

Circuit Court for Baltimore County
Case No. 03-C-15-004858

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1669

September Term, 2023

FRANCES BJORK

v.

BRETT BJORK

Wells, C.J.
Albright,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: October 22, 2024

*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).

This appeal comes to us from the Circuit Court for Baltimore County following the granting of Appellee Brett Bjork’s Petition to Modify Alimony.¹ The circuit court reduced the monthly amount Mr. Bjork was to pay his former wife, Appellant Frances Bjork, from \$2,300 per month to \$1,300. Here, Ms. Bjork challenges this reduction, along with one of the circuit court’s discovery rulings, the circuit court’s failure to hold Mr. Bjork in contempt for failing to pay alimony while his modification petition was pending, and the circuit court’s denial of Ms. Bjork’s attorney’s fees claim.² We agree with Ms. Bjork on some aspects of her attorney’s fees challenge but disagree with her on the balance of her appellate claims. Accordingly, as to those aspects of Ms. Bjork’s attorney’s fees challenge with which we agree, we vacate and remand for further proceedings. Otherwise, we affirm the judgments of the circuit court.

On appeal, Ms. Bjork presents six questions for our review.³ For clarity, we have

¹ Mr. Bjork did not file a brief before this Court.

² We do not address the denial of Mr. Bjork’s request for attorney’s fees because this issue is not before us on appeal.

³ Ms. Bjork phrased her questions as follows:

i) Did the Trial Court err in not permitting evidence of Appellee’s current’s [sic] wife’s income and finances to be discoverable to Appellant?

ii) Did the Trial Court err in failing to conduct an analysis of the voluntary impoverishment factors and in failing to find that Appellee had voluntarily impoverished himself?

iii) Did the Trial Court err in determining that there was a material change in circumstances when Appellee’s overall financial circumstances were no worse

consolidated those questions into four questions, which we rephrase as:

1. Did the circuit court abuse its discretion in not compelling Mr. Bjork to produce his current wife's financial information during discovery?
2. Did the circuit court abuse its discretion in modifying Mr. Bjork's alimony obligation?
3. Did the circuit court err by declining to hold Mr. Bjork in contempt?
4. Did the circuit court err or abuse its discretion by denying Ms. Bjork's request for attorney's fees?

For the reasons stated below, we answer Questions One and Two in the negative.

We do not reach Question Three, concluding that a circuit court's declining to hold someone in contempt is not subject to appellate review. We answer Question Four partly in the affirmative and partly in the negative. Thus, as to the aspects of Ms. Bjork's attorney's fees challenge with which we agree, we vacate the circuit court's judgment and remand for further proceedings not inconsistent with this opinion.

than they were at the time of the Marital Settlement Agreement and in failing to properly consider Appellee's financial resources including income and expenses in granting the modification of alimony?

iv) Did the Trial Court err in considering the amount of moneys Appellant may receive under the annuity in determining the amount of alimony when the annuity was a monetary award and considered at the time of the Marital Settlement Agreement?

v) Did the Trial Court err in refusing to hold Appellee in contempt and instead treating the matter as a breach of contract?

vi) Did the Trial Court err in refusing to award any counsel fees to Appellant and in not conducting an analysis to see if they should be awarded and in not awarding counsel fees based on the Marital Settlement Agreement for Appellee's breach of it?

BACKGROUND

The parties were married in 1992 in Alabama and are parents to two adult children. The parties attribute the end of their marriage to Mr. Bjork's affairs. The parties separated in 2010 and divorced in 2018,⁴ via a Judgment of Absolute Divorce ("JAD") granted by the Circuit Court for Baltimore County. The JAD incorporated, but did not merge, the parties' marital settlement agreement ("MSA").

With regard to alimony, the parties agreed in the MSA that commencing in February 2017, Mr. Bjork would pay Ms. Bjork indefinite and modifiable alimony in the amount of \$2,300 per month. The incomes "used to determine" this amount were the parties' 2016 incomes, which was \$18,000 for Ms. Bjork and \$114,000 for Mr. Bjork. The MSA further provided that "[e]ither party may apply to the Court for modification of the terms of the alimony provided herein based on a significant change of circumstances, including but not limited to a material change in their incomes or expenses."

With regard to Mr. Bjork's Civil Service Retirement System ("CSRS") gross monthly annuity, the MSA provided that Ms. Bjork would receive 50% of the marital portion of the annuity and "the maximum possible former spouse survivor annuity." The MSA further provided for the issuance of a separate order directing the United States Office of Personnel Management ("OPM") to pay Ms. Bjork "directly" her share of Mr.

⁴ The parties delayed divorce following their separation in part to allow for Ms. Bjork to stay on Mr. Bjork's health insurance because she had recently been diagnosed with breast cancer.

Bjork’s gross monthly annuity.⁵

Mr. Bjork petitioned to modify alimony in June 2020. Mr. Bjork had significant difficulty serving Ms. Bjork. He retained a private process company, which repeatedly but unsuccessfully attempted to serve Ms. Bjork at her home. Ms. Bjork was ultimately served in March 2021 by posting.

Originally, Mr. Bjork’s modification petition was based on the loss of his secondary income source. Mr. Bjork alleged that due to the cancellation of all games in response to the COVID-19 pandemic, he was unable to continue earning income from organizing and refereeing recreational sports. Mr. Bjork also alleged that his monthly expenses had increased significantly. At the time, Mr. Bjork still worked full-time as a probation officer for the federal government.

In June 2022, Mr. Bjork amended his petition to “include, as another reason for modification, his retirement.” Mr. Bjork stated that he planned to retire in September 2022 and alleged that while he would receive an annuity after retirement, his income would be “significantly reduced.” The amended petition noted that Ms. Bjork would receive one-half of the marital share of Mr. Bjork’s annuity when he retired.⁶ In Ms.

⁵ At the time that Mr. Bjork petitioned to modify alimony, and then amended his petition, such an order had not been entered. The order was not entered until June 2023, roughly two months before the trial of Mr. Bjork’s modification petition began.

⁶ Mr. Bjork’s amended petition notes that Ms. Bjork “will receive one-half (1/2) of Plaintiff’s annuity.” We presume, in light of the parties’ MSA and the Court Order Acceptable for Processing that was eventually entered, that this language refers to half of *the marital share* of the annuity.

Bjork’s answer to the amended petition, she responded that Mr. Bjork’s “potential optional retirement is not a valid basis for a modification of alimony.” Ms. Bjork also requested that the circuit court award her attorney’s fees in answering Mr. Bjork’s petition and amended petition.

Both parties filed multiple motions related to discovery disputes in the case. On two occasions in 2022, the circuit court ordered Mr. Bjork to provide discovery responses. The circuit court then held a hearing to address discovery issues in March 2023 and ordered Mr. Bjork to produce additional documents.⁷ Critically, the circuit court also ordered Mr. Bjork to produce unredacted versions of his jointly-filed income tax returns⁸ and other tax documents for the court’s *in camera* review. Ms. Bjork followed this order with a motion to compel Mr. Bjork to produce his unredacted joint income tax returns for 2021 and 2022, as well as the income and employment information of his current wife in the form of W-2s or 1099s for those years. The circuit court denied both Ms. Bjork’s motion to compel and her motion to reconsider the denial.

In January 2023, while the discovery disputes were pending, Ms. Bjork petitioned that Mr. Bjork be held in contempt due to his failure to make full alimony payments as ordered pursuant to the JAD. In her petition, Ms. Bjork again requested that Mr. Bjork be required to pay Ms. Bjork’s “reasonable counsel fees and costs.” This time, Ms. Bjork

⁷ The court also ordered Ms. Bjork to produce documents following the March 2023 hearing.

⁸ By then, Mr. Bjork had remarried but the record does not reflect precisely when he did so.

specifically relied on the parties' MSA, stating the "MSA specifically provides for the payment of counsel fees in the event that either party has to file a court action to enforce the MSA."

In June 2023, while the modification petition was pending, the parties submitted, and the court subsequently entered, a Court Order Acceptable for Processing ("COAP") directing the division of Mr. Bjork's CSRS gross monthly annuity. The COAP provided that Ms. Bjork would receive half of the marital share of the "self-only (i.e., [unreduced])" monthly annuity payable to Mr. Bjork "at his retirement."⁹

On August 23 and 24, 2023, the circuit court tried Mr. Bjork's modification petition and Ms. Bjork's contempt petition. Mr. Bjork, Ms. Bjork, and the parties' adult daughter, Abigail Bjork, testified. The parties also introduced several exhibits related to their finances, including financial statements, bank statements, paystubs, Venmo transactions, and bills.

Mr. Bjork retired in September 2022 from his job as a probation officer after having worked with the federal government for twenty-four years. He explained that he had been eligible to retire beginning in August 2019. As reasons for his retirement, Mr. Bjork cited a lack of "opportunity for advancement" in his career as well as the "mentally exhausting" nature of the work in a "law enforcement position." Mr. Bjork has continued to officiate sports since his retirement and has also worked part-time at Recreational

⁹ The COAP also provided that Ms. Bjork's share of the gross monthly annuity would be reduced by the cost of the survivor annuity Mr. Bjork elected that Ms. Bjork would receive.

Equipment, Inc. (REI) and Sun and Ski, a ski shop. Mr. Bjork testified that his income fluctuates, but that it was between \$28,000 and \$30,000 in 2022. Mr. Bjork testified that he would be receiving a monthly annuity payment in the amount of \$2,075.32.

After the divorce, Mr. Bjork remarried. He lives with his current wife in her home. He testified that his current wife subsidizes his expenses, which include his alimony payments, and largely pays for the multiple vacations that they take during the year. Mr. Bjork estimated that his current wife has given him over \$15,000 in the last two to three years.

Mr. Bjork admitted that he stopped paying alimony in full in October 2022. He made payments in the amount of \$400 per month in November and December 2022. Mr. Bjork acknowledged that he was aware that the MSA was still in effect and that any time he did not make a payment, he would be in violation of the agreement.

Ms. Bjork presently lives with Abigail in what was formerly the marital home, which is now owned by Abigail. Abigail physically and financially assists Ms. Bjork. Ms. Bjork previously was diagnosed with breast cancer. She also has other significant health problems, including a degenerative neurological disorder, a thyroid disorder, and eyesight issues. As such, Ms. Bjork is permanently disabled and unable to work. She receives disability benefits from the Social Security Administration. In 2022, these benefits were \$1,511 per month.¹⁰ Ms. Bjork acknowledged that she would receive a share of Mr.

¹⁰ In 2023, the amount Ms. Bjork received was increased to \$1,557 per month.

Bjork's monthly annuity.

Ms. Bjork maintained that her monthly income without alimony would be insufficient to pay her expenses. However, testimony from Abigail and Ms. Bjork revealed that Abigail had become primarily responsible for significant household expenses listed on Ms. Bjork's financial statement, including the gas and electric payment, cell phone bill, homeowner's insurance, and mortgage. A review at trial of Ms. Bjork's actual purchases for the month of July 2023 reflected frequent spending on take-out food and numerous charges for subscriptions and in-app purchases.

Shortly after the trial, Mr. Bjork submitted an adjusted monthly annuity figure, which the circuit court considered in making its decision on his modification petition.¹¹ This document from OPM for September 2023 showed a reduction for Mr. Bjork, lowering his monthly payout to \$1,957.32. This document also provided that the monthly court-ordered apportionment, referring to Ms. Bjork's share, was \$1,422.94.

On October 10, 2023, the circuit court issued a Memorandum Opinion and Order that reduced, but did not terminate, alimony. The opinion analyzed each of the statutory alimony factors¹² and concluded that Mr. Bjork had met his burden of proving a material change in circumstances in light of his retirement and "uncertain secondary employment

¹¹ Mr. Bjork also submitted additional OPM documentation of the October and November 2023 monthly payouts to the parties. These documents reflected a reduced payout to Mr. Bjork and an increase in the court-ordered apportionment to Ms. Bjork. However, these figures were not considered by the circuit court.

¹² See Md. Code Ann., Fam. Law ("FL") § 11-106(b).

as a lacrosse referee[.]” The circuit court found:

1. *The ability of the party seeking alimony to be wholly or partly self-supporting*

In the present case, Ms. Bjork currently lives with her daughter in the Rodgers Forge rowhome community in Baltimore County. Ms. Bjork was previously diagnosed with breast cancer. She was treated very aggressively, including chemotherapy, given other family members’ experiences. In addition, Ms. Bjork suffered from untreated Lyme’s disease, she was ultimately diagnosed with a degenerative neurological disorder, hypothyroid disorder and has significant eyesight problems. As a result, Ms. Bjork is permanently disabled and receives \$1,511.00 per month in Social Security. She is considered permanently disabled. It is unlikely she will ever become wholly or partly self-supporting.

Consideration of this factor supports a continuation of alimony in some fashion.

2. *The time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment*

As explained above, Ms. Bjork is permanently disabled and is, therefore, unable to work. This factor supports maintaining alimony in some fashion.

3. *The standard of living the parties established during their marriage*

The Parties provided minimal testimony regarding their standard of living during their marriage. They resided in the Rodgers Forge townhome community now owned by their adult daughter.

Testimony about respective current standards of living differed between the Parties. Ms. Bjork testified that she has minimal disposable income, has a minimal ability to contribute to household expenses and rarely, if ever, takes vacations. Mr. Bjork admitted to recently purchasing a new car and taking numerous considerable vacations per year. This factor supports a decision to maintain alimony in some fashion.

4. *The duration of the marriage*

The Parties married in 1992 and separated eighteen years later, in 2010. However, they remained separated for another seven years until their divorce in 2018. Credible testimony was admitted explaining that the delay was in part due to allowing Ms. Bjork to stay on Mr. Bjork's health insurance. Consideration of this factor in this specific case supports alimony being maintained in some fashion.

5. *The contribution, monetary and non-monetary, of each party to the well-being of the family*

Testimony revealed that Mr. Bjork was the primary breadwinner and Ms. Bjork was the primary non-monetary contributor. However, Ms. Bjork did work as an addictions counselor for a period of time. Overall, I find both Parties contributed to the well-being of the family, however, each concentrated on different aspects of that stability. Consideration of this factor does not move the needle in any direction.

6. *The circumstances that contributed to the estrangement of the Parties*

According to both Parties, the estrangement of the marriage was primarily due to Mr. Bjork's affairs over the course of the marriage. Although I am considering this factor, I am also cognizant that the Parties have been separated/divorced for the past thirteen years. Consideration of this factor weighs in favor of maintaining alimony in some fashion.

7. *The age of each party*

Each Party is in their mid-50's. In that Ms. Bjork is permanently disabled but Mr. Bjork ostensibly has many potential years left in the work force and the ability to earn income (albeit possibly part-time), the Parties' respective ages support maintaining alimony in some fashion.

8. *The physical and mental condition of each Party*

As already mentioned, Ms. Bjork is permanently disabled. Mr. Bjork requires knee replacement surgery. This is certainly a factor, however, it does not prohibit him from earning income in some capacity. Consideration of this factor supports maintaining alimony in some fashion.

9. *The ability of the Party from whom alimony is sought to meet that Party's needs while meeting the needs of the Party seeking alimony*

This was an area of much contention during the two-day hearing. There is a certain legal tension at play. Mr. Bjork's new wife has no obligation to, even indirectly, help support her husband's ex-spouse. On the other hand, the Appellate Court of Maryland has instructed that "The husband's overall financial ability to support (and not merely his current income) and the wife's need for support are controlling factors." Lott v. Lott, 17 Md. App 440, 450, quoting Quinn v. Quinn, 11 Md.App. 638 (1971). Evidence adduced at trial, including but not limited to a new vehicle purchase and multiple elaborate vacations by Mr. Bjork and his new wife, establish that he has sufficient assets to continue to pay alimony in some fashion.

10. *Any agreement between the parties*

The Parties' Marital Separation Agreement called for indefinite and modifiable alimony. Testimony revealed at least a perceived misconception about those words. It appeared clear to me that Ms. Bjork erroneously equates indefinite with permanent. Indefinite does not mean forever. Obviously, there is no agreement between the Parties regarding alimony. This factor does not affect the determination regarding alimony.

- 11. *The financial needs and financial resources of each Party, including***
- (i) *[A]ll income and assets, including property that does not produce income;***
 - (ii) *Any award made under §§ 8-205 and 8-208 of the Family Law Article;***
 - (iii) *The nature and amount of the financial obligations of each Party;***
 - (iv) *The right of each Party to receive retirement benefits***

I find this factor is of particular significance in this case. Much testimony and documentary evidence were adduced regarding this factor. It is clear to me Ms. Bjork has minimal assets and minimal income. As explained above, she receives approximately \$1,511 per month in Social Security. There was testimony regarding the allocation of monthly household expenses between Ms. Bjork and her daughter. Candidly, this testimony was less than clear. I believe Ms. Bjork assists her daughter minimally, if at all, with the bills. In addition, those two pools of funds appear to be commingled

for bill-paying purposes.

Testimony and documentary evidence also revealed that Ms. Bjork treats her monthly Social Security as almost “pocket money,” rather than funds to purchase what I would describe as “necessities”. Records established multiple daily trips to fast food restaurants such as Starbucks, Sonic, McDonald’s, Dunkin Donuts, etc. Funds are also routinely spent on various internet subscriptions and/or purchases such as Amazon and Apple, fee-based internet games such as Candy Crush, etc. I am mindful of Ms. Bjork’s testimony regarding the motive(s) surrounding such purchases – wanting to enjoy her children and grandchildren. However, I do factor these discretionary expenses into my analysis.

In addition, there was evidence establishing that Ms. Bjork depleted some \$50,000 (if not more) from a retirement account over the course of three years. However, under cross examination she was unable to account for, even anecdotally, where the funds were spent.

I am also factoring into my analysis that Ms. Bjork will be receiving some portion of Mr. Bjork’s monthly annuity. That increases her dependable monthly flow of income. I should be clear that during the drafting of this Memorandum and Order, the Plaintiff received the anticipated correspondence from the U.S. Office Of Personnel Management Retirement Services Program entitled “Notice of Annuity Adjustment.” This document, attached as an exhibit to Plaintiff’s post-hearing Motion, establishes that Plaintiff’s net monthly annuity will be \$1,957.32, not the \$2,075.32 figure discussed during the hearing. I want to make clear that negligible difference, approximately \$118, does not appreciably alter my ultimate analysis.

As discussed above, Mr. Bjork is receiving a steady stream of monthly pension/annuity payments. I also factor in, notwithstanding his required joint-replacement surgery, Mr. Bjork’s ability to continue to earn income for many years to come. This weighs in favor of continuing to pay alimony in some fashion.

12. Conclusion

In analyzing the above factors, the Parties’ respective financial positions and resources, I do find that Mr. Bjork has met his burden to prove a material change in circumstances. His reduced flow of income due to both his retirement and his uncertain secondary employment as a lacrosse referee merits consideration. My analysis of the above factors leads me to conclude

and find that this change warrants a downward modification of monthly alimony from the original \$2,300.00 per month to \$1,300.00 per month.

The circuit court ordered Mr. Bjork to pay indefinite and modifiable monthly alimony in the amount of \$1,300 per month, backdated to November 2022, as well as to repay previously unpaid alimony in the amount of \$200 per month until the arrearage of \$14,500 is repaid. The order did not grant Ms. Bjork’s petition for contempt based on the unpaid alimony, instead finding Mr. Bjork to be in breach of contract for not making the full alimony payments as required by the MSA. The circuit court denied both parties’ requests for attorney’s fees. Ms. Bjork timely appealed.

DISCUSSION

I. Discovery

Ms. Bjork argues that the circuit court abused its discretion by declining to compel the production of Mr. Bjork’s current wife’s tax information, as she had requested in her motion to compel and motion for reconsideration. This Court’s review of the circuit court’s resolution of a discovery dispute is “quite narrow.” *Adventist Healthcare, Inc., v. Mattingly*, 244 Md. App. 259, 273–74 (2018) (citation omitted). We review the denial of discovery for abuse of discretion. *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005). A court abuses its discretion when

no reasonable person would take the view adopted by the trial court or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court or when the ruling is violative of fact and logic.

Id. at 28 (citation omitted) (cleaned up).

The purpose of the discovery process is to ensure the disclosure of all relevant

facts. *Androustos v. Fairfax Hosp.*, 323 Md. 634, 638 (1991) (citation omitted). Maryland Rule 2-402, which concerns the scope of discovery, provides that:

A party may obtain discovery regarding any matter that is not privileged...if the matter sought is *relevant* to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Md. Rule 2-402(a) (emphasis added). More specifically, this Court previously addressed discovery of jointly-filed tax returns in *Rolley v. Sanford*, 126 Md. App. 124, 130 (1999) (applying *Ashton v. Cherne Contracting Corp.*, 102 Md. App. 87, 92, 98 (1994)). There, we held that such documents were discoverable if relevant, but that “to the extent that they disclose irrelevant financial information about h[is] or her spouse, that information may be redacted prior to disclosure.” *Rolley*, 126 Md. App. at 130.

The circuit court did not abuse its discretion by rejecting Ms. Bjork’s unpersuasive attempts to compel disclosure of the tax information of Mr. Bjork’s current wife, i.e., unredacted tax information. Ms. Bjork never made a showing below as to the relevance, based on the statutory alimony factors, of this information. Ms. Bjork’s motion to compel discovery and her motion to reconsider the court’s order denying her motion as to discovery, like her arguments here, relied only on *Lott v. Lott*, 17 Md. App. 440 (1973). As discussed *infra*, *Lott* does not support her argument that this tax information should have been produced.

Ms. Bjork cites to *Lott* for the proposition that “[t]he husband’s overall financial

ability to support (and not merely his current income), and the wife’s need for support are controlling factors” when determining alimony. *See Lott*, 17 Md. App. at 450. But even if *Lott* could be read to establish *an obligation* of support of a first spouse in every divorce (we don’t read it that way), such an obligation would not extend to an alimony payor’s second spouse. Instead, the alimony statute directs the trial court to consider, and thus focuses our analysis on, the parties to the alimony claim, not non-parties.¹³ Thus, the tax

¹³ FL Section 11-106(b) provides:

(b) In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:

- (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
- (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
- (3) the standard of living that the parties established during their marriage;
- (4) the duration of the marriage;
- (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
- (6) the circumstances that contributed to the estrangement of the parties;
- (7) the age of each party;
- (8) the physical and mental condition of each party;
- (9) the ability of the party from whom alimony is sought to meet that party’s needs while meeting the needs of the party seeking alimony;
- (10) any agreement between the parties;
- (11) the financial needs and financial resources of each party, including:
 - (i) all income and assets, including property that does not produce income;
 - (ii) any award made under §§ 8-205 and 8-208 of this article;
 - (iii) the nature and amount of the financial obligations of each party; and
 - (iv) the right of each party to receive retirement benefits; and

information of Mr. Bjork’s current wife (a non-party here) is not relevant.

II. Alimony Modification

In reviewing a circuit court’s determination on the modification of alimony, we “defer to the findings and judgments of the trial court.” *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383 (2006) (cleaned up) (citation omitted). Such an alimony determination will not be disturbed unless the ultimate decision was clearly wrong or an arbitrary use of discretion. *Id.* at 384.

Maryland’s alimony statute instructs the court to “modify the amount of alimony awarded as circumstances and justice require.” FL § 11-107(b). In doing so, “a trial court has discretion to determine the extent and amount of alimony and must consider specific factors in exercising its discretion.” *Baer v. Baer*, 128 Md. App. 469, 484 (1999) (cleaned up) (citing the FL § 11-106(b) factors). The party seeking modification “must demonstrate through evidence presented to the trial court that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification.” *Ridgeway*, 171 Md. App. at 384 (citation omitted). A court has the discretion to modify an alimony award “at any time if there has been shown a material change in

(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health - General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

FL § 11-106(b). We recognize, of course, that not all of the above factors will be relevant to the determination of modified alimony. *See Shapiro v. Shapiro*, 346 Md. 648, 665 (1997); *see also Blaine v. Blaine*, 336 Md. 49, 74 (1994).

circumstances that justify the action.” *Id.* (citation omitted).

In this case, the parties agreed to the original monthly alimony in the amount of \$2,300 in their MSA, rather than submit the issue to the court for determination. Nonetheless, a court may modify an alimony agreement unless “there is a waiver or a specific statement that the payments are not subject to any court modification.” *Goldberg v. Goldberg*, 290 Md. 204, 209 n.5 (1981). Here, the parties’ MSA expressly permits modification of the amount by the court in the case of certain changes in circumstances. Specifically, the parties agreed that either party may apply to the court for modification “based on a significant change of circumstances, including but not limited to a material change in their incomes or expense[.]”¹⁴

Ms. Bjork contends that the circuit court abused its discretion in three ways in its treatment of Mr. Bjork’s modification petition. First, Ms. Bjork contends that the circuit court did not sufficiently consider Mr. Bjork’s income and expenses in its analysis of whether there was a material change in circumstances. Second, Ms. Bjork argues that the circuit court should have analyzed whether Mr. Bjork voluntarily impoverished himself and should have found that he did by retiring. Finally, Ms. Bjork argues that the portion of Mr. Bjork’s annuity that she will receive should not have been factored into the analysis of her financial resources for alimony purposes. We address, and reject, each of

¹⁴ With their reference to this standard in their MSA, the parties appeared to adopt the standards set out in FL Section 11-107(b) regarding alimony modification and the relevant alimony factors in FL Section 11-106(b). Neither party contended otherwise below, and Ms. Bjork does not contend otherwise here.

these contentions below.

A. Material Change in Circumstances

Ms. Bjork argues that the circuit court did not properly consider the financial resources and needs of Mr. Bjork in its analysis of whether there was a material change of circumstances to warrant modification of alimony. Ms. Bjork’s objections focus on the circuit court’s treatment of “the financial needs and financial resources of each party” under FL Section 11-106(b)(11). Ms. Bjork argues that the circuit court focused solely on her income and expenses and did not properly consider Mr. Bjork’s income and expenses under this factor.

Contrary to Ms. Bjork’s argument, the circuit court did not “focus[] solely on the expenses and income of [Ms. Bjork]” in making its decision. As to Mr. Bjork, the circuit court found under FL Section 11-106(b)(11) that he was “receiving a steady stream of monthly pension/annuity payments” and that he has the “ability to continue to earn income for many years to come.” The circuit court concluded under this factor that Mr. Bjork had the ability to continue to pay alimony in some fashion.

Ms. Bjork takes issue with the circuit court’s discussion under FL Section 11-106(b)(11) of her use of funds in light of her “minimal assets and minimal income.” But such analysis of Ms. Bjork’s financial circumstances was appropriate because the statute directs the court to consider the financial needs and resources of *each* party. FL § 11-106(b)(11). The circuit court’s opinion reflects its weighing of the evidence adduced at trial and, in particular, its consideration of the “[p]arties’ respective financial

positions and resources.”

Considering all the factors, the circuit court concluded that the facts and circumstances of the parties warranted a downward modification of alimony. In addition to the analysis under FL Section 11-106(b)(11), the circuit court’s consideration of Mr. Bjork’s vehicle purchase and vacations under FL Section 11-106(b)(9) and its conclusion referencing “Mr. Bjork’s reduced flow of income due to both his retirement and his uncertain secondary employment as a lacrosse referee” demonstrate that Mr. Bjork’s financial needs and resources were appropriately considered. The circuit court did not abuse its discretion in finding that Mr. Bjork met his burden to prove a material change in circumstances.

B. Voluntary Impoverishment

Ms. Bjork contends that the circuit court abused its discretion by not analyzing whether Mr. Bjork voluntarily impoverished himself and by not finding that he had done so. Again, we disagree.

Voluntary impoverishment is a legal concept defined in Maryland’s child support statute as when “a parent has made the free and conscious choice, not compelled by factors beyond the parent’s control, to render the parent without adequate resources.” FL § 12-201(q) (defining “voluntarily impoverished”); *see also Long v. Long*, 141 Md. App. 341, 350–51 (2001) (quoting *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993)) (similarly defining “voluntarily impoverished”). When determining a child support obligation under FL Section 12-204(b), the circuit court is instructed that “child

support may be calculated based on a determination of potential income” if a parent is voluntarily impoverished. FL § 12-204(b)(1). If there is a dispute as to whether a parent is voluntarily impoverished, the court is directed to make a finding as to this issue based on the statutory factors for attributing potential income. FL §§ 12-204(b)(2), 12-201(m).

In contrast with the above requirements under the child support statute, the court is “not expressly require[d] . . . to consider a spouse’s voluntary impoverishment or potential income for alimony purposes.” *St. Cyr v. St. Cyr*, 228 Md. App. 163, 179 (2016). Alimony and child support are separate issues for which Maryland has distinct statutory provisions. Of course, a spouse’s potential income may be relevant to considerations under FL Section 11-106(b) and the court, acting within its discretion, may consider a party’s potential income in an alimony case. *See Durkee v. Durkee*, 144 Md. App. 161, 181 (2002) (recognizing that potential income is relevant to FL § 11-106(b)(9), which concerns “the ability of the party from whom alimony is sought to meet that party’s needs, while also meeting the needs of the party requesting alimony”); *see also St. Cyr*, 228 Md. App. at 179–80 (discussing the factors under FL § 11-106(b)(1), (2), and (11) and concluding that “the court may consider the potential income of a voluntarily impoverished spouse when it considers an alimony request”).

Here, the circuit court found that Mr. Bjork had the ability to pay alimony and considered his potential to continue to earn income in the future. In considering “the ability of the party from whom alimony is sought to meet that party’s needs while

meeting the needs of the party seeking alimony” under FL Section 11-106(b)(9), the court concluded that the evidence established that Mr. Bjork “has sufficient assets to continue to pay alimony in some fashion.” In analyzing “the age of each party” under FL Section 11-106(b)(7), the circuit court also noted that Mr. Bjork “ostensibly has many potential years left in the work force and the ability to earn income (albeit possibly part-time).” In addressing “the physical and mental condition of each party” under FL Section 11-106(b)(8), the court similarly noted that although Mr. Bjork requires knee replacement surgery, this “does not prohibit him from earning income in some capacity.” When discussing the financial needs and resources of each party under FL Section 11-106(b)(11), the court again “factor[ed] in, notwithstanding his required joint-replacement surgery, Mr. Bjork’s ability to continue to earn income for many years to come.” The court concluded that each of these factors supported maintaining alimony because Mr. Bjork was able to pay alimony.

To the extent that Ms. Bjork relies on *John O. v. Jane O.*, 90 Md. App. 406 (1992), *abrogated by Wills v. Jones*, 340 Md. 480, 494 (1995), and *Guarino v Guarino*, 112 Md. App. 1 (1996), her reliance is misplaced. First, *John O.* was a child support case. 90 Md. App. at 423. And, while *Guarino* was an alimony case in which the chancellor had found that the payee was “not voluntarily impoverishing herself” after considering the *John O.* factors, we did not mandate such analysis in the alimony context. 112 Md. App. at 15, n.4. That some circuit courts in previous alimony cases have used the term “voluntary impoverishment” does not mean that a court abuses its discretion when it

chooses not to do so. This is especially true when, as here, a party is found to have sufficient resources to pay alimony, i.e., not to be voluntarily impoverishing themselves.

C. Consideration of Annuity as a Financial Resource

Ms. Bjork argues that the circuit court abused its discretion by considering the share of Mr. Bjork’s CSRS gross monthly annuity she will receive when assessing her financial circumstances. As previously discussed, the circuit court is directed to consider “the financial needs and financial resources of each party.” FL § 11-106(b)(11). This provision includes “all income and assets,” any monetary award following divorce, and “the right of each party to receive retirement benefits.” FL § 11-106(b)(11) (referencing FL § 8-205, which provides for the transfer of retirement benefits on absolute divorce, among other marital property dispositions). The amount of the annuity that Ms. Bjork will receive is a “financial resource” appropriately considered by the court under FL Section 11-106(b)(11). That Ms. Bjork receives the annuity as part of the parties’ MSA does not remove it from consideration by the court under this factor because the statutory language makes specific reference to such retirement benefit plans.

Riley v. Riley, on which Ms. Bjork relies, virtually forecloses her argument that the circuit court abused its discretion in considering the annuity a financial resource. 82 Md. App. 400 (1990). Ms. Bjork points to language in *Riley* that describes how alimony and monetary awards function differently in their nature and purpose. *See id.* at 405–06. To be sure, monetary awards based on marital property (and divisions of marital property such as retirement benefit plans) are different from alimony. But there is nothing in the

plain language of FL Section 11-106(b), nor does Ms. Bjork identify anything, that directs the court not to consider retirement benefits received as a transfer of marital property when determining how much alimony to award.

If anything, *Riley* further supports the conclusion that retirement benefits are a financial resource to be considered when calculating alimony. *Id.* at 407–08. The court in *Riley* determined that the payor’s entitlement to receive monthly pension benefits was “a resource that he has from which to pay alimony” and was appropriately considered by the court in determining the amount of the alimony award. *Id.* Nothing in FL Section 11-106(b)’s plain language makes this consideration applicable only to the alimony payor. Indeed, it would be inconsistent with the language of the alimony statute for this only to be true for a payor.

In sum, we see no abuse of discretion in the circuit court’s inclusion of Ms. Bjork’s share of Mr. Bjork’s CSRS gross monthly annuity as part of her “dependable monthly flow of income.” The circuit court had to consider Ms. Bjork’s share of this asset.

III. Contempt

Ms. Bjork’s challenge to the circuit court’s denial of her contempt petition also fails. Appellate review in contempt cases is limited “to persons adjudged in contempt.” *Pack Shack, Inc. v. Howard Cty.*, 371 Md. 243, 254 (2002); *see also* Md. Code, Courts & Judicial Proceedings § 12-304 (providing a person held in contempt the right to an appeal). A person not held in contempt has “no right to appeal the trial court’s denial of

the contempt petition.” *Pack Shack, Inc.*, 371 Md. at 254. Ms. Bjork, who was not held in contempt, cannot appeal the circuit court’s denial of her petition for contempt. We have no jurisdiction to review this decision.

IV. Attorney’s Fees

The final issue before us on appeal is the circuit court’s denial of attorney’s fees to Ms. Bjork. The circuit court addressed Mr. Bjork’s and Ms. Bjork’s respective requests for attorney’s fees in its opinion, denying both:

REQUESTS FOR LEGAL FEES

“[T]he court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding,” FL §8-214. “Before ordering the payment, the court shall consider: (1) the financial resources and financial needs of both parties; and (2) whether there was substantial justification for prosecuting or defending the proceeding.” FL §8-214(c)(1) & (2).

In this case, I heard credible testimony that Ms. Bjork actively avoided service for a substantial amount of time. In fact, Mr. Bjork had to resort to hiring a private investigator to locate Ms. Bjork, despite her living in what was the marital home. This fact, coupled with my finding that Mr. Bjork did not act in bad faith by making the request for modification of alimony, leads me to conclude there is no legal or factual basis to award legal fees and costs to either Party. The Parties’ respective requests for legal fees and costs are denied.

Whether to award attorney’s fees and, if so, in what amount is within the “wide discretion” of the circuit court. *Malin v. Mininberg*, 153 Md. App. 358, 435–36 (2003). The denial of attorney’s fees is governed by the abuse of discretion standard. *Id.* at 436; *see also Guillaume v. Guillaume*, 243 Md. App. 6, 11–12 (2019).

Ms. Bjork argues that the circuit court erred in two respects when it denied her

request for attorney's fees. First, she contends that she was entitled to attorney's fees under the parties' MSA. Second, Ms. Bjork contends that the court erred by not considering the required factors under the alimony statute. We agree, to an extent, with Ms. Bjork's contentions and discuss each below.

We are not convinced that the circuit court fully analyzed Ms. Bjork's request for attorney's fees. Specifically, it does not appear that the circuit court considered Ms. Bjork's claim to contractual attorney's fees under the MSA. Nor does it appear that the circuit court fully considered Ms. Bjork's claim to statutory attorney's fees in the absence of bad faith. Accordingly, we vacate and remand for further proceedings not inconsistent with this opinion on the issue of attorney's fees.

A. Attorney's Fees Under the Parties' MSA

The parties' MSA provides for the award of contractual attorney's fees in the event of breach. Specifically, the MSA provides that:

Each party hereby waives the right to assert any claim against the other party for counsel fees for legal services rendered to him or her at any time in the past, present, or future, except as permitted by law and except that if either party breaches any provision of this Agreement, or is in default thereof, said party shall be responsible for any reasonable legal fees incurred by the other party in seeking to enforce this Agreement which are awarded by a court of competent jurisdiction.

Here, the circuit court found that Mr. Bjork was in breach of the MSA by failing to pay all the alimony that was due while his modification petition was pending. The circuit court found that Mr. Bjork owed Ms. Bjork \$14,500 in unpaid alimony and ordered him to repay it at the rate of \$200 per month. Nonetheless, the circuit court did not explain

why it did not award contractual attorney’s fees as a result of this breach. Accordingly, we agree with Ms. Bjork that further proceedings regarding this breach, and attendant contractual attorney’s fees, are in order, and we will remand for this purpose.

However, to the extent that Ms. Bjork argues that the MSA requires that Mr. Bjork be responsible for all attorney’s fees incurred by Ms. Bjork in defending against Mr. Bjork’s modification petition and in bringing this appeal, we disagree. The MSA’s creation of a contractual right to attorney’s fees from the other party is narrow. The language of the agreement generally provides that each party is responsible for their own attorney’s fees. The exception to this general rule quoted above applies only when a party incurs attorney’s fees in “seeking to enforce” the MSA in the event of breach or default by the other party. It does not provide for contractual attorney’s fees to the nonprevailing party on a modification petition. Accordingly, we will not remand on that issue.

B. Attorney’s Fees Under the Attorney’s Fees Statute¹⁵

The court’s discretion for awarding attorney’s fees in alimony cases is addressed under FL Section 11-110.¹⁶ The statute provides that the court, at any point, “may order either party to pay to the other party an amount for the reasonable and necessary expense

¹⁵ Plainly read, the MSA preserved both parties’ right to claim counsel fees “in the future” “as permitted by law.”

¹⁶ The circuit court’s opinion quotes FL Section 8-214. Title 8 of the Family Law Article governs agreements between spouses. We assume that the circuit court meant to refer to the standard under FL Section 11-110. In any event, the statutory provisions as to attorney’s fees are substantively identical under both titles and Ms. Bjork does not contend otherwise. *See* FL § 8-214(b); FL § 11-110(b).

of prosecuting or defending the proceeding.” FL § 11-110(b). Before ordering a party to pay, the court must consider “(1) the financial resources and financial needs of both parties” and “(2) whether there was substantial justification for prosecuting or defending the proceeding.” FL § 11-110(c).

Ms. Bjork contends that the circuit court erred in denying attorney’s fees incurred in defending against Mr. Bjork’s modification petition because it did not consider the statutory criteria under FL § 11-110(c), citing *Malin*, 153 Md. App. 358. *Malin* provides that the “[f]ailure of the court to consider the statutory criteria constitutes legal error.” 153 Md. App. at 435. We agree that the court erred in failing to consider the required statutory factors. First, while the circuit court concluded that Mr. Bjork’s request for a modification of alimony was substantially justified and that he “did not act in bad faith” by initiating the proceeding, it is not apparent to us that the court addressed whether Ms. Bjork was substantially justified in defending the proceeding, a defense one might expect given that Ms. Bjork was disabled and dependent, at least to some extent, on alimony.¹⁷ Second, if the court were to have found that Ms. Bjork was substantially justified in defending the proceeding, the court failed to discuss the financial resources and needs of Mr. Bjork and Ms. Bjork for the purpose of paying Ms. Bjork’s reasonable attorney’s fees. Thus, we remand to the circuit court for further proceedings regarding Ms. Bjork’s

¹⁷ The circuit court also referred to Ms. Bjork’s apparent extended avoidance of service, but this discussion does not refer to the financial resources or needs of the parties or whether Ms. Bjork had substantial justification for her defense of the entire proceeding.

claim for attorney's fees under FL Section 11-110(c).

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED
IN PART AND VACATED IN PART. CASE
IS REMANDED FOR PROCEEDINGS NOT
INCONSISTENT WITH THIS OPINION.
COSTS TO BE PAID TWO-THIRDS BY
APPELLANT AND ONE-THIRD BY
APPELLEE.**