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COURT OF SPECIAL APPEALS

Unreported opinions

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Termination of parental rights: independent adoption: untimely objection

In Re: Adoption of Sean M.

No. 54, September Term, 2012

Argued Before: Bell, C.J., Harrell, Battaglia, Greene, Adkins, Barbera, McDonald, JJ.

Opinion by Harrell, J.

Filed: March 22, 2013. Reported.

Ed. note: Reported opinions of the state courts of appeal are subject to minor editing by the courts prior to publication. Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

A putative father's failure to file the objection to a stepparent adoption within the statutory time period constituted an irrevocable consent to the adoption.

We are asked in this matter whether the failure of a putative father to file timely a notice of objection to a proposed independent adoption operates as an irrevocable deemed consent to the termination of his assumed parental rights. This case involves the adoption of a minor child, Sean M. ("Sean"), by his stepfather, Respondent Jeffrey Craig K. Petitioner, William H., the putative father of Sean, filed an objection to the stepparent adoption one day after the expiration of the thirty-day deadline provided by the show cause order issued by the Circuit Court for Queen Anne's County, pursuant to Maryland Rule 9-107(b). Petitioner asks us to reverse the trial court's and the Court of Special Appeals's judgments that his failure to file the objection within the statutory time period constituted an irrevocable consent to the adoption. For the reasons stated below, we affirm the judgments of those courts.

FACTUAL AND PROCEDURAL HISTORY

Moira M. ("Mother") and William H. engaged in a romantic relationship from April to November of 2008. They were not married. Sean was born to Moira M. in Annapolis, Maryland, on 16 June 2009. Moira M. became engaged to Jeffrey Craig K. ("Stepfather") in November of 2009. Since that time, she and Sean lived with Stepfather in Queen Anne's County. Mother and Stepfather married on 16 October 2011.

On 14 July 2009, Mother filed a Complaint against William H. in the Circuit Court for Anne Arundel County, asserting that William H. is the natural father of Sean[1] and seeking sole legal and physical custody. In his Answer, filed on 14 September 2009,[2] William H. denied that he was the natural father of Sean and stated that he had no objection to Mother having custody.[3] On 14 January 2010, the suit was dismissed by agreement of the parties.

On 30 March 2011, Stepfather filed a Petition for Stepparent Adoption of a Minor and Change of Name ("Petition") in the Circuit Court for Queen Anne's County, stating his intention to continue to reside with Sean's mother, and "[t]hat the natural father of the minor child has not been identified; no persons alleging to be the natural father of the minor child have come forward; and no natural father is listed on the minor child's birth certificate." The Petition stated also that, even if William H. was the natural father of Sean, he has "abandoned his parental rights" as to Sean because William H.: (1) denied that he was the natural father of the minor child during the earlier custody proceeding in the Circuit Court for Anne Arundel County; (2) has not "exercised any parental rights since the minor child's birth;" and, (3) has not attempted to support and maintain Sean since his birth.

On 15 April 2011, the Circuit Court issued a show cause order and form notice of objection to William H., who was served properly by personal service on 29 April 2011. The show cause order stated, in pertinent part (emphasis in original):

> RELATIONSHIP TO POTENTIAL ADOPTEE: **[Puported] FATHER**
>
> You are hereby notified that:
>
> 1. A Petition has been filed for the adoption of Sean . . . , who was born on June 19, 2009 in Queen Anne's County, Maryland.[4]
>
> 2. If you wish to object to the adoption(s), you must file a notice of objection with the Clerk of the Court at Circuit Court for Queen Anne's County . . . **within thirty (30) days** after this Order is served on you. For your convenience, a form notice of objection is attached to this Order.
>
> * * * * *
>
> **WHETHER THE PETITION REQUESTS ADOPTION OR GUARDIANSHIP, IF YOU DO NOT MAKE SURE THAT THE COURT RECEIVES YOUR NOTICE OF OBJECTION ON OR BEFORE THE DEADLINE STATED ABOVE, YOU HAVE AGREED TO A TERMINATION**

OF YOUR PARENTAL RIGHTS.

The form notice of objection, provided to William H. along with the show cause order, stated, in relevant part (emphasis in original and emphasis added):

> Instructions to the person served with the show cause order: **IF YOU WISH TO OBJECT, YOU MUST MAKE SURE THAT THE COURT RECEIVES YOUR NOTICE OF OBJECTION ON OR BEFORE THE DEADLINE STATED IN THE SHOW CAUSE ORDER**. You may use this form to do so. You need only sign this form, print or type your name, address, and telephone number underneath your signature, and mail or deliver it to the court at the address shown in paragraph 2 of the show cause order. ***IF THE COURT HAS NOT RECEIVED YOUR NOTICE OF OBJECTION ON OR BEFORE THE DEADLINE STATED, YOU HAVE AGREED TO A TERMINATION OF YOUR PARENTAL RIGHTS.***

The required deadline for William H. to file with the Circuit Court for Queen Anne's County any objection to Stepfather's petition for adoption of Sean was 31 May 2011.[5] The Circuit Court received William H.'s written objection on Wednesday, 1 June 2011, one day after the expiration of the thirty-day deadline. On 13 June 2011, Stepfather filed a Motion to Strike Late Notice of Objection, requesting that the adoption proceed as an uncontested matter. A hearing was held before Judge J. Frederick Price on 8 August 2011. Judge Price granted Stepfather's motion, noting that William H. did not allege any disability or any other circumstance to excuse the requirement, pursuant to Maryland Rule 9-107(b)(1),[6] of filing a notice of objection to an adoption within thirty days after the show cause order is served.

William H. filed a Motion to Alter and Amend Judgment on 18 August 2011,[7] and, a week later, an Emergency Motion to Stay Adoption Proceeding. The court denied both motions. William H. appealed the denial of the orders to the Court of Special Appeals. On 27 April 2012, a panel of the court affirmed the Circuit Court's grant of Stepfather's Motion to Strike William H.'s untimely objection. The court held that the time period established in Md. Rule 9-107(b)(1) applied equally to guardianships as well as adoptions, and that it rendered the late filing of a notice of objection to an adoption as an irrevocable consent to termination of the pertinent parent's rights, *In re: Adoption of Sean M.*, 204 Md. App. 724, 742, 42 A.3d 722, 732 (2012). The intermediate appellate court held also that this statutory scheme did not offend any due process right of William H. *Id.* at 749, 42 A.3d at 737. William H. filed a petition for Writ of Certiorari with us on 18 June 2012. We granted the petition, *In re: Adoption of Sean M.*, 427 Md. 606, 50 A.3d 605 (2012), to consider two questions:

> 1. Whether a natural parent's failure to file a timely objection to a proposed independent adoption, as directed in a show cause order, constitutes an irrevocable consent to the adoption?
>
> 2. Whether the statutory scheme resulting in an irrevocable deemed consent to an independent adoption offends the due process rights of the parent?

DISCUSSION

Where a trial court interprets and applies Maryland case or statutory/regulatory law, we determine on appellate review, under a non-deferential standard of review, whether the trial court's conclusions are "legally correct." *Garfink v. Cloisters at Charles*, 392 Md. 374, 383, 897 A.2d 206, 211 (2006) (quoting *Gray v. State*, 388 Md. 366, 374-75, 879 A.2d 1064, 1068 (2005) (internal citations omitted)). Thus, we apply the non-deferential standard in reviewing the trial court's conclusion here that a Maryland statute and rule of procedure renders William H.'s late filing of his notice as an irrevocable consent to the adoption of Sean.

A. Failure to file a Timely Objection Constitutes an Irrevocable Consent

William H. contends that his failure to file timely a notice of objection to the proposed independent adoption does not constitute an irrevocable consent to the adoption. Stepfather argues, and the panel of the Court of Special Appeals agreed, that, under several Child in Need of Assistance ("CINA") cases interpreting the effect of a similar thirty-day objection period, a parent's late-filed objection is a deemed irrevocable consent in independent adoptions as well.

This Court has not addressed previously the issue of statutorily-deemed consent in the context of independent adoptions. The principles of statutory interpretation guide our analysis of the effect of the thirty-day notice of objection period upon independent adoptions. In interpreting statutory and rule-based language, our "'primary goal is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the Rules.'" *Miller v. Mathias*, 428 Md. 419, 450, 52 A.3d 53, 72 (2012) (quoting *Ray v. State*, 410 Md. 384, 404, 978 A.2d 736, 747 (2009) (internal citations omitted)). The rules of interpretation applicable to statutes apply equally to

interpreting the Maryland Rules. *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 78, 775 A.2d 1218, 1224 (2001). Our first step in this analysis is to look to the "normal, plain meaning of the language of the statute, reading the statute [or rule] as a whole to ensure that 'no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" *Id.* at 450-51, 52 A.3d at 72 (quoting *Ray*, 410 Md. at 404, 978 A.2d at 747-48 (internal citations omitted)). "If the language of the statute is clear and unambiguous, we need not look beyond the statute's provisions and our analysis ends." *Ray*, 410 Md. at 405, 978 A.2d at 748 (citations omitted).

Md. Code (1984, 2006 Repl. Vol) Fam. Law ("FL") § § 5-3B-01 to 5-3B-32, and their implementing rules, Md. Rules 9-101 through 9-113, govern independent adoptions. The independent adoption process begins with the filing of a petition to adopt, which requires the trial court to issue and serve a show cause order "on each of the prospective adoptee's living parents who has not consented to the adoption." FL § 5-3B-15. An order for adoption may be entered only if each of the prospective adoptee's parents consents either in writing or "by failure to timely file notice of objection after being served with a show cause order . . . ." FL § 5-3B-20.

Md. Rule 9-105 establishes for all adoptions the required content of the show cause order and when a show cause order must be issued. Pursuant to Md. Rule 9-105(a), a show cause order is required in independent adoptions, public agency adoptions, public agency guardianships, and private agency guardianships.[8] According to Md. Rule 9-105(e), all show cause orders must include language substantially similar to the following:

> IF YOU DO NOT MAKE SURE THAT THE COURT RECEIVES YOUR NOTICE OF OBJECTION ON OR BEFORE THE STATED DEADLINE, YOU HAVE AGREED TO A TERMINATION OF YOUR PARENTAL RIGHTS.

The show cause order served personally on William H. on 29 April 2011 contained language consistent with the requirements of Md. Rule 9-105.

According to Md. Rule 9-107(b)(1), a parent must file "any notice of objection to an adoption or guardianship . . . within 30 days after the show cause order is served." William H. concedes that he filed his notice of objection on 1 June 2011, thirty-one days after he was served with the show cause order on April 29. He does not dispute that the filing was untimely under Md. Rule 9-107(b)(1). Thus, the sole issue in this appeal is what is the legal effect, if any, of William H.'s late filing.

Analyzing how Md. Rule 9-107(b)(1) and the corresponding guardianship statutory provisions operate in guardianship cases provides helpful guidance in determining that Rule's effect in independent adoption cases. A close comparison of the statutory language of FL § 5-320, which establishes the procedure for consent to a guardianship petition and governs the failure to object to a guardianship of a child, and of similar language in FL § 5-3B-20, which addresses the ramifications of a parent's failing to object to the adoption of a child, reveals that the Legislature intended for both statutes to have the effect of rendering a late-filed objection as a statutorily-deemed consent. FL § 5-320 provides, in relevant part:

> (a) *Consent and acquiescence or best interests*. – A juvenile court may grant guardianship of a child only if:
>
> * * * * *
>
> (iii) 1. Each of the child's living parents consents:
>
> A. in writing;
>
> B. knowingly and voluntarily, on the record before the juvenile court; or
>
> C. *by failure to file a timely notice of objection* after being served with a show cause order in accordance with this subtitle . . .

FL § 5-320 (emphasis added).

Section 5-3B-20 of the Family Law Article, which governs the court's authority to grant independent adoptions, provides a procedure virtually identical to the one established by FL § 5-320 for guardianship proceedings. FL § 5-3B-20 states:

> A court may enter an order for adoption only if:
>
> (1) (i) 1. Each of the prospective adoptee's living parents consents:
>
> A. in writing; or
>
> B. *by failure to timely file notice of objection* after being served with a show cause order in accordance with this subtitle . . .

FL § 5-3B-20 (emphasis added). We agree with intermediate appellate court that "there is no basis to conclude that the [L]egislature intended the language of FL § 5-3-B-20 be given different effect than the language of FL § 5-320." *In re: Adoption of Sean M.*, 204 Md. App. at 739, 42 A.3d at 731. The Legislature's 2005 revisions to the adoption and guardianship statutes demonstrate that it intended for a late filing of a notice of objection to an adoption to become a consent to that adoption arising under operation of law:

> [§ 5-3B-19][9] is derived from former FL

> SECTION 5-317(c)(2), as it related to adoption under this subtitle, and revised to clarify that failure to respond to a show cause order is deemed to be consent.

Committee Note, 2005 Md. Laws, ch 464 § 3, p. 2718.

Furthermore, the thirty-day period to file an objection under Md. Rule 9-107 applies to guardianship and adoption proceedings alike, and thus provides additional support for the proposition that failure to adhere to the Rule's deadline constitutes a deemed consent in the context of guardianship cases *and* independent adoption cases. Md. Rule 9-107 provides the requirements to file an objection in either an adoption or guardianship proceeding:

> (a) In general. Any person having a right to participate in a proceeding for adoption or guardianship may file a notice of objection to the adoption or guardianship. The note may include a statement of the reasons for the objection and a request for the appointment of an attorney.
>
> (b) Time for filing objection.
>
> > (1) In general. . . . [*A*]*ny notice of objection to an adoption or guardianship shall be filed within 30 days after the show cause order is served*.

Md. Rule 9-107 (emphasis added). The absence of any distinction or limitation between filing a notice of objection to a guardianship or an adoption demonstrates that there is no difference in the effect of the Rule in either proceeding.

Lastly, we have held that a statutorily-deemed consent to a guardianship petition is irrevocable. *In re Adoption/Guardianship No. 9321005*, 344 Md. 458, 486, 687 A.2d 681, 694 (1997) ("*No. 9321005*").[10] *See In re Adoption/Guardianship of Audrey B.*, 186 Md. App. 454, 476, 974 A.2d. 965, 978 (2009) (finding that the conclusions of *No. 9321005* apply with "equal force to the 2005 revisions to Maryland's guardianship and adoption laws."). Thus, we deduce that the statutory scheme for independent adoption proceedings supports a similar holding. The current statutory scheme that provides parents and putative parents notice of and a means to object to an independent adoption is similar to that employed in guardianship proceedings that was at issue in *No. 9321005*, where we observed that, "in cases in which the parent does not affirmatively consent to the guardianship . . . the court, upon the filing of a petition, [must] enter and serve upon the parent a show cause order informing the parent of the petition. . . . a copy of the petition [must] also be served on the parent and [must] set forth a form of show cause order for the courts to use. The order explains in plain language that the parents have the right to object to the guardianship but that, if they wish to object, they must file their objection with the court by the date set forth in the order."[11] *Id.* at 478-79, 687 A.2d at 691. We held, therefore, that the failure to file within the statutory time period constituted a deemed consent. *Id.* at 479, 687 A.2d at 691. Once an untimely filed objection to a guardianship petition operates as a deemed consent, that "deemed consent under § 5–322(d) may not be revoked, for it is not a volitional consent but one arising by operation of law." *Id.* at 481, 687 A.2d at 692.[12]

Because a parent's or putative parent's deemed consent to his or her child's adoption arising from his or her failure to file a notice of objection is — as we held in *No. 9321005* in the context of guardianship proceedings — not a "volitional consent but one arising by operation of law," such deemed consent is, we believe, likewise irrevocable ordinarily. The nearly identical statutory language of FL § 5-321 and FL § 5-3B-21 demonstrates that the Legislature intended this result. FL § 5-3B-21(b) provides:

> (b) *Revocation period*. – (1) (i) Subject to subparagraph (ii) of this paragraph, *a parent may revoke consent at any time within 30 days after the parent signs the consent*.
>
> (ii) A parent may not revoke consent for adoption of a prospective adoptee if:
>
> > 1. In the preceding year, the parent has revoked consent for or filed a notice of objection to adoption of the prospective adoptee; and
> >
> > 2. The child is at least 30 days old and consent is given before a judge on the record.

FL § 5-3B-21(b). Analogous language is found in FL § 5-321, which applies to guardianship cases and which, as we have discussed, does not countenance a parent or a putative parent revoking a statutorily-deemed consent:

> Revocation period; waiver
>
> (c)(1) Subject to paragraph (2) of this subsection, *a person may revoke consent to guardianship any time within the later of*:
>
> > (i) *30 days after the person signs the consent; or*
> >
> > (ii) *30 days after the consent is filed* as required under this section.

FL § 5-321(c) (emphasis added). Under both statutes, revocation of an affirmative consent may be revoked within thirty days after the consent is signed. FL § § 5-3B-21(b), 5-321(c).

William H. argues that *No. 9321005* and its progeny do not apply to the present case because, unlike those cases, this case is not a CINA guardianship/adoption. He does not provide, however, any basis for us to conclude that the statutory interpretations of *No. 9321005* and the subsequent cases affirming its holding should not apply to the comparable regulatory and statutory language of Md. Rule 9-107 and FL § § 5-3B-01 through 5-3B-32 in other adoption proceedings. As explained above, we believe that the statutory schema of guardianship and adoption procedures are sufficiently similar in their plain language and legislative intent as to the effect of a late-filed notice of objection to have the same effect ordinarily in either a guardianship or an adoption proceeding.

B. The Deemed Consent Statutory Scheme of the Maryland Family Law Article and the Maryland Rules Does Not Offend Due Process

William H. asserts additionally that, even if his failure to file timely an objection is considered a deemed consent under Family Law § 5-3B-20 and Md. Rule 9-107, these provisions "constrain" unduly his fundamental right as a natural father to participate in raising his son.[13] Although he does not refer us to any particular federal or Maryland constitutional provision, we assume, based on the arguments raised in his brief, that William H. rests this argument on the due process provision of the Fourteenth Amendment to the United States Constitution.[14]

It is well settled that "parents have a fundamental liberty interest in the care, custody, and management of their children . . . ." *No. 933210055*, 344 Md. at 491, 687 A.2d at 697 (citing *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed.2d 599 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed.2d 640 (1981)). In *Walker v. Gardner*, 221 Md. 280, 284, 157 A.2d 273, 275-76 (1960), we noted that the ramifications of severing permanently the natural tie between a parent and his child through an adoption "has led the Legislature and this Court to make sure, as far as possible, that adoption shall not be granted over parental objection unless that course clearly is justified."

Nevertheless, a parent's fundamental right to raise his child "is not absolute and does not exclude other important considerations." *In re Mark M.*, 365 Md. 687, 705, 782 A.2d 332, 343 (2001). Rather, we have reaffirmed consistently that the State's interest in protecting the best interests of the child "'takes precedence over the fundamental right of a parent to raise his or her child.'" *In re Yves S.*, 373 Md. 551, 569-70, 819 A.2d 1030, 1041 (2003) (quoting *Wolinski v. Browneller*, 115 Md. App. 285, 300-02, 693 A.2d 30, 37-38 (1997)). Any procedure by which a State interferes with or restrains this fundamental liberty must be "fundamentally fair." *No. 933210055*, 344 Md. at 491, 687 A.2d at 697.[15] What process is due to a parent in a termination of parental rights action "turns on a balancing of the three factors specified in *Matthews v. Eldridge*, 424 U.S. 319 . . . (1976), *i.e.*, the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting the use of the challenged procedure." *Id.*

Two important and countervailing interests compete here: Petitioner's assumed fundamental right to be a part of raising Sean as his assumed natural father, and the interest in "*timely* provid[ing] permanent and safe homes for children consistent with their bests interests" by establishing an orderly adoption procedure. FL § 5-3B-03(b)(1) (emphasis added).

William H. argues that the State's interest in stepparent adoptions is not sufficiently "compelling" — unlike the State's interest, as *parens patriae*, in protecting minors in CINA cases — so as to supersede a putative natural father's liberty interest in being a partner to raising his child. We see it differently. Because a "guiding principle" in adoption cases is "not the natural parent's interest in raising the child, but rather what best serves the interest of the child," we conclude that the State has a compelling interest in protecting the child's best interests in a disputed adoption case by establishing an effective and predictable (as much as possible) adoption process. See *In re Yves S.*, 373 Md. at 569-70, 819 A.2d at 1041; *In re Adoption/Guardianship No. A91–71A*, 334 Md. 538, 561, 40 A.2d 1085, 1096 (1994) (acknowledging the importance of a natural parent's right to raise his child, but stressing that the"controlling factor" in adoptions is what serves the best interests of the child) (citing *Lippy v. Breidenstein*, 249 Md. 415, 420, 240 A.2d 251, 253 (1968) ("The guiding principle in all child adoption and custody cases is that action should be taken which subserves the best interests of the child"); *Ex Parte Johnson*, 247 Md. 563, 569, 233 A.2d 779, 782 (1967) (recognizing that a parent's natural rights are "carefully guarded" and will not be terminated unless the parents voluntarily consent or "the best interest of the child dictate to the contrary.")). *See also* FL § 5-3B-03(b)(1). One method by which the State may create an adoption procedure consistent with a child's best interests (after providing the natural parent the opportunity to object) is by rendering the parent's untimely objection to the adoption as an irrevocable consent to the adoption, thereby enabling the adoption process to

proceed in a timely and orderly manner. *Id.*[16]

We turn now to the second *Matthews* factor: the risk of error created by the State's chosen procedure. We have held that, as to the risk of error created by the deemed consent scheme of guardianship proceedings, "zero tolerance" is not required under this second factor, as the absence of error is

> probably not achievable in any procedure. The statutory deemed consent does not exist in a vacuum. It arises only after services on the parent of a show cause order that explains, in plain simple language, the right to object, how, where, and when to file a notice of objection, and the consequence of not filing one within the time allowed. A form notice of objection is attached to the order, and all the parent need do is sign it, print on it his or her name, address, and telephone number, and mail or deliver it to the address shown in the order.

In re 933210055, 344 Md. at 493, 687 A.2d at 698. We agree with the panel of the intermediate appellate court that the risk of error created by the present statutory scheme is limited. The statutorily-deemed consent in adoption proceedings operates only after a parent or putative parent receives, in "plain simple language," a show cause order explaining the consequences of filing an untimely notice of objection to the petitioned-for adoption. As the Court of Special Appeals observed, "[t]he show cause order must explicitly notify the parent of his or her right to object to the adoption, and the show cause order must include language substantially similar to the following:

> IF YOU DO NOT MAKE SURE THAT *THE COURT RECEIVES YOUR NOTICE OF OBJECTION ON OR BEFORE THE STATED DEADLINE*, YOU HAVE AGREED TO A TERMINATION OF YOUR PARENTAL RIGHTS.

Md. Rule 9-105(e)" (emphasis added). *In re: Adoption of Sean M.*, 204 Md. App. at 735-36, 42 A.3d at 728-29. The statutory scheme, therefore, may not have "zero tolerance" of error, but it leaves room for only a limited risk of error.

Moreover, William H. does not dispute that he was served personally and timely with a show cause order, or that he understood the consequences of not filing a notice of objection within the time allowed by the show cause order. The intermediate appellate court noted aptly that, as William H. was an attorney at all relevant times to the operative facts of this case, he "should have understood the importance of complying with court-ordered deadlines." *In re: Adoption of Sean M.*, 204 Md. App. at 749, 42 A.3d at 736. William H. offered no excuse as to why he did not file his notice of objection within the thirty-day time period, nor did he claim any disability or *force majeure* impeding his ability to file a timely objection.

We hold therefore that the statutory scheme of Sections 5-3B-1 through 5-3B-32 of the Family Law Article and its implementing mechanisms of Maryland Rules 9-105 and 9- 107, which render an untimely filed notice of objection as an irrevocable consent by operation of law to an independent adoption, is fair fundamentally. Based on the *Matthews* factors, the procedures established in these statutory provisions provide fair notice to a parent or putative parent that his or her right to participate in raising his child will terminate by requiring that (1) the parent receives notice that an adoption petition is filed and (2) the parent is made aware clearly that the court may enter an order for adoption only if each of the adoptee's parents consents by writing or by failure to file a notice of objection within the thirty-day statutory time period. FL § § § 5-3B-14, 15, 20, 21. William H. does not contend that he did not receive such notice, that the notice was unclear, or that he did not have the opportunity to object to Stepfather's adoption of Sean. Hence, we hold that the statutory provisions are fundamentally fair procedures that did not deprive William H. of due process.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY PETITIONER.

FOOTNOTES

1. Sean's birth certificate does not identify a father.

2. William H.'s answer was received initially by the court on or about 28 August 2009, but was returned due to a failure to pay an attorney appearance fee.

3. William H. explains in his brief that he ought to have answered Mother's complaint that he was without knowledge or sufficient information to either admit or deny properly Mother's allegation that he was the natural father of Sean. He notes correctly, however, that such a response would have operated legally as a denial of paternity, pursuant to Md. Rule 2-323(c).

4. The show cause order stated incorrectly Sean's birth date, which is 16 June 2009, and Sean's birth place, which is Annapolis, Maryland.

5. This case reached the Court of Special Appeals and was decided by a panel of that court. The panel explained correctly, in its reported opinion, that "the thirtieth calendar day after [William H.] was served with the show cause order fell on Sunday, May 29, 2011. The thirty-first calendar day after [William H.] was served with the show cause order fell on Monday, May 30, 2011, which was Memorial Day. Therefore,

pursuant to Maryland Rule 1-203, any objection was due to be received by Tuesday, May 31, 2011, the following business day." *In re: Adoption of Sean M.*, 204 Md. App. 724, 731, n. 2, 42 A.3d 722, 726, n.2 (2012). The trial court judge found that the notice of objection was filed two days late; however, as the panel explained, William H.'s notice was filed actually one day late.

6. Md. Rule 9-107(b)(1) provides, in pertinent part:

(b) Time for Filing Objection.

(1) In General. Except as provided by subsections (b)(2) and (b)(3) of this Rule, any notice of objection to an adoption or guardianship shall be filed within 30 days after the show cause order is served.

7. In his Motion to Alter and Amend Judgment, and appended Memorandum, William H. asserted that his then-attorney was at fault for failing to file the notice of objection within the 30-day time period required under Md. Rule 9-107(b)(1). William H. did not press, however, this apparent "ineffective assistance of counsel" challenge in the hearing before Judge Price, nor did Petitioner assert this in his Petition for Writ of Certiorari. William H., an attorney admitted to practice in Maryland at all relevant times in this matter, offers us no explanation or extenuating circumstances for why the objection was filed late.

8. Guardianships, like adoptions, terminate parental rights. Such proceedings are governed by FL § § 5-313 through 5-328. Similar to the statutory procedure for independent adoptions, a parent may consent to a guardianship by failing to file a timely notice of objection after being served with a show cause order. FL § 5-320.

9. FL § 5-3B-20 was found previously as FL § 5-3B-19 prior to the 2005 revisions. Section 5-3B-19 became § 5-3B-20 in 2006. 2006 Md. Laws ch. 365, § 1, p. 1896.

10. In *No. 9321005*, we considered, in five cases where the State sought guardianship of several children in need of assistance (CINA), (1) whether the Circuit Court of Baltimore City had statutory authority to consider the parent's untimely objection; and (2) if a parent who failed to file a timely objection had the right to revoke the deemed consent. *No. 9321005* 344 Md. at 464, 687 A.2d at 684. Show cause orders had been served upon the parents, but they had failed to file objections within the time period provided by the court's order. *Id.* at 466-74, 687 A.2d at 685-89. Nonetheless, the trial court accepted the parents' late objections. *Id.*

> Our holding in *No. 9321005* involved the then-in-effect FL § 5-322(d), which provided: "If a person is notified under this section and fails to file notice of objection within the time stated in the show cause order . . . (1) the court shall consider the person who is notified . . . to have consented to the guardianship; and (2) the petition shall be treated in the same manner as a petition to which consent has been given." Md. Code (1984, 1991 Repl. Vol.), Fam. Law § 5-322.

11. We note further that, similar to the form notice of objection to Sean's adoption that Petitioner received in conjunction with the show cause order, in *No. 9321005* there likewise was a form notice that was "appended to the [guardianship] show cause order, which also advises the parent of the need to file the notice before the stated deadline. The notice makes clear that the parent need do nothing more than sign the form and print his or her name, address, and telephone number in the places indicated and mail or deliver it to the court at the address shown." *Id.* at 479, 687 A.2d at 691.

12. The current statutory provision providing for the revocation of consent in the context of a guardianship proceeding is FL § 5-321.

13. On the record before us, the paternity of Sean has not been established conclusively.

14. The Fourteenth Amendment provides, in relevant part, that no state may "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

15. In addition to the statutory interpretation issues raised in *No. 933210055*, we addressed also whether the parents' due process rights were violated by the court's refusal to excuse the parents' late-filed objections to the guardianship petitions. 344 Md. at 491, 687 A.2d at 697.

16. Furthermore, the code revision committee note of FL § 5-3B-03(b)(1), entitled "Statement of findings, purposes" for independent adoptions, explains that the "timely" provision of "permanent and safe homes . . . consistent with [the child's] best interests" was identified as a purpose of the statute in order to "emphasize the need for *prompt resolution* of a case in accordance with the 'best interests' standard . . . ." 2005 Md. Laws, ch. 464, § 3 (emphasis added). This is further evidence that the State has an important interest in ensuring effective and orderly adoption procedures for the sake of the child's best interests.

NO TEXT

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Divorce: monetary issues: required considerations

Jeffrey W. Reichert

v.

Sarah H. Hornbeck, f/k/a Sarah H. Reichert

No. 0213, September Term, 2012

*Argued Before: Zarnoch, Hotten, Kenney, James A., III (Ret'd, Specially Assigned), JJ.**

Opinion by Hotten, J.

Filed: March 20, 2013. Reported.

*Judge Deborah S. Eyler did not participate in the Court's decision to designate this opinion for publication in the Maryland Appellate Reports pursuant to Maryland Rule 8-605.1.

The trial court's decisions ordering the husband to pay an unrealized amount of income, ordering alternating years to the tax dependency exception without the appropriate consideration, the granting of monetary award to the wife, and the decision ordering the husband to pay $60,000 in attorney's fees were vacated.

In this divorce action between Jeffrey W. Reichert ("Jeffrey"), the appellant-cross-appellee, and Sarah Hornbeck[1] ("Sarah"), the appellee-cross-appellant, the Circuit Court for Baltimore City granted a divorce on the grounds of a twelve-month separation, pursuant to Md. Code (1984, 2012 Repl. Vol.), § 7-103(a)(4) of the Family Law Article,[2] and granted both parties joint physical and legal custody of the child with tie-breaking authority to Sarah. The court declined to make any award of rehabilitative alimony to Sarah.

The court, however, ordered Jeffrey to pay $1,651 per month in prospective and retroactive child support. Because Jeffrey had contributed $500 per month in *pendente lite* child support prior to the absolute dissolution of the parties' marriage, the court credited him $4,806 in retroactive child support but, nevertheless, concluded he owed $15,006 in arrearages. As a consequence, the court ordered Jeffrey to pay an additional $500 per month in child support until the $15,006 in arrearages were satisfied. In addition, the court granted Jeffrey the right to claim the parties' minor child as a dependent for his 2011 taxes and every-other year thereafter.

Ed. note: Reported opinions of the state courts of appeal are subject to minor editing by the courts prior to publication. Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

After reviewing the property the parties amassed during their eighteen-month marriage, the court found that the 2009 joint tax refund should have been equally divided into both Jeffrey and Sarah's accounts. As a consequence, the court concluded that because Jeffrey had wrongfully dissipated the entire amount of the refund, it was extant property. Therefore, the court designated half the amount of the refund ($3,100) Jeffrey's extant property. As a result, the court granted Sarah a monetary award in the amount of $7,000 and further awarded her $60,000 in attorney's fees.

Following the court's judgment of absolute divorce, Jeffrey filed a motion to alter or amend the court's judgment on October 27, 2011. In response, Sarah filed a motion in opposition and further moved to revise the court's previous judgment on November 16, 2011. The trial court held a hearing on February 21, 2012, and issued a memorandum and order on March 30, 2012, leaving open the issue of whether Sarah was entitled to additional attorney's fees for the post-trial motions. As a result, the court held an additional hearing on April 13, 2012, denying her request for additional fees.

Jeffrey noted a timely appeal to this Court.[3] In response, Sarah filed a timely cross-appeal. In sum, both parties presented six questions for our review. We have consolidated, rephrased, and reorganized them as follows:[4]

> 1. Did the circuit court abuse its discretion when it ordered joint legal custody of the minor child with tie-breaking authority to Sarah Hornbeck and when it ordered joint physical custody of the minor child?
>
> 2. Did the circuit court err in its findings when it calculated the child support owed to the parties' minor child?
>
> 3. Did the circuit court err abused its discretion regarding the tax exemption for the parties' minor child?
>
> 4. Did the circuit court err in granting Sarah Hornbeck a monetary award in the amount of $7,000?
>
> 5. Did the trial court abuse its discretion in awarding Sarah Hornbeck $60,000 in attorney's fees?

For the reasons outlined below, we affirm the Circuit Court for Baltimore City's judgment of absolute divorce and its grant of joint physical and legal custody, with tie- breaking authority to Sarah Hornbeck. Because we conclude, however, that the court erred in ordering Jeffrey to pay an unrealized amount of income, in ordering alternating years to the tax dependency exemption without the appropriate consideration, in the granting of a monetary award, and in ordering $60,000 in attorney's fees, we vacate those orders and remand the case for further proceedings consistent with this opinion.

I.
FACTUAL AND PROCEDURAL HISTORY

Sarah and Jeffrey first met in a restaurant on April 8, 2000. Jeffrey was a recent law school graduate and bar exam passee, working for Allegis Group as Associate General Counsel. At that time, Sarah was preparing for her matriculation to the University of Baltimore School of Law and contemplating a future career in legal practice. The couple dated for a little over three years until their initial breakup in the spring of 2003. The relationship ended shortly before Sarah's successful completion of her legal studies. Although both Sarah and Jeffrey attributed their initial breakup of 2003 to different factors, both parties characterized their initial relationship as "rocky."

Nonetheless, Sarah and Jeffrey remained in contact with one another following the end of their initial relationship. Around April of 2008, the two agreed to meet for dinner.

Thereafter, the parties resumed their romance on and were engaged four months later. At that time, Jeffrey had proverbially moved-up the ladder at Allegis Group and was now earning approximately $125,000 a year as Group General Counsel for Allegis Group. In addition, he earned an additional amount from his work with the Army Reserves.

Shortly before the rekindling of their romance, Sarah was earning approximately $120,000 a year at Roy Kirby and Sons, Inc. She left the company, however, shortly after the end of her prior failed engagement. She subsequently assumed employment with Thomson Reuters as a Westlaw Research Specialist on August 17, 2009, earning roughly $68,340 a year.

On November 1, 2008, Sarah and Jeffrey moved into a three-story rental property located at 1286 Harbor Island Walk, Baltimore, Maryland 21230. The parties were subsequently married in an elaborate ceremony at Mount Vernon Place United Methodist Church on January 31, 2009. At the time of the parties' marriage, Jeffrey was 35.[5] Sarah was nearly 34.[6] Shortly thereafter, the parties' honeymooned on St. Kitts, an island located in the West Indies formally known as St. Christopher Island. Unfortunately, the conflict that Sarah and Jeffrey had experienced during their first relationship returned on the second night of their honeymoon and would remain throughout their short marriage.

Despite the parties' many disagreements, Sarah bore a son, Grant Lyle Reichert ("Grant"), on November 7, 2009. Sadly, Grant was born with a collapsed lung, and spent the first three nights after his birth in the Neonatal Intensive Care Unit at Johns Hopkins Hospital. At approximately twenty-four to twenty-five days of age, Grant began vomiting. Unfortunately, Grant's vomiting progressively worsened, necessitating emergency surgery to correct his pyloric stenosis.[7] Grant's medical complications have subsequently resolved.

Sarah and Jeffrey found ways to work through their personal conflicts to attend to the needs of their child. However, once Grant's condition improved Sarah and Jeffrey's discourse resumed. Marriage counseling proved unsuccessful.

At the end of a counseling session on August 27, 2010, Sarah and Jeffrey departed separately. Fearing for her safety and for that of her son, Sarah attempted to obtain a protective order, but her request was denied. Sarah returned home to Grant, who was in the care of Sarah's mother. Later that evening, divorce and custody papers were delivered to Sarah. After Sarah contacted counsel, she was subsequently informed that Jeffrey had filed a protective order against her. In response, Sarah filed a counter complaint for limited divorce, custody, child support and other relief. She subsequently filed a timely answer to Jeffrey's complaint on September 24, 2010. The parties proceeded to litigate the matter for a series of months.

Trial commenced on September 20, 2011. At the close of trial on September 30, 2011, the circuit court issued its oral opinion, in which it granted a divorce on the grounds of a twelve-month separation, pursuant to Md. Code (1984, 2012 Repl. Vol.), § 7-103(a)(4) of the Family Law Article,[8] and granted both parties joint physical and legal custody of the child with tie-breaking authority to Sarah. The court declined to make any award of rehabilitative alimony to Sarah.

However, the court ordered Jeffrey to pay $1,651 per month in prospective and retroactive child support. Because Jeffrey had contributed $500 per month in *pendente lite* child support prior to the absolute dissolution of the parties' marriage, the court credited him $4,806 in retroactive child support but concluded he, nevertheless, owed $15,006 in arrearages. As a consequence, the court ordered Jeffrey to pay an addition $500 per month in child support until the $15,006 in arrearages were satisfied. Additionally, the court granted Jeffrey the right to claim the parties' minor child as

a dependent for his 2011 taxes and every-other year thereafter.

The court subsequently addressed Sarah and Jeffrey's distribution of the marital property. Preliminarily, it noted that both Jeffrey and Sarah entered the marriage as property owners, each individually owning condominiums in Baltimore City, Maryland. Further, although the court acknowledged that the parties' retirement plans were marital property, it granted the retirement plans to the respective spouse for whom the plan was created. After reviewing additional property the parties' amassed during their eighteen-month marriage, the court found that the 2009 joint tax refund should have been equally divided into both Jeffrey and Sarah's accounts. As a consequence, the court concluded that because Jeffrey had wrongfully dissipated the entire amount of the refund, it was extant property. Thereafter, the court granted Sarah a monetary award in the amount of $7,000 and further awarded her $60,000 in attorney's fees.

Following the court's judgment of absolute divorce, Jeffrey filed a motion to alter or amend the judgment on October 27, 2011. In response, Sarah filed a motion in opposition and further moved to revise the court's previous judgment on November 16, 2011. The trial court held a hearing on February 21, 2012, and issued a memorandum and order on March 30, 2012, leaving open the issue of whether Sarah was entitled to additional attorney's fees for the post-trial motions. As a result, the court held an additional hearing on April 13, 2012, denying her request for additional fees. Jeffrey noted a timely appeal to this Court, to which Sarah responded by filing a timely cross-appeal.

Additional pertinent facts with be provided *infra*.

II.
DISCUSSION

(A) The Legal And Physical Custody Of The Parties' Minor Child.

After granting the parties' request for an absolute divorce and ordering that Sarah's maiden name be restored, the circuit court addressed the issue of child custody in its oral opinion, stating:

> [Sarah's counsel] has said to me that because [Jeffrey] has exhibited the behavior that I've already spoken about before the trial, during the trial and the like. That I should not award him with the joint custody that he's requesting.
>
> And I believe it was something to the effect that if, you know, is the kind of character, the person with this kind of character that should have the joint custody with the child. And when I thought about this and literally I had not made up my mind about anything, until I heard you all argue.
>
> So I'm back there thinking about it. And part of me initially said, you know, yeah. She's kind of right, because that's a character flaw. A lot of what I've seen here is character flaw. But if I did that who would I be punishing? Would I punish [Jeffrey]?
>
> **But who am I to be concerned about when I'm talking about custody? It's Grant. And then also if I did that it would punish Grant. And I'm not willing to make him suffer. He has, regardless of what your flaws or individual flaws are[,] I think he has great parents.** Regardless to what your individual flaws may be.
>
> I can address those in another way. **But as far as [G]rant is concerned[,] he gets the best of both of you. As much as the other witnesses tried when they came in, and when it came down to it, each of them said I've got concerns about him, but they're fit, and they're proper and they love their son.**
>
> **And even when the other person testified concerning the parenting if you would of the other, it wasn't a whole lot that you all could say about, that was negative about the parenting, because it wasn't. Each of you are a good parent. Your character flaws show up when you deal with each other, but not when you deal with Grant.**
>
> And so when it comes to custody, this Court believes[,] and as much as I don't like to split children down the middle, it has been working, it's not broken. Joint custody I am going to grant. Physical joint custody with Grant. And I'm going to address some other – we're going to change some issues concerning the holidays and the like, and we'll take about that in a moment.
>
> But I just want to get the decision part out of the way, and we'll go back and tweak some of the other

things. Each of you talked about, or you both said joint legal custody would be acceptable. **And I, the concern that I have is that you all don't communicate well.**

That's a concern that I have, but you've asked for, or you've agreed to a parent — a parental — a parent coordinator, sorry. You've agreed to a parent coordinator. And I think that that [sic] is the best way to do it. . . .

And the reason, short of your inability to communicate with each other, I have to deal with, certainly the character and reputation of the parents. I think short of what you all exhibit towards each other, as I said I think that each of you are – yeah – other persons that came here to testify on your behalf, the proffers that I received.

They each find that you all are good people. **Nobody has said that you're horrible people.** One individual may not have liked how somebody looked at them, or how they didn't speak, or they did speak. Not that you're bad people. **So[,] I can't say there's anything wrong with your character, or your reputation that gives this Court any concern when it comes to custody.**

The psychological and physical fitness of each parent, I find that you all are certainly equal in that matter. And so[,] therefore, I don't think that gets in the way. The desire of the parents and the content of any agreement between them, you all had one agreement concerning just the – that was financial more than anything else, the investment and the college tuition.

But you at least desire, each of you desires to be a good parent to Grant. And that's what I think is very, very important. Your willingness to share the custody, I know that one side wanted, [Sarah] wanted sole custody with joint legal, but sole physical.

But [Jeffrey] wanted joint physical, as well as joint legal custody. So there's a little bit, you know, kind of plus and minus I did there with the willingness part of this, the factors that I look at. **But not so much so that[ ] it would make me override that the consent agreement that you all entered into has been working. It has been.**

The ability for you all, I talked about the communicating, we're going to settle that with the parent coordinator. The potential of maintaining natural family relations, I believe that whether the child is with [Jeffrey], or with [Sarah], . . . they will have the ability commune with their families on an equal basis. Not just [Sarah] and not just [Jeffrey], but with grandparents, with cousins, and with aunts and uncles and the like on each side.

He's too young to tell me what his preference is, so we can't even consider that. The material opportunities that would affect the child's future, you all are more, as I indicated, extremely blessed to provide material opportunities.

Certainly [Jeffrey] makes more money than [Sarah] does. Whether that's, you know, in my opinion sometimes it's a choice that we make as to, you know, whether or not you make a lot of money, and sometimes it's not. Sometimes it's the best job you can get, and you hold onto that until you can do better. That's just the way of the world.

The age, health and sex of the child, and Grant's very young. Not quite two, almost two, not quite. And his health is, from what I understand now is great. The only time that I think you all had the chance to bring it together was when he was ill.

Yeah, and that was really when I thought, that was the one time that you all actually came together. And a lot of weight for a little boy. He couldn't even hold you together. So, you know, it only lasted for awhile. **But that was the time in which you all[,] sort of, had a meeting of the minds if you will.**

The suitability of your residences, I have — they're certainly very suitable. I have no concerns one

way or the other. I think again, he's a blessed little boy to have two residences, and the two that are as – that they're safe. And that he has a place where he can grow, and he can thrive. And so I think they're very suitable.

How long — you want me to consider how long the child's been separated from one parent or the next. You all for the last year, all right, it's been 13 months maybe, something like that been [sic] sharing him back and forth. So he certainly hasn't had to be separated from either one of you to any extent to where it would damage him when he wasn't with you, or that he would resist going with you, because he's not familiar with you.

There's been no voluntary abandonment for me to consider. His relationship with each of you, everyone comes in and testifies to each of you. And said how Grant loves you back, as much as you all love him. And that's important, as well.

You all live [in] very close proximity to each other[. S]o[,] that's not like someone has to travel a long, long distance to get to him and the like, but you do live very, very close. There's nothing, no schools I have to worry about, whether he lives – he's going to be able to go to school or he's not. I don't have to worry about that.

The demands of each parent's employment. And there's a lot of talk about that. **And in my reviewing and listening to the evidence, I think each of you, the way it came out can work as much as you want to work. In that sense of flexibility. You can work from home, when you want to work from home. You can go to work.**

You spend some hours when you travel, some hours when you travel. The Army – the Jag Reserve that [Jeffrey], that may take him away a little bit more. And I'm going to address that period of time with the custody.

* * *

. . . . The age and number of children involved, only one child that's involved in this matter. **Sincerity, motivation of the parent's request, you all are more sincere than anybody.** And I think that the legal fees bear that out, that you've been very serious about your requests, and the best interest of Grant, which is the final thing that I must consider.

And as I said, I think that Grant deserves the best of both of you. I think that in the last 13 months, or how – I say 13 months, how many months are we talking about a year? . . . . That he has gotten the best of both of you. Nobody has testified to me about anything that's been less.

When Grant – when it was concerning [ ] Grant, . . . you all gave your best. And that you all were, **for the most part on your best behavior, when you all were doing the exchanges. . . .**

(emphasis added).

Following the court's continued discussion of how Grant's holidays and vacation schedule would be divided between Sarah and Jeffrey, the Court considered the matter of a tie-breaking authority with the parties' counsel:

> THE COURT: Yes, and I am holding — I don't know what I want to do. But I know what I have to do. I have to give a tie[-]breaker. I mean[,] that's the hard part, because I just wish that you guys could talk, but you don't.
>
> Is there a way, and I've seen this before, [counsel], where the parties cannot come to an agreement. That they have to seek a mediator, I've seen that done before.
>
> [Sarah's counsel]: Or with the parent coordinator *bona fide* efforts to try to resolve it, and if not then a tie[-]breaker's allowed.
>
> THE COURT: Okay, okay. I can't make the parent coordinator do the tie[-]breaking authority can I? No.
>
> [Jeffrey's counsel]:
> Unfortunately, Your Honor, you can't.
>
> THE COURT: **Okay, all right. But the parent coordinator will be used for that particular reason, for communication between the parents. So there must be some *bona***

> ***fide* effort. And then [Sarah] will have the tie[-]breaking authority.**

(emphasis added).

On appeal, Jeffrey contends that the trial court abused its discretion when it ordered joint legal custody, with tie-breaking authority to Sarah. Specifically, he asserts that the court abused its discretion "because [the court] gave no reason for the decision, because it was not supported by the evidence, and because there was no finding that it was in the son's best interest." Thus, he argues that, "[i]n essence, the court gave legal custody to [Sarah.]"

Conversely, Sarah argues that while "the court had reason to grant sole custody" to her, the trial court properly exercised its discretion when it ordered joint legal custody of their minor child with tie-breaking authority to her, because the court's order of a *bona fide* effort to agree via the parent coordinator safeguards Grant's best interest. Nevertheless, Sarah further contends that the circuit court erred when it ordered joint physical custody for two reasons. First, she asserts that "[t]he trial court failed to give weight to [Jeffrey's] abuse of the legal system in his effort to obtain custody" of their minor child. Second, she attests that "[t]he court further failed to give adequate weight to the best interest[ ] of the child," which, she insists, is not "served here by joint physical custody." We conclude, however, that the circuit court properly exercised its discretion.

Preliminarily, we note that this Court reviews child custody determinations utilizing three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012) (affirming the circuit court's modification of physical custody by granting significantly more access to the father and concluding there was no error in modifying the joint legal custody decree by granting the father tie-breaking authority in the event of an impasse). The Court of Appeals described the three interrelated standards in the case of *In re Yve S.,* 373 Md. 551 (2003):

> . . . . [W]e point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. at 586. Therefore, the reviewing court gives "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id*. at 584. Further, we acknowledge that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only [it] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor" child. *Id*. at 585–86.

It is a bedrock principle that when the trial court makes a custody determination, it is required to evaluate each case on an individual basis in order to determine what is in the best interests of the child. *Gillespie*, 206 Md. App. at 173 (citations omitted). *See also Bienenfeld v. Bennet-White*, 91 Md. App. 488, 503 (1992) ("It is well established that child custody determinations be made by careful examination of facts on a case-by-case basis."); *Montgomery Cnty v. Sanders*, 38 Md. App. 406, 419 (1978) (the best interest of the child varies with each individual case). "Courts are not limited or bound to consideration of any exhaustive list of factors in applying the best interest standard, but possess a wide discretion concomitant with their 'plenary authority to determine any question concerning the welfare of children within their jurisdiction[.]'" *Bienenfeld*, 91 Md. App. at 503–04 (internal citation omitted) (quoting *Kennedy v. Kennedy*, 55 Md. App. 299, 310 (1983)). Nonetheless, Maryland courts have provided a list of factors that the trial court may use in rendering its custodial determination. These factors include:

> [A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rationale choice, the preference of the child.

Wagner v. Wagner, 109 Md. App. 1, 39 (1996) (citing *Hild v. Hild*, 221 Md. 349, 357 (1960), and *Kramer v. Kramer*, 26 Md. App. 620, 623 (1975)), *quoted in*

Gillespie, 206 Md. App. at 173. "At best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but in doing so we recognize that none has talismanic qualities and that no single list of criteria will satisfy the demands of every case." *Taylor v. Taylor*, 306 Md. 290, 303 (1986) (discussing joint custody considerations). Accordingly, "[t]he best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Id*.

Indeed, there are specific factors particularly relevant to a consideration of joint custody: (1) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (2) the willingness of parents to share custody; (3) the fitness of the parents; (4) the relationship established between the child and each parent; (5) the preference of the child; (6) the potential disruption of child's social and school life; (7) the geographic proximity of the parental homes; (8) the demands of each parents' employment; (9) the age and number of children; (10) the sincerity of the parents' request for joint custody; (11) the financial status of the parents; (12) the impact on state or federal assistance; (13) the benefit to the parents; and (14) any other relevant factors to be considered. *Taylor*, 306 Md. at 304–11. These factors, however, are "in no way intended to minimize the importance of considering **all** factors and **all** options before arriving at a decision." *Id.* at 303 (emphasis added).

To be sure, the capacity of the parties to communicate and reach shared decisions regarding the children's welfare is of paramount importance. *Id.* ("This is clearly the most important factor in the determination of whether an award of joint legal custody is appropriate. . . ."). *See also Gillespie*, 206 Md. App. at 173. As a consequence, "[r]arely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future" *Taylor*, 306 Md. at 304.

We caution, however, that this does not require the parents to agree on every aspect of parenting, "but their views should not be so widely divergent or so inflexibly maintained as to forecast the probability of continuing disagreement on important matters." *Id*. at 305–06. *See also Barton v. Hirshberg*, 137 Md. App. 1, 25 (2001). Therefore, at a minimum, the parties must maintain "[a] sense of respect for one another as parents, despite the disappointment in each other as marriage partners. Each [must] appreciate[ ] the value of the other to the child, and [maintain] sensitiv[ity] to the possible loss of a parent-child relationship." *Taylor*, 306 Md. at 306 (citing S. Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications,* 16 U.C.D.L. Rev. 739, 745 (1983)).

Ordinarily, the best evidence of compatibility with this criterion will be the past conduct or "track record" of the parties. *Taylor*, 306 Md. at 307. "We recognize, however, that the tensions of separation and litigation will sometimes produce bitterness and lack of ability to cooperate or agree." *Id.* Thus, "[t]he trial judge will have to evaluate whether this is a temporary condition, very likely to abate upon resolution of the issues, or whether it is more permanent in nature." *Id*. "Blind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon the warring parents will bring peace, is not acceptable." *Id*. Therefore, "[i]n the unusual case where the trial judge concludes that joint legal custody is appropriate notwithstanding the absence of a 'track record' of willingness and ability on the part of the parents to cooperate in making decisions dealing with the child's welfare, the trial judge must articulate fully the reasons that support that conclusion." *Id.*

The instant record contains evidence of the parties' ability to cooperate in matters relating to Grant. First, there was the existence of an agreement for joint custody pursuant to a consent order prior to trial. *See Barton*, 137 Md. App. at 26. Sarah argues before us, as she did before the trial court, however, that she "entered into the [i]nterim [c]onsent [a]greement in the belief that the joint custody schedule would be temporary." She further asserts that she only acquiesced "to this short-term solution on the courthouse steps in fear that she might lose custody entirely in light of the entry of the fraudulently obtained [i]nterim [p]rotective [o]rder" Jeffrey had obtained against her. Notwithstanding these assertions, she offered other testimony at trial suggesting that both she and Jeffrey "should participate fully in Grant's life and his development and also [in] the decisions affecting his life and development and well-being." She additionally noted a willingness to adapt to circumstances when both she and her husband are working. Moreover, Jeffrey's testimony at trial additionally recognizes the parties' ability to work in tandem to address Grant's needs.

This evidence indicates that the parties have been able to communicate and reach decisions regarding Grant in the past. Admittedly, tensions and disagreements between the parties have escalated. Nonetheless, after hearing all the testimony and after judging the credibility and demeanor of the witnesses, the trial court concluded that the parties could resolve their differences and act together in Grant's best interest. As the trial court observed, "when it was concerning [ ] Grant, . . . you all gave your best. And that you all were, for the most part on your best behavior, when

you all were doing the exchanges."

Further, even assuming *arguendo* that the record reflects the parties' inability to communicate or cooperate regarding Grant's best interest, the court "articulated fully the reasons that support[ed the] conclusion" that joint physical and legal custody was appropriate through an extensive and thoughtful consideration of all suggested factors. The court specifically noted the parties' flexibility in their employment schedules and their sincerity in providing for Grant's best interest. In sum, the court believed, "that Grant deserves the best of both [Sarah and Jeffrey]." The court believed "that in the last 13 months, or how – I saw 13 months, how many months are we talking about a year? . . . . That he has gotten the best of both of you. Nobody has testified to me about anything that's been less." The court additionally explained its reasoning in providing Sarah tie-breaking authority and observed that this authority was not to be used cavalierly: "But the parent coordinator will be used for that particular reason, for communication between the parents. So there must be some *bona fide* effort. And then [Sarah] will have the tie[-]breaking authority."

As a consequence, we find no error or abuse of discretion in the circuit court's grant of joint legal and physical custody. The circuit court's decision was not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *In re Yve S.*, 373 Md. at 583–84. Therefore, we affirm the circuit court's order of joint legal and physical custody.

(B) The Calculation Of Child Support.

Following the circuit court's custodial determination, the court proceeded to address the issue of child support. Specifically, the court stated:

> . . . . So[,] that being said, the child support which I will follow right up with this.
>
> And my figures came out different from everybody's figures. And this is where people are going to stop smiling at me, and stop shaking their head in agreement, and I know that so I won't look at you.

Both sides agree that [Sarah's] salary per month is $5,695. Where you all differed was as to what [Jeffrey's] salary is. And I think that had [Jeffrey] been forthcoming about a number of things, we wouldn't have that question. I don't know whether that military salary is more or less than what that one document says that it is.

> I can't imagine, sir, that since January the 1[st], 2001 and September the 30[th], 2011 that you could not have gotten one document to show this [c]ourt what it is that you were making this year. So as I said when you hide from me, it makes me wonder what you're hiding from me.
>
> And so where I won't punish you when it comes to Grant. And punish is a harsh word, I don't even really mean it in that term, but I guess what I mean is when I look at what I have to consider across the [b]oard, there is some way in which that has to be a sanction that I have to look at it, in a light that makes it more beneficial or equitable if you will for both parties.
>
> **So I am taking the salary that was on your W-2 form of $23,052. I know that that [sic] includes the investment incentive, I know that. I know it and I'm doing that on purpose, because I believe that a lot of this — hold that, take it back. $23,052 is what the [c]ourt came up with and believes that [is] what [Jeffrey's] salary is.**
>
> The problem is when I look at it on a shared basis, I did not include any allowance for a childcare [provider]. And I'll tell you why, this [is] 50/50[. W]hen the child's in your care[,] you pay for childcare. When the child is in your care and you need childcare, you pay for it. That's how this [c]ourt looks at it.
>
> The $140 will certainly be put in dad's column when it comes to the medical insurance. But that was the only thing that I put in the column. And I don't believe that either of the attorneys, short of the child care included anything else in their columns, other than the salaries.
>
> * * *
>
> This is what the guidelines tell me. That the child support based on the shared custody, comes out to be $2,492 a month. That's what it comes out to be. And I don't know, it didn't make sense to me, because I looked at [Sarah's] proposal, that was based on the shared [custody].
>
> It was – I mean based on sole custody, physical custody to [Sarah], I would've expected the numbers to have been higher, than what they

were for shared. I put the numbers in, that's what they came out to be.

And if anybody wants to say there's anything I'm doing wrong with it, I'm happy to hear it. But I can only plug the numbers in and it comes out to what it is.

(emphasis added).

Upon the court's invitation, the parties' counsel both indicated that the schedule on which the court had relied did not have equal amounts of overnights between Sarah and Jeffrey. After correcting the number, the circuit court concluded:

Okay, that you all. $1,651 is the monthly child support. Let me go to my calculator. The date of filing that this [c]ourt had, and I'm doing it as to the date that [Sarah] filed. Now this is the date that I'm using, September 21, 2010. Is that correct?

* * *

Okay. So actually, we're taking about one year? And I'm dealing with the arrearages at this point. When I multiply 12, which is one year, it's $19,812. And that is before I subtract the credit that he is due. I had the credit at $4,806?

* * *

So I have the arrearages at $15,006. Now, [Jeffrey], I'll tell you one of the things that did disturb this [c]ourt in hearing it, even though you were not under an order to pay child support. It would've gone such a long way, had you taken that responsibility a lot earlier.

And certainly the $500 and some odd dollars that was given, it was $534 that was given to [Sarah] during the time that — pending trial, between January and today's date, was offset by the fact that she had to pay the — and agreed to pay for the Touareg. So really she came out with $5 a month.

In essence, I'm giving you credit for what you paid, but in a essence, that's kind of what she ended up with, it was like $5 once she paid the car note. It was $5 that she had. So you weren't under the order, but this is the child that you tell me that you – this is your man. This is your little man. And so I took that into consideration when I used the figure that I used.

I think the figures are legitimate. I know there was a question about the investment that was included in there. I believe that certainly your potential for this year getting the bonuses that you have gotten in the past. I certainly can't imagine that those won't happen again.

And when you look at the information that I was given, this is the figure that the [c]ourt believes is the actual figure of your salary, at least as much as I could put together about your salary, since there's a piece of it that I don't know.

(emphasis added). Following the court's oral opinion and order, Jeffrey petitioned the court for rehearing to alter or amend its judgment. Specifically, Jeffrey argued that the circuit court "erred in the determination of [his] income . . . which resulted in an error in the calculation of [his] child support obligation and . . . arrears." In response, Sarah moved for an increase in child support and requested the circuit court to modify Jeffrey's income to include his previously unreported rental income.

The trial court held a hearing on February 21, 2012. After considering the parties' arguments, the court denied Jeffrey's request to amend the judgment of child support and issued a memorandum opinion and order on March 30, 2012, providing:

[Jeffrey] requests that this court amend its judgment to reflect that [his] actual monthly income is $18,295 and not $23,052. [Jeffrey] alleges that in calculating [his] child support and arrearage payments, the court included unrealized income in [his] monthly salary. [He] argues that the income received from the Allegis Group on Plaintiff's W[-]2 was unrealized income. For further guidance, [Jeffrey] sugges[ts] that the Allegis Plan illustrates that [he] did not realize this income. [He] states that his correct monthly income is $18,295. Accordingly, per [Jeffrey], the monthly child support should be amended to $977 and the arrears should be amended to $6,918.

In reviewing the Allegis Group Plan[,] it is clear to this court that the Allegis Group is a complicated invest-

ment vehicle. During trial, [Jeffrey] failed to provide the testimony necessary to support his claim that the $23,052 monthly salary is partially unrealized income based on how the Allegis Group investment vehicle is designed. The time to offer this testimony would have been at trial. [Jeffrey] likened the Allegis Plan to the S Corporation at issue in *Walker v. Grow,* 170 Md. App. 255 (2006). The facts in *Walker v. Grow* indicated that the Appellee did not technically receive all the income reported on his tax returns. In that case, as in this case before this court, the court had before it someone with a "somewhat complex business and personal financial picture." **Unlike the present case, expert testimony was offered to the trial court in *Walker v[.] Gro[w]* to assist the trier of fact to understand the evidence and to determine a fact in issue. An expert or a witness familiar with the design of the Allegis Plan would have been helpful to this court in determining if [Jeffrey] actually received income from Allegis. This testimony was not presented.**

* * *

. . . . Considering the fact that Allegis is not an S Corporation, no expert testimony was presented during trial and that this court questions the credibility of [Jeffrey] as it concerns his income, this court is not persuaded to rely on [Jeffrey's] assertion alone.

The court did not find [Jeffrey] to be a credible witness during the trial on the merits, especially as to his testimony concerning his income. The court finds that [he] has not been credible and forthcoming about his income in that [he] refuse[s] to respond to [Sarah's] request for documents detailing his income from all sources in discovery. [Jeffrey] failed to respond to the court's order compelling discovery and during depositions[. He] failed to refused to produce documents as to all his income. Trial testimony revealed that [Sarah] willfully (and wrongfully) cashed the 2009 joint income tax return and retained the funds. Additionally [Jeffrey] points to his 2010 tax return to show his actual income. However, during the hearing on the motion it was brought to this court's attention that [he] failed to include on his income tax statement the rental income from his real property. Again, this is a credibility issue on the part of [Jeffrey]. For all of the above reasons, this court cannot rely on [his] testimony concerning his salary. Therefore, the court denies [Jeffrey's] request to alter and amend the order by reducing the income to $18,295. This court also denies the request to adjust the arrears to the amount of $6,918.

(footnotes omitted) (emphasis in added).

In addition, the circuit court granted Sarah's request to revise the guidelines to reflect an income from Jeffrey's rental property in the amount of $1,800 per month in rent. As a consequence, Jeffrey's monthly child support obligation was increased from $1,651 per month to $1,653 per month.

Before this Court, Jeffrey asserts that the circuit court erred when it calculated the child support owed to Grant. Specifically, Jeffrey contends that "[t]he trial court's inclusion of [his] [i]ncentive [i]nvestment [p]lan and gross rental income . . . to calculate child support was clearly erroneous and an abuse of discretion." Sarah counters Jeffrey's argument by asserting that circuit court properly exercised its discretion in calculating Jeffrey's child support obligations because Jeffrey "was given ample opportunity to present evidence[,] including expert testimony to explain the overly complicated Allegis Group, Inc.[,] compensation plan." She further argues that "[r]egardless, the parties' income is above the child support guidelines established by statute and the [court] did not err in including [Jeffrey's] [i]ncentive [i]nvestment [p]lan earnings in the calculation of child support as the court clearly questioned [Jeffrey's] veracity when presenting his financial picture at trial."

Preliminarily, we note that "[t]he parents of a child are his [or her] natural guardians and, quite apart from the moral obligations of parenthood, owe the child a legal, statutory obligation of support." *Walker v. Grow*, 170 Md. App. 255, 265 (2006) (quoting *Lacy v. Arvin,* 140 Md. App. 412, 422 (2001)). Therefore, in addressing these contentions, it is useful to put them in context by reviewing the purpose of the child support guidelines – notwithstanding our observation that this is an "above guidelines" case. *See, e.g., Jackson v. Proctor,* 145 Md. App. 76, 89 (2002).

To comply with federal law, the General Assembly enacted Maryland's Child Support Guidelines ("the guidelines") in 1989, contained in Md. Code (1989, Repl. Vol. 2012), § 12-201 *et seq*. of the Family Law Article. *Jackson*, 145 Md. App. at 89 (citations omitted). The purpose of the guidelines is: "(1) to remedy a shortfall in the level of awards that do not reflect the actual costs of raising children[;] (2) to improve the consistency, and therefore, the equity of child support awards[;] (3) to improve the efficiency of court processes for adjudicating child support." *Voishan v. Palma*, 327 Md. 318, 322 (1992) (internal quotes omitted). *See also Bagley v. Bagley*, 98 Md. App. 18, 36 (1993).

As a consequence, the General Assembly chose to create guidelines based on the Income Shares Model to fulfill these goals. This model rests upon the principle that

> a child should receive the same proportion of parental income, and thereby enjoy the same standard of living, he or she would have experienced had the child's parents remained together. Accordingly, the model establishes child support obligations based on estimates of the percentage of income that the parents in an intact household typically spend on their children.

Voishan, 327 Md. at 322–23 (internal citations omitted).

If the combined adjusted *actual* income of the parents is $15,000 per month or less, the court must calculate the proper amount of child support using the statutory child support guidelines. *See* Md. Code (1991, 2012 Repl. Vol.), §§ 12-202(a)(1) and 12-204(d) of the Family Law Article. *Cf. Walker*, 170 Md. App. at 265 (discussing the statutory obligation prior to the 2010 amendments, increasing the guidelines from a statutory consideration of $10,000 to $15,000); *Johnson v. Johnson*, 152 Md. App. 609, 614 (2003). In the event the combined adjusted actual income is over $15,000, "the court may use its discretion in setting the amount of child support." Md. Code (1991, 2012 Repl. Vol.), § 12-204(d) of the Family Law Article. Maryland's appellate courts recognize "[s]everal factors [that] are relevant in setting child support in an above [g]uidelines case. They include the parties' financial circumstances, the 'reasonable expenses of the child,' and the parties' 'station in life, their age and physical condition, and expenses in educating the child[ ].'" *Smith v. Freemen*, 149 Md. App. 1, 20 (2002) (quoting *Voishan*, 327 Md. at 329). "Nevertheless, in above [g]uidelines cases, calling for the exercise of discretion, the rational of the [g]uidelines still applies." *Malin v. Mininberg*, 153 Md. App. 358, 410–11 (2003). In the case at bar, the circuit court calculated the amount of child support by extending the scheduled support to a combined monthly income of $30,547.

Ordinarily, child support orders are within the sound discretion of the trial court. *Walker*, 170 Md. App. at 266 (citing *Shenk v. Shenk*, 159 Md. App. 548, 554 (2004)). Nonetheless, "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." *Id*. (quoting *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556 (2002)).

"When the [circuit court] exercises discretion with respect to child support in an above [g]uidelines case, [the court] 'must balance the best interests and needs of the child with the parents' financial ability to meet those needs.'" *Freeman*, 149 Md. App. at 20 (quoting *Unkle v. Unkle*, 305 Md. 587, 597 (1986), *quoted in Walker,* 170 Md. App. at 267. To be sure, "'the central factual issue is the "actual adjusted income" of each party[.]'" *Johnson*, 152 Md. App. at 615 (citation omitted). Therefore, "even in a case in which the statutory schedule of basic child support obligations does not apply, the trial court must ascertain each parent's 'actual income.'" *Walker*, 170 Md. App. at 267. *See also Johnson*, 152 Md. App. at 615–22 (using the statutory definition of "actual income" to determine that a "bonus" received by the obligor should be included in the calculation, which caused the combined income to exceed the statutorily enumerated maximum).

"'Actual income' means income from any source." Md. Code (1991, 2012 Repl. Vol.), § 12-201(b)(1) of the Family Law Article. *See Walker*, 170 Md. App. at 267. "For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, 'actual income' means gross receipts *minus* ordinary and necessary expenses required to produce income." Md. Code (1991, 2012 Repl. Vol.), § 12-201(b)(2) of the Family Law Article (emphasis added). Further, Md. Code (1991, 2012 Repl. Vol.), § 12-201(b)(3) of the Family Law Article explicitly provides that a party's actual income includes: (i) salaries; (ii) wages; (iii) commissions; (iv) bonuses; (v) dividend income; (vi) pension income; (vii) interest income; (viii) trust income; (ix) annuity income; (x) Social Security benefits; (xi) workers' compensation benefits; (xii) unemployment insurance benefits; (xiii) disability insurance benefits; (xiv) . . . any third party payment paid to or for a minor child as a result of the obligor's disability, retirement, or other compensable claim; (xv) alimony or maintenance received; and (xvi) expense reimbursements or in-kind payments received by a parent in the course of

employment, self-employment, or operation of a business to the extent the reimbursements or payments reduce the parent's personal living expenses." *Id*.

In addition, based on "the circumstances of the case," "the court **may** consider the following items as actual income: (i) severance pay; (ii) capital gains; (iii) gifts; or (iv) prizes." Md Code (1991, 2012 Repl. Vol.), § 12-201(b)(4) of the Family Law Article (emphasis added). "Actual income," however, shall **never** include "benefits received from means-tested public assistance programs, including temporary cash assistance, Supplemental Security Income, food stamps, and transitional emergency medical and housing assistance." Md. Code (1991, 2012 Repl. Vol.), § 12-201(b)(5) of the Family Law Article. The definition of actual income in Section 12-201(b) contains numerous enumerated factors that constitute income. None of the enumerated factors, however, include unrealized gains or appreciation in asset value. *See Barton*, 137 Md. App. at 20. *Compare* Md. Code (1991, 2012 Repl. Vol.), § 12-201(b) of the Family Law Article *with* Md. Code (1984, Repl. Vol. 2012), § 11-106(b)(11)(i) of the Family Law Article ("directing that for the determination of **alimony**, the court shall consider "'all income **and assets,** including property that does not produce income'") (emphasis added).

In making an actual income determination, "[t]he court **must verify** the parents' income statements 'with documentation of both current and past actual income.'" *Walker*, 170 Md. App. at 269 (quoting Md. Code (1991, 2012 Repl. Vol.), § 12-203(b)(1) of the Family Law Article) (emphasis added). Therefore, this prompts two questions: (1) "What is required to verify the parent's actual income;" and (2) "what constitutes suitable documentation to verify the income alleged by the parent?" Section 12-203(b)(2)(i) of the Family Law Article provides an answer:

> [S]uitable documentation of actual income includes pay stubs, employer statements otherwise admissible under the rules of evidence, or receipts and expenses if self-employed, and copies of each parent's 3 most recent tax returns.

Md. Code (1991, 2012 Repl. Vol.), § 12-203(b)(2)(i) of the Family Law Article.

In the instant case, Jeffrey provided his 2010 Federal Income Tax Return, noting that his adjusted gross income was $219,542. This amount included his income from both Allegis Group and the United States Army Reserves. At trial, he further submitted into evidence his current Allegis Group pay stub (noted as "Joint Exhibit No. 7 "), acknowledging that – as of September 10, 2011 – Jeffrey had earned $131,446.19 from his employ at Allegis Group. Jeffrey additionally provided his pay stub for the Army Reserves (noted as "Joint Exhibit No. 8 "), and he testified about his earnings with the Army. Of particular importance, however, was Jeffrey's submission of the Allegis Group Incentive Investment Plan ("the Plan"), designated as "Joint Exhibit No. 13." Section 7, entitled, **"ALLOCATION OF UNITS TO THE ACCOUNT,"** provides as follows:

> The Companies [Allegis Group and its subsidiaries] shall initially allocate to the Account of each Participant [of the Allegis Group Incentive Investment Plan] who is eligible to be allocated Units, the number of Units such Participant is eligible to receive and earn. At any given time, each Unit allocated to the Participant's Account shall be deemed to be economically equivalent to the sum of (i) the Fair Market Value of one share of Allegis Group's common stock, plus (ii) the excess, if any, of (a) the aggregate Cash dividends made by Allegis Group with respect to one issued and outstanding share of common stock of Allegis Group, over (b) the aggregate cash distributions made by the Companies with respect to one Unit.[9]
>
> All determinations of Fair Market Value, the amounts allocated to the Account of each Participant, and the value of such Participant's Account shall be made by the Board, whose determinations shall be binding upon the Companies and all Participants. **The establishment and maintenance of any Accounts do not create in any Participant any rights in, or entitle any Participant to any payments with respect to, any Units until payments with respect to such Units are earned in accordance with Section 9 of the Plan.**
>
> The Companies shall not be required to set aside any funds to make the payments required herein or to purchase, hold or dispose of any common stock of the Companies or any investment with respect to amounts allocated in the Accounts; each Company's only obligation being to make payments as described in Section 9. Any funds set aside by the Companies to make the payments

required herein or any earnings thereon shall be solely for the purpose of aiding the Companies in measuring and meeting their respective obligations under this Plan and no escrow, trust or trust fund is intended.

(emphasis added).

In addition, Section 9 of the Allegis Group Incentive Investment Plan, entitled "**EARNING OF UNITS; RIGHT TO RECEIVE PAYMENT FOR ACCOUNT,**" in pertinent part, provides:

> **In order to earn and become entitled to receive payment for the Units allocated to a Participant pursuant to the Plan, the Participant shall not, during the thirty (30) month period following the date of his or her Separation from Service, either directly on his or her own behalf, or indirectly through any entity in, or on behalf of or with respect to which, the Participant is an officer, director, trustee, shareholder, creditor, employee, partner, or consultant.**
>
> (1) Engage in the business of recruiting, employing and providing the services of scientific, telecommunications, engineering, automotive, technical, information, technology, information systems, industrial, office support, financial support, accounting, legal, energy, aviation, environmental and/or other personnel on a temporary or permanent basis, providing information systems, information technology and telecommunications services, or any other lines of business that the Companies engage in, enter or prepare to enter during the Participant's employment with the Companies (collectively, the "Companies Business"), in which the Participant performed work or obtained knowledge and information during the two (2) year period preceding his or her Separation from Service, within a radius of two hundred fifty (250) miles of the office in which the Participant last worked or any other office in which the Participant worked during the two (2) years preceding his or her Separation from Service, or as much thereof as a Court of competent jurisdiction deems reasonable;
>
> (2) Approach, contact, solicit or induce any individual, corporation or other entity which is a client or customer of any of the Companies, about which Participant obtained knowledge by reason of Participant's employment by the Companies, in an attempt to:
>
> (a) enter into any business relationship with a client or customer of any of the Companies if the business relationship is competitive with any aspect of Companies' Business in which Participant worked during the two (2) year period preceding his or her Separation from Service, or
>
> (b) reduce or eliminate the business such client or customer conducts with the Companies;
>
> * * *
>
> **If the Participant complies with the terms and conditions of this Section 9 and earns and becomes entitled to receive payment for the Units that he or she is eligible to earn, the Company that employed the Participant at the time of his or her Separation form Service shall have the obligation to pay such Participant the value of such Participant's Account as determined at the time of the Participant's Separation from Service and in accordance w ith the terms of the Plan.** If the Separation from Service is due to death or Disability . . . , payment shall be by check within 30 days after the date of Separation from Service. If Separation from Service is due to any reason other than death or a Disability . . . , the amount credited to the Participant's Account, together with simple interest on the outstanding principal balance at the rate of (i) 9% per annum with respect to any Units

awarded prior to or on December 31, 2004, and (ii) 6% per annum with respect to any Units awarded after December 31, 2004, will be paid to the Participant as follows: (a) five percent (5%) of the amount credited to the Participant's Account shall be paid to the Participant at the end of each of the ten consecutive calendar quarters immediately following his or her Separation from Service and the receipt by the Company of his or her Unit certificates (if any were issued); and (b) fifty percent (50%) of the amount credited to the Participant's Account, plus all accrued and unpaid interest, shall be paid to the Participant at the end of the thirty month period following his or her Separation from Service.

The terms and conditions set forth in this Section 9 are material and essential terms of any award of Units. . . .

(emphasis added).

Additionally included as part of Joint Exhibit No. 13 was the executed Allegis Group Incentive Investment Plan 2007 Award Agreement for Jeff[rey] Reicher ("Agreement I"). The agreement awarding Jeffrey a total of 7500 Incentive Investment Units, which Jeffrey accepted, was, by reference, subject to the terms and restrictions of the Allegis Group Incentive Investment Plan. Specifically, Agreement I, in pertinent part, provides:

The award is subject in all respect to the applicable provisions of the Plan, a complete copy of which has been furnished to you and receipt of which you acknowledge by acceptance of the award. Such provisions are incorporated herein by reference and made a part hereof.

In addition to the terms, conditions and restrictions set forth in the Plan, all terms, conditions and restrictions set forth in this Agreement, including the following, are applicable to the award of Units as evidenced hereby:

* * *

3. Payment. **Subject to the terms and conditions set forth in this Agreement and in the Plan, you shall be entitled to receive payment for vested Units upon your Separation from Service (as defined in the Plan) with the Company.** You shall have no right to payment for Units that have not vested as of the date of your Separation from Service with the Company.

In addition, you specifically acknowledge and agree that the terms and conditions set forth in Section 9 of the Plan are material and essential to your award of Units and your eligibility to receive payment for any vested Units. . . .

* * *

7. Conformity with Plan. **This Agreement is intended to conform in all respects with, and is subject to all applicable provisions of, the Plan, which is incorporated herein by reference.** Inconsistencies between the Agreement and the Plan shall be resolved in accordance with the terms of the Plan.

(emphasis added).

Further attached to Joint Exhibit No. 13 was an executed **"ALLEGIS GROUP INCENTIVE INVESTMENT PLAN 2010 AWARD AGREEMENT FOR Reichert, Jeffrey,"** ("Agreement II"), which advised Jeffrey as to the potential tax consequences pursuant to the Allegis Incentive Investment Plan. The tax consequences, found in paragraph 3 of the agreement, provide that

Units are not consideration for services rendered and are not to be considered or deemed wages. Under the Internal Revenue Code, as now in effect, you will not recognize income at the time you accept the award of Units under the Plan. Instead, you will recognize ordinary income, subject to federal and state income tax withholding, at the time you receive, or have the right to receive, payment for Units . . . . **Although the Company anticipates that the federal income tax consequences of the Plan are as described, the Internal Revenue Service is not bound by such description and the Company does not guarantee the federal income tax treatment of your award of Units, or your acceptance or**

> **redemption of or payment for the Units.** Accordingly, you should discuss with your own tax advisor the anticipated tax consequences of the Units and the Plan.

(emphasis added).

We conclude that Jeffrey's submission into evidence of his 2010 Federal Income Tax Return, his Allegis Group pay stub, his Army Reserves pay stub, the Plan, and Agreements I and II are well within the parameters of Md. Code (1991, 2012 Repl. Vol.), § 12-203(b)(i), provided, *supra*. Therefore, these documents were, in fact, suitable and must be included in the court's verification of the parents' adjusted actual income. See Md. Code (1984, 2012 Repl. Vol.), § 12-203(b)(1) of the Family Law Article (noting that "[i]ncome statements of the parents **shall** be verified with documentation of both current and past actual income.") (emphasis added).

Nonetheless, Sarah relies on the circuit court finding that "[d]uring trial, [Jeffrey] failed to provide the testimony necessary to support his claim that the $23,052 monthly salary is partially unrealized income based on how the Allegis Group investment vehicle is designed." In addition, the circuit court dismissed Jeffrey's contention that his unrealized income was similar to the "pass-through" corporate income reported on a shareholder's tax return discussed within this Court's opinion in *Walker v. Grow*, 170 Md. App. 255, 269–76 (2006), stating that

> [u]nlike the present case, expert testimony was offered to the trial court in *Walker v[.] Gro[w]* to assist the trier of fact to understand the evidence and to determining a fact in issue. An expert or a witness familiar with the design of the Allegis Plan would have been helpful to this court in determine if [Jeffrey] actually received income from Allegis. This testimony was not presented.
>
> * * *
>
> . . . . Considering the fact that Allegis is not an S Corporation, no expert testimony was presented during trial and that this court questions the credibility of [Jeffrey] as it concerns his income, this court is not persuaded to rely on [Jeffrey's] assertion alone.

But Sarah's reliance on the circuit court's interpretation of this Court's opinion in *Walker v. Grow* is misconceived. We explain.

In *Walker v. Grow*, the parents of two minor children, Elinor Walker ("mother") and Ronald Grow ("father"), had engaged in several support disputes over the years. 170 Md. App. at 263, 264. There, the mother moved for modification of child support, alleging that the children's expenses had increased, and, additionally, that the father's income had increased. *Id.* at 264. The basis of the mother's assertion was premised on the fact that the father was chief operating officer to a S Corporation ("Aliron") and a shareholder in said corporation, which, in turn, resulted in the father's tax return showing an adjusted gross income of $272,835. *Id.* As a consequence, the mother requested that the circuit court "recalculate child support on the basis of an 'above [g]uidelines' analysis of the joint income of the parties, the minor children's expenses and other related factors." *Id.*

In his monthly statement to the court at trial, however, the father listed in his financial statement monthly wages at $12,499.06, which amounted to an actual income of $149,988.72 per year. *Id.* at 264, 269. This financial statement, however, was a stark contrast to the father's federal income tax return for 2003, listing a taxable income of $277,175, and the federal income tax returns of 2001 and 2002, showing taxable incomes of $174,751 and $249,148 respectively. *Id.* at 269. Therefore, the father offered into evidence testimony of Aliron's accountant, who noted that "because Aliron is a Subchapter S corporation, [the father's] federal income tax returns do not reflect his actual income. Rather, '[the] income of the business is flowed through the shareholders and reported on the shareholder's personal tax returns, and the taxes associated with that income [are] paid by the shareholders.'" *Id.* Aliron's account further explained that the father did not "'technically receive the income that was reported' on his tax returns[.]" *Walker*, 170 Md. App. at 269. Thereafter, the father entered into evidence a 1040 tax return on which Aliron's accountant had calculated his income without the pass-through income that was retained by Aliron, which would be used to pay the company's taxes or distributed for business purposes. *Id.* at 270. Aliron's accountant explained how she came to that calculated income and then proceeded to demonstrate the calculation from the stand. *Id.*

After considering all the evidence presented, the court ultimately found that the father's income was even less than the amount testified by Aliron's accountant. *Id.* 273. Consequently, the circuit court based its child support award on a determination that the pass-through corporation's income should be excluded and that the father's actual income was $12,442 per month, which would amount to $149,304 per year. *Id.* The mother objected to the court's exclusion of the pass-through corporate income in the modified calculation of child support. *Id.*

Before this Court, the mother asserted that the circuit court erred in accepting the testimony of Aliron's

accountant in making its determination of the father's adjusted actual income. *Id*. Rejecting the mother's argument, we concluded that the trial court **may** admit expert testimony to assist in determining a parent's income when appropriate so long as "the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 274 (quoting Md. Rule 5-702[10]), 276–77. We therefore observed that "[b]ecause the evidence included [the father's] financial statement and his tax returns, it was certainly appropriate for the court to consider [the accountant's supplemental] testimony on the issue in verifying [the father's actual] income[ ]" as required by Md. Code (1991, 2012 Repl. Vol.), § 12-203(b)(1) of the Family Law Article. *Walker*, 170 Md. App. at 276–77.

Nothing in our opinion, however, requires a parent seeking to exclude pass-through or unrealized income from actual income in the calculation of the court's child support award to offer expert testimony supporting that parent's documentation used to verify his or her actual income. This is particularly true when that parent offers a variety of "suitable documentation of actual income" into evidence. *See* Md. Code (1991, 2012 Repl. Vol.), § 12-203(b)(2)(i) of the Family Law Article. Should a parent seeking to exclude the pass-through or unrealized income desire to present expert testimony, he or she may. A parent's choice to present expert testimony is beneficial to the trial court, but it is a gratuitous addition when suitable documentation of that parent's actual income is offered into evidence.[11] Accordingly, we conclude that the circuit court abused its discretion in its inclusion of Jeffrey's Allegis Incentive Investment Plan.[12]

Upon remand, the circuit court should analyze its child support determination pursuant to Md. Code (1991, 2012 Repl. Vol.), §§ 12-201 and 12-204(d) of the Family Law Article. In addition, because Jeffrey and Sarah share physical custody of the child, the circuit court must also adhere to Md. Code (1991, 2012 Repl. Vol.), § 12-204(m) of the Family Law Article.[13]

(C) The Alternating Tax Exemption.

Following a discussion of the court's grant of joint legal custody, the court addressed the parties' right to the tax exemption for the parties' minor child. The court found that because the parties shared custody of their son, they should share the right to claim the tax exemption of his dependency in the following colloquy:

> THE COURT: . . . . Taxes, let me ask a question. I saw on the taxes from one of the years, well Grant's only been around for one probably, tax year. Where both persons had, both persons claimed him. Did they claim him for the full year, or half? Does anybody know?
>
> [Sarah's counsel]: Well[,] I believe both claimed him as a dependent, as head of household with a dependent.
>
> THE COURT: Okay. I believe if I'm not mistaken, for taxes that each of them claim him for six months a piece on taxes. They cannot. Okay, then first year claiming since and – I thought I saw that on that. When I'm filling out taxes 1 to 12 months, they gave you a range.
>
> Mr. – for the – the [c]ourt is actually, because I know what I'm going later on concerning finances, the [c]ourt is actually going to, for the first – the taxes for this would [be for the] 2011 year, right? Tax 2011, [Jeffrey] is going to be able to claim Grant, 2011 and every odd year thereafter.
>
> 2012 tax year, [Sarah] will be able to claim him, and every even year thereafter. Okay, let me go – are we – we're clear about the custody issues? So I can move onto the next thing.

Within Jeffrey's petition for rehearing to alter or amend its judgment of October 11, 2010, Jeffrey additionally argued that the circuit court had abused its discretion in alternating the tax dependency exemption. Specifically, he argued that "[a]ccording to IRC §152(c)(4)(A)(ii), when a child resides equally with both parents, as in the instant case, the parent with the highest adjusted gross income is entitled to the dependency exemption."

After the parties' hearing of February 21, 2012, the court denied Jeffrey's request to be named the sole beneficiary of the tax exemption within its memorandum and opinion of March 30, 2012, stating:

> The court did not err when it ordered that the tax dependency exemption alternate between [Jeffrey] and [Sarah]. [Jeffrey] argues that this court abused its discretion in alternating the tax dependency and requests the sole right to claim minor child as a dependent for state and federal tax returns.
>
> IRC Section 152(c)(4)(B)(i) states that the tax exemption for a child shall be claimed by the "parent with whom the child resided for the longest period of time during the taxable year." Prior to 1984, a non-custo-

dial parent could claim a tax dependency exemption if the non-custodial parent paid more than $1,200 toward the support of the child in the calendar year. The law now provides that the custodial parent is always entitled to the exemption unless he or she executes a signed waiver disclaiming the child as an exemption for a given year. The law changed in order to resolve the dispute between the divorce [sic] parents and to reduce the number of divorced parents both claiming the dependency exemption in the same calendar year. The committee wished "to provide more certainty by allowing the custodial spouse" to claim the exemption.

Congress was silent on whether a state court can require a custodial parent to execute a waiver of the tax exemption to the non-custodial parent. The Maryland Court of Special Appeals in *Wassif v. Wassif*[, 77 Md. App. 750 (1988)] ruled that a court order alone is insufficient to effectuate the transfer of the tax exemption. A non-custodial parent may claim the tax exemption only if the custodial parent executes a signed waiver of the exemption.

Although a Maryland court has not ruled on whether alternating the tax exemption is within the court's discretion, other states have made such a determination. A Mississippi state court ruled that the parties may alternate the tax exemption because the court found that both parties would benefit from the dependency exemption. In this case, the Mississippi court determined that the court did not abuse its discretion by alternating the tax exemption because both parties in the case are employed, have similar monthly incomes and would benefit from use of the dependency exemption.

An Illinois appellate court also determined that alternating the tax dependency is within the court's discretion. The court ruled that Defendant was entitled to the dependency exemption in alternating years because Defendant has substantial visitation with minor child and provides child support and health insurance benefits.

> This court holds that due to the parties' shared custody of the minor child[,] alternating the tax dependency is within the spirit of IRS Section 152(c)(4)(B)(i) and follows Maryland [L]aw. This court finds this [sic] its decision is also consistent with other jurisdictions in that alternating the dependency exemption is beneficial to both parties. The minor child is in the care and custody of each party on a shared basis and therefore, both are entitled to claim the child on their taxes but in alternating years.

(footnotes omitted).

Before this Court, Jeffrey maintains his assertion that the circuit court "abused its discretion when it refused to modify its finding that the parties should alternate the tax dependency for Grant" because "even if child support is modified to reflect [Jeffrey's] actual income, he pays the majority of the support for Grant." Thus, he attests that the court failed to conform with Section 152(c)(4)(B)(ii) of the Internal Revenue Code, which provides that in situations where more than one parent is claiming the qualified child,[14] "if the parents claiming any qualifying child do not file a joint return together" and "if the child resides with both parents for the same amount of time during such taxable year," then that child will be treated as the qualifying child of "the parent with the highest adjusted gross income." *See* 26 U.S.C. 152(c)(4)(B)(ii).

Conversely, Sarah, relying on this Court's opinion in *Wassif v. Wassif*, 77 Md. App. 750 (1989), argues that the trial court properly exercised its discretion because "[a] court may assign or otherwise allocate the tax exemption for a minor child" as it sees fit. We find Jeffrey's argument more persuasive and, therefore, vacate the circuit court's order and remand the issue for further consideration.

Title 26, Section 152(e) of the United States Code provides the "[s]pecial rule [regarding the tax dependency exemption] for divorced parents[.]" *Id*. Prior to January 1, 1985, Sections 152(e)(2)(B)(i) and (ii) (1982) of the Internal Revenue Code provided that unless otherwise specifically agreed to in writing by the parties or addressed in a court decree, the non-custodial parent could claim a dependency tax exemption if he or she paid more than $1,200 toward the support of a child in any calendar year and the custodial parent did "not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody." *See Wassif v.*

Wassif, 77 Md. App. 750, 759 (1989) (quoting 26 U.S.C. § 152(e)(2)(B)(i) (1982)). "By virtue of the Deficit Reduction Act of 1984 (Pub. L. No. 98-369, 98 Stat. 494), this law was amended to provide that the custodial parent is now always entitled to the exemption **unless** he or she executes a signed waiver disclaiming the child as an exemption for a given year." *Id.* (citing 26 U.S.C. § 152(e)(2)(A) (Supp. II, 1984)) (emphasis added). Specifically, Section 152(e) of the Internal Revenue Code, in pertinent part, now provides:

> (e) Special rule for divorced parents, etc.
>
> (1) **In general. Notwithstanding subsection (c)(1)(B),**[15] **(c)(4),**[16] **or (d)(1)(C),**[17] **if –**
>
> (A) a child receives over one-half of the child's support during the calendar year from the child's parents–
>
> (i) who are divorced or legally separated under a decree of divorce or separate maintenance,
>
> (ii) who are separated under a written separation agreement, or
>
> (iii) who live apart at all times during the last 6 months of the calendar year, and–
>
> **(B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child of a qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.**
>
> **(2) Exception where custodial parent releases claim to exemption for the year. For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if –**
>
> **(A) the custodial parent signs a written declaration (in such a manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and**
>
> **(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.**

26 U.S.C. 152(e)(1) & (2) (2008) (emphasis added).[18]

This Court first addressed the post-1984 revisions to 26 U.S.C. 152(e) *et seq*., in *Wassif v. Wassif*, 77 Md. App. 750 (1989). There, Patricia Lynn Wassif (the "mother") petitioned to alter the Circuit Court for Anne Arudel County's judgment of absolute divorce, which, in part, ordered that Anis M. Wassif (the "father") would be entitled to claim one of the couple's three minor children as a dependent on his income tax returns. *Id.* at 753–54.

On appeal, the mother argued before this Court that the circuit court lacked jurisdiction to order a custodial parent to execute a waiver of his or her presumptive right to the tax dependency exemption provided by Section 152(e) of the Internal Revenue Code. *Id*. at 759. Rejecting her argument, we noted that

> [t]he legislative history of the 1984 amendment indicates that the purpose of the new law was to relieve the IRS of acting as the mediator in disputes between parents over exemptions. Up to that time, the IRS had been involved in numerous factual disputes between divorced parents over which parent provided more support for a child. The new statute was meant to address the desire of the IRS not to get involved in such factual disputes where it had very little, if anything, to gain by the outcome.

Id. (relying on H.R.Rep. No. 432, Part II, 98th Cong., 2d Sess., *reprinted in* the 1984 U.S. Code Cong. & Admin.News 697, 1140).[19] *See also Vohsen v. Vohsen,* 801 S.W.2d 789, 791 (Mo. Ct. App. 1991) (noting that "[t]he 1984 amendment wa[s] not designed to provide a benefit to the custodial parent. Rather, it sought to achieve "'certainty in the allocation of the dependency exemption *for federal tax administration purposes*.'" (quoting *Cross v. Cross*, 363 S.E.2d 449, 457 (W.Va. 1987)) (emphasis in original).

As a consequence, we joined the majority of our sister jurisdictions, holding that state court allocations of the exemptions to a non-custodial parent does not interfere with Congressional intent and concluded "that a custodial parent may be ordered to execute the nec-

essary waiver of dependency exemption in favor of a non-custodial parent who is paying child support." *Wassif*, 77 Md. App. at 761.[20] But our opinion in *Wassif* only addressed the permissibility to allocate the tax dependency exemption generally and declined to further consider the nature of the exemption within the greater scheme of the marital dissolution. Our review was limited to Patricia Wassif's contention that the trial court was without any power to allocate the tax dependency exemption provided by 26 U.S.C. § 152(e). *See Wassif*, 77 Md. App. at 759. Thus, we return to an analysis of the Internal Revenue Code's statutory language.

When a reviewing court engages in an analysis of statutory construction, the overarching rule is that, in construing statutes, "our primary goal is always 'to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision. . . .' *Babre v. Pope*, 402 Md. 157, 172 (2007) (citations omitted). *See Opert v. Criminal Injuries*, 403 Md. 587, 593 (2008). If the language is clear and unambiguous, we ordinarily "need not look beyond the statute's provisions and our analysis ends." *Opert*, 403 Md. at 593. If, upon this preliminary analysis, however, we conclude that "the language is subject to more than one interpretation, it is ambiguous, and we resolve the ambiguity by looking at the statute's legislative history, case law, and statutory purpose." *Barbre*, 402 Md. at 173.

Unfortunately, the plain language of the Internal Revenue Code does not explicitly address whether a state court can effectively order that the tax dependency exemption alternate between the child's parents, or whether this is within the spirit of 26 U.S.C. § 152(e) *et seq*.[21] Likewise, Maryland has never addressed the permissibility of such an order. Therefore, we turn our attention to the reasoning of our sister jurisdictions for guidance and begin where our decision in *Wassif* left off.

In *Cross v. Cross*, 363 S.E.2d 449 (W.Va. 1987), the West Virginia Supreme Court of Appeals reasoned that Congressional silence in the amended code as to whether a state trial court can require a custodial parent to execute a waiver "demonstrates Congress's surpassing indifference to how the exemption is allocated as long as the IRS doesn't have to do the allocating." *Id*. at 457. As a consequence, the court concluded that Congress did not intend to forbid state courts from allocating the exemption and that a state court has broad equitable power to order a custodial parent to sign the necessary waiver:

> Indeed, under the new [26 U.S.C. § 152(e)] a state court does not have the power to allocate the exemption simply by court order alone (as it could have done before the 1984 Amendment), but it does have the equitable power to require the custodial parent to sign the waiver . . . [T]here is *no prohibition* – express or implied – on a state court's requiring the execution of the waiver, and because the court allocation of dependency exemptions has been custom and usage for decades, it is more reasonable than not to infer that if Congress had intended to forbid state courts from allocating the exemption by requiring the waiver to be signed, Congress would have said so.

Id. at 458 (emphasis in original), *quoted in Wassif*, 77 Md. App. at 760. *See also Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (noting that in family law matters, the Court "has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that the state law be preempted."). Thus, the court found "nothing in the 1984 amendment to [26 U.S.C. § 152(e)] that precludes a power in [West Virginia's] trial courts to award the dependency tax exemption as an integral power of setting child support *by ordering the custodial parent to execute the waiver required by the* [Internal Revenue Code]." *Cross*, 363 S.E.2d at 458 (emphasis in original).

Notwithstanding these findings, however, the court did not completely dismiss notions that the 1984 amendment to 26 U.S.C. § 152(e) may also serve as "a collateral financial benefit upon the custodial parent." *Cross*, 363 S.E.2d at 457. The court went on to note that despite Congressional intent to only remove the Internal Revenue Service from the dependency dispute, See H.R.Rep. No. 432, Part II, 98th Cong., 2d Sess, *reprinted in* 1984 *U.S. Code Cong. & Admin.News* 697, 1140, nothing was meant to imply that "the new [26 U.S.C. § 152(e)] does not provide valuable benefits to custodial parents even though providing those benefits was not its primary purpose." *Id.* at 459. The court continued, stating:

> . . . . In the 94 percent of all divorces that are concluded by voluntary settlement, the custodial parent is given a new bargaining chip that, depending upon the economic circumstances, may be of significant value. Furthermore, when the dependency exemption is allocated to the non-custodial parent on a year-to-year basis[,] the custodial parent must sign a waiver to allow the non-custodial parent to

take the exemption. **This simple mechanical requirement provides the custodial parent with an opportunity to collect back support payments every April 15th. In light of the low level of compliance with alimony and child support awards, this scheme hardly seems ill-conceived from points of view other than the [Internal Revenue Service]'s.**

* * *

The facts of life are that income tax exemptions are valuable only to persons with income, and up to a certain point, the higher the income the more valuable exemptions become because of the progressivity of the federal income tax. In this regard, it is to be remembered that the federal government is not providing every custodial parent with a cash grant under [26 U.S.C. § 152(e)]. Rather, [Section 152(e)] provides an economic benefit that is of significantly greater value to a parent with income than it is to a parent without income. **Consequently, it seems only reasonable that the trial judge should allocate the dependency exemption to the parent in the highest tax bracket, and then enhance (or reduce) the value of the cash child support payments to offset the value of the exemption. . . .**

This, however, is not to say that the custodial parent loses any of the benefits rightly conferred upon her by the new [Section 152(e)]. When the circuit court orders that a custodial parent execute the waiver of the dependency exemption in favor of her former spouse, execution of the waiver is dependent upon a non-custodial parent's having paid his [or her] court-ordered child support. This gives the custodial parent leverage because she [or he] can refuse to execute the waiver in the event of non-payment, which forces the non-custodial parent to take her [or him] back to court to force the execution of the waiver, at which time she [or he] may raise the back payment issue.

Cross, 363 S.E.2d at 459–60 (emphasis added). Thus, the West Virginia Supreme Court of Appeals concluded that a trial court may allocate the tax dependency exemption to the non-custodial parent so long as he or she is within a higher tax bracket and additionally enhance the child support obligation of the non-custodial parent to offset the value of the tax exemption. *Id.* at 460.

Like the West Virginia Supreme Court of Appeals' opinion in *Cross*, the Court of Appeals of Missouri reached a similar conclusion regarding the Congressional silence in *Vohsen v. Vohsen*, 801 S.W.2d 789 (Mo. Ct. App. 1991) (noting that 26 U.S.C. § 152(e)'s amendments "sought to achieve 'certainty in the allocation of dependency exemption *for federal tax administration purposes*.'" (quoting *Cross*, 363 S.E.2d at 457)) (emphasis in *Cross*, 363 S.E.2d at 457). Specifically, the intermediate appellate court noted that "the 1984 [A]mendment was made to eliminate the need for the Internal Revenue Service to resolve conflicts when both parents claimed a child as a dependent." *Id.* at 791. Therefore, under the court's holding:

> [W]hen parents cannot agree on who is to receive the exemption, it will be appropriate for our trial courts to determine this issue. This trial court involvement will have no impact on the [Internal Revenue Service] and does not conflict with the Internal Revenue Code. . . .
>
> * * *
>
> . . . [T]o efectuate such an allocation, a trial court must order the custodial parent to annually sign the prescribed declaration. . . . The court's order should make execution of the declaration contingent upon the custodial parent's receipt of the court ordered child support payments. A deadline for singing the declaration . . . should [further] be established.
>
> **If the custodial parent does not timely sign the annual declaration, the noncustodial parent may seek appropriate court relief. In such a situation, whether the court ordered support payments have been made will be readily ascertainable, and the trial court will be able to determine if either parent has not complied with its previous orders.**
>
> **If the support payments have not been made, the trial court could**

> **allow the custodial parent to retain the exemptions. On the other hand, if the payments have been made, the trial court could enforce its order requiring both parents to sign the declaration.**

Id. at 792 (emphasis added). In either circumstance, the court concluded that the trial court's permissive order will neither infringe on the Internal Revenue Code nor involve the Internal Revenue Service in determining which parent is entitled to the exemptions, satisfying the amendment's purpose. *See id*. The court additionally recognized that the financial benefit of the tax dependency exemption served because it could be leveraged by a custodial parent against a non-custodial parent's obligation to timely tender the court-ordered child support. *See id*.

Although the cases referenced, *supra*, discuss circumstances in which there is but one primary custodial parent and one non-custodial parent, they impart two underlying principles to the 26 U.S.C. § 152(e)'s amendments: (1) a state court has broad equitable power in determining whether an allocation of the tax dependency exemption is appropriate and; (2) any allocation of the tax dependency exemption pursuant to 26 U.S.C. § 152(e) is an element of the parties' child support calculus. *In re marriage of Fowler*, 554 N.E.2d 240, 243 (Ill. Ct. App. 1989); *In re Marriage of Lovetinsky,* 418 N.W.2d 88, 90 (Iowa Ct. App. 1987). *See Monterey Cty. v. Cornejo*, 53 Cal.3d 1271, 1279 (1991); *Nichols v. Tedder*, 547 So.2d 766, 775 (Miss. 1989). As a consequence, any allocation of the tax dependency exemption must be evaluated based on a child's best interests. *Singer v. Dickinson*, 558 N.E.2d 806, 811–12 (Ohio 1992); *Bobo v. Jewell*, 528 N.E.2d 180, 182 (Ohio 1988); *Dindal v. Dindal*, 2009 Ohio 3528, P.20 (Ohio Ct. App., Hancock Cty., July 20, 2009); *Hildenbrand v. Hildenbrand*, 1998 Ohio App. *LEXIS* 25, *5 (Ohio Ct. App., Butler Cty., Jan 12, 1998). *See Cornejo*, 53 Cal.3d at 1280; *Cross*, 363 S.E. at 460. *Cf. Vohsen*, 801 S.W.2d at 792. In this regard, we find the Ohio Supreme Court's opinion in *Singer v. Dickinson*, 588 N.E.2d 806 (Ohio 1992) (defining the applicable test to a determination of whether an allocation of the tax dependency exemption was warranted), *superceded by statute*, OHIO REV. CODE ANN. § 3119.82 (LEXISNEXIS 2013), *as recognized in Dindal v. Dindal*, 2009 Ohio 3528, P.20 (Ohio Ct. App., Hancock County, July 20, 2009), instructive.

In *Singer v. Dickinson*, the Ohio Supreme Court observed that, given the amendments to Section 152(e)'s administrative convenience, 26 U.S.C. § 152(e) "does not limit the state court's authority to allocate the exemption[,]" because the allocation of the exemption concerns the support of the child. *Singer*, 588 N.E.2d at 809, 811 (citation omitted). The court's evaluation of the Section 152(e) resulted in a determination that "[t]he exemption is clearly meant to provide a federal tax allowance for the costs attributable to supporting children." *Id*. at 811 (reasoning that such a purpose is apparent from the plain language of the statute, "which recognizes the custodial parent presumption only if the child received over half of his support from his parents"). The court rejected, however, the juvenile court's stated reasons for the allocation of the tax exemption, premised on an analysis of the percentages of support. *Id*. at 812. It reasoned that an allocation of the dependency exemption that only "marginally increased the non-custodial parent's ability to pay child support equates to no more than a "zero-sum transaction," resulting in infinitesimal benefit to the child's interests. *Id*. Specifically, it concluded:

> **The juvenile court's analysis of percentages of support is inadequate when the dependency exemption is at issue.** The allocation of the dependency exemption provided by Section 152(e) . . . **may be awarded to the non[-]custodial parent when that allocation would produce a net tax savings for the parents, thereby furthering the best interest of the child. Such savings would occur through allocation to the non[-]custodial parent only if the non[-]custodial parent's taxable income falls into a higher tax bracket than the tax bracket of the custodial parent . . . . If both parents' incomes are taxed in the same tax bracket, no net savings are realized by allocating the exemption to the non[-]custodial parent. . . .**
>
> * * *
>
> The juvenile court's analysis assumes that the parent having the greater support obligation under the guidelines should have the exemption. However, we do not perceive how it serves the child's best interest to allow the non[-]custodial parent to claim the exemption when there will be no net tax savings. **While an additional exemption for the non[-]custodial parent may marginally increase his ability to pay support, the removal of an exemption would equally decrease the custodial parent's ability to support the child.**

The child's best interest is not furthered by the zero-sum transaction.

Singer, 558 N.E.2d at 812 (emphasis added). Therefore, the court recognized that even where the non-custodial parent's share of support was greater, "it would make little sense to allocate the exemption to the non-custodial parent merely because that parent is responsible for a higher percentage of the support obligations under the guidelines[ ]" when that benefit to the non-custodial parent was weighed against a custodial parent's lesser income and closer day-to-day support relationship with the child. *Id*. *See also Motes v. Motes,* 786 P.2d 232, 239 (Utah Ct. App. 1989) (noting that "use of the power to order a custodial parent to execute a *section* 152 declaration should not be used to evenly or otherwise divide the available exemptions without regard to the particular economic realities[ ]" of the parties to that specific case) (emphasis in original).

Rather, allocation of the tax dependency exemption to the non-custodial parent requires an on record showing that the interests of the child have been furthered. *Id*. at 811. Primarily, the Ohio Supreme Court found that such an allocation to the non-custodial parent would only be in the best interest of the child if "that allocation would produce a net tax savings for the parents," *id*. at 812, because it thereby increased the after-tax spendable income of the family as a whole, which can then be channeled into an increase in child support payments to offset the dependency exemption. *Cf. id*. Indeed, the majority of our sister jurisdictions agree with this general principle. *Cornejo, supra*, 53 Cal.3d at 1279–80; *Motes, supra*, 786 P.2d at 239; *Nichols, supra*, 547 So.2d at 775; *Fudenberg v. Molstad*, 390 N.W.2d 19, 21 (Minn. Ct. App. 1986). *Cf. Cross*, 363 S.E.2d at 459–60; *In re Marriage of Lovetinsky,* 418 N.W.2d at 90; *Lincoln v. Lincoln*, 746 P.2d 13, 17 (Ariz. Ct. App. 1987). *But see Sarver v. Dathe,* 439 N.W.2d 548, 551–52 (S.D. 1989) (concluding that an allocation is preempted by federal law but, nevertheless, recognizing that the tax dependency exemption is still a factor to be considered in determining child support).

We, accordingly, adopt the majority view and further conclude that the allocation of the tax dependency exemption may be allocated to a non-custodial parent only if it enhances the child's best interest. Requiring the trial court to consider both the comparative actual incomes of a child's parents and whether the non-custodial parent is, in fact, within a higher tax bracket to warrant a tax dependency exemption allocation to the non-custodial parent is in accordance with the General Assembly's adoption of the Income Share's Model, which rests upon a child's ability to "receive the same proportion of parental income, and thereby enjoy the same standard of living, he or she would have experienced had the child's parents remained together." *Voishan*, 327 Md. at 322–23. *See also Petrini v. Petrini*, 336 Md. 453, 460 (1994) ("[I]t is for the trial judge to set an amount reasonably calculated to maintain as nearly as possible the standard of living enjoyed by the child prior to the parents' divorce.").

To be sure, "it would be an abuse of discretion for a divorce court to order a custodial parent to sign the declaration in the absence of appropriately supported findings that [the allocation would result in an increase in after-tax spendable income of the family as a whole] or demonstrating other exceptional circumstances making it in the best interest of the parties and their child[ ] that the [exemption] be" waived to the non-custodial parent. *Motes*, 786 P.2d at 239. Therefore, because "[t]he parents of a child are his [or her] natural guardians and, quite apart from the moral obligations of parenthood, owe the child a legal, statutory obligation of support," *Walker*, 170 Md. App. at 265, an allocation of the tax dependency exemption to the non-custodial parent requires the trial court to engage in an on record analysis of whether such allocation would be within the child's best interest. See Motes, 786 P.2d at 239. If the trial court determines that the non-custodial parent's income places him or her within a higher tax bracket, the court must then find, pursuant to Maryland Law, whether the requesting party's higher tax bracket results from the existence of unrealized or pass-through income or is the result of the party's actual income. If the requesting party has received no unrealized income or the unrealized/pass-through income is inconsequential, the court should allocate the exemption to the non-custodial parent and include an equitable portion of the after-tax increased spendable income within its award of child support to further the best interest of the child. As we indicated in *Wassif*, however, under the current state of 26 U.S.C. § 152(e)(2), such a court order, standing alone, is ineffective to transfer a tax dependency exemption. 77 Md. App. at 761. As a consequence, the court must order the custodial spouse to execute a yearly declaration waiving his or her right to the tax dependency exemption pursuant to 26 U.S.C. § 152(e)(2) *et seq*. Further, the court's order should provide that the duty to execute the waiver of the custodial parent's right to the exemption at the end of each year is contingent on the non-custodial parent maintaining satisfaction of his or her child support obligations.

In the instant case, however, we are met with the unique circumstance where the parents maintain shared custody of their minor child. *See* Parts I & II(A), *supra*. "Shared physical custody may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between

days and nights." *Taylor, supra*, 306 Md. at 297. Therefore, in instances where the parents share joint custody but one parent still attains primary physical custody and care of the child for more than one-half of the calendar year, we conclude that the general principles regarding the exemption analysis remain constant whether the parents share joint physical custody – in theory – or one parent is specifically designated the primary custodian of the minor child. *See* 26 U.S.C. § 152(e)(1)(B) (2008). But when both parents share joint physical custody of the child on an essentially 50/50 basis, Section 152(e) of the Internal Revenue Code does not apply because it operates under the assumed premise that one parent is the primary physical custodian of the minor child. *See id*. § 152(e)(1)(B) (explicitly noting that, notwithstanding other sections of the statute that would allocate the exemption to the parent with the highest adjusted gross income, if "such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child" of the primary custodial parent unless the primary custodial parent signs a written declaration waiving his or her right to the tax dependency exemption). Consequently, in instances where Section 152(e) is inapplicable, allocation of the exemption returns to the parent with the highest adjusted gross income pursuant to 26 U.S.C. § 152(c)(4)(B)(ii).

Notwithstanding assertions that "alternating the tax dependency is within the spirit of [26 U.S.C. §] 152(c)(4)(B)(ii) and [additionally] follows Maryland [L]aw," any reliance on the Mississippi Court of Appeals' decision in *H.L.S v. R.S.R.*, 949 So.2d 794 (Miss. Ct. App. 2006), or the Third District Appellate Court of Illinois' opinion in *In re Marriage of Sawicki* ("*Sawicki*"), 806 N.E.2d 701 (Ill. App. Ct. 2004), is misconceived. The facts and reasoning of these cases are inapposite to the case at bar. Both intermediate appellate courts acknowledge that, in those particular cases, there is but one primary physical custodian of the minor child. *H.L.S.*, 949 So.2d at 796–97 (noting that "full care, custody, and control of the minor child" was awarded to the father that the Chancery Court only modified custody to allow the mother a broader visitation with the minor child); *Sawicki*, 806 N.E.2d at 704 (observing that the mother was awarded primary physical custody of the child). Thus, the court addressed the parties contentions within the context of a 26 U.S.C. § 152(e) analysis. *See H.L.S.*, 949 So.2d at 799 (relying on the court's previous opinion in *Laird v. Laird*, 788 So.2d 844, 852 (Miss. Ct. App. 2001), which, in turn, was based on an adoption of the Indiana Child Support Guidelines set forth in *In re Marriage of Glover v. Torrence ("Glover"),* 723 N.E.2d 924, 938 (Ind. Ct. App. 2000));[22] *Sawicki*, 806 N.E.2d at 711 (premising its analysis on the trial court's broad equitable discretion to allocate the exemption pursuant to 26 U.S.C. § 152(e) as set forth by the court's previous decisions of *In re Marriage of Fowler*, 554 N.E.2d 240, 243 (Ill. App. Ct. 1989), and *In re Marriage of Van Ooteghem*, 543 N.E.2d 899, 900–01 (Ill. App. Ct. 1989)).

As noted, *supra*, when both parents share joint physical custody of the child on an essentially 50/50 basis, Section 152(e) of the Internal Revenue Code does not apply because it operates under the assumed premise that only one parent is the primary physical custodian of the minor child. Accordingly, we conclude that the circuit court abused its discretion in allocating the tax dependency exemption between the parents in alternating years.

Based on the particular circumstances of the case at bar, the circuit court must allocate the exemption to the parent with the highest adjusted gross income pursuant to 26 U.S.C. § 152(c)(4)(B)(ii). However, when the circuit court does so, it must additionally consider whether any increase in after-tax spendable income should be channeled into an increase in child support payments to offset the dependency exemption in order to further the best interest of the child pursuant to the Income Share's Model. *Cf. Singer*, 558 N.E.2d at 811–12. *See also Cornejo,* 53 Cal.3d 1279–80; *Motes*, 786 P.2d at 239; *Nichols*, 547 So.2d at 775. Therefore, if the parent with the highest adjusted gross income additionally falls within a higher tax bracket, similar to a Section 152(e) analysis, the court must determine whether the exempt party's higher tax bracket results from the existence of unrealized or pass-through income. If the party maintains no unrealized income or if the unrealized or pass-through income is inconsequential, the court must include that after-tax increased spendable income within its award of child support. Merely adjusting the child support payment without these considerations would be insufficient because it leaves the child no better off than before. There must be more.

(D)The Monetary Award Granted To Sarah Hornbeck.

Jeffrey next contends that the circuit court abused its discretion when it granted Sarah a monetary award in the amount of $7,000 for two reasons. First, Jeffrey asserts that the court erred by refusing to "go back and make the appropriate adjustments to the marital property calculations" regarding the parties' debt for the VW Toureg subsequent to "chang[ing its] mind and order[ing] that the vehicle be transferred to [Jeffrey." He attests that this error further "made him responsible" for selling the vehicle and for the entire debt – notwithstanding the fact that the value of the vehicle was negative. Second, he contends that the circuit court further erred when it attributed to Jeffrey

$3,100 of extant property for the wrongfully dissipated 2009 tax refund.

Sarah counters that the court "correctly classified the property and then considered the statutory factors in making the determination to order a $7,000 monetary award[.]" She argues, therefore, that the circuit court properly exercised its "pure" discretion, and that the monetary award should be affirmed. We elect to address these contentions in reverse order.

(1) The Circuit Court's Finding of Dissipation And The Valuation of Extant Property.

We begin by addressing Jeffrey's second contention: that the $3,100 was wrongfully attributed to him. Preliminarily, we note that "[m]arital property means property, however titled, acquired by one or both parties during the marriage." Md. Code (1984, 2012 Repl. Vol), § 8-201(e)(1) of the Family Law Article, *quoted in Williams v. Williams*, 71 Md. App. 22, 34 (1987). *See also Campolattaro v. Campolattaro*, 66 Md. App. 68, 81 (1986). Thus, "[p]roperty acquired by a party up to the date of the divorce, even though the parties are separated, is marital property." *Williams*, 71 Md. App. at 34 (citations omitted). But, as this court has previously articulated:

> . . . [M]arital property which generates a monetary award must ordinarily exist as "marital property" as of the date of the final decree of divorce based on evidence adduced at the trial on the merits or a continuation thereof. Therefore, property disposed of before commencement of the trial **under most circumstances** cannot be marital property.

Gravenstine v. Gravenstine, 58 Md. App. 158, 177 (1984) (emphasis added), *quoted in Williams*, 71 Md. App. at 34. The exception to this general principle exists under circumstances of wrongful dissipation of the parties' marital property.

It is well established that "[d]issipation [occurs] where one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown." *Sharp v. Sharp*, 58 Md. App. 386, 401 (1984). Stated more simply, it occurs when "marital assets [are] taken by one spouse without agreement by the other spouse." John F. Fader, II & Richard J. Gilbert, *Maryland Family Law*, § 15-10 (4th ed. 2006). Therefore, "a conveyance made by a husband before and in anticipation of his wife's suit for alimony, or pending such suit, or after decree has been entered therein in the wife's favor, to prevent her from obtaining alimony, is fraudulent and may be set aside, unless the grantee took [the marital property] in good faith, without notice and for value." *Oles Envelope Corp. v. Oles*, 193 Md. 79, 89 (1949) (holding that a spouse's sale of marital property stock for $42,000 over book value adequate consideration to defeat fraudulent dissipation claim), *quoted in Solomon*, 383 Md. at 202.

In *Jeffcoat v. Jeffcoat*, this Court discussed the appropriate burdens of persuasion and production, stating:

> The burden of persuasion and the initial burden of production in showing dissipation is on the party making the allegation. *Choate v. Choate*, 97 Md. App. 347, 366, 629 A.2d 1304 (1993). That party retains throughout the burden of persuading the court that funds have been dissipated, but after the party establishes a prima facie case that the monies have been dissipated, i.e. expended for the principal purpose of reducing the funds available for equitable distribution, the burden shifts to the party who spend the money to produce evidence sufficient to show that the expenditures were appropriate.

102 Md. App. 301, 311–12 (1994) (concluding that dissipation was clearly demonstrated by the record when, notwithstanding the family's prior "hard work, frugality, and sound fiscal management," the husband spent almost $300,000 in the year following the parties' separation), *quoted in Simonds*, 165 Md. App. at 614–15.

More recently, the Court of Appeals specifically addressed a dissipation argument's specific burdens of persuasion and production in *Omayaka v. Omayaka*, 417 Md. 643 (2011). There, the plaintiff ("wife") filed a complaint for divorce on grounds of voluntary separation. *Id.* at 647. In response, the defendant ("husband") denied that he and his wife had ever resolved to voluntarily live apart for the statutory period required for a divorce by voluntary separation and further submitted a counterclaim for absolute divorce alleging in "count II" of his counter-complaint that his wife had dissipated the parties' marital assets. *Id*. Specifically, the husband, in part, asserted:

> COUNT II DISSIPATION OF MARITAL ASSETS 11. [The husband] did refinance the marital home. Pursuant to an agreement between the parties, [the wife]'s counsel was to place her share of the proceeds in an escrow account until she had accounted for the transfer of marital funds in the amount of $80,000[ ]. By a June 13th 2006 communication, the parties understood that [the wife]'s counsel was to release all but $40,000[ ] to her

> and would provide an accounting of what, if anything, was taken and how the marital money was spent. To date[,] no such accounting has been provided.
>
> 12. [The wife] has clearly dissipated the marital funds, these funds were transferred during the pendency of litigation and not spent for any family use purposes. Indeed some of these funds were wired to an overseas bank account and/or [to] persons that [the husband] is not aware of or was privy to.

Id. at 647–48.

Thereafter and during the trial before the Circuit Court for Prince George's County, the defendant called his wife as his first witness on his counterclaim of divorce. *Id.* at 648. The wife's testimony included two concessions: "that (1) while married to [her husband], she opened two bank accounts in her name only, and (2) from March of 2005 through December of that year, she made 'over the counter' withdrawals of approximately $80,000[ ] from those accounts." *Id* 648–49. The wife, however, denied the allegations of dissipation, attesting that when she and the defendant lived together "each one of [them] had [their] own account[s]. So the way [she] spent [her] money, [she] spent [her] money, and he just spent his own money." *Id*. at 649. She further explained that "[t]he only joint account that [they] had [was] where [they] used to pay [their] bills." *Id*.

At the conclusion of the trial, the circuit court granted the wife an absolute divorce and denied the husband's counterclaim for dissipation, noting that he had failed to meet his burdens of production and persuasion. *Id.* 649–51. As a consequence, the husband noted an appeal to this Court. *Id*. at 646. The Court of Appeals, however, issued a writ of certiorari on its own initiative to address the parties' contentions regarding a dissipation arguments' burden of persuasion and production. *Id*.

After reviewing the parties' contentions on appeal, the Court acknowledged with approval Judge John F. Fader, II, and Judge Richard J. Gilbert's "cookbook method" to resolve a dissipation allegation, and noted:

> ° If property does not exist at the time of divorce, it cannot usually be included as marital property.
>
> ° Well, that is so unless one spouse proves [by a preponderance of the evidence] that the other spouse dissipated assets acquired during the marriage to avoid inclusion of those assets toward consideration of the monetary award.
>
> ° [A prima facie case] of dissipation occurs when evidence is produced that marital assets were taken by one spouse without agreement by the other spouse.
>
> ° Then, the burden of going forward with evidence shifts to the party who [allegedly] took the assets without permission to [produce evidence that generates a genuine question of fact on the issue of (1) whether the assets were taken without agreement, and/or (2)] where the funds are [and/or (3) whether the funds] were used for marital or family expenses.
>
> ° If that proof of use for marital or family purposes is not produced, then the property taken is "extant" marital property, titled in or owned by the individual who took the marital property without permission.
>
> ° From that "extant" property in the name of one spouse, the other spouse may be given a monetary award to make things equitable.

Omayaka, 417 Md. at 655–66 (quoting John F. Fader, II & Richard J. Gilbert, *supra*, at § 15–10) (additions and modifications in *Omayaka*, 417 Md. at 655–66). Thereafter, the Court concluded, "It is clear that the **ultimate burden of persuasion remains on the party who claims that the other party has dissipated marital assets."** *Id*. at 656 (emphasis added).

In doing so, the Court recognized that, although the husband was entitled to argue that the wife's explanation of the dissipated marital funds was unreasonable, the circuit court maintained no requirement to accept the husband's argument because it was within the circuit court's discretion to determine which evidence offered was the "better" evidence. *Id.* at 657 & n.4. Specifically, the Court reasoned that

> **[w]hen a party attempts to prove a particular point by presenting evidence that is less clear, less direct, less reliable and/or less satisfactory than other evidence available to that party, the trier of fact is permitted — but not required — to find that the "better" evidence** "would have been detrimental to [that party] and would have laid open deficiencies in, and objections to [that party's] case which the more obscure and uncertain evidence did not disclose."

Omayaka, 417 Md. at 657 n.4 (quoting *Loyal Protective Ins. Co. v. Shoemaker*, 63 P. 2d 960, 963 (Okla. 1936)) (additional citations omitted) (textual addition in *Omayaka, supra*, 417 Md. at 657 n.4) (emphasis added). Thus, because dissipation is a clear question of fact, the circuit court was entitled to accept or reject any portion of the testimony of a witness. *Id.* at 658. "The finding that [the wife] had testified truthfully was therefore not erroneous – clearly or otherwise – merely because the [c]ircuit [c]ourt could have drawn different 'permissible inferences which might have been drawn from the evidence by another trier of facts.'" *Id.* (quoting *Hous. Opportunities Comm'n of Montgomery Cnty v. Lacey,* 322 Md. 56, 61 (1991) (emphasis in *Omayaka, supra*, 417 Md. at 658). Clearly, therefore, the appellate court must consider evidence produced at trial in a light most favorable to the prevailing party, and, if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. *Housing Opportunities Comm'n v. Lacey*, 322 Md. 56, 60 (1991) (quoting *Ryan v. Thurston*, 276 Md. 390, 391–92 (1975)).

In the instant case, Sarah presented testimonial evidence of the wrongful dissipation of the parties' 2009 joint tax return in the following colloquy with her counsel at trial:

> [Sarah's counsel]: You and [Jeffrey] filed a joint return for 2009; is that correct?
>
> [Sarah]: Yes.
>
> [Sarah's counsel]: Showing you what has been marked for identification as Joint Exhibit No. 3, can you identify this document?
>
> [Sarah]: Yes, this is the joint tax return for the year 2009.
>
> [Sarah's counsel]: Thank you. And there was a refund due to the two of you, is that correct?
>
> [Sarah]: Yes.
>
> [Sarah's counsel]: Did you get that refund, or any part of it?
>
> [Sarah]: No, I did not.
>
> * * *
>
> [Sarah's counsel]: What was your understanding about the nature of the refund? Was it a direct deposit or paper?
>
> [Sarah]: It was my understanding the joint refund was – a paper check was to be issued.
>
> * * *
>
> [Sarah's counsel]: What happened with the refund?
>
> [Sarah]: I was expecting a paper check when I reviewed the tax refund document – the income tax return documents, because direct deposit was not selected, as I understood. And, I never saw a paper check. I was expecting a joint check to be made out to both of us and I never saw it.
>
> [Sarah's counsel]: Did you execute the necessary document for the electronic filing?
>
> [Sarah]: No.

Indeed, Sarah and Jeffrey's Maryland e-File Declaration for Electronic Filing explicitly noted that the parties "d[id] not want direct deposit of [their] refund or any electronic funds withdrawal (direct debit) of [their] balance due." Moreover, Joint Exhibit No. 3 included a letter of correspondence from Paar, Melis & Associates, the parties' accountants, dated August 27, 2010, in which the parties were, in relevant part, advised:

> Enclosed is your 2009 Form 1040, U.S. Individual Tax Return, prepared from the information you provided. Your return will be electronically filed with the IRS once we receive your signed Form 8879, IRS e-file Signature Authorization.
>
> Your federal return reflects a refund of $3,476.
>
> **You should receive a check for this amount in approximately four to eight weeks.**
>
> Enclosed is your 2009 Maryland income tax return, prepared from the information provided. Your return will be electronically filed with the Maryland taxing authority.
>
> You're Maryland income tax return reflects a refund of $703.
>
> **You should receive a check for this amount in approximately four to eight weeks.**

(emphasis added).

In addition, during Jeffrey's cross-examination at trial, Jeffrey, in fact, provided no testimony that he used the money for living expenses. Rather, he asserted, in contrast to Sarah's statement, that the 2009 tax refund was deposited electronically, during the following colloquy:

> [Sarah's counsel]: You received a – you and Sarah [Hornbeck] filed joint tax returns for 2009; is that correct?

[Jeffrey]: Yes.

[Sarah's counsel]: And, checks were issued as refunds in both of your names; isn't that correct?

[Jeffrey]: I don't know whose names were on the checks. It was direct deposited to my account by my accountant; but I never saw a check.

[Sarah's counsel]: It's your testimony there was direct deposit?

[Jeffrey]: Yes.

[Sarah's counsel]: Did you give [Sarah] any of that money?

[Jeffrey]: No.

[Sarah's counsel]: You kept it all?
[Jeffrey]: Yes.

[Sarah's counsel]: You had it directed into your account?

[Jeffrey]: Yes.

[Sarah's counsel]: Did you tell [Sarah] you were doing that?

[Jeffrey] I didn't know what was on the statement. We filed – she signed – when you fill out the tax form, it's an option to give them your checking account number that says that you would like to have any refunds deposited directly. She signed the return, so I didn't specifically tell her; no.

Further evaluation of the record additionally demonstrates Jeffrey's calculated conduct in anticipation of the parties' imminent dissolution. The court noted this conduct throughout its oral opinion. Because an accusation of dissipation is a clear question of fact, the circuit court was entitled to accept or reject any portion of the testimony of a witness. *Omayaka*, 417 Md. at 658. Therefore, "when a party attempts to prove a particular point by presenting evidence that is less clear, less direct, less reliable and/or less satisfactory than other evidence available to that party, the trier of fact is permitted — but not required — to find that the 'better' evidence." *Id.* at 657 n.4 (citation omitted). Accordingly, we conclude that the circuit court committed no error in attributing to Jeffrey $3,100 of extant property for the wrongfully dissipated 2009 tax refund.

(2) The Circuit Court's Marital Property Calculations Regarding The VW Touareg.

Subsequent to the circuit court's valuation and identification of the majority of the parties' marital property, identification of extant property in the amount of $3,100 and its denial of Sarah's request for alimony, the court returned to discuss the VW Touareg and initially ordered Sarah to sell the vehicle and split the proceeds with Jeffrey:

> . . . . What I am doing with the Touareg, I'm going to order the Touareg be sold. I'm going to – since the Touareg is in your possession, I am going to order that [Sarah] within 60 days will sell the Touareg, and you will split the proceeds with [Jeffrey] on that Touareg. All right. The next one –

That decision prompted the following dialogue between the court and the parties:

[Sarah's counsel]: May I ask a question, Your Honor?

THE COURT: You may, did I miss something?

[Sarah's counsel]: Who is responsible for the debt on the Touareg, since that's in [Jeffrey's] name? It was my understanding –

THE COURT: I was supposed to address that, yes. Well[,] here's what – there is no proceed, unless the debt is paid.

[Sarah's counsel]: Correct.

THE COURT: So[,] when you sell it, the debt gets paid. And then out of that, then there's a proceed. So if she sells it for, I don't know what you can sell it for, and I'm not even sure whether or not, you know, if it really is worth $24,000 or not.

[Sarah's counsel]: I think we agreed that the fair market of the car, was $15,999.

THE COURT: But they owe $24,000?
[Sarah's counsel]: $24,000 correct, yes.

THE COURT: $24,000, that's where the $24,000 came from.

[Sarah's counsel]: And it was my understanding Your Honor, that you had put that into the marital property calculation on [Jeffrey's] side.

THE COURT: Uh-huh.

[Sarah's counsel]: So[,] since the debt's in his name, –

* * *

[Sarah's counsel]: Okay, it was my understanding that that [sic] was — well I guess I'm confused. Who's paying the — any deficit, if there is a deficit, who is going to be responsible

for the deficit? The debt is in [Jeffrey's] name?

THE COURT: Here it is.

[Jeffrey's counsel]: According to my notes, Your Honor, it says that you estimated that the value would be at $15,909 for the lien of $24,047, based on Exhibit 25. And then you said that they are – the $24,000 lien would be split between the parties, each –

THE COURT: Right, I was taking it off of the – and I didn't take it off of the marital property, because to me it was a flush. And I was going to deal with it later, and I didn't deal with it, that was the problem. So there is still this $24,047.

Then[,] I think the best thing we can we do [sic] in this regard, and it's the only other way I can think of, instead of letting – instead of having [Sarah] sell the car – I'm trying to think what the equitable thing will be to do. Then here's what I'm going to do.

The vehicle will be given back to [Jeffrey], because the loan is in his name. It will be given back to him. If [Jeffrey] decides to sell it, that's up to [him]. If he decides to sell it. I don't know what else to do with this vehicle.

(emphasis added). Jeffrey's counsel objected to this designation of the VW Touareg to Jeffrey based an impermissible transfer of property and on its negative value in the following colloquy:

[Jeffrey's counsel]: Your Honor, I do not believe under the Family Law [Article] you have the authority to do that.

THE COURT: To do what? Really? I can't transfer –

* * *

THE COURT: But it's titled in both of their names, correct?

[Sarah's counsel]: Yes, ma'am.

THE COURT: It's just the loan that we're talking about.

[Sarah's counsel]: It'd be the same thing if you sold it. If it was ordered to be sold, and he was responsible for the debt. It's the same issue.

THE COURT: Uh-huh.

[Jeffrey's counsel]: And then he now has a negative marital debt that was acquired during the marriage attached to him, and then a monetary award.

He has a $24,000 debt with something that's only valued at $16,000. He's getting double penalized for this negative asset, with your award of the monetary award – with your Order of a Monetary Award.

THE COURT: Well[,] let me ask you a question.

[Jeffrey's counsel]: He's being double billed for that.

* * *

THE COURT: Because I didn't give her any alimony, that's the one thing that I'm doing. I'm not giving her alimony. And so that might be the reason I'm doing that, [counsel], is because I'm not making any alimony payments to her that [Jeffrey] will have to keep up over a period of time.

Which may in the long run end up, if I did that, putting him in certainly much more of a peril than it would be to deal with the debt of the Touareg. He doesn't have to sell it, he doesn't have to if he doesn't want to. I mean[,] it's in their name.

can certainly ask – have [Sarah] take her name off this Touareg as having on the title [sic]. She can do that. The loan is not in her name.

(emphasis added).

Jeffrey argues that the court erred by refusing to "go back and make the appropriate adjustments to the marital property calculations" regarding the parties' debt for the VW Toureg subsequent to "chang[ing its] mind and order[ing] that the vehicle be transferred to [Jeffrey]." He attests that this error further "made him responsible" for selling the vehicle and for the entire debt – notwithstanding the fact that the value of the vehicle was negative. Thus, he asserts that the court abused its discretion in making a monetary award by including the negative value of the vehicle. We agree.

"The purpose of the monetary award is to correct any inequity created by the way in which property acquired during the marriage happened to be titled." *Doser v. Doser*, 106 Md. App. 329, 349 (1995). *See*

Long v. Long, 129 Md. App. 554, 579 (2000). In *Ward v. Ward*, 52 Md. App. 336 (1982), this Court explained:

> The monetary award is thus an addition to and not a substitution for legal division of the property accumulated during the marriage, according to title. It is "intended to compensate a spouse who holds title to less than an equitable portion of that property. . . ." What triggers operation of the statute is the claim that a *division* of the parties' property according to its title would create an inequity which would be overcome through a monetary award. *Id*. at 339–40 (internal citation omitted) (emphasis in original).

"When a party petitions for a monetary award, the trial court must follow a three-step procedure." *Malin v. Mininberg*, 153 Md. App. 358, 428 (2003) (citations omitted). As we explained in *Innerbichler v. Innerbichler*, 132 Md. App. 207, 228 (2000):

> First, for each disputed item of property, the court must determine whether it is marital or non[-]marital. [Md. Code (1984, 2012 Repl. Vol.), §§ 8-201(e)(1) & 8-203 of the Family Law Article]. Second, the court must determine the value of all marital property. [Md. Code (1984, 2012 Repl.Vol.), § 8-204 of the Family Law Article]. Third, the court must decide if the division of marital property according to title will be unfair; if so, the court may make a monetary award to rectify any inequity. . . . [Md. Code (1984, 2012 Repl. Vol.), § 8-205(a)].

Jeffrey's quarrel focuses on the circuit court's valuation of this marital property in view of the outstanding debt on the VW Touareg. Nonetheless, Sarah argues that "the trial court can exercise pure discretion when granting a monetary award."

"Were we to accept the wife's position [and turn a blind-eye to the circuit court's ruling], we would be forced to distinguish this case from the situation presented in *Ward[v. Ward*, 52 Md. App. 336 (1982)], solely on the grounds that th[is] marital debt[ ] [was] in [Jeffrey's] name only and because the debt impairs the title to [court identified marital property]. Such an approach would ignore the economic realities of the debt[.]" *Schweizer v. Schweizer*, 55 Md. App. 373, 377 (1983). Had the circuit court credited Jeffrey with the debt of $24,000, the vehicle would have had no value for the purposes of a monetary award consideration and would not have been included in the granting of any such award. *See Sharp v. Sharp*, 58 Md. App. 386, 397 (1984) (citing *Schweizer*, 55 Md. App. at 378).

Accordingly, we conclude that the circuit court abused its discretion in the valuation of the VW Touareg resulting in an inequitable monetary award. Thus, we vacate the judgment and remand for further consideration.

(E) The Attorney's Fees Granted To Sarah Hornbeck.

Following the circuit court's $7,000 monetary award to Sarah, it addressed Sarah's request for attorney's fees, awarding her $60,000. Specifically, the court stated:

> . . . . Okay. I think the attorneys [sic] fees is [sic] the last issue that I have to deal with.
>
> A lot has been made about the month of August and — excuse me. A lot has been made about the August, period of time between August the 1[st], and the time that the Protection Orders were sought. And so I'm going to address that when I'm looking at whether or not I'm going to require [Jeffrey] to pay any of the legal fees of [Sarah].
>
> And the testimony came out that there was an August the 1[st] incident. There was an August the 10[th] incident. [On A]ugust 1[st,] the police were called and some injury to [Jeffrey].
>
> [Sarah] filled out the document that indicated that she had been physically assaulted, and then changed her mind based on the police officer's assertion to her that an arrest would be imminent if in fact that happened.
>
> And she changed her mind and filled out a different document. Being an Ex-Domestic Violence Prosecutor, that doesn't sound strange to the Court at all, that a police officer would say that. I don't think that it's right, but they say it.
>
> And so I don't find that to be – and it doesn't surprise me that people do in fact change their minds. Sometimes immediately when it looks as though what they don't – can't imagine happening, is going to happen.
>
> And many people who call the police, and then once the police officers start to do what it is that they do,

and what they're ordered to do, mandated to do[,] people change their minds. Which is why it makes these situations very dangerous for police officers. It makes it very, very dangerous.

And so they allowed [Sarah] to opt out, by changing what her statement was. I'm looking for my statute, hold on for a second. On August the 10[th,] there was an incident that involved [Sarah] taking [Jeffrey's] phone, going to the very top floor, locking the door.

[Jeffrey] wanted to get in, get his phone, or get into her, it was not clear. [Jeffrey] then leaves. [Jeffrey] also called [Sarah's father] . . . [t]o see if he could call his daughter to get her to give him his phone back, and it was just a mess. A mess.

And I'm going to tell you, I've always learned that sometimes you keep people out of your marriage. Because what happens a lot of times, you all get other people mad at the other person. And you all go right back together again, and they're stuck with the emotion because they love you.

So sometimes you got to keep people out of it. But be that as it may, [Jeffrey] testified meaning – I'm sorry, [Sarah's father] testified that he was involved in the sense that he was getting phone calls from [Jeffrey].

And [Sarah's mother] testified getting calls from her daughter, as to the emotion that this particular night's incident caused. Which I believe[,] at that point[,] was probably when it dawned on [Sarah] that this was it. Meaning that things could not be repaired again. Because then it leads to the locks being changed.

[Jeffrey] not really staying in the home, but staying at – I want to say Dominic's house. I think I'm correct. But then I certainly did pay close attention to the legal bills that [Jeffrey] presented in his testimony that, this was in [Jeffrey's] head way before August 4[th].

Not long after the August 1[st] incident, [Jeffrey] puts things in motion. That he wanted out and I have to agree that a lot of it was calculated it was. You can't get around it. [Jeffrey] set it in motion, had communications with [his attorney], about protection orders, divorce, etc. [He d]id not mention a word to [Sarah].

And let me say this, I also know that I'm only being told a piece of this whole story. I do realize that there's a whole lot more that you all were communicating to each other that I'll never know. But what I do know [is] it sounds as though [Jeffrey] [w]as on his way to divorce, and did not share that.

At least did not articulate that to [Sarah]. And sort of, you know, kept up with the doctor's appointments, and the like. And[,] you know[,] planning out what lawyers do. **You are both lawyers. You know, we plan litigation.**

Thinking about litigation, you know, long before. That's why when things happen in your friends[']lives, they call you. They want to know how can I start this thing so it can look best for me? And I have to admit, when we get to the filing of the Protection Orders, both of – it just surprised this [c]ourt that both of you went on the same day and complained an incident that happened 20 some odd days earlier.

I read the text messages, or the e-mails from [Sarah] to [Jeffrey]. And when I read it it's not a text message that wife, I think[,] sends a husband. You were documenting. That's what lawyers do[. W]e document.

Because at that point, you had already come back from being denied a Protection Order in one of the e-mails, and it didn't look as thought it was something that, you know, you were just saying to him. Because you didn't say to him[, "]I went today to get a Protection Order. I don't want you around anymore.["]

It was, you know, very detailed so that just in case it ended up that it'd have to be in [c]ourt. That's my

opinion, we'd do it that way. But I don't believe that [Sarah] – [Sarah] put this in motion. So[,] the [c]ourt has to look at, when I'm looking at [c]ounsel fees is the reasonableness of the fees.

I have to look at the financial resources and financial needs of both of the parties. And whether there was substantial justification for prosecuting and/or defending the proceedings.

And I'm looking at 11-110 in the Family Article. And if there's absence of justification[, i]f I find that there is an absence of justification for prosecuting or defending, or good cause to the contrary, the [c]ourt can award to the other party the reasonable and necessary expenses.

Perhaps had someone at some point, and I'm saying [Jeffrey] been honest and said, [" Y]ou know what[,] I don't want to be in this marriage anymore. I want out.["] You all could've come to some kind of agreement.

But what happens[? Jeffrey], when you look back in hindsight, as I'm sure [Sarah] did, it looks like you had already planned it. And everything else after that looked very contrived.

And so it sort of put her in a position where she had to defend herself legally. Because you were drumming up all of the ammunition that you could drum up. You were getting, you know, getting your lawyers lined up. Trying to get the psychiatrist, psychologist, whoever lined up.

You all went to a session together. Something happened in that session, and I'm not even privileged, not even allowed to know, but I know something happened that would send both of you not long after that to the courthouse. One going in one direction, and one going in the other.

But I believe that's when the rubber met the road was inside of that session, that none of us will ever know sort of what happened. Perhaps it did come out that it was already set up, I don't know.

But when looking at the records, [Jeffrey], set it up. It didn't have to get this far. I'll look at the – again, I'll go back to the number of requests that were made for documents. That had to be made for documents.

There was a question about whether or not the surveillance, or there was an argument that they were trying to catch [Jeffrey] doing something. And[,] again, that's distrust. But also, you didn't leave much trust left after you've done this to [Sarah].

And you know, you got to see what you can get to defend your case. So I don't think that they were unreasonable things that she did. And building the expense that you built I would say that.

The [c]ourt sanctioned [Jeffrey], because of the failure to comply with discovery. Although during trial, no one asked this [c]ourt to enforce the sanction, and they didn't. And to their credit they did not ask that, but it didn't get over me that there had to be not only an [o]rder to [c]ompel, and that didn't do it.

And then there had to be a sanction. So now I have to figure out the sanction and attorney's fees. Because I believe that there was information that was purposefully kept from this litigation. It didn't have to be.

If you don't have anything to hide, bring it forward. So I'm not sure what's out there, but I'm going to certainly have to, again do what I believe is equitable. [Sarah's] finances are way, way lower. Meaning income and finances way, way lower than [Jeffrey's].

[Jeffrey] makes a tremendous amount of money comparatively speaking to [Sarah]. The [c]ourt is going to order based on that, that [Sarah] was[,] in fact[,] justified in defending the proceedings the way in which she did. And I'm going to order [Jeffrey] to pay a portion of the attorneys fees for [Sarah].

The court is going to require you, sir, to foot $60,000 of this bill.

> **And that is to be paid directly to the attorneys, to [the firm of Sarah's attorney].**

(emphasis added).

Following the entry of the circuit court's final order correlative to its oral opinion, Jeffrey filed within his petition for rehearing an argument that the circuit court had abused its discretion in awarding $60,000 in attorney's fees, noting that "the amount of attorney's fees far exceeded the amount in controversy." The court denied Jeffrey's request to alter or amend its previous award of attorney's fees, stating within its memorandum and opinion of March 30, 2012:

> The court did not err when it awarded attorney's fees to the [Sarah]. [Jeffrey] request that the judgment be amended to reduce or abate the counsel fees. [Jeffrey] argues that the court erred in ordering [him] to pay $60,000 as contribution to [Sarah's] counsel fees. The court denies this request.
>
> **The court[,] in determining whether to award [Sarah's] request for counsel fees[,] is bound by the factors outlined in Fam. Law. § 12-203. This court considered the financial circumstances of each party and the[n] considered [Sarah's] justification for defending and bringing her claim. [Jeffrey's] obstructionist behavior throughout the entire case from its inception weighed heavily in the court[']s consideration of [Sarah's] justification for defending and bringing her claim.**
>
> **[Jeffrey] failed to challenge the counsel fees at trial. [Jeffrey] also argues that he is unable to pay the required amount and should not be forced to go into debt to pay [Sarah's] counsel fees.** [Jeffrey] compares this case to a contempt hearing standard. This is not a contempt hearing[,] and[,] therefore[, Jeffrey] uses the incorrect standard. The court carefully weighed the factors and determined [Jeffrey's] contribution to [Sarah's] counsel fees to be [$]60,000.

(emphasis added).

Before this Court, Jeffrey's final assignment of error is that the circuit court erred in awarding Sarah $60,000 in attorney's fees. Specifically, he asserts that the trial court's award of attorney's fees was unreasonable because "[t]he trial court did not properly analyze and explain the financial status and needs of each party." Therefore, he attests that the trial court's simple statement that Jeffrey makes "a lot more money" than Sarah is an inadequate analysis of the financial status of each party, the needs of each party, and whether there was substantial justification for bringing, maintaining, or defending the proceeding. See Md. Code (1999, 2012 Repl. Vol.), §§ 7-107(c) & (d) of the Family Law Article; Md. Code (1984, 2012 Repl. Vol.), § 13-203(b) of the Family Law Article. In sum, Jeffrey contends that the circuit court misapplied the statutory criteria for awarding attorney's fees. We agree.

Although the circuit court is vested with a high degree of discretion in making an award of attorney's fees, *Lieberman v. Lieberman*, 81 Md. App. 575, 600 (1990), the trial judge must "**consider and balance**," *Bagley v. Bagley*, 98 Md. App. 18, 39 (1993) (emphasis added), the required considerations as articulated by the General Assembly in Sections 7-107(c) and 12-203(b) of the Family Law Article, which provide consideration of "(a) the financial status of both parties, (b) their respective needs, and (c) whether there was substantial justification for instituting or defending the proceeding." *Holston v. Holston*, 58 Md. App. 308, 325 (1984); *Bagley*, 98 Md. App. at 40. *See* Md. Code (1999, 2012 Repl. Vol.), §§ 7-107(c) & 12-203(b) of the Family Law Article. As a consequence, "[t]he [trial court] necessarily [must] consider the financial status of both parties and their respective needs in [its] award of alimony." *Holston*, 58 Md. App. at 325. Section 7-107 provides that the circuit court may order one party to pay the other a "'reasonable' amount for 'reasonable' and 'necessary' expenses," *id.* at 326, including: (1) suit money; (2) counsel fees; and (3) costs. Md. Code (1999, 2012 Repl. Vol.), § 7-107(a) of the Family Law Article.

It appears from the record that the circuit court did not satisfactorily consider the financial status and needs of Jeffrey. Certainly, the court's bald statement that Jeffrey earns "a tremendous amount of money" compared to Sarah is insufficient. As discussed in Parts II(b) and II(d)(2), *supra*, Jeffrey was erroneously ordered to pay support on an unrealized amount of income and a miscalculated $7,000 monetary award. Jeffrey's own financial statement admitted during the divorce proceedings demonstrated a deficit each month. Further Sarah acknowledged through the parties' Joint Property Statement that Jeffrey did not maintain sufficient assets to cover the marital debt and his attorneys fees much less an additional $60,000 in counsel fees for Sarah's attorney.

We conclude that, even though there may be basis for an award of some counsel fees and costs

pursuant to the rule, an award of $60,000 in attorneys fees is, on this record, arbitrary and clearly wrong. *Miller v. Miller*, 70 Md. App. 1, 12–13 (1987) (citation omitted). We accordingly vacate the judgment. Upon remand, the circuit court should consider whether Sarah is entitled to a contribution toward her attorney's fees once a decision regarding the issue of a monetary award is rendered. *See, e.g., Doser v. Doser*, 106 Md. App. 329, 335–36 n.1 (1995); *Kelly v. Kelly*, 153 Md. App. 260, 280 (2003) (remanding an award of attorney's fees for further consideration subsequent to this Court's decision to remand the case for reconsideration of a monetary award and on the issue of whether alimony should be ordered). *See also Alston v. Alston*, 331 Md. 496, 509 (1993) (remanding alimony issue upon reversal of monetary award); *Randolph v. Randolph,* 67 Md. App. 577, 589 (1986) (vacating monetary award in light of reversal of counsel fees, and vacating alimony for reconsideration in light of new monetary award).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED IN PART AND VACATED IN PART. CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. Sarah Reichert, appellee, has been referred to throughout the course of proceedings as both Sarah Reichert and Sarah Hornbeck. At the close of the proceedings below, appellee's name was restored to her maiden status: Sarah Hornbeck. As a consequence, for the purposes of this appeal, appellee shall be referred to by her maiden name, Sarah Hornbeck, throughout the opinion.

2. Section 7-103, entitled, "Absolute divorce," in relevant part, provides:

> (a) Grounds for absolute divorce. – the court may decree an absolute divorce on the following ground[ ]:
>
> * * *
>
> (4) 12-month separation, when the parties have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce[.]

Md. Code (1984, 2012 Repl. Vol.), § 7-103(a)(4) of the Family Law Article.

3. Jeffrey noted an appeal after the circuit court's written opinion of March 30, 2012. He also noted an appeal after the denial of Sarah's request for attorney's fees.

4. In his brief, Jeffrey Reichert presented the following five questions for our review:

> 1. Did the trial court err in its findings regarding Reichert's income when it calculated child support?
>
> 2. Did the trial court abuse its discretion regarding the tax exemption for the parties' minor child?
>
> 3. Did the trial court abuse its discretion in awarding Hornbeck $60,000 in attorney's fees?
>
> 4. Did the trial court err when it granted Hornbeck a monetary award?
>
> 5. Did the trial court abuse its discretion when it ordered joint legal custody of the minor child but with tie breaking authority to Hornbeck?

In Sarah Hornbeck's cross-appellate brief, she presented one additional question for our review:

> I. Did the trial court abuse its discretion when it ordered joint physical custody of the minor child?

5. Jeffrey was born on April 2, 1973.

6. Sarah was born on July 13, 1974.

7. Pyloric stenosis is a condition affecting the opening (pylorus) between the stomach and the small intestine. *See* Pyloric Stenosis, Definition, http://www.mayoclinic.com/health/pyloric-stenosis/DS00815 (last visited Feb. 5, 2013) When the condition occurs, "the pylorus muscles thicken, blocking food from entering the baby's small intestine." *Id.* Symptoms usually include: vomiting after meals that usually occurs after three weeks of age, but may occur at anytime between one week and five months of age. *See* Pediatric Surgery Health Topics, Pyloric Stenosis, http://www.hopkinschildrens.org/pyloric-stenosis.aspx (last visited Feb. 5, 2013). The vomiting is forceful and usually has the appearance of partially digested milk. *Id*.

8. *See* note 2, *supra*.

9. Section 2, subsection (l) of the Allegis Group Incentive Plan, entitled,

"DEFINITIONS," specifically provides:

> (1) "Incentive Investment Unit" or Unit" shall mean, as the context requires, either the total number of incentive investment units with respect to which Participants are eligible to earn the right to receive payment in accordance with the terms and conditions of the Plan, or, in he case of any particular Participant, the number of incentive investment units with respect to which such Participant can earn the right to receive payment in accordance with the terms and conditions of the Plan[.]

10. Rule 5-702, entitled, "Testimony by experts," provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the

evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702.

11. We caution, however, that the party seeking to exclude the unrealized or pass-through income still bears the burden of persuasion as to why the court should disregard the information provided within his or her income tax documentation in calculating child support.

12. Because we recognize that "[f]or income from self-employment, rent, royalties, proprietorship of a business or joint ownership of a partnership or closely held corporation, 'actual income' means gross receipts minus ordinary and necessary expenses required to produce [that] income," Md. Code (1991, 2012 Repl. Vol.), § 12-201(b)(2) of the Family Law Article, we further conclude that it was error for the circuit court to calculate Jeffrey's child support obligations by including the gross rent he received for his condominium without subtracting "ordinary and necessary expenses required to produce [that] income[.]" *See id.* § 12-201(b)(2).

13. Section 12-204(m) provides:

> (m) Shared physical custody cases. – (1) In cases of shared physical custody, the adjusted basic child support obligation shall first be divided between the parents in proportion to their respective adjusted actual incomes.
>
> (2) Each parent's share of the adjusted basic child support obligation shall then be multiplied by the percentage of time the child or children spend with the other parent to determine the theoretical basic child support obligations owed to the other parent.
>
> (3) Subject to the provisions of paragraphs (4) and (5) of this subsection, the parent owing the greater amount under paragraph (2) of this subsection shall owe the difference in the 2 amounts as child support.
>
> (4) In addition to the amount of the child support owed under paragraph (3) of this subsection, if either parent incurs child care expenses under subsection (g) of this section, health insurance expenses under subsection (h)(1) of this section, extraordinary medical expenses under subsection (h)(2) of this section, or additional expenses under subsection (i) of this section, the expense shall be divided between the parents in proportion to their respective adjusted actual incomes. The parent not incurring the expense shall pay that parent's proportionate share to:
>
> (i) the parent making direct payments to the provider of the service; or
>
> (ii) the provider directly, if a court order requires direct payments to the provider.
>
> (5) The amount owed under paragraph (3) of this subsection may not exceed the amount that would be owed under subsection (l) [which apply to cases other than shared physical custody cases] of this section.

Md. Code (1991, 2012 Repl. Vol.), § 12-204(m) of the Family Law Article. *See* Part II(C), *infra*, for further discussion of Section 12-204(m)'s relation to an allocation of a tax dependency exemption when the parents share physical custody of the minor child.

14. Section 152(c) of the Internal Revenue Code states that a "[q]ualifying child[, f]or the purposes of this section," means:

> (1) In general. The term "qualifying child" means, with respect to any taxpayer for any taxable year, an individual –
>
> (A) who bears a relationship to the taxpayer described in paragraph (2) [meaning, if the individual is the child of the taxpayer or the descendant of such a child, or a brother, sister, stepbrother, or stepsister of the taxpayer or descendant of any such relative. *See* 26 U.S.C. § 152(c)(2), *et seq*.]
>
> (B) who has the same principal place of abode as the tax payer for more than one-half of such taxable year,
>
> (C) who meets the age requirements of paragraph (3) [requiring that the individual is younger than the taxpayer claiming such individual as a qualifying child and has not attained the age of nineteen as of the close of the calendar year in which the taxable year of the taxpayer begins, or is a student who has not attained the age of twenty-four as of the close of such calendar year. *See* 26 U.S.C. § 152(c)(3) *et seq*.]
>
> (D) who has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins, and
>
> (E) who has not filed a joint return (other than only for a claim or refund) with the individual's spouse under section 6013 [26 U.S.C. § 6013] for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.

15. *See* note 14, *supra*.

16. Section 152(c)(4), provides the "[s]pecial rule relating to 2 or more who can claim the same qualifying child," specifically providing:

> (A) In general. Except as provided in subparagraphs (B) and (C), if (but for this

paragraph) an individual may be claimed as a qualifying child by 2 or more taxpayers for a taxable year beginning in the same calendar year, such individual shall be treated as the qualifying child of the taxpayer who is –

(i) a parent of the individual, or

(ii) if clause (i) does not apply, the taxpayer with the highest adjusted gross income for such taxable year.

(B) More than 1 parent claiming qualifying child. If the parents claiming any qualifying child do not file a joint return together, such child shall be treated as the qualifying child of –

(i) the parent with whom the child resided for the longest period of time during the taxable year, or

(ii) if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income.

(C) No parent claiming qualifying child. If the parents of an individual may claim such individual as a qualifying child but no parent so claims the individual, such individual may be claimed as the qualifying child of another taxpayer but only if the adjusted gross income of such taxpayer is higher than the highest adjusted gross income of any parent of the individual.

26 U.S.C. §152(c)(4) (2008).

17. Section 152(d)(1)(C) provides that a qualifying relative is an individual "with respect to whom the taxpayer provides over one-half of the individual's support for the calendar year in which such taxable year begins. . . ." 26 U.S.C. § 152(d)(1)(C) (2008).

18. Section 152(e)(4) defines the terms provided in Sections 152(e), and specifically states:

(4) Custodial parent and noncustodial parent. For the purposes of this subsection –

(A) Custodial parent. The term "custodial parent" means the parent having custody for the greater portion of the calendar year.

(B) Noncustodial parent. The term "noncustodial parent" mans the parent who is not the custodial parent.

26 U.S.C. § 152(e)(4) (2008).

19. The Legislative History of the Deficit Reduction Act (Pub.L. No. 98-369 reported in H.R.Rep. No. 432, Part II, 98th Cong., 2d *Sess., reprinted in* the 1984 *U.S. Code Cong. & Admin.News* 697, 1140, gives as the "[r]easons for [c]hange[:]"

The present rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds. The cost to the parties and the Government to resolve these disputes is relatively high and the Government generally has little tax revenue at stake in the outcome. **The committee wishes to provide more certainty by allowing the custodial spouse the exemption unless that spouse waives his or her right to claim the exemption.** Thus, dependency disputes between partners will be resolved without the involvement of the Internal Revenue Service.

Id. (emphasis added), *quoted in Wassif*, 77 Md. App. at 760.

20. Specifically, we observed:

[o]ther courts have similarly held that state court allocation of the exemption to a non[-]custodial parent does not interfere with Congressional intent. *See Pergolski v. Pergolski*, 143 Wis.2d 166, 420 N.W.2d 414 (1988); *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13 (1987); *Fudenberg v. Molstad,* 390 N.W.2d 19 (Minn.[Ct.] App. 1986). *But see Gerardy v. Gerardy*, 406 N.W.2d 10 (Minn. [Ct.] App. 1987); and *Theroux v. Boehmler*, 410 N.W.2d 354 (Minn. [Ct.] App. 1987). *Contra Lorenz v. Lorenz*, 166 Mich. App. 58, 419 N.W.2d 770 (1988); *Davis v. Fair*, 707 S.W.2d 711 (Tex. App. 1986).

Wassif, 77 Md. App. at 761.

21. Admittedly, as we noted in *Wassif, supra*, 77 Md. App. at 759–60, Section 152(e) of the Internal Revenue Code fails to even address with specificity the permissibility of any allocation.

22. Concluding that the trial court properly exercised its discretion to allocate the tax exemption to the **primary custodian** of the minor child, the Indiana Second District Court of Appeals premised its decision in *Glover* on five enumerated factors within Indiana Child Support Guideline 6. The intermediate appellate court found that the trial court considered the five factors, which provide:

In determining when to order a release of exemptions, it is recommended that at a minimum the following facts be considered:

(1) the value of the exemption at the marginal tax rate of each parent;

(2) the income of each parent;

(3) the age of the child(ren) and how long the exemption will be available;

(4) the percentage of the cost of supporting the child(ren) borne by each parent; and

(5) the financial burden assumed by each parent under the property settlement in the case.

Glover, 723 N.E.2d at 938.

> Nonetheless, the court recognized that the "discretionary authority to order the custodial parent to sign a waiver of her [or his] presumed right to claim a child as dependent for income tax purposes[,]" should be guided primarily by the goal of making the maximum amount of support available to the minor child. *Cf. id.* (citing *In re H.M.H.*, 691 N.E.2d 1308, 1309 (1988)). *See also In re Ritchey*, 556 N.E.2d 1376, 1379 (1990) (concluding a trial court maintains "equitable jurisdiction to consider the respective tax burdens of custodial and non[-]custodial parents and, in a proper case, to order a custodial parent to sign a waiver of a dependency exemption," and that such authority does not contravene 26 U.S.C. § 152(e)).

Cite as 5 MFLM Supp. 47 (2013)

Child support and custody: modification: best interest of child

Janvier Richards
v.
Edward Burke

No. 0565, September Term, 2012

Argued Before: Wright, Matricciani, Rodowsky, Lawrence F. (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: March 8, 2013. Unreported.

The trial court did not abuse its discretion in finding that it was in the child's best interest to continue the joint custody agreement, under which both parties were charged generally with supporting the child, and in rejecting the mother's petition for sole custody and child support.

Appellant, Janvier Richards ("Mother"), and appellee, Edward Burke ("Father"), were never married. Together they are the parents of one child, Miles Edward Frederick Burke, who was born on January 8, 2004. On December 29, 2008, Mother filed a complaint in the Circuit Court for Prince George's County seeking full custody of Miles, visitation rights for Father, and an award of child support. On July 20, 2009, Father responded that he would like the court to order the parties' Agreement for Shared Custody ("agreement") to be enforced and filed a counterclaim seeking full custody of Miles. After a hearing, on September 29, 2009, the circuit court ordered that all terms and provisions of the agreement were approved and incorporated by reference, but not merged, and that the parties were charged generally with the support of Miles.

On June 6, 2011, Mother filed a petition to modify custody in which she requested sole physical custody of Miles, visitation for Father, and a change in child support. In his response filed on February 12, 2012, Father requested dismissal of Mother's petition and filed a counter-petition seeking full custody of Miles, visitation for Mother, and a change in child support.

A hearing on the pending motions was held on May 3, 2012, at which time Mother was represented by counsel and Father appeared *pro se*. The issues

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before the court included physical custody, legal custody, child support, and Father's motion for dependency exemption. The court, *inter alia*, denied both parties' requests for modification of custody, as well as Mother's petition for child support, ordering that Mother and Father "are charged generally with the support of the minor child[,]" and that all terms and provisions of the agreement would remain in effect. This timely appeal followed.

Mother presents two questions for our review, which we have reworded as follows:[1]

1. Did the circuit court err in denying Mother's motion to modify child support by failing to follow the Maryland Child Support Guidelines?
2. Did the circuit court abuse its discretion in denying Mother's motion to modify physical custody because the decision was based on clearly erroneous evidence that did not support its finding?

For the reasons discussed below, we find no error or abuse of discretion and affirm the judgment of the circuit court.

Facts and Procedural History

Miles was born on January 8, 2004. Shortly before his fifth birthday, Mother filed her initial *pro se* complaint seeking full custody and child support. At the hearing currently on appeal before this Court, Mother testified that her reason for filing the initial complaint was that she and Father were not "sticking to the schedule that we had set forth between the both of us." Before filing a response, Father contacted Miles's godparent who is Mother's older cousin. Mother testified: "My cousin called me and said, listen, let's all sit down together. Let's talk about it. It's better if the parents work it out among themselves." During a coffee shop meeting, Mother and Father each expressed their concerns and limitations and, in a joint effort, they reached an agreement. After the meeting, the parties signed the following document on April 22, 2009:

AGREEMENT FOR SHARED CUSTODY of Miles E.N.F. Burke

In an attempt to provide for the best interest of our son Miles, Janvier Richards (mother) and Edward Burke (father) voluntarily enter into the following agreement.

Residence – Miles will have his own room at the following homes

Miles will reside with [Mother] at 1101 Kathryn Road, Silver Spring, MD 20904.

Miles will reside with [Father] at 3800 Winchester Lane, Bowie, MD 20715.

Clothing

We would each individually provide clothing and school uniforms for Miles.

Schedule

On alternating weeks in each month, [Mother] will pick up Miles from daycare/school Monday to Thursday before it closes with [Father] picking him up from daycare/school for the weekend on Friday before it closes and return him to school on Monday.

On alternating weekends when [Mother] has Miles, [Father] will pick him up from daycare/school before it closes on (Tuesday, Wednesday).

Whichever party is late picking Miles up from school/daycare on their day will pay the late fee charges associated with school/daycare rules and regulations.

Whichever party calls the other late to pick Miles up for them, the party that was supposed to pick Miles up will pay the late fee charge associated with the pickup time.

Food

We will each individually provide food and shelter for Miles during the time he is residing with parent.

Medical

[Father] has agreed that Miles will remain fully on his medical plan. This plan provides full coverage for dental care, Opticians, doctor's appointments in AETNA network as well as emergency medical care.

We agree to consult each other frequently by telephone, in person or by correspondence to mutually agree as to the general health and welfare, education and development of Miles. Both of us shall have access to medical and school records.

In the case of extreme medical emergency either parent can authorize treatment without the other being present or without their consent.

Daycare

Daycare/School fees will be split 50/50 between [Mother] and [Father]. [Father] has volunteered that if and when he has additional funds it will be given to Miles.

Holidays

[Mother] and [Father] will alternate major holidays every year. (Thanksgiving, Christmas, New Year). If [Father] or [Mother] would like to switch a particular holiday, this would have to be agreed by the party who's [sic] holiday it is. That party does not have to comply.

Vacations – Out of State and Overseas

[Mother] or [Father] will agree by written consent if either party plans to take Miles on vacation out of state or overseas. Each party has to give destination address and phone numbers of where Miles will be.

School

[Mother] and [Father] both have to be in agreement with Elementary, Middle, High School and University Miles attends. Any costs related to Miles school/after-care will be split 50/50 between both of us.

Moving

If either one of us moves in State we both have to notify each other of this and update any personal contact details accordingly.

On May 26, 2009, Mother filed a request that the agreement be filed with the court, noting that both parents "have sat down & worked out an agreement for child." After notification from the court that Father had not filed a response, Mother filed a request for order of default. Father filed a response and counterclaim seeking that custody be awarded in accordance with the agreement. Father also requested that the court schedule a hearing.

A hearing was held on September 10, 2009. The

master ordered that "all of the terms and provisions of the parties' Agreement for Shared Custody . . . be and hereby are approved by the Court and incorporated (but not merged) herein by reference," and that the parties "be and hereby are charged generally with the support of the minor child[.]" The parties' agreement was in effect for the next several months without any need for further intervention from the courts.

Miles's parents were raised in different countries — Mother is from Liberia and Father is from Great Britain — and both parents are living in America on visas. Since August 2011, Mother has worked at the Bellamy Family Dentistry in Crofton. In 2010, Father left his job at the British Embassy but, before he could begin his new job, he had to return to England to get a work visa. However, what Father believed would take three weeks took longer and resulted in him being "stuck there" for five months unable to find work. Father testified that, because he wished to maintain interaction with Miles, he called every day during that time period, a fact which Mother confirmed.

After returning to Maryland, Father began his new job at the Smithsonian National Museum of African Art ("Smithsonian") in Washington, D.C. During 2011, he had a difficult work schedule and problems often arose between him and Mother regarding the schedule for Miles. When Father's mother passed away, he returned to England, and Mother acted as sole custodian of Miles.

On June 6, 2011, Mother filed a petition to modify custody and for change in child support. Father responded with a request for dismissal and counter-petition for full custody.[2] Mother responded, and a hearing was set for May 3, 2012.

During the hearing, each party testified that the other was a good, loving parent, and each wanted the other in Miles's life. For example, each parent would always ensure that Miles had a gift for the other parent at holidays and birthdays, and Father has taken Miles to visit his family in England, to which Mother agreed. Mother testified: "A child needs both parents[,]" each of whom interacts very differently in the life of Miles. "[I]t's never been about [Father's] involvement with him. It's been about the scheduling and the fact that it's not consistent. . . . Again, I'm not asking [Father] not to be involved in his life." In Mother's words: "[T]he schedule is fine as it is. As long as he can stick with it, it's fine."

Each party called a single witness. Mother called her cousin, Weahde Weefur Greaves, Miles's godparent. Greaves testified that Mother was a "great mother," but Father had cancelled or been late to visitations. When asked when Father had been unreliable in picking up Miles, Greaves admitted that she could not recall any recent incidents, and could only remember ones that were "[a] year or so ago[.]"

Father's witness was his fiancé, Heather Joy Thompson. A former school teacher, Thompson testified that "Miles has only ever expressed to me love and admiration for both [Father] and his mother. . . . He adores his mom. He has been very clear about that. He adores [Father]. He has that kind of light up, the look in his eye, whenever he sees [Father]." Whereas Mother was stronger in Miles's spiritual development, Father was important to all other areas of his development and was very involved in his life in a day-to-day basis. Miles did not testify, and no counsel appeared on behalf of the child.

After hearing testimony from both Mother and Father, the court stated it was using "its common sense and everyday experience" in the drawing of reasonable inferences from the evidence presented at trial. Based on the totality of the evidence, the court made its findings of fact as to what would be in the best interest of Miles. In doing so, the court recognized its need to review each of the several factors set forth in *Taylor v. Taylor*, 306 Md. 290, 307-11 (1986), which sets forth the relevant factors in a case involving joint custody.

The court stated that, unless presented with evidence to the contrary, it would assume each parent was acting in the best interests of the child, and that the court tended to prefer that both parents be involved in a child's life. Prior to reviewing the factors set forth in *Taylor*, the court stated:

> [T]he Court is only concerned about Miles' life, not necessarily the life of the parents. Because when you decide to bring a child into this world, that child's well being is paramount. It may be inconvenient for a parent to have to do certain things, even though it may be in the best interests of the child, but that inconvenience to the parents in no way overrides that what must be done and shall be done in the best interests of the child. So the Court is only concerned about Miles here.

As to each of the factors, the court made the following general findings of fact, which we summarize:

Capacity of parents to communicate and reach shared decisions. In 2009, the parties came to an agreement, without assistance of the court, to work together in Miles's best interest and are still able to communicate and reach shared decisions affecting his welfare. Mother's primary complaint is that Father had been failing to adhere to the schedule set forth in the agreement. However, the court found circumstances have changed in that Father is now working for the Smithsonian in a secure position, and that he has

been able to better adhere to the schedule that the parties established in 2009. The court found that the parties have the capacity to communicate and reach shared decisions respecting the child's welfare.

Willingness of parents to share custody. Outside of Mother's complaints regarding Father's adhering to the schedule, there was no indication of any problem sharing custody.

Fitness of the parents. Both parents are fit and proper to raise Miles. Each parent gives him their own unique gifts and experiences to make him a whole person, and it appears that Miles is a well-adjusted child who is currently on the honor roll at school.

Preference of the child. Because Miles did not testify, the court found there was "really no evidence" as to his preference.

Potential disruption of the child's social and school life. Mother lives in Laurel, Maryland, and Father lives in Bowie, Maryland, directly across the street from Miles's school. The least amount of disruption to Miles and his current life would be for him to remain in his current situation, in which he shares his time between the homes of both Mother and Father.

Geographic proximity of parental homes. Although there was no testimony regarding the distance between their homes in Laurel and Bowie, it is probably no more than 30 minutes away, which is not oppressive, and close enough in proximity.

Demands of parental employment. Mother's employment seems to be flexible, and Father's employment seems to have stabilized and his work schedule is flexible. In the future, there may be instances where Father will have to travel or go to functions at night, and he will have to find other people to watch Miles. It is assumed that a fit and proper parent acts in the best interest of their children and will be able to do so.

Sincerity of the parents' request. Mother is requesting sole custody because Father is not adhering to the schedule, and she alleges that it is disruptive to Miles. The court viewed her allegation with a questionable eye in light of Miles's success in school. Father admits that he is not seeking sole custody but wants to retain joint custody and expand the time with Miles, given that the minor will soon be in his teens. As an African American male, increased involvement by Father, who is British, can only enhance Miles's progression into his teenage and adult years, so the court finds it to be sincere. There are also things that only Mother, an African woman, can give Miles. These factors strengthen the court's resolve that a joint custody arrangement is the best for Miles's interests.

Financial status of the parties. Both parents have the means by which to provide for Miles financially, and both parties do care for Miles when he is with each of them. Father earns over $60,000.00, and Mother also has the financial means to support Miles.

Impact on state and federal assistance. This is not an issue in the current case.

Benefit of the parents. For parents, seeing your child grow into a positive, contributing member of society is one of the greatest joys. The court clearly sees that both parents love him dearly and put his own interests before their own, so keeping Miles in both parents' lives is a great benefit and will make them each better parents.

Other factors in this case. Circumstances had changed given that Father is now engaged to be married, and the court hoped that Mother and Father understood that personal feelings had to be put aside because people move on with their lives and become involved with other persons. Fortunately, an incident at Miles's eighth birthday party did not escalate into something larger.[3] Father said he trusts the judgment of Mother, and that it is a two-way street.

In sum, the court stated:

> And so, given that [Mother) feels that [Father] is a good father and testified as to that, and [Father] testified that [Mother] is a wonderful mother, you have to remember that and trust each other's judgment.
>
> So the Court has gone through the factors and, based upon the factors, the **Court finds, in the totality of the evidence . . . that it is in the best interests of Miles for the parties to have joint custody of him.**

(Emphasis added). The court concluded by denying both Mother's and Father's motions to modify custody.

As to Father's motion for a dependency exemption, the court found that Father has been maintaining health insurance for Miles since he was born, and ordered that Father would be able to claim him for tax purposes in odd years, and in even years, Mother could claim Miles on her tax return.

As to the parties' request for child support, the court ruled that the current situation, in which each parent fully provides for Miles when he is in their care, continues to work well:

> Again, if ever there was a joint custody case, I think this is a joint custody case. It's beneficial for Miles. He's doing well. And you're very blessed to have that in this day and age. And so I'm not going — the Court is not going to upset that apple cart to that extent.[4]

Counsel for Mother then asked the court, "did you run guidelines or are you just denying child support?" The

court responded as follows:

> I am denying child support in that I think it's in the best interests of Miles to remain the child support the way it is. [Mother]'s testimony essentially was, since she is seeking sole custody, she feels that she needs additional support. But I'm not changing the custody and access arrangement. Each party shall be charged generally with supplying the needs for Miles when they are in his care and beyond.

In addition, the court ruled that it would be beneficial for Miles to see Liberia with Mother, so Father must cooperate in obtaining a new passport for Miles. Other issues were to be worked out between Mother and Father, although the court did review recommended protocol regarding Father's upcoming wedding.

In the court's written order, dated May 9, 2012, the court denied each party's motion to modify custody and denied Mother's motion to modify child support but granted Father's motion to modify child support.[5] The court ordered that the agreement continued to remain in full force and effect. In addition to the shared terms for the dependency exemption, the written order also memorialized the other issues ruled upon, discussed above.

DISCUSSION

Standard of Review

When reviewing cases in which a court decided whether to modify an order of child custody, this Court utilizes three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012) (citing *In re Yve S.*, 373 Md. 551, 586 (2003)). These standards involve a review of the findings of fact, the conclusions of law, and the determinations of the court as a whole. *In re Yve S.,* 373 Md. at 584-86. First, when reviewing factual findings, the clearly erroneous standard of Maryland Rule 8-131(c)[6] applies. *Gillespie*, 206 Md. App. at 170. Second, when reviewing conclusions of law, unless the error is determined to be harmless, further proceedings in the trial court will ordinarily be required. *Id*. Finally, when the appellate court views the ultimate conclusion of the court, this decision should be disturbed only if there has been a clear abuse of discretion. *Id*.

> We recognize that it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

Id. at 171 (citation omitted). It is well settled that the "exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *Stern v. Stern*, 58 Md. App. 280, 300-01 (1984) (quoting *Lapides v. Lapides*, 50 Md. App. 248, 254 (1981)).

I. The court erred did not err in denying child support to Mother.

Mother argues that the trial court erred in denying her motion to modify child support because it failed to calculate and, failed to award, child support pursuant to the Maryland Child Support Guidelines set forth in Md. Code (1984, 2006 Repl. Vol.), § 12- 201, *et seq*. of the Family Law Article ("FL"). Mother's brief, citing the court's reference to a "material change in circumstances" resulting from Father's upcoming marriage, concludes that the court erred by failing to deny Mother's motion for modification of child support, and argues that "[i]nstead of rubbber-stamping the parties agreement from 2009, the trial court should have calculated child support pursuant to the Guidelines as mandated by Maryland law." Father maintains that the trial court properly denied Mother's motion for child support, given that her modification request was contingent on the court granting her sole physical custody of Miles, and there was no evidence that such a modification would be in Miles's best interest.

As Mother correctly notes in her brief, FL § 12-104(a) provides that the "court may modify a child support award . . . upon a showing of a material change of circumstance." However, prior to the hearing before the court on May 3, 2012, no child support was being paid. Rather, pursuant to the agreement, each parent was "charged generally with the support of Miles." The only exception was for Miles's medical care, given that Father was responsible for maintaining the child's health insurance.

The parties' existing agreement is consistent with Maryland law, which provides that "parents of a minor child . . . (1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and (2) have the same powers and duties in relation to the child." FL § 5-203(b). *See Rand v. Rand*, 40 Md. App. 550, 554 (1978) (Child support "derives from the obligation of the parent to the child, not from one parent to another"); *Moore v. Tseronis*, 106 Md. App. 275,

281 (1995) ("It is well established in Maryland that parents have an obligation to support their minor children.") (citations omitted).

In reaching the decision not to change the existing order, in which each parent fully contributes to the life and development of Miles, the court noted that "if ever there was a joint custody case, I think this is a joint custody case . . . [and so] the Court is not going to upset that apple cart[.]" During the hearing, when Mother's counsel asked if she were asking for child support, Mother responded that it was based upon her request that Miles be with her on a full time basis: "Since I would like for him to be with me full time, I believe [Father] needs to help me take care of him." The request for sole custody was denied; accordingly, the request for child support was also denied.

The court found that because Mother and Father were each voluntarily contributing everything possible to help Miles as he grows, and all evidence indicated that Miles continued to improve as he grew older, it was in the best interests of Miles to maintain the parents' existing support system. Unlike many child support cases, in which one parent is attempting to bargain or waive away appropriate child support, *see, e.g.*, *Petitto v. Petitto*, 147 Md. App. 280, 303 (2002), Mother and Father each have Miles's interests as their top priority. A decision regarding modification of child support "is left to the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Moore*, 106 Md. App. at 281 (citations omitted). Because the record reveals that the circuit court neither erred nor abused its discretion, we affirm the court's denial of Mother's motion to modify child support.

II. The circuit court did not abuse its discretion in denying sole physical custody to Mother.

Mother argues that "the trial court abused its discretion in denying [Mother's] motion to modify physical custody because (a) it based its decision on clearly erroneous factual findings and (b) the evidence did not support a finding that the agreement for shared custody, dated April 22, 2009, should remain in effect." Father maintains that, "based on the evidence and facts deduced at trial, the trial court did not commit any error by denying [Mother's] and [Father's] respective positions to modify the custodial arrangement, as it was and is in the best interest of their minor child that the 2009 agreement memorializing the parties' intent to share physical and legal custody be maintained."

Mother's position on appeal is somewhat confusing, given that the record shows that during the hearing her testimony was that ". . . the schedule is fine as it is. As long as [Father] can stick with it, it's fine." Mother's brief explains that the circuit court erroneously concluded that the parents' schedule had been "working fine" since December 2011, despite the fact that Father again returned to England for a month, and despite the fact that Mother had been serving as Miles's primary custodian since 2009. The record reveals that Father returned to England for a month after his mother passed away, and that Mother was the sole custodian while Father was detained in England attempting to obtain his work visa. The court, recognizing that those issues had been legitimate problems, concluded that Father's job situation had since stabilized and his work schedule was more flexible and those issues had been resolved.

"[T]he authority to grant joint custody is an integral part of the broad and inherent authority of a court exercising its equitable powers to determine child custody." *Taylor*, 306 Md. at 298. In the cases where "joint custody has been appropriate, benefits have accrued not only to the child, but to the parents as well." *Id.* at 302. In the words of the Court of Appeals:

> We emphasize that in any child custody case, the paramount concern is the best interest of the child. As Judge Orth pointed out for the Court in *Ross v. Hoffman*, 280 Md. 172, 175 n.1, 372 A.2d 582 (1977), we have variously characterized this standard as being "of transcendent importance" and the "sole question." The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.

Id. at 303; *McCready v. McCready*, 323 Md. 476, 481 (1991); *see also Petrini v. Petrini*, 336 Md. 453, 468-69 (1994). "The question of whether to award joint custody is not considered in a vacuum, but as a part of the overall consideration of a custody dispute." *Taylor*, 306 Md. at 303.

In determining whether to modify the child custody arrangement between the parties, the court carefully reviewed the evidence in light of factors set forth in *Taylor,* 306 Md. at 307-11. After reviewing its findings, the court determined that it would be in the best interest of Miles, an eight-year old boy, to remain in a joint custody arrangement and spend time with both his mother and his father.

Trial courts are endowed with great discretion in making decisions concerning the best interest of a child. *Petrini*, 336 Md. at 470. The trial court has the ability to observe the demeanor and credibility of all witnesses and its findings will only be disturbed if there has been a clear abuse of discretion. *Id.* Finding no such abuse of discretion, we affirm the circuit

court's denial of Mother's motion to modify physical custody.

For all of the foregoing reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Mother presented the following questions in her brief:

> 1. Did the trial court err in denying appellant's motion to modify child support because (a) it failed to calculate child support pursuant to the Maryland child support guidelines, and (b) it failed to award appellant child support pursuant to the Maryland child support guidelines.
> 2. Did the trial court abuse its discretion in denying appellant's motion to modify physical custody because (a) it based its decision on clearly erroneous factual findings and because (b) the evidence did not support a finding that the agreement for shared custody, dated April 22, 2009, should remain in effect.

2. In his response, Father compared his home with Mother's, and emphasized that he "can provide the continuity, stability, support and love that [Miles] needs to reach his fullest potential," whereas Mother "has provided an unfit home environment due to a seemingly endless cycle of moving from home to home and switching from job to job. She lacks the stability and consistence every child needs in order to thrive . . . . In contrast, I have owned and lived in the same home for the last six years. . . ."

3. After Father brought his fiancé, Thompson, as an uninvited guest to the party, Mother asked her to leave and they engaged in an argument of some sort. Father ended up leaving with Thompson. Fortunately, Miles did not witness the dispute.

4. "Upset the apple cart" is a figure of speech meaning "to mess up or ruin something." www.thefreedictionary.com (Last visited on February 27, 2013).

5. This line of the order, unless referring to the motion for dependency exemption, was apparently entered in error.

6. Maryland Rule 8-131(c) states:

> **Action tried without a jury.** When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

NO TEXT

Cite as 5 MFLM Supp. 55 (2013)

Visitation: authorization to obtain a child's passport: best interest of the child

Bertha Angeles

v.

Mario Zamora

No. 0664, September Term, 2012

Argued Before: Eyler, Deborah S., Hotten, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 8, 2013. Unreported.

The trial court should have granted the mother's motion for authorization to obtain her child's passport and to travel with the child to Mexico to visit with her family, as the court's conclusion that she would not return to the United States rested on at least one clearly erroneous finding of fact and was not otherwise supported by the evidence.

On February 2, 2012, at a *pendente lite* custody hearing in their divorce case in the Circuit Court for Baltimore County, Bertha Angeles ("Mother"), the appellant, and Mario Zamora ("Father"), the appellee, reached an agreement concerning custody and visitation of their child, Erick. The agreement provided for joint legal and shared physical custody and for two weeks per year of vacation time for each parent with Erick. The agreement also provided that neither parent would travel with Erick to any location outside of Maryland and states adjoining Maryland without the consent of the other parent or permission of the court. The issue of travel outside Maryland and its adjoining states was reserved for future decision. A consent order memorializing the agreement was entered on March 8, 2012.

In the meantime, on March 1, 2012, Mother filed a "Motion for Authorization to Obtain Minor Child's Passport and for Permission to Travel to Mexico with Minor Child and for other Appropriate Relief." She sought to travel to Mexico for one week in June of 2012 and one week in December of 2012. She did so after Father refused to consent to Mother's traveling to Mexico with Erick. Mother requested a hearing on her motion. Father filed an opposition to the motion.

The court held an evidentiary hearing on Mother's motion on May 9, 2012. Thereafter, the court entered an order denying the motion. Mother noted this appeal, presenting five questions for review, which we have reworded and reordered:

I. Did the trial court err as a matter of law when it allowed outside influences to affect its decision?

II. Did the trial court err by finding a "substantial risk" that Mother would permanently relocate to Mexico with Erick?

III. Did the trial court err by failing to address the best interest of the child standard?

IV. Did the trial court err by admitting certain evidence?

V. Did the trial court err by failing to structure a proper visitation order?

For the following reasons, we shall reverse the order of the circuit court and remand this case to the circuit court with instructions to grant Mother's "Motion for Authorization to Obtain Minor Child's Passport and for Permission to Travel to Mexico with Minor Child and for other Appropriate Relief," as updated to reflect travel dates in 2013 comparable to those requested in 2012.

FACTS AND PROCEEDINGS

The parties were married on August 2, 2003, in Austin, Texas. Erick, born on September 28, 2008, is their only child. He is now four years old. During their marriage, the parties lived in Maryland, and they still live here. The parties separated on June 13, 2011.

Mother was born in Mexico, and her entire family (parents, siblings, and other relatives) still live there in the State of Hidalgo, located north of Mexico City. The record does not show where Father was born, but he is fluent in Spanish, and is an American citizen. Mother trained as an architect in Mexico, and is licensed as an architect there. At the time of the evidentiary hearing, Mother had been living in the United States for nine years, since 2003. She has had a green card since that time, which remains valid until 2017. She has not sought United States citizenship, but looked into it

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soon before the hearing. She explained that it was her understanding that she would not be eligible to apply for citizenship for at least a few more years.[1]

At the time of the hearing, Mother had just started working at Creative Access, which is an architectural interior design company in Ellicott City. Immediately before then, she had worked for 15 months for a different interior design company. According to Mother, her career plan is to become licensed as an architect in Maryland. Working at Creative Access will help her obtain the hours of experience she needs to become qualified to sit for the nine tests that she must take before she can become licensed.

Mother testified that she already had earned around 280 hours of qualifying work, but, because the licensing rules had changed, she was not sure how many more hours she would need to earn to sit for the tests. She estimated that it will take her another two to three years to become licensed as an architect in Maryland. Mother said that if she is not able to become licensed as an architect in Maryland she will pursue becoming licensed as an interior designer. Her other long range plan is to earn enough money to move to Howard County so Erick can attend the public schools there.

The evidentiary hearing did not reveal what kind of work Father does.

Mother testified that she and Erick had visited her family in Mexico three times after Erick's birth and before the parties separated. The first trip was to celebrate Christmas with Mother's family. Father went on that trip, which lasted 5 weeks. The second trip was to celebrate Erick's baptism. Father also went on that trip. The record is not clear as to how long that trip lasted. The third trip, which Father did not go on, lasted 8 to 10 days. That trip took place in December of 2009. Prior to that last trip, Father went to court, without telling Mother, and filed a petition to prevent her from traveling to Mexico with Erick. He withdrew the petition the next day, however, and drove Mother and Erick to the airport for their flight to Mexico. He also picked them up at the airport when they arrived home. According to Mother, the problems in the marriage started thereafter.

Mother also testified that she and Father's long-term plan had been that when Father became qualified for early retirement they would move to Mexico. When they separated, however, that plan was no longer viable, because it always had involved the two of them as a couple. Mother expressed the view that she wanted Erick to know the members of both sides of his family, including Father's side of the family, who live in the United States, and it is very important to her that Erick be close with Father, who would not be in Mexico. Mother stated that, after the separation, she never threatened to move to Mexico with Erick, and she had no intention of doing so. She wants to travel to Mexico with him, however, so he can get to know the members of her family, including her parents who are elderly and cousins who are close to his age. When asked why her parents and other family members did not fly to Maryland to visit Erick, Mother responded that they had done so in the past, but her father, who was nearly 79, now has severe arthritis that has made air travel very difficult for him.

Mother was questioned about whether she intends to take Erick to Mexico and not return, either soon or in the future. She answered "No." She said that when she asked for Father's consent to travel to Mexico with Erick, she always said that she just wanted to take Erick there on a trip — not to stay there. Father would not agree to her traveling to Mexico with Erick, however. Mother was asked whether she stood to inherit any property in Mexico if her parents passed away; she answered yes, but that her plan would be to sell it.

Mother testified that she had Erick's passport in her possession, but that she had learned recently that Father had taken steps to have the passport canceled. She alleged in her motion that Father had accomplished that by fraud.

Father testified that in late 2009 Mother told some of his family and friends that they would be divorced soon and she was going to return to Mexico. That was soon before Mother and Erick were supposed to take a trip to Mexico, so he filed a petition in court to prevent her from leaving with Erick. He withdrew it the following day because Mother cried and was upset, and he wanted to give her "another chance." Father testified that around June of 2011, right before the separation, Mother made threats to move to Mexico with Erick. She did that frequently, until the separation. In expressing her intention to move to Mexico with Erick, Mother said that she hates the United States, hates all Americans, and does not want to be in the United States.

Father was questioned about the cancellation of Erick's passport. He said that in January of 2010, soon after Mother and Erick returned from their trip to Mexico, he asked Mother for Erick's passport, but she refused to give it to him. He then contacted the State Department, obtained from it a document entitled, "Statement Regarding a Lost or Stolen Passport," and filled it out. He checked the box indicating that Erick's passport had been lost and wrote on the form that he "want[ed] to prevent child abduction to another country. Please cancel. Wife refuses to give me child's passport and I do not give permission for child to leave U.S." (Emphasis in original.)

Father filed the "Statement Regarding A Lost or

Stolen Passport" in January of 2010 and, in response, the State Department canceled Erick's passport. Father insisted that everything he wrote in the statement was true, although he agreed that Erick's passport was neither lost nor stolen. Father has refused to take any steps to obtain another passport for Erick because he is concerned that Mother will take Erick to Mexico and will not return with him, despite her saying that she has no intention to do so. The basis for Father's concern is that Mother has done nothing to obtain United States citizenship, that she has not taken steps to become licensed as an architect in Maryland, that she hates America and Americans and does not want to be here, and has made threats to return to Mexico.

Father acknowledged that, even though Mother has not become licensed as an architect, she has worked in that field for five years. He testified that he knows Mother's family, where they live and who they are, and is able to communicate well with them because he is fluent in Spanish.

On rebuttal, Mother testified that Father took the steps to cancel Erick's passport without telling her, and that she had never threatened to go to Mexico with Erick and not return. The last trip she and Erick took to Mexico, after Father filed and withdrew his petition to prevent her from traveling with Erick, was supposed to be a Christmas vacation for the three of them. Father was unable to go because he was scheduled to have eye surgery during the time of the trip, so Mother and Erick went by themselves. They returned as scheduled.

At the conclusion of the hearing and closing arguments, the court ruled as follows:

> I tend to believe that, based on the evidence, there's a substantial risk that [Mother] . . . [w]ill, in fact, take the children to Mexico permanently, if given the opportunity and that would not be in the child's best interest and I base that on a number of factors. One is, and basically it's a credibility question, although it's not, it's certainly not, everyone agrees that Mom here had said from day one she wanted to move back to Mexico with her family after ten years of marriage and that her testimony on the witness stand was that that changed, that she, and as of the date of separation, she no longer had a desire to move back to Mexico, she wanted to stay here in the United States and just visit her family in Mexico. I have to determine whether or not that's credible and I, I don't on balance, I don't find that, I find there's a, there's a substantial risk that she intends and would like to move back permanently with her children [sic]. If you look at the ties she has to both this country and Mexico, there are very, very limited ties here and much greater ties to Mexico. She testified her mother and father live in Mexico, her siblings live in Mexico, her extended family all live in Mexico, none, not one family member lives in the United States. All her family lives in Mexico. She's licensed as an architect in Mexico, she's not licensed here. She's been here for quite a long time and hasn't made any real effort to become licensed here. She's not even aware of the number of hours necessary to sit for the nine licensing tests to become licensed here. She could, by virtue of being licensed in Mexico, she could easily get a job in Mexico as a licensed architect. That can't be done and no effort has been made to become licensed. She doesn't have, she doesn't own any real property here and so the ties are very slim to this country. Even if I don't consider and I, I give very little weight to the one, the one bit of testimony from [Father] that she hates the United States, hates, hates all Americans. I don't need to go there. I don't really give that a whole lot of weight. It's very vague. I just look at the ties here and her desire since day one really to move back. And so putting the child in the position of potentially a tug of war between these two parents is not in the child's best interest. I said children before, I meant child. In Eri[c]k's best interest. Her family can easily come here. I know one, her father is in poor health. I think you testified, ma'am that he's in poor health. And, you know, I'm cognizant of that but the family can, I think given all the, all the risk involved, I be, I feel that the Motion should be denied so I'm going to deny it.

DISCUSSION

I.

Mother contends the circuit court erred by allow-

ing outside influences to affect its decision. Her argument is in two parts. First, she maintains that the court had no knowledge whatsoever of her job prospects as an architect in Mexico, and therefore erred in basing its ruling against her in part on the "fact" that she easily could become employed as an architect in Mexico. Second, Mother complains that the court improperly was influenced by a case that immediately preceded hers, in which a mother had absconded to Trinidad with the couple's children, leaving the father despondent, and by the argument in closing of Father's counsel that his client could end up in the same position.

On Mother's first point, we agree there was no evidence in the record to support a finding that Mother easily could obtain a job in Mexico as an architect. The only factual evidence was that she was licensed as an architect in Mexico and had lived in the United States for the past nine years without practicing architecture. The court's finding that Mother easily could get a job in Mexico as an architect, not being based on any evidence in the record, was clearly erroneous.

Although the comments by Father's counsel in closing, that Father could end up despondent like the father in the case that preceded this one, were inappropriate, we are confident they did not affect the court's ruling in this case, nor did the juxtaposition of the cases on the docket.[2]

II.

Mother next contends that the trial court's finding that there is a "substantial risk" that if she and Erick travel to Mexico she will not return to the United States with him was clearly erroneous, because the court considered and gave improper weight to the fact that she is not a United States citizen and ignored undisputed facts in evidence regarding her ties to the United States.

Father responds that the circuit court's finding of a "substantial risk" was based on non-clearly erroneous factual findings which must be accorded deference. He maintains that the court was not required to consider any particular factors in reaching its determination.

Our review of the propriety of the trial court's determination is governed by Rule 8-131(c):

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

An "appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence." *In re Anthony W.,* 388 Md. 251, 279 (2005) (citation omitted). A factual finding is clearly erroneous if it is unsupported by any competent evidence in the record. *See, e.g., Omayaka v. Omayaka*, 417 Md. 643, 652 (2011).

In the instant case, the trial court ultimately determined to deny Mother's motion based on its finding that there was a "substantial risk" that Mother intended "to move back [to Mexico] permanently with [Erick]." The court explained that it based this finding, in turn, on what it characterized as a "credibility question," *i.e.,* was Mother's stated present intention to live in the United States, but to travel to Mexico with Erick once or twice a year for visits with her family believable? The court answered this question in the negative.

Credibility determinations ordinarily are accorded extraordinary deference on appellate review because the trial judge has had an opportunity to observe the witness's demeanor, while a reviewing court must rely only on the "cold record." *See, e.g., Smith v. State*, 415 Md. 174, 185 (2010) (explaining that the "fact-finder possesses the unique opportunity . . . to observe firsthand the demeanor and to assess the credibility of witnesses during their live testimony"); *Beckman v. Boggs*, 337 Md. 688, 703 (1995) (demeanor-based credibility findings reserved to the trial court in a visitation matter), *overruled in part on other grounds by Koshko v. Haining*, 398 Md. 404 (2007). In this case, however, the trial court stated that it disbelieved Mother's testimony for two, non-demeanor based reasons: because it had been Mother's desire since "day one . . . to move back to Mexico" and because her "ties" to the United States were "very, very limited." As we shall explain, we conclude that the court's finding that Mother lacked ties to the United States was clearly erroneous and that its finding that she previously had intended to move back to Mexico did not support a reasonable inference that she would take Erick to Mexico and not return with him.

With respect to Mother's respective ties to the United States and Mexico, the court emphasized that Mother's family lives in Mexico; she was licensed as an architect there; she has not "made any real effort to become licensed [as an architect]" in the United States; and she does not own property in the United States.[3] Mother's ties to Mexico notwithstanding, the record evidence belies the trial court's finding that Mother's ties to the United States are "very, very limited." Mother has lived in the United States for nine years; is a permanent, legal resident; and is employed with a company in her chosen field. She testified that she has many close friends here, with whom she

socializes on a weekly basis both alone and with Erick. She hopes to purchase a home in Howard County in the near future. In the more than three years since Erick was born, she has visited her family in Mexico just three times for a total of less than two months. The United States is her home. There simply was not "any competent evidence" in the record supporting the trial court's finding that Mother has limited ties to the United States and therefore it was clearly erroneous. *See Omayaka*, 417 Md. at 652.

We now turn to the evidence bearing on Mother's previous intention to return to Mexico. As discussed, Mother testified that, prior to their separation, she and Father had planned to move to Mexico as a couple after Father qualified for early-retirement. Quite reasonably, however, the separation of the parties and their imminent divorce scuttled this plan. Mother testified that she "want[ed] [Erick] to be close to his father" and to grow up with him. The court did not discuss or explicitly reject Mother's testimony on this point.

Even if we were to accept the trial court's finding, however, that Mother continued to harbor a desire to move to Mexico with Erick, this finding would not support a reasonable inference that she intends to do so imminently and in contravention of a court order. "Maryland courts have long drawn a distinction between rational inference from evidence, which is legitimate, and mere speculation, which is not." *Dukes v. State*, 178 Md. App. 38, 47, *cert. denied*, 405 Md. 64 (2008); *see also Titus v. State*, 423 Md. 548, 557-58 (2011) (appellate court defers to "any possible *reasonable* inferences" drawn from the facts as found by the court) (emphasis added). In seeking to take a vacation to Mexico with Erick, Mother first asked Father's permission and, when he would not give it, she sought the permission of the court in compliance with the terms of the parties' consent agreement.[4] The only justification Father offered for why Mother would take Erick to Mexico and never return was that she hated "the United States [and] hate[d] all Americans." The court accorded "very little weight" to that testimony, however. Moreover, Mother's past conduct was directly contrary to the inference drawn by the court. Mother had taken Erick to Mexico on three prior occasions and, on each occasion, had returned as scheduled. On the most recent trip, in December of 2009, Father had threatened to prevent her from going to Mexico and, without her knowledge, had filed an emergency motion to prevent her from leaving the country. Despite the growing discord in the marriage, Mother and Erick returned from Mexico as scheduled.

The court based its ruling on at least one clearly erroneous factual finding and its non-clearly erroneous factual findings did not support a reasonable inference that, if allowed to travel to Mexico with Erick, Mother would not return. Accordingly, we shall reverse the court's order and remand with instructions for the court to grant Mother's motion. Given our resolution of this issue, we need not address Mother's remaining contentions of error.

ORDER REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION. COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. As Mother explains in her brief, a legal, permanent resident of the United States who is married, but separated, would need to wait five years to apply for citizenship. 8 U.S.C. 1427(a)(1).

2. It is worth noting that Mexico is a member of the Hague Convention of 25 October 1980 on the Civil Aspects of International child Abduction, as is the United States. *See* "Hague Conference on Private International Law," http://www.hcch.net (last visited February 20, 2013).

3. Given our earlier determination that the court's finding that Mother could "easily get a job in Mexico as a licensed architect" was not supported by any evidence in the record, we have omitted this finding from our discussion.

4. In contrast, there was evidence that Father had surreptitiously obtained the cancellation of Erick's passport. In his application to the State Department, Father falsely represented that Erick's passport was "lost," even though, as he testified, he knew it was in Mother's possession.

NO TEXT

Cite as 5 MFLM Supp. 61 (2013)

Custody: UCCJEA: Child with no home state

Felicia Henry

v.

Clifton Allison

No. 1285, September Term, 2011

Argued Before: Woodward, Wright, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Kenney, J.

Filed: March 8, 2013. Unreported.

The trial court acted within the provisions of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act in declining to enroll a custody order of the Supreme Court of Judicature of Jamaica and, ultimately, in awarding custody to the child's father, where neither Jamaica nor Maryland qualified as the child's home state under UCCJEA.

Appellant, Felicia Henry ("the Mother"), appeals the decision of the Circuit Court for Prince George's County granting appellee, Clifton Allison ("the Father"), custody of their son, Kyle Allison ("the Child"). The Mother presents one question for our review,[1] which we have revised as follows: Did the court err in not enrolling the custody order of the Supreme Court of Judicature of Jamaica? For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL PROCEDURAL BACKGROUND

The underlying facts of this case are not in dispute. The Child was born on September 27, 2006 to the Mother and Father, both of whom are natives of Jamaica. On July 5, 2009, leaving the Child with the Father, the Mother moved to the United States, settling in Pennsylvania. In October 2009, the Father and the Child also moved to the United States, settling in Florida. On March 14, 2010, the Father and Child moved from Florida to Prince George's County, Maryland. In May 2010, the Mother filed, in Jamaica, a motion for custody of the Child, and, on June 14, 2010, the Supreme Court of Judicature of Jamaica granted her custody.

On July 27, 2010, the Mother filed, in the Circuit Court for Prince George's County, a Complaint for Custody and a Petition to Enroll a Foreign Order. On July 28, 2010, the Mother was awarded temporary custody of the Child "until further Order of the Court," and, on August 3, 2010, she filed a Motion and Affidavit for Emergency Hearing. On August 17, 2010, the Father filed, in the circuit court, (1) a Counter-Complaint for Custody, (2) an Answer to Petition to Enroll Foreign Order, and (3) a Motion to Dismiss Petition to Enroll Foreign Order. On August 26, 2010, the Father filed an Answer to Complaint for Custody.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

On October 29, 2010, after a hearing, the circuit court awarded the Mother "temporary sole legal and primary physical custody" of the Child. On April 13, April 14, June 27, and June 30 of 2010 the parties came before the court for a merits hearing on the issues of custody and support. At the end of the hearing, the court "decline[d] to extend [comity] to the Jamaican custody order" and found "that the Jamaican order is not appropriate to enroll." The court reasoned that, under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Child had not been living in Jamaica for at least six months before the May 2010 motion for custody in that case, and thus Jamaica was not the Child's "home state." The court also found that Maryland did not qualify as the Child's home state, because the Child had not been living in Maryland for at least six months before July 2010 motion for custody in this case.

Asserting that it may "consider jurisdiction where there is no other state or locality that would meet the requirements" of being a "home state," the court found that it was "in the best interests of [the Child]" to award the Father "sole legal and physical custody with liberal parental access" to the Mother,[2] stating:

> this court has had the opportunity to hear three days of evidence. We've had the benefit of home studies or custody evaluations of both parents and the opportunity to hear from the parents and other witnesses, weighing their credibility.
>
> * * *
>
> The court finds that [the Father] has been [the Child's] primary caregiver for most of [the Child's] relatively short life. He has assumed a lot of

responsibility for [the Child] when the parties lived together and he resumed responsibility for [the Child] when the parties were living apart between May and July of 2009 and he took care of [the Child] from July of 2009 until June of 2010.

[The Father] has, by all accounts, taken really excellent care of [the Child]. He's attended to his needs. [The Child] was thriving in his care and I think [the Child] was a very happy little kid. [The Father] is a stay at home parent at this time, only working part-time. He has the present ability to spend significant amounts of time with [the Child].

[The Mother] has both her college courses and a full time job to juggle with her parenting responsibilities. And her job and the nature of it fits well into her college courses, but it requires days, nights, weekends, all the times that the hotel is opened and needs a desk clerk.

The court is aware that there was a whole year that [the Mother] was not in [the Child's] life and she has to take on responsibility for that. She made the decision to leave Jamaica and leave [the Child] behind and comes to the United States.

* * *

Due to the fact that [the Mother] elected to immigrate, [the Child] established a very close bond with his father. That's [the Child's] reality.

So in this case . . . I think that [the Father] has been the parent that has had the closest relationship to [the Child] up to this point and I think he's done a good job caring for him.

On July 25, 2011, the court entered an order denying the Mother's Petition to Enroll a Foreign Order and awarding the Father "sole legal and primary physical custody" of the Child.

DISCUSSION

"Whenever a child custody dispute in Maryland involves another state or another country, the [UCCJEA] is implicated." *Toland v. Futagi*, 425 Md. 365, 370 (2012). Unless it "violates fundamental principles of human rights," Md. Code, Fam. Law § 9.5-104(c), under the UCCJEA, "a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this title must be recognized and enforced under subtitle 3 of this article." *Id*. § 9.5-104(b). "A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Subtitles 1 and 2 of this title." *Id*. § 9.5-104(a).

Under § 9.5-201(a), a Maryland court has threshold jurisdiction[3] to make a child custody determination if:

> (1) this State is the home state[4] of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
>
> > (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
> >
> > (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;[5]
>
> (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
>
> (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.[6]

The word "or" at the end of subsection (a)(3) indicates that any of subsections (a)(1), (a)(2), (a)(3), or (a)(4) will independently establish jurisdiction. *See Walker v. Lindsey,* 65 Md. App. 402, 407 (1985) ("The word 'or' is a disjunctive conjunction which serves to establish a relationship of contrast or opposition.").

The Mother contended at oral argument that, because the Child and Mother "were still legal residents of Jamaica" at the time the Mother filed her Jamaica action,[7] Jamaica was the home state of the Child within the six-month period prior to the Mother's filing of her petition in Jamaica. Thus, the contention is that the circuit court "erred"[8] in exercising jurisdiction and refusing to "grant comity to the Jamaican custody order." Asserting that neither Jamaica nor Maryland was the home state, the Father responds that the circuit court "had jurisdiction to make an initial custody determination under the UCCJEA" because "the Child and Father had developed significant connections with Maryland."

We review a circuit court's decision to exercise jurisdiction and to not recognize the judgment of a foreign jurisdiction for abuse of discretion, *Apenyo*, 202 Md. App. at 414, and circuit court's determination as to a child's home state for clear error. *See Garg v. Garg*, 163 Md. App. 546, 595 (2005) ("the court below was clearly erroneous to the extent that it found that Maryland was not a home state of the child"). Thus, "[w]e may not reverse a court's determination that it has [or does not have] home state jurisdiction under the [UCCJEA] unless the findings of fact upon which it was based were clearly erroneous." *Gruber v. Gruber*, 141 Md. App. 23, 44 (2001).

Although it might be argued that the circuit court could exercise jurisdiction under subsection (a)(2) of § 9.5-201 of the UCCJEA ("a court of another state does not have jurisdiction under item (1) of this subsection"), the court's statement that it may "consider jurisdiction where there is no other state or locality that would meet the requirements" for being a "home state" in fact indicates that the court exercised jurisdiction under subsection (a)(4). To exercise jurisdiction under subsection (a)(4), the court must first find that "no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection." Md. Code, Fam. Law § 9.5-201(a)(4).[9]

Here, the court found that nether Maryland (pursuant to subsection (a)(1)) nor Jamaica (pursuant to subsection (a)(2)) was the home state, and that finding is not clearly erroneous. Moreover, subsection (a)(3) is not implicated because Jamaica is not a home state under subsections (a)(1) or (a)(2). Through the *absence* of specific findings that: (1) there was a "significant connection" with Maryland (pursuant to subsection (a)(2)(i)),[10] and (2) there was "substantial evidence about the [Child's] care, protection, training, and personal relationships" available in Maryland (pursuant to subsection (a)(2)(ii)), we are persuaded that, by skipping directly to subsection (a)(4), the court implicitly found that: (1) subsections (a)(2)(i)-(ii) did not confer jurisdiction on Maryland, (2) home state jurisdiction was not established under subsections (a)(1), (a)(2), or (a)(3), and (3) Maryland jurisdiction was proper under subsection (4). In our view, the court, under the circumstances of this case, did not err or abuse its discretion in exercising jurisdiction and not enrolling the custody order the Supreme Court of Judicature of Jamaica.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. As it appears in the Mother's brief, the question presented is: "Did the trial court disregard principles of comity in concluding that Jamaica lacked jurisdiction to grant custody of the parties' child because the parties resided in Maryland?"

2. The court observed that the Jamaican court "allowed for service by e-mail and by sending a copy of the pleadings to [the Father's] mother," rather than "requiring that the paperwork by handed to" the Father. Recognizing that the Father denied receiving this email, even if he had received it, he "wasn't going to be able to participate because to do so would require that he leave the United States with [the Child] and, because of his overstayed status, he would not be allowed to return to the United States."

3. In *Apenyo v. Apenyo*, 202 Md. App. 401 (2011), we explained:

> That jurisdictional qualification, however, is only a threshold consideration and is not ultimately dispositive of the issue before us. Subtitle 2 goes on to spell out circumstances under which Maryland, even when it has threshold jurisdiction, will nonetheless decline to exercise jurisdiction for any of three different reasons: (1) pursuant to § 9.5-206, when the same proceeding is pending in another state; (2) pursuant to § 9.5-207, when Maryland determines that it is an inconvenient forum and that another state is a more appropriate forum; and (3) pursuant to § 9.5-208, when Maryland declines jurisdiction because the party seeking jurisdiction "has engaged in unjustifiable conduct."

Id. at 419-20 (internal citations omitted).

4. According to § 9.5-101(h):

> "Home state" means:
>
> > (1) the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding; and

(2) in the case of a child less than 6 months of age, the state in which the child lived from birth with any of the persons mentioned, including any temporary absence.

5. Items (i)-(ii) are applicable to the first part of subsection (a)(2), which states: "a court of another state does not have jurisdiction under item (1) of this subsection[.]" *See In re John F.,* 169 Md. App. 171, 184 (2006) ("that a court in another state did not have jurisdiction under the home state analysis and the boys and at least one parent had a significant connection with Maryland and Maryland had substantial evidence about the boys' care, protection, training, and personal relationships").

6. Subsection (a)(4) has been described as a "catch-all 'vacuum jurisdiction' provision[.]" *Toland*, 425 Md. at 376.

7. The Father and the Child moved from Jamaica to the United States in October, 2009.

8. During oral arguments, the Mother's counsel stated that the circuit court "*abused its discretion* in ignoring a valid custody order of a sister state." (Emphasis added).

9. At oral argument, the Father's counsel stated that "if there is no home state, you move down the prongs of UCCJEA."

10. In his brief, the Father states, citing page 108 of the record extract, that "the court found that jurisdiction was proper in Maryland because Maryland had 'substantial connections' to the Child." We note that nowhere in the court's oral or written orders, let alone on page 108 of the record extract, did we find where the court stated that Maryland had "substantial connections" to the Child.

Cite as 5 MFLM Supp. 65 (2013)

Adoption/Guardianship: termination of parental rights: mental health issues

In Re: Adoption/Guardianship of Yehonadab L.-B.

No. 1798, September Term, 2012

Argued Before: Matricciani, Nazarian, Eyler, James R. (Ret'd, Specially Assigned), JJ.

Opinion by Nazarian, J.

Filed: March 8, 2013. Unreported.

The trial court did not err in terminating the mother's parental rights without first affording her "a reasonable opportunity for her mental health to stabilize." Although the statute contemplates that parents will have an opportunity to improve their circumstances before parental rights are terminated, that opportunity is neither indefinite nor mandatory.

Two days after his birth, the Montgomery County Department of Health and Human Services (the "Department") removed Yehonadab L.-B. from the care of his mother, appellant Jaelle B. ("Mother"), based on her unwillingness to get prenatal care and her inability to care for him. Her continuing mental health problems and other serious concerns about her parenting skills and peripatetic lifestyle ultimately led the Department to petition the Circuit Court for Montgomery County to terminate Mother's parental rights (the "TPR Petition"). The trial court granted the TPR Petition after a hearing (the "TPR Hearing") and after "find[ing] by clear and convincing evidence that Mother is unfit, that Mother poses an unacceptable risk to Yehonadab's future safety, and that it is in Yehonadab's best interests that the parental rights of [Mother] and, by deemed consent, [his father] be terminated." Mother appeals, contending that the circuit court erred in terminating her parental rights without first affording her "a reasonable opportunity for her mental health to stabilize." We disagree and affirm.

BACKGROUND

Mother came to the attention of the Department after it received a report during her pregnancy with Yehonadab that she would not accept prenatal care. Although she was living in a shelter when Yehonadab was born on April 23, 2011, Mother and Yehonadab's father, Juan Carlos B. ("Father"), had lived previously in a tent in the woods. Yehonadab was placed in shelter care at a foster home two days after he was born, and after that his mother had only sporadic contact with him. He remained in the same foster home as of the time of the TPR Hearing nearly a year-and-a-half later.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

On May 27, 2011, the court held an Adjudicatory Hearing and found Yehonadab to be a Child in Need of Assistance ("CINA"). *See* Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (LexisNexis 2012). He was placed under the jurisdiction of the Juvenile Court and committed to the Department for placement in foster care. *See id.* § 3-823(e). In the Adjudication and Disposition Order, the Court provided for visitation between Yehonadab and Mother and Father.[1]

The Department worked closely with Mother while Yehonadab was in foster care, both to assess her ability to care for him and to provide services to assist her. Mother had supervised visitation with Yehonadab, participated in therapy and mental health treatment, and participated in a psychological evaluation with follow-up care that continued through the time of the TPR Hearing. Nonetheless, on April 2, 2012, the Department filed the TPR Petition, which asked the circuit court to terminate Mother's and Father's parental rights and to grant guardianship of Yehonadab to the Department with the right to consent to adoption. The Department grounded the TPR Petition in the CINA adjudication and the fact that "[t]he conditions which led to the separation [of Mother from Yehonadab] still persist, and similar conditions of a potentially harmful nature continue to exist." As the Department reasoned,

> [t]here is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the biological parents in the immediate future and the continuation of the relationship between the biological parents and the child greatly diminishes the child's prospects for early integration into a stable and permanent family.

The TPR Hearing extended over three days in

September 2012, during which the circuit court developed a full record. Among the individuals who testified on behalf of the Department were Miryan Machado and Jillian Kelly, the two licensed social workers who worked with Mother over the course of Yehonadab's young life. Ms. Machado met with Mother from June 2011 through March 2012, when she was transferred to another part of the Department.[2] She testified that Mother behaved erratically during the initial review period, which covered the time between the beginning of her treatment through a review hearing on October 31, 2011. Mother obtained mental health treatment throughout that time, but it was not clear whether she was taking her medications and she nevertheless exhibited "symptoms of paranoia, hallucinations, delusional thinking and bizarre behavior." Mother informed Ms. Machado that she had stopped seeing a therapist in June 2011 because "her therapist spoke English and whenever [Mother] would speak English it would cause her to have a heart attack." Mother also indicated that she believed Yehonadab "had epilepsy, schizophrenia and was asthmatic and that the Department had caused these ailments because [it] had authorized a blood transfusion for the child," even though Yehonadab's medical records confirmed that he was healthy and had none of these ailments.

Mother interacted inconsistently with Yehonadab during the initial review period. She missed nine out of twenty-four scheduled visits, and when Mother did attend, Ms. Machado observed little connection between Mother and her son:

> If the Department was attempting to show her how to, for example, warm the child's bottle, she would leave in the middle of the instruction. During the visits, Yehonadab often cried inconsolably. It was very hard to soothe him. [A]fter feeding he did need to be burped. We would try to show [Mother] how to do that, how to properly hold a child. She would indicate that she could not burp him because her hands were not created by God for burping, they were not strong enough, and that it would be her husband's role to do that.

Ms. Machado testified specifically that she saw no "consistent upward trajectory" to Mother's progress:

> [S]he was very inconsistent. There were days that she did tend to [Yehonadab], she did feed [him], she did attempt to engage [him] and be affectionate. She would make pictures and bring clothes. And then there were other days she would cite religious aversions to providing basic care such as feeding, changing, clothing, burping.

Ms. Machado explained further that "[t]here was no consistency in her behaviors that could provide Yehonadab with a safe environment[,] . . . and that [put a] child of his age at a high risk of maltreatment." Notably, she saw a

> very different affect at home with the foster parents. After visits if . . . I would transport [Yehonadab] back home, the foster father, the child had a complete change in affect, began smiling, cooing, reaching out for the foster father, was a hardy [sic] eater. He would at times not want to eat at the visit and then would be fed at home.

The second review period, which lasted from the October 31, 2011 review hearing through the March 5, 2012 review hearing, yielded no improvement in Mother's condition or her interactions with Yehonadab. Mother "continued to be very inconsistent with her visits," and still refused to feed or change him. Mother told Ms. Machado that Yehonadab "ha[d] the tingles and that she can also feel the tingles when [Yehonadab] feels the tingles. She attributed tingles to having schizophrenia. And, again, she . . . continued to insist that the Department provided a blood transfusion and that the child now also has epilepsy and asthma." After Mother completed parenting classes in that time period, she informed Ms. Machado that she would no longer visit with Yehonadab because she was simply "waiting for the judge to grant her reunification."[3]

In March 2012, Mother's case was transferred from Ms. Machado to Jillian Kelly. Ms. Kelly testified that despite attempting to contact Mother after the March 5, 2012 hearing, Mother's first visit with Yehonadab came over a month later, on April 17, 2012. Of the next seven visits, Mother attended five, but her behavior remained inconsistent and erratic:

> In some visits she would be appropriate with [Yehonadab]. She would hold him and talk to him and soothe him while he was crying with little to no encouragement by the Department. However, there were other visits where she would not . . . interact with [him]. She would tell us why she could not hold him.
>
> At one visit she said she had arthritis and she could not hold [Yehonadab], not even sitting down with the child in her lap. At that visits [sic] we tried to make suggestions to her of ways she

> can continue a visit without holding [him], such as having him sit next to her and she could talk to him, show him a toy, read to him from the Bible, but she said that . . . she did not need to be told what to do for her visit.
>
> * * *
>
> When she would not interact with [Yehonadab] she would either sit in the visiting room and . . . look at us, or look . . . off into space. Other times, she would pick up the Bible and read the Bible to herself. Two times . . . she received calls on her cell phone and exited the room to talk on the cell phone.

Ms. Kelly explained that when Mother held Yehonadab, he would "try to get away," and "he would just remain very tense and hyper[-]vigilant. We would not see him smile, babble, or try to talk, . . . or otherwise . . . be the energetic child that we see in the foster home." Ms. Kelly, like Ms. Machado, saw a very different child when Yehonadab returned to his foster home, where he has lived since he was two days old. According to Ms. Kelly, "[w]hen he was in the foster home he's very active, lively. He giggles, he babbles. He loves to explore and pull things out and interact with people." She expressed the opinion that "there would be a risk to [Yehonadab's] health and safety if returned to [Mother's] care." Ms. Kelly listed a number of factors that contributed to her opinion:

> [Yehonadab] is still a toddler, so he is nonverbal and not able to protect himself. He is bonded in his foster home with his foster parents who are meeting all his needs. [Mother] has not shown an improvement in . . . her mental health nor her interactions with Yehonadab. Despite having the parenting classes, we did not see a dramatic shift . . . [in] her level of participation . . . in the visits and knowledge of child care, and, also, we still do not know where she was living.

Ms. Kelly testified that Mother's mental health status remained troubling:

> [w]e have not seen a dramatic improvement either in [Mother's] mental health, because . . . she still believed . . . that [Yehonadab] suffers from schizophrenia, which leaves concerns about . . . the medical care [he] would receive. She still presents the paranoid beliefs about the Department and the conspiracy by the Department to take her child.

Finally, Ms. Kelly testified that she knew of no further services the Department could provide Mother that could facilitate reunification.

Although Mother acted appropriately with Yehonadab during several visits over the summer of 2012, at other times she simply read the Bible to herself or otherwise declined to interact or play with him. Ms. Kelly testified that "when we were talking to her about how she can interact with [Yehonadab] she'd become frustrated and her voice would escalate when she would tell us she did not have to listen to the Department and she could do whatever she wanted during her visits." Even at that time, Ms. Kelly saw no "consistent pattern" in mother's engagement with Yehonadab, and she continued to have the same concerns about Mother's mental health and lack of stable housing.

The Department also presented the testimony of Dr. Alfred Amado, a clinical psychologist who had evaluated Mother. Dr. Amado testified that Mother showed "tangential" thinking, would go off-topic in conversations, and exhibit "odd behavior." When Dr. Amado asked Mother what she was doing to prepare in case Yehonadab was returned to her, she responded that "all she had to do was pray for him, or give him the food of God." When asked about Yehonadab and language development, Mother told Dr. Amado that Yehonadab "was gifted and that wouldn't be a problem because he understood all 16 languages" that she claimed to speak. Dr. Amado ultimately diagnosed Mother with schizophrenia, paranoid-type, exhibiting paranoid thoughts such as her suspicion that she was "on the hit list of an Islamic group which caused her to periodically change her living situation." Dr. Amado saw little if any change in Mother's progress over the course of her treatment and testified based on his review that "it seems her level of symptoms, including behaviors, though [sic] processes, and so forth, hadn't changed much from when I evaluated her."

Mother offered testimony from Amber Lee Hass, a psychiatric nurse practitioner who managed Mother's medications from September 2011 through the time of the TPR Hearing. Ms. Hass noted a "gradual improvement" in Mother's symptoms after she began taking an injectable form of Haldol–an anti-psychotic medication indicated for the treatment of schizophrenia; but she also testified that Mother has had setbacks, particularly when, as Ms. Hass put it, there are "stressors" in her life: "For example, when housing is going poorly, when she's concerned about the court case, *which was last Thursday*, she has had significant increase in her symptoms. So overall, I've seen improvement, but I, there are times where she's not doing as well" (emphasis added).

Mother also testified on her own behalf,[4] and did not present any expert testimony.

On September 28, 2012, the circuit court issued a thorough, fourteen-page opinion that listed and applied each factor it considered in determining, under Family Law Article § 5-323(d), "whether terminating a parent's rights is in the child's best interests." The court ultimately found "by clear and convincing evidence that Mother is unfit, that Mother poses an unacceptable risk to Yehonadab's future safety, and that it is in Yehonadab's best interest that the parental rights of [Mother] and, by deemed consent, [Father] be terminated."[5] The court issued a Final Order appointing the Department guardian of Yehonadab with the right to consent to adoption or long-term care. This timely appeal followed.

DISCUSSION

Mother argues on appeal that the circuit court erred when it terminated her parental rights "before permitting her a reasonable opportunity for her mental health to stabilize." We apply a three-tiered, interrelated standard of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Second,] if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Yve S., 373 Md. 551, 586 (2003). To the extent Mother challenges the circuit court's factual finding that her mental health was unlikely to improve to the point she would be fit to parent Yehonadab, we review for clear error. *Id.* To the extent Mother challenges the trial court's termination of her rights in light of its factual findings, we review for abuse of discretion. *See id.; see also In re Shirley B.*, 419 Md. 1, 19 (2011) (to warrant reversal, the trial court's decision must "be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable"). We find no error in the circuit court's findings that Mother's mental health renders her unfit to parent Yehonadab now and that "it is unlikely she ever will be." And based on that finding, we hold that the circuit court properly exercised its discretion in terminating Mother's parental rights without further delay.

Maryland law governing termination of parental rights balances the presumption that a child's best interest lies in remaining with his or her parent(s) "against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007). Accordingly, the Family Law Article authorizes a juvenile court to terminate parental rights without parental consent[6] only if it finds "by clear and convincing evidence that terminating the rights of a parent is in a child's best interests." Md. Code Ann., Fam. Law § 5-323(b) (LexisNexis 2012). The Court of Appeals has recently reaffirmed that "the child's best interest has always been the transcendent standard in . . . TPR proceedings," *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 112 (2010), and "trumps all other considerations," even the rights and interests of parents. *Id.* at 111. And to that end, § 5-323(d) lists the factors a juvenile court must consider in determining whether to grant non-consensual guardianship, including: (1) services offered to the parent to facilitate reunion — *i.e.*, whether the Department has made "best efforts"; (2) the parent's efforts to adjust her circumstances (including among other things the existence of a "parental disability" such that the parent cannot care for the child); (3) the existence of any abuse or neglect; and (4) the child's emotional ties with the parents and the impact on the child's well being. *See* Md. Code Ann., Fam. Law § 5-323.

Mother does not argue that the trial court erred in determining that she is unfit, nor does she attack the court's general application of and conclusions relating to the § 5-323(d) factors. She argues only that the court erred in not exercising its discretion to allow her a "reasonable opportunity" for her mental health to stabilize before terminating because she had shown a "marked improvement in her ability to comply with services upon receiving Haldol as an injection." In support of her position, Mother cites the eighteen-month period articulated in § 5-323(d)(2)(iv), which requires the court to consider, as part of a parent's efforts to adjust her own circumstances, whether the provision of further services to the parent might bring about a lasting change. The Department counters that Mother was suffering significant delusions just prior to the TPR Hearing, and that clear and convincing evidence demonstrated no likelihood that she could ever capably care for Yehonadab.

Although the statute contemplates that parents will have an opportunity to improve their circumstances before their parental rights are terminated, that opportunity is neither indefinite nor mandatory:

> whether additional services *would be likely* to bring about a lasting parental adjustment so that the child could be returned to the parent *within an ascertainable time not to exceed 18 months from the date of placement* unless the juvenile court makes a *specific finding that it is in the child's best interests to extend the time for a specified period.*

Id. (emphasis added). Here, Mother's reading of this section would effectively subordinate the best interests of her son to her (remote) potential for recovery. *First*, as a legal matter, nothing in this factor suggests that the mere "possibility" Mother might become a fit parent at some indeterminate point requires a juvenile court to deny a TPR Petition. Indeed, the language suggests the opposite, *i.e.*, that termination of an unfit parent could be warranted *unless* additional services *likely* will bring about a "parental adjustment" *within* eighteen months, and that the court should extend that deadline only if it makes a specific finding that the child's best interests would be served by doing so. Mother's reading of the factor also would thwart the recognized goal of limiting the time a child remains in "'foster care drift' — the legal, emotional, and physical limbo of temporary housing with temporary care givers." *In re Adoption/Guardianship of Victor A.*, 157 Md. App. 412, 427-28 (2004).

Second, as a factual matter, the circuit court did not err in finding that Mother "is not fit to parent Yehonadab, and it is unlikely she ever will be." The circuit court grounded this finding in abundant evidence demonstrating that Mother's chances for improvement were small and that an extended foster period would not serve Yehonadab's best interests:

> Mother has been diagnosed with schizophrenia and major depression, serious mental disorders. Mother has participated in services through the Department, including parenting classes and medication management. Throughout the last eighteen months, there has been little improvement in her symptoms or her ability to take care of Yehonadab. Mother gave herself a perfect score at the end of her parenting class in February, 2012, yet has not consistently been able to feed, diaper, or comfort Yehonadab. Despite monthly injections of Haldol, Mother continues to experience paranoid delusions. Dr. Amado's testimony that Mother has impaired ability to form healthy attachments, and his pessimistic view of Mother's ability to improve, is mirrored in Mother's behavior. Mother has exhausted the services the Department can provide; it is not likely that additional services will bring about a lasting improvement in Mother's parental adjustment, no matter how long the period is extended.
>
> The Department made extensive efforts to improve Mother's interactions with Yehonadab. One example of the lengths to which the Department went stands out. For the first year of the family's involvement with the Department, Mother wore dark glasses, indoors and out, including during her visits with Yehonadab. When Yehonadab continued to be very distressed at visits, the Department asked the foster parents to wear dark glasses indoors while with Yehonadab, hoping he would acclimate to them. Mr. Trigo, the foster father, testified that they did this. It did not alleviate the problem in the relationship between Yehonadab and Mother, but it does show that the Department has gone to extraordinary lengths, with the full cooperation of the foster parents.
>
> Meanwhile, Yehonadab has been in his current foster care placement for almost eighteen months and has strongly bonded with his foster parents. Despite seeing his Mother, sometimes weekly, during this time, Yehonadab has not shown an attachment to Mother and is often very distressed when with her.
>
> The Court finds that it would be contrary to Yehonadab's best interest to extend the foster period.

Notwithstanding the testimony that Haldol injections "improved [Mother's] overall mental health and prognosis," the broader body of testimony and evidence painted a muddled and distinctly less favorable picture of her mental health future. Dr. Amado testified that there had not been any real change in her condition over time, and Ms. Hass, whom Mother herself called, testified that Mother has setbacks when there are "stressors" in her life, including as recently as a week before the TPR Hearing, and the trial court noted that Mother still experienced delusions as of August 2012. Although Mother may be optimistic about her chances for recovery, she presented no expert testimony to rebut the substantial evidence presented by the

Department, and on which the circuit court relied, demonstrating that her serious mental health problems persist and likely will continue. Indeed, the circuit court witnessed first-hand the same erratic behaviors witnesses had observed during Mother's visits with Yehonadab:

> Mother's behavior at the TPR trial displayed many of the actions and symptoms that were reported and testified about. Mother read from the Bible during several parts of the TPR trial. She also appeared to be sleeping during some parts of the trial and left the courtroom for extended bathroom breaks. Mother also testified at trial, displaying the tangential thought patterns Dr. Amado testified and reported about.

The circuit court was in the best position to assess Mother's current and future mental health as part of its overall analysis of Yehonadab's best interests, and its conclusions regarding Mother's current and future fitness as a parent are supported by ample evidence. We hold that the circuit court did not abuse its discretion in terminating Mother's parental rights rather than waiting to see if her mental health might improve, *In re Yve S.,* 373 Md. at 583-84; *cf. In re Nathaniel A.,* 160 Md. App. 581, 596 (2005) (holding that in the context of a CINA petition, the judge "need not wait until the child suffers some injury" before making a finding that he is a CINA, as "[t]he purpose of the act is to protect children–not to wait for their injury" (quoting *In re William B.,* 73 Md. App. 68, 77-78 (1987)), and, therefore, affirm the Final Order.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Father ultimately was deemed to have consented to the TPR Petition based upon his failure to respond to service through publication. Md. Code Ann., Fam. Law § 5-320(a)(1)(iii)(1)(c); *see In re Adoption/Guardianship No. 93321055/CAD,* 344 Md. 458, 486 (1997).

2. On two occasions, Ms. Machado presented Mother with a service agreement, and both times Mother refused to sign. The first agreement would have covered the period running from June 24, 2011 through October 24, 2011, and the second from October 25, 2011 through April 24, 2012.

3. Mother's evaluation of her parenting skills differed significantly from the professionals' assessments. After the parenting class, which she attended in January 2012, Mother rated herself a 60 out of 60 at "nurturing" skills, even though her refusal even to hold Yehonadab at times shows little success in this area.

4. Mother's testimony spanned three pages in the transcript and, by any objective standard, was rambling and incoherent.

5. We discuss further findings of fact below where relevant to our analysis.

6. Termination may also take place over the child's objection, although in this case Yehonadab, through counsel, consented to the TPR Petition.

Cite as 5 MFLM Supp. 71 (2013)

Child support: enforcement of outstanding judgments: contempt

Zvi Covaliu
v.
Dina Omacy

No. 1409, September Term, 2011

Argued Before: Kehoe, Hotten, Eyler, James R. (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: March 11, 2013. Unreported.

The trial court did not err in denying the father's motion to vacate a March 2005 child support payment judgment or in granting the mother's motion to enforce outstanding judgments for child support by issuing a qualified domestic relations order.

Zvi Covaliu appeals from a judgment of the Circuit Court for Montgomery County disposing of several motions relating to child support filed by Covaliu and his former spouse, Dina Omacy. Covaliu presents four issues to this Court, which we restate and consolidate as:

> I) Whether the circuit court erred by denying Covaliu's motion to vacate the March 2005 Judgment?
>
> II) Whether the circuit court erred by granting Omacy's motion to enforce outstanding judgments for child support owed by Covaliu by entry of a qualified domestic relations order ("QDRO")?
>
> III) Whether the circuit court abused its discretion by denying Covaliu's motion for reconsideration?[1]

Finding neither error nor abuse of discretion on the part of the circuit court, we affirm its decisions.

BACKGROUND

Covaliu and Omacy were married in Israel on October 10, 1985. Three children were born of the marriage: Itay, born March 11, 1986; Sigal, born August 21, 1992; and Elad, born April 21, 1994. At some point thereafter, the parties relocated to Montgomery County. The parties separated in August, 1996 as a result of Covaliu's two-year extramarital relationship with another woman, Maria Pilar Fuentes. The circuit court granted the parties an absolute divorce on January 6, 1999, a judgment which ordered Covaliu to pay child support of $1,741.74 per month for the parties' three children.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

Covaliu's compliance with court orders pertaining to his child support obligations has been grudging at best and his refusal to comply quite often contumacious. As a result, this action has accumulated 684 docket entries after the judgment of absolute divorce, including numerous petitions by Omacy to hold Covaliu in contempt for non-payment of child-support. We confine our recitation of the facts to those at issue in this appeal, which shall include a brief recitation of the facts underlying this Court's most recent opinion concerning these parties, *Omacy v. Covaliu*, No. 489, September Term 2005, filed March 14, 2006. ("*Covaliu I*"), and the events thereafter.

Covaliu I

The last time these parties were before this Court, the panel reviewed the circuit court's March 25, 2005 judgment, wherein the court in relevant part:

> (1) concluded, and the parties agreed, that Covaliu owed $10,886.14 in unpaid child support for Sigal and Elad for the period of May, 2004 through February 28, 2005;
>
> (2) held Covaliu in contempt as a result of his non-payment;
>
> (3) entered a judgment against Covaliu for $10,886.14 (the "March 2005 Judgment");
>
> (4) ordered that Covaliu could purge himself of his contempt by payment of $3,000 to Omacy;
>
> (5) ordered that, upon his $3,000 purge payment to Omacy, Covaliu would pay the remaining $7,886.14 arrearage at a rate of $300 per month beginning April 1, 2005; and
>
> (6) granted Covaliu's motion seeking modification of his child support oblig-

ation, reducing his obligation to $1,415 per month.

Covaliu paid the $3,000 purge and both Covaliu and Omacy appealed.

A panel of this Court affirmed the circuit court's finding of contempt[2] and the award of attorney's fees but otherwise vacated the portion of the court's judgment modifying Covaliu's child support obligation because late disclosure of financial documents by both sides improperly denied both sides their right to verify the income of the other and remanded the matter for further proceedings consistent with the panel's opinion. Covaliu made no further payments on the March 2005 Judgment after the panel's opinion.

The 2007 Remand Proceeding Following *Covaliu I*

The circuit court held a two-day hearing to resolve the issues presented on remand. After the hearing and in a written order, the court:

> (1) modified Covaliu's child support payment for the parties' two children still eligible for child support, Sigal (born August 21, 1992) and Elad (born April 21, 1994) to $1,696 per month payable on the first day of the month;
>
> (2) entered a judgment against Covaliu and in favor of Omacy for $1,224 (the "June 2007 Judgment"), the sum of Covaliu's child support arrears from March 1, 2005 through March 1, 2006 ($324) and the costs mandated by this Court in its *Covaliu I* mandate ($900);
>
> (3) ordered that Covaliu pay child support arrears accumulated from January 1, 2007 through May 31, 2007 in the amount of $1,512 by June 15, 2007 (with judgment to be entered if he failed to do so); and
>
> (4) entered a judgment against Covaliu and in favor of Omacy for $10,000 in attorney's fees.

Relevant to this appeal, Covaliu never paid Omacy any portion of the June 2007 Judgment for $1,224. Nor did he pay, as we can determine, any portion of the $10,000 judgment or the $1,512 judgment.

The 2011 Motions

On October 5, 2010, Covaliu filed a motion for modification of child support seeking a retroactive reduction of his child support obligation for Sigal and Elad. On February 11, 2011, Omacy filed her opposition to Covaliu's motion and filed a separate petition seeking: (1) an order holding Covaliu in contempt; (2) a determination of Covaliu's arrearage; (3) a judgment for the arrearage; (4) an order stating Covaliu could purge his contempt by paying the arrearage; and (5) attorney's fees for discovery violations. On March 4, 2011, Covaliu filed an amended motion for modification of child support, which we reproduce in relevant part below:

> The current child support in the amount of $1,696 per month [payable on the first day of the month] was latest established by the Court in an Order entered on June 20, 2007, for then two minor children: SIGAL COVALIU, born August 21, 1992, and ELAD COVALIU, born April 21, 1994.

The following material circumstances have changed since then:

> On August 27, 2010, Mr. Covaliu was laid off by his employer, Sallie Mae, and he has been unemployed since. Despite his best and relentless efforts, he has not been able to obtain employment yet. He started receiving unemployment insurance benefits in the amount of $378/week in September.
>
> Plaintiff's income has increased since the child support obligation was determined in June 2007, while her expenses for the minor children have decreased.
>
> Mr. Covaliu has two younger children from his current marriage, ALBERTO COVALIU-FUENTES, born October 4, 2001, and VERONICA COVALIU-FUENTES, born March 12, 2006, both of whom he has the responsibility to support and is supporting . . .
>
> [Eighteen]-year old- SIGAL COVALIU will graduate from Walter Johnson High School on June 15, 2011. Any child support obligation beyond this date should be based on the Maryland guidelines for one, not two minor children.

The circuit court, Judge Louise G. Scrivener presiding, held a hearing on the parties' motions. In a written opinion filed July 6, 2011 (the "July, 2011 Judgment"), the court:

> (1) retroactively modified Covaliu's child support obligation for Sigal and Elad from $1,696 per month to $900 per month for those months com-

mencing on the date that Covaliu filed his motion for modification;

(2) reduced Covaliu's obligation to $700 effective upon Sigal's graduation from high school;

(3) determined that Covaliu's current arrearage was $7,832.31

(4) awarded Omacy $600 in attorney's fees;

(5) held Covaliu in contempt for non-payment of the $7,832.31 in child support because Covaliu had "unilaterally reduced his child support and accumulated new child support arrears" despite receiving a "$60,000 lump-sum severance [from Sallie Mae after he was laid-off in August, 2010] and unemployment income, as well as [holding] retirement assets"; and

(6) set a purge for payment of the full arrearage ($7,832.31) and further ordered that this amount would be paid through two qualified domestic relations orders ("QDROs") in that amount relating to Covaliu's PNC Bank retirement account (which contained $9,421.91) and his IRA at Mid-Atlantic Federal Credit Union (which contained $7,923.77).

In its opinion, the court stated (emphasis added):

. . . At the time [Covaliu's amended motion to modify the 2007 child support order] was filed, the parties had two remaining minor children. Sigal Covaliu, born 8/21/92, has since graduated from high school, **so from June 2011 through May 2012, only one child,** [Elad] Covaliu, born 4/21/94, **will be eligible for support.**

* * * *

Child Support Modification

* * * *

. . . For November 2010 through **May 2011, the court will [retroactively] reduce the defendant's child support to $900.00 per month [for both Sigal and Elad]. From July 1, 2011 until the defendant obtains employment the child support will be reduced to $700.00 per month [to support Elad].** The child support is to be recomputed commencing the month in which the defendant commences work.

Arrears

The parties agree that through October 2010, the child support arrears are $2,919.55. For **November 1, 2010 through June 2011, the arrears are computed as follows: $900.00 per month x 8 = $7,200 due.** The defendant paid $2,287.24. Therefore the arrearage for that period is $4,912.76, and the total arrearage is $4,912.76 + $2,919.55 or $7,832.31. . . .

The Parties' Motions Filed After the 2011 Hearing

On July 11, 2011, Covaliu filed a motion to alter or amend the July 2011 Judgment arguing that the court had improperly: (1) stated that Covaliu had filed his motion on October 14, 2010 when it was filed on October 5, 2010; (2) calculated the arrearage with the $900 per month reduced support payment beginning November, 2010, instead of October, 2010; (3) calculated the arrearage with the further reduced $700 per month support amount beginning July, 2011 instead of June, 2011, because, he argued, Sigal graduated from high school at the end of May, 2011; (4) issued two QDROs for the arrearage amount, permitting Omacy to recover twice for the same judgment; and (5) erroneously awarded Omacy $600 in attorney's fees where he had complied with discovery requests. Omacy filed her opposition to Covaliu's motion to alter or amend the judgment, and, the same day, filed a motion to enforce two outstanding judgments for child support, namely, the still unsatisfied March 2005 Judgment for $10,886.14, and the still unsatisfied June 2007 Judgment for $1,224, together with accrued interest by means of the entry of a third QDRO.

On August 15, 2011, Covaliu filed an opposition to Omacy's motion arguing: (1) that the panel in *Covaliu I* vacated the March 2005 Judgment; and (2) that the court could not enforce the June 2007 Judgment using a QDRO because $900 of it represented his share of appellate costs in *Covaliu I,* as mandated by the panel. Covaliu attached a "Request for Hearing" to his opposition. The same day, Covaliu filed a motion to vacate the March 2005 Judgment arguing that it erroneously remained on the docket because the panel in *Covaliu I* vacated the judgment.

On October 6, 2011, the court denied both Covaliu's motion to alter or amend the July 2011 Judgment and his motion to vacate the March 2005 Judgment and granted Omacy's motion to enforce her outstanding judgments against Covaliu. Based on the record, no third QDRO has yet been entered.

Covaliu then filed a notice of appeal.

STANDARD OF REVIEW

Covaliu's contentions require us to engage in three different methods of appellate review. These modalities were summarized by Judge Adkins for the

Court of Appeals in *In re Adoption/Guardianship of Ta'niya C.*, 417 Md. 90, 100 (2010):

> [W]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

We review a circuit court's denial of a motion to alter or amend a judgment under an abuse of discretion standard. *Helman v. Mendelson*, 138 Md. App. 29, 58 (2001).

Discussion

I. The Motion to Vacate the 2005 Judgment

Covaliu contends that the circuit court erred by denying his motion to vacate the March 2005 Judgment because: (1) the panel in *Covaliu I* vacated the entry of that judgment and it improperly remained on the docket; and (2) he had made a partial payment on the March 2005 Judgment, which in turn required the court to vacate the March 2005 Judgment and enter a new judgment for the full March 2005 judgment less his partial payment. We are not persuaded by these arguments.

This first argument is based on a misreading of the panel's opinion in *Covaliu I.* Quite simply, the judgment against Covaliu for $10,886.14 was not an issue in that appeal — indeed, the panel noted that the parties had agreed before the circuit court that Covaliu owed that amount. The panel's opinion made it clear that its mandate vacated only the portion of the circuit court's judgment dealing with the modification of child support but did not vacate the order holding Covaliu in contempt.

Turning to Covaliu's second argument, we note that Covaliu did not argue in his motion to the circuit court that he had partially satisfied the March 2005 Judgment. Normally, the scope of our appellate review is restricted to issues "that plainly appear[ ] to have been raised in or decided by the trial court." Md. Rule 8-131(a). We will nevertheless briefly address Covaliu's argument. Omacy may recover the full amount of the judgment in her favor, together with interest, but no more. *See, e.g., Underwood-Gary v. Mathews*, 366 Md. 660, 669 (2001) ("[A] plaintiff is entitled to but one compensation for his or her loss, and full satisfaction of a plaintiff's claim prevents it from being further pursued . . . [D]ouble recovery for the same harm is not permissible."). As such, there is no need for a court to vacate and enter amended judgments on every partial payment by a defendant. If Covaliu pays the money he owes Omacy, Maryland Rule 2-626 governs the procedures by which the court will enter the judgment as satisfied.[3]

II. The Motion to Enforce the Outstanding Judgments

Covaliu makes three arguments to this Court as to why the circuit court erred by granting Omacy's motion to enforce the outstanding judgments against Covaliu by entry of a third QDRO against his two retirement accounts. We are not persuaded by Covaliu's arguments and discuss them in turn.

First, Covaliu contends that the court erred by granting Omacy's motion both because the panel in *Covaliu I* vacated the March 2005 Judgment it enforced and because Covaliu partially satisfied the March 2005 Judgment with his $3,000 payment. As we have already discussed, the panel in *Covaliu I* did not vacate the March 2005 Judgment. With regard to Covaliu's partial satisfaction of the March 2005 Judgment, we note that Covaliu did not present this issue to the circuit court in his opposition to Omacy's motion to enforce the outstanding judgments. Pursuant to Maryland Rule 8-131(a), the scope of our appellate review is restricted to issues "that plainly appear[ ] to have been raised in or decided by the trial court." Nonetheless, we conclude that even if Covaliu had informed the circuit court of his $3,000 payment on the March 2005 Judgment, any error in enforcing the full amount of the March 2005 Judgment by entry of a QDRO would have been harmless error. As we have previously stated, a plaintiff is only entitled to one recovery for a single wrong. *See Underwood-Gary*, 366 Md. at 669.

Second, Covaliu argues the court erred by granting Omacy's motion to enforce the outstanding judgments by entry of a QDRO because the June 2007 Judgment, in part, was for Covaliu's share of the appellate court costs from *Covaliu I.* From there, Covaliu argues that QDROs cannot be used to enforce a judgment for costs incurred in collecting unpaid child support. Covaliu fails to present any authority to support his position in his brief and his failure to do so constitutes a waiver of the argument. *See Poole v. State*, 207 Md. App. 614, 633 (2012) (collecting cases in which appellate courts have refused to consider arguments that were unsupported by citations to legal authority). In any event, Covaliu's argument fails substantively. The award of court costs was clearly part of Omacy's efforts to enforce Covaliu's child support

obligation. Omacy was within her rights to attempt to collect this amount through a QDRO. *See Roosevelt v. Corapcioglu*, 415 Md. 434, 443-44 (2010).

Third, Covaliu contends that the court abused its discretion by granting Omacy's motion without "scheduling a hearing" where one was "explicit[ly] request[ed]" in his opposition. Once again, Covaliu presents this Court with a bald assertion without providing us with any indication of the authority upon which he relies, thereby failing to meet Rule 8-504(a)(6)'s standards and leaving us with no obligation to address his argument. *See Poole*, 207 Md. App. at 633.

In any event, we are not persuaded by Covaliu's argument. Maryland Rule 2-311(e) and (f) pertain to hearings on motions. "Certain post-hearing motions are subject to Rule 2-311(e)'s hearing requirements, while Rule 2-311(f) treats hearings on the other motions that are not addressed in section (e)."[4] *Miller v. Mathias*, 428 Md. 419, 440 (2012). Omacy's motion to enforce the outstanding judgments falls under Rule 2-311(f) which, as amended effective July 1, 2011, states (emphasis added):

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532[motion for judgment notwithstanding verdict], 2-533 [motion for new trial], or 2-534 [motion to amend the judgment], shall request the hearing in the motion or response under the heading "Request for Hearing." **The title of the motion or response shall state that a hearing is requested.** Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, **but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.**

Thus, Rule 2-311(f) "mandates a hearing only if a party requests one and if the court 'render[s] a decision that is dispositive of a claim or defense." *Miller*, 428 Md. at 442. We have previously explained that a decision is "dispositive," as the term is used in Md. Rule 2-311(f), "when it conclusively settles a matter and actually and formally disposes of the claim or defense." *Wilson v. N.B.S., Inc.*, 130 Md. App. 430, 452 (2000) (internal citations and quotation marks omitted).

We turn to whether the court's grant of Omacy's motion to enforce the outstanding March 2005 and June 2007 Judgments, plus accrued interest, was dispositive of a claim or defense. The docket entries clearly reflect that on March 25, 2005 and June 20, 2007, the circuit court entered judgments against Covaliu that were dispositive of Omacy's claims to unpaid child support. By granting Omacy's motion to enforce those outstanding judgments, and the accrued post-judgment interest,[5] by imposition of a QDRO, the court granted Omacy the means with which to enforce her judgments against Covaliu. We conclude that this court action was not "dispositive of a claim or defense," as that concept has been defined in *Wilson*. 130 Md. App. at 452. Thus, the court had discretion to determine whether to hold a hearing and did not abuse its discretion by electing not to do so.

III. The Motion for Reconsideration

Covaliu contends that the court abused its discretion by denying his motion for reconsideration because the court: (1) stated that Covaliu filed his motion on October 14, 2010 when it was filed on October 5, 2010; (2) calculated the arrearage with the $900 per month reduced support payment beginning in November, 2010, instead of October, 2010; (3) calculated the arrearage with the further reduction to $700 per month support amount beginning in July, 2011 instead of June, 2011; and (4) issued two QDROs for his newest arrearage, permitting Omacy to recover twice for the same judgment. We are not persuaded by these arguments and consider them in turn.

First, Covaliu argues that the circuit court abused its discretion in denying his motion for reconsideration because the court's order stated that he had filed his original motion for modification on October 14, 2010 instead of the correct date, October 5, 2010. We cannot conceive how this typographical error prejudiced Covaliu.

Second, we are not persuaded that the court erred by calculating Covaliu's arrearage with the reduced child support payment beginning in November, 2010 instead of October, 2010. Section 12-104(b) of the Family Law Article states that a court "may not retroactively modify a child support award prior to the date of the filing of the motion for modification." F. L. § 12-104(b). *See also Harvey v. Marshall*, 158 Md. App. 355, 370-71 (2004), *aff'd* 389 Md. 243 (2005) (concluding that F.L. § 12-14(b) prevents a circuit court from modifying or setting aside any child support arrearage that accrued before the obligor parent petitioned for modification). Covaliu filed his original motion for modification of child support of October 5, 2010. In this motion, he sought a reduction of child support owed pursuant to the most recent order in 2007 which set child support for Sigal and Elad at (emphasis added): "$1,696 per month, **payable on the first day of the month."** Thus, Covaliu's October, 2010 child support obligation of $1,696 for the month

of October had already accrued when Covaliu filed his motion for modification. As such, we conclude there was no error where the circuit court calculated Covaliu's arrearage using November, 2010 as the first month where Covaliu owed the reduced child support amount.

Third, Covaliu argues that the circuit court abused its discretion by calculating Covaliu's arrearage with the $700 child support obligation (for Elad only) beginning in July, 2011 instead of June, 2011 because eighteen-year-old Sigal graduated from high school on May 31, 2011 and, therefore, became ineligible for child support the day before Covaliu's June obligation accrued.

We do not perceive any error by the circuit court in concluding that Sigal graduated in June, 2011 and calculating the arrearage accordingly. "A person who has attained the age of 18 years and who is enrolled in secondary school has the right to receive support and maintenance from both of the person's parents until the first of the following events: . . . "[t]he person graduates from or is no longer enrolled in secondary school or . . . attains the age of 19 years." MD. CODE ANN, ART. 1, § 24(a)(2). Here, the parties have characterized the date of eighteen-year-old Sigal's graduation differently. In his amended motion for modification of child support, Covaliu stated that Sigal would graduate from high school on June 15, 2011. During the June 22, 2011 hearing on the parties' motions, Omacy's attorney made the following statement, "I understand [that Sigal's] high school graduation was, in fact, May 31[, 2011], and so, we are in agreement that the change of circumstances will be effective June 1[, 2011.]" Regardless of these statements, Omacy's appendix submitted to this Court, without objection from Covaliu, contains a copy of Sigal's high school diploma generally dated "June 2011." Based on this, we conclude that the court did not err by determining Sigal obtained her high school diploma in June, 2011 and that Covaliu began supporting only Elad in July, 2011.

Fourth, Covaliu argues that the court abused its discretion by entering two QDROs to satisfy the March 2005 and June 2007 judgments. As explained previously, there was no error by the circuit court in this regard.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED.

APPELLANT TO PAY COSTS.

FOOTNOTES

1. In his brief, Covaliu's questions presented were framed as follows:

> 1. Did the Trial Court err in denying Defendant's Motion to Vacate Money Judgment in the amount of $10,886.14, as mandated by the 3/14/2006 Court of Special Appeals Opinion and Mandate?
>
> 2. Did the Trial Court err in granting Plaintiff's Motion to Enforce Judgment through a QDRO requiring the transfer of $19,504.48 of Defendant's retirement assets to Plaintiff?
>
> 3. Did the Court err in denying Defendant's Motion for Reconsideration and in not correcting the timing calculation errors of the child support arrears from the original amount of $7,832.31 to the correct amount of $6,836.31?
>
> 4. Did the Trial court err in denying Defendant's Motion for Reconsideration and in the issuing of two — rather than one — QDRO[s] (each in the amount of $7,832.31, the execution of which might result in the transfer to Plaintiff of double the intended and ordered amount[?]

2. The panel's opinion affirms the court's judgment finding Covaliu in contempt stating:

> Maryland Rule 15-207(e) governs constructive civil contempt actions for failure to pay child support. Omacy, as the petitioner, carried the burden of proving "by clear and convincing evidence that [Covaliu] has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing." Md. Rule 15-207(e)(2). This burden was satisfied because the parties agreed that Covaliu was in arrears by $10,866.14 as of the March Hearing.
>
> The burden then shifted to Covaliu to prove "by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing [Covaliu] (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment . . ." Md. Rule 15-207(e)(3).
>
> Covaliu admittedly never made full disclosure of his financial assets to the court, and cannot be heard to complain that the court drew an adverse inference from Covaliu's brazen refusal to make full disclosure. Covaliu refused to disclose to Omacy, and failed to provide to the court, the identity of all of his clients and information relating to at least one of his bank accounts. His well-founded concern that his bank accounts may be attached to satisfy outstanding judgments against him

> does not relieve him of his obligation to disclose all of his financial information so that the court may determine whether he was able to pay child support during the period when he was delinquent.
>
> * * * *
>
> Covaliu's failure to fully disclose all of his financial information to the court made it impossible for him to satisfy his burden to prove that he "never had the ability to pay more than the amount actually paid," as required by Maryland Rule 15-207(e)(3)(A)(i). Accordingly, the circuit court did not err in finding Covaliu in contempt, and we affirm its judgment in that respect.

Covaliu I, slip opinion at 9-10.

3. Maryland Rule 2-626 provides:

> (a) Entry Upon Notice. — Upon being paid all amounts due on a money judgment, the judgment creditor shall furnish to the judgment debtor and file with the clerk a written statement that the judgment has been satisfied. Upon the filing of the statement the clerk shall enter the judgment satisfied.
>
> (b) Entry Upon Motion. — If the judgment creditor fails to comply with section (a) of this Rule, the judgment debtor may file a motion for an order declaring that the judgment has been satisfied. The motion shall be served on the judgment creditor in the manner provided in Rule 2-121. If the court is satisfied from an affidavit filed by the judgment debtor that despite reasonable efforts the judgment creditor cannot be served or the whereabouts of the judgment creditor cannot be determined, the court shall provide for notice to the judgment creditor in accordance with Rule 2-122.
>
> (c) Costs and Expenses. — If the court enters an order of satisfaction, it shall order the judgment creditor to pay the judgment debtor the costs and expenses incurred in obtaining the order, including the reasonable attorney's fees, unless the court finds that the judgment creditor had a justifiable reason for not complying with the requirements set forth in section (a). If the motion for an order of satisfaction is denied, the court may award costs and expenses, including reasonable attorney's fees under Rule 1-341.

4. Md. Rule 2-311(e) provides:

> (e) Hearing — Motions for judgment notwithstanding the verdict, for new trial, or to amend the judgment. When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.

5. Section 11-107 of the Courts and Judicial Proceedings Article provides that "the legal rate of interest on a judgment shall be at the rate of 10 percent per annum on the amount of the judgment." MD. CODE ANN., CTS. & JUD. PROC., § 11-107(a). Interest begins to accrue at that rate on the date that the clerk of the court records the judgment in the docket. *See* Md. Rule 2-604(b). *See also* Md. Rule 2-601(b) ("The clerk shall enter a judgment by making a record of it in writing on the file jacket, or on a docket within the file, or in a docket book, according to the practice of each court, and shall record the actual date of the entry. That date shall be the date of the judgment.").

NO TEXT

Cite as 5 MFLM Supp. 79 (2013)

Child support: above-guidelines case: financial circumstances of parents

Stephen S. Noto V. Molly Noto N/K/A Molly Johnson

No. 2442, September Term, 2011

Argued Before: Wright, Berger, Nazarian, JJ.

Opinion by Berger, J.

Filed: March 11, 2013. Unreported.

The trial court did not err in failing to deviate downward from the child support guidelines, where the parties' income actually exceeded the maximum level specified in the guidelines. As required, the circuit court considered the financial circumstances of the parties, their station in life, their age and physical condition, their ability to work, and the expense of educating the children.

On December 29, 2010, appellant, Stephen Noto ("Father") filed a complaint for absolute divorce in the Circuit Court for Caroline County. On March 4, 2011, appellee, Molly Noto ("Mother") filed an answer and counter complaint. A hearing on the merits was held on November 10, 2011. On December 13, 2011, the circuit court issued an order of absolute divorce ordering Father to pay monthly child support in the amount of $1,966.00.

Father filed a timely appeal and presents four issues for our review, which we have consolidated and rephrased as follows:

1. Did the circuit court err in failing to deviate from the child support guidelines.[1]

For the reasons set forth below, we affirm the judgment of the Circuit Court for Caroline County.

FACTS AND PROCEEDINGS

The parties were married September 12, 2008 in Pensacola, Florida. Father and Mother separated a little over a year later in December 2009. After moving to Denton, Maryland, Father filed a complaint for absolute divorce in the Circuit Court for Caroline County on December 29, 2010. In late January 2010, Mother discovered that she was pregnant, but Father did not learn of her pregnancy until March 2010. At Father's request, a blood test was administered, which confirmed his paternity. Father and Mother's child was born on August 20, 2010.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

After several delays and discovery disputes, a merits hearing was held on November 10, 2011. Thereafter, the court granted Father and Mother an absolute divorce. With the consent and agreement of the parties, the court awarded Mother sole legal and physical custody of the minor child. Father declined contact and visitation with the child. The parties did not, however, consent or agree to child support. Accordingly, the parties testified at the merits hearing as to their respective finances and provided various documentation to the court.

After listening to testimony and receiving evidence at the merits hearing, the circuit court found that the parties' combined monthly income, adjusting for the support paid by Father for his two children from a prior marriage, is $15,932.00. Although the combined adjusted income of the parties was greater than the maximum amount under the guidelines, the court used the top end of the guidelines in ordering Father to pay monthly child support of $1,966.00. This timely appeal followed.

DISCUSSION

I.

Father's contention on appeal is that the trial court erred in failing to deviate from the child support guidelines.[2] Father maintains that: (1) the circuit court speculated as to the loss of Mother's second home and the impact such a foreclosure may have upon her security clearance; (2) awarding child support to Mother at the top level of the guidelines was not financially feasible for Father; (3) the court failed to consider the impact of the guidelines amount on Father's employment; and (4) there was insufficient evidence to establish that the daycare expenses incurred by Mother on behalf of the parties' minor child are reasonable. Upon a review of the record, the trial court did not err in failing to deviate from the child support guidelines.

Generally, "the amount to be awarded for child support is governed by the circumstances of the case

and is entrusted to the sound discretion of the [trial judge], whose determination should not be disturbed on appeal unless he arbitrarily used his discretion or was clearly wrong." *Gates v. Gates*, 83 Md. App. 661, 663 (1990) (citing *Kramer v. Kramer*, 26 Md. App. 620, 636 (1975)).

Section 12-202(a)(1) of the Family Law Article of the Maryland Code requires a court to use the child support guidelines "in any proceeding to establish or modify child support, whether pendente lite or permanent." Md. Code Ann., Fam. Law ("FL") § 12-202(a)(1) (LexisNexis 2012); *Beck v. Beck*, 165 Md. App. 445, 449 (2005). In *Petrini v. Petrini*, 336 Md. 453, 460 (1994), the Court of Appeals explained that:

> The purpose of the guidelines was to limit the role of the trial courts in deciding the specific amount of child support to be awarded in different cases by limiting the necessity of factual findings that had been required under pre-guidelines case law. The legislature also intended the guidelines to remedy the unconscionably low levels of many child support awards when compared with the actual cost of raising children, to improve the consistency and equity of child support awards, and to increase the efficiency in the adjudication of child support awards.

(internal footnotes omitted). "There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines . . . is the correct amount of child support to be awarded," FL § 12-202(a)(2)(i), but that "presumption may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii); *Knott v. Knott*, 146 Md. App. 232, 251 (2002).

In *Otley v. Otley*, 147 Md. App. 540, 561 (2002), the court acknowledged that "if the combined adjusted actual income exceeds the highest level specified in the schedule . . . the court may use its discretion in setting the amount of child support." *See* FL § 12-204(d). In *Voishan v. Palma*, 327 Md. 318, 331-32 (1992), the Court of Appeals noted that:

> [T]he guidelines do establish a rebuttable presumption that the maximum support award under the schedule is the minimum which should be awarded in cases above the schedule. Beyond this, the trial judge should examine the needs of the child in light of the parents' resources and determine the amount of support necessary to ensure that the child's standard of living does not suffer because of the parents' separation.

In *Voishan*, a case in which the parents' incomes were above the guidelines, the husband appealed the court's child support decision on the basis that the amount of support could not exceed the maximum amount under the guidelines. *Id*. at 325. The Court of Appeals disagreed and held that "had the legislature intended to make the highest award in the schedule the presumptive basic support obligation in all cases . . . it would have so stated and would not have granted the trial judge discretion in fixing those awards." *Id*. at 326.

The Court of Appeals in *Voishan* further explained that the legislature specifically declined to set guidelines above a certain amount because "the legislative judgment was that at such high income levels judicial discretion is better suited than a fixed formula to implement the guidelines' underlying principle that a child's standard of living should be altered as little as possible by the dissolution of the family." *Id*. at 328. The Court of Appeals held that "extrapolation from the schedule may act as a guide, but the judge may also exercise his or her own independent discretion." *Id.* at 329 (internal quotations omitted).

In the case *sub judice*, the child support guidelines were not directly applicable because the parties' combined adjusted income exceeded the maximum level specified in the guidelines. The circuit court determined that the parties' combined adjusted income is $15,932.00, which is $932.00 more than the $15,000.00 maximum under the child support guidelines. A combined adjusted income of $15,000.00 for one child equates to a monthly child support payment of $1,942.00 under the guidelines. *See* FL § 12-204(e). Consequently, the amount of child support here rested in the sound discretion of the trial court. As such, the court exercised its discretion in ordering Father to pay monthly child support of $1,966.00, $24.00 more than the top end of the guidelines for one child.

In the amended order of absolute divorce, the circuit court fully explained its reasoning for imposing the amount of child support it ordered. The court's child support determination was based upon the testimony and evidence presented at the merits hearing. As required, the circuit court considered "the financial circumstances of the parties, their station in life, their age and physical condition, their ability to work, and the expense of educating the children." *Collins v. Collins*, 144 Md. App. 395, 440 (2002); *Kramer, supra*, 26 Md. App. at 636.

During the merits hearing, Father testified that he was under financial hardship and that he was not going to pay any child support until the court deter-

mined that it was necessary for him to do so. Father requested the court to deviate from the child support guidelines partly because of his visitation arrangements with his two children from his prior marriage. Father stated that he travels to Virginia every other weekend to visit his two children, which costs him $268.00 for lodging. Father explained that he incurs additional expenses for gas and food. Moreover, Father testified that he not only provides financial support to the two children from his previous marriage, but he further provides financial support for his live-in girlfriend and her two children because of a "human obligation." Critically, this Court has noted that FL § 12-202(a)(2)(iv) prohibits a downward departure from the child support guidelines based solely upon the presence of children from a previous relationship. *Beck, supra*, 165 Md. App. at 447.

Father further testified that he works at Advanced Engineering and IT Solutions as a "cyber instructor," earning an annual salary of $135,000.00. Father stated that he is current on his mortgage, but he borrowed $10,000.00 to "catch up." Father submitted to the court financial records demonstrating that his monthly debt was in excess of $2,600.00 prior to the order of child support. Further, Father testified that his live-in girlfriend does not contribute to their expenses because she is unemployed. As such, Father is responsible for all of their household expenses. Additionally, Father pays for three vehicles, one of which is driven by his girlfriend. The total monthly payment for the three automobiles is $1,206.00. Father is also contributing to the car insurance, which covers his girlfriend as an insured driver. Moreover, Father further testified that he co-signed as a guarantor for a loan for his girlfriend so that she could obtain breast augmentation.

The court acknowledged that the "parties are on the brink of financial collapse despite having full-time jobs and health benefits." Father is supporting, without legal obligation, another family who currently resides with him, without any financial support from that family. Mother is paying rent for an apartment in Delaware, but she is also contributing to a mortgage of an unoccupied home in Pennsylvania, which is in arrears. Although Father has limited resources to pay the accumulated child support arrears of $17,694.00, the court noted that Father has neither paid any support nor placed any funds in escrow "to cover the possibility of arrears."

Additionally, Father requested the court to deviate from the child support guidelines because he claimed that Mother's expenses for childcare are "astronomical."[3] Father, however, did not investigate alternative childcare arrangements to support his claim. Mother testified that she researched several childcare options prior to enrolling the minor child at La Petite Academy. Mother stated that this particular childcare allows her to place the child in any of the locations in the country. Mother further testified that her employment demands frequent and unexpected travel. After considering all of the testimony and evidence submitted, the court found that Mother's expenses related to the minor child's care are necessary and reasonable.[4]

In the court's amended order of absolute divorce, the court clearly analyzed the financial circumstances of the parties and provided findings as to the costs of maintaining the child. The court acknowledged that "[b]oth parents will have to make sacrifices in order to support [the child], and to maintain her day care which is essential to [Mother's] employment." Indeed, "a parent's child support obligation should not be used to shackle the parent by preventing him or her from making a needed lifestyle change, based on valid reasons." *Lorincz v. Lorincz*, 183 Md. App. 312, 341 (2008) (citing *Malin v. Mininberg*, 153 Md. App. 358, 404 (2003)). Nonetheless, Father failed to show any persuasive reasons that would necessitate a downward departure from the child support guidelines. Additionally, Father failed to demonstrate that the trial court's application of the guidelines was unjust or inappropriate. *See* FL § 12-202(a)(2)(ii); *Knott, supra*, 146 Md. App. at 251. Furthermore, both Mother and Father, as the trial court indicated, need to make financial adjustments to avoid having the minor child adversely affected by their respective lifestyle choices. Accordingly, the circuit court did not err in its award of child support.

For the reasons set forth above, we affirm the judgment of the Circuit Court for Caroline County.

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

FOOTNOTES

1. Father phrases the questions for review, which we repeat *verbatim*, as follows:

   1. Did the Circuit Court err in considering the possibility of events that had yet to occur in determining if there was good cause for deviation from the child support guidelines?
   2. Did the Circuit Court err in its determination that the daycare expenses incurred by Defendant were reasonable?
   3. Did the Circuit Court fail to give due weight to economic factors in the case in failing to deviate from the child support guidelines?

4. In failing to deviate from the child support guidelines did the Circuit Court err in determining what was in the best interest of the child?

2. Alternatively, Mother claims that the circuit court actually deviated from the child support guidelines. The record demonstrates, however, that the circuit court did not deviate from the guidelines, which is evidenced by footnote one of the circuit court's amended order of absolute divorce. The court's amended order provides that it "opted to use the top end of the guidelines to calculate the support," indicating that it did not deviate from the guidelines. In its calculation, the circuit court adjusted upward for the higher combined adjusted income of the parties. Nevertheless, the court relied on the guidelines in its determination to award child support.

3. The record shows that Mother pays $1,166.00 per month for childcare.

4. Under FL § 12-204(g)(1), "actual child care expenses incurred on behalf of a child due to employment . . . shall be divided between the parties in proportion to their adjusted actual incomes."

Cite as 5 MFLM Supp. 83 (2013)

Child support: modification: actual income determination

John Boniface Maier, II
v.
Heather Ann Maier

No. 2077, September Term, 2011

Argued Before: Eyler, Deborah S., Matricciani, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: March 12, 2013. Unreported.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

Before deciding that a father's circumstances did not merit a reduction in his child support payments, the trial court should have determined what his actual income was.

Appellant John Boniface Maier was granted an absolute divorce from appellee Heather Anne Maier by judgment of the Circuit Court for Montgomery County docketed on December 7, 2009. In anticipation of the judgment, the parties entered into an agreement settling certain financial matters and obligating appellant to make support payments for the two children born of the marriage.[1] After appellant fell behind in making his child support payments, appellee filed a petition for contempt and a motion for show cause order. While that petition was pending, appellant filed a motion to reduce his child support payments. The parties came before the Circuit Court for Montgomery County on September 21 and 22, 2011. The circuit court dismissed appellant's motion while concurrently granting appellee a judgment in the amount of $399,593.27.[2] The court made an oral ruling that was later reduced to a written order and docketed on September 30, 2011. Appellant filed a motion to alter or amend the judgment and for a new trial before the order was docketed and submitted a supplemental motion afterwards. That motion was denied on November 11, 2011, prompting appellant to note this timely appeal.

QUESTIONS PRESENTED

Appellant presents five questions for our review which we rephrase as:[3]

I. Did the circuit court err in conducting the trial in such a way that prevented appellant from testifying directly or in calling his desired expert?

II. Did the circuit court err in denying appellant's motion to reduce his child support?

III. Did the circuit apply the correct standard for awarding attorney's fees?

IV. Did the circuit court enter a properly formed contempt order?

Because we answer question II affirmatively, it is unnecessary to base our ruling on the answers to questions I, III, or IV, given the new evidence anticipated upon remand. For the trial court's guidance, however, we will address briefly the conduct of the trial here.

FACTUAL AND PROCEDURAL HISTORY

After fifteen years of marriage, the parties separated with the intention of becoming divorced. In anticipation of a formal divorce, on July 2, 2008, the parties entered into a Voluntary Separation and Property Settlement Agreement, the ("Agreement").[4] The Agreement pertained to dividing the proceeds from the sale of the marital home and obligated appellant to begin paying child support once the marital home sold. In June of 2009, the home sold. On June 18, 2009, appellant filed a complaint for divorce and a motion to modify his child support obligation. Following an evidentiary hearing, the Circuit Court for Montgomery County docketed a judgment of absolute divorce on December 7, 2009. The judgment incorporated, but did not merge the parties' Agreement.

Appellant's original obligation to pay child support arose under the Agreement. The court's judgment of absolute divorce, however, ordered appellant to "pay child support to the [ ] [appellee] in the amount of $7,000 per month," $1,000 less than stipulated under the terms of the Agreement. Additionally, the Agreement entitled appellee to a share of appellant's unearned income, determined how the parties will share certain household and familial expenses, and contained a fee-shifting provision , which read:

> [in] the event that it becomes necessary for either party to file suit or to

> institute legal proceedings of any type against the other party in order to enforce any term or provision of this Agreement, or in order to recover damages for the breach of this Agreement by the other party, or in the event that either party files an action to rescind, to set aside, to modify, or to reform this Agreement, then in such event *the party who prevails* in such suit, action or proceeding shall, in the discretion of the court, *be entitled to an award from the court or other judicial tribunal of all costs incurred by the prevailing party* in prosecuting, or in defending, such suit, action or proceeding, as the case may be, including, but not limited to, filing fees, costs of discovery, expert witness fees, and reasonable attorney's fees.

DISCUSSION

Standard of Review

The parties came before the court sitting without a jury. As such, we apply Maryland Rule 8-131(c) to our review. That rule states:

> [w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Id. "The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the court's determination, it is not clearly erroneous and cannot be disturbed." *Clickner v. Magothy River Ass'n*, 424 Md. 253, 266 (2012) (citing *Ryan v. Thurston*, 276 Md. 390, 392 (1975)). "The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence." *Knowles v. Binford*, 268 Md. 2, 11 (1973). "It is thus plain that the appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence." *Ryan v. Thurston*, 276 Md. 390, 392 (1975). "Questions of law, however, require our non-deferential review." *Clickner*, 424 Md. at 266.

The Court's Handling of Testimony and Evidence

Appellant was self-represented at trial. The record reflects that his trial presentation was less than artful. He complains that the trial judge impermissibly influenced the proceedings because during the "shortened trial, the court promised [appellant] a 'fair' trial." Yet, appellant argues that the court, "only allowed him time to present a single witness, did not permit him to call his expert witness on the afternoon of Day 2, belittled his cross-examination of [appellee], prevented him from calling [appellee] as a witness in his case, sustained the trial judge's own objections to [appellant's] cross-examination and required the parties to present closing arguments although many hours remained in which the trial court could have permitted [appellant] to present his case."

In appellee's view, however, the fact that appellant was self-represented at trial does not entitle him to stray from a line that all others must follow. *See Tretick v. Layman*, 95 Md. App. 62, 68 (1993) ("The rules of procedure apply primarily to parties, and, for the most part, to attorneys in their representative capacity . . . The principle of applying the rules equally to pro se litigants is so accepted that it is almost self-evident."). Thus, the parties disagree about the trial judge's exercise of his control over the trial, as authorized by Maryland Rule 5-611(a).[5]

Appellant claims that the trial judge affected his presentation at trial by prohibiting him from calling appellee as a witness and by objecting throughout his cross-examination. While we believe the trial judge became frustrated with appellant and curtailed his presentation unnecessarily, we do not find it necessary to reverse on this basis because appellant's circumstances have changed again and the child support issue must be reconsidered for the reasons explained, *infra*.

Before the court were appellant's motion to reduce his child support and appellee's petition for contempt. On the second day of trial, after appellee rested her case, appellant called his first witness who testified without incident. The alleged interference occurred after the first witness stepped down. Appellant specifically identifies the following colloquy as impermissible interference:

> COURT: Who's your next witness?
>
> APPELLANT: Next witness is LeAnne Friedman (the vocational expert). Your Honor, my witness [ ] is on the way. I had asked her to be here by 12:30, trying to anticipate how the day was going to unfold.
>
> COURT: I guess you're going to testify now, right, you can start to testify.
> APPELLANT: Am I testifying?
>
> COURT: Yes. Are you calling yourself

as a witness in your case?

APPELLANT: No, I'm waiting for–

COURT: No, no, well, we're not waiting. Who is your next witness?
APPELLANT: May I request a break?

COURT: At 12:30 when we break. Who is your next witness now? I didn't give anybody leave to come in at 12:30. No one asked that courtesy. I'm happy to engage people, but simply telling witnesses to come whenever they want to come doesn't work that way.

* * *

APPELLANT: I can't call [appellee?]

COURT: You've already had the opportunity to examine her, not terribly effective —

* * *

COURT: No, sir, anybody else?

APPELLANT: I can't produce anybody else right now.

COURT: Okay, all right, we'll take a luncheon recess. We'll come back for closing argument at 1:30.

Appellant did not testify directly in his case–he asserts that the trial judge denied him the opportunity. During closing argument the judge addressed this contention, saying "[l]et me, I don't want to interrupt you in your closing argument, but the statement that you have not been allowed to put on a case is not accurate . . . I asked you to call what witnesses that you had and you didn't have any witnesses. So, you had every opportunity to put on whatever case you wanted to put on." In determining whether or not the trial judge violated his legal and ethical obligations to conduct a fair trial,[6] we are mindful that "Judges go about their duties with widely different styles and approaches. Some are stern and aloof; some, at the other extreme, are relaxed and friendly. Some remain detached during court proceedings; others become involved. The law is tolerant of the variations." *Ricker v. Ricker*, 114 Md. App. 583, 597 (1997). But "[a] judge's participation should not overreach and disrupt a litigant's development of the evidence." *Atty. Griev. Comm'n v. Kreamer*, 404 Md. 282, 346 (2008).

First, the record reflects that appellant declined to testify–he was not absolutely deprived of the opportunity to do so. Although the court would have been within its discretion to permit appellant to testify at a later time, its failure to provide a second opportunity does not "transcend the bounds of proper judicial conduct and . . . deprive [the] litigant of the right to a fair trial." *Id*.

Second, appellant assigns error to the fact that he was not permitted to call appellee as a witness in his case. The trial judge noted that appellant examined appellee once during her case, through cross-examination. But appellant's right to cross- examination of appellee during her case and his ability to call her as a witness in his own case are distinguishable events. Although appellant's questions of appellee blurred the distinction between direct and cross-examination, the court responded in the negative when appellant asked (during his cross-examination of appellee) if he would be able to call appellee as a witness in his case.

"Consistent with the trial court's authority concerning the conduct of trial, the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of discretion." *In re Lavar D.*, 189 Md. App. 526, 597 (2009) (internal quotation omitted). By prohibiting appellant from calling appellee as a witness, the trial judge limited the "scope of examination of [a] witness[ ] at trial." *Id*. Assuming, without deciding, that such limitation was error, we conclude that it does not require reversal.

"[I]t has long been the settled policy of this court not to reverse for harmless error." *Brown v. Daniel Realty Co.*, 409 Md. 565, 613 (2009). "[T]he burden is on the appellant in all cases to show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004). "Prejudice will be found if a showing is made that the error was likely to have affected the verdict below." *Id*. "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry." *Id*. To the circuit court, and again on appeal, appellant failed to proffer what testimony appellee could have provided relevant to his motion to reduce child support.[7] Without an articulation of the harm he suffered as a result of the trial court's prohibition, we conclude that appellant has not demonstrated "prejudice as well as error." *Id*.

Third, the circuit court prohibited appellant from calling his vocational expert, LeAnne Friedman. Although the expert was not present in the courtroom at the time the judge would have preferred that she be called, she was available to testify on day two of trial after the luncheon recess but before closing argument. Appellant successfully demonstrated a material change in circumstances due to the involuntary loss of his employment. *See infra*, pages12-13 and n. 10. Therefore, he was entitled to the benefit of his expert's testimony. Although the circuit court abused its discretion by prohibiting appellant's expert witness from testifying, the resulting prejudicial effect has been nullified, and the issue mooted, by appellant's admission that he is currently employed. Appellant designated his vocational expert witness to testify about the jobs for which he is suitable and what salary he could expect.

Because he now has employment, there is no longer need for that testimony.[8]

Appellant's Motion to Modify Child Support

Appellant contends that the circuit court erred by failing to modify his child support obligation to reflect an alleged material change in circumstances. In his motion, appellant argues that "[s]ince the [j]udgment of [a]bsolute [d]ivorce, there have been substantial and material changes in [appellant's] economic circumstance." Appellant continues, saying he "has since been let go from [his job] and . . . at the present time [his] only source of income is unemployment compensation of $340 per week." Pursuant to MD. CODE ANN., FAM. LAW § 12-104 "[t]he court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." "A decision regarding such a modification is left to the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Moore v. Tseronis*, 106 Md. App. 275, 281 (1995).

"The burden of proving a material change in circumstance is on the person seeking the modification." *Petitto v. Petitto*, 147 Md. App. 280, 307 (2002). Under our decision in the case of *Corby v. McCarthy*,

> [a] change is material when it meets two requirements. First, it must be relevant to the level of support a child is actually receiving or entitled to receive. Second, the change must be of a sufficient magnitude to justify judicial modification of the support order. Thus, the court must focus upon the alleged changes in income or support that occurred after the child support award was issued. *Wills [v. Jones*, 340 Md. 480 (1995)] makes clear that the passage of some event causing the level of support a child actually receives to diminish or increase is relevant and material. A change that affects the income pool used to calculate the support obligations upon which a child support award was based is also relevant.

154 Md. App. 446, 477 (2003) (internal quotations and citations omitted). In denying appellant's motion, the circuit court reflected that "there is nothing [in the record] with regard to your motion to modify child support that this [c]ourt can rely upon that would form the basis to grant that motion or to modify child support." The court reached this conclusion, in our view, as a result of appellant's failure to offer any direct testimony.

"Unquestionably, [however,] an *involuntary* loss of employment is a material change in circumstances."[9] *Rivera v. Zysk*, 136 Md. App. 607, 619. (emphasis in original). Through the testimony of a representative from his previous employer, appellant successfully established that his termination was without fault. Demonstrating a material change in circumstances "is a threshold requirement for any modification of any final order for child support." *Walsh v. Walsh*, 333 Md. 492, 497 (1994). After meeting this threshold requirement, appellant was "entitled to the opportunity to show that he [ ] ha[s] neither the estate nor the present ability to pay the obligation." *Rivera*, 136 Md. App. at 615 (2001).

The circuit court presented appellant with only a limited opportunity to make these showings. By not testifying, the circuit court found that appellant offered insufficient evidence to justify a reduction in his child support obligation. But we conclude that after appellant met the threshold burden, and before finding that his circumstances do not merit a reduction is appellant's child support, the circuit court was required to make a finding of appellant's actual income.[10] *See e.g., Sczudlo v. Berry*, 129 Md. App. 529, 541 (1999) ("While appellant's lifestyle is a relevant consideration, his actual income should be considered to determine his ability to meet his obligation.). *See also Wills v. Jones,* 340 Md. 480, 497 (1995) ("Consistent with this position, the circuit court on remand must calculate Jones's current support obligation based upon his current actual income."). Now that appellant is employed, the court should begin its analysis of appellant's actual income with a confirmation of his new salary.

We note also that the court's discussion during the motions hearing relied heavily on the value of appellant's home (a non-income producing asset) to support the decision not to make a downward adjustment to appellant's child support obligation. Although a modification may not be in the best interest of the children, the equity in appellant's home is not a sufficient basis on which to find that appellant has the necessary liquid assets to meet his support obligation on an ongoing basis. In the case of *Barton v. Hirshberg*, 137 Md. App. 1 (2001) we said that "[w]e do not agree, however, that the mere ownership of non-income-producing assets alone constitutes a basis for reliance upon those assets in determining child support." *Id.* at 20. For the determination of an *alimony* award, non-income producing assets are a material consideration. *See* MD. CODE ANN., FAM. LAW §11-106(b)(11) (the court shall consider "the financial needs and financial resources of each party, including: (i) all income and assets, including property that does not produce income.") By contrast, actual income for the purpose of determining, or modifying, an award of *child support* does not include non-income producing assets. *See*

generally MD. CODE ANN., FAM. LAW §12-201.

A ttorney's Fees

At the end of trial, appellee was awarded $48,000 in attorney's fees. The court said:

> [I]astly, the award of attorney's fees, this is not pursuant to the statute where there's, I allowed testimony regarding the bickering back and forth and the suggestion of obstructive conduct and whatnot, that would be relative to the statute in the award of attorney's fees. But this isn't statutory in nature. This is contractual in nature and this is pursuant to the agreement that attorney's fees would be paid by the prevailing party.

The fee-shifting provision in the Agreement applies only "[in] the event that it becomes necessary for either party to file suit or to institute legal proceedings of any type against the other party in order to enforce any term or provision of this Agreement."

Pursuant to the Agreement, appellant was obligated to make child support payments in the amount of $8,000 per month. The judgment of absolute divorce, however, ordered appellant to "pay child support to the [ ] [appellee] in the amount of $7,000 per month." At the time of the court's order, therefore, appellant's obligation to pay child support ceased to arise under the Agreement, and instead followed from the judgment of absolute divorce.[11] After the judgment of absolute divorce, appellant's obligation to provide child support was no longer a "term or provision of th[e] Agreement" and therefore, a dispute with respect to it was not subject to the Agreement's fee-shifting provision. This conclusion, however, does not foreclose the availability of attorney's fees here — it simply requires a statutory rather than contractual analysis as a condition precedent to their award. On remand, if still applicable, the circuit court should assess what amount of attorney's fees was generated by appellee's counsel to defend appellant's motion to modify his child support obligation and what amount of fees was generated to prosecute the contempt for failure to pay support. Then the court should apply MD. CODE ANN., FAM. LAW §12-103.

The Contempt Order

If appellant's contempt has not been purged, the court should enter a properly formed contempt order. "In the case of a civil contempt, the order shall specify how the contempt may be purged." Maryland Rule 15-207(d)(2). "It is well settled in Maryland that a civil contempt order must contain a purging provision with which the contemnor has the ability to comply." *Young v. Fauth*, 158 Md. App. 105, 113 (2004) (quoting *Baltimore v. Baltimore*, 89 Md. App. 250, 253 (1991)). Here, it is undisputed that the contempt order did not contain a purge provision. On remand, if not moot, the circuit court should employ one of the "various options [it has] for constructing a purging provision with which [a contemnor] can comply." *Id*. at 114. *See* Maryland Rule 15- 207(e)(4).[12]

Conclusion

On remand, the circuit court must find appellant's actual income before deciding if the circumstances merit a reduction in appellant's child support obligation. The circuit court must also enter a properly formed contempt order if still required, and reconsider the attorney's fees award, if warranted.[13]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Under the Agreement, appellant was obligated to pay child support in the amount of $8,000 per month. This amount was amended to $7,000 per month by the court's judgment of absolute divorce.

2. This amount represents past due child support, an alimony buyout, funds due appellee from the vesting of certain restricted stock, and a partnership distribution entitlement.

3. The questions as presented originally are:

> (I) Mr. Maier's employment was terminated in September 2010 resulting in the loss of his substantial income that was the basis of the 2009 child support award. He remained unemployed at the time of the September 2011 modification hearing. The trial court denied Mr. Maier's motion to reduce his child support obligation without making any finding concerning his income and based its decision on his non-income producing assets, i.e. his house equity. Did the trial court err in denying Mr. Maier's motion to modify child support?
>
> (II) Did the trial judge abuse his discretion in the management of the court proceedings, including terminating Mr. Maier's cross-examination of Ms. Maier, refusal to permit him to call his vocational expert and Ms. Maier as witnesses in his child support case, and other prejudicial conduct that pre-

vented Mr. Maier from having a fair hearing?

(III) Did the trial court err in ordering Mr. Maier to pay to Ms. Maier the sum of $50,470.77 representing 50% of the gross amount of the Credit Suisse First Boston distributions where under the parties' Modification Agreement she was entitled to receive only 50% of the "net after tax income or profit or gain" of such distributions and certain distributions were subject to payment to Bank of American pursuant to a Charging Order?

(IV) Did the trial court err in entering an Order of contempt without making any finding of contempt or specifying how the contempt may be purged by Mr. Maier as required by Maryland Rule 15-207?

(V) Did the trial court err in awarding Ms. Maier her entire $48,000 attorneys' fees incurred under a provision of the parties' Agreement where the trial court neither considered the parties' and their respective counsel's conduct nor excluded the amount of fees that were incurred related to Mr. Maier's child support modification proceeding?

4. On May 27, 2009, the parties executed an amendment to the Agreement.

5. Under Maryland Rule 5-611(a), the "court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Pursuant to Maryland Rule 5-611(a), "[t]rial courts are granted broad discretion . . . to control the mode and order of the interrogation of witnesses and the parties' presentation of evidence." *Myer v. State*, 403 Md. 463, 476 (2008). "Subject to constitutional considerations, the same is true as to the scope and timing of cross-examination." *Id*.

6. "A judge certainly ought not to conduct a hearing in such a manner that permits litigants to feel threatened or to discourage them from presenting their cases completely." *Ricker v. Ricker,* 114 Md. App. 583, 597 (1997). Maryland Rule 16-813 recognizes that "[i]ncreasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively . . . Th[ese] Rule[s] do[ ] not require a judge to make any particular accommodation."

7. "The determination of relevance is reserved for the discretion of the trial judge; we will not disturb the trial judge's ruling unless he has abused that discretion." *Tetso v. State*, 205 Md. App. 334, 401-402 (2012).

8. In his expert witness designation, appellant states that the vocational expert witness may testify "regarding the occupations or jobs for which [appellant] is qualified, the availability of such occupations in the market place, and the income which [appellant] could be expected to earn now and in the future." Such testimony is no longer required assuming that appellant remains employed.

9. While an involuntary loss of employment is a material change in circumstances, "a parent is obligated to support his or her children, and a parent, therefore, cannot use unemployment as an excuse to avoid a child support obligation. "*Rivera*, 136 Md. App. at 613. Now that appellant has become employed, he may not invoke that situation as the threshold of a material change. But that question is for the circuit court to consider upon remand.

10. At the time of the modification, appellant was relying on non-wage income sources. He commanded fees from the various corporate boards on which he sits and got reimbursed for expenses from a company that he reinitiated. Although appellant may have had zero *wage* income, the court never made an explicit factual finding about his collective *actual* income.

11. The record does not reflect how the circuit court decided that this issue was covered by the Agreement.

12."Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged . . . ."

13. At oral argument, counsel indicated that the Credit Suisse issue – directly correlating with the third question appellant presented for our review — is moot.

Cite as 5 MFLM Supp. 89 (2013)

Custody: modification: relocation of parent

Michael Dwayne Shindle
v.
Morgan Michelle Landers

No. 0966, September Term, 2012

Argued Before: Zarnoch, Hotten, Kenney III, James A. (Ret'd, Specially Assigned), JJ.

Opinion by Kenney, J.

Filed: March 19, 2013. Unreported.

The trial court properly considered both parents' schedules, their respective financial resources and the best interest of the child before denying the father's motion to modify custody after his ex-wife was discharged from the military, moved to a different state with her boyfriend and enrolled in college as a full-time student.

Appellant, Michael Shindle ("the Father"), appeals the order of the Circuit Court for Montgomery County denying his motion to modify custody and for contempt, and granting in part and denying in part the counter-complaint of appellee, Morgan Landers ("the Mother"), to modify custody and child support.

In his timely appeal, he presents one question for our review, which we have rephrased as follows: Did the circuit court abuse its discretion in denying the Father's motion to modify custody and for contempt? For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Father and the Mother were married on October 12, 2007 and resided in Maryland. At that time, both were in the military. Their son, Tristan ("the Child"), was born September 18, 2008. Shortly thereafter, the Father and the Mother mutually and voluntarily separated with the intention of ending the marriage.

On January 13, 2009, the Mother filed a Complaint for Limited Divorce which included a request that she be awarded "sole legal and physical custody of the [Child], both *pendente lite* and permanently, with reasonable rights of visitation for" the Father. On August 4, 2009, the Father filed a Counter-Complaint for Absolute Divorce in which he requested sole legal and physical custody of the Child.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

At an October 8, 2009 hearing on *pendente lite* custody and support, the court granted the Mother physical custody of the child. The Father was awarded "access" to the Child every other weekend, from 6 pm Friday through 6 pm Monday, and "access" to the Child every other Wednesday from 6 pm to 8 pm. An order was entered to this effect on November 16, 2009.

On December 23, 2009, judgment of absolute divorce was entered.[1] The judgment "incorporated" an agreement between the parties that had been placed on the record previously. Under that agreement, "the parties . . . agreed to keep the regular access schedule, pursuant to the pendente lite order," with exceptions for holidays, birthdays, school vacations, and other special occasions. The parties also agreed that "primary residential" custody would be with the Mother, and legal custody would be jointly shared.

In the summer of 2010, the Mother was discharged from the military and moved to New York. Subsequently, the Father filed a Motion for Contempt and Modification of Custody, Visitation and Child Support, and the Mother filed a Counter-Complaint to Modify Custody, Access and Support. Each accused the other of violating the custody agreement and inappropriate care of the Child. On April 17-18, 2012, the parties came before the court for a hearing on these matters. As stated by the court, "at issue principally is physical and legal custody, child support, and contempt."

At the hearing, the Father testified about what the Child had told him about having been having been punched, pinched, hit, and spanked by the Mother's boyfriend ("the Boyfriend"). The Court permitted this testimony "not for the truth of the matter," but rather as the basis for the Father's "concern about what he was told" by the Child.

Later, during direct examination, the Mother denied that the Child had made these statements. In response, "as an overall issue of what's in the best interest of the child," and to impeach the Mother's testimony, the Father's counsel attempted to enter into evidence a video of the Child talking about the Boyfriend "hitting him on the feet," "pushing" the Mother, and "breaking the TV." When the Mother's counsel object-

ed, the following colloquy occurred:

> The Court: Up until this point there has been no objection on the basis that [the statements] weren't made, nor did I have any problem or issue with whether or not they were made. So I'm willing to, as a matter of credibility of the testimony by [the Father], I'm willing to find that they were made.
>
> [Father's counsel]: Okay. If Your Honor is willing to make the finding that they were, in fact, made, I do —
>
> The Court: But nonetheless received for that limited purpose.
>
> [Father's counsel]: Understood, Your Honor. If I could, Your Honor, just for, just as an offer of proof, Your Honor, just on the argument of whether it's hearsay or not, if I may at least place on the record my —
>
> The Court: They've been admitted for a certain purpose.
>
> [Father's counsel]: Okay. All right, Your Honor. Then I will
>
> refrain from —
>
> The Court: I have no doubt, at the time, nor do I know, that they were made. But I have not received them for any purpose other than for which I indicated yesterday.
>
> [Father's counsel]: Okay. Then I'll accept that, Your Honor.

At the end of the hearing, the court made findings of fact, which included:

- The Father has a three-year lease on a townhouse in Maryland where he lives with his new wife;
- The Father, who is employed by Science Applications International Corporation ("SAIC") with a yearly income of $92,700, "works about an average of 40 hours per week" but "doesn't have to clock in or out at a designated time," and thus "has flexibility when needed to come and go . . . in the event of an emergency" involving the Child;
- After living in five different residences since her divorce, the Mother and the Boyfriend now rent a loft apartment in New York for $1,082 per month;
- After having trouble securing employment, the Mother enrolled in college full-time in pursuit of a business administration degree, and was scheduled to graduate in December 2012; and
- The Mother receives $1,499 per month from the military for college and living expenses.

Based on those findings, the court conducted a "best interest of the child" analysis:

> Now, the law is in a relocation case a full evaluation by the Court is necessary with respect to the child's [best interests] . . . [a]nd a full hearing with respect to the best interest standard is necessary.
>
> * * *
>
> Now, the Court makes the following conclusions. With respect to [the Father], that he has a good home; that [the Child] has his own room, his own bedroom, a shower; that there are two pets present. That the [Father] has flexibility as far as his work schedule is concerned; that he has provided nice daycare facilities for [the Child], which is close to the [Father's] place of employment.
>
> That the [Mother] has, on occasion, at least one occasion, for an extended period of time, kept [the Child] away from the [Father]. And that was not in the best interest. That the [Mother] has constantly changed access of schedules and has denied access by the [Father] at times. That he is remarried. He has a stable home life, and that he earns a good living as I indicated. He earns $92,000 plus. And at this time, the [Mother] is unemployed.
>
> The Court makes the following conclusions about [the Mother] as well. She has a flexible work schedule. She doesn't work, but she does have income. She's available for [the Child] on most days, and again, because she has a flexible schedule, and she provides adequate care for him when she is not available.
>
> The Court also concludes, based on the testimony, having heard no contrary testimony that she has been the primary caretaker for [the

> Child] since his birth. She's provided appropriate [care] for him. She loves him and he loves her. That her residence is an appropriate one for [the Child]. There are playground facilities nearby. [The Child] has his own room. She and [the Child] have a great relationship. There is an appropriate daycare facility nearby which she has utilized, and she has no weekend Reserve obligations.
>
> In short . . . the Court finds that both parties are fit and proper persons to have custody. So with respect to physical custody, I guess this comes down to a Solomon-esque at least attempt by this Court to be fair and equitable.
>
> Considering that I have no evidence which would indicate to me a need to change physical custody, since both parties are fit, and both parties provide adequate and appropriate housing, love and affection and care for [the Child], that custody will not be modified in this case. And I will grant sole physical custody to [the Mother].
>
> With respect to legal custody . . . the Court is going to give these parties a chance to do this on a permanent basis, and I will grant joint legal custody to both parties, such as it is at this time.

The Court also awarded the Father "visitation" to the Child every other weekend, from 4 pm Friday through noon Monday, and maintained the same holiday and vacation schedule set forth in the judgment of divorce. Reflecting these oral conclusions and findings, on June 22, 2012, the court entered an order an order denying in part and granting in part "the parties Cross Motions for Modification."

On July 5, 2012, the Mother filed a Motion to Alter or Amend Order and Request for Execution of Proposed Order. On August 2, 2012, the court entered an order granting in part and denying in part the Mother's "complaint" to modify custody and child support, and denying the Father's "complaint" to modify custody and for contempt. That order implemented a new "holiday, break, special occasion and summer access schedule."

DISCUSSION

The Father argues that in awarding physical custody to the Mother, the circuit court abused its discretion by failing to consider certain material changes in circumstances subsequent to the judgment of divorce. More specifically, the Father points out that he now

> is employed in a stable position with SAIC and earns nearly a six-figure salary. He is the primary financial provider for himself and his [new] wife and has entered into a long-term lease on a residence which provides [the Child] his own private room and bathroom. Also, [the Father's] position with SAIC allows him unique availability to timely respond to issues which may arise that affect [the Child] such as illness or injury.

In contrast, according to the Father, the Mother "has remained unemployed for years," has "limited" availability due to her class schedule, has changed residences five times in the last three years, and "must rely upon" her boyfriend "to make ends meet." According to the Father, if the relationship with her boyfriend were to end, the Mother "would lose her ability to provide for both herself and" the Child. Essentially, the Father contends that the court abused its discretion by failing to properly account for these factors.

The Mother replies that the court did not abuse its discretion because it "did take into consideration the parties' incomes, financial abilities, financial liabilities and respective residences," while also noting that, in a custody determination, these factors "play[ ] absolutely no role – absent correlation between the party's financial condition and the resulting ability to care for [the Child]. Such a correlation is obviously absent in this matter."

This Court has explained:

> A change of custody resolution is generally "a chronological two-step process." Initially, unless a material change of circumstances is found to exist, the court's inquiry must cease. If a material change is found to exist, "then the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding."

Braun v. Headley, 131 Md. App. 588, 610 (2000) (internal citations omitted). "[R]elocation . . . is a sufficient 'change in circumstances' to trigger a trial judge's full evaluation of the future best interests of the child, weighing in the balance the move and any other relevant circumstances." *Goldmeier v. Lepselter*, 89 Md. App. 301, 308 (1991).

We have said:

> Where modification of a custody

> award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child.
>
> * * *
>
> The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents, 2) character and reputation of the parties, 3) desire of the natural parents and agreements between the parties, 4) potentiality of maintaining natural family relations, 5) preference of the child, 6) material opportunities affecting the future life of the child, 7) age, 8) residences of parents and opportunity for visitation, 9) length of separation from the natural parents, and 10) prior voluntary abandonment or surrender[.]
>
> While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, or the length of separation.

Montgomery County Dep't of Social Services v. Sanders, 38 Md. App. 406, 419-21 (1977) (internal citations omitted). "While custody decrees are never final in Maryland, any reconsideration of a decree should emphasize changes in circumstances which have occurred subsequent to the last court hearing." *Hardisty v. Salerno*, 255 Md. 436, 439 (1969) (citation omitted).

And the Court of Appeals has said:

> The standard of review in custody cases is whether the trial court abused its discretion in making its custody determination. In setting forth this standard, we concluded that "when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion." Particularly important in custody cases is the trial court's opportunity to observe the demeanor and the credibility of the parties and witnesses.

Petrini v. Petrini, 336 Md. 453, 470 (1994) (internal citations omitted). "[A]n abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case." *Wilson v. John Crane, Inc.,* 385 Md. 185, 199 (2005).[2]

We are not persuaded that the court abused its discretion here. The findings and conclusions stated at the motions hearing clearly reflect that, in making its custody determinations, the court considered the Mother and the Father's schedules and their respective financial resources. While the Father may not agree with the court's analysis of these factors, there was not, in our view, an abuse of discretion by the court.

The Father also avers that the court abused its discretion by excluding from evidence a video allegedly containing statements by the Child regarding abuse by the Boyfriend. Although the Father was permitted to testify as to what the Child told him regarding this alleged abuse, "the best evidence to support [his] position was excluded." The Mother responds that the court "properly excluded the admission of the video recording" because the court permitted the Father "to testify as to what the [C]hild said[.]"

"It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court[].'" *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619-20 (2011) (quoting *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)). Under Maryland Rule 4-323(c) ("Objections to other rulings or orders."):

> For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

"[R]ulings resulting in the exclusion of evidence are considered under subsection (c)" of Rule 4-323. *Reed v. State*, 353 Md. 628, 640 (1999).

Here, there was apparent acquiescence by the Father's counsel to the exclusion of the video. *See Ebb v. State*, 341 Md. 578, 589 (1996) ("We found no basis for appeal of the trial court's ruling excluding the evidence concerning the pending theft charge because

defense counsel acquiesced in the court's ruling and the issue was not preserved for appeal."). But, assuming, without deciding, that the court should have admitted the video, we are, nevertheless, not persuaded that not admitting it was, in any way, prejudicial. *See Hance v. State Roads Comm.*, 221 Md. 164, 176 (1959) ("Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice."). Because, "as a matter of credibility of the testimony by [the Father]," the court was "willing to find that" the Child made statements regarding alleged abuse by the Boyfriend, the exclusion of the video was, in our view, harmless. *See Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011) ("most of the harmless error analyses . . . involve erroneous exclusion or admission of evidence").

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

FOOTNOTES

1. At this time, both parties still resided in Maryland and were still in the military.

2. At oral argument, the Father's counsel stated that this was "a pretty uphill standard."

NO TEXT

Cite as 5 MFLM Supp. 95 (2013)

Adoption/Guardianship: termination of parental rights: reunification services

In Re: Adoption/Guardianship Of Matija T.

No. 1253, September Term, 2012

Argued Before: Eyler, Deborah S., Hotten, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Hotten, J.

Filed: March 19, 2013. Unreported.

Where attempts at reunification would obviously be futile, the Department of Social Services did not have to go through the motions in offering services doomed to failure.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

This appeal arises from a decision from the Circuit Court for Baltimore City, sitting as a juvenile court, which ordered the termination of the parental rights of appellant–mother, Crystal S. ("Mother"), and appellant–father, Rodney T. ("Father"), for minor child, Matija T. ("Matija"). The Baltimore City Department of Social Services ("Department"), appellee, received a child protective services report of neglect, reporting a drug exposed newborn. The Department thereafter filed a Petition with Request for Shelter Care, which the court granted, and Matija was placed in foster care. Following a hearing, the court determined that Matija was a Child in Need of Assistance ("CINA"), and ordered that she be placed in the Department's temporary custody for continued foster care placement. The Department filed a Petition for Guardianship with the Right to Consent to Adoption, to which Mother and Father noted an objection. Following a hearing on the petition, the court entered judgment terminating Mother and Father's parental rights. The parents noted an appeal, and present the following question for our consideration:

> Did the circuit court err in terminating parental rights when the Department of Social Services' inequitable conduct towards the parents resulted in the failure to provide reasonable efforts to reunify the family?

For the reasons outlined below, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Matija was born on January 5, 2007 to Mother and Father at Harbor Hospital in Baltimore, Maryland.[1] As a result of exposure to drugs, she tested positive at birth for cocaine and opiates. Matija experienced withdrawal symptoms, but fortunately, there were no medical issues as a result of the drug exposure. On January 9, 2007, Matija was released from the hospital, and placed in foster care with a family, Albert G., Sr. ("Mr. G.") and Virginia G. ("Ms. G.").

During Mother's pregnancy, she was an active drug user, indicating that she "snorted heroin" and "smoked cocaine" on January 4, 2007, the day before Matija's birth. She also used both substances again on January 8, 2007. Mother could not care for Matija because of her illicit drug abuse, and she was not undergoing treatment as a substance abuser.

On January 10, 2007, the Department filed a Petition with Request for Shelter Care,[2] alleging that Matija was a CINA.[3] After a shelter care hearing on January 11, 2007,[4] the court granted the petition, ordering that Matija be placed in the Department's temporary care and custody.[5] The court instructed the Department to refer Mother to the Family Recovery Program for her substance abuse. On January 19, 2007, the court indicated that Mother attended the Family Recovery Program's initial assessment and intake, and enrolled in drug treatment at Chrysalis House.

On January 25, 2007, Mother and Father both signed a service agreement to (1) maintain contact with Matija and the Department; (2) participate in Matija's medical care and educational planning; (3) provide the Department with legal, financial, and family history; (4) identify relatives who could be a resource for placement; (5) keep the Department informed concerning home addresses and employment; (6) attend court hearings relating to Matija; (7) support Matija financially; and (8) enroll in and complete drug treatment.

During an adjudicatory hearing on March 2, 2007, the court decided to continue shelter care. Thereafter, a hearing was held on June 7, 2007, and Matija was declared a CINA. The trial court ordered that Matija be placed in the Department's temporary custody for continued foster care placement.

Furthermore, the court noted that Mother discontinued her substance abuse treatment at Chrysalis House, and was therefore referred to outpatient treatment at Powell Recovery, but she only attended the initial assessment and one session. Despite Mother's non-attendance, the court ordered that the Department continue to reunify Matija and her parents.

On August 31, 2007, the court found that Mother "ha[d] not met drug treatment guidelines, not met with the drug treatment case manager as required, not met with the [Family Recovery Program] case manager as required, not met with the [Department] case manager as required, not complied with treatment requirements regarding submission of urinalysis results, not submitted satisfactory urinalysis and not met with [the Family Recovery Program's] requirements for Track A." As a result of her non-compliance, the court ordered that Mother be discharged from the treatment program.

Because of the parents' incarcerations,[6] several hearings were rescheduled between 2008 – 2010, and this case was subsequently referred for mediation. On March 11, 2010, the parties signed a mediation agreement to which (1) the parents would agree to participate in drug assessments and clinical evaluations; (2) the Department would contact the Angel Foundation regarding the continuation of visitation; (3) the current permanency plan was for custody and guardianship or adoption by a relative with a secondary plan of reunification;[7] (4) the Department would investigate the maternal grandmother and two paternal great-aunts for placement;[8] and (5) the Department and the parents would enter into a new service agreement. Mother's clinical evaluation indicated that she suffered from bipolar, personality, and post-traumatic stress disorders. Mother also claimed she underwent hospitalizations, since Matija's birth, for various medical issues, including a hysterectomy and brain surgery.

On August 15, 2011, the Department filed a Petition for Guardianship with the Right to Consent to Adoption, and both parents noted their objections.[9] On November 8, 2011, the court determined that the matter was a contested guardianship, and ordered a hearing on the merits.

On February 17, April 5, May 16, June 20, and July 10, 2012, the court conducted a termination of parental rights hearing, during which, the Department sought guardianship of Matija for the purpose of having her placed for adoption by Mr. and Ms. G.'s granddaughter, Ms. Tianna H ("Ms. H."). Ms. H became Matija's foster mother because of Mr. and Ms. G.'s age. She has known Matija since birth, and testified that Matija refers to her as "mommy," and refers to Mr. and Ms. G. respectively as "pop pop" and "momma." The Department's social worker, Arlene Williams ("Ms. Williams"), who was assigned to Matija from January 2008 to February 2012, testified during trial.[10] The following colloquy regarding the service agreements ensued, and is pertinent to the issue of reasonable efforts to reunify:

> [DEPARTMENT'S COUNSEL]: Ma'am, would you please identify State's Exhibit No. 36 for the purposes of identification?
>
> [MS. WILLIAMS]: This is a service agreement between myself and –
>
> [DEPARTMENT'S COUNSEL]: Make sure you speak up and speak into the microphone.
>
> [MS. WILLIAMS]: Service agreement between myself and parent.
>
> [DEPARTMENT'S COUNSEL]: Okay. Now, what did you do with this service agreement? What is done with the actual document?
>
> [MS. WILLIAMS]: It was placed in the record.
>
> * * *
>
> [DEPARTMENT'S COUNSEL]: Okay. Would you please identify State's Exhibit No. 37 for the purposes of identification?
>
> [MS. WILLIAMS]: Service agreement.
>
> * * *
>
> [DEPARTMENT'S COUNSEL]: And was this document entered into your record in the same procedure?
>
> [MS. WILLIAMS]: Yes, it was.
>
> * * *
>
> [DEPARTMENT'S COUNSEL]: Okay. Thank you, ma'am. State moves into evidence State's Exhibits No. 36 and 37 for the purposes of identification as State's 36 and 37.
>
> * * *
>
> [MOTHER'S COUNSEL]: I would not object with the proviso that it be admitted as just has been suggested, service agreements that were drafted by the Department of Social Services but not for the truth of any statements that may be contained therein.
>
> THE COURT: Okay.
>
> [FATHER'S COUNSEL]: Well, I join in that objection because they are just drafts, they're not signed by anybody including the Department of Social Services.

THE COURT: Actually that's an interesting question, they're not signed by anybody. So these are not agreements that actually were entered into as agreements?

[DEPARTMENT'S COUNSEL]: They are merely drafts.

THE COURT: And the relevance?

[DEPARTMENT'S COUNSEL]: The relevance is that we continued to draft documents in order to work with the parents and they weren't signed.

[MOTHER'S COUNSEL]: On that basis, Your Honor, I full out object and say they are wrong, what is the relevance of a draft without there being any indication that it was anything other than simply an exercise of this writing?

Thereafter, the Department resumed examining Ms. Williams regarding the unsigned service agreements.

[DEPARTMENT'S COUNSEL]: And these documents do not appear to be signed. Why not?

[MS. WILLIAMS]: When the parents refuse or are unavailable to sign them, a copy is placed in the record.

* * *

THE COURT: Service agreements are relevant to the case but that's because they are agreements, this is not an agreement, this is a draft to something, it's not an agreement. If you can show as an example that the parents refused to sign it unreasonably or something, that might make it relevant. Right now I'm not understanding what reading this stuff off accomplishes, so if you can tie it into, you know, these parents, this circumstance, you know, then it might be relevant but right now I don't see it.

Unfortunately, Ms. Williams was unable to complete her testimony as a result of a medical issue, so her supervisor, Ms. Thomas, testified in her stead. Over several objections, the following colloquy ensued concerning conversations that occurred between Ms. Williams and Ms. Thomas regarding the service agreements:

[DEPARTMENT'S COUNSEL]: Tell the [c]ourt what you learned as a result of that conversation?

[MS. THOMAS]: This service agreement was not presented to the parents.

[DEPARTMENT'S COUNSEL]: Why not?

[MS. THOMAS]: This service agreement, Ms. Williams, the case worker did not present it to the parents.

[DEPARTMENT'S COUNSEL]: You said that. Why?

[MS. THOMAS]: During that time, the parents were not available to sign.

* * *

[DEPARTMENT'S COUNSEL]: State's Exhibit No. 37. Did you discuss that service agreement with your worker, Ms. Williams?

[MS. THOMAS]: The permanency planning was discussed on this case with Ms. Williams but she did not present this case also –

* * *

[DEPARTMENT'S COUNSEL]: Okay. Let's move onto State's Exhibit No. 38, did you discuss State's Exhibit No. 38 with your own worker, Ms. Williams?

[MS. THOMAS]: Uh, this service agreement – I have got to say was also not presented for the same reasons.

[DEPARTMENT'S COUNSEL]: Okay. But did you discuss it with your worker? You indicated earlier you discussed all of them.

[MS. THOMAS]: I believe I did.

[DEPARTMENT'S COUNSEL]: Okay. And was that presented to the parents?

THE COURT: You are still talking about 38?

[MS. THOMAS]: I don't know. That's my best response to that one, I don't know.

* * *

[DEPARTMENT'S COUNSEL]: All right. 39?

[MS. THOMAS]: 39 was not presented.

* * *

[DEPARTMENT'S COUNSEL]: Did you talk – I will move on. 41. State's Exhibit No. 41, did you discuss that with your worker?

[MS. THOMAS]: We did discuss that one.

* * *

[MS. THOMAS]: This service agreement the parents were unable to sign on this service agreement.

* * *

[DEPARTMENT'S COUNSEL]: You need to identify it for the record, that is State's No. 43 everyone, State's No. 43. Did you discuss State's No. 43 with your worker?

[MS. THOMAS]: Yes.

[DEPARTMENT'S COUNSEL]: Okay.

[MS. THOMAS]: This service agreement was discussed, Ms. Williams did not have the family to sign.

At the end of the trial, the court considered all the factors enumerated in Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article,[11] specifically § 5-323(d)(1)(i) regarding the offered services, stating:

> The referrals that we made to [Mother] by [the Department] were specifically to participate in the Family Recovery Program which is supervised by a different judge of this [c]ourt which offer[ed] a comprehensive set of services to [M]other, including drug treatment and other related services. And subsequently also, she was referred to Chrysalis House which is a drug, an inpatient drug treatment program and there was a subsequent referral to a third program, I believe the Powell Program . . . . Subsequently, she also took part in mental health treatment from two additional organizations . . . .

Regarding Father, the court indicated that the Department provided him with drug treatment, but there was not much assistance for housing and employment. However, the court surmised that the lack of services for Father likely occurred because he had a passive role concerning his parental rights.

Concerning § 5-323(d)(2)(iv), relating to additional services, the court surmised that additional services would not bring about a lasting parental adjustment because over a five year period, Mother did not complete her drug treatment, and Father did not maintain stable and appropriate housing. The court found:

> And I do believe that the, that the Department has made reasonable efforts to achieve reunification. But I want to emphasize, I am making the finding of reasonable efforts towards reunification. Reasonable is not the same thing as doing a good job.
>
> Efforts were made. And had they succeeded, had [M]other in particular been able to follow through in the treatment programs that were specified, particularly the [Family Recovery Program], we might have had a different result in this matter. But I, I really am very uncomfortable with the notion that we put things into a file that are there simply to make a complete record, but were not really designed to be acted upon, that the parents were not given an opportunity, it appears, to sign or see the subsequent service agreements. That bothers me a lot. And it is something that perhaps [the Department] may wish to, may wish to address.

Thereafter, Mother and Father filed their timely appeal.

STANDARD OF REVIEW

In *In re Adoption/Guardianship of Ta'Niya C.,* 417 Md. 90, 100 (2010), the Court of Appeals outlined the standard for reviewing a juvenile court's decision to terminate parental rights:

> Namely, [w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies.[12] [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (quoting *In re Yve S.,* 373 Md. 551, 586 (2003)) (citations omitted).

Therefore, we review the court's factual findings under a clearly erroneous standard, *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. 701, 709 (2011), and will reverse "'where no reasonable person would take the view adopted by the [trial] court,'" or when the court does not refer to any guiding principles or rules. *In re Yve S.,* 373 Md. at 583 (quoting *In re Adoption/Guardianship* No. 3598, 347

Md. 295, 312-13 (1997)). "Questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." *In re Caya B.*, 153 Md. App. 63, 74 (2003) (quoting *In re Adoption/Guardianship No. 359*8, 347 Md. at 312) (internal quotation omitted).

DISCUSSION

When a court removes a child from a parent's custody to place them in "foster care, kinship care, group care, or residential treatment care," the court is required to regularly conduct a permanency planning hearing. *In re James G.,* 178 Md. App. 543, 568 (2008) (citing Md. Code (1984, 2012 Repl. Vol.), § 5-501(m) of the Family Law Article; Md. Code (2006, 2012 Supp.), § 3-823(b) of the Courts and Judicial Proceedings Article).[13] "In developing the permanency plan, the department is required to consider a statutory hierarchy of placement options in descending order of priority." *In re Adoption/Guardianship No. 10941,* 335 Md. 99, 105 (1994) (citing Md. Code (1984, 2012 Repl. Vol.), § 5-525(f)(1) of the Family Law Article). These placement options are:

> 1. Reunification with the parent or guardian;
>
> 2. Placement with a relative for:
>
> A. Adoption; or
>
> B. Custody and guardianship[ ]. . .;
>
> 3. Adoption by a nonrelative;
>
> 4. Custody and guardianship by a nonrelative[ ]. . .; or
>
> 5. Another planned permanent living arrangement that:
>
> A. Addresses the individualized needs of the child[ ] . . .[ ]and
>
> B. Includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life[ ]. . . .

In re James G., 178 Md. App. at 569 (citing Md. Code (2006, 2012 Supp.), § 3-823(e) of the Courts and Judicial Proceedings Article).

When determining the placement option, the social services department should consider:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

In re James G., 178 Md. App. at 569 (citing Md. Code (1984, 2012 Repl. Vol.), § 5-525(f)(1) of the Family Law Article.

"The valid premise is that it is in the child's best interest to be placed in a permanent home and to spend as little time as possible in foster care." *In re Adoption/Guardianship No. 10941*, 335 Md. at 106. Hence, when reunification of the child and parent is not within the best interest of the child, but adoption is, the Department must petition the court for guardianship, which will terminate the parental rights. *See id*.

The United States Constitution protects a parent's fundamental right to raise and care for his or her child without state interference. *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 299-300 (2005). *See In re Yve S.,* 373 Md. at 565; *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666, 692 (2002); *In re Mark M.,* 365 Md. 687, 705 (2001). Similar to the U.S. Supreme Court, Maryland recognizes that a parent's interest "'occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility." *In re Adoption/Guardianship of Victor A.,* 386 Md. at 299 (citing *In re Yve S.,* 373 Md. at 567, quoting *In re Adoption/Guardianship No. 10941, 335 Md. 99*, 113 (1994); in turn quoting *Lassiter v. Dep't. of Social Services,* 452 U.S. 18, 38 (1981); *In re Mark M.,* 365 Md. at 705). Although protection of one's property is of utmost importance in American history, "parental rights have been deemed to be among those 'essential to the orderly pursuit of happiness by free men . . . .'" *Id*.

The Court of Appeals has indicated that in termination of parental rights proceedings, "a parent's right to custody of his or her children 'must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect.'" *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. at 709 (quoting *In re Adoption/Guardianship of Rashawn H.,* 402 Md. 477, 497 (2007)). Therefore, when the State decides to terminate a parent's rights, we employ the "best interests of the child" standard. *In*

re Adoption/Guardianship of Cross H., 200 Md. App. 142, 152, cert. granted 422 Md. 352 (2011) (citing Md. Code (1984, 2012 Repl. Vol.), § 5-323 (b) of the Family Law Article. *See also Washington County Dep't of Social Services v. Clark*, 296 Md. 190, 198 (1983)). After considering these factors, if the court . . . "finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child, . . ." then the court should terminate the mother and/or father's parental rights. Md. Code (1984, 2012 Repl. Vol.), § 5-323 (b) of the Family Law Article.

I. Whether The Court Erred In Finding That The Department Provided The Parents With The Appropriate Services, And Thus Made Reasonable Efforts To Support A Permanency Plan of Reunification.

Md. Code (1984, 2012 Repl. Vol.), § 5-525(e) of the Family Article provides:

> (e) *Reasonable efforts*. — (1) Unless a court orders that reasonable efforts are not required . . ., reasonable efforts shall be made to preserve and reunify families:
>
> (i) prior to the placement of a child in an out-of-home placement, to prevent or eliminate the need for removing the child from the child's home; and
>
> (ii) to make it possible for a child to safely return to the child's home.
>
> (2) In determining the reasonable efforts to be made and in making the reasonable efforts described under paragraph (1) of this subsection, the child's safety and health shall be the primary concern.

In *In re Adoption/Guardianship of: Rashawn H. and Tyrese H.,* 402 Md. 477, 500 (2007), the Court of Appeals offered a comprehensive understanding of "reasonable efforts," stating:

> . . . Implicit in that requirement is that a reasonable level of those services, designed to address both the root causes and the effect of the problem, must be offered — educational services, vocational training, assistance in finding suitable housing and employment, teaching basic parental and daily living skills, therapy to deal with illnesses, disorders, addictions, and other disabilities suffered by the parent or the child, counseling designed to restore or strengthen bonding between parent and child, as relevant . . . .

In the case at bar, the parents aver that "[w]ithout a service agreement for an extended period of time, [they] were without clear guidance about what they were to do to regain custody of [Matija] and without guidance about the ways in which the Department could be expected to assist them." Matija's counsel contends that the parents signed a service agreement, and that the Department "[was] not required to continue to provide referrals to a parent who [was] unwilling to accept those services." The Department maintains that "the parents' failure was caused by their own lack of motivation, not by any deficiency in services," as Mother failed to complete the drug programs, and Father often took a passive role in caring for Matija.

In *In re James G.,* 178 Md. App. at 549, a mother and the plaintiff–father gave birth to a baby boy, James. As a result of the mother's drug abuse, James lived with the plaintiff. *Id*. When James was seven years old, social services filed a Petition with Request for Shelter Care, asserting that James was a CINA because of the mother's substance abuse and the plaintiff's incarceration. *Id*. The trial court determined that James was a CINA, and placed him with a relative. *Id*. at 550. The court continued a permanency plan of reunification, but social services filed a petition to change the permanency plan to placement with a relative for custody and guardianship. *Id*. The plaintiff contested guardianship, and the court ordered a hearing on the merits. *See id*. at 551.

During the hearing, the assigned social worker testified that the plaintiff and social services drafted a service agreement, which required the plaintiff to become employed, obtain adequate housing, and communicate with the child and social services. *Id*. "However, the service agreement was not placed in the record, and no evidence was presented as to [social services'] obligations, if any, under the agreement." *Id*. Regarding the services relating to the plaintiff's unemployment, the social worker stated that the plaintiff was referred to an organization, People Encouraging People, but he claimed that after visiting the organization, personnel could not help him.[14] *Id*. at 552. Concerning the plaintiff's housing, the social worker explained that she did not aid him. *Id.* at 553. The family law master asserted, "[s]eems like [social services] has done some things although it certainly could have done more . . . . Here's what we're going to do. The court will change the plan to placed with a relative for custody and guardianship . . . ." *Id*. at 559-60. The trial court accepted the master's recommenda-

tions, but stated:

> [Social services] had made reasonably, although certainly not exemplary, efforts to achieve reunification . . . . Certainly, more could have been done to help [the plaintiff] get a job, which would in turn have helped with getting housing . . . . [Social services] must make more aggressive efforts to help [the plaintiff] obtain employment.

Id. at 564.

The plaintiff noted an appeal, and contended that the trial court erred in finding that social services provided adequate services, and thus the permanency plan should not have been modified. *Id*. at 565. On appeal, our Court reversed the trial court's findings because the plaintiff initiated his own "reasonable efforts" by attempting to find employment. *See id*. at 591. However, because of his criminal history, and his lack of education and expertise, he was unable to secure a job. *Id*. Our Court further concluded:

> Although [social services'] effort regarding therapeutic and educational services for James was commendable, [social services did] not suggest [ ] how such efforts were designed to assist [the plaintiff] with his needs. Notably, the only "reasonable effort" in the list . . . that pertained to [the plaintiff was] that [social services] "monitored" his employment and "entered into a service agreement." Yet, the service agreement was not included in the record. At the hearing before the master, both [the plaintiff] and [the social worker] testified as to the requirements that the service agreement placed on [the plaintiff], which included obtaining employment and housing, as well as maintaining contact with James and with the agency. No evidence was presented, however, as to the [social services'] obligations under the agreement. Thus, the court could not evaluate what services [social services] had committed to provide [the plaintiff]. And, whatever "reasonable efforts" entail, under the circumstances attendant here it should have been more than mere "monitor[ing] [of the] [plaintiff's] employment," or a single referral to one employment program.

Id.

In *In re Adoption/Guardianship Nos. J9610436 and J9711031,* 368 Md. 666, 679 (2002), the plaintiff–father relinquished his six month old son, Tristynn, to social services when his apartment did not have electricity, and he did not have food. As a result, Tristynn was placed in foster care with relatives. *Id*. at 679-80. The plaintiff's second child, Edward, was born drug-infested and suffered from medical issues. *Id*. at 680. Edward was also placed with a foster care family. *Id*. The original permanency plan for both children was reunification with the plaintiff. *Id.* Social services drafted a service agreement, which required the plaintiff "to obtain electricity in his apartment, attend parenting classes, complete a domestic violence program, complete an alcohol and drug evaluation, submit to random urinalysis, confirm in advance his intent to keep scheduled visits, be completely truthful with [social services], and remain drug and alcohol free." Social services subsequently filed a Petition for Guardianship with the Right to Consent, and for the termination of plaintiff's parental rights.[15] *Id.* at 678. The court terminated the plaintiff's parental rights, and our Court affirmed. *Id*.

On appeal, the Court of Appeals determined that social services lacked sufficient evidence that it properly referred the plaintiff to adequate services for the purpose of reunification, and thus, our Court and trial court erred in terminating parental rights. *Id.* at 698. While social services did inform the plaintiff of parenting classes, and requested that he register for a domestic violence program and drug and alcohol assessment, *id.* at 684, these services were not adequate because "[t]he record [did] not indicate that [the plaintiff] was involved in domestic violence in respect to either of the children or had any drug or alcohol addictions from which to remain free." *Id*. at 681, n.1. The type of services needed for the plaintiff related to his "intellectual and cognitive skill levels," as the plaintiff was disabled based upon his mental deficiency. *Id.* at 682-83. Despite this, the plaintiff attended parenting classes, completed part of the domestic violence program, as well as the drug and alcohol assessment. Id. at 681-82. Furthermore, the plaintiff secured housing in a two- bedroom townhouse for his two children. *Id*. at 688. The Court stated, "[w]hile there may be no easily ascertainable levels of assistance that must be offered when the termination of parental rights of a "disabled" parent is involved, that level [was] far above the minimal services [social services] offered . . . ." *Id*. at 693.

In *In re: Adoption/Guardianship No. J970013,* 128 Md. App. 242, 245 (1999), a baby, Kevon, was conceived and birthed while his parents were inmates at a correctional facility. Social services filed a Petition for Guardianship with the Right to Consent to Adoption. *Id*. at 246. During the hearing, the court "waived any obligation of [social services] to provide

services to the [plaintiff–father] . . .” because “here [was] a man that conceived a child while in jail, and had been in jail for some time.”[16] *Id*. at 255. The court granted the petition, and terminated the plaintiff’s parental rights. *Id*. at 247.

On appeal, the plaintiff asserted that the trial court erred because social services failed to certify reasonable efforts towards reunification. *Id*. at 254. While incarcerated, the plaintiff voluntarily attended a concerned fathers’ program, completed drug treatment, and participated in stress and anger management seminars. *Id*. at 246. Our Court agreed with the trial court, which stated, “we [would] not put Kevon’s welfare in “legal limbo” while waiting for the scant possibility that the [plaintiff] [would] be released in the near future.” *Id*. at 256-57. Hence, we affirmed the trial court’s ruling. *Id*. at 257.

In *In re: Adoption/Guardianship No. 10941,* 335 Md. 99, 107 (1994), the plaintiff–mother gave birth to her third child, Ivan, and the hospital contacted social services regarding its concern. Ivan was then placed in foster care with relatives. *Id*. The court determined that Ivan was a CINA, and during the hearing, the plaintiff and the father signed a service agreement. *Id*. The agreement referred the parents to psychological assessments and parenting courses. *Id*. at 107-08.

Thereafter, the plaintiff suffered from a psychotic episode when the father, an illegal immigrant from Nicaragua, was convicted of raping one of the plaintiff’s friends, and was subsequently deported. *Id*. at 108. The social worker made appointments for the plaintiff to reside at a psychiatric clinic, but the plaintiff refused. Id. The plaintiff neither participated in her psychological assessments nor accepted housing assistance when she became homeless. *Id*. at 109-10. Despite the social worker’s efforts to establish visitation sessions with Ivan, the plaintiff did not visit. Id. at 110. Social services filed a Petition for Guardianship, which the court denied, stating that social services did not provide adequate services for reunification. *Id*. at 116. Before our Court could consider the case, the Court of Appeals granted certiorari. *Id*. at 111.

On appeal, the Court stated that social services did provide adequate services to the plaintiff, and that:

> The problem with the trial judge’s analysis [was] that he failed to recognize that no amount of reunification services [were] likely ever to allow [the plaintiff] to get custody of her children. Assuming without deciding that [social services] failed to meet its statutory duty to facilitate reunification . . . would obviously be futile, [social services] need not go through the motions in offering services doomed to failure.

Id. at 117. The Court recognized that there was sufficient evidence that the plaintiff was an unfit parent because she (1) had recurring mental disorders; (2) failed to obtain employment and a permanent home; (3) had five children, and four of them were conceived by four different men; (4) never had custody of her children; and (5) made poor choices because her children’s fathers were either incarcerated and/or illegal immigrants. *Id*. at 118. Hence, “since no amount of reunification services by [social services] would likely result in reunification of Ivan and his parents, [social services] need[ed] not [to] meet its obligations . . . in order for the [trial] court to [have] terminate[d] the natural parents’ rights . . . .” *Id.* at 119.

In the case at bar, as demonstrated in the record, several service agreements were prepared by either Ms. Williams and/or Ms. Thomas, but were neither presented to Matija’s parents nor signed by them. Similar to the trial court, we are concerned about these documents. The trial court compared these documents to “Potemkin Village,”[17] and we use the analogy of “placebos.” A placebo is “a harmless, unmedicated preparation given as a medicine to a patient merely to humor him,” or “something said or done to win the favor of another.” WEBSTER’S NEW WORLD DICTIONARY 1087 (2nd ed. 1976). Thus, these prepared agreements are mere placebos that either attempted to appease the parents or the court. However, unlike *In re James G.* where there was no service agreement filed in the record, in the case at bar, the parents did sign a service agreement on January 25, 2007. This agreement stated that Mother and Father were to (1) maintain contact with Matija and the Department; (2) participate in Matija’s medical care and educational planning; (3) provide the Department with legal, financial, and family history; (4) identify relatives who could be a resource for placement; (5) keep the Department informed concerning home addresses and employment; (6) attend court hearings relating to Matija; (7) support Matija financially; and (8) enroll and complete drug treatment.

Because of Mother’s substance abuse, the Department referred her to the Family Recovery Program, which “[h]elp[ed] parents overcome their addiction to drugs and alcohol [as] a proven way to ensure their children can be reunited with them in safe, stable and nurturing families . . . .”Justin Reyna, *The Family Recovery Program Compac*t, FAMILY RECOVERY PROGRAM, http://morefor maryland.org/page.php?id=51 (last visited Mar. 6, 2013). Mother did attend the Family Recovery Program’s initial assessment and intake, but eventually she “ha[d] not met drug treatment guidelines, not met with the drug treatment case manager as required, not met with the [Family Recovery Program] case manager as required, not met with the [Department] case manager as required, not complied with treatment requirements regarding submission of

urinalysis results, not submitted satisfactory urinalysis and not met with [the Family Recovery Program's] requirements for Track A." The Department also referred Mother to Chrysalis House, which "has a sole purpose: to enhance treatment opportunities and outcomes for women suffering from alcoholism and other drug dependence." *Our Mission*, CHRYSALIS HOUSE INC., 2012, http://www.chrysalishouses.org/ (last visited Mar. 6, 2013). Mother enrolled in drug treatment at Chrysalis House, but discontinued her substance abuse treatment there. She was subsequently referred to outpatient treatment at Powell Recovery, which is "a behavioral health company that specializes in addiction treatment." *Home*, POWELL RECOVERY CENTER, INC., http://powellrecovery.com/ (last visited Mar. 6, 2013). Nonetheless, Mother only attended the initial assessment and one session.

Father also signed the service agreement, but did not undergo substance abuse treatment because he alleged that he did not have a drug problem. The Department acknowledged that it did not provide services to Father because "[h]e expressed only an interest in helping [Mother] to reunify with Matija, not in assuming the parenting responsibility himself. He also showed little interest in developing a relationship with Matija, visiting her only five times during a five-year period."

The record before us overwhelmingly illustrates that Mother and Father are unfit to care for Matija. Akin to the plaintiff in *In re: Adoption/Guardianship No. 10941,* the undisputed evidence is Mother suffered from several mental disorders, including bipolar, personality, and post-traumatic stress disorders, and had been prescribed several psychotropic medications for these mental illnesses. Mother also has undergone a hysterectomy and brain surgery to which "[a]s a safety measure, [she] has another adult accompany her — either [Father] or another family member — when the children are with her."

The evidence demonstrates that neither parent has been able and/or willing to obtain adequate, and stable housing and regular employment. During the hearing, the trial court stated:

> As an example, the testimony was that the current house has been determined not to be appropriate for children. They've been in that house for four or five months. The prior house they lived in was also found not to be appropriate and they lived in that one for four or five months. So even now they do not have stable housing. This is five years after the fact.
>
> Neither is gainfully employed. Dad is a barber which is a, a good and honorable job that is recession-proof, but he's not working regularly as a barber. He does, he did testify that he has, although he's not working at a barber shop, he has 12 customers that, whose hair he cuts. But a competent barber can do 12 customers in a day. It just seems to me that that [sic] is not the same thing as, as regular employment . . . .

Additionally, the parents' lifestyles reveal an inability to raise Matija. Many visitation appointments were cancelled because of the parents' incarcerations, alleged illnesses, and so forth. Neither parent visited Matija between October 2010 and February 2012. Sporadic visitations occurred, as reflected in Father visiting Matija once between January 2007 and April 2007, but he did not visit again until the bonding evaluation in June 2010.

The case at bar differs from *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. at 681-82 because although there was only one service agreement, the father attended parenting classes, obtained adequate housing, and despite no evidence of domestic violence or drug abuse in the record, the father still completed part of the domestic violence program, as well as drug and alcohol assessment. Here, Mother and Father did not demonstrate this same initiative. Instead, they failed to comply with the terms of the January 25, 2007 service agreement by failing to complete several drug treatment programs and failing to secure adequate housing over a five year period. Because "attempts at reunification would obviously be futile, the Department need not [have] go[ne] through the motions in offering services doomed to failure." *In re: Adoption/Guardianship No. 10941*, 335 Md. at 117. Therefore, the trial court did not err in finding that the Department provided the parents with the appropriate services, and thereby made reasonable efforts to support a permanency plan of reunification. We affirm the court's ruling in terminating Mother and Father's parental rights pursuant to Md. Code (1984, 2012 Repl. Vol.), § 5-323 of the Family Law Article.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

FOOTNOTES

1. Mother has seven children including Matija. Mother's then three year old was also a drug-exposed newborn. Four of Mother's children have reached the age of majority, and all but one have been in the care of relatives. In addition to

Matija, Father has two majority-aged children to which his parental rights were voluntarily terminated.

2. Shelter care is defined as "a temporary placement of a child outside of the home at any time before disposition." Md. Code (1974, 2006 Repl. Vol.), § 3-801(y) of the Courts and Judicial Proceedings Article.

3. A "Child in Need of Assistance" is a child who requires court intervention because he or she has been abused, neglected, has a developmental disability and/or a mental disorder, and his or her parents, guardian, or custodian, are either unwilling or unable to provide proper care and attention to the child and the child's needs. Md. Code (1974, Repl. Vol. 2006), § 3-801(f) of the Courts and Judicial Proceedings Article.

4. A shelter care hearing is "a hearing held before disposition to determine whether the temporary placement of the child outside of the home is warranted." Md. Code (1974, 2006 Repl. Vol.), § 3-801(z) of the Courts and Judicial Proceedings Article.

5. In the trial court's January 11, 2007 order, it referred to the shelter care hearing as the CINA hearing. However, the CINA hearing did not occur until June 2007.

6. Since 1993, Mother was arrested and/or convicted regarding possession of controlled dangerous possession with intent to distribute or manufacture, theft, trespass, and prostitution. Similarly, Father has been arrested and convicted concerning various crimes, including possession of controlled dangerous substances with intent to distribute or manufacture and assault.

7. The record before us does not contain the original order that modified the permanency plan from "reunification with a concurrent plan of relative placement" to what was purported in the mediation agreement. According to Matija's counsel's brief, "[t]he court-ordered evaluation of Ms. G., foster parent, dated May 4, 2010, indicate[d] that the CINA court orders were reviewed. Contained within the body of the report, the evaluator recite[d]: "'In documentation from the court, [p]ermanency [p]lanning [r]eview dated 9/11/08[,] the Baltimore City Department of Social Services changed permanency planning for [Matija] from a plan for "reunification with a parent or guardian' to a primary plan of "relative placement for adoption and custody and guardianship with the secondary plan of reunification.'"

8. The maternal grandmother, who had custody of Mother's then three year old experienced legal issues and medical ailments, and decided she did not want to care for Matija. The Department attempted to telephone one of the great-aunts, but never made contact. Other relatives either were substance abusers or possessed a criminal history.

9. Neither the record nor the court entry indicates a notice of objection by Mother and/or Father. In a court order dated November 8, 2011, it read, "Filed: Notice of Objection by parents." Thus, we accept that the parents filed their objection.

10. Mother and Father complained to Ms. Williams' supervisor, Eleanor Thomas ("Ms. Thomas"), regarding concerns that Ms. Williams did not provide them with proper services and information while she was their assigned social worker. Ms. Thomas noted the concern to the administrator. The record does not reflect whether any action was taken against Ms. Williams.

11. To ascertain the best interests of a child, the court must consider all the factors enumerated in Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article, which reads:

> (d) *Considerations*. – Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1) (i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust to the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> (i) the extent to which the parent has maintained regular contact with:
>
> 1. the child;
>
> 2. the local department to which the child is committed; and
>
> 3. if feasible, the child's caregiver;
>
> (ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;
>
> (iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and
>
> (iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interest to extend the time for a specified period;
>
> (3) whether:
>
> (i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidence by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidence by positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist . . . or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

(iv) the parent has been convicted, in any state or any court of the United States, of:

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

2. aiding or abetting, conspiring, or soliciting to commit a crime described in item 1 of this item; and

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4) (i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

12. Md. Rule 8-131(c) reads:

> Action tried without a jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

13. Our Court in *In re James G.* cited to the 2007 supplement regarding § 3-823(b) of the Courts and Judicial Proceedings Article, and to the 2006 Replacement Volume and 2007 supplement concerning § 5-501(m) of the Family Law Article. Because these provisions have been updated, we provide the revised citations throughout the opinion.

14. During his testimony, the plaintiff stated that People Encouraging People only assisted individual who suffered from Human Immunodeficiency Virus. *In re James G.*, 178 Md. App. at 556.

15 .The mother consented to terminating her parental rights. I*n re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. at 678.

16. The plaintiff was sentenced to twenty years to life for first degree. *In Re: Adoption/Guardianship No. J970013,* 128 Md. App. at 253.

1. Potemkin Village is "an impressive facade or show designed to hide an undesirable fact or condition." *Potemkin Village,* MERRIAM-WEBSTER ONLINE, 2013, http://www.merriam-webster.com/dictionary/potemkin+village (last visited Mar. 6, 2013).

NO TEXT

Cite as 5 MFLM Supp. 107 (2013)

Custody: visitation: emergency motion for modification

Susan Carrillo
v.
Oscar Carrillo

No. 1013, September Term, 2012

Argued Before: Wright, Kehoe, Alpert, Paul E. (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: March 22, 2013. Unreported.

The trial court did not err or abuse its discretion in determining that the father should regain full custody of the children because, based on the mother's current mental health condition, staying with their father would be in the best interests of the children.

Susan Carrillo ("Mother"), appellant, is unhappy with the circuit court's decision to grant an emergency motion to return her minor children to the appellee, Oscar Carrillo, Sr. ("Father"), and suspend her access. Mother is the biological mother of Oscar Cristian Carrillo, age 14, and Gabriel Carrillo, age 9. On June 12, 2012, an Interim Access Consent Order granted by the Circuit Court for Montgomery County gave Mother the right to a specific unsupervised visitation schedule with the minor children. On July 8, 2012, she filed a petition for a Protective Order from Domestic Violence against Father. The District Court for Montgomery County granted Mother's petition and scheduled a hearing for July 10, 2012.

On July 9, 2012, Father filed an Emergency Motion for Modification of the June 12th Consent Order in the circuit court, alleging that Mother had violated the terms of the Order. The circuit court granted Father's Emergency Motion and suspended Mother's right to visitation with the minor children as provided in the June 12, 2012 Consent Order. Mother filed a timely appeal.[1]

QUESTION PRESENTED

Appellant asks:

> Was the Montgomery County Circuit Court correct in ordering the denial of all of the appellant's right to visitation without sufficient factual basis or justification on July 9, 2012?

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

FACTS AND PROCEDURAL HISTORY

On June 12, 2012, the circuit court entered an Interim Consent Order granting the Mother extended visitation rights with her two minor children. Prior to that order, following the parties' divorce, sole legal and primary physical custody had been granted to the Father. The June 12, 2012 Consent Order allowed Mother to have extended visitation with her children for the following six months, as long as she continued a mental health treatment plan. The Order provided:

> That starting in May 2012, Mother shall have mid-week access on either Wednesday or Thursday 3:30 p.m. to 7:00 p.m.; the Parties will mutually agree to determine on which day the access will occur, and to otherwise adjust mid-week access to accommodate the boys [sic] regular activities . . . .
>
> That the Parties agree to increasing the mother's access to one overnight every other weekend, either Friday or Saturday; pick-up at 9:00 a.m. Saturday and 9:30 a.m. drop-off on Sunday; or 3:30 p.m. pick-up Friday, and 3:30 p.m. Saturday drop-off if on Friday during school, for the next three months — May, June and July; from August through October, the mother will continue having overnights every other weekend . . . .
>
> That provided that the parties are in town, and the children are available and there is no conflict with their activities, the parties agree that the [Mother] shall have access with the children for a period of three (3) hours on or around the weekends on which [Mother] is not scheduled to have overnight access with the children.
>
> That a stipulation for this interim visitation agreement is that the boys shall always have the overnights with mother together . . . .

> That an additional stipulation is that the children shall always have unfettered access to their cell phones/ipods, when they are with the [Mother]; [Mother] shall not turn off child's cell phones or confiscate their cell phones while the children are in her care.

On July 8, 2012, Mother filed a petition for relief from abuse[2] in the district court. The Petition for Ex Parte Relief was granted. A Protective Order hearing was schedule for July 10, 2012.[3] In the petition, Mother alleged that the Father was abusing the two minor children and, consequently, she needed to keep them in her custody and protection. Mother has previously filed for Protective Orders on behalf of her children four times based on allegations of abuse by their Father.

On July 9, 2012, Father filed an Emergency Motion for Modification of the June 12, 2012 Consent Order in the circuit court. The pertinent paragraphs of Father's motion are as follows:

> 3. That [Father] files this Ex-Parte Emergency Motion for Modification of consent order and Request for Other Relief for the reasons stated herein. [Father] contends that if the Court does not intervene, that the minor children in this case will be irreparably harmed and alienated from the [Father].
>
> 4. That on July 7, 2012, the [Mother], without notice or cause, filed District Court Domestic Violence petition alleging that [Father] committed child abuse on the minor children . . . .
>
> * * *
>
> 6. That the [Mother] has failed to return the children to the [Father] as scheduled on July 8, 2012. Gabriel was scheduled to in a swim relay [sic] and it was crucial that he participate. Gabriel did not appear.
>
> 7. That the minor children have not been contacted by the children [sic]. That [Mother] is refusing to allow the children to speak to the [Father] and is harboring them in her apartment in D.C.
>
> 8. That the [Mother] has a history of mental health problems and it is clear that she is now relapsing into having delusions. That the [Mother] is emotionally unstable and has been treated for depression and/or anxiety. [Mother] remains unemployed.
>
> 9. That since 2009 [Mother] has filed 4 other District Court petitions alleging child abuse. During these times she was suffering from delusions. [Father] adamantly denies ever abusing the minor children.
>
> 10. That the [Mother] has during recent weeks exhibited behavior which causes the [Father] to believe that the [Mother] is not taking her medication.
>
> 11. That it is not safe for the children to be in the presence of the [Mother]. [Mother] is not rational and is unpredictable and it is not in the best interest of the children to be in her presence. [Father] is requesting that the Court immediately terminate the [Mother's] access to the children until the [sic] Dr. Dvoskin can assess the situation and make recommendations.

Judge Joseph A. Dugan granted Father's Emergency Motion for Modification. The order provided:

> ORDERED, That the Court Order dated June 4, 2012, is hereby modified such [Mother's] access is hereby suspended immediately, and it is further
>
> ORDERED, That Child Protective Services is to do a report and investigation of all current allegations of abuse within seven days to be forwarded to Judge Albright[4] for any action she deems appropriate regarding the defendants' vacation with the minor children and it is further
>
> * * *
>
> ORDERED, That the Court is sua sponte modifying the Commissioner's Order in 0602-SP02311-2012 and returning Gabriel and Christian Carrillo to the custody of their father immediately.

STANDARD OF REVIEW

Where a case is tried without a jury, the starting point for our standard of review would be dictated by Maryland Rule 8-131(c). *See Davis v. Davis*, 280 Md. 119, 122 (1977) (discussing Rule 886, a predecessor to Rule 8-131(c)). "[I]n a non-jury action, we review the case on the law and the evidence, and we will not set aside the judgment on the evidence unless clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses."

Williams v. State, 173 Md. App. 161, 167 (2007) (citing Md. Rule 8-131(c)). "If there is any competent evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *Goff v. Sta*te, 387 Md. 327, 338 (2005) (citations omitted). In short, a "decision founded upon sound legal principles and based upon factual findings that are not clearly erroneous will not be disturbed in the absence of a showing of a clear abuse of discretion." *Domingues v. Johnson*, 323 Md. 486, 492 n.2 (1991) (citations omitted). *See Maness v. Sawyer*, 180 Md. App. 295, 312 (2008); *Kierein v. Kierein*, 115 Md. App. 448, 452 (1997).

The ultimate decision to award or to modify custody is committed to the sound discretion of the court, and appellate review of that determination is reviewed for an abuse of discretion. *See In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297 (2005); Davis, 280 Md. at 125.

DISCUSSION

Mother appeals the July 9, 2012 Consent Order suspending her custody rights to her two minor children. She avers that the circuit court granted the Consent Order in favor of Father "without sufficient factual basis or justification" and provides a series of arguments to that end.

Mother argues that the circuit court modified the July 8, 2012 Protective Order granted by the District Court Commissioner "based on inadmissible and insufficient evidence." She contends that the circuit court did not permit her to object to the admission of Father's Exhibit #1 (a text message from Cristian), which Mother argues was inadmissible as hearsay and as lacking proper authentication. Mother further argues that she was not permitted to present evidence regarding the domestic violence allegation. Mother avers that the circuit court incorrectly delegated its judicial responsibility to investigate domestic abuse claims to Child Protective Services.

Next, Mother argues that the circuit court improperly assessed her mental health condition. She contends that the court made a statement assessing her mental health without taking into account the testimony of the two mental health experts assigned to the case, and additionally, that the court's statement was a result of the judge impermissibly testifying as an expert witness in a trial over which he is presiding. Furthermore, Mother states that the court discriminated against her because of her medical disability. Mother contends that the court's use of her testimony regarding abuse and neglect should be considered retaliation for testimony and that it discriminates against her.

Finally, Mother argues that the denial of her visitation rights, based on the July 9, 2012 Consent Order, denied her right to a fair trial in that it prejudiced the final custody evaluation connected with this case against her and in favor of Father. Specifically, because she was denied visitation and custody in the months leading up to the December, 2012 custody hearing, Mother could not bring in any collateral witnesses to speak on her behalf.

Mother requests that the July 9, 2012 Interlocutory Order granting Father's Emergency Motion be vacated. She asks that all denied visitation during the period from July 9, 2012, to December 4, 2012 (the start of the final custody hearing), be rescheduled according to the June 4, 2012 Interim Access Consent Order. The Mother's myriad complaints are summarized by the allegation that the circuit court abused its discretion, which resulted in an order suspending Mother's visitation rights.

"The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child."[5] *Wagner v. Wagner*, 109 Md. App. 1, 29 (1996) (citations omitted). "[T]he circuit court functions as both a protector of the child and as the resolver of a dispute between the parents." *McMahon v. Piazze*, 162 Md. App. 588, 593 (2005) (citation omitted). As stated by the Court of Appeals:

> "The determination of which parent should be awarded custody of a minor child rests within the sound discretion of the trial court. The court's exercise of discretion must be guided first, and foremost, by what it believes would promote the child's best interest which, in custody disputes, is of transcendent importance."

Giffin v. Crane, 351 Md. 133, 144-45 (1998) (citations omitted).

The party seeking a modification of a custody order bears the burden of persuasion to justify a change in custody. When considering a request for a modification of custody, the court employs a two-step process. The court must initially determine whether there has been a "material" change in circumstances that would justify further inquiry, and, if so, whether a modification prompted by that change would be in the best interest of the child. *Wagner*, 109 Md. App. at 28. The test for "materiality is whether the change is in the best interest of the child." *McMahon*, 162 Md. App. at 596 (citation omitted).

After hearing from both parties, the circuit court observed that the Mother had "been rambling for some time now . . . [and] haven't [sic] made a lot of sense. These [were] allegations that [she had] made in the past." The circuit court allowed the Mother to present

her allegations of abuse and evidence in the form of an e-mail from one of the sons. The circuit court made an extensive ruling on the record. A lengthy recitation is required:

> Okay. All right, it is now 5:32 p.m. The Court has reviewed some of the pleadings in this case, certainly not all of them. I have reviewed the letter from Dr. Putnam, [Mother's] treating psychiatrist, indicating that she is taking her medication, that she's in compliance with her appointments and other treatment. It's not particularly detailed. But it indicates that she is taking her medications, at least as of July 2 of 2012. It is now July 9, seven days later. I don't know – she tells me that she has taken her medication and that may be true.
>
> The court is extremely troubled by the history of this case. There is nothing more serious than alleging child abuse if the child abuse did not occur. The Court has reviewed the [Mother's] petition for protection for child abuse for both of the children in this case and it is a rather rambling listing of different things that have happened over the course of the past several months. It looks like it corresponds with when she was scheduled to begin or did begin having overnight visitation.
>
> One of the things that her visitation was condition upon was making certain that the children make all of their events and meets. One of the boys didn't make a swim meet.
>
> * * *
>
> The Court is satisfied that [Mother] certainly believes that she's correct. The past complaints of child abuse, particularly where there's four apparently since 2009 — additionally the Court notes that by her own admission, she was voluntarily admitted for seven days for psychiatric care back in 2010. The Court is extremely concerned that she may be having a recurrence of some type of a breakdown or meltdown. The fact of the matter is that counsel has indicated that in each case she represented – and when I say counsel, I mean Ms. Brown [Father's attorney].
>
> The matter came before the Court for a hearing. There was no determination by the Court of any child abuse.
>
> What the Court has seen in the pleadings that have been placed in this case before the Commissioner and which are scheduled to be reviewed tomorrow by a judge at the District Court, I don't know whether they would amount to child abuse or not, because I don't know the facts behind all of these allegations. I just notice that as soon as she had overnight visitation, it looks like these complaints of abuse began. And I'm also in possession of this exhibit from the [Father] which is a text message from Christian to one of his friends. No motivation for that.
>
> The [Mother] of course indicates that this has been misconstrued by [Father] and [Father's] counsel. It's 9:26 a.m., 7/8/12: "I would love to, but you see, my mom has locked me in her building until Tuesday cause she left last night at like 11:30 p.m. and got my [Brother] a protective order because she thinks my dad is abusing him, which he's not.
>
> So now I have to obey the order and stay here until Tuesday and I probably can't go to El Paso. Don't tell anybody yet, okay?" There's no motivation for writing that, but it certainly is written by a child, a text from a child who is 14 as I understand it, to a friend. And there's no fear in his voice, there's only annoyance that he can't go with his father to El Paso for a trip. I don't believe that these children have any fear . . .
>
> * * *
>
> In any event, the Court is satisfied that these children are not currently in any danger from any serious abuse as alleged by [Mother] on the record here today.
>
> The Court has not listened or heard her evidence beyond looking at her petition for protection from domestic violence and plugging in her past complaints of child abuse of her children. The fact of the matter is that she makes many irrational statements

on the record today.

An example of one is that Judge Ryan and the two attorneys that were involved in the case coerced her into consenting to allowing her husband to have sole legal and primary physical custody of the boys. The Court has already read into the record Judge Ryan's voir dire.

Judge Ryan, I have absolutely no doubt in my mind in any way, shape, or form coerced [Mother] into agreeing to [Father] having sole legal and primary physical custody of these two children. As recently as June 12, 2012 there is a consent order entered into the record that was agreed to back in April. That consent order allows her visitation which apparently she has not had in the past. It began in May with mid-week access, June, July and August, and was allowing for one overnight and ordered a custody evaluation which of course would by definition in this order also involve an evaluation of her mental health because it was ordered by the Court that her doctors furnish monthly reports to the custody evaluator.

I don't know whether that's been done or not. That letter that I've already referred to says she is compliant.

However, the Court is satisfied that this is — although she may believe that this abuse is happening, the Court is not satisfied that this abuse is happening. However, if indeed the Court were satisfied tomorrow morning, the Court could indeed order Child Protective Services to do a report and evaluation.

But I do not believe that these children are in danger. I believe that the [Mother] is making these allegations — I believe she may be in a deteriorated state mentally. I believe that the children are not in any danger from their father and I don't know what the Court may choose to do tomorrow morning, but I know what this court is going to do today. This is an order from a Commissioner which is in effect only until such time as the Court has passed upon it.

The District Court once they find out that the Circuit Court has a custody case in all likelihood would pass on that temporary order and then forward it to the Circuit Court. Based on these past complaints and my observations of [Mother] today, I am going to act in this case that's in front of me now, and I recognize that it may have some ramifications as to the Commissioner's order as well as to the hearings tomorrow.

And I have taken well over an hour now for just that purpose.

What the Court is going to do is, the Court is going to grant the ex parte emergency motion – and it's not really ex parte, because [Mother] is here and participated. So it's not really an ex parte emergency motion.

So I'm going to cross that out and call it an emergency motion for modification. Both parties being present, the Court having reviewed the prior consent orders in this matter, the Court being aware of the [Mother's] past mental history and the Court having observed her today in court, the Court is ordering that the court order dated June 4, 2012, is hereby modified such that [Mother's] access is hereby suspended immediately. I'm saying suspended and not terminated.

It is further ordered that Child Protective Services is to do a report and investigation of all current allegations of abuse within seven days to be forwarded to Judge Albright for any action that she deems appropriate regarding the [Mother's] visitation with the minor children.

It's further ordered that the sheriff is to take all efforts to return the minor children to the [Father].

* * *

The precise Order is as follows:

The matter has come on for hearing on the [Father's] emergency motion for modification and other relief. Both parties being present and after testimony, it is this 9th day of July ordered that the emergency motion for modification of consent and

other relief is granted in part and it is further ordered that the court order under date of June 4, 2012 is hereby modified such that [Mother's] access is hereby suspended immediately. It's further ordered that Child Protective Services is to do a report and investigation of all current allegations of abuse within seven days to be forwarded to Judge Albright for any action she deems appropriate regarding the defendant's visitation with the minor children. It's further ordered that the sheriff is to take all reasonable effort to return the minor children to the [Father]. It's further ordered that the Court is sua sponte modifying the Commissioner's order in 0602SP02311-2012 and returning Gabriel and Christian Carrillo to the custody of their father immediately.

The circuit court did not err in determining that the Father should regain full custody of the two minor children because, based on the Mother's current mental health condition, staying with their Father would be in the best interests of the children. Specifically, the court stated at the hearing that "[t]he Court is extremely concerned that [Mother] may be having a recurrence of some type of a breakdown or meltdown." Additionally, the circuit court did consider Mother's concerns about the alleged abuse, and although it stated that "the court is satisfied that these children are not currently in any danger from any serious abuse as alleged by [Mother]," it ordered an investigation be carried out by Child Protective Services.

After reviewing the evidence and exercising independent judgment, the circuit court determined that the evidence demonstrated a material change in circumstances, and that a change in the legal custody arrangement would be in the children's best interests. We discern no abuse of discretion in this decision.

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

FOOTNOTES

1. Father has not filed a brief in this case.

2. Md. Code (1984, 2006 Repl. Vol.), § 4-505(a)(1) of the Family Law Article ("FL") states: "If, after a hearing on a petition, whether ex parte or otherwise, a judge finds that there are reasonable grounds to believe that a person eligible for relief has been abused, the judge may enter a temporary protective order to protect any person eligible for relief from abuse."

3. FL § 4-506 states in part:

> (a) *Hearing–In general*.— A respondent under § 4-505 of this subtitle shall have an opportunity to be heard on the question of whether the judge should issue a final protective order.
>
> (b) *Hearing–Date and time*. —
>
> * * *
>
> (1)(ii) Except as provided in § 4-505(c) of this subtitle, or unless continued for good cause, the final protective order hearing shall be held no later than 7 days after the temporary protective order is served on the respondent.

4. Judge Anne K. Albright was presiding over the ongoing Family Law case.

5. We find particularly instructive the following observation made by the Supreme Court of Oregon:

> In divorce cases, the right of one parent to share child custody with the other becomes subordinate to the welfare of the child precisely because the divorce makes natural family life impossible. Since a child is not divisible, one parent must yield; and, since it is the parents who have destroyed the natural habitat of the child, it is proper that the adverse effects of the divorce upon the child be minimized as much as possible. Thus, the court chooses the environment which is the more suitable for the child, or, more accurately, the less unsuitable for the child.

Simons v. Smith, 366 P.2d 876 (Or. 1961).

Cite as 5 MFLM Supp. 113 (2013)

CINA: Denial of party status: Paternity disproved

In Re: Alonah M.

No. 1285, September Term, 2012

Argued Before: Meredith, Watts, Nazarian, JJ.

Opinion by Watts, J.

Filed: March, 22, 2013. Unreported.

Putative father's appeal of the trial court's decision declaring that he was not a party to the CINA case is moot, given the subsequent results of DNA tests that established he was not the child's father.

Reginald M., appellant, appeals the decision of the Circuit Court for Baltimore City, sitting as a juvenile court, declaring that he was not a party to Alonah M.'s Child in Need of Assistance ("CINA") case. Appellant raises one issue, which we quote:

> Did the [circuit] court err when it refused to recognize [a]ppellant as the father of Alonah M. and denied him status as a party to the case?

For the reasons set forth below, we conclude that the question is moot. Accordingly, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Alonah was born on November 21, 2011, to Sandra. No father was listed on Alonah's birth certificate. On July 25, 2012, the Baltimore City Department of Social Services (the "Department") filed a Petition with Request for Shelter Care for Alonah, alleging that Alonah had been "abused, [or] neglected, . . . and [Alonah]'s parents, guardian, or custodian are unable or unwilling to give proper care and attention[,]" as follows:

> [ ] On or about July 24, 2012, [Alonah]'s mother called 911 and reported she felt like she was having a seizure. The mother was transported to Harbor Hospital.
>
> [ ] Before the[ ] paramedics arrived at the mother's home, the mother placed [Alonah] on a sofa, left the room, and [Alonah] fell to the floor. . . .
>
> [ ] The Baltimore City Police were contacted and have assigned [a] compl[ai]nt number[.]
>
> [Alonah] was taken to Johns Hopkins Hospital to be examined and receive medical attention if needed. [Her] sibling, A[ ]rianna, was also transported to JHH so she would not be left in the home alone.
>
> [ ] Harbor Hospital determined that the mother was intoxicated and unable to provide adequate care for herself, [Alonah], or [Arianna].
>
> [Arianna] was placed with her father, [appellant].
>
> [Alonah]'s mother was unable and/or unwilling to provide the father's name. Family members report that the father's first name is Cordell and that he is incarcerated.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

On July 25, 2012, following an Emergency Shelter Care hearing before a master, the circuit court issued an order placing Alonah in shelter care, and ordered the parties to appear at an adjudicatory hearing on August 13, 2012. The circuit court stated the following regarding appellant:

> The putative father has been identified as [appellant,] who was present. At the start of this case [appellant] was unable to be represented [because] he was not a party to the case at the time the petition was prepared. [The Department] stated that [appellant] previously denied paternity so he is not named on the petition. . . . [S]ince [appellant] has stated that he is the father he can be interviewed by [the Public Defender] and can be represented prior to genetic testing. A paternity test is set for [appellant].

On July 25, 2012, the circuit court issued a Paternity Testing Appointment Letter, requiring appellant to appear for a paternity test on August 2, 2012. On July 27, 2012, Sandra filed a motion for immediate review of shelter care. On the same day, the circuit court scheduled an immediate review for August 3, 2012. On August 2, 2012, a DNA paternity test for Alonah was

performed by DNA Diagnostics Center, but the results were not immediately available.

On August 3, 2012, the circuit court held a hearing to review the emergency shelter care order, at which the Department objected to appellant "being given party status in th[e] case." The Department contended that, on the night that Alonah was removed from her mother's care, appellant stated to the police officer at the scene that he was Arianna's father, but not Alonah's father. The Department argued that "it would be more appropriate" not to treat appellant as a party until the results of the paternity test were known. Alonah's attorney asserted that appellant should not be afforded party status because he denied paternity on the night that Alonah was removed from her mother's care. Alonah's attorney maintained that Sandra's relatives had provided the name of another man as Alonah's potential father.

Sandra's attorney contended that appellant informed the police officer only that he was not listed as Alonah's father on Alonah's birth certificate, not that he was not Alonah's father. Sandra argued that appellant has held himself out as Alonah's father, and, as a result, should be granted party status as the father. Appellant asserted that there was no evidence that he told police officers that he was not Alonah's father, as the police report stated that he was Arianna's father and made no mention of his relationship to Alonah. Appellant maintained that he believed he was Alonah's father based on his relationship with her mother at the time of conception, and that he had held himself out as her father. Appellant argued that in CINA proceedings, the man identified by the mother as the child's father should be considered a party until proof is offered that he is not the father.

The circuit court ruled from the bench as follows:

> The Court cannot make a finding at this point and will not make one without the genetic testing. The evidence presented thus far is insufficient for the Court to even state — I mean at this point there may be another person out there that we also need to test or may be able to be a party to this proceeding as well. . . . So at this time, [appellant] is not a party to these proceedings. He will continue to receive a summons essentially as a witness in the chance that the genetic test returns — returns that he is the father[.]
>
> ***
>
> [I]n this particular case, at the time [Alonah] was born I have no reason to believe that [Sandra] believed that [appellant] was the father and I also have reason to believe that she continued to not believe that [appellant] was the father in as much as she has given someone else's name at some point or another as the father or a possible father.
>
> ***
>
> [B]ased upon everything I've heard . . . I really don't have much reason to believe that [appellant is] the father. . . . And so the genetic test has been ordered. . . . So without the genetic test I am going to grant the Department's motion and find that [appellant] is not at this time a party with respect to Alonah.

The circuit court issued an order on August 3, 2012, stating that appellant "is NOT a party to this case[.]"

On August 10, 2012, the results of the DNA paternity test were reported as follows: "The alleged father is excluded as the biological father of the tested child. . . . The alleged father lacks the genetic markers that must be contributed to the child by the biological father. The probability of paternity is 0%."

On August 15, 2012, appellant noted this appeal.

DISCUSSION

The Department contends that the appeal should be dismissed because the issue of whether the circuit court abused its discretion in excluding appellant from the shelter care hearing is moot, as the results of the DNA test establish that appellant is not Alonah's father.[1] In short, we agree.

Maryland Code Ann., Courts and Judicial Proceedings Article ("C.J.P.") § 3-801(u) defines a party to a CINA proceeding as follows:

> (u) Party. —
>
> (1) "Party" means:
>
> (i) A child who is the subject of a petition;
>
> (ii) The child's parent, guardian, or custodian;
>
> (iii) The petitioner; or
>
> (iv) An adult who is charged [rendering a child in need of assistance] under § 3-828 of this subtitle.
>
> (2) "Party" does not include a foster parent.

"'Parent' means a natural or adoptive parent whose parental rights have not been terminated." C.J.P. § 3-801(t).

"A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy and generally, a moot case is dismissed without our deciding the merits of the controversy." In re: Joseph N., 407 Md. 278, 301 (2009) (citation and internal quotation marks omitted). "Because we do not sit to give advisory opinions, we generally order that moot actions be dismissed without a decision on the merits." In re: Kaela C., 394 Md. 432, 452 (2006) (citation omitted). When considering the issue of mootness on appeal, Maryland appellate courts have identified the following three exceptions to the mootness doctrine: (1) cases where the issue is capable of repetition, yet evades review, (2) matters of public importance, and (3) voluntary cessation of the challenged conduct. See Dep't of Human Res., Garrett Cnty. Dep't of Soc. Servs., Bureau of Support Enforcement v. Kamp, 180 Md. App. 166, 195 (2008), aff'd, 410 Md. 645 (2009); In re: Justin D., 357 Md. 431, 445 (2000); Carroll Cnty. Ethics Comm'n v. Lennon, 119 Md. App. 49, 61 (1998).

In Kamp, 180 Md. App. at 170, a child support enforcement case involving the question of whether the presumed father of a child born during the parties' marriage was the biological father of the child, this Court considered the validity of an order to conduct genetic testing. In an effort to terminate child support, appellee sought to rebut a presumption of paternity by requesting a DNA test. Id. at 170-71. Appellant challenged the validity of the paternity test order on the ground of *res judicata*, as appellee had previously held himself out as the child's father in court proceedings despite knowing that a question as existed to her parentage, and as he had been named the child's father in an enrolled judgment. Id. at 189-90. Although the genetic testing had already been conducted and appellee had been determined not to be the biological father, we reviewed the validity of the order on the grounds that: (1) because "a circuit court order allowing a genetic test will generally reach us after the test has already been performed[,]" the issue in this case was "capable of repetition, yet evading review"; and (2) if the circuit court erred in ordering the genetic test to contest paternity, the error could have affected the order terminating child support. Id. at 195 (citation omitted).

Returning to the case at hand, given that it was determined through genetic testing that appellant is not Alonah's father,[2] appellant is not a "party" as defined by C.J.P. § 3-801, and, therefore, not eligible to participate in legal proceedings relating to Alonah's CINA or shelter care status. Accordingly, the issue of whether appellant was improperly excluded from participation in the shelter care hearing as Alonah's putative father is moot.[3]

At oral argument, appellant urged this Court to review the issue of his exclusion from the shelter care hearing as an exception to the mootness doctrine because the circumstances are capable of repetition, yet evading review. Appellant conceded that he failed to submit a reply brief–raising any issue as to exceptions to the mootness doctrine–in response to the Department's motion to dismiss. As appellant failed to reply to the motion to dismiss, the issue of an exception to the mootness doctrine was not raised or briefed before this Court. Nonetheless, we find no merit in appellant's position that the circumstance–of a man who is not listed on a child's birth certificate, but purports to be the child's father, being improperly excluded from a shelter care hearing affecting the child–is a situation that is likely to recur, yet evading review. The circumstance in this case is that appellant was determined via genetic testing not to be Alonah's biological father. Thus, he was properly excluded from the shelter care hearing as a non-party.[4] To the extent that genetic testing had revealed appellant to indeed be Alonah's biological father, the issue of his exclusion as a party would not be moot. As such, the case does not present an issue capable of repetition, yet evading review.

Although the issue of appellant's right to participate in the shelter care hearing is moot, we observe that the circuit court did not abuse its discretion in excluding appellant based on the record before it at the time. Appellant contends that the circuit court abused its discretion in excluding him from the hearing because "[b]y holding himself out to the world and by stating in open court, through his attorney, that he [was] Alonah's father, [he] ha[d] openly and notoriously recognized Alonah to be his child."[5] Contrary to appellant's assertions, the record contains contradictory evidence that he held himself out to be Alonah's father prior to the hearing. Indeed, on the night the Department removed Alonah from her mother's care, appellant had held himself out only as Arianna's father, not Alonah's. The record before the circuit court at the time of the shelter care hearing, therefore, was inconclusive as to appellant's claim of paternity. On this record, the circuit court did not abuse its discretion in excluding appellant from the shelter care hearing.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellant did not submit a reply brief or otherwise respond to the motion to dismiss prior to oral argument.

2. Appellant has raised no issue with regard to the validity of the circuit court's Paternity Testing Appointment Letter,

requiring him to submit to genetic testing to determine his relationship to Alonah.

3. Pursuant to Maryland Rule 8-602(a)(10), "[o]n motion or on its own initiative, the Court [of Special Appeals] may dismiss an appeal . . . [if] the case has become moot."

4. At oral argument, appellant contended that it is in the best interest of children that any putative parents be included at CINA hearings. We disagree. To protect the privacy of a child, C.J.P. § 3-810(b)(1) provides that, "[i]n any proceeding in which a child is alleged to be in need of assistance . . . , the court may exclude the general public from a hearing and admit only those persons having a direct interest in the proceeding and their representatives." To require the circuit court to allow participation of any party claiming to be a child's parent, without any proof of the relationship, would destroy the confidential nature of CINA proceedings.

5. Maryland Code Ann., Estates & Trusts Article § 1-208(b) provides as follows:

> (b) Child of his father. — A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:
>
> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
>
> (2) Has acknowledged himself, in writing, to be the father;
>
> (3) Has openly and notoriously recognized the child to be his child; or
>
> (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

Cite as 5 MFLM Supp. 117 (2013)

Adoption/Guardianship: termination of parental rights: reasonable efforts toward reunification

In Re: Adoption/Guardianship of Lemar J., Tyshawn T. and Craig J.

No. 1416, September Term, 2012

Argued Before: Berger, Kehoe, Nazarian (Ret'd, Specially Assigned), JJ.

Opinion by Berger, J.

Filed: March 22, 2013. Unreported.

The juvenile court did not abuse its discretion in terminating parental rights after finding, in part, that the department made reasonable efforts toward reunification; nor did the juvenile court abuse its discretion by denying mother's request for a bonding study.

Lemar J. ("Lemar"), Tyshawn T. ("Tyshawn") and Craig J. ("Craig") were each found to be a Child In Need of Assistance ("CINA").[1] The Circuit Court for Baltimore City, sitting as a juvenile court, issued an order terminating the parental rights of appellant Kimberly T.B. ("Mother") as to Lemar, Tyshawn, and Craig. The order also terminated the parental rights of co-appellant Malik S. ("Father") as to Tyshawn.[2] The court further granted guardianship of all three children to the Baltimore City Department of Social Services ("the Department") with the right to consent to adoption or long-term care. This appeal followed.

Mother presents four questions for our review, which we have rephrased as follows:

1. Whether the juvenile court abused its discretion by terminating Mother's parental rights in Tyshawn, Craig, and Lemar.
2. Whether the juvenile court abused its discretion in terminating Father's parental rights in Tyshawn.
3. Whether the juvenile court abused its discretion by denying Mother's request for a bonding study.

For the reasons below, we affirm the decision of the Circuit Court for Baltimore City.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

FACTS AND PROCEEDINGS

Tyshawn

Tyshawn was born on June 15, 2007. He tested positive for methadone when he was born. In August 2007, while in Mother's custody, Tyshawn suffered two unexplained life-threatening injuries, one week apart. He was admitted to the hospital, and tests revealed severe injuries, including a skull fracture and brain injuries. Tyshawn has been irreversibly brain-damaged ever since.

Tyshawn was declared CINA on November 28, 2007, and placed in non-relative foster care. Tyshawn's foster parents ("the L.'s") received training on how to care for Tyshawn. He requires a breathing machine and cannot walk or talk. Tyshawn's foster father communicates with Tyshawn by making sounds, and Tyshawn makes noises that the foster parents are able to understand as indicating that Tyshawn is hungry or otherwise in need. The L.'s household includes the L.'s four biological children, who are eleven months, two, four, and six years old. The L.'s children play with their toys around Tyshawn and Tyshawn laughs. Under supervision, the children push Tyshawn's wheelchair. The L.'s testified that they want to care for Tyshawn because he needs their help. Tyshawn has lived with the L.'s for one and a half years, and they would like to adopt him.

Department social worker Netricia Barnett visits Tyshawn monthly in the L.'s foster home. He testified that Tyshawn is medically fragile, and that Tyshawn has a seizure disorder, cerebral palsy, and asthma, and must receive his nutrition through a gastrointestinal feeding tube. He requires frequent examination by numerous doctors each year, eight of whom are specialists. Tyshawn requires several medications, and he receives physical and occupational therapies. During the termination of parental rights proceedings, the court noted for the record that Tyshawn was present in the courtroom, seat-belted in a wheelchair, and that even though he was awake, it appeared that he had limited attention and was not cognizant of what was going on.

Craig

Craig lived with Mother and his maternal grandmother ("Grandmother") before entering foster care. In

2007, when he was two years old, Craig entered foster care after Tyshawn was permanently injured while in Mother's custody. Once Craig was sheltered, social workers learned that Craig had an untreated ear infection, ringworm, and upper respiratory infections, and had been neglected while in Mother's care. Craig required surgery to remove his tonsils, but Mother had not followed through with arrangements for the operation.

Department social worker Ginna Wagner has been assigned to Craig's case since June 2011. She testified that the Department had tried to keep the half-brothers together; however, Tyshawn's injuries required a higher level care. As a result, Tyshawn and Craig were separated. Craig experienced difficulty adjusting after that move. In his first foster home, Craig acted out sexually and had to be moved.

Craig began living with his current foster home with Emma C. in June 27, 2011. The home is a treatment foster home, and his placement is preadoptive. Craig does well in school, and his foster mother, to whom he is bonded, is always available to help him whenever he needs help. Ms. Wagner testified that she has seen Craig in his foster home and feels that he is very comfortable with the family. He attends church with them and they participate in additional activities. Craig likes school, his teacher, and his classmates. Craig seems very stable in his foster home.

Craig receives weekly therapy for an adjustment disorder. He does not require medication. Ms. Wagner testified that if Craig were moved from his current treatment foster home, it would further complicate Craig's adjustment disorder.

In June 2010, Mother was entitled, by court order, to eight hour visits with Craig and Tyshawn, which he looks forward to and enjoys. Craig was always happy to see Tyshawn, but tended to regress into baby talk when visiting with Mother. Mother would occasionally bring food or clothing for Craig.

Lemar

Lemar was placed into foster care while residing with his mother and maternal grandmother. While there, he was hit, bullied, and fondled, suffering physical, mental, and sexual abuse. Allegations of sexual abuse against Mother were substantiated, although Lemar has been unwilling to name the person who abused him.

Lemar suffers from several psychiatric conditions. He has post-traumatic stress disorder ("PTSD") and curls up in a ball, becomes mute, sucks his thumb and completely shuts down when asked to discuss the events leading to his trauma. Lemar also has a mood disorder that leads him to rapidly cycle from mood to mood, and he displays highly oppositional behavior. Additionally, Lemar demonstrates highly aggressive and sexualized behaviors. He receives several medications to stabilize his moods, and to treat his Attention-Deficit Hyperactivity Disorder. Lemar requires weekly therapy and requires 24-hour supervision. Lemar has difficulty forming and maintaining relationships.

Lemar has a mentor, but no preadoptive resource, and the long term goal for him is to enter a therapeutic foster home once he becomes more stable. Ms. Barnett explained that Lemar has been living in residential treatment centers since he was 10 years old. Lemar is currently in a residential treatment center. In April 2012, after turning 13 years old, Lemar was moved from the Villa Maria Residential Treatment Center ("RTC") to the Good Shepherd RTC due to his age. Lemar currently resides at the Good Shepherd RTC.

Social worker Kathy Holmes is Lemar's therapist at the Good Shepherd RTC. Ms. Holmes provides Lemar with intensive, behavior, and psychiatric therapy, and manages his case. The juvenile court accepted Ms. Holmes as an expert in providing therapeutic services to emotionally disturbed children. She testified that Good Shepard is for children who have severe emotional and behavioral problems that must be treated in a very controlled environment. Ms. Holmes further testified that Lemar is volatile and has limited social skills, as well as learning disabilities. He attends classes at Good Shepherd, where he is below grade level. Lemar's moods change rapidly, and he lashes out at common events that other children would not react to.

Lemar has not seen Mother since he entered foster care. Contact with Mother of any kind, including by telephone, has been forbidden by the court. Any contact with Mother prompts Lemar into regressive behavior, including aggression and sexualized conversations or acts toward other children at the RTC. Grandmother is allowed to visit Lemar monthly, and Lemar is attached to her. Lemar, however, recently declined to telephone his Grandmother and stated that: "I just don't want to talk to them." That declaration occurred after Grandmother had allowed Mother to speak on the telephone with Lemar in violation of the no contact order, and without the knowledge of Lemar's care providers, an action that upset Lemar. Ms. Barnett explained, however, that a termination of Mother's parental rights would not inhibit Lemar's maintaining a relationship with Grandmother if that proved to be in his best interests.

Lemar has not expressed a desire to see his siblings, and does not discuss returning home. Ms. Holmes opined that Lemar would be traumatized by coming to court or undergoing a bonding study with Mother, and would regress rapidly if he were returned to Mother's care.

Mother

Mother has six children, none of whom are in her care. She has a history of opiate dependence, and has been on methadone maintenance since 2004. Several of Mother's children were born opiate-exposed. The Department determined that Mother did not have appropriate housing, and she has never ameliorated that problem.

The juvenile court ordered Mother to undergo psychological evaluations in 2009 and 2011, during which psychologists determined that Mother possessed limited insight into her behaviors. Dr. Harriett Siegel-Miller is a psychologist for the Juvenile Court Medical Service. The juvenile court accepted Dr. Siegel-Miller as an expert in the field of parenting and child development. Dr. Siegel-Miller evaluated Mother at the juvenile court's request in 2009 to determine Mother's parenting skills relative to her son Tyshawn. Dr. Siegel-Miller administered psychological tests to determine Mother's child abuse potential. On those tests, Mother "faked good," that is, she answered unreliably and tried to portray herself as a safe, caring parent. However, she showed traits of narcissism and drug addiction and dependency, and demonstrated a lack of empathy. Dr. Siegel-Miller noted that Mother was unable to place others' needs above her own, continued to use substances even after becoming a parent, and continued to have children despite her substance abuse. In describing her children, Mother had an exaggerated sense of her importance, and stated that she was the sole decision-maker for Tyshawn and nobody could act without her. In 2011, the evaluation report noted that "[t]here is no substantial indication that [Mother]'s functioning as a parent has improved to the extent that she would be able to provide consistently adequate protection, supervision and nutur[ing] to Craig and Tyshawn, should they be placed back in her care." Additionally, the report noted that: "It is important that [Mother] continue in drug treatment programs."

Moreover, Mother has a personality disorder that is deeply entrenched and not amenable to treatment. In sum, Dr. Siegel-Miller opined to a reasonable degree of professional certainty that Mother did not "demonstrate the prerequisites needed to care for [a] special needs child," and she recommended that Tyshawn be placed outside of Mother's care. Dr. Siegel-Miller testified that she did not think that Mother would ever be able to care for Tyshawn's needs.

Father

Father lives in Virginia. In October 2011, Father telephoned the Department to ask about Tyshawn. Father stated that he had been unaware that Tyshawn had entered foster care. He contradicted himself, though, when he told Ms. Barnett that he had seen Mother, by chance, two years earlier, and had learned then about Tyshawn's entry into foster care. He later acknowledged that in 2009 he knew he had a child in foster care but had not followed up with the Department. He also asked about his ability to obtain custody of Tyshawn.

The juvenile court found that the Department has offered Father visits with Tyshawn and training in Tyshawn's care. Father only attended one of the training sessions. Father and the Department have both been responsible for cancelling visits / training sessions. Nevertheless, these visits have never been rescheduled. In addition, the Department has recommended that Father locate services and providers in the state of Virginia, where he resides, which would be comparable to the services that the Respondent is presently receiving. The juvenile court found that Father has not followed through with that recommendation. Father has not provided any financial support for Tyshawn.

Father has been to one of one training session regarding Tyshawn's care, but still requires "far more training" to be able to have Tyshawn in his care. Father lives in Virginia and is often unable to travel to Baltimore. Tyshawn must be present for the training sessions, but Tyshawn cannot be transported to Virginia. The juvenile court found that there was no evidence of any disability that makes Father consistently unable to care for Tyshawn.

The juvenile court found that Father's testimony regarding his desire to have Tyshawn in his care is "somewhat disingenuous and ill-motivated; his testimony was self-impeaching and lacked credibility." Father testified that he wants custody for reasons such as: "he's my blood," "I never got to have a son," "I'm being raped — DSS is taking him from me." The court found "Father's testimony regarding his reasons for now wanting custody of [Tyshawn] was replete with self-fulfillment. His testimony focused more on what he wanted for himself than why it would be in [Tyshawn's] best interest to deny the petition." Additionally, the court found that Father's testimony was self-impeaching because he said he "always believed that [Tyshawn] was his child, yet he did not attempt to locate [Tyshawn] (or the Mother) until two years after his birth. Once Father was presented with the highly suspicious information regarding [Tyshawn], he still did nothing to locate Tyshawn, despite the fact that the Mother had lied about [Tyshawn's] whereabouts and that the Mother had not been forthcoming with the facts surround[ing] [Tyshawn]'s placement. Further, despite being advised that [Tyshawn] was in DSS care, and notwithstanding the fact that Father's own mother is a licensed foster care provider and his fiancé is a registered nurse, Father did absolutely nothing to

attempt to locate [Tyshawn] or get information about his well being. Upon receiving the Petition for Guardianship, the Father again asserted unequivocal paternity, and then requested genetic testing."

The Department's Efforts

Ms. Barnett, the social worker assigned to Lemar, Craig, and Tyshawn, developed the permanency plan for each child. Beginning in January 2012, Ms. Barnett guided the Department's provision of reunification services to Mother and Father.

Ms. Barnett offered Mother reunification services, including preparing and implementing service agreements, visitation, and maintaining contact with the Department. Mother's contact information changed frequently, but Mother was reasonably compliant in maintaining communication with the Department. Although she was frequently late, she visited with Craig and Tyshawn when allowed.

Ms. Barnett referred Mother to Universal Counseling for court-ordered anger management classes. Universal Counseling, however, determined that Mother was not a good candidate for anger management classes. Mother also received mental health therapy and housing assistance through Universal Counseling. Ms. Barnett discussed Tyshawn's medical appointments schedule with Mother. She and providers at Mentor (Tyshawn's health care provider), sent Mother letters informing her of Tyshawn's medical appointments. Mother claimed to have attended one medical appointment, but Ms. Barnett later learned that Mother had not attended the appointment. Mother also claimed to have attended a surgery that Tyshawn underwent, but it was later learned that she did not attend the surgery.

Ms. Barnett referred Mother for substance abuse treatment, and Mother was reasonably compliant. However, Mother has remained on methadone maintenance despite promises to undergo opiate withdrawal.

Mother was unemployed when Ms. Barnett received the case. Mother remains currently unemployed. She relies on Grandmother's income and support received from her husband, Mr. Dennis B ("Mr. B."). Mother has not provided any financial support for any of her children.

Ms. Barnett also coordinated court-ordered visits between Mother and Tyshawn and Craig. Initially, the visits lasted two hours. However, when the permanency plans changed to adoption, the visits were limited to one hour. Mother is under a no contact order with Lemar, and, therefore, had no visits with him.

Mother has had two different addresses since September 2010. She has repeatedly claimed that she was about to move into appropriate housing, but she has not done so. In October 2011, Mother moved to North Broadway Street to live with Grandmother, who also is the custodian of two of Mother's daughters. Mother's residence now includes Grandmother, Mother's two daughters, a niece and a cousin. Grandmother almost lost her housing in September 2011, which would have prompted Mother's daughters to enter foster care with a non-relative. As a result, Ms. Barnett provided housing assistance to Grandmother, and thereby indirectly to Mother, through the Department's Homeless Prevention Unit, and offered Grandmother a security deposit and first month's rent to enable her to move the household into stable housing.

To provide Father with reunification services, Ms. Barnett first had to locate him. To do that, she used the parent locator electronic resources, including VineLink, the Maryland Case Search, and the juvenile court records. She also sent letters to Father's last known addresses. Ms. Barnett did not receive any response from Father, nor were the letters returned with a notation "Returned to Sender."

In 2006, Father changed his name. It was not until Ms. Barnett learned of the name change from Mother in July 2010 that Ms. Barnett was able to locate Father. Mother reported to Ms. Barnett that she had not seen Father since she was seven months pregnant with Tyshawn. She said she did not know how to find Father, and that Father had not paid Mother child support. In 2008 or 2009, Ms. Barnett's records showed that Father's parental rights had previously been terminated with another child under his former name.

In November 2011, Father came to the Department to see Tyshawn. Ms. Barnett provided Father with transportation for the visit from his home in Virginia. Ms. Barnett also provided Father with training to help him care for Tyshawn's medical needs. Father asked for paternity testing in December 2011 regarding his paternity of Tyshawn. This testing was conducted in February 2012, and confirmed Father's paternity. In 2011, Father received training on Tyshawn's equipment, but Father attended only one day of the two-day training session.

Father provided his mother — Tyshawn's paternal grandmother — as a relative placement source for Tyshawn, but Tyshawn's paternal grandmother did not follow through with Ms. Barnett. Moreover, Father has never completed training on Tyshawn's medical equipment. Similarly, although offered visitation with Tyshawn, Father has not visited Tyshawn since his initial visit in November 2011, nor has he contacted the Department for updates regarding Tyshawn.

The Juvenile Court's Findings

In separate opinions and orders entered on August 20, 2012, the juvenile court found that the Department had provided Mother with timely and

appropriate reunification services. The court found that Mother had "been able to accomplish some of the service requirements such as drug treatment and job readiness," but had been "unable to maintain herself in the community," and was "regularly involved in criminal activity including illegal narcotics, assault and theft." The court found that Mother had "not been able to establish stable housing" for any of her children "even with assistance of the Department."

In Lemar's case, the juvenile court found that Lemar "has suffered physical and sexual abuse in the Mother's care." In Craig's case, the court found that Mother had "neglected" Craig "for several years," had failed to "seek medical treatment" for him when he "developed a history of medical issues, e.g. ringworm, multiple ear infections and tonsillitis," and repeatedly had failed to establish stable housing for Craig. The court found that while in Mother's care and custody, Tyshawn "suffered physical injury and irreversible brain damage," and that she has failed to maintain contact with Tyshawn's care providers or learn how to care for him. The court also noted that Mother had lost parental rights to one of her older children in May 2006.

Regarding Father, the court found that his interest in obtaining custody of Tyshawn was "somewhat disingenuous and ill-motivated," and that Father was "self-impeaching and lack[ing] in credibility." Accordingly, the orders of the juvenile court terminated the parental rights of Mother in all three of her sons and Father's rights in Tyshawn.

STANDARD OF REVIEW

When reviewing the decisions of a juvenile court to terminate parental rights, an appellate court applies three different standards of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Shirley B., 419 Md. 1, 18 (2011) (citation omitted).

When reviewing the juvenile court's ultimate decision, a reviewing court is "mindful that '[q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.'" *Id.* at 19 (internal quotations and citations omitted). An abuse of discretion occurs when "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Id.* (quoting *In re Yve S.,* 373 Md. At 583-84 (internal quotations marks omitted)).

DISCUSSION

Section 5-323 of the Family Law Article ("FL") authorizes a juvenile court to terminate the parental relationship if the court finds by clear and convincing evidence that termination is in the child's best interests. FL § 5-323(b). Before terminating parental rights, a juvenile court must make a finding of either parental unfitness or exceptional circumstances. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007). In conducting the requisite analysis, the juvenile court must consider the following factors:

> (d) Considerations. — Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1) (i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the

parent's home, including:

(i) the extent to which the parent has maintained regular contact with:

1. the child;

2. the local department to which the child is committed; and

3. if feasible, the child's caregiver;

(ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period;

(3) whether:

(i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

(iv) the parent has been convicted, in any state or any court of the United States, of:

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

2. aiding or abetting, conspiring, or soliciting to commit a crime described in item 1 of this item; and

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4) (i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

FL § 5-323(d).

The "'reasonable efforts' requirement is case-specific, and must be considered in light of the services at the Department's disposal." *In re Shirley B.,* 419 Md at 18. The Department's efforts will be deemed reasonable even "[w]here the Department's

efforts . . . to help reunify the children with their parents were continually rebuffed or hindered . . . [by parents who] generally failed to avail themselves of the help offered to them from the Department." I*n re Nicole B.,* 410 Md. 33, 71 (2009).

A. Termination of Mother's Parental Rights

Mother challenges the juvenile court's decision to terminate her parental rights in Tyshawn, Craig, and Lemar on the basis that the Department failed to make reasonable efforts in helping Mother to reunify with these three children. The Department contends that the juvenile court properly concluded that it had provided reasonable assistance to Mother. We agree with the Department.

i. The Department's Efforts

The evidence on the record demonstrates that the Department's social worker, Ms. Barnett, offered Mother many reunification services. Mother received service agreements that included supervised visits with Tyshawn and Craig, anger management classes, mental health therapy, and housing assistance. Further, Mother was offered, but declined, medical training. Mother received notice of Tyshawn's medical appointments but did not attend the appointments. Mother failed to maintain contact with Tyshawn's care providers or learn how to care for him.

Ms. Barnett also referred Mother for substance abuse treatment. However, these efforts have proven unsuccessful because Mother has failed to undergo withdrawal from her long-term methadone use. Testimony established that Mother's unabated drug addiction and dependency traits produce a lack of empathy and an inability to place her children's needs above her own. Further, Mother has a severe personality disorder.

The juvenile court found that the Department offered and provided Mother with timely and appropriate services, as evidenced by service agreements, letters and phone calls. Mother accomplished "some of the service requirements such as drug treatment and job readiness." Nevertheless, the juvenile court found that:

> [S]he has been unable [to] maintain herself in the community. She is regularly involved in criminal activity including illegal narcotics, assault and theft. She has failed to appear for court and violated her probation on more than one occasion. She has not been able to establish stable housing for . . . any of her children, even with assistance of the Department. More importantly, [Tyshawn] has suffered a devastating brain injury while in Mother's care.

Finally, the juvenile court found that "there are presently no additional services that would make it likely to bring about a relationship with the Mother . . . much less a parenting relationship that could return the [children] to the Mother's . . . care." The Family Law Article provides that the juvenile court should consider "whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time . . ." FL § 5-323(d)(2)(iv); *see also In Re Adoption/Guardianship No. 10941*, 335 Md. 99, 211 (1994) (Holding that additional services would be futile for a parent where the "problems are persistent and ongoing. They do not represent a temporary crisis or an unfortunate string of bad luck.").

In our view, based upon the particular circumstances of this case, the Department's efforts were reasonable. The Department provided numerous services to Mother. As was the case in *In re Nicole B.,* supra, 410 Md. at 71, Mother simply did not avail herself of all of the help offered from the Department. Likewise, the evidence demonstrated that, much like *In Re Adoption/Guardianship No. 10941, supra*, 335 Md. at 211, additional services would be futile. Accordingly, the juvenile court's finding that the Department provided reasonable efforts was not clearly erroneous.

We also point out that the efforts of the Department are one of many factors that the juvenile court must consider in a termination of parental rights proceeding. As set forth below, the juvenile court also found that other factors weighed in favor of termination of parental rights.

ii. Tyshawn

First, the juvenile court found that Tyshawn "suffered physical injury and irreversible brain damage while in the Mother's care" and that, under the circumstances, these injuries were "unexplained and highly suspicious for non-accidental trauma[.]" *See* FL § 5-232- (d)(3)(I) directing the juvenile court to consider whether "the parent has abused or neglected the child . . . and the seriousness of the abuse or neglect"). The juvenile court further considered that Mother "involuntarily lost parental rights of a sibling" of Tyshawn. *See* FL § 5-232-(d)(3)(v) (directing the juvenile court to consider whether "the parent has involuntarily lost parental rights to a sibling of the child").

Expert testimony indicated that Mother does not "demonstrate the prerequisites needed to care for [a] special needs child." The expert further testified that he did not think Mother would ever be able to care for Tyshawn's needs.

Mother has no contact with Tyshawn, although she maintains contact with the Department. Mother has no contact with Tyshawn's care providers. She has not been trained on how to care for Tyshawn and does

not contribute to Tyshawn's care and support. The juvenile court found that there was no evidence of any disability that makes Mother consistently unable to care for Tyshawn.

The juvenile court found that Tyshawn "remains medically fragile," requiring "intensive in-home care, including physical therapy, occupational therapy, feeding through G-tube, G-tube maintenance, and medication," and yet that Mother "has not been trained on how to care for [Tyshawn] and does not contribute to [his] care and support."

In light of the juvenile court's consideration of the requisite factors, we hold that it was not an abuse of discretion to terminate Mother's parental rights to Tyshawn.

iii. Craig

The juvenile court also found that, after considering all of the requisite statutory factors, these factors weighed in favor of terminating Mother's parental rights in Craig. First, the juvenile court found Mother to be unfit to care for Craig, and that it would be detrimental to Craig's well-being if he were to be returned to Mother's care. The court based this determination on several findings of fact. First, the court found that when Mother had custody of Craig, she neglected him by failing to "seek medical treatment or . . . follow through with doctor's orders" to treat Craig's various "medical issues, e.g., ringworm, multiple ear infections and tonsillitis." In addition, the court found that Craig "was diagnosed with post-traumatic stress disorder, adjustment disorder, language disorder and sexual abuse."

Given Mother's prior neglect of Craig, the juvenile court found that returning Craig to Mother "would pose an unacceptable risk" to Craig's future safety. Moreover, the court found that removing Craig from his current caregivers "would complicate [Craig's] adjustment disorder and possibly lead to attachment disorder." The court found that no additional services would assist Mother in ameliorating her parental unfitness or ever make her ready to care for Craig.

Based on these findings, we hold that there was clear and convincing evidence for the trial court to deem Mother unfit to care for Craig. Accordingly, the juvenile court did not abuse its discretion in terminating Mother's parental rights in Craig.

iv. Lemar

Finally, the juvenile court considered the requisite statutory factors regarding Lemar, and determined that these factors weighed in favor of terminating Mother's parental rights in Lemar. Mother is under a long-standing no-contact order with Lemar. The Department substantiated allegations that Mother had hit, bullied, and fondled Lemar, causing him physical and mental distress that has left him suffering from severe post-traumatic stress disorder. The court further found that Lemar "has suffered physical and sexual abuse while in [Mother]'s care[.]" In light of these findings of fact, we hold that it was not an abuse of discretion to terminate Mother's parental rights in Lemar.

B. Termination of Father's Parental Rights

Next, the appellants contend that the juvenile court abused its discretion in terminating Father's parental rights in Tyshawn on the basis that the Department failed to make reasonable efforts in helping Father to reunify with Tyshawn. The Department contends that the juvenile court properly concluded that it had provided reasonable assistance to Father. We agree with the Department.

The Department diligently worked to locate Father. Upon locating Father, the Department offered training services regarding Tyshawn's medical needs, and provided transportation for Father to attend training. Critically, Father met Tyshawn only once, and failed to complete training on Tyshawn's medical equipment. Thereafter, Father did not attend training sessions, and did not contact the Department to inquire as to the well-being of Tyshawn.

Further, the Department has recommended that Father locate services and providers in the state of Virginia, where he resides, but Father has not followed through with that recommendation. In addition, Father has not provided any financial support for Tyshawn. The juvenile court found that there was no evidence of any disability that makes Father consistently unable to care for Tyshawn. The juvenile court also found that "there are presently no additional services that would make it likely to bring about a relationship with . . . Father, much less a parenting relationship that could return the Respondent to . . . Father's care."

Much like *In re Nicole B., supra*, 410 Md. at 71, Father did not avail himself of all of the help available from the Department. Likewise, the juvenile court determined that, as in *In Re Adoption/Guardianship No. 10941, supra*, 335 Md. at 211, additional services would be futile. Accordingly, we hold that the juvenile court's finding that the Department provided reasonable efforts was not clearly erroneous.

We also observe that the juvenile court determined that Father was insincere and "ill- motivated" in his desire to obtain custody of Tyshawn. In particular, the court ruled that Father lacked credibility when he claimed to be unaware that Tyshawn was his son, or that Tyshawn was in foster care in 2009. The court found that Father's testimony was wanting and "telling," when he stated that he wanted Tyshawn because "[s]omebody [was] taking something from me now that I know he's mine. So I feel as though I want my son." The court found Father to be "focused more on what

he wanted for himself" than what would be in Tyshawn's best interests.

In light of the totality of the circumstances, the juvenile court did not abuse its discretion in deciding to terminate Father's parental rights in Tyshawn.

C. Denial of Mother's Request for a Bonding Study

Finally, Mother argues that the juvenile court abused its discretion by denying Mother's request for a bonding study with Craig. The Department contends that the court acted within its discretion because Mother failed to establish any grounds for the bonding study. Further, the Department argues that this issue is not preserved for appeal. We agree with the Department that even if this issue is preserved for appeal, the juvenile court did not abuse its discretion.

We do not address on appeal an issue that has not been "preserved by sufficient objection at the trial court level." *In re Billy W.,* 387 Md. 405, 446 (2005). Where a pre-trial motion is denied, and a party does not, thereafter, make any motion or objection at trial, we have held that the issue is not preserved. *Harmon v. State*, 227 Md. 602, 605 (1962) ("[T]he record fails to show that appellant made any motion . . . or entered any objection to the trial court's refusal [of her pretrial motion], and such defense is therefore not available on appeal.").

Here, Mother, through counsel, filed a pre-trial motion on February 1, 2012, requesting a bonding study of Craig. The stated purpose was to provide the juvenile court with "probative evidence" at the hearing regarding Craig's feelings about the termination of Mother's parental rights, and its impact on him. The juvenile court denied the February 1, 2012 motion at a settlement conference conducted on February 23, 2012. Mother did not move for reconsideration of the denial of that motion. Thereafter, at the termination of parental rights proceeding, Mother did not object to the court's denials of her preliminary request for a bonding study, or her request during testimony for a bonding study. Thus, it is questionable whether this issue is preserved for appeal.

Even assuming, arguendo, that the issue is preserved, we hold that it was not an abuse of discretion to deny the request for a bonding study. "[W]hether a [bonding] study should be conducted is left to the court's discretion." *In re Samone H.,* 385 Md. 282, 306 (2005). When a parent moves for a bonding study, the parent "must then demonstrate that there is good cause for the proposed examination and that the examination will not be harmful to the child." *In re Adoption/Guardianship of Mark M. ("Mark M."),* 147 Md. App. 99, 108-09 (2002). *See also id*. at 109 (explaining that a demonstration of good cause for an evaluation "should be reasonably calculated to assist the trier of fact in rendering its decision.").

Here, Mother asserted that she was requesting a bonding study because "[n]one of the witnesses in the case were able to describe Craig's bond with his mother." Contrary to that assertion, lay testimony by Craig's foster mother acknowledged that Craig had a bond with Mother. Indeed, the court found that Craig "has a positive relationship with" Mother and "looks forward to his visits with her." In our view, given the court's findings suggesting that Craig had a positive bond with Mother, she failed to demonstrate good cause for a bonding study in this case. Accordingly, in light of the juvenile court's finding of fact that Mother and Craig had a bond, we hold that the court did not abuse its discretion in finding no good cause for a bonding study, or that such a study would not reasonably assist the trier of fact.

For the foregoing reasons, we hold that the juvenile court did not abuse its discretion in denying Mother's request for a bonding study. Further, the juvenile court did not abuse its discretion in terminating Mother's parental rights in Tyshawn, Craig, and Lemar. Finally, the juvenile court did not abuse its discretion in terminating Father's parental rights in Tyshawn.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY, SITTING AS A JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

FOOTNOTES

1. Sections 3-801(f) and (g) of the Courts and Judicial Proceedings Article respectively define "Child in Need of Assistance" and "CINA":

> (a) In this subtitle the following words have the meanings indicated.
>
> * * *
>
> (f) "Child in Need of Assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.
>
> (g) "CINA" means a child in need of assistance.

Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (LexisNexis 2012) ("CJP"). *See In re: Adriana T.,* 208 Md. App. 545, 551 n. 6 (2012).

2. Mother and Father are also hereinafter referred to collectively as "appellants."

NO TEXT

Cite as 5 MFLM Supp. 127 (2013)

CINA: visitation: suspension due to existing protective order

In Re: Chaida B.

No. 1456, September Term, 2012

Argued Before: Eyler, Deborah S., Zarnoch, Graeff, JJ.

Opinion by Zarnoch, J.

Filed: March 26, 2013. Unreported.

The juvenile court did not err when it relied on the existence of a protective order in suspending a mother's visitation with her child.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

Appellant Yoha B. ("Ms. B.") appeals a judgment of the Circuit Court for Montgomery County suspending visitation with her 12 year-old daughter, Chaida B. ("Chaida"). She asks this Court to consider the following issue:

> Did the juvenile court err when it relied on the existence of a protective order in suspending [Ms. B.'s] visitation with her child?

We find no error and therefore affirm the circuit court's ruling.

FACTS AND LEGAL PROCEEDINGS

Chaida was living with her mother until early 2010, when Chaida reported at school that Ms. B. physically abused and neglected her.[1] The Montgomery County Department of Health and Human Services ("Department") removed Chaida from her mother's home on March 18, 2010 and sheltered her first with her father[2] and then an aunt and uncle. Chaida has lived with a foster family since June 2011. As of this appeal, the permanency plan for Chaida is a concurrent plan of Another Planned Permanent Living Arrangement ("APPLA")[3] and custody/guardianship with a non-relative.

On April 13, 2010, the Circuit Court for Montgomery County found Chaida to be a Child in Need of Assistance ("CINA"). The court also ordered that Chaida and Ms. B. each participate in therapy. Subsequent review hearings have shown that Ms. B. has generally been unsuccessful in therapy, as she is unwilling to take any responsibility for Chaida's removal from her care and instead continues to blame Chaida for their separation.

At a CINA review hearing in February 2011, the court set the following conditions for visitation, as recommended by Chaida's therapist:

1. Visits will take place as long as they are done in a productive comfortable setting for the Child,
2. If, *at any time*, the Mother engages in any conduct, including comments, expressions of opinions or any other actions that are not designed towards reconnecting, but rather to revisit past events;
3. The visit will end;
4. Shall be suspended until further court order.[4]

(Emphasis in original). The court ordered that Ms. B. have, at a minimum, monthly supervised visits with Chaida under these conditions. However, Ms. B. was only able to follow these requirements sometimes, leading the court to suspend visitation several times in 2011 and 2012. The Department facilitated several telephone and in-person visits between Chaida and Ms. B. from April to July 2012. The first three visits were moderately successful, in that Chaida and her mother were able to communicate. However, Chaida was often upset by the end of the visits.

Chaida and her mother had a fourth visit on July 11, 2012, at a Burger King. Tania Butler, a Department social worker assigned to Chaida's case, accompanied Chaida to the visit and supervised Ms. B. and Chaida's time together. Unfortunately, the visit went poorly, and Butler left with Chaida after only a short period of time. Shortly after the visit, the Department filed a motion to revise the visitation order, asking that the court suspend visitation between Chaida and Ms. B. The Department, on behalf of Chaida, also filed a petition for a protective order against Ms. B.

The circuit court held a hearing on the protective order on August 15, 2012. Butler and Ms. B. both testified about the Burger King incident. Each presented a different account of the visit. According to Butler, the visit started out well but soon went downhill. Ms. B. asked Chaida when she was going to come home and what her plan was. Butler informed Ms. B. that these

questions were inappropriate, and Ms. B. became agitated. Chaida then left the table and went to the restroom. Butler continued to tell Ms. B. that the conversation was inappropriate, and Ms. B. told her that she would talk to Chaida about whatever she wanted. Butler then informed Ms. B. that the visit was over and that she was going to get Chaida.

Butler testified that Ms. B. blocked her path to the restroom and refused to let her pass. When Butler tried to go around her, Ms. B. got in front of her and entered the restroom first, with Butler close behind. Ms. B. grabbed Chaida's arm and started yelling at her; Chaida started crying. Butler attempted to get Ms. B. to let Chaida go, and Butler and Ms. B. started grappling with each other. Butler kept saying that Ms. B. needed to let go of Chaida, while Ms. B. kept yelling that Butler was not going to take her daughter.

According to Butler, Ms. B. then seemed to calm down somewhat. She said that she wanted to show Chaida some Bible verses. She opened the baby changing table to use a ledge for the Bible, opened her Bible, and asked Chaida to read some passages aloud. When Chaida read them quietly to herself and declined to read them aloud, Ms. B. pushed Chaida's head towards the Bible. Butler then informed Ms. B. that she and Chaida were leaving, which caused Ms. B. to start screaming that Butler was not going to take her child. Butler then grabbed Chaida's arm, put herself between Ms. B. and Chaida, and pushed Chaida towards the restroom door. At some point, Butler felt something hit the back of her head; when she turned towards Ms. B., she saw Ms. B. raising her Bible at her. Butler eventually got Chaida to leave the bathroom and go to her car. Butler then followed Chaida outside, with Ms. B. close behind. After Butler and Chaida got in the car, Ms. B. approached the passenger side, continued yelling, and tried to give Chaida an index card with handwritten notes about Bible verses. Butler took the index card from Chaida and informed Ms. B. that she was not going to give Chaida the card. Butler and Chaida then left the Burger King parking lot. Ms. B. did not follow.

Ms. B.'s testimony corroborated some of Butler's version of events but varied greatly in her view of her demeanor and who was at fault for how the visit unraveled. She testified that Butler was aggressive towards her and refused to let her talk to her daughter the way that she wanted. Ms. B. also said that she never grabbed or struck Chaida and that Chaida was not upset at any point. Indeed, according to Ms. B., Chaida was interested in the Bible verses and wanted to stay with her at the Burger King.

Although Chaida did not testify, the Department submitted as evidence, without objection, a copy of a report from a child welfare investigator who had interviewed Chaida shortly after the Burger King incident. According to Chaida, Ms. B. asked her when she would be coming home and where she was living, and these questions made her feel uncomfortable. She said that she got up from the table and went to the restroom after Ms. B. and Butler started yelling at each other. Chaida said that Ms. B. and Butler followed her into the restroom and continued to yell at each other. Ms. B. then grabbed Chaida and made her read some Bible verses. Chaida said that she did not see Ms. B. strike Butler with the Bible, but she did hear a "whack" sound that was consistent with someone being struck. She said that by this point, she was crying and humiliated and wanted to leave the restaurant. She reported that Ms. B. followed her and Butler out to the car and threw an index card through the window of the car before Butler drove away.

The court summarized the evidence before it and found that the Department

> presented clear and convincing evidence, by virtue of Ms. Butler's testimony, and the investigation that was ordered by this Court, with the child also indicating that she watched her mother strike the social worker, attack is the word that Chaida used,[5] after this incident that I cannot imagine any scenario in which it would not have been humiliating to anybody, especially a 12-year-old child.
>
> And so the Court takes no pleasure in having to consider this request for a protective order. But under these circumstances, I find that there is clear and convincing evidence to warrant the issuance of this protective order. . . .
>
> . . . .
>
> And so I have no other recourse but to find that it is for the child's protection that this Court issue this protective order, and that the actions the mother engaged in on July 11th, 2012, with regard to the child, with regard to Ms. Butler, that that has already been dealt with by another Court. But specifically, with regard to the child being present, being subjected to questions about when she is coming home, when she has no control over that, and nor is it an appropriate question to be asking this 12-year-old, coupled with the mother's behavior in this restaurant, I find to be not in the child's best interest.
>
> . . . . And that there is clear and con-

> vincing evidence that the Court finds to believe that the respondent, Yoha. B. has committed the following acts of abuse. And I do also find that these acts of abuse include assault and false imprisonment, as well as placing the child in fear of imminent serious bodily harm.

The court issued a Final Protective Order for Chaida against Ms. B. on August 15, 2012, effective until August 15, 2013. The order indicated that visitation between Ms. B. and Chaida was "suspended until further order of this court."

The circuit court next convened for a CINA review hearing on September 6, 2012, for the purpose of reviewing Chaida's permanency plan. The Department asked the court to reaffirm the concurrent permanency plan of APPLA and custody/guardianship with a non-relative. Ms. B. asked that she be allowed to see Chaida and that the court authorize visitation. The court declined, however, citing Ms. B.'s lack of progress in therapy and her inability to understand why Chaida had been taken from her. The court observed:

> So it is also a very unique situation for a court to make any part of a permanency plan for a 12-year-old, 13-year-old [APPLA]. That is certainly not something that any judge wants to take under advisement lightly, but I've had no alternative in this case because, quite frankly, ma'am, you simply have made no progress. That anger is still there. That hostility is still there. And a complete lack of understanding of your daughter's issues and what you need to do to help her remains, and that's the long and the short of the information that I unfortunately consistently hear every time we come to court.

The court then found the following facts and made an oral ruling:

> So the Court finds that the respondent is 12 ½ years of age, continues to reside in a licensed foster home in Gaithersburg, where she has been since June 16, 2011. The child continues to receive exceptional care in her foster care placement, however, there are difficulties that have arisen due to the emotional setbacks the respondent has exhibited during this reporting period.
>
> . . . .
>
> The Court, for all of these circumstances, is going to order that the permanency plan remain at this time a concurrent plan of [APPLA] and custody and guardianship with [a] non-relative. The Court has Ms. Butler's report dated August 3, 2012, which sets forth the reasonable efforts the Department has undertaken to achieve the plan.
>
> . . . .
>
> This Court orders that the respondent remain a child in need of assistance under the jurisdiction of this Court, committed to the Department for continued placement in foster care.
>
> . . . .
>
> It is ordered that visitation between Chaida and her mother is suspended pursuant to the terms of the protective order issued by this Court and there is to be no direct or indirect contact by the mother with the respondent and that means not through any third party at all as well.
>
> . . . .
>
> And this Court understands that the mother does not, the Court finds that it understands that the mother does not agree with the protective order, does not agree with the findings the Court has made, and does not agree that she should not have contact with her child.

The court entered an order to that effect on September 6, 2012. Visitation between Ms. B. and Chaida remained suspended pursuant to the terms of the August 15 protective order. Ms. B. noted her appeal on September 14.

DISCUSSION

A. Standard of Review

"Decisions concerning visitation generally are within the sound discretion of the trial court, and are not to be disturbed unless there has been a clear abuse of discretion." *In re Billy W.,* 387 Md. 405, 447 (2005). An abuse of discretion occurs when "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 313 (1997) (Quotation omitted).

B. Analysis

Visitation may be denied "when the child's health or welfare is threatened." *Billy W.,* 387 Md. at 447. A court is

further constrained in its ability to grant visitation when a child has been declared a child in need of assistance: "[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party." FL § 9-101(b). The court may approve supervised visitation if it can arrange visitation "that assures the safety and the physiological, psychological, and emotional well-being of the child." *Id*.

Ms. B. argues that the circuit court erred when it "did not articulate the factors that influenced [it] to deny visitation" and instead "relied on the existence of the protective order." She contends that FL § 4-506(j)(3) authorizes the court to issue a visitation order that would supercede the preexisting protective order and therefore permit the court to "fashion a supervised visitation arrangement that would assure the safety and physiological, psychological, and emotional well-being" of Chaida.

Ms. B.'s argument that the circuit court erred when it failed to articulate the factors that caused it to deny visitation gets the statute backward. FL § 9-101(b) requires that a court make findings if it chooses to *grant* visitation to a party previously determined to be abusive or neglectful. The statute places no such burden on a court that decides to deny visitation. Nonetheless, the circuit court stated in detail the reasons for its decision. It summarized the state of Ms. B.'s participation in court-ordered therapy, Chaida's mental health and well-being up to that point, and the July Burger King visit that led to the entry of the protective order. In the circuit judge's opinion, the previous attempts to establish visitation conditions that would protect Chaida's psychological and emotional health had all failed, leading the judge to deny visitation.

Based on the record before the court, we cannot disagree with the judge's decision. Ms. B. has consistently failed to conform her behavior to the standards and conditions the circuit court has set. Although Ms. B. may very well disagree with the court's view of her daughter's situation, her chance to be a part of her daughter's life fully depends on her ability to follow the instructions and terms the court has set. Failing that, she will be prevented from seeing Chaida. Further, although Ms. B. correctly argues that FL § 4-506(j) permits a court to issue an order that supercedes the terms of a prior protective order, the statute does not *require* the court to issue such an order. Absent evidence of a change in Ms. B.'s attitude or circumstances in the three weeks that passed between the entry of the protective order and the CINA review hearing, the circuit court reasonably concluded that visitation with Ms. B. still posed a danger to Chaida.

For all of these reasons we affirm the judgment of the circuit court.

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

FOOTNOTES

1. This is the second time that Ms. B. and Chaida have been before this Court. *See In re Chaida B.,* No. 133, Sept. Term 2012 (Md. Ct. Spec. App. Nov. 14, 2012) (affirming circuit court order setting visitation parameters).

2. Ms. B. and Chaida's father were never married and did not live together.

3. Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL"), § 3-823(e) defines APPLA as a permanency plan that "[a]ddresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and socialization needs; and [i]ncludes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life."

4. The court modified the visitation terms in October 2011 and added a fifth condition: "The Mother shall not be permitted to have any visits with the Child outside the dictates of this provision. If such contact occurs, even inadvertently, the Department is to be notified immediately. If the Father is present, he is to notify the Department immediately." This condition is not at issue in this appeal.

5. The circuit court's description of Chaida's testimony appears to be inconsistent with the report of the child welfare investigator, which indicated that Chaida said she did not actually see Ms. B. attack Butler. However, because Ms. B. has not appealed the entry of the protective order, determination of this factual point is not necessary to resolve this case.

Cite as 5 MFLM Supp. 131 (2013)

CINA: transfer of venue: custody to other parent

In Re: Dominic P.

No. 1484, September Term, 2012

Argued Before: Meredith, Woodward, Zarnoch, JJ.

Opinion by Meredith, J.

Filed: March 26, 2013. Unreported.

The trial court did not abuse its discretion in refusing to transfer venue to another county after learning that the mother of one of the parties worked for the Washington County Department of Social Services, nor in closing the case and awarding custody to the child's father where, regardless of a prior CINA case, the evidence indicated that he was a fit parent at present and the child was thriving in his care.

In this appeal, Kristina J. ("Mother" or "appellant") contends that the Circuit Court for Washington County abused its discretion in declining to transfer to another county a CINA case involving Kristina J.'s son. She further contends that the court abused its discretion in deciding to close the case after awarding custody of the child to Philip P. ("Father" or "appellee").

QUESTIONS PRESENTED

Appellant presented two questions for our consideration:

1. Did the trial court abuse its discretion in refusing to transfer venue of the case to another county after learning that the mother of one of the parties worked for the W[ashington] C[ounty] D[epartment] [of] S[ocial] S[ervices]?
2. Did the trial court abuse its discretion in closing the case and awarding custody to Father where the child had been adjudicated a CINA and Father had not completed important recommendations set out by WCDSS and ordered by the court?

We answer these questions "no," and affirm.

FACTS AND PROCEDURAL HISTORY

Dominic P. was born on May 6, 2010 to Kristina J. and Philip P., who never married. Dominic resided with Mother, who had physical and legal custody of him, but Father exercised visitation. On March 23, 2012, Father attempted to contact Mother to return Dominic from a visit after Mother failed to appear at the police station where Mother and Father normally exchanged custody. Father was not able to reach Mother by telephone. So he contacted the Washington County Department of Social Services ("the Department"). Police were dispatched to Mother's apartment, where Mother was located asleep on a couch with an unidentified male. Mother reported that she "had taken some cold medicine which cause [sic] her to fall asleep," and that she was not aware that anyone was trying to reach her. The custody exchange did not occur on that date. Rather, the Department asked Mother to consent to a safety plan for Dominic and Mother's other child, and to permit the Department to speak to Mother's doctors to try and "determine what could be causing [Mother] to be so drowsy and unresponsive[.]" Mother refused. Dominic remained in the custody of Father.

On April 5, 2012, the Department filed a petition for continued shelter care and a CINA petition alleging that Dominic was a child in need of assistance due to Mother's use of prescription drugs and refusal to cooperate with the Department.[1] The petition recounted that, on the day prior to the hearing,

> Washington County Department of Social Services conducted a F[amily] I[nvolvement] M[eeting] at which time due to the significant concerns regarding [Mother's] mental health and medical conditions as well as possible prescription drug abuse[,] a safety plan was again requested placing the children with family resources. [H]owever [Mother] again refused to do this at which point Washington County Department of Social Services took emergency custody of the children.[2]

The April 5, 2012, proceeding was the emergency shelter care hearing held pursuant to CJP § 3-815. At that hearing, Mother informed the court that Father's mother, Ann Marie P., worked for the

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Department, and because of that, Mother had "some concerns" with regard to Ann Marie P. exerting improper influence upon the case. The Department's attorney explained that it could implement a "Chinese wall," or restricted case protocol, to ensure that Ann Marie P. — whose role with the Department, it was represented, was largely administrative — did not have access to the file. The Department's attorney explained that such a protocol was used statewide in cases in which a Department employee's family member was involved in a case. Mother responded that this proposed solution did not allay her concerns. Ultimately, the court ordered that the Department implement the restrictive case protocol, continued the custody of Dominic with Father, and set the matter for adjudication on May 3, 2012.

At the adjudication hearing, Mother neither admitted nor denied the allegations made in the CINA petition, but conceded that the Department could prove those allegations. She consented to Dominic being found to be a child in need of assistance. Mother also requested that custody be returned to her that day. Father denied the allegations of the petition because they could be construed to indicate abuse or neglect by Father, but he also consented to Dominic being found a CINA based on the petition. The court found Dominic to be a CINA.

Father argued, pursuant to *In re Russell G.,* 108 Md. App. 366 (1996), that because he is a sufficiently fit parent, the court should award him custody and close the CINA case. Mother acknowledged that she had not been "quite as compliant" with the Department in the earlier stages of the case, but argued that she was working with the Department now, and wanted the court to either return Dominic to her custody forthwith, or expand her visitation with him beyond the one hour a week she was receiving at that time. The court decided to continue matters as they were, but did expand Mother's visitation to ninety minutes per week, and scheduled a three-month review.

On July 26, 2012, the review hearing was held. Mother renewed her request that the case be transferred out of Washington County. The court replied that it did not have a conflict; if any conflict existed, it was that of the Department, and if the Department wanted to transfer the case to another county, it was free to do so. However, the court also stated that Mother was "entitled to an evidentiary hearing on this issue," and a review hearing was scheduled for September 6, 2012. On August 28, 2012, the Department filed a motion to transfer jurisdiction of the matter to the Circuit Court for Frederick County, noting that, although measures had "been implemented to avoid any impropriety in case management," the Department had concluded that "further steps are necessary to ensure the integrity of the process and to eliminate even the mere appearance of impropriety." Mother filed no written motion for transfer.

At the September 6 hearing Mother was not present, although her interests were represented by counsel. Mother, through counsel, renewed orally her request for the case to be transferred to any county other than Washington County, indicating that Mother was not confident that the restricted case protocol was working. Father argued, based on *Russell G.*, that the court should simply award him custody of Dominic and remove the Department from the case entirely. The trial court took that course, denying Mother's request to transfer the case out of Washington County. The court awarded Father custody of Dominic, with reasonable visitation to Mother, and included a provision in the order that Mother was "entitled to seek custody through a civil proceeding without having to show a material change of circumstances." The court also found that there was no "reason for the Department to be involved in Dominic's case anymore."

Mother appeals both the grant of custody to Father, and the denial of her motion to transfer venue of the case.

DISCUSSION

I. The denial of Mother's request to transfer case

Mother's request for the court to transfer the case was made orally. The Department has not appealed the denial of its motion for transfer. Mother asserts that the court abused its discretion in "failing to transfer the case to a department [sic] in which Mother could have confidence that she was being given fair treatment."

In the absence of any clear legal requirement for the circuit court to transfer a case under these circumstances, we review the denial of Mother's request by considering whether she has shown an abuse of discretion. An abuse of discretion is said to occur "where no reasonable person would take the view adopted by the [trial] court," or where the court acts "without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1, 13 (1994) (citations omitted). We conclude Mother has not shown any abuse of discretion.

Venue in a CINA case is governed by CJP § 3-805, which provides, in pertinent part:

(a)(1) A petition alleging that a child is a CINA **shall be filed in the county where:**

(i) **The child is residing when the petition is filed;** or

(ii) The act on which the petition is based allegedly occurred.

[. . .]

(b)(1) Whenever a petition is filed **other than in the county where the child resides,** the court, on its own motion or on motion of a party, may transfer the case at any time to any appropriate county, including a county where:

(i) Another case involving custody, visitation, or support of the child is pending;

(ii) The child resides;

(iii) A parent of the child resides; or

(iv) The court determines it is in the child's best interests for further proceedings concerning the child to take place.

[. . .]

(Emphasis added).

Dominic lives in Washington County; therefore, pursuant to § 3-805(a)(1)(i), the CINA petition regarding him was properly filed in Washington County.

In her brief, Mother argues that "a court cannot allow the appearance of impropriety to exist in the actions of a state agency," citing *Maryland State Board of Pharmacy v. Spencer,* 150 Md. App. 1 (2003), *reversed in part and remanded, Spencer v. Md. State Bd. of Pharm.,* 380 Md. 515 (2004). We are not persuaded that *Spencer* required a different ruling by the circuit court. In *Spencer*, a pharmacist let her license lapse, and was eventually charged by the State Board of Pharmacy with practicing without a license. Two of the members of the Board who sat in decision of her case on the merits had earlier participated in settlement discussions, as part of a case resolution conference ("CRC") held prior to trial. Because she believed the participation of the Board members in the settlement negotiations rendered the Board incapable of providing her "a fair and impartial hearing[,]" *Spencer*, 150 Md. App. at 142, Spencer requested that the case be referred to the Office of Administrative Hearings. Spencer's requests were "repeatedly denied[.]" *Id*. at 143.

At the merits hearing, Spencer, through counsel, renewed her request that the entire matter be delegated to the OAH, and also requested that the Board members involved in her CRC recuse themselves.[3] Both requests were denied. Thereafter, the hearing devolved into a shouting match between Spencer's counsel and various Board members, complete with finger-pointing, accusations by Spencer's counsel that a Board member was "sleeping," a Board member calling Spencer's counsel a liar, and demands (unmet) for apologies all around. Spencer was eventually found by the Board to have practiced pharmacy without a license, and punishment was imposed.

Spencer filed a petition for judicial review to the Circuit Court for Baltimore City, which reversed, based on its finding that the transcript of the hearing "raise[d] serious questions" as to the Board's impartiality. The Board appealed to this Court, which affirmed. We concluded that Spencer was deprived of her rights, under the Administrative Procedures Act, codified at Maryland Code (1984, 2009 Repl. Vol.), State Government Article ("SG"), § 10-201 *et. seq*., and Art. 24 of the Maryland Declaration of Rights, to a "fair and unbiased resolution of her dispute with" the Board. We remanded the case and directed the Board to delegate its authority to hear it to the Office of Administrative Hearings.

The Board's petition for writ of certiorari was granted, 376 Md. 49 (2003). The Court of Appeals held that this Court erred in directing the Board to "exercise its discretion" to refer the case to OAH, because such a direction tramples on the Board's discretionary power. But the Court also noted:

> To be sure, because of the nature of the Board members participating, it was improper for those members who participated in the settlement negotiations to remain as panel members adjudicating petitioner's case, and those members may not constitute a part of the panel if or when petitioner's case is reheard.

Spencer, 380 Md. at 534. The Court specified that it was "not adopt[ing] a per se rule of recusal, nor do we intend our holding or comments to imply that recusal is mandatory when a trial judge participates in settlement negotiations," but "it is the overall appearance of impropriety in this case that requires recusal." *Id*., fn 7. In contrast to the situation in *Spencer*, it has never been Mother's contention in the present case that the trial court had a conflict or should recuse itself.

In this case, Mother's concerns were based on the fact that Father's mother worked for the Department. Mother claims in her brief that the mere fact of Ann Marie P.'s employment by the Department "gave rise to an appearance of impropriety." The trial court, however, was not persuaded. The court explained its denial of the transfer request:

> The conflict the Department has

or at least the appearance of impropriety they are concerned about has to do with [Father's] mother apparently being an employee of the Department of Social Services. Now I remember this came up the first time at the very first hearing. I was told, I don't know this lady, I don't know that I met her, at least I don't have a recollection of meeting her, she is involved in scheduling these family involvement meetings. And she is not a social worker, child protective service worker or adult protective service or child support or anything else. I guess she works with the CPS investigators in order to coordinate these uh these FIMS. And I was told of course there could be this partition where she could be locked out of computer access and she be prevented from having any knowledge of this case and I think at that time the attorney for the Department informed me that he was going to make sure a memo was circulated that Mrs. P. wouldn't have anything to do with this case and nobody was to discuss this case involving her grandson with her. And uh then it came up against [sic] apparently with Judge Boone and with Judge Beachley. The concern I heard from [Mother's attorney] today is troubling, that someone who works in the reception area at the Department of Social Services may have been privy to some u'm some aspect or another of [Mother's] treatment and knew about the results of urinalysis or something like that. And if that's, if that's going on, that's something I think [the Department's attorney] would want to know about, I would want to know about, [the Director of the Washington County Department of Social Services] would want to know about and if disciplinary action is necessary against whoever this person is who mentioned this or leaked something to this receptionist, I would hope that would be something the Department would be able to handle and look into. And like I said, I would be very upset about that too because as we all know these proceedings are confidential and there is not suppose to be any idle chat about these cases because of the privacy interest of the children involved.

But that's not anything that is unique to this case because people could have idle chat about any number of cases. T**here was no indication that whatever information that got back to [Mother] originated with Ms. P.** But even, even so, if this is a conflict of anybody it's with the Department of Social Services and it's clearly established and everybody agrees not with this Court.

There is ability, I think, that the Department has to bring in caseworkers from other jurisdictions, whether the Washington County Department of Social or statewide. And if there is any problem in this case or any other case where, I guess it would be [the Department Director's] call, feels that there is some issue that really needs to be handled by like a outside u'm agent, an outside social worker, that would be something I think that is within the Department's discretion. But I don't think u'm and my ruling is that it's a reason to change venue. It does say that venue can be changed to any appropriate county but it gives for instances. If there is a place where the child resides or a parent resides or the Court determines it's in the child's best interest further proceedings concerning the child take place there, those are the types of cases that can be transferred.[4] There is no — But again there is a catch-all that really can be for any reason to any appropriate county. **I don't find though any, any legitimate reason that this Court can't hear this case. If the Department has some concern about their u'm personnel, then they can address it by having agents from other areas of the state handle this case, but it will be in this county.** I am thinking about **both of these children living in Washington County,** at least both of the active parents, **[Mother] and [Father] living in Washington County. The grandparents live in Washington County,** the — you know the history of this case being in

> Washington County, all of the treatment — substance abuse, mental health, those things going on in Washington County.

(Emphasis added.)

Here, it is plain that the court did act with the applicable "guiding rules and principles." *See North, supra,* 102 Md. App. at 13. We perceive no abuse of discretion in the court's denial of Mother's request for transfer.

II. The award of custody to Father

Mother also appeals from the court's decision to award custody of Dominic P. to Father, and close the CINA case. Father's argument in this regard was based on *In re: Russell G.,* 108 Md. App. 366 (1996). *Russell G.* stands for the proposition that a child cannot be found a CINA if he or she has one fit parent who is willing and able to care for the child: "A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court." *Id.* at 376-77. See also CJP § 3-819(e).[5] Mother argues that the court abused its discretion in awarding custody to Father because Father had not completed certain "important recommendations" the Department made for him, and additionally that the court "erred in considering Dr. Munson's report."

Dr. Munson performed an evaluation of Father's capability to parent, and issued a report of his findings on July 26, 2012. The report concluded that, in Dr. Munson's opinion, Father "show[ed] good indications of being a capable parent." Dr. Munson opined that Father "meets the criteria for being suitable to parent his son at the present time," and the report showed that the series of tests Dr. Munson gave Father resulted in Father getting "a very good score" of "94% favorable in his capability to parent." Dr. Munson's only two areas of concern were that it had been a long time since Father had had a physical, and that Father needed to quit smoking.

Although Mother complains that the court erred in relying on Dr. Munson's report, she did not object to the court's consideration of the report at the September 6, 2012 hearing, but made many of the same arguments that she makes on appeal about the weight of its contents. We find her argument that the court erred in relying on it to be waived, because Mother never argued that the court should not rely on it. Rule 8-131(a). Rather, she contended that Father was not truthful in what he told Dr. Munson. But the weight to give a report such as that of Dr. Munson is a matter within the discretion of the trial court. *In re: Faith H.,* 409 Md. 625 (2009).

With respect to the ultimate decision of the court to close the CINA case and award custody of Dominic to Father, we review that action for an abuse of discretion. In *In re: Yve S.,* 373 Md. 551 (2003), the Court of Appeals noted:

> For cases involving the custody of children generally, our precedents establish a three part review of the decisions of the lower courts, addressing the findings of fact, conclusions at law, and the determination of the court as a whole. We set forth the rule for review of custody cases in *Davis v. Davis*, 280 Md. 119, 372 A.2d 231 (1977), where we explained:
>
> > Maryland Rule 886 (applicable to this Court) and, in identical language, Rule 1086 (applicable to the Court of Special Appeals) provide the standard of review of actions tried without a jury. In such actions, the appellate courts of this State "review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." Rule 886 & 1086. The "clearly erroneous" concept is no newcomer to Maryland procedure: The predecessor of Rule 886 (adopted effective January 1, 1957 as Rule 886 a), General Rules of Practice and Procedure, Part Three, III, Rule 9 c (effective September 1, 1944), contained the same scope of review embodied in the present rule; moreover, prior to the standard's codification as a rule, it was the time-honored practice on appeals to this Court in equity actions to give great weight to the chancellor's findings of fact. And we have heretofore noted that these rules in essence merely conformed the scope of review in nonjury actions at law to the scope of review we had always applied in equity appeals. Nothing in Rule 886 indicates that it does not apply to all cases tried without a jury, and we have explicitly held

that the rule applies when we review nonjury criminal causes (under Rule 772), nonjury defective delinquency cases, child support awards, and child custody cases. *Hild v. Hild*, 221 Md. 349, 359, 157 A.2d 442, 448 (1960). Since *Hild* we have consistently applied the "clearly erroneous" portion of Rule 886 (or that standard without citation to the rule) in our review of child custody awards. Moreover, even prior to our explicit recognition in Hild of the applicability of Rule 886, our predecessors in essence utilized the clearly erroneous standard when reviewing factual determinations on appeals of child custody actions. Since Rules 886 and 1086 are identical, what we say with respect to one is equally applicable to the other.

Having determined that Rule 886 is controlling in child custody cases, we now consider the extent to which the "clearly erroneous" portion of it applies in such appeals. The words of the rule itself make plain that an appellate court cannot set aside factual findings unless they are clearly erroneous, and this is so even when the chancellor has not seen or heard the witnesses. On the other hand, it is equally obvious that the "clearly erroneous" portion of Rule 886 does not apply to a trial court's determinations of legal questions or conclusions of law based upon findings of fact.

Although these two propositions are clear, there is some confusion in our cases with respect to the standard of review applicable to the chancellor's ultimate conclusion as to which party should be awarded custody. Notwithstanding some language in our opinions that this conclusion cannot be set aside unless clearly erroneous, we believe that, because such a conclusion technically is not a matter of fact, the clearly erroneous standard has no applicability. However, we also repudiate the suggestion contained in some of our predecessors' opinions, and relied upon by the Court of Special Appeals in *Sullivan v. Auslaender,* 12 Md. App. 1, 3-5 (1971), and its progeny, that appellate courts must exercise their "own sound judgment" in determining whether the conclusion of the chancellor was the best one. Quite to the contrary, it is within the sound discretion of the chancellor to award custody according to the exigencies of each case, and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the chancellor because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

In sum, we point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of Rules 886 and 1086 applies. [Secondly,] if it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erro-

neous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

Yve S., supra, 373 Md. at 584-86 (quoting *Davis*, *supra*, 280 Md. at 122-26 (some internal citations omitted; footnote omitted; emphasis in *Yve S.*).

In this case, the court found there was no ongoing reason for the Department to be involved in Dominic's case because Father's ability and willingness to care for Dominic meant that Dominic was not a CINA.

At the time of the September 6, 2012, hearing in this case, Dominic had been in Father's custody for at least five months, and by all accounts was thriving. Dominic's attorney confirmed to the court that Dominic was "doing well" with his Father, and "seem[ed] completely well adjusted there." The Department did not join in Father's motion to close the case pursuant to *Russell G.,* but acknowledged that "progress has been made" since Dominic had been in Father's care.

In our view, Father's five-month "track record" of successfully having custody of Dominic, when considered in combination with Dr. Munson's favorable report about Father's parenting skills, was sufficient evidence to support the court's decision to find that Dominic was no longer a CINA. There was ample evidence from which the court could have concluded that awarding custody of Dominic to Father and terminating the CINA case was in Dominic's best interest, and Mother has failed to demonstrate that the court abused its discretion in that regard. Accordingly, we affirm.

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

FOOTNOTES

1. A CINA case is brought pursuant to Maryland Code (1973, 2006 Repl. Vol., 2012 Supp.), Courts and Judicial Proceedings Article ("CJP"), § 3-801 et seq. A child is considered to be "in need of assistance" within the statute when he or she "requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." CJP § 3-801(f), (g).

2. The petition — which was stamped "filed in open court (date) 4-5-12" — refers to the Family Involvement Meeting as having occurred on May 4, 2012, an apparent error. The transcript of the April 5, 2012, proceedings reflects that the meeting occurred April 4, 2012.

3. Maryland Code (1984, 2009 Repl. Vol.), State Government Article ("SG"), § 10-205(a)(2)(ii)(1) permits the Board to make such a delegation.

4. This language appears to be a reference to CJP § 3-805(b), which we quoted above. That statute was not applicable in this case because the CINA petition was not filed "other than in the county where the child resides[.]"

5. "If the allegations in the [CINA] petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent."

NO TEXT

Cite as 5 MFLM Supp. 139 (2013)

Adoption/Guardianship: termination of parental rights: evidence from CINA proceeding

In Re: Adoption/Guardianship of Koa A. and Megan B.

No. 1655, September Term, 2012

Argued Before: Graeff, Hotten, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Graeff, J.

Filed: March 28, 2013. Unreported.

The trial court did not err in admitting prejudicial hearsay evidence on the ground that it already had been admitted in the underlying, but separate, CINA proceeding. The trial court also did not err in terminating the mother's parental rights, in part because termination would serve the children's interest by facilitating their adoption by their caretaker.

Kelly B., appellant, appeals from an order of the Circuit Court for Baltimore City, sitting as a juvenile court, terminating her parental rights to two of her minor children, Koa A. and Megan B., appellees. On appeal, Ms. B. presents the following issues for our review:

1. Did the trial court err in admitting prejudicial hearsay evidence on the ground that the evidence previously had been admitted in the underlying, but separate, CINA proceeding?
2. Did the trial court err in terminating Ms. B.'s rights in part because termination would serve Koa's and Megan's interest by facilitating their adoption by their caretaker, Ms. W.?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On or about May 18, 2009, Megan was adjudicated a child in need of assistance ("CINA")[1] after a hearing in the Circuit Court for Baltimore County. On or about June 18, 2009, Koa was also adjudicated a CINA in the Circuit Court for Baltimore County. Both cases were transferred to the Circuit Court for Baltimore City. On March 8, 2012, the Baltimore City Department of Social Services (the "Department"), also an appellee, filed petitions for guardianship with the right to consent to adoption or long-term care short of adoption.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

On September 5, 6, 13, 17, and 20, 2012, the court held a termination of parental rights ("TPR") hearing. During the ensuing proceedings, the following was adduced.

Koa was born on May 16, 2005 to Ms. B. and an unknown father. When Koa was eight months old, Ms. B. asked Arlene W., the mother of a friend, to care for Koa until she "got herself together." Ms. W. lives in four-bedroom home in Virginia with her husband. At the time, Ms. B. was homeless, was using drugs, and was financially unstable. When Koa was born, another child of Ms. B.'s, Julia B., was in foster care as a result of Ms. B.'s drug use and neglect. Ms. B. consented to termination of her parental rights to Julia.

Megan was born on July 4, 2007 to Ms. B. and an unknown father. At the time of Megan's birth, Ms. B.'s circumstances had not changed. When Megan was three days old, Ms. B. asked Ms. W. to care for Megan as well. Ms. W. agreed, and both Koa and Megan have remained in Ms. W.'s care since that time, with for rare visits with Ms. B. Ms. W. is willing to adopt the children.

The children came to the attention of the Department on April 20, 2009, after a visit with Ms. B. The previous day, Tylie B., Ms. B.'s 20-day-old baby, was injured, after Ms. B. left Tylie, Koa, and Megan in the care of a friend, Anita J. Anita had shaken Tylie, thrown her against a wall, and thrown her down the stairs. Koa and Megan were present in the caretaker's home when this incident occurred. Tylie's injuries left her blind and potentially incapable of walking. Subsequently, Ms. B. consented to termination of her parental rights to Tylie.

After the Department became involved, Koa and Megan were placed in shelter care and adjudicated CINA. Physical custody and limited guardianship was given to Ms. W. On June 7, 2010, Koa and Megan were placed in temporary custody with Ms. W., who became a licensed foster care provider in Virginia in order to continue caring for the children. Ms. B. has supervised

visitation with the children, and according to Ms. W., visits with the children every three to six months. Ms. B. has, at times, offered Ms. W. money toward the children's care, but Ms. W. declined the money and asked Ms. B. to use it to "get herself together."

On November 2, 2010, Ms. B. gave birth to Madisen B. Madisen was born drug exposed and was placed by the court with Ms. W., where she remains. Ms. W. and her husband take Koa, now seven years old, and Megan, now five years old, to school, to the doctor and the dentist, to church, and on family vacations, and they consider them to be their own children.

Charity Dziekaety, one of Ms. B.'s social workers, testified that, at the time Koa and Megan came to the attention of the Department, Ms. B. needed drug treatment and housing. Although Ms. B. told Ms. Dziekaety that she was employed, Ms. B. never provided her with any documentation in that regard. Ms. B. was difficult to contact and uncooperative in pursuing services offered to her by the Department. Ms. B. did not provide the Department with an address, rarely returned phone calls, and told Ms. Dziekaety that she did not need help other than with housing. Ms. B. was similarly uncooperative with Prolog, a transitional housing agency.

On July 23, 2009, Ms. B. entered into a service agreement with the Department. Pursuant to the terms of the agreement, Ms. B. was to have biweekly visits with the Department and work on her own needs. The Department provided Ms. B. with referrals for housing and drug treatment. Ms. B. did not comply with the terms of the agreement, and she provided no documentation of employment, drug treatment, or attempts to obtain housing. Ms. B.'s contact with the Department was "very minimal," and she made it clear to Ms. Dziekaety that she did not want to work with her. Ms. B. asked Ms. Dziekaety to stop calling her; she did not want to visit with her.

Ms. Dziekaety made twice monthly visits to Ms. W.'s home to visit the children. She observed a very close relationship between the children and Ms. W., stating that the children had a bond with Ms. W. Ms. Dziekaety did not observe a bond between the children and Ms. B., but rather, there "was such a disconnect." Ms. Dziekaety did not have any concerns about the children's living arrangements at Ms. W.'s, and she "felt very comfortable with the children residing in the home and care of" Ms. W.

In 2011, case worker specialist Ashley Biggs was assigned to Koa's and Megan's cases. Ms. Biggs had previously worked with Ms. B. in 2010 with respect to Julia and Tylie. Ms. Biggs offered Ms. B. services, including referrals, drug treatment, housing assistance, parenting classes, and mental health services. Ms. B. never provided documentation that she had completed drug treatment or a mental health program or secured stable housing. Ms. B. did complete a parenting class at one time, but she still lacked the necessary skills to "create an appropriate bond and appropriate parent child relationship with her . . . children," so Ms. Biggs asked her to complete another class. Ms. B. did not do so.

Ms. Biggs was aware that Ms. B. "[s]ometimes danced at some clubs," but Ms. B. did not provide Ms. Biggs with any information as to where she worked, how often, or what she was paid. Although Ms. Biggs offered Ms. B. assistance with housing, either with the first month's rent or with a security deposit, she needed proof of employment from Ms. B. Ms. Biggs never received the requested documentation.

Ms. Biggs visited with the children at Ms. W.'s home. Based on her observations, the children were "very bonded" to the W.'s, "very comfortable" and "very happy there." She stated that they were thriving, doing well, and "meeting and exceeding developmental milestones." Koa and Megan were "incredibly well adjusted and . . . very stable."

On February 10, 2012, the Department notified Ms. B. of its intention to file a TPR petition regarding Koa and Megan, and Ms. Biggs subsequently transferred the cases to case worker Thomas Thompson. In the year that the cases were assigned to Ms. Biggs, Ms. B.'s circumstances had not changed. Ms. Biggs opined that it would be in the children's best interests to be adopted by Ms. W.

Ms. B. testified that she has a lease and lives in a three bedroom house in Baltimore with her sixth child, nine-month-old daughter, Kendall. She stated that she had been employed for 18 months cleaning houses for WW Cleaning in Washington, D.C., and that she earned approximately $1,400 every other week. Ms. B. did not produce a pay stub verifying her employment, and the Department was not able to verify Ms. B.'s employment information.

Ms. B. agreed that she had consented to the termination of her parental rights to Julia and Tylie. She disagreed that Madisen was born drug exposed. In addition to Koa and Megan, Ms. B. desires for Madisen to live with her. She stated that she visits the children monthly at Ms. W.'s, and she calls them at least five times per week. The children call her "Mommy." When Ms. B. visits, she brings the children gifts. She has also offered Ms. W. money, but Ms. W. rejected her offers.

Ms. B. admitted that, during the period between 2009-2011, she had not been cooperative with her social workers. Ms. Dziekaety was "very aggressive" with her, and because Ms. B. was drinking and depressed at the time, she was not "going to allow her to just keep yelling at" her, and therefore, she decided not to be in contact with her. Ms. B. also believed that

she could work out the children's arrangements with Ms. W., who had agreed to care for Koa and Megan on a temporary basis until Ms. B. could improve her circumstances. When Ms. B. learned that she may lose her parental rights to Koa and Megan, she sought Mr. Thompson's help, and she entered into a service agreement at that time. Ms. B. would "not have waited until the last day" to cooperate with the Department and seek to regain custody of her children if she had known that she could lose her parental rights. She stated that she had complied with the service agreement, providing Mr. Thompson with documents regarding her housing and the results of a drug assessment. She also presented a pay stub, and she testified that she had improved her circumstances and wanted to raise her children.

Ms. B. conceded that she previously had been a cocaine user, but she stated that she had since stopped. She agreed that she did not work to retain custody of Julia or Tylie. She stated that she has changed her life, no longer works in the "club atmosphere," and no longer maintains friendships with the "people [she] used to be around."

Mr. Thompson testified that Ms. B. contacted him in April 2012, after he was assigned to the cases. Ms. B. sought Mr. Thompson's help in getting her children back, although Mr. Thompson explained to her that TPR proceedings had commenced. On August 9, 2012, Ms. B. entered into a service agreement with the Department. Shortly before Mr. Thompson's testimony, Ms. B. provided him with a copy of a lease agreement indicating that her rental was set to begin on September 10, 2012. She did not, however, provide him with proof of employment. Ms. B. did follow up with a drug evaluation referral, although Ms. B. had not provided Mr. Thompson with the results of the evaluation.

When he was first assigned the cases, Mr. Thompson visited Koa and Megan in Ms. W.'s home. He stated that, based on his observations, the children were very happy with their home, and they were receiving "very genuine" love from Ms. W. He did not have any concerns about the children's placement in Ms. W.'s home, and he recommended a permanency plan of adoption.

STANDARD OF REVIEW

We review orders terminating parental rights using three interrelated standards. The Court of Appeals set forth the standard of review as follows:

> [w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131 (c)] applies. [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Adoption/Guardianship of Ta'Niya C., 417 Md. 90, 100 (2010) (quoting *In re Adoption/Guardianship of Victor A.,* 386 Md. 288, 297 (2005)).

DISCUSSION

I.

Admission of Evidence

Ms. B.'s first argument involves the admission of the Department's Exhibits 6 and 7, which were reports from the original CINA proceedings in Baltimore County, dated May 13, 2009 and June 9, 2009. After hearing counsel's argument, the court admitted the exhibits, stating that the exhibits were "case history," "not substantive evidence in and of itself," and "in the event this case has to go up on appeal . . . . [p]art of the record on appeal will be the prior history of the case, including supporting documentation and the like." The court noted that admitting the exhibits "allows for [the record] to be complete because . . . part of the record in this case will include not just the record from the Baltimore City Circuit Court, but also portions of the record of the Baltimore County Circuit Court."

Ms. B. contends that the court erred in admitting these exhibits, asserting that they contained multiple layers of hearsay, in violation of Md. Rules 5-802 and 5-805. According to Ms. B., the court reports are "shot through with extrajudicial statements, offered to prove the truth of the matters asserted," and the content was prejudicial.

The Department responds that the court was permitted to take judicial notice of the prior CINA proceedings, and in any event, the court expressly noted that it was only admitting the documents as part of the case history, not as substantive evidence. Furthermore, the Department asserts that Ms. B. failed to demonstrate prejudice in the admission of the documents, as the court did not refer to or rely on the content of the documents to support its findings.

The children respond that the evidence was properly admitted, as it was either not hearsay, or it was not inadmissible hearsay. They argue that the exhibits fell within the business records exception, Md. Rule 5-803(b)(6), to the rule against hearsay.

As indicated, the court admitted the documents as "[p]art of the record," stating that they were not being

admitted as substantive evidence. Thus, even assuming that the exhibits were inadmissible hearsay evidence, because the record does not reflect that the court considered the contents of the exhibits or relied on the exhibits in supporting its findings and conclusions, there is no showing of prejudice, and therefore, there is no basis for reversal of the court's judgment. *See Miller v. Mathias,* 428 Md. 419, 446 (2012) ("an error that is not shown to be prejudicial does not warrant reversal"); *Green v. Taylor*, 142 Md. App. 44, 60 (2001) ("Unless an appellant can demonstrate that a prejudicial error occurred below, reversal is not warranted.") (quoting *Bradley v. Hazard Tech. Co.,* 340 Md. 202, 206 (1995)).

II.
Termination of Parental Rights

Ms. B. next contends that the court erred in terminating her parental rights. She asserts that the court improperly focused on whether the children would be better off in the custody of Ms. W, a "focus that was contrary to the law."

This Court has recognized the "fundamental right of parents generally to direct and control the upbringing of their children." *Barrett v. Ayres*, 186 Md. App. 1, 14 (citations and quotations omitted), *cert. denied*, 410 Md. 560 (2009). "The termination of fundamental and constitutional parental rights is a 'drastic' measure, and should only be taken with great caution." *In re Adoption/Guardianship Nos. J9610436 & J9711031,* 368 Md. 666, 699 (2002).

A parent's fundamental right to raise his or her child, however, is not absolute. That right "must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect." *In re Adoption/Guardianship of Rashawn H.,* 402 Md. 477, 497 (2007).

In determining whether to terminate parental rights, "it is unassailable that the paramount consideration is the best interest of the child." *In re Adoption/Guardianship No. T00032005,* 141 Md. App. 570, 581 (2001). *Accord Ta'Niya C.,* 417 Md. at 112 ("the child's best interest has always been the transcendent standard in adoption, third-party custody cases, and TPR proceedings"); *Rashawn H.,* 402 Md. at 496 ("the best interest of the child remains the ultimate governing standard"). It is generally presumed "that it is in the best interest of children to remain in the care and custody of their parents." *Id*. at 495. That presumption, however, "may be rebutted upon a showing either that the parent is 'unfit' or that 'exceptional circumstances' exist which would make continued custody with the parent detrimental to the best interest of the child." *Id*.

Maryland Code (2009 Supp.) § 5-323(b) of the Family Law Article ("F.L."), gives juvenile courts the authority to terminate an individual's parental rights. It provides:

> *Authority.* — If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.

The factors that a court must consider in determining the child's best interest are set forth in F.L. § 5-323(d):

> *(d) Considerations.* — Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1) (i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> (i) the extent to which the parent has maintained regular contact with:
>
> 1. the child;
>
> 2. the local department to which the child is committed; and

3. if feasible, the child's caregiver;

(ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period;

(3) whether:

(i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

* * *

(4) (i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

On September 26, 2012, the court delivered its ruling from the bench, terminating Ms. B.'s parental rights. In its ruling, the court considered at length each of the foregoing factors, seriatim, and made findings consistent with the evidence. Ms. B. does not challenge any of the court's factual findings, nor does she contend that the court failed to consider all of the requisite factors. Rather, Ms. B. asserts that the court improperly considered Ms. W. as an adoptive resource and improperly focused on in whose care and custody the children would be "better off." Specifically, Ms. B. argues that the court relied "upon a comparison between" Ms. B. and the Ms. W., and its decision to terminate Ms. B.'s parental rights was based upon the "improper consideration of Koa's and Megan's adoption as well as the quality of care given by their foster care providers." Furthermore, she asserts that the court "greatly emphasized the girls' bond to the W.'s," in concluding that the "girls are better off being in the W.'s custody and being adopted by them, rather than focusing on the issue of whether it would be in their best interest to maintain an ongoing relationship with their mother."

The Department and the children respond that the court properly considered and made findings as to each criterion, ultimately concluding that Ms. B.'s long-standing chronic and untreated drug use and mental health issues, lack of stable housing and income, and failure to engage in services to assist herself or her daughters, rendered her unfit to parent the children, that exceptional circumstances existed in that the children had not been in Ms. B.'s care from a very early age, and that it would not be in the best interests of the children to maintain a parental relationship with Ms. B. Contrary to Ms. B.'s assertion that the court improperly considered the benefits of the children's relationship with Ms. W., giving too much weight to their bond with Ms. W. and their prospects for adoption, the Department and the children assert that the court properly considered the impact of termination on the children's well-being, pursuant to F.L. § 5-323(d)(4)(iv), and in that regard, considered the children's stable relationship with the Ms. W., who expressed interest in adopting the children, and the lack of such a relationship with Ms. B., due to her consistent unwillingness to ameliorate the circumstances that rendered her unfit to care for the children. We agree.

To be sure, as Ms. B. argues, the circuit court did consider the children's bond with Ms. W. in determining whether to terminate Ms. B.'s parental rights. That was, however, entirely appropriate. *See* F.L. § 5-323(d)(4)(ii)(3) (directing court to consider the child's "adjustment to . . . placement."). The court also properly focused on the likely impact of terminating parental rights on the children's well-being. *See* F.L. § 5-323(d)(4)(iv).[2]

The court's ultimate decision, however, was based in large part on its finding that Ms. B. was unfit as a parent and that exceptional circumstances existed that made custody with Ms. B. detrimental to the children. The court stated:

> In that the Mother has had enormous difficulties sustaining a mature and responsible [relationship] with any of her children, and specifically that

she has failed, except at the very last minute – questionable even at the very last minute – to deal with the issues that have arisen in her care, I am compelled to find that the Mother, at this point, is still unfit to have custody of the children.

In addition, I do believe that there are exceptional circumstances that make such custody detrimental to the best interests of the child. The two children in this case have been away from the biological parent since from a very early age, a couple of months old. And the caretaker has been consistently in charge of their care for a number of years at this point.

* * *

[Ms. B.'s] genuine desire [to reclaim the children] needed to have been coupled with significant efforts made toward reclamation. And because of the Service Agreements and all the work was [the Department], those efforts were clear as to what needed to have taken place, including not five days before the termination of parental rights hearing begins, but some longer period of time before that, stable housing. And, stable employment. And dealing again with the other issues; mental health and the drug issues that have persisted in this case.

We don't see that. We don't see a completion of parenting classes. We don't see any of the things that I would like to have seen to indicate to me that the Mother had not just an abstract desire to have the child, but the kind of burning desire that would have led her to have taken serious steps to cooperate with [the Department] to have solved the issues, and eliminated the obstacles to the return of the children.

* * *

I am not confident of the child's future in the custody of the parent. I think that the parent has had a history both of the use of drugs, of loss of other children, of unstable housing, of unstable employment and the like. And it raises serious concerns to me as to the stability and certainty of the child's future.

After finding that the "children's future – would be best guaranteed by remaining in the custody of the caretaker," where "there would be great stability and great certainty as there has been through the lives of these children to date," the court found that "a continued parental relationship with the parent in this case would be detrimental to the best interests of these [children]."

The record refutes Ms. B.'s assertion that the court improperly considered the children's prospects for adoption and gave too much weight to the children's bond with Ms. W., rather than focusing on the children's best interests. Rather, the court carefully and meticulously considered each relevant statutory factor, made specific factual findings based on the evidence as to each of them, and expressly determined that Ms. B. was unfit to remain in a parental relationship with the children and that exceptional circumstances existed that would make a continuation of the parental relationship detrimental to the best interests of the children. We perceive no error or abuse of discretion.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. A CINA is a child who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. Md. Code (2006 Repl. Vol) § 3-801(f) of the Courts & Judicial Proceedings Article ("CJP"). An adjudicatory hearing is a hearing to determine whether the allegations in the CINA petition are true. CJP § 3-817.

2. In this regard, the court stated:

> I believe that the emotional effect on the children, if custody were changed to the biological parent, would, in fact, be devastating. These children are living in a household that they have lived in for a number of years, that the view as a home, with people that they view as their parents.
>
> As I have described, the relationships at home are loving, stable, successful relationships. Where the caretakers took them on in the first instance, almost as a favor. Fell in love with the children.
>
> And . . . the possible emotional effect on the child if the custody is given to the caretaker? Well, the caretaker has custody. And I think this would simply perpetuate what seems to be a successful and loving relationship.

Cite as 5 MFLM Supp. 145 (2013)

Custody: modification: case mooted by agreement on the record

Alenia Fowlkes Johnson
v.
Lorenzo Green I

No. 1004, September Term, 2012

Argued Before: Kehoe, Berger, Eyler, James R. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, James R., J.

Filed: April 1, 2013. Unreported.

An appeal of a custody order granting primary physical custody of the minor child to father and instituting a visitation schedule for mother is dismissed because it is moot and does not comply with the Maryland Rules.

Appellant, Alenia Johnson, noted an appeal of the custody order entered in the Circuit Court for Prince George's County on June 26, 2012. The custody order granted primary physical custody of the minor child in common to appellee, Lorenzo Green, and instituted a visitation schedule for appellant. Because this appeal is moot and does not comply with the Maryland Rules, we decline to address either issue presented[1] and accordingly, dismiss this appeal.

BACKGROUND

On July 9, 2007, appellee filed a complaint for custody in circuit court. On April 8, 2008, a consent order was entered granting the parties joint legal custody and primary physical custody to appellant. On August 24, 2011, appellee filed a motion for modification of the consent order. The parties went before the Master on January 11, 2012, and recommendations were filed. Appellee filed exceptions to the Master's recommendations, which were heard by the court on April 19, 2012. On June 26, 2012, the court ordered that appellee have primary physical custody of the minor child and established a visitation schedule for appellant. On July 25, 2012, appellant filed a timely appeal of the court's June 26, 2012, order.

On July 9, 2012, prior to filing the appeal in this case, appellant filed a motion for contempt, which was heard by the court on August 3, 2012, after this appeal was filed. According to the docket entries, an agreement was placed on the record the same day, which addressed the current pending issues. On August 13, 2012, the court entered an order amending the visitation schedule, but left the remaining provisions of the June 26, 2012, order intact. On October 9, 2012, appellant filed a motion for modification, which was heard by the court on December 26-27, 2012. A further hearing was held on January 9, 2013, and an agreement was placed on the record in open court. The docket entries indicate that the case was closed statistically and settled the same day.

Additional facts will be discussed below, as they pertain to each reason for dismissal.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

DISCUSSION

I. Appeal Is Moot

Pursuant to Maryland Rule 8-602(a)(10), an appellate court may dismiss an appeal, on motion or on its own initiative, if the case is moot. "A case is moot when there is no longer any existing controversy between the parties at the time that the case is before the court, or when the court can no longer fashion an effective remedy." *In re Kaela C.,* 394 Md. 432, 452 (2006). Although we have discretion to decide an issue that has become moot, where, as in this case, the issue is unlikely to recur, and there is no "'imperative and manifest urgency to establish a rule of future conduct,'" we decline to address the merits. *Woods v. Constantine,* 337 Md. 487, 489 (1995) (quoting *Attorney Gen. v. Anne Arundel Cnty. Sch. Bus. Contractors Ass'n,* 286 Md. 324, 327-28 (1979)).

This appeal is moot for two reasons. First, the June 26, 2012, order that is the subject of this appeal, has been modified and superceded by two subsequent custody orders. Second, the docket entries reflect that on January 9, 2013, an agreement was placed on the record in open court, the case settled, and the case was closed statistically. Thus, there is no existing controversy between the parties because the circuit court case settled and the subject of this appeal is no longer in effect. Accordingly, there is no effective remedy that this Court can fashion, and, therefore, this appeal is dismissed as moot.

II. Noncompliance with Maryland Rules

The Maryland Rules "'are not guides to the practice of law but precise rubrics established to promote the orderly and efficient administration of justice and . . . [they] are to be read and followed[.]'" *Pinkney v. State*, 427 Md. 77, 87 (2012) (quoting *Parren v. State*, 309 Md. 260, 280 (1987)). Maryland Rule 8-602(a)(8) allows an appellate court, on motion or on its own initiative, to dismiss an appeal if "the style, contents, size, format, legibility, or method of reproduction of a brief, appendix, or record extract does not comply with Rules 8-112, 8-501, 8-503, or 8-504[.]"

Appellant failed to comply with Maryland Rules 8-501(c), 8-504(a)(4), and 8-504(a)(8). We first address Maryland Rule 8-501(c), which provides:

> The record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal. It shall include the circuit court docket entries, the judgment appealed from, and such other parts of the record as are designated by the parties . . .

Appellant's record extract does not contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal, as is required by Maryland Rule 8-501(c). The record extract in this case only includes the docket entries. Among the many documents missing from the record extract are: the complaint, the April 8, 2008 consent order, the motion for modification of custody, the Master's Recommendations, and the June 26, 2012, order that is the subject of this appeal. Further, in her brief appellant cites to "OAH decision page 14[,]" which is not included in either the record extract or in the record transmitted from the circuit court.

Second, Maryland Rule 8-504(a)(4) provides that an appellate brief shall include:

> A clear concise statement of the facts material to a determination of the questions presented . . . Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Appellant's statement of facts does not include a single citation. The entire statement of facts is, therefore, unsupported and accordingly, fails to comply with the mandatory requirements of Maryland Rule 8-504(a)(4).

Finally, Maryland Rule 8-504(a)(8) provides that an appellate brief shall include: "The citation and verbatim text of all pertinent constitutional provisions, statutes, ordinances, rules, and regulations . . ."

Appellant's brief similarly violates Maryland Rule 8-504(a)(8) by failing to provide any legal authority to substantiate her argument. Appellant did not provide the citation and verbatim text of any pertinent legal authority, and it "'is not our function to seek out the law in support of a party's appellate contentions.'" *Conrad v. Gamble,* 183 Md. App. 539, 569 (2008) (quoting *Higginbotham v. Public Service Comm'n of Maryland,* 171 Md. App. 254, 268 (2006)). Accordingly, in addition to filing a brief that fails to comply with the Maryland Rules of appellate procedure, appellant's unsupported contentions are waived. *See Id*. (quoting *Anderson v. Litzenberg,* 115 Md. App. 549, 577-78 (1997) ("Because appellants' argument is 'completely devoid of legal authority,' we deem this contention to be waived and decline to address the issue on its merits.")).

"[D]ismissing an appeal on the basis of an appellant's violations of the rules of appellate procedure is considered a 'drastic corrective' measure." *Rollins v. Capital Plaza Assocs., L.P.,* 181 Md. App. 188, 202 (2008) (quoting *Brown v. Fraley,* 222 Md. 480, 483 (1960)). When, however, there are multiple blatant violations of the appellate rules of procedure, coupled with the fact that this case is moot, we are left with no other choice, but to dismiss.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTE

1. Appellant presented the following issues on appeal, which we quote:

> 1. Whether the Judge in this case failed to issue an Order that ruled on the recommendations made by Master Wright in the lower Court? Why did Judge El-Amin leave this matter in a temporary state by issuing a ruling as *pendente lite*?
> 2. Whether the Judge acted in the best interest of the child by awarding custody of the minor child to the appellee?

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