mizina seems to argue that the circuit court should not have considered Dr. Tice's child support obligations to his other children when it decided there was no material change in circumstance. Additionally, Ms. Mizina argues that even if the court was allowed to consider Dr. Tice's preexisting child support obligations, the circuit court should have used the amount determined by the September 15, 2021 order because new findings should have been barred by res judicata and collateral estoppel. Dr. Tice argues that prior child support obligations are permitted to be considered in determining child support and that determining whether a change in prior child support obligations had occurred was necessary.

The circuit court did not err in considering Dr. Tice's child support obligations to his other children when assessing whether there was a material change of circumstance. "A change 'that affects the income pool used to calculate the support obligations upon which a child support award was based' is necessarily relevant" in determining whether there has been a material change in circumstance. *Wheeler v. State*, 160 Md. App. 363, 373 (2004) (quoting *Wills v. Jones*, 340 Md. 480, 488 n.1 (1995)). When determining if a case is an above the guidelines case, allowing the court to use its discretion in setting the child support amount, the circuit court considers the adjusted actual income of the parties. Fam. Law § 12-204(d). "Adjusted actual income" is defined as "actual income minus: (1) preexisting reasonable child support obligations actually paid . . . ." Fam. Law § 12-201(c).

The circuit court, therefore, was not only permitted, but obligated to consider Dr. Tice's child support payments to his other children when assessing his income. Additionally, because the circuit court was assessing whether a material change in income had occurred, it was allowed to assess how Dr. Tice's current child support obligations may have differed from the amount determined at the first child support hearing. Although Dr. Tice's preexisting child support obligations are used to calculate his adjusted actual income, such obligations do not negate that Ms. Mizina is entitled to reasonable child support. *See* Fam. Law §12-202(a)(2)(iv) (stating that the presumption that the application of the child support guidelines results in the correct amount of child support "may not be rebutted solely on the basis of evidence of the presence in the household of either parent of other children to whom that parent owes a duty of support and the expenses for whom that parent is directly contributing"); *Cf.* Cynthia Callahan & Thomas C. Reis, Fader's Maryland Family Law § 6-1(r) (7th ed. 2021) ("[T]he approach of 'first come, first served' is not child-focused, and unfairly allows the happenstance of birth order, over which children have no control, to override a child's right to support at a level commensurate to his or her parents' ability to pay."). Accordingly, the circuit court did not err when it considered Dr. Tice's preexisting child support obligations.

C. Arrears

Ms. Mizina argues that the circuit court should have awarded her arrears beginning from the time she filed her initial pleading for modification in February 2022. According to Ms. Mizina, the circuit court was required to award her arrears because it was in the child's best interest to do so. Dr. Tice argues that the circuit court correctly

decided not to award arrears because the court denied her motion to modify child support, and therefore Ms. Mizina was not entitled to arrears.

"[I]t is within the discretion of the trial court to determine whether and how far retroactively to apply a modification of a party's child support obligation up to the date of the filing of the petition for said modification." *Ley v. Forman*, 144 Md. App. 658, 677 (2002). The circuit court did not retroactively modify the child support award to the date of the filing of the motion for modification because it denied the motion and therefore had no reason to retroactively modify the child support. Upon remand, the circuit court may use its discretion to retroactively award child support up to the date of the motion for modification.

D. Written Findings

Ms. Mizina argues that the circuit court erred because it did not "make a [written finding] or specific finding on the record stating the reasons for departing from the guidelines" as required by Family Law § 12-202(a)(2)(v). According to Ms. Mizina, the failure to do so is a reversible error. Conversely, Dr. Tice argues that the circuit court did not err because this is an above the guidelines case and the requirements of Family Law § 12-202(a)(2)(v) do not apply in above the guidelines cases.

Family Law § 12-202(a)(2)(v)(1) states that "[i]f the court determines that the application of the guidelines would be unjust or inappropriate in a particular case, the court shall make a written finding or specific finding on the record stating the reasons for departing from the guidelines." Further,

> [t]he court's finding shall state:

> A. the amount of child support that would have been required under the guidelines;
>
> B. how the order varies from the guidelines;
>
> C. how the finding serves the best interests of the child; and
>
> D. in cases in which items of value are conveyed instead of a portion of the support presumed under the guidelines, the estimated value of the items conveyed.

Fam. Law § 12-202(a)(2)(v)(2). The statute, however, only applies to circumstances in which the circuit court departs from the guidelines, not in circumstances where the parties' incomes fall outside of the guidelines and the court is permitted to use its discretion in determining the appropriate child support amount. Here, the parties' income falls above the guidelines, and we therefore decline to hold that the circuit court was required to follow the statutory requirements of Family Law § 12-202(a)(2)(v).

II. THE CIRCUIT COURT ERRED WHEN IT DID NOT ADDRESS MS. MIZINA'S REQUEST FOR ATTORNEYS' FEES.

Ms. Mizina argues that the circuit court erred when it did not award attorneys' fees to her. She argues that the circuit court did not offer any justification as to why it did not award attorneys' fees and that the income disparity between the parties is sufficient reasoning to award attorneys' fees to Ms. Mizina. Dr. Tice argues that the circuit court properly denied Ms. Mizina's request for attorneys' fees because "there was no substantial justification for her to bring this case."

Section 12-103(a) of the Family Law Article provides that "[t]he court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person . . . files any form of proceeding . . . to

recover arrearages of child support [or] to enforce a decree of child support . . . ." Further, "[b]efore a court may award costs and counsel fees under this section the court shall 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." Fam. Law § 12-103(b). Finally, "[u]pon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees." Fam. Law § 12-103(c). The purpose of enacting the mandatory award under subsection (c) "was to address the inability of custodial parents to finance judicial enforcement of court-ordered child support." *Davis v. Petito*, 425 Md. 191, 202 (2012) (citing Memorandum of Delegate Ellen R. Sauerbrey, Additional Testimony on HB 381, Alimony and Child Support - Mandatory Award of Expenses (Feb. 16, 1993)).

"Although the court has the discretion to grant or deny a request for attorney[s'] fees, the court, in exercising that discretion, 'is bound to consider and balance the considerations contained in [Family Law] § 12-103.'" *Best v. Fraser*, 252 Md. App. 427, 438 (2021) (quoting *Frankel v. Frankel*, 165 Md. App. 553, 589 (2005)). Thus, "[d]enial of a request for attorney[s'] fees without consideration of the statutory factors has been deemed reversible error." *Best*, 252 Md. App. at 438.

In *Kierein v. Kierein*, this Court considered the denial of attorneys' fees where one party earned an income nearly five times more than the other party. 115 Md. App. 448, 458 (1997). In that case, the trial court did not explain his decision to decision to deny

the parties' requests for attorneys' fees. *Id.* at 453, 459. Although this Court acknowledged the discretion afforded to trial courts in deciding whether to award attorneys' fees, it also made clear that "[i]n exercising his or her discretion, the trial judge must consider and balance the required considerations as articulated by the Legislature in § 12-103[.]" *Id* at 459 (quoting *Lieberman v. Lieberman*, 81 Md. App. 575, 600-01 (1990)). In conclusion, we stated: "Considering their disparate incomes, we shall remand the case for the trial court to consider the factors in [Family Law] § 12-103 and articulate its basis for denying counsel fees." *Kierein*, 115 Md. App. at 459.

Here, the circuit court never addressed Ms. Mizina's request for attorneys' fees. The circuit court, therefore, did not consider the three factors under Family Law § 12-103(b). As we see it: (1) Dr. Tice's income is at least $535,000 per year more than Ms. Mizina's income, and Dr. Tice's income is anywhere between 20 and 29 times more than Ms. Mizina's income; (2) Ms. Mizina's income is around $27,000 per year, an amount close to the federal poverty line; and (3) Dr. Tice's yearly income increased from $350,000 to at least $562,000, and potentially up to $786,000. Although we are remanding the issue of Ms. Mizina's attorneys' fees for appropriate findings, we note that, in light of the increase in Dr. Tice's income, Ms. Mizina likely had substantial justification for bringing the proceeding. Accordingly, we remand so the circuit court may determine whether Ms. Mizina is entitled to the attorneys' fees she requested. *See Scott v. Scott*, 103 Md. App. 500, 524-525 (1995) (explaining that a remand for further proceedings is appropriate relief when a trial court does not address a party's request for fees and costs). Upon remand, the circuit court shall consider the factors in Family Law

§ 12-103(b) and articulate its basis for its decision. *Id.* (citing *Bagley v. Bagley*, 98 Md. App. 18, 41 (1993), *cert. denied*, 334 Md. 18 (1994)).

III. THE CIRCUIT COURT WAS NOT BIASED THROUGHOUT THIS MATTER.

A. July 8, 2021 Hearing Allegations

Ms. Mizina argues that the circuit court was biased throughout this matter. According to Ms. Mizina, the magistrate conducting the July 8, 2021 hearing winked to Dr. Tice's counsel after Ms. Mizina's counsel objected to the testimony regarding Dr. Tice's employment at Ronceverte. Dr. Tice argues that Ms. Mizina's arguments regarding the July 8, 2021 hearing are not appealable because they are untimely under Maryland Rule 8-602(b)(2) and not properly preserved under Maryland Rule 2-517(a).

Maryland Rule 8-202(a) states that "the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Maryland Rule 8-602(b) states that this Court "shall dismiss an appeal if . . . the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202." Here, Ms. Mizina's arguments regarding the winking allegation during the July 8, 2021 hearing was appealable from the circuit court's September 15, 2021 order. As such, if Ms. Mizina wanted to appeal that order, she was required to file a notice of appeal within 30 days of September 15, 2021. Because a notice of appeal was not filed until October 19, 2022, well after the 30-day deadline, Ms. Mizina's appeal regarding the incident is untimely and we do not address it.

B. October 19, 2022 Order Allegations

Ms. Mizina argues that the circuit court was not impartial or fair because the circuit court had trouble understanding Ms. Mizina because she has an accent, did not make a clear finding as to Dr. Tice's income, did not consider the substantial increase in Dr. Tice's income, did not modify the child support, and did not explain why it deviated from the guidelines. Ms. Mizina argues that this case should be removed from Circuit Court for Allegany County or be heard before a judge that does not preside in the county because Dr. Tice is a resident of Allegany County while Ms. Mizina is located in California. Dr. Tice states that the circuit court "has never been biased towards [Ms.] Mizina."

Examples where appellate courts reversed judgments on the ground of actual or perceived judicial bias generally have involved truly egregious behavior by trial judges. See, e.g., *Webb v. Texas*, 409 U.S. 95, 98 (1972) (reversing because trial judge made "threatening remarks, directed only at the single witness for the defense, effectively [driving] that witness off the stand, and thus depriv[ing] the petitioner of due process of law"); *Archer v. State*, 383 Md. 329, 336 (2004) (reversing because trial judge used coercive methods to "probably cause[] [a recalcitrant witness] to change his testimony," including by "orchestrat[ing] a hearing on contempt, by inviting another member of the bench to try and convict the witness for contempt of court, under circumstances that would undermine the impartiality of the judges and the integrity of our criminal justice system").

Here, in contrast, Ms. Mizina's arguments primarily stem from adverse final decisions made by the trial court against her, not from true allegations of bias or lack of impartiality. Because "adverse rulings or decisions made by [the circuit court] in a judicial setting" are not "impermissible judicial conduct[,]" Ms. Mizina's allegations of judicial conduct do not constitute impermissible bias or amount to a lack of impartiality or fairness. *S. Easton Neighborhood Ass'n, Inc. v. Town of Easton, Md.*, 387 Md. 468, 501 (2005). Accordingly, we decline to hold that the circuit court was biased throughout this matter.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY REVERSED AND CASE REMANDED FOR ADDITIONAL PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY APPELLEE.