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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Closing the door on the Meese house

Giving house back to father was a fraudulent conveyance, CSA holds

By Steve Lash
Contributing writer

A woman who deeded her childhood home back to her father made a fraudulent conveyance that shortchanged her estranged husband out of his right to a share of what had been their marital abode, a Maryland court affirmed.

The Court of Special Appeals vacated Megan Meese's transfer of the Silver Spring house, which her father had transferred to her after she married Timothy Meese.

The court found the May 2005 transfer violated the Maryland Uniform Fraudulent Conveyance Act because Megan was insolvent at the time, conveyed the house for free and included a provision that she would get the house back after her father's death.

"As we held in *Meese II*, there can be no dispute that Megan intended, by making the transfer, to prevent Timothy from realizing a share of the property in the divorce proceedings," Judge Arrie Davis wrote for the Court of Special Appeals in the most recent opinion.

See MEESE page 4

Divorced woman sues both sides' lawyers for $4M

By Kristi Tousignant
Contributing writer

A Texas woman is calling for a financial pox upon two law firms, after love lost and an alleged legal conflict of interest.

Judith A. Wilhelm has filed a conflict-of-interest lawsuit against Miles & Stockbridge P.C., which represented her ex-husband in divorce proceedings a few years after the couple had retained the firm to help them with estate planning matters.

Wilhelm is also suing her ex-husband and her own former divorce lawyer in the action, filed in U.S. District Court Aug. 11. Wilhelm claims the Miles attorneys conspired with her ex-husband to conceal the extent of his assets, and as a result, she lost out on more than $4.25 million in the couple's divorce.

"The Defendants were able to use 'inside' knowledge about the parties' assets to their benefit, and to stall, delay and obstruct Ms. Wilhelm's access to marital estate information to their advantage in the divorce litigation, access to which Ms. Wilhelm was clearly entitled as their former estate planning client," the complaint says.

Her former attorney, David L. Dowell, a solo practitioner in Hereford, allowed the Miles & Stockbridge attorneys to dictate the terms of the divorce and failed to investigate the opposing attorneys

See CONFLICT page 2

6 years after hearing argument, top court finds order expired

By Steve Lash
Contributing writer

Judges may not extend the duration of a domestic violence protective order unless a hearing on the motion to extend is held while the order is still in effect, the Court of Appeals held.

The court heard arguments in the case nearly six years ago, on Sept. 7, 2007.

"You could have a pregnancy and your kid could have been in kindergarten since the argument," attorney James S. Maxwell quipped after the June 26 decision. Maxwell argued the case on behalf of the husband who successfully challenged the extension.

However, Maxwell said he understands why the decision of this magnitude might take some time to decide.

"I think [the court] realized that this was a subject of deep concern and importance on the part of the public given that it deals with domestic violence," said Maxwell, of Maxwell & Barke LLC in Rockville.

Janet La Valle had filed for a temporary protective order against her husband, Lawrence, following a fight. The Maryland District Court in Montgomery County issued the temporary order on May 30, 2006. It was upgraded to a final protective order on June 21, 2006, after a hearing.

The order was set to expire on Oct. 1, 2006. That September, Mrs. La Valle moved to extend it.

Her husband objected, and the court scheduled a hearing for Oct. 3, two days after the order expired. At the hearing, Mr. La Valle argued that the order could not be extended because it had expired.

The district court rejected that argument and extended the order to March 1, 2007. The circuit court upheld the ruling, saying the key date was the request to extend, not the hearing.

The Court of Appeals accepted a direct appeal by Mr. La Valle and ruled in his favor, citing Section 4-507(a) of the Family Law Article. The law provides that a protective order "may be modified … during the term of the protective order after … a hearing."

"The legislature's intent as to the necessary prerequisites to obtaining a modification of a protective order is clearly revealed and stated in FL Section 4-507(a)," Bell wrote for a unanimous court. "Consequently, we hold Section 4-507 does not permit a

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Monthly Memo

Checking for deadbeat lawyers

Facing a possible hold on $1 million in funding, the Maryland Judiciary has turned over the names and Social Security numbers of the state's 37,000 licensed attorneys to the Child Support Enforcement Administration.

Under a 2007 law, failure to pay court-ordered child support for 120 days can be grounds for suspension of an attorney's license. But CSEA did not ask the Court of Appeals for the information until last month, state audits showed. The agency also failed to seek data from seven other licensing agencies.

The information exchange — and the possible penalty for noncompliance — were ordered by the Joint Chairmen's Report on the fiscal 2014 state operating and capital budgets in April. The Office of Legislative Audits confirmed the exchange was completed on July 22.

Keeping up

• The MSBA offers its 2013 **Family Practice Update,** at the Ecker Business Center in Columbia or via webcast, on Aug. 23 with an online on-demand version available after Aug. 29. The half-day program features legislative and case-law updates, including Supreme Court developments, by Paul Reinstein, Bryan Renehan, and Maureen Glackin. For more information, go to www.msba.org and click on "Calendar".

• The American Academy of Matrimonial Lawyers and the Association of Family and Conciliation Courts are teaming up for **Advanced Issues in Child Custody: Evaluation, Litigation and Settlement**, Sept. 26-28 at the Gaylord National Resort in Prince George's County. For more information, go to www.AAML.org.

Expediting permanency planning without constraining individual rights

Joan F. Little
Guest columnist

Permanency planning law in Maryland has taken a substantial step forward in an exciting and new opinion from our highest court. This new opinion addresses one of the dilemmas that practitioners in Child In Need of Assistance cases regularly face, the delays that occur in achieving permanency for children in foster care.

The Court of Appeals' July 16th decision, *In Re: Adoption/Guardianship of Jayden G.*, provides a thorough analysis as well as clear guidance on the legal process and how to avoid delays due to properly asserted judicial challenges. Jayden was 5 years old at the time of his appeal and had been in the same foster home with a potential adoptive family for two-thirds of his life.

The procedural history of Jayden's case is complex. On May 25, 2011, at Jayden's seventh Permanency Planning Hearing, the permanency plan was changed from a concurrent plan of reunification with Mother and placement with a relative to the new plan of adoption by a non-relative. This change of plan was based on Mother's lack of progress in addressing her mental health problems and her abduction of Jayden and his siblings after a visit. Mother appealed this decision.

On June 24, 2011, when the plan was changed to adoption, the Montgomery County Department of Health and Human Services ("Department") filed to terminate parental rights ("TPR") as required by law. On July 13, 2011, Mother sought a stay of the TPR proceedings. Included in her argument was that the TPR should not be heard until the appeal of the Permanency Planning Hearing was decided. Mother's request for the stay was denied.

The TPR proceeded and was granted by the Juvenile Court one month prior to the permanency plan decision by the Court of Special Appeals in Mother's favor. Mother appealed the TPR. Again, she argued that the TPR should not have proceeded during the pendency of the permanency planning appeal. She also challenged the TPR decision on substantive grounds.

In deciding whether the procedure in Jayden's case was proper, the Court of Appeals stated "[w]e agree with Jayden that — when it comes to the best interests of the child — the-one-size-fits-all approach does not work." (*Jayden G.* at 19). In other words, the court may not grant or deny stays automatically, rather, it is mandated to be guided by the best interests of the child exercising individualized sound discretion in every child's case.

The Court made two important findings in deciding whether the stay of the TPR should have been granted. First, it decided that the procedure of this case was properly driven by the statutory requirement to hold a TPR hearing within 180 days and that the hearing itself was "permitted independent action that only had the incidental effect of rendering the appeal [of the permanency planning hearing] moot." (*Jayden G.* at 26).

Second, the Court of Appeals rejected the notion that a stay of the TPR proceeding should automatically be granted or denied. In doing so, it rejected Mother's argument that the stay should be granted where a parent appeals a change in the CINA permanency plan from reunification. It also rejected the Department's argument that the court was mandated to automatically deny the stay and grant the TPR simply based on the 180 day time period proscribed by the statute. FL § 5-319.

Further, the Court of Appeals analyzed the Juvenile Court's denial of Mother's motion to stay and determined that, despite the lack of evidence explaining the court's rationale, it had not abused its discretion. The significant amount of evidence demonstrating that Mother would not be likely to prevail in challenging the change of permanency plan combined with Jayden's need for expedited permanency, supported the court's denial of Mother's request for a stay.

The discussion of the Court of Appeals appropriately considers the interplay between "the parent's right to parent and the child's best interests." (*Jayden G.* at 17). The Court assessed the facts that, Jayden spent his first sixteen months in his Mother's care, his next twenty-seven months in foster care with a prospective adoptive family, and his continuing need for permanency. It did so, recognizing a parent's fundamental right to parent. It also determined that the vehicle for protecting that right was the Mother's request for a stay of the TPR proceedings.

The recognition that a request for stay is the proper procedural vehicle to protect the individual rights to a parent/child relationship is a significant development in Maryland jurisprudence in CINA/TPR cases. It provides a meaningful connection between a party's likelihood of success and the required permanency planning determinations, taking into consideration the timeline within which permanency is to occur. This connection gives guidance to trial courts to make prompt permanency planning decisions in the best interest of a child, without constraining or narrowing the fundamental right to the parent/child relationship.

The case is In re: Adoption/Guardianship of Jayden G., CoA No. 84, Sept. Term 2012. Reported. Opinion by Adkins, J. Argued May 6, 2013. Filed July 16, 2013.

Joan F. Little is the Chief Attorney in the Baltimore City Child Advocacy Unit at Maryland Legal Aid.

Meese

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As the Roman numerals indicate, this was not the first time the Meeses have come before the intermediate appellate court. In fact, it's the fourth time in five years — but it appears likely that *Meese IV* will be the final chapter.

Megan has decided not to appeal, said Brian M. Barke, the attorney who represented Megan and her father.

The decision stands for the principle that "if you have a divorcing spouse returning a piece of property to a parent, they need to look to the fraudulent conveyance statute," added Barke, of Maxwell & Barke LLC in Rockville.

However, Stewart A. Sutton, attorney for Timothy, said the finding of a fraudulent conveyance should serve as a warning to lawyers who might seek to shield their client's assets in divorce proceedings.

"Don't help your client dissipate real property," said Sutton, adding that participating in a fraud also violates an attorney's ethical rules. "This [decision] will remind attorneys of that obligation."

He confirmed that Megan has now paid the $30,000 monetary award, along with about $6,000 in interest.

That payment should end the former couple's legal wrangling over the house, which stretched from May 2005 until this June — or about a year longer than the couple lived in it.

Charles A.A. Miller had permitted his daughter and son-in-law to move into his house on Weller Road soon after their marriage in August 1998. He later deeded the property to Megan to avoid a due-on-sale clause in his existing mortgage.

Under a side agreement, Miller agreed that the couple would buy the house from him, and let him live there rent free.

The side agreement also provided that Megan and Timothy would assume the remaining mortgage, and give Miller a promissory note for $30,000 that would come due on the earliest of three dates: the date the home was sold; on Nov. 29, 2015; or 60 days after Miller's death.

But the marriage began to dissolve before any of those events occurred.

In May 2005, after Timothy told Miller to look for a new place to live, Megan transferred title to the home to her father's trust.

Timothy filed for divorce on July 26, 2005, in Montgomery County Circuit Court.

In the divorce action, Megan argued the home had been a gift to her from her father; Timothy countered that the purchase agreement showed it was a sale, not a gift, and thus marital property. The circuit court ultimately treated the house as if it belonged to neither party.

The divorce became final in 2007.

And then the appeals began.

In *Meese I*, decided in April 2008, the Court of Special Appeals ordered the trial judge to determine if the house was marital property. On remand, the judge determined the house was a gift to Megan from her father. Timothy appealed.

In *Meese II*, filed in July 2010, the Court of Special Appeals reversed. It found that the house was marital property and that Megan's transfer "amounted to dissipation as a matter of law."

On remand following *Meese II*, the Montgomery County Circuit Court found Timothy was entitled to a monetary award of $30,000. Timothy appealed the amount of the award, but in June 2012, the Court of Special Appeals affirmed the ruling (*Meese III)*.

Meanwhile, the $30,000 award gave Timothy standing, as a judgment creditor, to file the MUFCA action at issue in *Meese IV*.

Timothy argued that the transfer of the marital home to the father's trust was a fraudulent conveyance. The circuit court agreed with Timothy this time, granted him summary judgment in March 2011.

The Court of Special Appeals, in affirming that award, noted that a conveyance is fraudulent if the conveyer is insolvent at the time of transfer and makes the transfer for no consideration.

Megan's financial statement in the underlying divorce action showed her net worth as negative $30,000 at the time of the conveyance, the court said. In addition, the quitclaim deed accompanying the conveyance stated that no consideration was paid, the appellate court added.

"As there was no genuine dispute of fact concerning Megan's insolvency at the time of the transfer, the lack of consideration for the transfer or that the Trust did not purchase the real property in good faith, without notice, and for value, the circuit court did not err in determining as a matter of law, that Megan's conveyance of the property to the trust was a fraudulent conveyance under the MUFCA," Davis wrote in the opinion that judges Christopher B. Kehoe and Shirley M. Watts joined.

Creditor's choice

Megan and her father also challenged the trial court's choice of remedy, arguing that the amount of the debt was only about a tenth of the equity in the property and that vacating the sale could allow other creditors to seize the house and displace them. Instead, they argued, the court should only have allowed Timothy to levy on or garnish the property.

However, MUFCA "establishes that either remedy is appropriate," Davis wrote, and "the choice of remedies belonged to the creditor, in this case, Timothy."

WHAT THE COURT HELD

Case: *Megan Meese et al. v. Timothy Meese, CSA* No. 827 Sept. Term 2011. Reported. Opinion by Davis, J. (retired, specially assigned). Argued Sept. 6, 2012. Filed June 26, 2013.

Issue: Was a divorcing wife's transfer of the marital home to her father for no consideration a fraudulent conveyance?

Holding: Yes; there was "no dispute" that the wife intended the transfer to prevent her estranged husband "from realizing a share of the property in the divorce proceedings."

Counsel: Brian M. Barke for appellants; Stewart A. Sutton for appellee.

RecordFax # 13-0626-00 (16 pages).

Conflict

Continued from page 1

for conflict of interest and to move to disqualify them.

Dowell said on Aug. 12 that he had not read the lawsuit and could not comment, while Miles & Stockbridge's policy "is not to comment on pending litigation," the law firm said in a statement. "That being said, we believe the claims asserted are meritless."

Judith Wilhelm's current attorney, Philip J. Sweitzer, of Philip J. Sweitzer LLC in Baltimore, also declined to comment on the lawsuit.

Judith and Donald C. Wilhelm Jr. were married Feb. 15, 1969, in Kansas.

While they were married, the pair retained Charles T. Bowyer of Miles & Stockbridge in Towson to review their marital estate and were using his services up until 2000, just a few years before the couple's divorce.

Judith Wilhelm hired Dowell in January 2004, a few months before the couple, who lived in Clarksville at the time, separated.

Donald Wilhelm filed for divorce in April 2004 in Howard County Circuit Court. He retained Stephen J. Cullen of Miles & Stockbridge in Washington, D.C., for the divorce proceedings.

The couple entered into a settlement agreement in June 2005. Judith Wilhelm, however, believed not all of her ex-husband's assets had been disclosed in the proceedings and hired a new attorney in 2006, who filed motions to extend post-divorce discovery.

The court ordered an accountant be permitted to look at Donald Wilhelm's financial records in September 2007. The accountant discovered undisclosed assets, including Northrop Grumman Corporation stock options.

Judith Wilhelm recovered $500,000 and other assets in a second marital settlement agreement.

Afterward, she looked into her ex-husband records and allegedly found that she had been "cheated out of" at least $250,000 based on an appraisal of the couple's Clarksville home. She also found that her ex-husband withdrew $30,000 from their joint bank account upon separation (bringing its balance to $20), and was hiding $50,000 in cash in the home safe, she alleges.

Judith Wilhelm also discovered her husband bought a $100,000 Mercedes-Benz car for his "paramour" and attempted to hide it as a marital asset by asking the dealer to keep it on the lot for more than a year. She also says her ex-husband bought a five-carat Harry Winston engagement ring with "ostensibly cash lying around the house."

And there were high-value collectibles like antique furniture, French crystal collectibles, stock options, U.S. Treasury bonds and travel miles that were not accounted for, the suit alleges.

Judith Wilhelm also believes her ex-husband was using his deceased aunt's investment accounts, for which he was the trustee, to flow marital assets through during divorce proceedings.

The suit includes one count of negligence and one count of breach of fiduciary duty each against Miles & Stockbridge, its attorneys and Dowell, and seeks $1 million in compensatory damages and $1 million in punitive damages, jointly and severally. In addition, the suit seeks the same damage awards against Donald Wilhelm, Miles & Stockbridge and its attorneys on counts of fraud and civil conspiracy.

LaValle

Continued from page 2

court to extend an expired protective order, even when the motion to extend such order was timely filed during the term of the order. An expired protective order no longer exists, and an untimely hearing cannot revive it."

Attorney Jonathan Dean Isaacs, who represented Janet La Valle, said the decision will require lawyers and district court judges to consider ways of expediting the process to ensure extension hearings are held before protective orders expire.

Isaacs said he appreciated the time the high court spent crafting its decision and expressed no concern about the nearly six-year wait.

"I don't really have consternation because I think all of the courts and the legislature are constantly considering those delicate issues," said Isaacs, of Bromberg Rosenthal LLP in Rockville. "So for victims of domestic violence, I think that on balance everyone is trying to do a really good job."

WHAT THE COURT HELD

Case: Lawrence La Valle v. Janet La Valle, CA No. 2 Sept. Term 2007. Reported. Opinion by Bell, C.J. Argued Sept. 7, 2007. Filed June 26, 2013.

Issue: Can a court extend a domestic violence protective order without holding a hearing on the extension motion during the term of the order?

Holding: No; Maryland law requires that the hearing be held while the order is still in effect.

Counsel: James S. Maxwell for petitioner; Jonathan Dean Isaacs for respondent.

RecordFax # 13-0626-21 (17 pages).

UNREPORTED CASES IN BRIEF

Ed. note: Unreported opinions of the Court of Special Appeals are neither precedent nor persuasive authority. See Md. Rule 1-104.

*Helen Adames v. Kevin McCray**

CUSTODY: MODIFICATION: AVAILABILITY DURING CHILD'S WAKING HOURS

CSA No. 1958, September Term 2012. Unreported. Opinion by Wright, J. Filed June 18, 2013. Appeal from Baltimore City. Affirmed. RecordFax #13-0618-00, 15 pages.

The trial court's decision that awarding sole legal and physical custody to the father was in the child's best interest was supported by evidence that, although the mother also was a fit parent, she had concealed the child's true paternity for three years and, due to her work schedule, was not available to care for the child from 3:00 p.m. until 11 p.m.

"Kevin McCray filed a complaint seeking sole legal and physical custody of his biological son, Xavier.

Xavier was born on January 31, 2008, to [Helen] Adames. At that time, Askahie Harris, Adames' boyfriend and father of two of her older children, was the putative father.

When Xavier was approximately four months old, unbeknownst to Harris, a DNA test revealed that McCray was the biological father. Once he learned he was the father, McCray took an active role in Xavier's life.

McCray lived in his parent's home and when Xavier was an infant McCray's mother, Sandra Vaughn, would care for Xavier two to three days per week. Vaughn testified that from ages two to three, Xavier would stay overnight in her home several days per week.

Harris testified that Xavier split his time between his house and Adames.' However, Harris was unaware that Adames was taking Xavier to McCray's home and leaving him there. Adames finally told Harris that McCray was Xavier's father when the child was three years old.

Adames worked the swing shift from 3:00 to 11:00 p.m., including weekends, as a machine operator at Mid-Atlantic Bakery. Adames testified that she would prepare breakfast for Xavier, but that he was taken to school by Harris, and that the rest of the time he was cared for by her mother, brother, Harris, or her older children.

McCray worked as a driver for Loomis Fargo, with regular hours from 6:30 a.m. to 2:30 p.m., Monday through Friday. On occasion, McCray would work as late as 6:00 p.m. While McCray was at work, Vaughn would care for Xavier.

On November 13, 2012, the final custody hearing was held. The court addressed credibility and explained that the main issue was who would actually be caring for Xavier.

The circuit court found both parents fit, but stated that "the Court has to consider … how those employment [demands] impact a parent's ability to be available to the child and to meet the child's needs." The court stated "I cannot wrap my head around what sense it makes to have a non-parent pick up the child and keep the child all evening when a parent is ready, willing, and able … to take care of the child."

The court considered "availabilities of opportunities" and found Xavier's needs would be met "wherever he goes."

Regarding "the opportunity for maintaining natural relationships," the court found that "in Mr. McCray's household the relationship between the child and the mother is promoted" but that McCray has never been inside Adames' home, and the court was concerned about Adames' promotion of the relationship between Harris and Xavier.

On communication, the circuit court found no impediments.

The court considered "voluntary surrender of custody" and found that Adames had allowed Xavier to live in McCray's home, at least since the beginning of the school year in 2011.

The court considered stability. It concluded that being shuffled to available family members from the time school ended until Adames was home from work at 11:00 or 12:00 p.m. was "not in [Xavier's] best interests when there's [an] option that's stable and the same way every day."

The court issued a custody and visitation order granting sole physical custody to McCray, visitation to Adames, and joint legal custody to the parties. This appeal followed.

Discussion

Adames argues that the circuit court's finding that Xavier had stayed with McCray for a majority of his life was clear error. Adames contends that the circuit court's determination that she was not credible "was opposite all the evidence."

"Child custody awards have traditionally been predicated on the 'best interest' of the child involved." *Petrini v. Petrini,* 336 Md. 453, 468 (1994). The standard involves looking at the future rather than the past. See *Domingues v. Johnson*, 323 Md. 486, 499 (1991). In making its determination, the circuit court is to consider, among other factors: 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, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender. *Mont. Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977).

We find no error in the finding that Xavier was spending a significant amount of time at McCray's home. The testimony supports a finding that over his first three years, Xavier gradually spent more time at McCray's house until he was there the majority of the time.

Harris, also found credible by the circuit court, testified that for the first three years, Xavier split his time between Adames' house and Harris' house. Harris was unaware that Xavier was spending time with McCray. This undermines Adames' testimony that Xavier was primarily with her.

Regarding Adames' argument that the circuit court "ignored" testimony of "corroborating events" that support her contention that Xavier was "living" with her, we

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UNREPORTED CASES IN BRIEF *Continued from page 7*

find no error. At best, the evidence demonstrated that all the parties were involved in Xavier's care. The court is not required to articulate every aspect of its thought process in determining credibility or evaluating evidence.

We find no abuse of discretion in the finding that Adames was not credible. The circuit court considered the three-year paternity deception as well as Adames' insistence that Xavier spent the majority of his time with her, despite copious evidence to the contrary.

Further, the testimony supports the finding that, in Adames' custody, Xavier was primarily cared for by other people. Xavier was in school from 9:00 a.m. until 2:40 or 3:00 p.m., and Adames'work hours were from 3:00 p.m. until 11:00 p.m. Adames, Harris, Robla, Nidia, and DeLeon all testified that each of them, along with Adames' brother, Michael, cared for Xavier at different times, sometimes more than one person in a given day. Therefore, even if the circuit court found Adames to be credible, such a determination would not be dispositive. The best interest determination emphasized the stability of McCray's home compared to the juggling necessary when Xavier was with Adames.

In sum, Adames' focus on where Xavier "lived" before he was three years old is misplaced. The circuit court was not constrained to using information about where the child had lived in the past in making its determination about what was in the child's best interest in the future. See *Domingues, supra,* 323 Md. at 499. The circuit court considered and articulated the relevant factors necessary in making a best interest of the child determination and found that Xavier would have a more stable environment in McCray's home. The circuit court's findings are supported by the evidence and were not clearly erroneous."

Slip op. at various pages, citations and footnotes omitted.

*Felecia Amos-Hoover v. Antonio J. Amos, Sr.**

CUSTODY AND CHILD SUPPORT: TRANSFER OF VENUE: CHOICE OF FORUM

CSA No. 0866, September Term 2012. Unreported. Opinion by Wright, J. Filed June 18, 2013. Appeal from Baltimore County. Affirmed. RecordFax # 13-0618-02, 19 pages.

Where a child's father filed a complaint to modify custody in Harford County, and the child's mother then sought to register a foreign support order in Baltimore County and filed an action to increase child support there, the Baltimore County Circuit Court did not abuse its discretion in finding the two cases should be consolidated and transferring venue to Harford County.

"This appeal arises from the Circuit Court for Baltimore County's grant of a change in venue. Appellant, Felecia D. Amos-Hoover, lives in Baltimore County and appellee, Antonio J. Amos, Sr., lives in Harford County. They are the divorced parents of one minor child, born February 11, 2009, when the parties were living in Virginia. In April 2010, Amos-Hoover and the minor child relocated to Baltimore County. In March 2011, Amos relocated to Harford County. On April 8, 2011, the parties were divorced in Virginia. Pursuant to an agreement, Amos-Hoover was granted primary physical custody and the parties were granted joint legal custody.

On July 15, 2011, the Virginia court relinquished jurisdiction because the home state of the child was now Maryland. On August 19, 2011, Amos filed a complaint to modify custody, visitation, and child support in Harford County. With his complaint, Amos filed a motion to enroll the Virginia decree in Harford County.

On August 26, 2011, Amos-Hoover petitioned the Baltimore County circuit court for registration of the Virginia orders, including two orders regarding wage garnishment and visitation that Amos had omitted from his motion in Harford County. The parties signed a consent agreement to have the Virginia orders registered in Baltimore County.

On December 19, 2011, Amos-Hoover filed a petition to increase child support in the Baltimore County circuit court. On January 31, 2012, Amos filed a motion to dismiss Amos-Hoover's child support petition, or in the alternative, to transfer venue to Harford County.

The case was transferred to Harford County on July 10, 2012. Proceedings in the consolidated cases have been ongoing in the Harford County circuit court.

Discussion

Amos-Hoover argues that the Baltimore County court did not give full faith and credit to the Virginia child support order in violation of §9.5-313 of the Family Law Article because the court "created a prerequisite for the Appellant that there must first be a new child custody determination in the state of Maryland before the trial Court would entertain any modification of child support for the Appellant."

A. Jurisdiction

Whenever the courts of two or more states are embroiled in custody proceedings the Uniform Child Custody Jurisdiction Act, or its successor, The Uniform Child Custody Jurisdiction Enforcement Act is implicated. In Maryland, UCCJEA is codified in FL § 9.5-101 *et seq*.

The case at bar, however, does not involve "courts of two or more states." It is undisputed that Maryland had become the home state of both the child and the parties and that Virginia relinquished jurisdiction on July 15, 2011. Maryland had exclusive jurisdiction and, when faced with claims of changed circumstances, was not required to give "full faith and credit" to the Virginia orders.

Contrary to Amos-Hoover's assertion, the Baltimore County circuit court did not create a "prerequisite" that a new custody determination be made before it would "entertain any modification of child support for [her]." A complaint for modification of custody had been filed in the Harford County circuit court before Amos-Hoover filed her petition to increase child support and the motion to transfer was before the Baltimore County circuit court. The issue was whether, in light of that complaint and motion, Baltimore County was the appropriate venue.

B. Venue

"Venue does not concern the power of a court to decide an issue. It concerns the place, among courts having jurisdiction, that an action will be litigated." *Sigurdsson*, 180

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UNREPORTED CASES IN BRIEF *Continued from page 8*

Md. App. at 343.

Amos-Hoover contends that Amos' original complaint could not have been filed in the Harford County court because Amos "had never confirmed or enrolled the foreign orders in Harford County" and, therefore, he did not fulfill the procedural requirements of FL § 9.5-305. Amos-Hoover avers that Harford County could not modify a foreign order without first having the order in its court and, therefore, the filing of her petition to modify child support should control.

Contrary to Amos-Hoover's assertions, FL § 9.5-305 does not require registration of a foreign order prior to filing a complaint to modify custody but does require that the court follow certain procedural steps if a party elects to register a foreign order in order to have it enforced.

Maryland had exclusive jurisdiction and Amos was not required to register the Virginia orders as a prerequisite to filing a complaint for modification of custody based on changed circumstances.

Amos-Hoover asserts that she was never served with Amos' original or amended complaint in the Harford County court pursuant to Md. Rule 2-121 and, therefore, she was not required to file a motion to transfer venue from Harford County to Baltimore County.

We agree that Amos-Hoover was not served with the summons issued by the Harford County court. However, whether or not Amos-Hoover was properly served is not dispositive. The Baltimore County circuit court did not rule that the action should be transferred because Amos-Hoover had not filed a motion to transfer venue to Baltimore County. The Baltimore County court was verifying that there was no conflicting motion and clarifying whose motion it was considering, as the record shows that the court had discussed the confusion created by the parties being in opposite postures in different counties.

Next, Amos-Hoover avers that when Amos raised improper venue as a defense to her petition to increase child support, the Baltimore County court "should have placed the burden of persuasion on [Amos] of meeting the threshold requirements of Md. Rule 2-327."

In his motion to transfer venue, although a general motion suffices, Amos clearly invoked Md. Rule 2-327(c) by arguing that "[v]enue in Harford County is more convenient and Harford County is the venue in which any action was first initiated between the parties." As the moving party, Amos bore the burden of persuasion that "proving that the interests of justice would be best served by transferring the action."

The general rule that a court give "a proper regard for the plaintiff's choice of forum" cuts both ways in this case. *Stidham, supra*, 161 Md. App. at 569 (citation omitted). The Baltimore County court found venue was proper in either county, both counties were convenient, but the Harford County action was filed first and the issues raised in Amos' complaint affected Amos-Hoover's claim for increased child support. While the cases cited by Amos-Hoover state that when the factors stand in near equipoise, transfer is an abuse of discretion, this is not the case here. *See Leung v. Nunes,* 354 Md. 217 (1999); *Scott v. Hawit,* ___ Md. App. ___ (May 3, 2013).

Because Amos filed his complaint for custody first in Harford County, we think his choice of forum tips the balance in his favor. We find no abuse of discretion in the Baltimore County court's decision."

Slip op. at various pages, citations and footnotes omitted.

*Joao Carones v. Ivone Vilas Boas Carones**

DIVORCE: PRIVATE SCHOOL TUITION: INDEFINITE ALIMONY

CSA No. 1600, September Term 2012. Unreported. Opinion by Eyler, D., J. Filed June 13, 2013. Appeal from Montgomery County. Affirmed. RecordFax #13-0613-01, 30 pages.

The trial court's assessments of the parties' incomes, debts, assets and needs, including the need for a daughter to continue attending private school, were supported by the record, and the award of indefinite alimony based on unconscionable disparity in living standards was not clearly erroneous.

"The Circuit Court granted a judgment of absolute divorce to Joao Carones from Ivone Carones on the ground of a one-year separation; awarded Ivone child support and indefinite alimony; and equitably distributed the marital property but did not grant either party a monetary award.

Joao noted this appeal raising issues we have rephrased, combined, and re-ordered:

I. Did the trial court err in awarding child support of $1,800 per month?

II. Did the trial court err in failing to grant Joao a monetary award based on Ivone's dissipation of marital assets?

III. Did the trial court err in awarding indefinite alimony to Ivone?

Trial took place on July 17, 2012. Joao, his daughter Kelly, and Kelly's husband testified on Joao's behalf. Ivone and Joao's sister testified on Ivone's behalf. Emily was 15½ years old; she did not testify.

DISCUSSION.

I. Child Support

Joao contends first, that the court made a clearly erroneous factual finding about his monthly income. Second, Joao maintains that the court erred in including the cost of private school for Emily in calculating the amount of the child support award.

Joao's Income

At trial, there was a major dispute between the parties about Joao's income. Joao testified that, on average, he earned $4,560 per month from his work at J. C. Pride Construction. He moved into evidence bank account statements and tax returns documenting that on average he earned that amount of money monthly. He testified that he paid his bills from the business accounts and provided the court with documents showing the transactions made from those accounts.

Ivone testified that the tax returns filed by the parties did not accurately reflect Joao's monthly income from J. C. Pride. She could not provide documentary evidence of Joao's additional income, however, because it was never

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reported.

Ivone went on to testify that Joao often paid bills in cash and sent money orders to Portugal. Ivone testified that Joao would have approximately $10,000 extra in cash per month, "maybe eight, nine months" out of the year, which was used to pay bills and everyday expenses, or was sent to Portugal

In ruling from the bench, the court found Joao's monthly actual income was $8,560 and Ivone's monthly actual income was $1,300 (a number not in dispute).

Joao argues that the trial court's finding about his monthly income was clearly erroneous because Ivone's testimony was not credible and his own testimony was credible, as he produced documentary evidence, including tax returns, showing that his monthly income averages only $4,560. Joao asserts that Ivone presented absolutely no evidence that he receives additional cash income each month beyond her own testimony.

The judge clearly explained her finding and that it was based on Ivone's factual testimony and a determination that Ivone's testimony was credible. It was within the sole province of the trial judge to assess the credibility of the witnesses. Ivone's testimony that Joao was paid cash income above and beyond what he reported to the IRS, as credited by the court, was "substantial evidence" to support her factual finding about Joao's monthly income.

Even if Ivone knew about this illegal activity, the clean hands doctrine does not apply to this case. The illegal conduct — Joao's not reporting his full income to the IRS — did not produce the claims Ivone was pursuing. Ivone was not attempting to benefit from Joao's illegal activity. She was simply attempting to give the court the correct amount of monthly income for Joao.

Amount of Child Support/Private School Tuition

Joao further argues that the trial court erred by including the cost of Emily's private school tuition in calculating child support.

Under FL section 12-204(i)(1), in determining child support a trial judge may order payment of "any expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child." In deciding whether to do so, the court should take into account the following non-exclusive factors: (1) "the child's educational history," (2) "the child's performance while in the private school," (3) "family history," (4) "whether the parents had made the choice to send the child to the school prior to their divorce," (5) "any particular factor that may exist in a specific case that might impact upon the child's best interests," and (6) "the parent's ability to pay for the schooling." *Fuge v. Fuge*, 146 Md. App. 142, 178 (2002) (quoting *Witt v. Ristaino*, 118 Md. App. 155, 170-71 (1997)).

In this case, it was reasonable to infer Emily had been attending private school for at least three years — from 2009 to 2012 — so the question was not whether she needed to go to private school at all. The question was whether, at age 15½ and beyond, she needed to continue to attend private school as she had done since age 11.

Joao argues that there was no evidence that Emily had "particular educational needs" that required her to attend private school. However, at trial, Joao, through counsel, argued that the parties did not have enough money to continue to send Emily to private school "as much as the parties would like to." If the only reason Joao was offering against private school was financial, then it was reasonable for the trial court to conclude that there was no dispute that attending private school met Emily's particular needs. Moreover, there was no evidence that Emily was not performing well at school. And, based on the trial judge's finding concerning Joao's income, it was clear that he could afford to pay the same private school tuition he had been paying for the preceding three years.

II. Equitable Distribution/Monetary Award

Joao contends the trial court erred in declining to grant him a monetary award as part of its equitable distribution of the marital property. He argues that the evidence showed Ivone withdrew $110,000 from the parties' joint accounts and she lost it gambling in Atlantic City. Joao complains that the court did not make a finding as to whether this money was dissipated.

In his closing argument, Joao did not mention the word "dissipation" or ask the court to make a dissipation finding with respect to the $110,000.

In her ruling from the bench, the trial judge addressed the issue of marital property. In effect, by recognizing that Ivone had received the entire $110,000 (some of which, although Ivone could not specify how much, was used for household goods), which meant that she had received $55,000 of that total that would have gone to Joao, the court wound up with what amounted to a distribution by title of $96,000 to Joao, and $166,000 to Ivone (of which Ivone already had spent $110,000), with Ivone owing $30,000 in debt. Given the circumstances, we cannot say that the judge abused her discretion.

At no point until a motion for reconsideration was filed did Joao mention the word dissipation before the court. Thus, the trial court did not make a finding about dissipation, because it was not asked to. Indeed, at the end of the trial, after the ruling was given on the record, there was no statement by Joao to the court asking the court to make a dissipation finding.

Joao seems to argue that, without being asked to make a finding of dissipation, the court should have *sua sponte* found that Ivone dissipated that money. It was not quite that simple. Ivone did not categorically agree that she had spent all of that money gambling. She stated that some of the money had been spent on household necessaries, although she could not pinpoint how much.

In any event, because the court was not asked to make a finding on dissipation, it did not; but it thoughtfully considered the marital assets, both existing and spent, and the amount of debt incurred by Ivone, most of which was to the benefit of Emily and the family home, in deciding not to grant a monetary award. Again, we see no abuse of discretion, or error, in the decision.

III. Alimony

The only issue concerning alimony is whether the court erred in awarding indefinite, rather than rehabilitative, alimony.

FL 11-106(c)(2) provides that if, "after [making] as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living

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of the parties will be unconscionably disparate," alimony may be awarded on an indefinite basis. Joao argues that the court's finding of unconscionable disparity was clearly erroneous because the evidence showed that it was possible that within a reasonable period Ivone would be able to earn significantly more money than she was earning at that time.

Joao's argument puts the cart before the horse. The evidence showed that Ivone was earning $1,300 a month ($15,600 per year) cleaning houses. The court aptly described this level of income as "subsistence." The court found that, with only a high school education from Portugal, 23 years out of the work force, and a few computer classes, Ivone was not self-supporting and faced little prospect of becoming self-supporting in the future. These findings were supported by competent and material evidence in the record and were not clearly erroneous. Joao did not put on any evidence to the contrary.

The trial judge reviewed all of the factors relevant to alimony and to the issue of indefinite alimony. As we have discussed, the evidence showed that Joao's income was $102,720 per year. On the facts before it, the court's finding that the parties' standards of living would be unconscionably disparate even after Ivone has made as much progress as possible toward becoming self-supporting was not clearly erroneous."

Slip op. at various pages, citations and footnotes omitted.

*Radka Elloin Duku v. Kofi Elloin Duku**

CUSTODY: FUTURE-ORIENTED CUSTODY AGREEMENT: REVISORY POWER

CSA No. 1970, September Term 2012. Unreported. Opinion by Berger, J. Filed June 17, 2013. Appeal from Cecil County. Affirmed. RecordFax #13-0617-00, 18 pages.

Future-oriented custody agreements are not void per se, and do not constitute fraud, mistake or irregularity; thus, where a divorce decree incorporated a custody agreement under which the child's Czech mother would have custody until the 3-year-old turned 5-1/2, after which the child's father would have custody until the child's 18th birthday, the circuit court did not abuse its discretion in denying the mother's motion to strike the provision from the divorce decree.

"This case arises from the denial of a request to modify a custody agreement which was incorporated into a judgment of absolute divorce in Cecil County. The custody agreement provided that the parties' minor child would reside in the Czech Republic with appellant, Radka Elloin Duku ("Mother"), until the child turned five and one-half years old. Upon attaining that age, the minor child would return to the United States to be in the legal and physical custody of appellee, Kofi Elloin Duku ("Father"). Mother later sought to strike the provision requiring the return of the child to the United States. Various actions were filed in Czech Republic courts, and the minor child was ultimately ordered to be returned to Maryland pursuant to the custody agreement.

In June 2012, Mother filed a motion in the Circuit Court seeking to strike the provisions of the custody agreement pertaining to the minor child's return to the U.S.

Since August 2008, the minor child has spent over four years living in the Czech Republic. Mother's pleadings in the circuit court asserted that the minor child has developed friendships and established ties to the Czech community, attends school in the Czech Republic and speaks only Czech.

On October 17, 2012, the circuit court held a hearing on Mother's motions. The trial court denied both motions, ordered that Mother surrender the passport of the minor child to the court. [and] that custody of the be transitioned over a thirty day period. Mother filed a motion to alter or amend the judgment, which was denied. This appeal followed.

DISCUSSION

Motion to Strike Provisions of Judgment of Absolute Divorce

Mother's first argument is that the circuit court abused its discretion by denying Mother's motion to strike certain provisions of the judgment of absolute divorce. In particular, Mother urges that the custody agreement, which was incorporated into the judgment of divorce, contained future-oriented custody provisions, which rendered the judgment invalid and unenforceable because the provisions did not comport with the best interests of the minor child.

Section 12-104 of the Family Law Article, "Modification of child support award" provides that: "(a) The 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.

When presented with a request for a change custody, courts employ a two-step analysis. First, the circuit court must assess whether there has been a 'material' change in circumstance. If there has been such a material change, the court proceeds to consider the best interests of the child. *McMahon v. Piazze*, 162 Md. App. 588, 593-94 (2005).

Mother maintains that "the facts of this case required [Mother] to file to strike certain custody provisions, not to alter custody, but to keep it the same." In light of Mother's own assertion that she is not seeking to modify custody, we hold that the trial court did not abuse its discretion in treating Mother's pleading as a motion filed pursuant to Md. Rule 2-535, which governs a court's authority to alter or amend a judgment. Moreover, we observe that Mother's motion did not even assert that there had been a material change in circumstances, and, therefore, the circuit court had no occasion to rule on this issue.

Mother filed her motion more than 1300 days after the entry of the judgment. Accordingly, Md. Rule 2-535(b) is the only provision under which Mother's motion could be deemed timely filed. Rule 2- 535(b), however, is clear that, on "motion of any party filed at any time," the court may alter or amend the judgment only "in case of fraud, mistake, or irregularity." In our view, future-oriented custody provisions are not per se void or invalid so as to warrant the striking of such provisions as a matter of law. Accordingly, Mother did not assert any fraud, mistake, or

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irregularity as the basis for her motion. The trial court, therefore, did not abuse its discretion in denying Mother's motion.

Mother relies on *Sullivan v. Auslaender* for our predecessors' holding that "[w]e cannot conceive how it would be in the best interest of the children to take them from the mother, place them with the father in Israel for three years, then uproot them again and return them to the mother in the United States for three years, leaving their future at the end of the six year period to be later determined." *Sullivan v. Auslaender*, 12 Md.App. 1, 17 (1971). However, in *Sullivan*, the Court of Special Appeals substituted its judgment for that of the trial judge. Subsequently, the *Sullivan* "best judgment" standard of review was expressly disapproved in *Davis v. Davis*, 280 Md. 119 (1977). Moreover, in applying the now-inapplicable "best judgment" standard, the Court of Special Appeals in Sullivan did not rest its decision on the sole basis of future-oriented custody provisions. Rather, the Court of Special Appeals considered various factors, including the wishes of the children.

Mother also relies on *Schaefer v. Cusack*, 124 Md. App. 288, 298 (1998), where we addressed a custody order which required a change in custody between parents when the (kindergarten-age) child completed fifth grade. We held that the trial judge abused its discretion in entering the custody order.

In our view, *Schaefer* does not stand for the broad proposition that any future-oriented custody provision is per se invalid and should be struck as a matter of law. We do not think the future-oriented custody provisions amount to fraud, mistake or irregularity. In light of these considerations, the circuit court did not abuse its discretion in denying Mother's motion to strike certain provisions of the custody agreement. For clarity, we observe that our holding does not preclude Mother from having the merits of her request considered upon the filing of a motion to modify custody pursuant to FL § 12- 104.

Circuit Court Jurisdiction

Mother filed a motion in Cecil County requesting that the court "deny further jurisdiction over this matter so that a proceeding within the Czech Republic regarding custody can be properly commenced."

Mother appears to quarrel with the Hague appellate court's finding that it had no authority to alter the parties' custody agreement, and with the Czech District Court's stay of proceedings based on the Hague petition. The Circuit Court for Cecil County has no authority over these Czech courts. Accordingly, the trial court did not abuse its discretion in declining to enter an order regarding the jurisdiction of Maryland courts over any future custody matters involving the parties' minor child."

Slip op. at various pages, citations and footnotes omitted.

*Sandra Gilmore v. James Gilmore**

DIVORCE: SALE OF MARITAL HOME: MOTION TO RECONSIDER

CSA No. 2690, September Term 2011. Unreported. Opinion by Kenney, James A., III (Retired, Specially Assigned). Filed June 18, 2013. Appeal from Anne Arundel County. Affirmed. RecordFax #13-0618-03, 16 pages.

The lower court did not abuse its discretion in denying a woman's motion to reconsider its appointment of a trustee to sell the marital home, where her motion to reconsider did not raise any new allegations that were relevant to the court's underlying determination that she had violated the terms of the consent order that obligated her to sell the property.

"Sandra Gilmore challenges the Order of the Circuit Court, signed on October 21, 2011, granting the Motion to Enforce filed by appellee, James Gilmore. Sandra further challenges the court's denial of her *pro se* Motion to Vacate, filed on October 24, 2011, and her Motion to Reconsider and Revise, filed through counsel on December 16, 2011, which were respectively denied on November 29, 2011, and January 25, 2012.

The only judgment for which Sandra filed a timely Notice of Appeal is the denial of her Motion to Reconsider. Discerning no error or abuse of discretion in the circuit court's judgment, we affirm.

HISTORY

Sandra was divorced from James on January 18, 2007. A Consent Order, docketed on September 4, 2009, provided that the marital home would be listed for sale, and that "[t]he parties are required to accept any bona fide offer to purchase the home submitted by a third party at a price which is equal to or more than 95% of the asking price."

On May 4, 2011, the house was initially listed for sale at $430,000, and later was reduced to $405,000. On July 17, 2011, an offer was made to purchase the house for $400,000.

As of October 2011, Sandra had not signed the necessary documents to effectuate the sale, nor had she made any attempts to negotiate or communicate with the potential buyer.

James's Motion to Enforce was filed on October 11, 2011. An Order granting James's Motion to Shorten Time and setting the case for a hearing on October 20, 2011, was docketed on October 18, 2011. Sandra did not appear at the hearing on October 20, 2011. The court granted James's motions, memorializing its decision on October 21, 2011, docketed on October 25, 2011.

On October 24, 2011, Sandra filed a *pro se* Motion to Vacate the court's Order granting James's Motion to Enforce. Sandra denied that she had been personally served or otherwise received any notice of the hearing on October 20, 2011, until the court's Order was forwarded to her by her real estate broker. Sandra asserted she was still in the process of negotiating closing costs with the potential buyer.

Sandra's Motion to Vacate was denied. The court denied Sandra's Motion to Reconsider. Sandra filed the instant appeal on February 23, 2012. James has not filed a brief in response to Sandra's contentions.

ANALYSIS

We have jurisdiction to examine the issues generated by the circuit court's Order of January 25, 2012, denying Sandra's Motion to Reconsider. It is, however, well estab-

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lished that we employ a more limited standard of review of a trial court's denial of a motion to reconsider than we do when considering the underlying judgment itself. We will generally only find an abuse of discretion "'where no reasonable person would take the view adopted by the [trial] court,' … or when the court acts 'without reference to any guiding rules or principles.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citations omitted)).

We shall address first Sandra's allegation that she was deprived of due process because the Order granting James's Motion to Shorten Time was not docketed until October 18, 2011, which was after the deadline for serving Sandra and the October 17, 2011 deadline for her to file a response. While the Order was not *final* until it was docketed, it was *effective* when it was executed by the circuit court, October 13, 2011, before any of the deadlines had elapsed.

Moreover, the evidence indicated that Sandra was personally served with James's motions and the court's Order on October 14, 2011; therefore, she was presumed to have actual knowledge of the deadlines and the hearing date. We are not persuaded by Sandra's assertions that she was deprived of her due process rights.

In regard to whether the trial court otherwise abused its discretion, the only assertions in Sandra's Motion to Reconsider that were not previously considered by the circuit court were her contentions that she had not been served with any court papers in 2009, and that she had not previously been served by the same process server who signed the Affidavit of Service submitted to the court on October 20, 2011. Whether Sandra had been served with any court papers in 2009, and whether she had been served by the same process server on a previous occasion was not relevant to the court's underlying determination of whether Sandra had violated the terms of the Consent Order defining the responsibilities of the parties regarding the sale of the marital home as alleged in James's Motion to Enforce. Because Sandra's Motion to Reconsider failed to provide any arguments or assert any facts upon which the court could determine that, contrary to its previous determination, Sandra had not violated the terms of the Consent Order, we perceive no abuse of discretion in the circuit court's denial of Sandra's Motion to Reconsider."

Slip op. at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of Elijah R.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: REQUEST FOR CONTINUANCE

CSA No. 2252, September Term 2012. Unreported. Opinion by Alpert, Paul E. (Retired, Specially Assigned), J. Filed June 20, 2013. Appeal from Baltimore City. Affirmed. RecordFax #13-0620-00, 11 pages

The judge hearing a termination of parental rights case was under no obligation to grant a continuance to evaluate the father's mental health and whether his absence was voluntary, based on the father's vague statements, by phone, that he was "under the weather" and lacked transportation to the courthouse five to 10 miles away in Baltimore.

"This case is about termination of parental rights where the mother did not contest the termination but the father did. Although the legal relationship between father and son has ended, the bond they forged over fifteen years will not. This is evident from the son's poignant letter to his father in the middle of the termination proceedings:

"Dear Dad,

"I love you, [b]ut I wish to be adopted. I will always love you, but want to stay where I am. I have during these years gotten new [f]riends[.] I am going to high school with them, and I have a family here. We will still be able to talk to each other and joke about the stuff we did. I will always love you no matter what happens.

"Your son, Elijah"

On November 30, 2012, the Circuit Court granted the Baltimore City Department of Social Services petition for guardianship with right to adoption or long term care of fifteen-year-old Elijah R., terminating the rights of Elijah's birth parents.

Steven R., appellant, contested the petition but failed to appear at the hearing. Appellant argues that the court erred in denying his motion for a continuance.

FACTS AND LEGAL PROCEEDINGS

When Elijah was two, his father took physical custody of him, and it appears that Elijah has not seen his mother since then. On April 29, 2009, when Elijah was 11, police transported appellant to the University of Maryland psychiatric ward. Elijah was placed in a foster home, and committed to the BCDSS as a CINA.

On January 31, 2012, BCDSS filed a petition for guardianship with right to adoption or long term care. In March, BCDSS amended its petition, alleging that appellant may have a mental health disability that could make him incapable of consenting to the petition or participating in the proceedings. Shortly thereafter, appellant's attorney entered his appearance and filed an objection to the petition.

The court held a hearing on the amended petition. Appellant failed to appear and his attorney again requested a continuance. The attorney for BCDSS objected, arguing that appellant "has absented himself from almost every single hearing in both the CINA case, as well as the TPR" and that "he's had no contact with the Agency." The court called for a half an hour recess.

When the parties reconvened, appellant's attorney stated that he had called appellant and that appellant was "sick" and did not have transportation.

At appellant's attorney's suggestion, the court spoke with appellant by telephone on the record. After appellant was placed under oath, the court asked how he was feeling. Appellant responded, "very sick … in and out of sickness over the past several days, and I just need to see if I can postpone the trial." Appellant denied having any seizures, headaches, dizziness, stomach ache, or chest congestion. Appellant told the court that he had not seen a doctor "this week." After almost ten pages of written transcript, their telephone conversation ended and the

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court made the following ruling:

"Just for the record. We have just completed the phone call with [appellant]. I do not believe he has expressed an adequate explanation for his failure to appear today…. I think he is consciously choosing not to be here. …I've given him the option of showing up at 2:00 p.m."

Three and a half hours later, at 3:00 p.m., the court reconvened. Appellant's attorney related that he had spoken to appellant, but that his client was still seeking a postponement on the grounds that he was sick and lacked transportation. The court denied the motion.

After hearing evidence, arguments, and considering the factors in Family Law §5-323, the circuit court issued an order granting guardianship of Elijah to the BCDSS and terminating appellant's parental rights.

DISCUSSION

According to appellant, the court was aware of his potential mental health issues and should have granted a continuance to evaluate his mental health status so as to ensure that his failure to attend was volitional. We are persuaded no error occurred.

Md. Rule 2-508 governs requests for continuances. The Court of Appeals has written that "the decision to grant a continuance lies within the sound discretion of the trial judge[.]" *Touzeau v. Deffinbaugh*, 394 Md. 654, 667 (2006).

In *Touzeau*, the Court of Appeals found, generally, that a trial court abuses its discretion in not granting a continuance when mandated by law or when counsel, acting diligently, was taken by surprise by an unforeseen trial event. Additionally, the Court noted that "a request for a continuance must reflect that the basis for the delay will be obviated within a brief period of time." *Id*. at 670-671.

Here, there was no statute or rule requiring the circuit court to grant a continuance. Appellant admitted he had proper notice of the proceeding so there was no element of surprise. Appellant's continuance request was based solely on his vague assertion that he was "under the weather" and did not have transportation to the courthouse. Appellant was unable to describe any medical symptoms or provide documentation of his illness. Neither appellant nor counsel suggested when appellant might be feeling better. As to transportation, appellant was five to ten miles from the courthouse but failed to take advantage of the three-plus hour postponement granted so he could make travel arrangements. The court also noted appellant's past history for failing to appear, and that he had already been granted a continuance in September 2012.

Appellant asserts that he had a right to a continuance because the proceedings implicated his right as a parent. The fundamental nature of the right to parent, however, does not necessarily implicate the full range of due process protections. *See Touzeau*, 394 Md. at 676. While not desirable, it is "permissible to hold a custody hearing in the absence of one or both parents." *In re McNeil*, 21 Md. App. 484, 499 (1974).

In *McNeil* we concluded that "without making a realistic inquiry into the circumstances of [the mother's] absence, or ascertaining whether she had been guilty of a pattern of unconcern," the judge had acted "so arbitrar[ily] as to constitute a denial of due process." *Id.* at 498-99. The facts of *In re McNeil* are far removed from the facts of this case.

Under the circumstances, we are persuaded that the court did not abuse its discretion in declining to grant appellant's request for a continuance."

Slip op. at various pages, citations and footnotes omitted.

*Johnathan A. James, Sr. v. Kendra R. Bell**

VISITATION: EMPLOYMENT-BASED RESTRICTION: 'ON CALL' STATUS

CSA No. 1676, September Term 2012. Unreported. Opinion by Woodward, J. Filed June 13, 2013. Appeal from Baltimore City. Affirmed. RecordFax # 13-0613-00, 12 pages.

The trial court did not abuse its discretion by restricting Father's visitation rights on weekends that his work schedule required him to be "on call," as the restriction was reasonable and applied only to those times when the father was, in fact, on call.

"On February 13, 2012, appellant, Johnathan A. James Sr. ("Father"), filed a complaint in the Circuit Court against Kendra R. Bell ("Mother"), seeking joint physical and legal custody of Johnathan Jr. Mother filed an answer and a counter-complaint, seeking sole physical and legal custody.

Following a hearing, the court issued an order on August 8, 2012, granting Mother joint legal and primary physical custody. The order granted Father liberal visitation with Johnathan Jr. every weekend; provided that Father shall not have visitation on weekends that he is on call with his employer.

Father is employed full-time as a propane tanker driver for AmeriGas, which requires him to work eight hours per day, five days per week. His on-call responsibilities are scheduled many months in advance [but] "it can always change."

Father testified that he lives by himself in a two-bedroom townhouse. In the event that he were to be on call and required to work, according to Father, he would leave Johnathan Jr. with his aunt or a childhood friend who was convicted of assault in 2007 or 2008. In addition, Father testified that his aunt no longer provides child care for Johnathan Jr.

The circuit court awarded Father visitation every weekend from Friday at 6:00 p.m. until Sunday at 4:00 p.m., "provided that he serves as the minor child's primary caretaker during such visits."

As to Father's on-call work schedule, the order included the following restriction: "ORDERED that Plaintiff Father shall provide Defendant Mother with notice of his on-call work schedule by the first day of each month, and as soon as possible, in cases of emergency changes to his schedule. If Plaintiff Father is on[]call during any given weekend, then there shall be no visitation with the minor child[.]"

Father noted an appeal. Father challenges only the reasonableness of the restriction on his visitation.

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DISCUSSION

At oral argument before this Court, counsel for Father acknowledged that Father's employer provides him with the on-call schedule "many months in advance," and that Father has the unilateral ability to change his on-call schedule by "switching" with a co-worker. According to counsel, even if Father switches on-call assignments with a co-worker prior to the first of the month, it is of no avail, because once the on-call schedule is issued by his employer, "the schedule remains the schedule," and Father will be foreclosed from visitation on weekends that the schedule indicates he is on call.

At oral argument, this Court questioned Father's counsel whether Father had any objection if this Court were to interpret the order to mean that Father is not on call for purposes of the order when he switches assignments with a co-worker and notifies Mother of said switch prior to the first of the month. Father's counsel stated unequivocally that Father would have no objection to the restriction if we were to interpret the on-call provision in this manner.

It is abundantly clear from the circuit court's comments at the conclusion of trial, as well as the plain language of the visitation order, that being "on call" for purposes of visitation means actually being on call on a particular weekend, and not merely scheduled to be on call according to a written schedule issued by Father's employer. At trial, the court told Father that he is to provide Mother with notice of his on-call days by the first day of each month, and that "on call means working."

It is obvious [from the order] that the critical event is Father's on-call status as of the first day of the subject month, not his status as specified in the written schedule issued months earlier.

The interpretation is consistent with the circuit court's concerns pertaining to the well-being of Johnathan Jr. If, hypothetically, the court had not imposed the restriction, Father could have Johnathan Jr. at his house and be called into work to address an emergency situation at any time that night. Because Father testified that he lives alone, the reasonable inference is that there would be no suitable child care available during a late night or early morning emergency, and that Johnathan Jr. (11 months old at the time of the hearing) would be left unsupervised. The trial court's order is carefully crafted, considers the best interest of Johnathan Jr., and concludes that his well-being is best served by allowing Father visitation on weekends that he can give full-time attention to, and properly supervise, the minor child, *i.e.,* when Father is not on call.

We conclude that, pursuant to the statements made by the trial judge at the trial, as well as the language of the visitation order, if Father is able to switch any scheduled on-call weekend with a co-worker (so that he is not on call at any time from Friday at 6:00 p.m. to Sunday at 4:00 p.m.), and notifies Mother of said change by the first day of the month in which any scheduled on-call weekend was to take place, the provision precluding visitation on such weekend does not apply.

Finally, if Father is unable to switch an on-call weekend with a co-worker and the court-ordered restriction is triggered, we conclude, based on the foregoing discussion, that such restriction is reasonable. Accordingly, there was no abuse of discretion by the trial court in prohibiting Father from visitation on weekends when he actually maintains on-call responsibilities with his employer."

Slip op. at various pages, citations and footnotes omitted.

*Robert Lee v. Howard County Department of Social Services**

CHILD SUPPORT: CONTEMPT JUDGMENT: STATEMENT OF AMOUNT

CSA No. 2174, September Term 2011. Unreported. Opinion by Meredith, J. Filed June 17, 2013. Appeal from Howard County. Dismissed as moot. RecordFax #13-0617-03, 12 pages.

Although the contempt order should have included the amount of the arrearage for which enforcement by contempt was not time-barred, the failure to specify that amount was not reversible error because the defendant never disputed the amount of the arrearage and, to the contrary, paid it as a purge; therefore, the appeal was dismissed as moot.

"Robert Lewis Lee, appellant, challenges the Order For Constructive Civil Contempt entered against him by the Circuit Court on October 28, 2011. The Order was entered pursuant to a petition filed on May 9, 2011, by the Howard County Department of Social Services, appellee, which asserted that Lee had failed to pay court-ordered child support for his two minor children. Lee raises a single issue for our consideration:

Did the lower court err when it entered a contempt judgment against Mr. Lee which failed to specify, as required by Md. Rule 15-207(e)(4), "the amount of the arrearage for which enforcement by contempt is not barred by limitations"?

Although we agree with Lee's assertion that the circuit court erred in failing to include the information specifically required by Rule 15-207(c)(4), because we conclude that this appeal is moot, we shall dismiss the appeal.

ANALYSIS

As Lee's counsel noted at the hearing on November 14, 2011, Maryland Rule 15- 207(e)(4) provides in pertinent part:

(4) *Order*. 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. If the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the contemnor to comply with the direction to make payments.

The plain language of Rule 15-207(e)(4) supports Lee's position because it states explicitly that the contempt order should specify "(A) the amount of the arrearage *for which enforcement by contempt* is not barred by limitations." (Emphasis added). And the Department now effectively concedes in its brief that the Contempt Order did not comply with that aspect of Rule 15-207(e)(4). The

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Department states: "Nowhere in the contempt order does the court expressly state or even suggest that this total amount accounts for what can be *enforced* by contempt."

But, although we agree with Lee's contention that the Contempt Order should have included the amount of the arrearage for which enforcement by contempt is not barred by limitations, we conclude that, under the circumstances of this case, the court's failure to do so was not a reversible error.

The Department contends that this appeal should be dismissed because it is moot. Lee asserts, however, that a failure to correct the court's Contempt Order of October 28, 2011 "could have a collateral consequence of some importance" in any future actions between the parties, and therefore, he contends, this appeal is not moot.

We observe that it is clear from the record that Lee did not contest that the amount of arrearage stated in the circuit court's Contempt Order was, in fact, the total amount of arrearage which had accrued as of October 11, 2011. The circuit court did not make any finding regarding "the amount of the arrearage for which enforcement by contempt is not barred by limitations[.]" Indeed, it appears that Lee did not present evidence of that amount until the status hearing that was held on November 14, 2011, after the contempt had already been purged. Given that the Order of October 28, 2011, includes no findings regarding the amount of the accrued arrearage that could be enforced pursuant to a contempt action, that Order has no potential impact upon any future calculations of Lee's support obligation. In any future litigation between the two parties involved in the instant appeal, the figures and issues before the court at that time will be different from those before us now. Therefore, we conclude that findings regarding the amount of arrearages, whether included in or omitted from the circuit court's Contempt Order filed on October 28, 2011, should have no prejudicial impact upon Lee in any future actions, and Lee's proffered concern about the potential for the Department to invoke the doctrines of collateral estoppel or *res judicata* is misplaced.

It has been held that an appeal of an order of contempt is moot if the contempt has been purged. *Arrington v. Dept. of Human Res.*, 402 Md. 79, 90 (2007); *Chase v. Chase*, 287 Md. 472, 473 (1980); *Bradford v. State*, 199 Md. App. 175, 203 (2011). Because the Department has not argued that it can enforce by contempt the payment of arrearages which are more than three years past due, and the circuit court made no finding to the contrary, there is no pending controversy that warrants us granting Lee further relief. Accordingly, we conclude that the current action is moot, and we shall dismiss this appeal."

Slip op. at various pages, citations and footnotes omitted.

*Robert S. Lee v. Mary Lou Lee**

DIVORCE: PRENUPTIAL AGREEMENT: DURESS

CSA No. 0288, September Term 2012. Unreported. Opinion by Zarnoch, J. Filed June 17, 2013. Appeal from Talbot County. Affirmed. RecordFax #13-0617-05, 16 pages.

A prenuptial agreement was unenforceable, based on duress, where it had been presented to the bride-to-be two weeks before the wedding, while she was suffering from severe morning sickness and under a threat by her fiancé — who had insisted she prove her fertility before the marriage — to call off the wedding if she did not sign immediately, and she was not afforded meaningful time to meet with counsel.

"Robert S. Lee asks this Court to reverse the judgment of the Circuit Court for Talbot County declaring that his wife, Mary Lou Lee, signed the parties' prenuptial agreement under duress, thus making the agreement void and unenforceable. We find no error and therefore affirm the circuit court's decision.

Facts and Legal Proceedings

The Lees met in April 1985, and in December 1986, were engaged to be married.

Sometime during their engagement, Mr. Lee informed Ms. Lee that he would not marry her unless she became pregnant. [fn1: Mr. Lee attributed the failure of his first marriage to the fact that he and his previous wife were unable to have children and therefore required Ms. Lee to become pregnant prior to marrying her.]

Ms. Lee became pregnant in 1987. Ms. Lee suffered from severe morning sickness and lost a significant amount of weight.

Before the wedding, the Lees signed a prenuptial agreement, providing in part that all marital rights including alimony, support, and property would be waived and that "their marriage shall not affect their legal rights in property owned by them separately … both at the time of their marriage and any time thereafter." By the time the Agreement was signed, on August 20, 1987, wedding announcements had already been sent out, shower and wedding gifts had been received, flowers and wedding cake had already been purchased, among other wedding expenditures, and family members had already made travel plans to attend the wedding ceremony. The parties were married on September 6, 1987, in Pennsylvania, where they lived at the time.

After about twenty-four years of marriage, Ms. Lee filed a complaint for absolute divorce. On March 21, 2012, the circuit court held a hearing to determine whether the Agreement was valid and controlling.

In a written opinion, the circuit court held that the Agreement was void and unenforceable due to Ms. Lee's duress at the time she signed. Mr. Lee filed a timely appeal from the order voiding the prenuptial agreement.

QUESTIONS PRESENTED

1. Did the circuit court err as a matter of law in ruling that the Agreement was null and void due to duress at the time of signing?

2. Did the circuit court err as a matter of law in admitting testimony into evidence of events that occurred subsequent to the marriage when deciding the validity of the Agreement?

We answer both questions in the negative and affirm the circuit court's judgment.

DISCUSSION

Duress

Mr. Lee argues that, under applicable Pennsylvania law,

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there cannot be a finding of duress where Ms. Lee had over two weeks between signing the Agreement and the wedding and did not consult with an attorney despite the opportunity to do so. He also takes issue with the lack of medical evidence concerning Ms. Lee's sickness and Ms. Lee's own testimony that she continued to work between signing the Agreement and the wedding. We find that Mr. Lee's interpretation of Pennsylvania case law establishing the conditions for duress is incorrect. We are similarly unconvinced of the need for specific medical evidence concerning Ms. Lee's illness. We therefore conclude that the circuit court did not err in finding that the Agreement was procured under duress.

In Pennsylvania, prenuptial agreements are "on the same general footing as other contracts, to be enforced pursuant to the well-settled principles of contract law…." *Porreco v. Porreco*, 811 A.2d 566, 570 (Pa. 2002).

In applying Pennsylvania's standard of duress to the facts of this case, we conclude the circuit court was not clearly erroneous in finding that Ms. Lee was subjected to a level of threatened or impending restraint sufficient to overcome the mind of a person of reasonable firmness. *See Adams*, 848 A.2d at 994. Due to the nature of the ultimatum, *viz.*, having been told that she must sign the Agreement on the spot or forfeit the wedding, Ms. Lee was clearly deprived of any meaningful time to meet with counsel prior to signing the agreement. Unlike the wives in *Hamilton* and *Simeone*, who were also forced to sign their prenuptial agreements as late as the night before the wedding but had knowledge of their husbands' intentions, Ms. Lee was blindsided by the Agreement and did not know of its existence or Mr. Lee's intention any time before it was presented. *See Hamilton*, 591 A.2d at 721; *Simeone*, 521 A.2d at 163.

Further, Ms. Lee was, by all accounts, abnormally ill due to her morning sickness, and exhibited symptoms so severe that she was eventually hospitalized. Her illness, combined with the prospect of having a wedding canceled shortly before it was scheduled to occur and becoming a single mother, when becoming pregnant was a prerequisite to marriage imposed by the party demanding the prenuptial agreement, would probably overcome the mind of a person of reasonable firmness. Therefore, because we agree that the impending and threatened harm Ms. Lee was subjected to would overcome the mind of a reasonable person and she was not afforded meaningful time to meet with counsel prior to signing the Agreement, we conclude that there was duress in the signing of the Agreement.

Regarding Mr. Lee's alternative argument that the circuit court erred when it found duress in the absence of medical evidence, we disagree that Ms. Lee was required to provide medical evidence about the effects of her morning sickness in order to satisfy her burden of proof that the Agreement was signed under duress.

Admission of Testimony of Events Subsequent to the Marriage

Mr. Lee also argues that the circuit court erred in admitting, over his objection, testimony from Ms. Lee and her sister about the relationship between the parties after the wedding. Logically, the type of relationship Mr. and Ms. Lee had affects the understanding of the circumstances surrounding the Agreement. There was no error in admitting the testimony about post-wedding actions and events."

Slip op. at various pages, citations and footnotes omitted.

*Robert M. Levenson v. Michele G. Janis**

CUSTODY: ATTORNEY'S FEES: FEE-SHIFTING REQUIREMENTS

CSA No. 1326, September Term 2011. Unreported. Opinion by Matricciani, J. Filed June 18, 2013. Appeal from Montgomery County. Vacated and remanded. RecordFax #13-0618-00, 14 pages.

While appellant's failure to produce any evidence of his financial status justified an inference that he was able to pay an award of attorneys' fees, that unrebutted inference did not constitute substantive proof of that fact; nor did the court determine if the amount sought by appellee was reasonable. Thus, the requirements of the fee-shifting provisions of F.L. 12-103 were not satisfied.

"On July 21, 2011, the Circuit Court docketed its order denying appellant Robert M. Levenson's petition for an immediate order regarding school enrollment for his two minor children. Appellant does not argue that the court incorrectly ordered the children to attend Bethesda schools. He argues only that the court erred by imposing on him the cost of appellee's lawyers. We note that the PSA contains a fee shifting provision, but neither party asserted that the provision applied here. Because this case involves a decision pertaining to the children's education, however, section 12-103 of the Family Law article applies.

As a prerequisite to shifting fees under section 12-103, the court must consider the factors in section 12-103(b): "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." If the court finds there was no substantial justification for bringing the action, then it must shift fees pursuant to section 12-103(c).

The court made an explicit finding with regard to section 12-103(b)(3), that "this had no basis being here, whatsoever." Although the court did not make factual findings with respect to the first and second factors of section 12-103(b), as a whole, the record provides some evidence supporting the court's consideration of the required factors.

The record contains examples of appellee's financial status and her need for fee shifting. By contrast, however, appellant offered no evidence of his financial situation. Before trial, appellee served appellant with a subpoena pursuant to Maryland Rule 2-510. Although the subpoena incorrectly requested a broad category of documents, it did, consistent with the rule, designate specific documents for appellant to bring to trial. Among those documents requested properly were "any federal, state, or local income tax returns filed [from 2008 through the date of trial], including [] W-2 forms, k-1's, 1099's and all schedules and attachments."

Instead of complying with the relevant portion,

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appellant moved unsuccessfully to quash the subpoena and for a protective order. Appellant ultimately produced documents on the morning of trial, but no financial information. The court, attempting to clarify, asked "presumably you have the income tax returns. Do you not?" Appellant answered affirmatively, yet acknowledged that he failed to produce them. In response, appellee argued that appellant "has precluded us from being able to prove income, expenses, assets, liabilities, the entire thing." Based on appellant's failure to offer any evidence relevant to his finances, appellee asked the court to infer that appellant, in fact, did possess the means to pay "any award of attorney's fees that this [c]ourt might potentially [impose]."

An intentional refusal to produce relevant financial information, when properly subpoenaed, is as close as one gets to its willful destruction and may support a discovery sanction equivalent to the presumption arising from spoliation – that the missing information would not support appellant's position. *Larsen v. Romeo*, 254 Md. 220, 228 (1969). Here, we cannot conclude that granting an inference against appellant "has no reasonable relationship" to appellant's failure to produce the requested, relevant documents. *Anderson*, 424 Md. at 243.

The inference that appellant could satisfy a fee award does not, however, amount to substantive proof of that fact. *Miller v. Montgomery County*, 64 Md. App. 202, 214-15 (1985); *Maszczenski v. Myers*, 212 Md. 346, 355 (1957); *Long v. Long*, 141 Md. App. 341, 349 (2001). The trial court appears to have combined its permissible inference of ability to pay appellee's fees with appellant's failure to offer rebuttal evidence to the contrary, in order to satisfy the preconditions for fee shifting under section 12-103. Because we do not find that to be a sufficient basis to award counsel fees, we will vacate and remand the fee award, and provide the parties with another opportunity to present evidence on their financial status and needs.

Here, we pause to note that the Court of Appeals, in a very different context involving *pro bono* representation, drew a distinction between a fee award pursuant to section 12- 103(b) and one under section 12-103(c). *Davis v. Petito,* 425 Md. 191, 206 (2012). The *Davis* court indicated that, where the circuit court determines appellant lacked substantial justification for bringing the petition, and absent a finding of good cause to the contrary, "then under section 12-103(c), the reasonableness [of appellee's] attorneys' fees [] would be the only consideration." *Id*. We do not believe, however, that the Court of Appeals meant to extend this reasoning to a case such as this involving privately-retained counsel. Thus, we now turn to the issue of reasonable fees.

A court's award of fees is always subject to a review for reasonableness. *Petrini*, 336 Md. at 467 (1994). "A party seeking [shifting] of fees bears the burden to present evidence concerning their reasonableness." *Sczudlo v. Berry*, 129 Md. App. 529, 550 (1999). Once the proponent of fee shifting has introduced sufficient evidence, in assessing the fee's reasonableness, the court must take into account "such factors as labor, skill, time, and benefit afforded to the client, as well as the financial resources and needs of each party." *Dave v. Steinmuller*, 157 Md. App. 653, 675 (2004) (quoting *Petrini*, 336 Md. at 467).

The circuit court heard evidence from appellee to support its consideration of her financial status and need. The record does not contain, however, a finding that the $20,000 award of attorney's fees was reasonable. We must, therefore, vacate and remand the award of attorney's fees in order to enable the court to assess the fee's reasonableness.

The Hearing

Appellant contends that the court conducted the hearing improperly in that it allegedly prevented him from presenting the case he desired. The record reflects that the court acted appropriately by compelling appellant to follow the applicable procedural rules. *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.")."

Slip op. at various pages, citations and footnotes omitted.

*Montgomery County Office of Child Support Enforcement, et al. v. Ainul Faruqui**

CHILD SUPPORT: PATERNITY DETERMINATION: FULL FAITH AND CREDIT

CSA No. 1619, September Term 2012. Unreported. Opinion by Salmon, James P. (Retired, Specially Assigned), J. Filed July 10, 2013. Appeal from Montgomery County. Reversed. RecordFax #13-0710-03, 23 pages.

The circuit court improperly dismissed a Uniform Support Petition on the grounds that the child's mother was married to another man when the child was born, both because the presumption of legitimacy is rebuttable in Maryland and because a New Jersey court, in the mother's divorce action, conclusively determined that her husband was not the father of the child.

"Ainul Faruqui is a resident of Bethesda. Kelly Casey and her 15 year old daughter, Janette A., live in Columbus, Ohio.

On May 16, 2012, at the request of the Child Support Enforcement Agency of Franklin County, Ohio, the Montgomery County Office of Child Support Enforcement ("MCOCSE") filed a Uniform Support Petition pursuant to the Uniform Interstate Family Support Act. The petition, filed in Maryland, sought to establish that Faruqui is the father of Janette. Faruqui filed a motion to dismiss.

The Circuit Court dismissed the support petition. This timely appeal followed. MCOCSE raises two questions:

1. Did the trial court err in granting Mr. Faruqui's motion to dismiss the Uniform Support Petition, which alleges that Mr. Faruqui is the child's biological father, on the erroneous assumption that the mother's ex-husband, whose paternity was disestablished in a New Jersey enrolled divorce judgment, remains the presumed father?

2. In the alternative, did the circuit court err when it

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dismissed the Uniform Support Petition on the pleadings without allowing the introduction of any evidence or without conducting a best interest analysis?

We hold that the court erred when it dismissed the child support petition.

I. Background

The Maryland Uniform Interstate Family Support Act is codified in Family Law Sections 10-301-359.

The complaint filed by the MCOCSE fully complied with the requirements set forth FL §10-323. The complaint, together with the attached exhibits, showed that Ms. Casey married Mushtag Ahmed on March 20, 1997. About three months later, on June 22, 1997, Ms. Casey, in Columbus, Ohio, gave birth to Janette. On Janette's birth certificate, Mr. Ahmed is listed as the child's father.

Mr. Ahmed and Ms. Casey were divorced, by a judgment entered by the Superior Court for Ocean County New Jersey, on August 21, 2000. A true-test copy of the judgment was attached to the petition in this case. Superior Court Judge Sheldon R. Franklin struck out several typed provisions in the draft presented to him by Ms. Casey then made several hand written changes, which he initialed. In the paragraph that read "ORDERED and ADJUDGED that the Plaintiff shall have custody of the child(ren) to wit, Janette Hoda Ahmed [,] born June 22, 1997," Judge Franklin inserted the following sentence: "Janette is not the child of the Defendant."

The petition in the subject case alleged that Faruqui is Janette's father. According to the petition, Ms. Casey, a college student, has no source of income except for a Social Security disability payment of $736.60 per month; Janette receives $698.00 a month in supplemental security income (SSI) and both Ms. Casey and her daughter receive State medicaid benefits in Ohio.

II. Analysis

A. Full Faith and Credit

The MCOCSE argues that "the Circuit Court improperly found that the New Jersey judgment, holding that Ms. Casey's ex-husband is not Janette's father, was not entitled to full faith and credit in Maryland." Of significance here, in order to obtain full faith and credit, the proceedings of another state must satisfy "the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer v. Chemical Construction Corp*., 456 U.S. 461, 481 (1996).

Appellant argues that the motions judge was correct when he ruled that the "underlying issue in the New Jersey case was for (sic) divorce, not paternity." There are several problems with this argument. First, for full faith and credit purposes, it could not possibly matter what the order "primarily pertain[ed] to." Second, nothing in the record supports the implied argument that the issue of paternity was not properly before the New Jersey court.

Appellant also argues that full faith and credit should not be given to the New Jersey judgment because the MCOCSE failed to produce "any record, explanation, or justification as to why a parent's constitutional rights are being terminated in a divorce order, without any proof that due process was given." This argument misses the mark in several respects. First, the motions judge was called upon to rule on a motion to dismiss. Because the exclusive focus of such a motion is whether the complaint of the non-moving party states a cause of action, the MCOCSE, opposing the motion, had no reason to produce the "record, explanation, or justification" that appellee claims was needed.

In *McKay v. Paulson*, 211 Md. 90, 95 (1956), the Court of Appeals said a foreign divorce decree must be presumed valid and given full faith and credit until it is declared to be invalid by a competent court. *See also Miles v. Stovall*, 132 Md. App. 71, 78 (2000). As things now stand, nothing in the record impeaches the New Jersey judgment.

In summary, none of reasons given by the motions judge or by appellee in his appeal brief, provides a valid basis for not giving full faith and credit to the factual finding that Mr. Ahmed was not Janette's father. If a valid exception exists, then on remand, he is free to attempt to prove the applicability of an exception.

B. The Rebuttable Presumption

The MCOCSE argues that "[e]ven assuming, for purposes of discussion only, that Mr. Ahmed's paternity was not conclusively disestablished in New Jersey, the trial court also erred in treating the presumption that a child born during a marriage is a child of the marriage as if it is a conclusive presumption."

The case of *Mulligan v. Corbett*, which was relied upon by the motions judge, was concerned, exclusively, with the issue of whether the trial judge abused her discretion in denying a blood test. *Mulligan*, unlike the case *sub judice*, had nothing to do with whether a complaint stated a valid cause of action.

The holding in *Mulligan* was that "the circuit court did not err in performing a best interest of the child analysis when ruling on the Respondent's request for blood testing of a child conceived during the marriage, where the mother and the presumptive father raised the best interest of the child issue."

In the case *sub judice*, Faruqui argues that the motions judge, like the trial judge in *Mulligan*, did not abuse his discretion by concluding that blood testing in this case would not be in Janette's best interest. That argument is without merit, for several reasons.

First, the complaint should not have been dismissed unless it failed to state a cause of action. When deciding whether a cause of action was stated, the judge was obliged to treat all the allegations in the complaint as true. Moreover, the complaint fully complied with the requirements of FL §5-1010. Therefore, the complaint quite clearly set forth a valid cause of action.

Second, and of great importance, because there was no motion for a blood test filed, the motions judge did not have the power to exercise his discretion to determine if a blood test was in Janette's best interest.

Lastly, the motions judge said he was dismissing the case because the facts were analogous to those in *Mulligan*. The facts were in no way analogous to those in *Mulligan*. *Mulligan* concerned a self-proclaimed father seeking blood testing in order to delegitimize a presump-

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tively legitimate child. Prior to the request for blood testing, the child had been in an intact two-parent family that provided the child with stability, love and nourishment. *Id.* Here, Janette does not have a stable two parent family and, according to the complaint, subsists on government handouts and no male wants to be her parent. Under such circumstances, even if the issue had been before the motions judge, which it was not, the facts as alleged in the complaint, if true, may very well have presented one of the situations where a blood test would be in the child's best interest."

Slip op. at various pages, citations and footnotes omitted.

*Gregory F. Paulay v. Nancy A. Voisin**

CUSTODY & VISITATION: BEST-INTEREST ATTORNEY: ALLOCATION OF ATTORNEYS' FEES

CSA No. 1671, September Term 2010. Unreported. Opinion by Hotten, J. Filed July 2, 2013. Appeal from in banc review by the Sixth Judicial Circuit (Montgomery). Affirmed. RecordFax #13-0702-07, 41 pages.

The in banc panel properly reversed the circuit court and ordered payment of the best-interest attorney's fees, where the circuit court's conclusion that the BIA "patently and materially breached" her duties under a consent order was clearly erroneous, the billing statements were sufficiently detailed, and the amount and allocation of the requested fees were reasonable.

"This appeal arises out of a petition for attorney's fees brought by appellee, Donna E. Van Scoy, Esq. against the appellant, Gregory Paulay, for services Van Scoy rendered over approximately two years as the best interest attorney of "Sam" and "Jules," the two minor children of Nancy Voisin and Paulay.

Van Scoy was appointed as the best interest attorney for Sam and Jules pursuant to the Circuit Court for Montgomery County's consent order of March 12, 2007, additionally operating as "the only document governing the care, custody and parenting of the two minor children[.]" The Consent Order provided, in pertinent part, that Van Scoy's legal fees would "be paid by the [p]arty necessitating [her] intervention … as determined by" her.

On June 25, 2009, Van Scoy submitted a petition for attorney's fees and therapy costs to the circuit court, requesting that it award her Paulay's outstanding balance of $39,312.90 and Voisin's outstanding balance of $1,266.72.

Paulay challenged the petition, arguing, among other things, that Van Scoy had materially breached her duties as the court-appointed best interest attorney and that her billing statements were insufficiently detailed, bearing no rational basis.

Following a two-day hearing, the circuit court granted $6,660 of Van Scoy's petition. Specifically, the circuit court determined: (1) that there was insufficient detail regarding the services rendered; (2) that services were inappropriately combined; (3) that there was no explanation regarding the allocation of Van Scoy's attorney's fees; and (4) that Van Scoy had "patently and materially breached the agreement she reached with [Voisin and Paulay] as embodied in the Consent Order."

Van Scoy filed a notice for in banc review to the Sixth Judicial Circuit pursuant to MD. CONST. art. IV, § 22 and Md. Rule 2-551.

Ultimately, the in banc panel vacated the circuit court's judgment and awarded Van Scoy $39,312.90.

Paulay has presented questions for our review, consolidated and rephrased as follows:

(A) Whether a Best Interest Attorney may recover her claimed fees when the work she performed was unnecessary, intrusive, severely biased, and contravened the Consent Order under which she was appointed.

(B) Whether the professional standards of attorney billing apply to a Best Interest Attorney, and if so, whether the fees claimed were reasonable and compensable.

We affirm the judgment of the court in banc.

DISCUSSION

(A) THE CIRCUIT COURT'S CONCLUSION THAT VAN SCOY "PATENTLY AND MATERIALLY BREACHED" THE PROVISIONS OF THE ORDER IS CLEARLY ERRONEOUS.

In its seventy-five page memorandum and order of June 7, 2010, the circuit court concluded that Van Scoy had "patently and materially breached the agreement she reached with [Voisin and Paulay] as embodied in the Consent Order[ ]" for several reasons.

The circuit court found that Van Scoy had violated the clear and unambiguous language of the consent order by allocating fees on what she believed best benefitted Sam and Jules, and not a determination based on which party caused her intervention. Second, the circuit court took issue with Van Scoy's assertion that she would file an injunction to prohibit Paulay from instituting a legal claim against the summer camp in Oregon [where Sam had sustained a serious trampolining injury that required hospitalization; while Paulay wanted to sue, Voison, who was the custodial parent, did not want to subject Sam to a court battle]. The court believed that Van Scoy wrongfully favored Voisin. While the circuit court acknowledged that Van Scoy had intervened in good faith, it ultimately concluded that Van Scoy's intervention was, in most instances, arbitrary, capricious, and unnecessary, believing that the parties maintained the capacity to act in Sam and Jules' best interest. We disagree.

A consent order is an agreement entered into by its parties that maintains the same attributes of a contract and is subject to the same general rules of contract interpretation. Therefore, an analysis of a breach-of-contract claim based upon the theory of material breach or substantial performance must begin with a determination of the contract's terms. 15 Samuel Williston, *A Treatise on the Law of Contracts* § 44:54 at 228 (4th ed. 2000).

In the present case, the circuit court found Van Scoy's actions throughout her two year appointment contravened the contract's unambiguous directive that "[g]oing forward the [b]est [i]nterest [a]ttorney's fees shall be paid by *the [p]arty necessitating the intervention* of the [best interest attorney] as determined by the [best inter-

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est attorney]." (emphasis added). We do not believe that the words "the party necessitating the intervention" were so clear and unambiguous as to conclude that Van Scoy's billing practices violated court mandate or that she "patently and materially beached the agreement she reached with the parties as embodied in the Consent Order." Simply because "the party necessitating the intervention," however, was or can be interpreted as "the party that caused a conflict to arise between Voisin and Paulay" or as "the party that alerted Van Scoy to a conflict that had arisen between Voisin and Paulay," it does not necessarily follow that it must be so interpreted, or that parties to a contract so intended when they used those words.

Even assuming *arguendo* that the parties to the Consent Order intended such a meaning in those words, the circuit court was decidedly wrong in presupposing that either one or the other, but not both, of the parties could be allocated a portion of Van Scoy's attorney's fees. In a highly contested case such as this, one party is never completely wrong and one party is never completely correct. The fact that Paulay did not agree with Van Scoy's method of allocating her attorney's fees, a matter subject to her discretion, does not mean that she violated or breached her duties under the Consent Order.

We need not decide whether Van Scoy substantially performed under the terms of the Consent Order. We conclude that she fully performed. Van Scoy successfully worked with Voisin and Paulay for years and helped them resolve numerous disputes. She performed these tasks while keeping in mind the primary duty of her appointment — furthering the best interest of her two clients: Sam and Jules.

In addition, Van Scoy arduously called for the enforcement of numerous provisions within the Consent Order when either party's deviation concerned the best interest of Sam and Jules. Van Scoy cautioned the parties from discussing their contentions with their two children. Notwithstanding Dr. Campbell's refusal to mediate the parties' contentions absent satisfaction of Paulay's debt, Van Scoy endeavored to address the parties' desires to use Dr. Campbell in resolving the parties' contentions regarding the boys' extracurricular activities.

Moreover, allegations of demonstrated favoritism for Voisin regarding the incidents arising out of Sam's summer camp injury, Jules' absence from a tae kwon do belt competition to complete schoolwork, and both boys' medical care and treatment patently overlooks other provisions of the Consent Order that provided Voisin with sole legal custody of Sam and Jules and further prohibited Paulay's interference with the childrens' medical care and treatment.

Indeed, Van Scoy's allegedly inconsistent intervention and agreement with Voisin were neither inconsistent nor indicative of bias. Van Scoy was abiding by the specific terms of the Consent Order. Accordingly, the circuit court's finding that Van Scoy "patently and materially breached" her duties under the Consent Order was clearly erroneous.

(B) VAN SCOY'S ATTORNEY'S FEES WERE REASONABLE AND COMPENSABLE.

The record demonstrates that Van Scoy's intervention and allocation of the resulting attorney's fees were not arbitrary, capricious, and unnecessary instances. Further, it is indisputable that Van Scoy rendered the requisite services pursuant to the Consent Order.

Nonetheless, Paulay asserts that there were several entries in Van Scoy's billing statements that lacked sufficient detail. To be sure, "[i]t goes without saying that attorneys who bill on a time basis should make their billing as detailed as reasonably possible, so that the client, and any other person who might be called upon to pay the bill, will know with some precision what services have been performed." *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 760 (2007). Such reasonableness is determined on a case-by-case basis.

Admittedly, there could have been more detail in the description of services, but we believe [the entries] sufficiently describe the services rendered, [or] other entries and Van Scoy's testimony, provided context for these entries. Van Scoy's testimony, and the email records, suggest that the parties had sufficient knowledge regarding the entries.

"A precise allocation is not always practicable[.]" *Diamond Point*, 400 Md. at 760. Nor is it "reasonable to expect the lawyer to have in tow an industrial engineer with a stop watch to measure how much time was devoted to one claim or another." *Id*. Therefore, we do not believe these entries should preclude Van Scoy from receiving attorney's fees and accordingly affirm the Court In Banc for the Sixth Judicial Circuit."

Slip op. at various pages, citations and footnotes omitted.

*Richard S. Sternberg v. Sheryl S. Sternberg**

DIVORCE: APPELLATE ATTORNEYS' FEES: REQUIRED CONSIDERATIONS

CSA No. 0403, September Term 2012. Unreported. Opinion by Salmon, James P. (Retired, Specially Assigned). Filed July 10, 2003. Appeal from Montgomery County. Affirmed. RecordFax #13-0710-05, 11 pages.

In awarding attorneys' fees to defray the costs of defending an appeal, the trial court clearly considered 1) the financial resources of both parties, 2) the financial needs of both parties, and 3) whether there was substantial justification for prosecuting or defending the proceeding; and, under the circumstances, it was not an abuse of discretion to rely on information about the parties' resources already in the file.

"Richard and Sheryl Sternberg were married in 1984. The two separated in September 2009. On September 26, 2011, the Honorable Mary Beth McCormick granted Sheryl a judgment of absolute divorce based on Richard's adultery. The court ordered Richard to pay a monetary award, child support per month and $70,000 to help Sheryl pay her attorney's fees. The judgment was accompanied by a twenty-page opinion in which Judge McCormick explained her reasons.

Richard filed a timely appeal. A panel of this court

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affirmed in all respects. *See Sternberg v. Sternberg*, September Term, 2011, No. 1612 (unreported) filed January 7, 2013 ("the first appeal").

About four months after the first appeal was filed, on February 9, 2012, Sheryl filed a motion asking the circuit court to order that Richard pay her $25,000, which she believed she would have to pay in attorney's fees to defend against Richard's first appeal. Richard filed an opposition. The administrative judge signed a scheduling order setting March 14, 2012 as the date for a hearing on the motions for attorney's fees. That same scheduling order also set August 14, 2012 as the date the court would hear two other pending motions.

On April 3, 2012, the clerk of court filed an order, signed by the Honorable Michael D. Mason, which "ORDERED, that the Defendant shall pay to Plaintiff advanced attorney's fees for the prosecution of the appeal in the amount of Fifteen Thousand Dollars" [and] a separate order denying Richard's motion for appellate attorney's fees.

Richard raises one question: Did the trial court err in awarding advanced appellate attorney's fees without considering the necessary statutory factors?

The record is clear that Judge Mason did consider the necessary statutory factors before making a $15,000 award to Sheryl to help her pay her appellate attorney's fees.

I.

Sheryl, in her motion, and Richard in his opposition, discuss, in detail, <u>all</u> three statutory factors.

In regard to the first factor (financial resources of the parties), Sheryl relied on Exhibit A, Judge McCormick's memorandum opinion in which McCormick analyzed, in great detail, the resources of both parties. For our purposes, suffice it to say the financial resources of both parties were substantial.

Judge McCormick, in a thorough explanation, expressed the view that Richard had been untruthful regarding the income he had earned since the parties separated in 2009. McCormick found that as of the time of the hearing (June 2011), Sheryl's income as a physical therapist was holding steady at approximately $5,729 per month and that Richard currently earned at least $120,000 per annum (net) from his law practice.

Richard's opposition was supported by copies of Richard's 2009 and 2010 Federal income tax returns and a document showing that Richard had obtained insurance through the Maryland Health Insurance Plan — a plan for low income individuals. The tax returns were also exhibits at the trial presided over by Judge McCormick. Nevertheless, McCormick expressed the belief in her memorandum opinion that Richard earned far more per year than the amount shown on his tax returns.

When Sheryl filed her reply to Richard's opposition she, once again, discussed all three statutory factors that a judge is required to consider before making an attorney's fee award.

To support his argument that Judge Mason did not consider the three statutory factors, Richard asserts:

"In this divorce case, the trial court awarded Sheryl advanced appellate attorney's fees without the benefit of a hearing, contrary to the expectations of the parties, and without the current financial information of either Richard or Sheryl. Furthermore, there was no opinion issued giving an indication that the trial judge considered the required statutory factors. … The above strongly indicates that the trial court failed to consider the required statutory factors in its award of attorney's fees; a legal error and grounds for reversal. *See Carroll*, 320 Md. at 177. The present situation is analogous to that considered by the Maryland Court of Appeals in *Carroll County v. Edelmann*, a domestic relations case in which attorney's fees were at issue. *Carroll County v. Edelmann*, 320 Md. 155 (Md. 1990)."

Sheryl argues that *Edelmann* is distinguishable because the record shows that Judge Mason did consider all three factors. Sheryl points out, correctly, that in both her motion for attorney's fees and in Richard's opposition to the motion, the parties provided the court with "copious" material germane only to the three statutory factors.

We agree with Sheryl in this regard. In the first twenty words of the order, [Mason] said, "upon consideration of Plaintiff's Motion for Appellate Attorney's Fees and any opposition thereto, the same having been read and considered … ." If Sheryl's motion and Richard's opposition were in fact considered, Judge Mason could not have failed to consider the three statutory factors because the exclusive focus of both the motion and the opposition was on those factors. This is important because a judge is presumed to have performed his or her duties effectively. *See State v. Woodward*, 337 Md. 510, 526 (1995). In his brief, Richard points to nothing in the record that would rebut the presumption.

Richard's brief complains that the motion for attorney's fees was decided without a hearing, though he and his ex-wife expected [because of the scheduling order] that there would be a hearing on August 12, 2012. This argument, at least conceivably, might be read to suggest that under such circumstances, the failure to conduct a hearing prior to signing the order warrants a reversal. But at oral argument, appellant's attorney specifically disavowed any such implied suggestion and said that he did not contend that the motion could [not] be legitimately decided without a hearing. The aforementioned concession was well-founded. *See* Md. Rule 2-311(f). ("A party desiring a hearing on a motion . . . shall request the hearing in the motion or response under the heading 'Request for hearing.'"). As previously stated, neither Sheryl nor Richard asked for a hearing.

Richard also complains that Judge Mason decided the motion, "without current financial information as to either Richard or Sheryl." Mason did not abuse his discretion in deciding the fee issue on the material already in the file. Most importantly, Judge Mason had before him Judge McCormick's twenty page opinion that dealt, in large part, with the financial circumstances of each of the parties. Nothing in the motion or opposition suggests that anything material [concerning financial circumstances] had happened between the date of Judge McCormick's memorandum opinion and the date Judge Mason awarded counsel fees."

Slip op. at various pages, citations and footnotes omitted.

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** Indicates full text reprint in current supplement; boldface indicates published opinion*

CASE INDEX

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